LexisNexis

Date and Time: Wednesday, October 25, 2023 4:47:00 PM CST

Job Number: 208888648

Documents (100)

1. Spex Techs., Inc, v. Kingston Tech. Corp., 2019 U.S. Dist. LEXIS 228888

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2. Rincon EV Realty LLC v. CP III Rincon Towers, Inc., 43 Cal. App. 5th 988

Client/Matter: -None-

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3. Morice v. Hosp. Serv. Dist. #3, 430 F. Supp. 3d 182

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4. Ass'n for Accessible Meds. v. Becerra, 2019 U.S. Dist. LEXIS 223342

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5. Credit Suisse Secs. (USA) LLC v. Carlson, 2020 U.S. Dist. LEXIS 76

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Search Type: Natural Language

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6. *Radio Music License Comm., Inc. v. Global Music Rights, LLC, 2020 U.S. Dist. LEXIS 243375*

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7. *Apotex Corp. v. Hospira Healthcare India Private Ltd., 2020 U.S. Dist. LEXIS 2343*

Client/Matter: -None-

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8. *Ellis v. Salt River Project Agricultural Improvement and Power District, 432 F. Supp. 3d 1070*

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9. *In re Am. Express Anti-Steering Rules Antitrust Litig., 433 F. Supp. 3d 395*

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10. *State Bar v. Berry, 2020 Ariz. App. Unpub. LEXIS 53*

Client/Matter: -None-

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11. *FTC v. Surescripts, LLC, 424 F. Supp. 3d 92*

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12. *Inst. for Responsible Alcohol Policy v. State, 2020 OK 5*

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13. *Prime Steakhouse v. Mowi ASA, 2020 U.S. Dist. LEXIS 13909*

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14. *FTC v. Rag-Stiftung, 436 F. Supp. 3d 278*

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15. *Chandler v. Phoenix Servs., 2020 U.S. Dist. LEXIS 15702*

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16. [United States v. Vega-Martínez, 949 F.3d 43]

Client/Matter: -None-

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17. [Success Sys. v. Excentus Corp., 439 F. Supp. 3d 31]

Client/Matter: -None-

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

18. [Fonseca v. Hewlett-Packard Co., 2020 U.S. Dist. LEXIS 193343]

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19. [Sumotext Corp. v. Zoove, Inc., 2020 U.S. Dist. LEXIS 17253]

Client/Matter: -None-

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20. [721 Bourbon, Inc v. Willie's Chicken Shack, LLC, 2020 U.S. Dist. LEXIS 20044]

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21. [Maui Jim v. Smartbuy Guru Enters., 459 F. Supp. 3d 1058]

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22. Belnap v. Steward Health Care Sys. LLC, 2020 U.S. Dist. LEXIS 23512

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23. TMT Mgmt. Grp., LLC v. U.S. Bank Nat'l Ass'n, 940 N.W.2d 239

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24. Cesar Castillo, Inc. v. Sanofi-Aventis U.S., LLC (In re Lantus Direct Purchaser Antitrust Litig.), 950 F.3d 1

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25. Dickey v. NFL, 2020 U.S. App. LEXIS 36882

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26. Hatchett v. Henry Schein, Inc., 2020 U.S. Dist. LEXIS 25031

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27. *Alberici v. Recro Pharma, Inc., 2020 U.S. Dist. LEXIS 27535*

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28. *Atakapa Indian De Creole Nation v. Louisiana, 2020 U.S. Dist. LEXIS 57497*

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

29. *InfoDeli, LLC v. Western Robidoux, Inc., 2020 U.S. Dist. LEXIS 68111*

Client/Matter: -None-

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

30. *Giant Eagle, Inc. v. Eastern Mushroom Mktg. Coop., 2020 U.S. Dist. LEXIS 30603*

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31. *Infodeli v. W. Robidoux, 2020 U.S. Dist. LEXIS 66542*

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32. Sharif Pharm., Inc. v. Prime Therapeutics, LLC, 950 F.3d 911

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33. Viamedia, Inc. v. Comcast Corp., 951 F.3d 429

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34. Texas v. Am. Tobacco Co, 441 F. Supp. 3d 397

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

35. Am. Contrs. Supply, LLC v. HD Supply Constr. Supply, Ltd., 2020 U.S. Dist. LEXIS 257348

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

36. Gov't of P.R. v. Carpenter Co., 442 F. Supp. 3d 464

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

37. *In re Epipen Epinephrine Injection, 2020 U.S. Dist. LEXIS 40788*

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38. *In re EpiPen Mktg., Sales Practices & Antitrust Litig., 2020 U.S. Dist. LEXIS 40789*

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39. *Hannan v. Rose, 2020 U.S. Dist. LEXIS 35840*

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40. *Manookian v. Flippin, 2020 U.S. Dist. LEXIS 34445*

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41. *Staley v. Gilead Scis., Inc., 446 F. Supp. 3d 578*

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

42. *Chi. Mercantile Exch. Inc. v. ICE Clear US, Inc., 2020 U.S. Dist. LEXIS 37150*

Client/Matter: -None-

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

43. *John River Cartage, Inc. v. La. Generating, LLC, 300 So. 3d 437*

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Search Terms: "antitrust law"

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

44. *In re Glumetza Antitrust Litig., 611 F. Supp. 3d 848*

Client/Matter: -None-

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

45. *Comprehensive Sec., Inc. v. Metro. Gov't of Nashville, 2020 U.S. Dist. LEXIS 272437*

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46. *Krommenhock v. Post Foods, LLC, 334 F.R.D. 552*

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

47. *Biofrontera Inc. v. Dusa Pharms., 2020 Cal. Super. LEXIS 37309*

Client/Matter: -None-

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

48. *Am. Cricket Premier League, LLC v. USA Cricket, 445 F. Supp. 3d 1167*

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49. *Ellison v. Am. Bd. of Orthopaedic Surgery, Inc., 2020 U.S. Dist. LEXIS 43993*

Client/Matter: -None-

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

50. *In re SSA Bonds Antitrust Litig., 2020 U.S. Dist. LEXIS 54000*

Client/Matter: -None-

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

51. *Conklin v. Univ. of Wash. Med., 798 Fed. Appx. 180*

Client/Matter: -None-

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

52. *TCS John Huxley Am. v. Sci. Games Corp., 2020 U.S. Dist. LEXIS 62315*

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

53. MSP Recovery Claims, Series, LLC v. Mallinckrodt ARD Inc., 2020 U.S. Dist. LEXIS 51200

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54. Unicorn Global v. Hillo Am., 2020 U.S. Dist. LEXIS 138251

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55. U.S. Futures Exch., L.L.C. v. Bd. of Trade, 953 F.3d 955

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

56. Reserve Realty, LLC v. Windemere Reserve, LLC, 335 Conn. 174

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57. Miami Prods. & Chem. Co. v. Olin Corp., 449 F. Supp. 3d 136

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

58. *In re Platinum & Palladium Antitrust Litig., 449 F. Supp. 3d 290*

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59. *ESI/Employee Sols., L.P. v. City of Dallas, 450 F. Supp. 3d 700*

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60. *Innovation Ventures, L.L.C. v. Custom Nutrition Labs., L.L.C., 451 F. Supp. 3d 769*

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61. *In re German Auto. Mfrs. Antitrust Litig., 612 F. Supp. 3d 967*

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62. *Johannessohn v. Polaris Indus., 450 F. Supp. 3d 931*

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63. *Marion Healthcare, LLC v. S. Ill. Healthcare, 2020 U.S. Dist. LEXIS 55724*

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64. Jacobs v. Fareportal, Inc., 2020 U.S. Dist. LEXIS 59129

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65. Wun- Ling Chang v. Blue Cross of Cal., 2020 Cal. Super. LEXIS 1475

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66. Ashton Woods Holdings LLC v. USG Corp. (In re Domestic Drywall Antitrust Litig.), 2020 U.S. Dist. LEXIS 61227

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67. Atm Shafiqul Khalid v. Microsoft Corp., 2020 U.S. Dist. LEXIS 60263

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68. United States v. Sabre Corp., 452 F. Supp. 3d 97

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69. [Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., 2020 U.S. Dist. LEXIS 62795]

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70. [Somaxon Pharms., Inc. v. Actavis Elizabeth LLC, 2020 U.S. Dist. LEXIS 67939]

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71. [Virgin Enters. v. Virginic LLC, 2020 U.S. Dist. LEXIS 63580]

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72. [Chandler v. Phoenix Servs., 2020 U.S. Dist. LEXIS 63779]

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73. [In re Cal. Bail Bond Antitrust Litig., 2020 U.S. Dist. LEXIS 92836]

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74. *Prudential Locations, LLC v. Gagnon, 146 Haw. 239*

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75. *Mt. Crest SRL, LLC v. Anheuser-Busch InBEV SA/NV, 456 F. Supp. 3d 1059*

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76. *Simon & Simon, PC v. Align Tech., Inc., 2020 U.S. Dist. LEXIS 72499*

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77. *Turner v. McDonald's USA, LLC, 2020 U.S. Dist. LEXIS 78435*

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Narrowed by:

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

78. *First Priority Emergency Vehicles, Inc. v. REV Ambulance Grp. Orlando, Inc., 2020 U.S. Dist. LEXIS 74170*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by

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

79. Richardson v. All. Residential Co., 2020 U.S. Dist. LEXIS 75285

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

80. Nationwide Biweekly Administration, Inc. v. Superior Court, 9 Cal. 5th 279

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

81. Oliver v. Am. Express Co., 2020 U.S. Dist. LEXIS 76688

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

82. Bryant's Team Sports, Inc. v. Mizuno USA, Inc., 2020 U.S. Dist. LEXIS 240273

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

83. Acad. of Allergy & Asthma in Primary Care v. Superior Healthplan, Inc., 2020 U.S. Dist. LEXIS 253201

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

84. *In re Restasis (Cyclosporine Opthalmic Emulsion) Antitrust Litig., 335 F.R.D. 1*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

85. *In re Google Assistant Privacy Litig., 457 F. Supp. 3d 797*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

86. *Nuance Communs., Inc. v. Omilia Natural Language Sols., Ltd., 2020 U.S. Dist. LEXIS 79718*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

87. *United Food & Commer. Workers Health & Welfare Fund v. Ranbaxy Inc. (In re Ranbaxy Generic Drug Antitrust Litig.), 2020 U.S. Dist. LEXIS 81462*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

88. *Aya Healthcare Servs. v. AMN Healthcare, Inc., 613 F. Supp. 3d 1308*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

89. *Alston v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.), 958 F.3d 1239*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

90. 3Shape Trios A/S v. Align Tech., Inc., 2020 U.S. Dist. LEXIS 88709

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

91. New Horizon Home Care v. Northeastern Nev. Reg'l Hosp., 2020 U.S. Dist. LEXIS 88433

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

92. Black v. Occidental Petroleum Corp., 2020 U.S. Dist. LEXIS 259342

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

93. ICTSI Or., Inc. v. Int'l Longshore & Warehouse Union, 2020 U.S. Dist. LEXIS 93371

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

94. Tyntec Inc. v. Syniverse Techs., LLC, 2020 U.S. Dist. LEXIS 94138

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

95. *Kentucky v. Marathon Petro. Co. LP, 464 F. Supp. 3d 880*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

96. *In re Auto. Parts Antitrust Litig., 2020 U.S. Dist. LEXIS 260260*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

97. *In re Niaspan Antitrust Litig., 464 F. Supp. 3d 678*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

98. *Distance Learning Co. v. Maynard, 2020 U.S. Dist. LEXIS 99256*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

99. *City of Long Beach v. Total Gas & Power N. Am., Inc., 465 F. Supp. 3d 416*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

100. *In re Humira (Adalimumab) Antitrust Litig., 465 F. Supp. 3d 811*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

Spex Techs., Inc, v. Kingston Tech. Corp.

United States District Court for the Central District of California

December 23, 2019, Decided; December 23, 2019, Filed

SACV 16-1790 JVS (AGRx)

Reporter
2019 U.S. Dist. LEXIS 228888 *; 2019 WL 8194714

Spex Technologies, Inc. v. Kingston Technology Corporation

Prior History: Spex Techs., Inc. v. Kingston Tech. Corp., 2019 U.S. Dist. LEXIS 229077 (C.D. Cal., Sept. 24, 2019)

Core Terms

patent, Counterclaim, patent misuse, allegations, invalid, settlement agreement, Sherman Act, sham, motion to dismiss, infringement, antitrust, unfair, patentee's, baseless, immunity

Counsel: **[*1]** Attorneys Present for Plaintiffs: Not Present.

Attorneys Present for Defendants: Not Present.

Judges: James V. Selna, United States District Judge.

Opinion by: James V. Selna

Opinion

CIVIL MINUTES - GENERAL

Proceedings: [IN CHAMBERS] Order Regarding Motion to Dismiss

Plaintiff and Counter-Defendant Spex Technologies, Inc. ("Spex") moved to dismiss Defendant and Counter-Claimant Kingston Technology Corporation's ("Kingston's") counterclaims and affirmative defenses. Mot., Dkt. No. 184. Kingston opposed. Opp'n, Dkt. No. 188. Spex replied. Reply, Dkt. No. 190. Kingston filed a notice of supplemental authority, attaching two cases. Notice, Dkt. No. 192; Exs. 1 and 2.

For the following reasons, the Court **GRANTS IN PART and DENIES IN PART** the motion.

I. BACKGROUND

This is a dispute over patents involving portable USB memory devices. On September 27, 2016, Spex brought a complaint alleging that Kingston has infringed two of its patents, U.S. Patent Nos. 6,088,802 (the "802 patent"), entitled "Peripheral Device With Integrated Security Functionality," and 6,003,135 (the "135 patent"), entitled "Modular Security Device." Complaint, Dkt. No. 1.

On December 7, 2016, Kingston filed an Answer. Dkt. No. 57.

On March 14, 2017, Kingston sought *inter partes* review of the '135 patent. Kingston Technology **[*2]** Company, Inc. v. SPEX Technologies, Inc., Case IPR2017-01021 ("Kingston '135 IPR"). The Patent Trial and Appeal Board (PTAB) issued a Final Written Decision upholding the patentability of claims 55 and 57 of the '135 patent. Id., Paper No. 39 at 58-59.

On May 16, 2018, this Court stayed the case in light of the PTAB's decision to institute *inter partes* review proceedings to review Spex's patents. Dkt. No. 157; see Western Digital Corporation v. SPEX Technologies, Inc., IPR2018-00086 (the "Western Digital '135 IPR") (filed October 16, 2017). In its institution decision, the PTAB made a preliminary finding that the Petition established a reasonable likelihood that claims 55 and 57 were invalid over Harari and Anderson. Id., Paper No. 14.

Kingston sought to challenge the '135 patent by joining the Western Digital '135 IPR (Kingston Technology Company, Inc. v. SPEX Technologies, Inc., IPR2018-01002, Paper No. 12 at 2) but the PTAB dismissed its petition as estopped under *35 U.S.C. § 315*, in light of the prior Final Written Decision against Kingston in the Kingston '135 IPR and Kingston's knowledge of the Harari, Anderson, and Dumas references at the time of filing its earlier petition. Id. at 8-9

On January 11, 2019, Spex entered into **[*3]** a settlement agreement with the PTAB petitioners (Western Digital, Toshiba, and Apricorn) where Spex would cease pursuing its infringement allegations against them concerning the '135 patent in return for them requesting that the *inter partes* review be terminated. Dkt. No. 172-2, Appendix B.

On April 18, 2019, the PTAB found that claims 38 and 39 of the '802 patent were unpatentable as obvious over two prior art references: U.S. Patent No. 5,887,145 to Harari ("Harari") and a book describing the architecture for PCMCIA in various combination with Don Anderson, PCMCIA System Architecture 16-Bit PC Cards, Second Edition, 1995 ("Anderson"). See Final Written Decision, Paper 40, Western Digital Corp. et al. v. SPEX Technologies, Inc., IPR2018-00082 (the "Western Digital '802 IPR").

At the scheduling conference on August 1, 2019, the Court lifted the stay and set March 16, 2020 as the law and motion cut off, February 3, 2020, as the cut off for expert discovery and discovery, and set the jury trial for April 28, 2020. Dkt. No. 168.

On August 1, 2019, Kingston filed a motion seeking leave to amend its answer to add an affirmative defense of patent misuse and counterclaims involving alleged antitrust violations. Dkt. No. 172-3, Ex. B. The **[*4]** Court granted the motion on September 24, 2019. Order, Dkt. No. 177. Kingston filed its Amended Answer on September 25, 2019. Dkt. No. 178.

Now, Spex argues that Kingston's Counterclaims for (1) Violation of *§ 1* of the Sherman Act; (2) Violation of the Cartwright Act; (3) Declaratory Judgment of Patent Misuse; and (4) Violation of *§ 17200 of the California Business and Professions Code*, as well as its Affirmative Defense of Patent Misuse, fail to state a claim upon which relief can be granted. See generally, Mot., Dkt. No. 184.

II. LEGAL STANDARD

Under *Rule 12(b)(6)*, a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

In resolving a *12(b)(6)* motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal, 556 U.S. at 678*. Nor must the Court "'accept as true **[*5]** a legal conclusion couched as a factual allegation.'" *Id. at 678-80* (quoting *Twombly, 550 U.S. at 555*). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." *Id. at 679*. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

III. Discussion

A. Sherman Act

To state a claim under *Section 1* of the Sherman Act, *15 U.S.C. § 1*, a plaintiff must plead facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition. *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)*.

Spex argues that this Counterclaim should be dismissed because (1) Kingston cannot show that SPEX's assertion of the '135 patent is objectively meritless and (2) Kingston has failed to show the required anticompetitive contract because it has failed to show the existence of a "reverse-payment" settlement agreement and that the settlement **[*6]** agreement will harm competition. Mot. at 9.

The Noerr-Pennington doctrine provides absolute immunity for statutory liability for conduct when petitioning the government for redress. *Sosa v. DIRECTV, Inc., 437 F.3d 923, 929 (9th Cir. 2006)*. The Ninth Circuit has recognized an exception to the Noerr-Pennington doctrine, however. Noerr-Pennington immunity does not apply to conduct that, although "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere" with the defendant's business practices. *Sosa, 437 F.3d at 938* (citation omitted). As a result, "'[s]ham' petitions don't fall within the protection of the doctrine." *Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180, 1183-84 (9th Cir. 2005)*.

Determining whether litigation is a sham is a two-part test: "First, the lawsuit must be *objectively baseless* in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail." *Professional Real Estate Investors v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* (emphasis added). "Only if the challenged litigation is objectively meritless may a court [proceed to the second part of the test and] examine the litigant's **[*7]** subjective motivation." *Id. at 60*. "[T]he court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor." Id. (internal citation and quotation marks removed). However, "[t]his two-tiered process requires the plaintiff to disprove the challenged lawsuit's legal viability before the court will entertain evidence of the suit's economic viability." *Id. at 61*. "[N]either Noerr immunity nor its sham exception turns on subjective intent alone." *Id. at 59*.

In the patent context, "a sham suit must be both subjectively brought in bad faith and based on a theory of either infringement or invalidity that is objectively baseless." *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1072 (Fed. Cir. 1998)*. "[I]f a suit is not objectively baseless, an antitrust defendant's subjective motivation is immaterial. . . . It is the bringing of the lawsuit that is subjectively and objectively baseless that must be proved." Id. Citing this language, Spex contends that because Kingston "pleads only subjective invalidity," its Counterclaim fails to state a claim. Mot. at 12. Spex notes that in Kingston's briefing regarding the earlier Motion for Leave to Amend, Kingston stated that "[wa]s not affirmatively seeking to prove that claims **[*8]** 55 and 57 are invalid over Harari and Anderson." Dkt. No. 175 at 8. Kingston also explained that "this case does not turn on whether the claims are actually invalid. Rather, the case turns on SPEX's knowledge and actions." Id. at 9.

Kingston argues that Noerr-Pennington does not apply to non-petitioning activity, such as entering into a private settlement agreement: "SPEX cites no case and indeed makes no argument explaining how entering into an illegal and anti-competitive contract to end litigation constitutes petitioning activity." Opp'n at 10. Kingston's Counterclaim alleges that Spex violated the Sherman Act when it settled with Western Digital, Toshiba, and Apricorn. See Amended Answer ¶ 36. But Kingston further alleges that Spex settled "so that it may *continue to assert these known-invalid claims* against Kingston and other companies in the industry." Id. (emphasis added); see also ¶¶ 31, 37, 45, 52.

The Court finds that the Noerr-Pennington doctrine may be applicable here; Kingston's allegations depend not just on Spex's settlement agreements but how Spex then used those settlement agreements to maintain its claims against Kingston, which qualifies as petitioning activity. However, the **[*9]** Court believes that Kingston has sufficiently alleged that the sham litigation exception to the doctrine may apply: in its Amended Answer, it alleges that "SPEX's belief that these claims are invalid is *objectively* reasonable" (Amended Answer ¶ 29, emphasis added) and "SPEX has engaged in patent misuses by, inter alia, maintaining its allegations of infringement of claims 55 and 57 of the '135 patent, knowing these claims to be invalid." Id. ¶ 49. The Court concludes that Noerr-Pennington immunity itself does not require dismissal of the Sherman Act claim.

However, the Court finds that dismissal of Kingston's Sherman Act claim is appropriate on a separate ground, even if Kingston adequately alleged that the sham litigation exception applies. The basis for Kingston's Sherman Act claim is an allegation that Spex's settlement agreement with Western Digital, Toshiba, and Apricorn was an illegal "reverse payment settlement," as discussed in the Supreme Court's decision *F.T.C. v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*. See Amended Answer ¶ 38.[1]

Spex claims that the Actavis decision does not apply because it was "limited solely to Hatch-Waxman pharmaceutical patent disputes. Mot. at 17; see *Actavis, 570 U.S. at 141* ("Apparently most if not all reverse payment settlement agreements **[*10]** arise in the context of pharmaceutical drug regulation, and specifically in the context of suits brought under statutory provisions allowing a generic drug manufacturer (seeking speedy marketing approval) to challenge the validity of a patent owned by an already-approved brand-name drug owner."). The Federal Circuit seems to have agreed with Spex's position, explaining that "[w]hile Actavis stated that settlements do not, as a blanket rule, always fall under Noerr-Pennington, *133 S.Ct. at 2230-31*, it limited its holding to particular types of settlement agreements in the context of the Hatch-Waxman drug-regulatory framework, see *id. at 2230*, a situation entirely separate from the settlement discussions unsuccessfully attempted in this case." *Industrial Models, Inc. v. SNF, Inc., 716 Fed. Appx. 949, 957 (Fed. Cir. 2017)*.[2]

The Court is not convinced that it can find that Actavis was definitively limited to the Hatch-Waxman context. But the Court finds that Kingston still fails to state a claim for a violation of the Sherman Act, based on its allegations that Spex engaged in an illegal reverse-settlement. Kingston has not alleged that Western Digital, Toshiba, and Apricorn received "payment in return for *staying out of the market*." See Amended Answer ¶¶ 30-33; *Actavis, 570 U.S. at 154* (emphasis added). **[*11]** As Spex notes, the settlement agreements allow Western Digital, Toshiba, and Apricorn to continue to sell their products, so the "adverse effects on competition" that Actavis expressed concern about are simply not present here. Mot. at 19; Reply at 12; *Actavis, 570 U.S. at 153*.

Moreover, Kingston has not adequately alleged that a "large and *unjustified*" payment was exchanged between the settling parties. *Id. at 158* (emphasis added); see Amended Answer ¶ 30.[3] The Court does not believe that Kingston

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[1] Kingston alleges that Spex "got nothing of value other than the ability to extract licensing fees from Kingston and other companies for claims it knew were invalid."

[2] In its Notice of Supplemental Authority, Kingston directed the Court's attention to the Opinion of the Federal Trade Commission in In re: 1-800 Contract, Inc., FTC No. 9372, Slip Op. at 12-16 (FTC Nov. 7, 2018) to argue that Actavis applies outside of the Hatch-Waxman context. Spex should come prepared to discuss this case at the hearing.

[3] Kingston alleges Spex valued these licenses at over $10 million, and gave them to avoid an adjudication resulting in its claims being found invalid. See Amended Answer ¶ 3.

has adequately alleged that the value of the licenses Spex granted to Western Digital, Toshiba, and Apricorn count as reverse-payments. See *Actavis, 570 U.S. at 156* ("Where a reverse payment reflects *traditional settlement considerations*, such as avoided litigation costs or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement.").

Accordingly, the Court grants Spex's motion to dismiss Kingston's Sherman Act Counterclaim.

B. Cartwright Act

The Cartwright Act prohibits trusts, which the statute defines as "combination[s] of capital, skill or acts by two or more persons" including "[t]o create or carry out restrictions in trade or **[*12]** commerce." *Cal. Bus. & Prof. Code § 16720*. "Cases decided under the Sherman Act are applicable to interpreting the Cartwright Act" because "the analysis under California's ***antitrust law*** mirrors the analysis under federal law." *Stanislaus Food Prod. Co. v. USS-POSCO Indus., 782 F. Supp. 2d 1059, 1079 (E.D. Cal. 2011)*.

This Court believes that the reasoning supporting its dismissal of Kingston's Sherman Act claim Counterclaim is applicable to this claim, as well. Accordingly, the Court grants Spex's motion to dismiss Kingston's Cartwright Act Counterclaim.

C. Patent Misuse

"The defense of patent misuse arises from the equitable doctrine of unclean hands, and relates generally to the use of patent rights to obtain or coerce an unfair commercial advantage." *Mallinckrodt Inc. v. Medipart, Inc., 976 F.2d 700, 703-704 (Fed. Cir. 1992)*. "Patent misuse relates primarily to a patentee's action that affect competition in unpatented goods or that otherwise extend economic effect beyond the scope of the patent grant." Id. Patent misuse requires "that the alleged infringer show that the patentee has impermissibly broadened the 'physical or temporal' scope of the patent grant with anticompetitive effect." *Windsurfing Int'l. Inc. C. AMF, Inc., 782 F.2d 995, 1001 (Fed. Cir. 1986)* (citation omitted). "If . . . the practice has the effect of extending the patentee's statutory rights and does so with an anti-competitive effect, that practice must then be analyzed in **[*13]** accordance with the 'rule of reason.' *Virginia Panel Corp. v. MAC Panel Co., 133 F.3d 860, 869 (Fed. Cir. 1997)*. "Under the rule of reason, the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." Id. (internal quotation marks and citations omitted).

"Patent misuse is viewed as a broader wrong than antitrust violation because of the economic power that may be derived from the patentee's right to exclude." *C.R. Bard v. M3 Systems, 157 F.3d 1340, 1372 (Fed Cir. 1998)*. Accordingly, "misuse may arise when the conditions of antitrust violation are not met." Id.

Spex notes that in C.R. Bard, the Federal Circuit reversed a jury verdict of patent misuse, reasoning that "[t]t is not patent misuse to bring suit to enforce patent rights not fraudulently obtained . . ." and that "[t]he conduct to which the jury instruction on misuse generally refers, that is 'wrongful' enforcement of patents, is activity protected under Noerr." *Id. at 1373*. Kingston alleges that Spex has engaged in patent misuse by "maintaining its allegations of infringement of claims 55 and **[*14]** 57 of the '135 patent, knowing these claims to be invalid." Amended Answer ¶ 49. Spex argues that an allegation based on mere knowledge of invalidity is insufficient to state this claim. Mot. at 23-24. But, as this Court has previously found, Kingston does more than simply assert that Spex had subjective knowledge of invalidity. Opp'n at 21. Accordingly, the Court denies dismissal of Kingston's Counterclaim and Affirmative Defense of Patent Misuse.

D. California Unfair Practices Law

California Business and Professions Code § 17200, California's unfair competition law, prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by" *California Business and Professions Code § § 17500 to 17594*. See *Cal. Bus. & Prof. Code § 17200*. Under the statute, there are types of unfair competition: practices which are unlawful, unfair, or fraudulent. *In re Tobacco Cases II, 207 P.3d 20, 29 (Cal. 2009)*. "The section was intentionally framed in . . . broad, sweeping language" in order to allow courts "to enjoin on-going wrongful business conduct in whatever context such activity might occur." *Cel-Tech Commc'ns, Inc., et al. v. L.A. Cellular Tel. Co., 973 P.2d 527, 540 (Cal. 1999)*.

The Court has found that Kingston sufficiently pled facts to support its Patent Misuse Counterclaim. Because this Counterclaim is supported by the same facts as that cause of action (Amended Answer ¶ 52), the Court denies **[*15]** Spex's motion to dismiss Kingston's *§ 17200* Counterclaim.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART and DENIES IN PART** the motion.

IT IS SO ORDERED.

End of Document

Rincon EV Realty LLC v. CP III Rincon Towers, Inc.

Court of Appeal of California, First Appellate District, Division Four

December 26, 2019, Opinion Filed

A152935

Reporter

43 Cal. App. 5th 988 *; 257 Cal. Rptr. 3d 114 **; 2019 Cal. App. LEXIS 1301 ***; 2019 WL 7184476

RINCON EV REALTY LLC et al., Plaintiffs and Appellants, v. CP III RINCON TOWERS, INC., et al., Defendants and Respondents.

Subsequent History: Review denied by *Rincon Ev Realty Llc v. Cp Iii Rincon Towers, 2020 Cal. LEXIS 2105 (Cal., Mar. 25, 2020)*

Prior History: [*1]** Superior Court of San Francisco City & County, No. CGC10496887, Harold E. Kahn, Judge.

Rincon EV Realty LLC v. CP III Rincon Towers, Inc., 8 Cal. App. 5th 1, 213 Cal. Rptr. 3d 410, 2017 Cal. App. LEXIS 68 (Jan. 31, 2017)

Core Terms

legal claim, plaintiffs', equitable claim, trial court, defendants', cause of action, equitable, prong, fraudulent, binding, appellate court, dispose, statement of decision, pertaining, reversal, preclusive effect, judicial notice, slander of title, jury trial, preclusion, unfair competition, foreclosure, retrial, jury waiver, unfair, bench trial, jury demand, remittitur, correctly, grounds

LexisNexis® Headnotes

Civil Procedure > Judgments > Preclusion of Judgments

HN1[] **Judgments, Preclusion of Judgments**

When a case involves both legal and equitable claims or issues, the trial court may decide the equitable issues first, and this decision may result in factual and legal findings that effectively dispose of the legal claims.

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

HN2[] **Trade Practices & Unfair Competition, State Regulation**

The Unfair Competition Law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, prohibits unfair competition, which includes any unlawful, unfair or fraudulent business act or practice. *Bus. & Prof. Code, § 17200*. The UCL's 's unlawful prong borrows violations of other laws and makes those unlawful practices actionable under the UCL. Virtually any law or regulation—federal or state, statutory or common law—can serve as a predicate for an unlawful prong violation. A UCL claim brought by a private plaintiff is an equitable cause of action, even when it is based on an underlying violation that is legal in nature.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

Civil Procedure > Appeals > Remands

HN3[] **Preclusion of Judgments, Law of the Case**

A reviewing court has authority to affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. *Code Civ. Proc., § 43*. The order of the reviewing court is contained in its remittitur, which defines the scope of the jurisdiction of the court to which the matter is returned. The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void. In addition to following the appellate court's remittitur, a trial court on remand must comply with the law of the case. The doctrine of law of the case deals with the effect of the first appellate decision on the subsequent retrial or appeal: The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case.

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

Civil Procedure > Appeals > Remands

HN4[] **Standards of Review, De Novo Review**

Whether the trial court correctly interpreted the reviewing court's opinion on remand is an issue of law subject to de novo review. The court looks to the wording of the court's directions to determine whether the trial court's order comports with them. When the reviewing court remands the matter for further proceedings, its directions must be read in conjunction with the opinion as a whole.

Civil Procedure > Appeals > Remands

HN5[] **Appeals, Remands**

The fact that the court of appeal reverses in part for lack of an enforceable jury waiver does not mean the plaintiffs are necessarily entitled to a jury trial on their remaining legal claims. On remand, the defendants may submit to the trial court any *Code Civ. Proc., § 437c* motion or other form of dispositive motion they may wish to file.

Civil Procedure > Appeals > Remands

HN6[] **Appeals, Remands**

The appellate court may limit or define the issues to be addressed on remand.

Civil Procedure > Judgments > Preclusion of Judgments

Evidence > Judicial Notice > Adjudicative Facts

HN7[] **Judgments, Preclusion of Judgments**

It is proper for a court to take judicial notice of factual findings in determining whether those findings have preclusive effect.

Civil Procedure > Judgments > Preclusion of Judgments

Evidence > Judicial Notice > Adjudicative Facts

HN8[] **Judgments, Preclusion of Judgments**

The doctrines of res judicata and collateral estoppel will, when they apply, serve to bar relitigation of a factual dispute even in those instances where the factual dispute was erroneously decided in favor of a party who did not testify truthfully. In other words, even though a factual finding in a prior judicial decision may not establish the truth of that fact for purposes of judicial notice, the finding itself may be a proper subject of judicial notice if it has a res judicata or collateral estoppel effect in a subsequent action.

Headnotes/Summary

Summary
[*988] CALIFORNIA OFFICIAL REPORTS SUMMARY

After a bench trial in a commercial real estate dispute, the trial court entered judgment for defendants on all claims, some legal and some equitable. The Court of Appeal reversed and remanded as to the legal claims, holding that plaintiffs' demand for a jury trial as to those claims should not have been stricken. A second trial judge granted summary judgment for defendants, concluding that the findings of the first judge pertaining to the equitable claims were binding and were dispositive of plaintiffs' legal claims. (Superior Court of the City and County of San Francisco, No. CGC10496887, Harold E. Kahn, Judge.)

The Court of Appeal affirmed the judgment. On remand, the second judge properly found that the first judge's findings left nothing to submit to a jury. The first judge's ruling on all three prongs of plaintiffs' equitable claim under the unfair competition law disposed of the underlying legal claims because the findings addressed whether each of the legal claims had merit and expressly ruled that none of them did. The second judge did not disregard in its prior opinion the remittitur or the law of the case. The fact that the Court of Appeal in its prior opinion reversed in part for lack of an enforceable jury waiver did not mean that plaintiffs were necessarily entitled to a jury trial on their remaining legal claims. Plaintiffs were not entitled to relitigate the issues resolved by the first judge, and the second judge could properly take judicial notice of the findings of the first judge, in order to determine their preclusive effect. (Opinion by Streeter, J., with Pollak, P. J., and Tucher, J., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

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

Trial § 2—Legal and Equitable Claims.

When a case involves both legal and equitable claims or issues, the trial court may decide the equitable issues first, and this decision may result in factual and legal findings that effectively dispose of the legal claims.

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

Unfair Competition § 2—Legal and Equitable Claims.

The unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) prohibits unfair competition, which includes any unlawful, unfair or fraudulent business act or practice (*Bus. & Prof. Code, § 17200*). The UCL's unlawful prong borrows violations of other laws and makes those unlawful practices actionable under the UCL. Virtually any law or regulation—federal or state, statutory or common law—can serve as a predicate for an unlawful prong violation. A UCL claim brought by a private plaintiff is an equitable cause of action, even when it is based on an underlying violation that is legal in nature.

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

Unfair Competition § 2—Legal and Equitable Claims—Effect of Ruling.

In an action arising from a commercial real estate transaction, the trial judge’s ruling on all three prongs of plaintiffs’ equitable claim under the unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*) addressed whether each of the underlying legal claims had merit and expressly ruled that none of them did. After the reviewing court held that it was error to strike plaintiffs' jury demand as to the legal claims, a second trial court judge correctly ruled that the first judge's determinations disposed of plaintiffs' legal claims. There was nothing left to be submitted to a jury.

[Cal. Forms of Pleading and Practice (2019) ch. 322, Juries and Jury Selection, § 322.18; 7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 149; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 890.]

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

Jury § 7—Right to Jury Trial and Waiver—Judicial Review—Remand.

The fact that the Court of Appeal in its prior opinion reversed in part for lack of an enforceable jury waiver did not mean the plaintiffs were necessarily entitled to a jury trial on their remaining legal claims. On remand after issuance of the Court of Appeal's prior opinion and based on language in that opinion, the defendants could submit to the trial court any *Code Civ. Proc., § 437c* motion or other form of dispositive motion they may wish to file.

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

Judgments § 67—Res Judicata—Collateral Estoppel—Judicial Notice.

The doctrines of res judicata and collateral estoppel will, when they apply, serve to bar relitigation of a factual dispute even in those instances where the factual dispute was erroneously decided in favor of a party who did not testify truthfully. In other words, even though a factual **[*990]** finding in a prior judicial decision may not establish the truth of that fact for purposes of judicial notice, the finding itself may be a proper subject of judicial notice if it has a res judicata or collateral estoppel effect in a subsequent action.

Counsel: Foley & Lardner and Kathleen Smalley for Plaintiffs and Appellants.

Manatt, Phelps & Phillips, Barry W. Lee, Benjamin G. Schatz, Christian E. Baker, Ana G. Guardado and Stephanie A. Roeser for Defendants and Respondents.

Judges: Opinion by Streeter, J., with Pollak, P. J., and Tucher, J., concurring.

Opinion by: Streeter, J.

Opinion

[117]** **STREETER, J.**—After a bench trial in this commercial real estate dispute, the trial court (Hon. Marla Miller) entered judgment for defendants on all claims, some legal and some **[**118]** equitable.[1] Plaintiffs appealed the judgment, and we reversed as to the legal claims (holding plaintiffs' demand for a jury trial as to those claims should not have been stricken), affirmed as to the equitable claims, and remanded for further proceedings. (*Rincon I, supra, 8 Cal.App.5th at pp. 5, 22*.) On remand, the trial court (Hon. Harold Kahn) granted summary judgment for defendants, concluding Judge Miller's findings pertaining to the equitable claims were binding and were dispositive of plaintiffs' legal claims.

Plaintiffs appeal the ensuing judgment, contending that, on remand after *Rincon I*, they were entitled to a jury trial on their legal claims. Specifically, plaintiffs argue that **[***2]** (1) after this court's partial reversal in *Rincon I*, they were entitled to litigate anew all factual issues relevant to the legal claims, even if the same issues were determined by Judge Miller in connection with her resolution of the equitable claims, (2) by granting defendants' summary **[*991]** judgment motion, Judge Kahn violated this court's remittitur in *Rincon I* and the law of the case, (3) under the statutes governing judicial notice and summary judgment procedure, Judge Kahn, in ruling on defendants' motion, could not consider the "truth" of the facts found by Judge Miller, and (4) even if Judge Miller's findings were properly considered on remand and had binding effect, those findings do not dispose of plaintiffs' legal claims. We reject plaintiffs' arguments and will affirm the judgment.

I. BACKGROUND

"[Plaintiffs] borrowed $110 million in 2007 from Bear Stearns Commercial Mortgage, Inc. (Bear Stearns) to finance the purchase of Rincon Towers, a San Francisco apartment complex (the Property). In 2010, after plaintiffs failed to repay the loan and after changes in the ownership of the loan, defendant CP III Rincon Towers, Inc. (CP III) purchased the Property at a nonjudicial foreclosure **[***3]** sale. Plaintiffs sued CP III and seven other entities who were involved in administering the loan, unsuccessful workout negotiations, and the eventual foreclosure sale, alleging various causes of action, some legal (breach of contract, fraud, slander of title, trade secret misappropriation), and some equitable (unfair competition, to set aside the foreclosure sale, and for an accounting)." (*Rincon I, supra, 8 Cal.App.5th at p. 5*.)

Specifically, plaintiffs' fifth amended complaint, the operative complaint at trial, asserted the following causes of action: (1) breach of a loan agreement (Loan Agreement) entered at the time of the loan (the Loan) in June 2007, (2) breach of a cash management agreement (Cash Management Agreement) entered into by plaintiffs and Bear Stearns concurrently with the Loan Agreement, (3) breach of a March 2009 prenegotiation agreement entered **[**119]** into by plaintiffs and the Maiden Lane Trust (an entity that became the lender after Bear Stearns's 2008 collapse) in connection with negotiations about a possible modification of the Loan, (4) fraud, (5) to set aside the foreclosure, (6) unfair competition (*Bus. & Prof. Code, § 17200 et seq.*) (the unfair competition law (UCL)), (7)

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[1] The background of the parties' dispute and the resulting litigation (some of which we discuss further below) is set forth in this court's opinion addressing an earlier appeal in this matter. (*Rincon EV Realty LLC v. CP III Rincon Towers, Inc. (2017) 8 Cal.App.5th 1, 5–7 [213 Cal. Rptr. 3d 410]* (*Rincon I*).) The plaintiffs are Rincon EV Realty LLC, Rincon ET Realty LLC and Rincon Residential Towers LLC. (*Id. at p. 5*.) The defendants are (1) CP III Rincon Towers, Inc. (CP III), (2) other "Carmel Partners" entities (Carmel Partners, Inc.; Carmel Partners, LLC; Carmel Management, LLC; and Carmel Partners Investment Fund III, L.P.), (3) U.S. Bank National Association (USB) as trustee for the Maiden Lane Commercial Mortgage-Backed Securities Trust 2008-1 (the Maiden Lane Trust), (4) the Maiden Lane Trust, and (5) Maiden Lane LLC. (*Id. at pp. 6–7*.)

slander of title, (8) violation of the **[***4]** *Uniform Trade Secrets Act (UTSA) (Civ. Code, § 3426 et seq.)*, and (9) accounting. (*Rincon I, supra, 8 Cal.App.5th at p. 7*.) In their UCL cause of action, plaintiffs alleged in part that the conduct supporting several of their other causes of action (including defendants' alleged breaches of contract, fraud, slander of title and violation of the UTSA) also violated the UCL.

Plaintiffs sought a jury trial as to six of these claims—the three breach of contract claims, as well as the claims for fraud, slander of title and violation of the UTSA (the legal claims). (*Rincon I, supra, 8 Cal.App.5th at p. 9*.) As to their other three claims—to set aside the foreclosure, for unfair competition, and for an accounting (the equitable claims)—plaintiffs did not seek a **[*992]** jury trial and agreed those claims were "'equitable in nature.'" (*Ibid.*) In response to a motion by defendants, Judge Miller struck plaintiffs' jury demand based on jury waiver provisions in the three contracts at issue, the Loan Agreement, the Cash Management Agreement and the prenegotiation agreement. (*Ibid.*) According to the register of actions that is included in the appellate record, Judge Miller also denied or took off calendar two motions by defendants to bifurcate or sever certain issues to be tried separately (the second time on the ground that **[***5]** bifurcation was moot in light of the order striking the jury demand).

Judge Miller held a bench trial, issued a detailed statement of decision rejecting all of plaintiffs' claims, and entered judgment for defendants. (*Rincon I, supra, 8 Cal.App.5th at pp. 5, 10*.) Plaintiffs appealed. (*Id. at p. 5*.)

In *Rincon I*, we concluded Judge Miller erred by striking plaintiffs' jury demand as to the legal claims, and we therefore reversed the judgment as to those claims. (*Rincon I, supra, 8 Cal.App.5th at pp. 5, 10, 18, 21–22*.) We concluded, however, there was no error as to the equitable claims, and we affirmed the judgment as to those claims. (*Id. at pp. 5, 18–19, 22*.) We remanded for further proceedings as to the legal claims. (*Id. at pp. 5, 22*.)

On remand, defendants filed a motion for summary judgment, contending in part that the findings Judge Miller made in connection with her resolution of plaintiffs' equitable claims were "binding on, and dispositive of, plaintiffs' remaining legal claims." After a hearing, Judge Kahn granted the motion, concluding Judge Miller's findings in connection with plaintiffs' equitable claim for unfair competition (the UCL claim) necessarily resolved plaintiffs' legal claims. In reaching this conclusion, Judge Kahn relied on the principle that, in a case involving both legal and equitable claims, findings **[***6]** made in connection with one set of claims are binding in a subsequent disposition of the other set of claims.[2] (E.g., *Hoopes v. Dolan (2008) 168 Cal.App.4th 146, 156–157 [85 Cal. Rptr. 3d 337]* (*Hoopes*).) **[**120]**

In his written ruling, Judge Kahn stated in part: "Both the fifth amended complaint and plaintiffs' post-trial brief … make clear, and plaintiffs do not dispute, that all of the substantive law allegations of their six legal claims are also alleged as grounds that defendants violated the UCL. [Citations.] Because the alleged substantive law violations of the six legal claims were subsumed within the UCL claim, Judge Miller's findings resolving the entirety of the UCL claim in favor of defendants necessarily also resolved all **[*993]** six of plaintiffs' legal claims in favor of defendants, and a plain reading of [Judge Miller's] Statement of Decision shows that this is what happened. [Citation.] Among other things, as part of her ruling on the UCL claim, Judge Miller found that defendants did not breach any of the three contracts that they were alleged to have breached, did not commit any fraudulent conduct against the plaintiffs, did not slander plaintiffs' title to the property and did not misappropriate any of plaintiffs' asserted trade secrets."

Judge Kahn entered **[***7]** judgment for defendants, and plaintiffs appealed.

II. DISCUSSION

A. *When an Action Involves Both Legal and Equitable Claims, Findings Pertaining to One Set of Claims Are Binding in the Subsequent Resolution of the Other Set of Claims*

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[2] In their summary judgment motion, defendants also argued judgment in their favor was appropriate on the alternative ground of collateral estoppel. Judge Kahn did not reach that argument. Because we affirm on the ground addressed by Judge Kahn, we need not address defendants' argument that collateral estoppel provides an alternative basis for affirmance.

CA(1)[] **(1)** As we noted in *Rincon I*, "[w]hile a litigant in a civil action generally has a constitutional right to jury trial on 'legal' causes of action, there is no such right with respect to 'equitable' causes of action [citation], or 'equitable' remedies [citation]." (*Rincon I, supra, 8 Cal.App.5th at p. 19*.) For that reason, we held that, although it was error to strike plaintiffs' jury demand as to their legal claims, Judge Miller did not err in deciding the equitable claims. (*Id. at pp. 18–19*.) ***HN1***[] We also noted that, under established California precedent, when a case involves both legal and equitable claims or issues, the trial court ""may decide the equitable issues first, and this decision may result in factual and legal findings that effectively dispose of the legal claims."" [3] (*Rincon I, supra, 8 Cal.App.5th at p. 19*; accord, e.g., *Raedeke v. Gibraltar Sav. & Loan Assn. (1974) 10 Cal.3d 665, 671 [111 Cal.Rptr. 693, 517 P.2d 1157]* (*Raedeke*); *Alcoa, supra, 12 Cal.App.5th at p. 355*; see *Hoopes, supra, 168 Cal.App.4th at p. 158* ["The rule minimizes inconsistencies, and avoids giving one side two bites of the apple. [Citation.] The rule also prevents duplication of effort."].)

Judge Kahn concluded that this was in effect what **[***8]** happened here, i.e., the equitable claims were decided first, when Judge Miller addressed them in her statement of decision. On remand after our decision in *Rincon I*, with only the legal claims remaining for resolution, Judge Kahn noted **[**121]** that "[t]he **[*994]** present posture of this case is analogous to a bifurcated trial." He therefore applied the preclusion principle noted above and concluded the findings Judge Miller made when resolving the equitable claims also disposed of the legal claims.

On appeal, plaintiffs acknowledge the general applicability of the preclusion rule invoked by Judge Kahn. Plaintiffs state in their opening appellate brief that, "[a]bsent exceptional circumstances, factual findings by the factfinder in the first phase of the trial (either the judge or jury) are binding on the factfinder in the second phase. [Citations.] This may mean that findings from the first phase of trial obviate the need for the second phase." As noted, however, plaintiffs argue that, for several reasons, this rule should not apply here, or, if it does apply, it does not entitle defendants to judgment. We initially address (in pt. II.B. below) the parties' arguments as to whether Judge Miller's findings **[***9]** pertaining to the equitable claims (assuming they are binding) are dispositive of plaintiffs' legal claims. We then address (in pts. II.C.–II.E. below) plaintiffs' contention that, in the circumstances of this case, the usual preclusion rule applied by Judge Kahn should not apply and Judge Miller's findings pertaining to the equitable claims should not be given binding effect.

B. *Judge Miller's Findings Pertaining to the Equitable Claims Are Dispositive of the Legal Claims*

CA(2)[] **(2)** Judge Kahn correctly determined that Judge Miller's findings in connection with plaintiffs' equitable UCL claim disposed of plaintiffs' six legal claims. ***HN2***[] The UCL prohibits "unfair competition," which includes "any unlawful, unfair or fraudulent business act or practice." (*Bus. & Prof. Code, § 17200*.) "The UCL's 'unlawful' prong 'borrows violations of other laws … and makes those unlawful practices actionable under the UCL.' [Citation.] '"[V]irtually any law or regulation—federal or state, statutory or common law—can serve as [a] predicate for [an] … 'unlawful' [prong] violation."'" (*Candelore v. Tinder, Inc. (2018) 19 Cal.App.5th 1138, 1155 [228 Cal. Rptr. 3d 336]*.) A UCL claim brought by a private plaintiff is an equitable cause of action, even when it is based on an underlying violation that is legal in nature.[4] **[***10]** (*Hodge v. Superior Court (2006) 145 Cal.App.4th 278, 284 [51 Cal. Rptr. 3d 519]*.)

In their UCL cause of action, plaintiffs invoked all three prongs of the UCL, alleging defendants' conduct was unlawful, unfair, and fraudulent. As **[*995]** to the unlawful prong, plaintiffs incorporated their other claims, including

[3] California courts have stated the "'better practice' is for 'the trial court [to] determine the equitable issues before submitting the legal ones to the jury'" (*Hoopes, supra, 168 Cal.App.4th at p. 157*) and have referred to this approach as the ""equity first" rule'" (*Orange County Water Dist. v. Alcoa Global Fasteners, Inc. (2017) 12 Cal.App.5th 252, 355 [219 Cal. Rptr. 3d 474]* (*Alcoa*)). But the same preclusion principle applies when the legal claims are decided first by a jury, i.e., the jury's findings are binding in the trial court's subsequent disposition of the equitable claims. (*Hoopes, supra, at p. 157*.)

[4] The situation is different when the government brings a UCL claim for civil penalties, historically a legal claim as to which there is a right to a jury trial. (*Nationwide Biweekly Administration, Inc. v. Superior Court (2018) 24 Cal.App.5th 438, 454–455 [234 Cal. Rptr. 3d 468]*, review granted Sept. 19, 2018, S250047.)

all six of their legal claims, contending defendants' acts and practices were "unlawful" for purposes of the UCL because they constituted breaches of contract, fraud, slander of title, and violated the UTSA. Plaintiffs made a similar argument in their posttrial brief following the bench trial before Judge Miller, asserting defendants' unlawful acts included their alleged breaches of contract, slander of title, and violation of the UTSA, while asserting that the alleged misrepresentations and nondisclosures that formed the basis of their common law fraud claim established defendants' liability under the fraudulent prong of the UCL as well.

In her statement of decision, Judge Miller addressed all three prongs of the UCL when she resolved plaintiffs' claim under **[**122]** that statute. After concluding plaintiffs failed to establish defendants' conduct was unfair within the meaning of the UCL, Judge Miller turned to the fraudulent prong and found there was "no evidence supporting **[***11]** the allegations of fraudulent acts or practices." Judge Miller expressly found there was no merit in the fraud allegations asserted both in connection with plaintiffs' separate fraud claim and in support of their claim of fraudulent conduct under the UCL. Finally, as to the unlawful prong of the UCL, Judge Miller stated plaintiffs "failed to prove unlawful conduct," as they had not established any of "the alleged violations of law" cited in their posttrial brief (a list of violations that, as noted, included defendants' alleged breaches of contract, slander of title, and violation of the UTSA).

CA(3)[] **(3)** In ruling on plaintiffs' equitable claim under the UCL, Judge Miller thus addressed whether each of plaintiffs' six legal claims had merit. She expressly concluded none of them did. Judge Kahn correctly ruled these determinations dispose of plaintiffs' legal claims. There was nothing left to be submitted to a jury.

Plaintiffs' arguments to the contrary are not persuasive. Plaintiffs assert Judge Miller's findings on the equitable UCL claim do not dispose of the legal claims because in her statement of decision Judge Miller "applied different standards [to the UCL claim] from those that would **[***12]** be relevant to the legal claims." Plaintiffs cite a portion of the statement of decision in which Judge Miller states that plaintiffs did not meet what she concluded was the applicable standard for determining whether an act or practice is "unfair" within the meaning of the UCL, i.e., conduct that "'threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.'" (Citing *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 187 [83 Cal. Rptr. 2d 548, 973 P.2d 527]*.) Plaintiffs argue such **[*996]** a showing was not an element of any of their legal claims, so Judge Miller's finding that they did not meet the *Cel-Tech* standard does not establish that they cannot prevail on those claims.

This argument is misplaced. As noted, Judge Miller did not limit her analysis to whether plaintiffs had proven "unfairness" under the UCL. Instead, she addressed plaintiffs' claims under all three prongs of the statute, and she expressly concluded plaintiffs had not established the purported misconduct that supported both their legal claims and the "unlawful" and "fraudulent" branches of their equitable UCL claim.

In their reply **[***13]** brief, plaintiffs suggest Judge Miller's rulings on the "unlawful" and "fraudulent" prongs of the UCL did not encompass rulings on the merits of their breach of contract and fraud claims, because, they assert, (1) Judge Miller adopted an argument made by defendants that a breach of contract, without more, could not support UCL liability, and (2) Judge Miller's analysis of the "fraudulent" prong of the UCL was limited to whether defendants had deceived the general public. Plaintiffs are incorrect. In her statement of decision, Judge Miller did not reject plaintiffs' claim under the "unlawful" prong of the UCL on the ground that a breach of contract could not support liability under that prong. Instead, she ruled categorically that none of the "alleged violations of law" identified by plaintiffs (a list that included alleged breaches of contract) had been established. And as to fraud, Judge Miller did not limit her discussion to a conclusion that plaintiffs had not deceived **[**123]** the general public. She went on to hold specifically that the fraudulent inducement allegations asserted in support of both the fraud and UCL causes of action were "without merit."

Finally, focusing on the organization **[***14]** of Judge Miller's written statement of decision, plaintiffs note in their reply brief that Judge Miller included many of her more specific findings about whether plaintiffs had established their claims—such as her findings that plaintiffs did not meet the conditions for an extension of the Loan's maturity date, that plaintiffs breached the Loan Agreement by not repaying the Loan and by other conduct, that defendants did not fraudulently induce plaintiffs into entering the prenegotiation agreement or into paying taxes for the Property, and that plaintiffs did not establish damages—in the portions of the statement of decision addressing plaintiffs' legal claims, including their claims for breach of contract and fraud. But we reject plaintiffs' suggestion that this method of organizing the statement of decision means Judge Miller only made substantive findings in connection with the legal claims and not in connection with the UCL claim.

As Judge Kahn correctly noted at the hearing on defendants' summary judgment motion, the structure of Judge Miller's statement of decision was a **[*997]** result of the way plaintiffs presented their case. Judge Miller addressed plaintiffs' causes of action in the **[***15]** order in which they were pled in the fifth amended complaint, with headings for the different causes of action. To the extent certain findings pertained both to a legal cause of action and to the equitable UCL claim that incorporated the legal cause of action, it was not necessary for Judge Miller to repeat all the findings under both headings.

C. *Judge Kahn Did Not Disregard the Rincon I Remittitur or the Law of the Case*

Plaintiffs argue that Judge Kahn, by determining that Judge Miller's findings were binding and disposed of plaintiffs' legal claims, misinterpreted or disregarded this court's disposition in *Rincon I* and the "law of the case" as established by our *Rincon I* opinion. We disagree.

HN3[] "'A reviewing court has authority to "affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had." (*Code Civ. Proc., § 43*.) The order of the reviewing court is contained in its remittitur, which defines the scope of the jurisdiction of the court to which the matter is returned.' [Citations.] 'The trial court is empowered to act only in accordance with the direction of the reviewing court; action which **[***16]** does not conform to those directions is void.'" (*Ayyad v. Sprint Spectrum, L.P. (2012) 210 Cal.App.4th 851, 859 [148 Cal. Rptr. 3d 709]*.)

In addition to following the appellate court's remittitur, a trial court on remand must comply with the law of the case. ""The doctrine of 'law of the case' deals with the effect of the *first appellate decision* on the subsequent *retrial or appeal*: The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case."'" (*Leider v. Lewis (2017) 2 Cal.5th 1121, 1127 [218 Cal. Rptr. 3d 127, 394 P.3d 1055]*.)

Here, based on his reading of our opinion in *Rincon I*, Judge Kahn concluded he had authority to consider Judge Miller's findings pertaining to the equitable **[**124]** claims and to determine that those findings disposed of the legal claims. ***HN4***[] "Whether the trial court correctly interpreted our opinion is an issue of law subject to de novo review. [Citations.] [¶] Our remittitur directions are contained in the dispositional language of our previous opinion. [Citation.] The trial court's interpretation of those directions is not binding on us. [Citation.] We look to the wording of our directions to determine whether the trial court's order comports with **[***17]** them. [Citation.] When, as in this case, the reviewing court remands the matter for further proceedings, its directions **[*998]** must be read in conjunction with the opinion as a whole." (*Ayyad v. Sprint Spectrum, L.P., supra, 210 Cal.App.4th at p. 859*.)

The language of the *Rincon I* disposition and opinion establishes Judge Kahn acted within the permitted scope of jurisdiction on remand. In *Rincon I*, we stated in the disposition: "The judgment is reversed as to plaintiffs' claims for breach of contract, fraud, slander of title, and violation of the UTSA (the first, second, third, fourth, seventh and eighth causes of action in the fifth amended complaint) and the case is remanded for *further proceedings consistent with this opinion* as to those causes of action. The judgment is affirmed as to plaintiffs' claims to set aside the foreclosure sale, for unfair competition, and for an accounting (the fifth, sixth and ninth causes of action in the fifth amended complaint). The parties shall bear their own costs on appeal." (*Rincon I, supra, 8 Cal.App.5th at p. 22*, italics added.)

CA(4)[] **(4)** In footnote 12 of the *Rincon I* opinion (footnote 12), we addressed the parties' arguments about whether defendants' success in connection with the equitable claims would have an impact on resolution of the legal claims on remand. **[***18]** (*Rincon I, supra, 8 Cal.App.5th at p. 20, fn. 12*.) We stated in footnote 12: "Defendants assert that, on remand, the trial court's previously entered judgment on the equitable claims would likely require the court to enter summary judgment for them on any remaining legal claims. Plaintiffs disagree, contending even the present judgment on the equitable claims would not eliminate their right to submit some issues to a jury. We need not address this issue, except to point out the fact we reverse in part for lack of an enforceable jury waiver does not mean the plaintiffs are necessarily entitled to a jury trial on their remaining legal claims. ***HN5***[] On remand, defendants may submit to the trial court any [*Code of Civil Procedure] section 437c* motion or other form of dispositive motion they may wish to file. We express no view about whether the grounds relied upon by the trial court for rejecting any of plaintiffs' claims—equitable or legal—might justify granting such a motion." (*Rincon I, supra, at p. 20, fn. 12*.)

We thus did not determine in *Rincon I* whether Judge Miller's findings on the equitable claims disposed of plaintiffs' legal claims, but in footnote 12 we permitted defendants to present that question on remand, and we authorized the trial court to decide it. Accordingly, in the language of our *Rincon **[***19]** I* disposition, Judge Kahn's determination of the preclusive effect of Judge Miller's findings was a proceeding "consistent with" the opinion in *Rincon I.* (*Rincon I, supra, 8 Cal.App.5th at p. 22*.) And for the reasons discussed in part II.B. above, we conclude Judge Kahn's resolution of that preclusion issue was correct.

Plaintiffs assert Judge Kahn's ruling was in effect a finding that Judge Miller's error in striking plaintiffs' jury demand was "harmless," contrary to **[*999]** our **[**125]** determination in *Rincon I* that the error in striking the demand was per se reversible. Specifically, plaintiffs contend that, in *Rincon I*, "this court determined—and it is law of the case—that the record before it was insufficient to support judgment in favor of [defendants] on [plaintiffs'] six Legal Claims."

We disagree. In the bench trial, Judge Miller, pursuant to the contractual jury waivers, addressed and resolved the legal claims on the merits. (*Rincon I, supra, 8 Cal.App.5th at pp. 9–10*.) In *Rincon I*, we concluded (1) the jury waivers were unenforceable, so it was error to strike plaintiffs' jury demand (*id. at pp. 10–18*), and (2) the error was of a type that required reversal as to the legal claims without a showing of prejudice by plaintiffs (i.e., a showing that they would have fared better if their legal claims **[***20]** had been submitted to a jury) (see *id. at pp. 18–19*). In addressing the latter point, we stated in part: "'Denial of the right to a jury trial is reversible error per se, and no showing of prejudice is required of a party who lost at trial.' [Citation.] Accordingly, when a trial court erroneously deprives a party of a jury trial on a cause of action the party was entitled to submit to a jury, reversal of the judgment on that cause of action is required." (*Id. at p. 18*.)

Our partial reversal in *Rincon I* thus was based on the type of error involved; it was not based on an assessment of the strength or weakness of the evidence in the record. Contrary to plaintiffs' current argument, we did not hold or state that the record before Judge Miller (and before this court on appeal in *Rincon I*) was "insufficient" to support her findings or to support a later judgment in favor of defendants on the legal claims.[5] Judge Kahn's determination on remand that Judge Miller's findings pertaining to the equitable claims are dispositive of the legal claims does not conflict with any conclusion we reached in *Rincon I* about the evidence or about Judge Miller's findings, or with any rule of law stated in that opinion. Judge Kahn did not **[***21]** violate our remittitur or the law of the case.

More broadly, in our view there is no inconsistency between our finding of reversible error in *Rincon I* and the established rule in California jurisprudence that, when a case involves both legal and equitable claims, the resolution of one set of claims may result in factual and legal determinations that dispose of the other set of claims. (E.g., *Raedeke, supra, 10 Cal.3d at p. 671*; *Alcoa, supra, 12 Cal.App.5th at p. 355*; *Hoopes, supra, 168 Cal.App.4th at p. 157*.) As Judge Kahn correctly recognized, the net result of **[*1000]** our disposition in *Rincon I* was to leave intact (as a de facto first-phase trial) Judge Miller's resolution of the equitable claims. Before conducting a second-phase trial of the legal claims, it was appropriate for Judge Kahn to consider whether Judge Miller's findings in connection with the equitable claims rendered such a trial unnecessary.

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[5] Also incorrect is plaintiffs' assertion that this court's "mandate, after *Rincon I* and footnote 12, was to try the case on the legal claims with plaintiffs' jury demand granted." As noted, we stated in footnote 12 that "the fact we reverse in part for lack of an enforceable jury waiver does *not* mean plaintiffs are necessarily entitled to a jury trial on their remaining legal claims." (*Rincon I, supra, 8 Cal.App.5th at p. 20, fn. 12*, italics added.)

Plaintiffs were not powerless to avoid this result. As illustrated by the Supreme Court's decision in *Raedeke*, if a **[**126]** plaintiff asserts both legal and equitable claims and wishes to preserve the ability to submit the legal claims to a jury, the plaintiff can abandon the equitable claims. (See *Raedeke, supra, 10 Cal.3d at p. 671*.) In their briefing in *Rincon I*, plaintiffs themselves noted they might have taken this approach **[***22]** if Judge Miller had declined to enforce the jury waivers and had announced her intention to conduct a bench trial on the equitable claims before submitting the legal claims to a jury. (*Rincon I, supra, 8 Cal.App.5th at p. 20*.)

But plaintiffs could have taken *the same approach* in response to Judge Miller's actual ruling, i.e., her decision to enforce the jury waivers and conduct a bench trial on all claims. Having argued unsuccessfully to Judge Miller that the jury waivers were unenforceable (see *Rincon I, supra, 8 Cal.App.5th at p. 9*), and aware that her ruling on that point would be an appealable issue if they did not prevail on the legal claims at trial, plaintiffs could have decided it was a priority to preserve their ability to submit (eventually) their legal claims to a jury. To keep that option open, they could have dropped some or all of their equitable claims to ensure that an adverse outcome on those claims would not interfere with their ability to seek a future jury trial on the legal claims.

Plaintiffs may have had reasons for not taking this approach. They may have decided it was a priority to seek a favorable disposition of the equitable claims (which included the claim to set aside the foreclosure of the Property (see *Rincon I, supra, 8 Cal.App.5th at p. 9*)) rather than abandoning those **[***23]** claims. We note that, in their appellate briefs in *Rincon I*, plaintiffs presented extensive arguments challenging Judge Miller's resolution of the equitable claims for unfair competition and to set aside the foreclosure, suggesting they viewed those claims as important. (See *Rincon I, supra, 8 Cal.App.5th at p. 5*; *Rincon EV Realty LLC v. CP III Rincon Towers, Inc.* (Jan. 31, 2017, A138463) [nonpub. portion of partially pub. opn.] (*Rincon I*, nonpub. portion).) But similar considerations likely exist in any case where a plaintiff must choose whether to drop his or her equitable claims to preserve the ability to submit legal claims to a jury. Since plaintiffs did not abandon their equitable claims, Judge Miller's findings in connection with those claims are binding and (as discussed) dispose of plaintiffs' legal claims.
[*1001]

D. *Plaintiffs Are Not Entitled To Relitigate Issues Resolved by Judge Miller*

Plaintiffs contend that, as a matter of appellate procedure, they were entitled on remand to relitigate all factual issues relevant to their legal claims, even if Judge Miller resolved the identical issues when she addressed the equitable UCL claim. Plaintiffs base this argument on the rule that, in general, "'[a]n unqualified reversal **[***24]** remands the cause for a new trial [citation], and places the parties in the trial court in the same position as if the cause had never been tried, with the exception that the opinion of the court on appeal must be followed so far as applicable.' [Citation.] This principle is equally applicable to a partial reversal of a judgment." (*Hall v. Superior Court (1955) 45 Cal.2d 377, 381 [289 P.2d 431]* (*Hall*); accord, e.g., *Bevis v. Terrace View Partners, LP (2019) 33 Cal.App.5th 230, 263 [244 Cal. Rptr. 3d 797]*.)

HN6[] But as plaintiffs acknowledge, an appellate court may limit or define the issues to be addressed on remand. (E.g., *Puritan Leasing Co. v. Superior Court (1977) 76 Cal.App.3d 140, 148–149 [142 Cal. Rptr. 676]* **[**127]** [prior appellate opinion foreclosed retrial on some but not all issues]; see *Hall, supra, 45 Cal.2d at p. 381* [general rule allowing retrial is subject to proviso that trial court is to follow the opinion of the appellate court].) Here, as discussed in part II.C. above, our opinion in *Rincon I*, specifically footnote 12, contemplates and authorizes trial court proceedings on remand that could narrow or eliminate the issues to be tried. (*Rincon I, supra, 8 Cal.App.5th at p. 20, fn. 12*.) Judge Kahn, by proceeding in accordance with footnote 12, did not violate the rules of appellate procedure. We need not determine what the proper scope of proceedings on remand would have been if we had not addressed the matter in footnote 12.

The three pairs of cases highlighted by plaintiffs in support of their argument **[***25]** that a retrial was required here—the *Bate*, *Lagiss*, and *Robinson* cases—are distinguishable. In each set of cases, the appellate court in the first appeal reversed a trial court judgment without specifying any limitation on the issues to be retried. In the second appeal, the appellate court held the prior unqualified reversal required a retrial.

In Bate v. Marsteller (1959) 175 Cal.App.2d 573, 576, 583–584 [346 P.2d 903] (*Bate I*), a fraud action brought by sellers of real estate, the appellate court reversed a judgment in favor of a group of broker defendants as unsupported by substantial evidence, while rejecting some other grounds for reversal; the court affirmed the judgment in favor of a different group of defendants. In Bate v. Marsteller (1965) 232 Cal.App.2d 605, 617–618 [43 Cal. Rptr. 149] (*Bate II*), the appellate court held that the "unqualified reversal" in *Bate I* as to the broker defendants left factual issues as to those defendants "open for determination."

[*1002]

In People ex rel. Department of Public Works v. Lagiss (1958) 160 Cal.App.2d 28, 30, 33, 37 [324 P.2d 926] (*Lagiss I*), a condemnation action, the appellate court reversed the judgment because the trial court improperly prevented the defendant property owner from pleading and seeking to prove that the condemning agency acted in bad faith and abused its discretion. In People ex rel. Department of Public Works v. Lagiss (1963) 223 Cal.App.2d 23, 30, 31, fn. 4, 44–45 & fn. 13, 47–49 [35 Cal. Rptr. 554] (*Lagiss II*), the appellate court held that the "unqualified reversal" in *Lagiss I* "set[] **[***26]** the case at large," so the defendant property owner was entitled to relitigate the issue of the amount of compensation due, even though the first appeal involved no claim of error as to compensation.

In Robinson v. Thornton (1893) 102 Cal. 675, 679–681, 685 [34 P. 120] (*Robinson I*), an action involving competing claims to land, the Supreme Court reversed the trial court judgment and found there was sufficient evidence to support a finding that defendant Thornton obtained title through adverse possession. In Robinson v. Thornton (1896) 114 Cal. 275, 276–277 [46 P. 79] (*Robinson II*), the Supreme Court held that the reversal in *Robinson I* did not *require* the jury to find at the retrial that adverse possession was established, and the trial court erred by directing a verdict on that point; adverse possession was a question of fact for the jury.

None of these cases involved the scenario at issue here, where the first appellate decision (i.e., our opinion in *Rincon I*) (1) affirmed the judgment as to one set of claims and (2) authorized the trial court to determine on remand whether the findings made in connection with those claims disposed of the remaining claims. We are not persuaded by plaintiffs' argument that *Bate, Lagiss*, and *Robinson* establish that **[**128]** Judge Kahn committed reversible error here.

In a related argument, **[***27]** plaintiffs assert that the usual rule that findings pertaining to one set of claims (equitable or legal) are binding in the determination of the other set of claims (discussed in parts II.A. and II.B. above) has no application when the trial court's decisions resolving the two sets of claims are separated by a Court of Appeal decision. Plaintiffs contend applying that preclusion doctrine after a partial reversal and remand would conflict with the rules of appellate procedure allowing for a retrial as set forth in Hall, supra, 45 Cal.2d 377 and other cases. Again, however, we see no conflict between these doctrines in the present case. As discussed, Judge Kahn's determination of the preclusive effect of Judge Miller's findings was consistent both with our opinion in *Rincon I* (and thus with *Hall*, which, as noted, provides a trial court is to proceed in accordance with the opinion of the appellate court) and with the preclusion principles applicable in cases involving equitable and legal claims.

[*1003]

In their reply brief, plaintiffs suggest that giving preclusive effect to Judge Miller's findings improperly impairs their ability to obtain appellate review of those findings. They did not develop such an argument in their **[***28]** opening brief, so we need not address it. (Neighbours v. Buzz Oates Enterprises (1990) 217 Cal.App.3d 325, 335, fn. 8 [265 Cal. Rptr. 788].) Plaintiffs note that Samara v. Matar (2018) 5 Cal.5th 322 [234 Cal. Rptr. 3d 446, 419 P.3d 924] (*Samara*), the case on which they rely for this argument, was decided in June 2018, after plaintiffs filed their opening brief in May 2018, but before defendants filed their appellate brief in September 2018. If plaintiffs wished to add an argument based on *Samara*, they should have sought leave to file a supplemental opening brief before defendants' brief was due, rather than saving the issue for reply. (Reichardt v. Hoffman (1997) 52 Cal.App.4th 754, 764–766 [60 Cal. Rptr. 2d 770].)

Plaintiffs' contention lacks merit in any event. In their appeal from the judgment entered by Judge Miller, plaintiffs had the opportunity to challenge any and all of her factual and legal determinations. As we discussed in the unpublished portion of our opinion in *Rincon I*, plaintiffs challenged some aspects of Judge Miller's analysis of their UCL claim, including arguing (1) Judge Miller applied the wrong legal standard for determining whether defendants' conduct was "unfair" under the UCL, (2) Judge Miller misinterpreted contract terms and defendants' conduct pertaining to such matters as whether defendants approved a budget for the Property, and defendants' efforts to convince plaintiffs' investor sponsor to contribute **[***29]** funds for tax payments, and (3) Judge Miller's finding that plaintiffs were not entitled to extend the maturity date of the Loan beyond June 2009 and defaulted by failing to repay it (a finding that Judge Miller concluded barred all of plaintiffs' claims) did not insulate defendants from liability for their unfair conduct, including allegedly engaging in "dual tracking" by seeking to sell the Loan while participating in loan modification discussions. (*Rincon I, nonpub. portion, supra, A138463*.)

But as to Judge Miller's conclusion that plaintiffs had not established liability under the "unlawful" and "fraudulent" prongs of the UCL (and the legal causes of action that underlay those portions of the equitable UCL claim), plaintiffs did *not* challenge a number of the key findings that were the principal bases for Judge Miller's rulings. For example, Judge Miller found plaintiffs were not entitled to extend the maturity date of the Loan and therefore were in default when they failed to **[**129]** repay the Loan in June 2009, a finding that was a central ground for Judge Miller's conclusion that defendants were not liable on the legal claims that underlay their UCL claim. In addition, in connection with **[***30]** each of the alleged violations of law underlying the "unlawful" and "fraudulent" prongs of the UCL claim—including defendants' alleged breaches of contract, fraud, slander of title, and violation of the UTSA—Judge Miller found that plaintiffs did not show that defendants' **[*1004]** conduct caused them to suffer any damages, which she held to be an essential element of each of those underlying claims. In the *Rincon I* appeal, plaintiffs did not challenge Judge Miller's findings that they were in default and proved no damages.

In addition, as to the causation-of-injury element of the UCL claim itself, we concluded in *Rincon I* that, in plaintiffs' opening appellate brief in that case, they did not challenge Judge Miller's finding that they had not proven defendants' alleged conduct caused them to suffer injury. (*Rincon I, nonpub. portion, supra, A138463*.) Based on plaintiffs' failure to challenge that essential element of UCL liability, we affirmed Judge Miller's rejection of that claim, and we did not address plaintiffs' arguments about whether Judge Miller mischaracterized certain aspects of defendants' conduct. (*Ibid.*)

Plaintiffs now argue that, because this court in *Rincon I* affirmed the judgment **[***31]** on the UCL claim based on their failure to challenge Judge Miller's causation determination, her findings about whether defendants' conduct violated the UCL have "evaded" review and should not have binding effect. We disagree.

Plaintiffs rely on our Supreme Court's decision in *Samara, supra, 5 Cal.5th 322*, but that case provides no basis for reversal here. In *Samara*, the court held that, for purposes of claim and issue preclusion, when a trial court ruling is based on multiple grounds, "a ground reached by the trial court *and properly challenged on appeal*, but not embraced by the appellate court's decision, should not affect the judgment's preclusive effect." (*Id. at p. 334*, italics added.) Instead, the preclusive effect of the judgment should be evaluated as though the trial court had not reached the issue that the appellate court did not reach. (*Id. at pp. 326, 338*.) The Supreme Court noted a limitation on its ruling: "We caution, however, that we take no position on the significance of an independently sufficient alternative ground reached by the trial court and *not* challenged on appeal." (*Id. at p. 337*.)

In *Samara*, a dental malpractice case, the plaintiff (Samara) sued two dentists, Dr. Nahigian, who allegedly was negligent, and Dr. Matar, on grounds **[***32]** of vicarious liability. (*Samara, supra, 5 Cal.5th at p. 327*.) The trial court entered summary judgment for Dr. Nahigian on two grounds, the statute of limitations and a lack of evidence of causation. (*Ibid.*) In the first appeal, the appellate court affirmed solely on the basis of the statute of limitations, even though Samara urged the court to address and reverse the finding of a lack of causation. (*Ibid.*) In the meantime, Dr. Matar moved for summary judgment on the basis that the trial court's prior ruling that Dr. Nahigian's alleged negligence did not cause injury entitled him (Dr. Matar) to judgment as well, since the sole alleged basis for his liability was his vicarious liability **[*1005]** for Dr. Nahigian's conduct. (*Id. at pp. 327–328*.) After the appellate decision in favor of Dr. Nahigian became final, the trial court granted Dr. Matar's motion, but the Court of Appeal **[**130]** reversed, and the Supreme Court affirmed the Court of Appeal's decision (*id. at p. 328*), concluding "the preclusive effect of the judgment in favor of Nahigian should be evaluated as though the trial court had not reached the causation issue" (*id. at p. 338*).

Even assuming *Samara* might in some circumstances limit the applicability of the preclusion principle on which Judge Kahn relied (i.e., the **[***33]** rule that findings pertaining to equitable claims are binding in the resolution of legal claims *in the same case*), it does not support plaintiffs' position here. As discussed, unlike the appellant in *Samara, supra, 5 Cal.5th at p. 334*, plaintiffs in *Rincon I* did not "properly challenge[]" the findings by Judge Miller that are dispositive of the legal claims underlying the "unlawful" and "fraudulent" prongs of plaintiffs' equitable UCL claim, including the findings that plaintiffs were in default as of June 2009 and did not prove any damages flowing from defendants' conduct. Accordingly, Judge Miller's findings, in particular those bearing on causation of injury—whether viewed as an element of plaintiffs' underlying legal claims or as a prerequisite for liability on plaintiffs' equitable claim under the UCL—are binding and are unaffected by *Samara*. Those findings were grounds for Judge Miller's decision that plaintiffs did *not* challenge in their first appeal. (*Samara, supra, at pp. 334, 337*; *Rincon I, nonpub. portion, supra, A138463*.)

E. *Judge Kahn Could Properly Take Judicial Notice of Judge Miller's Findings To Determine Their Preclusive Effect*

In support of the summary judgment motion that ultimately was heard by Judge Kahn, defendants submitted **[***34]** a request for judicial notice of several documents, including Judge Miller's statement of decision. Plaintiffs contend Judge Kahn could not take judicial notice of the truth of Judge Miller's findings and therefore defendants' summary judgment motion lacked any evidentiary support. ***HN7***[] But even assuming it was necessary for Judge Kahn to take judicial notice as a prerequisite to considering findings made during an earlier phase of the same case, he correctly ruled that it is proper for a court to take judicial notice of factual findings in determining whether those findings have preclusive effect. (*Hawkins v. SunTrust Bank (2016) 246 Cal.App.4th 1387, 1393 [206 Cal. Rptr. 3d 681]* (*Hawkins*).)

CA(5)[] **(5)** Taking judicial notice of a finding in determining its preclusive effect does not involve a determination of the finding's truth. As the *Hawkins* court explained in the context of claim and issue preclusion: "'"Whether a factual finding is true is a different question than whether the truth of that factual finding may or may not be subsequently litigated a second time. ***HN8***[] The **[*1006]** doctrines of res judicata and collateral estoppel will, when they apply, serve to bar relitigation of a factual dispute even in those instances where the factual dispute was erroneously decided in favor of a party **[***35]** who did not testify truthfully." [Citation.] In other words, even though a factual finding in a prior judicial decision may not establish the truth of that fact for purposes of judicial notice, the finding itself may be a proper subject of judicial notice if it has a res judicata or collateral estoppel effect in a subsequent action.'" (*Hawkins, supra, 246 Cal.App.4th at p. 1393*.) Judge Kahn properly took judicial notice of Judge Miller's findings in determining their preclusive effect.

[**131] III. DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

Pollak, P. J., and Tucher, J., concurred.

Appellants' petition for review by the Supreme Court was denied March 25, 2020, S260477. Kruger, J., is of the opinion the petition should be granted.

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Morice v. Hosp. Serv. Dist. #3

United States District Court for the Eastern District of Louisiana

December 27, 2019, Decided; December 27, 2019, Filed

CIVIL ACTION NO. 18-7945 SECTION M (3)

Reporter
430 F. Supp. 3d 182 *; 2019 U.S. Dist. LEXIS 227316 **

NATCHEZ J. MORICE, III, M.D. VERSUS HOSPITAL SERVICE DISTRICT #3, et al.

Prior History: *Plaintiff Doctor v. Hosp. Serv. Dist. #3, 2019 U.S. Dist. LEXIS 13900, 2019 WL 351492 (E.D. La., Jan. 29, 2019)*

Core Terms

privileges, allegations, Bylaws, immunity, recommendation, obstetrical, suspension, motion to dismiss, Defendants', medical staff, Credentials, hospital service, reappointment, violations, staff, contends, patients, entities, due process, antitrust, relevant market, juridical, summary judgment, appointment, defamation, rights, fails, peer review, doctrine of primary jurisdiction, unincorporated association

Counsel: **[**1]** For Natchez J. Morice, III, Previously referred to as "Plaintiff Doctor", Plaintiff: Christopher H. Riviere, Todd M. Magee, Riviere Law Firm, Thibodaux, LA; Thomas Patrick Henican, Riess LeMieux, LLC, New Orleans, LA; Jeremy T. Grabill, Matthew Robert Slaughter, Phelps Dunbar, LLP (New Orleans), New Orleans, LA.

For Hospital Service District No 3, Parish of LaFourche, doing business as Thibodaux Regional Medical Center, Greg Stock, Chief Executive Officer of Thibodaux Regional Medical Center, Board of Commissioners, of Thibodaux Regional Medical Center, Medical Executive Committee of the Medical Staff of Thibodaux Regional Medical Center, of Medical Staff of Thibodaux Regional Medical Center, Credentials Committee, of TRMC, Defendants: Christopher K. Ralston, LEAD ATTORNEY, Phelps Dunbar, LLP (New Orleans), Canal Place, New Orleans, LA; Carl Edward Hellmers, III, Frilot L.L.C., Energy Centre, New Orleans, LA; Dowling Burke Stough, James P. Waldron, Frilot L.L.C., Energy Centre, New Orleans, LA; Jeremy T. Grabill, Matthew Robert Slaughter, Phelps Dunbar, LLP (New Orleans), Canal Place, New Orleans, LA.

Judges: BARRY W. ASHE, UNITED STATES DISTRICT JUDGE.

Opinion by: BARRY W. ASHE

Opinion

[*190] **ORDER & REASONS**

Before the Court **[**2]** is a motion to dismiss for failure to state a claim filed by defendants Hospital Service District No. 3 Parish of Lafourche d/b/a Thibodaux Regional Medical Center ("TRMC"), Board of Commissioners of TRMC ("the Board"), Medical Executive Committee of TRMC ("MEC"), Credentials Committee of TRMC ("Credentials

Committee"), and Greg Stock ("Stock"), the CEO of TRMC (collectively, "Defendants").[1] The plaintiff, **[*191]** Natchez J. Morice, III, M.D. ("Dr. Morice"), opposes the motion.[2] Also before the Court is a motion for partial summary judgment filed by Dr. Morice relating to his breach-of-contract claim,[3] which Defendants oppose,[4] and in further support of which Dr. Morice replies.[5] Having considered the parties' memoranda and the applicable law, the Court issues this Order & Reasons.

I. BACKGROUND

This litigation arises from TRMC's suspension and denial of Dr. Morice's clinical privileges in obstetrics at TRMC.[6] TRMC's Medical Staff Bylaws ("Bylaws") require a physician to apply for renewal of privileges at TRMC every two years.[7] As part of the written application, a physician must demonstrate "ability to work cooperatively with others," "provide peer recommendations," agree to continued peer review **[**3]** and quality review, and report any violations assessed by the MEC.[8] The Credentials Committee initially reviews the application and makes a recommendation to the MEC, which, in turn, makes a recommendation to the Board, which renders the final decision.[9] Under Article VII of the Bylaws, if the MEC makes an "adverse recommendation," the physician may generally initiate the "Hearing Procedure" set out in Article XI, which provides for a hearing conducted by a "Hearing Committee" (or Hearing Panel) and appellate review by the Board.[10] According to the Bylaws, the recommendation forming the basis of the hearing and appeal does not become "effective and final" until the Board's determination upon final review.[11]

TRMC first granted Dr. Morice privileges in obstetrics and gynecology in 2006. Following notice of five violations spanning from late 2014 to early 2017, however, the MEC recommended corrective action in relation to Dr. Morice's

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[1] R. Doc. 77. Before Dr. Morice filed a first supplemental and amending complaint (R. Doc. 64), Defendants had filed a motion to dismiss (R. Doc. 21) the original complaint (R. Doc. 1), to which Dr. Morice filed an opposition (R. Doc. 30), in further support of which Defendants filed a reply (R. Doc. 33), and in further opposition to which Dr. Morice filed a surreply (R. Doc. 36). The Court granted Defendants' motion to dismiss in part for Dr. Morice's failure to seek leave of court to proceed anonymously and directed Dr. Morice to file an amended complaint that disclosed his identity. R. Doc. 52. Dr. Morice did so in his first supplemental and amending complaint, which repeated verbatim the original allegations, but also added certain allegations relating to Defendants' denial of Dr. Morice's application for reappointment of privileges in obstetrics. R. Doc. 64. The Defendants' second motion to dismiss and Dr. Morice's response thereto largely repeat arguments made concerning the original motion to dismiss. The first supplemental and amending complaint supersedes the original complaint and moots the balance of the original motion to dismiss. Nevertheless, to the extent any arguments made concerning the original motion to dismiss are applicable to resolving the instant motion, the Court considers them here.

[2] R. Doc. 82.

[3] R. Doc. 69.

[4] R. Doc. 79.

[5] R. Doc. 85.

[6] R. Doc. 64 at 4.

[7] *See* R. Docs. 54-7 at 9; 59-1 at 9.

[8] *See* R. Docs. 54-7 at 8-10, 32-36; 59-1 at 8-10, 32-36.

[9] R. Docs. 54-7 at 28-31; 59-1 at 28-31.

[10] *See* R. Docs. 54-7 at 6, 22, 29; 59-1 at 6, 22, 29. Although Article VII refers to the "Hearing Procedure as outlined in Article X," Article X addresses "Corrective Action," whereas Article XI addresses the "Hearing and Appellate Review Procedure." It is apparent, then, that this is a typographical error, and the reference in Article VII should be to the "Hearing Procedure as outlined in Article *XI*."

[11] R. Docs. 54-7 at 41; 59-1 at 41.

privileges in obstetrics.[12] The violations, which Dr. Morice maintains were fabricated, involved Dr. Morice's failure to properly attend to his obstetrical patients.[13] Dr. Morice then requested a hearing under Article XI,[14] which took place on April 24-26, **[**4]** 2018, and May 8, 2018.[15] In preparation for the hearing, Dr. Morice alleges that he and TRMC submitted briefing on what burden of proof and evidentiary standard applied.[16] On June 13, 2018, the Hearing Panel rendered a decision to affirm the MEC's decision to suspend Dr. Morice.[17] Dr. Morice subsequently appealed the MEC's decision **[*192]** to the Board. Dr. Morice alleges that both he and TRMC filed briefs and made oral statements in support of their positions on appeal.[18] On August 13, 2018, the Board affirmed the Hearing Panel's decision suspending Dr. Morice's privileges in obstetrics for a period of six months, until February 13, 2019.[19]

Meanwhile, because Dr. Morice's two-year privileges appointment was set to expire on May 16, 2018, in the midst of the hearing-and-appeal process on his suspension,[20] the Board extended his privileges "until the earlier to occur of (i) the expiration of 4 months from May 15, 2018, the date of reappointment, or (ii) such time as the hearing before the ad hoc medical staff committee ... and the appellate review by the Board ... have concluded and a final decision has been rendered as set forth in Article XI of the TRMC Medical Staff Bylaws."[21] In this case, the latter **[**5]** term applied. Therefore, in the August 13, 2018 letter that informed Dr. Morice of the Board's final decision concerning his suspension, Stock advised Dr. Morice to "submit your application for reappointment and clinical privileges for review by the Credentials Committee as soon as possible."[22] Dr. Morice heeded Stock's instruction to make quick application for reappointment only as to his gynecological privileges. This application was submitted on August 16, 2018,[23] and TRMC approved his reappointment application a month later.[24] However, Dr. Morice waited to apply for privileges in obstetrics until December 17, 2018.[25] On January 14, 2019, the MEC recommended denial of his application for obstetrical privileges, citing a new violation of the professional standard of care and a variance report of unprofessional behavior in addition to the conduct for which Dr. Morice was suspended.[26] As of the date of the briefing of this motion to dismiss, Dr. Morice was still pursuing the hearing-and-appeal process as to the denial of his application for obstetrical privileges. TRMC declined to grant Dr. Morice temporary obstetrical privileges during the pendency of his appeal.[27]

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[12] R. Doc. 54-1 at 10-11.

[13] *See* R. Doc. 54-8 at 3.

[14] R. Doc. 54-4.

[15] R. Doc. 54-1 at 13.

[16] R. Doc. 64 at 17.

[17] R. Doc. 54-8.

[18] R. Doc. 64 at 18.

[19] R. Doc. 54-3.

[20] *See* R. Doc. 54-11 at 1.

[21] R. Doc. 59-2; *see also* R. Doc. 54-3 at 1.

[22] R. Doc. 54-3 at 1.

[23] R. Doc. 59-3. The application was structured as a joint application for GYN and OB privileges, but Dr. Morice scratched out the "Obstetrics" portion of the application.

[24] R. Doc. 59-4.

[25] R. Doc. 59-5.

[26] R. Doc. 59-6.

[27] R. Doc. 54-6. The Court has not been apprised of the disposition, if any, of Dr. Morice's appeal of the denial of his application for obstetrical privileges.

In his first supplemental **[**6]** and amending complaint for injunctive relief and damages,[28] Dr. Morice alleges that Defendants violated the *Sherman Act* (Counts I & II), breached the Bylaws and did so in bad faith (Counts III and IV), tortiously interfered with contractual obligations under the Bylaws (Count V), committed an abuse of rights and negligent misrepresentation (Counts VI and VII), intentionally inflicted emotional distress and defamed him (Count VIII), violated the *Louisiana Unfair Trade Practices and Consumer Protection Law ("LUTPA")* (Count IX), and violated his due process and equal protection rights (Count X).[29] In support of these claims, Dr. Morice's allegations may be **[*193]** grouped into three broad categories: the suspension, the denial of reappointment, and Defendants' purported illegal business practices.

First, Dr. Morice alleges that the peer review process relating to the suspension of his privileges was inherently flawed and designed to eliminate him as a competing provider of OB/GYN services. Dr. Morice alleges that the "trumped up" violations coincided with the success of his private practice.[30] In 2012, Dr. Morice opened an office in Thibodaux operated through his limited liability company, Thibodaux **[**7]** Gynecology and Obstetrics, LLC ("TGO").[31] Dr. Morice alleges that he does not have staff physician privileges at any tertiary level facility other than TRMC, which he says is the sole community provider of inpatient and outpatient hospital services in Thibodeaux.[32] Dr. Morice contends that his entire obstetrical practice is based at TRMC, and all of his privileges in obstetrics are with TRMC.[33] From 2006 until 2013, Dr. Morice says his only other competitors were the Thibodeaux Women's Center, an independently-owned OB/GYN group, and TRMC's OB/GYN group. During this time, Dr. Morice alleges that his practice grew dramatically, which he says affected TRMC's market share for ancillary services, in that he was performing all ancillary services within his own medical practice rather than sending these services to TRMC.[34]

In 2014, TRMC purchased the Thibodeaux Women's Center. As a result, TRMC employed the Center's physicians in-house and, says Dr. Morice, heightened the competition between TRMC and Dr. Morice's practice.[35] Only after purchasing the Thibodaux Women's Health Center, Dr. Morice contends, did TRMC cite him for numerous bogus violations to potentially restrict, suspend, or remove **[**8]** his privileges at TRMC, reduce competition in the region, and raise the prices TRMC charged its patients and insurers. In the first nine years of Dr. Morice's privileges at TRMC, Dr. Morice received no violations or write-ups. But between December 10, 2014, and January 5, 2017, Dr. Morice was charged with five Level III or IV violations. Given that Dr. Morice and TGO compete with TRMC's OB/GYN physicians, who earn money for TRMC through services (particularly ancillary services, which constitute most of Dr. Morice's revenue as a private physician) and referrals, Dr. Morice contends that TRMC has a substantial motivation for restricting and denying medical staff privileges to independent non-employee physicians like him.[36] Dr. Morice contends that TRMC fabricated the bases for the violations for the purpose of removing Dr. Morice and TGO from competition, thereby allowing the hospital to have a monopoly or near monopoly for OB/GYN services.[37]

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[28] The Court previously denied Dr. Morice's application for a temporary restraining order and preliminary injunction. R. Docs. 60 & 78.

[29] R. Doc. 64 at 25-41.

[30] *Id.* at 14.

[31] *Id.* at 6, 8.

[32] *Id.* at 6, 25.

[33] *See id.* at 25.

[34] *Id.* at 8-9.

[35] *Id.* at 8, 25-29.

[36] *Id.* at 10-11, 13.

[37] *Id.* at 11.

Dr. Morice alleges that members of the MEC were biased in weighing his suspension because they were likewise in direct competition with him.[38] In addition, Dr. Morice claims that the violations were groundless because each reviewing TRMC committee merely **[**9]** "rubber stamped" the prior committee's recommendation without **[*194]** reviewing the evidence. For instance, on April 11, 2017, Dr. Morice claims to have met with the MEC, and that its members acknowledged never having before them the medical charts or any other facts or evidence purportedly establishing the Level III and IV violations found by TRMC's administration.[39] Dr. Morice claims that this pattern continued at the hearing, where an independent reviewer, the National Peer Review Committee; the medical review panel composed of three independent OB/GYN physicians; and Dr. Morice's expert, all gave evidence that Dr. Morice complied with the applicable standard of care in relation to Case No. 7954, which charged Dr. Morice with a Level IV violation involving injury. Dr. Morice claims that even some testimony elicited from Defendants' expert supported his exoneration. However, TRMC merely reduced the charge from Level IV to Level III, and in so doing, Dr. Morice claims, the Hearing Panel and Board "rubber stamped" the decision of the MEC. The Hearing Panel and Board confirmed the remaining violations, despite "a wealth of evidence, establishing beyond any reasonable dispute, that a sham review **[**10]** process was conducted, and which completely refuted all of the bogus charges against him."[40] Dr. Morice also claims that TRMC evinced its disparate treatment of TRMC-employed physicians and private physicians like him when testimony at the hearing revealed that a TRMC physician's conduct was even more egregious than Dr. Morice's, but that physician was never charged with a violation.[41]

Dr. Morice further contends that the Bylaws are written to prevent a "fair hearing" because the Bylaws provide no guidance on burden of proof or evidentiary standards.[42] Article XI, section 5(H) of the Bylaws provides in pertinent part: "It will be the obligation of the representative to present appropriate evidence in support of the adverse recommendation. The practitioner will be responsible for supporting his/her challenge to the adverse recommendation or decision."[43] Although Dr. Morice and TRMC submitted briefing on the procedural issues, Dr. Morice contends that TRMC should have been required to prove Dr. Morice's charges by clear and convincing evidence, rather than the preponderance standard that was used.[44]

Second, in relation to the January 2019 denial of his request for privileges, Dr. Morice alleges that TRMC was obligated **[**11]** to reinstate his obstetrical privileges after his suspension lifted, even though TRMC had, in the interim, denied his application for such privileges based on new violations that were consistent with his past violations. Dr. Morice essentially argues that the sense of the word "suspension" implies that his obstetrical privileges should have gone back into effect automatically after the suspension ran, and that, under the Bylaws, the denial of his application for reappointment of his obstetrical privileges does not take effect until the Board's final decision on his appeal of such denial. Therefore, Dr. Morice claims he is entitled to exercise obstetrical privileges until the hearing-and-appeal process is complete.[45] Dr. Morice asserts that the deprivation of privileges violated the Bylaws and his constitutional rights to due process and equal protection, amounted to an abuse of rights and misrepresentation, caused intentional **[*195]** infliction of emotional distress, and defamed him. Dr. Morice further asserts that the Bylaws constitute a contract and that Defendants breached this contract, did so in bad faith, and tortiously interfered with obligations under the Bylaws.

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[38] *Id.* at 9.

[39] *Id.* at 12-13.

[40] *Id.* at 16.

[41] *Id.* at 15-16.

[42] *Id.* at 12-13, 37.

[43] R. Doc. 77-3 at 39.

[44] R. Doc. 64 at 17-18, 37.

[45] R. Docs. 53-2 at 19-21, 38-40; 54-1 at 18; 73 at 15.

Third, Dr. Morice asserts **[**12]** that TRMC has taken additional illegal actions that violate the *Sherman Act* and *LUTPA*. Dr. Morice claims that TRMC intentionally reduced the revenue Dr. Morice earns by "cherry-picking" referrals of higher-paying, non-Medicare/Medicaid patients and rerouting them to hospital-employed physicians, while lower-paying referrals such as uninsured or Medicare/Medicaid patients were sent to non-employee and on-call physicians, such as Dr. Morice.[46] For instance, Dr. Morice alleges that while on call at TRMC during the period from 2006 to 2013, he received average annual referrals of 15 non-Medicaid/Medicare, insured patients, versus 15 uninsured or Medicaid/Medicare patients; however, while on call during the 2013-2018 period, he received referrals of one insured and 20 Medicaid/Medicare or uninsured patients.[47] Dr. Morice alleges that doctors in other medical specialties who have privileges at TRMC but are not employed by TRMC have also experienced such dramatic changes in referrals. Dr. Morice also contends that TRMC has operated and continues to operate and solicit business in St. Mary Parish, without permission from St. Mary's Hospital Service District, another illustration of TRMC's pattern **[**13]** of illegal activity.[48]

II. PENDING MOTIONS

A. Defendants' Motion to Dismiss

Defendants seek to dismiss the entirety of Dr. Morice's supplemental and amending complaint. First, Defendants assert that all but TRMC lack the capacity to be sued.[49] Second, Defendants submit two grounds they claim would dispose of all allegations: (1) the complaint improperly relies on conclusory allegations; and (2) Defendants are immune under the *Health Care Quality Immunity Act ("HCQIA")*, Louisiana law, and the Bylaws.[50] Third, Defendants argue that under the primary jurisdiction doctrine, the suit should be stayed pending the outcome of Dr. Morice's second hearing and appeal.[51] Fourth, Defendants contend that Dr. Morice's individual claims fail for various independent reasons.[52]

In opposition, Dr. Morice argues that all Defendants have capacity to be sued.[53] Dr. Morice also contends that each claim is supported by sufficiently specific allegations to state plausible claims for relief.[54] When these allegations are taken as true, Dr. Morice says it is clear that Defendants do not qualify for statutory immunity or immunity under the Bylaws.[55] In regard to abstention under the primary jurisdiction doctrine, Dr. Morice asserts **[**14]** that the Court should decline to stay the proceedings because only the single claim relating to his denial of privileges would

[46] R. Doc. 64 at 18.

[47] *Id.* at 19.

[48] *Id.* at 18-19.

[49] R. Doc. 77-1 at 8.

[50] *Id.* at 7-17.

[51] *Id.* at 16-17.

[52] *Id.* at 17-31.

[53] R. Doc. 82 at 12-15.

[54] *Id.* at 11-12.

[55] *Id.* at 16-21.

be affected by any hearing or appeal.[56] Finally, Dr. Morice **[*196]** makes various arguments to rebut dismissal of his individual claims, which the Court will address in detail below.[57]

B. Dr. Morice's Motion for Partial Summary Judgment

In his motion for partial summary judgment, Dr. Morice presents arguments mirroring those he asserted in support of his second motion for preliminary injunction.[58] Essentially, Dr. Morice claims that Defendants violated the Bylaws' provision that adverse recommendations not become effective until the final recommendation of the Board at the end of the hearing-and-appeal process. Accordingly, Dr. Morice says that Defendants should have granted him interim privileges in obstetrics between the denial of his request for reappointment of privileges and the end of the hearing-and-appeal process. Dr. Morice further argues that Defendants impermissibly altered the two-year period of his reappointments (which ran from May to May) by unilaterally extending the period ending on May 16, 2018, to August 13, 2018. In doing so, says Dr. Morice, Defendants **[**15]** created a trap for Dr. Morice's privileges to lapse, so they could shut him out of local competition for obstetrical services. Because Dr. Morice served the entirety of his suspension and complied with all related conditions, he contends that the denial of his reappointment of obstetrical privileges is largely based upon the same "trumped up" allegations for which he was already punished. And, to the extent other instances of substandard and unprofessional conduct formed a basis for the denial of reappointment, Dr. Morice contends that these too were adverse recommendations that should not become binding and effective until the resolution of his hearing and appeal.[59]

In opposition, Defendants urge the Court to deny the motion for partial summary judgment on the same grounds that the Court denied the motion for preliminary injunction — namely, Dr. Morice does not have the right to interim privileges because he permitted his privileges to lapse before applying for reappointment.[60] Defendants also submit that the motion for partial summary judgment is premature and should be denied for the same reasons set forth in their motion to dismiss.[61]

In reply, Dr. Morice argues that certain **[**16]** representations by a staff member of TRMC and Stock indicated that his privileges did not lapse. Dr. Morice submits an email by staff member Dana Rodrigue, who on December 18, 2018, responded to him about his request for activation of his privileges in obstetrics, advising: "I will need you to resubmit the privilege form and leave the dates blank. Because this is not a new application or reappointment application and just a request for privileges, your dates will be from the date of approval to the end of your current reappointment which is May, 2020."[62] Dr. Morice contends that this correspondence proves that his privileges had not lapsed, or else proves that he could submit an application after the two-year period had expired and enjoy continuous privileges.[63] Dr. Morice further argues that Stock's correspondence gave no indication that his privileges had lapsed and thus implied that Dr. Morice's privileges would be granted.[64] **[*197]** Dr. Morice also questions the

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[56] *Id.* at 22.

[57] *Id.* at 23-52.

[58] *Compare* bulleted list in R. Doc. 69-1 at 9-14 *with* bulleted list in R. Doc. 73 at 12-17.

[59] R. Doc. 73 at 12-17.

[60] R. Doc. 79 at 2, 8-10.

[61] *Id.* at 1, 6-8.

[62] R. Doc. 85 at 5 (citing R. Doc. 69-3 at 7).

[63] *Id.* at 5-6.

[64] *Id.* at 7-10.

legitimacy of one of the two "new" grounds for the denial of his reappointment request, which concerned conduct that occurred in November of 2017.[65]

III. LAW & ANALYSIS

A. *Rule 12(b)(6)* Motion

1. *Rule 12(b)(6)* Standard

The Federal Rules of Civil Procedure require a **[**17]** complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. *Rule 8* "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). The statement of the claim must "'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Twombly, 550 U.S. at 555* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*). A pleading does not comply with *Rule 8* if it offers "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 555-57*).

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a party to move to dismiss for "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 570*). A claim is plausible on the face of the complaint "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly, 550 U.S. at 556*). Plausibility does not equate to probability, but rather "it asks for more than **[**18]** a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly, 550 U.S. at 556*). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (quoting *Twombly, 550 U.S. at 557*). Thus, if the facts pleaded in the complaint "do not permit the court to infer more than a mere possibility of misconduct, the complaint has alleged — but it has not 'show[n]' - 'that the pleader is entitled to relief.'" *Id. at 679* (quoting *Fed. R. Civ. P. 8(a)(2)*).

In considering a *Rule 12(b)(6)* motion to dismiss for failure to state a claim, a court employs the two-pronged approach utilized in *Twombly*. The court "can choose to begin by identifying pleadings that, because they are no more than conclusions [unsupported by factual allegations], are not entitled to the assumption of truth." *Iqbal, 556 U.S. at 679*. However, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* "[The] task, then, is to determine whether the plaintiff has stated a legally cognizable claim that is plausible, not to evaluate the plaintiff's likelihood of success." *Body by Cook, Inc. v. State Farm Mut. Auto. Ins., 869 F.3d 381, 385 (5th Cir. 2017)* (quoting *Doe v. Covington County Sch. Dist., 675 F.3d 849, 854 **[*198]** (5th Cir. 2012)* (internal **[**19]** quotation marks and citation omitted)). Motions to dismiss are disfavored and rarely granted. *Turner v. Pleasant, 663 F.3d 770, 775 (5th Cir. 2011)* (citing *Harrington v. State Farm Fire & Cas. Co., 563 F.3d 141, 147 (5th Cir. 2009)*).

A court's review of a *Rule 12(b)(6)* motion to dismiss "is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint." *Lone Star Fund V (US), LP v. Barclays Bank PLC, 594 F.3d 383, 387 (5th Cir. 2010)* (citing *Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498-99 (5th Cir. 2000)*. A court may also take judicial notice of certain

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[65] *Id.* at 10 (citing R. Doc. 79-6).

matters, including public records and government websites. *Dorsey v. Portfolio Equities, Inc., 540 F.3d 333, 338 (5th Cir. 2007)*; *see also* *Kitty Hawk Aircargo, Inc. v. Chao., 418 F.3d 453, 457 (5th Cir. 2005)*. Thus, in weighing a *Rule 12(b)(6)* motion, district courts primarily look to the allegations found in the complaint, but courts may also consider "documents incorporated into the complaint by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned." *Meyers v. Textron, Inc., 540 F. App'x 408, 409 (5th Cir. 2013)* (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)*).

2. Defendants' Capacity to be Sued

Rule 17(b) of the Federal Rules of Civil Procedure defines the capacity of persons to be sued: the capacity of "an individual who is not acting in a representative capacity" is determined "by the law of the individual's domicile," *Fed. R. Civ. P. 17(b)(1)*; a corporation's capacity to be sued is determined "by the law under which it was organized," *id.* *17(b)(2)*; and "for **[**20]** all other parties," the capacity to be sued is determined "by the law of the state where the court is located, except that ... a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws." *Id.* *17(b)(3)(A)*. The "law" of the state includes the "whole law," that is, both statutes and judicial decisions. *Klebanow v. N.Y. Produce Exch., 344 F.2d 294, 297 (2d Cir. 1965)*.

Defendants submit that the Board, MEC, and Credentials Committee should be dismissed because they lack the capacity to be sued because they are mere divisions of TRMC, the proper corporate defendant that is vested with the capacity to be sued under *La. R.S. 46:1060*. Defendants contend that the Board, MEC, and Credentials Committee are not unincorporated associations under *Rule 17(b)(3)* that have a separate identity from TRMC. Rather, Defendants suggest that these entities only exist as bodies of TRMC. For instance, while the Board acts as the "governing body" of TRMC, it does not "possess a corporate identity, the ability to own property (including any funds used to pay judgments), or the ability to sue or be sued."[66] Instead, say Defendants, those rights are vested **[**21]** in TRMC. Similarly, Defendants contend that "the MEC and Credentials Committee are merely internal committees of TRMC's medical staff and serve as the medical staff's representatives to the Board" with "no legal identity, no capacity to contract or be sued, and no ability to pay any judgment rendered against them."[67]

[*199] Dr. Morice responds that Louisiana law recognizes that the Board exists independently from a hospital service district such as TRMC as its governing body, and so too the committees that govern and review the credentials of the medical staff. For instance, *La. R.S. 46:1053* requires the Board to serve as an independent entity of the hospital service district, and *section 46:1055* grants the Board authority to "promulgate rules ... governing the conduct of the hospital," "conduct hearings and pass upon complaints by or against any officer or employee of the district," and appoint a director of the hospital and certain committees. *La. R.S. 46:1053* & *1055*.[68] Pursuant to the Bylaws, Dr. Morice asserts that the Board also makes the final decision in appointing physicians to the medical staff and granting privileges, after considering recommendations by the Credentials Committee and the MEC.[69] Dr. Morice also cites several Louisiana state **[**22]** cases and two federal cases in which the board of a hospital service district and/or committees were named as defendants.[70] In *Giles*, for example, the Louisiana Supreme

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[66] R. Doc. 77-1 at 8.

[67] *Id.* at 9.

[68] R. Doc. 82 at 12-14.

[69] *Id.* at 14-15 (citing R. Doc. 77-3 at 7, 37-42).

[70] *Id.* at 14 n.72 & 15 n.75 (citing *Leckelt v. Bd. of Comm'rs of Hosp. Dist. No. 1, 909 F.2d 820 (5th Cir. 1990)*; *Fremaux v. Bd. of Comm'rs of Hosp. Serv. Dist. No. 3 of Lafourche Par., 1997 U.S. Dist. LEXIS 4098, 1997 WL 159483 (E.D. La. Mar. 26, 1997)*; *In re Bd. of Comm'rs of St. Charles Par. Hosp. Serv. Dist., Par. of St. Charles, 95 So. 2d 588 (La. 1957)*; *Lamm v. Bd. of*

Court issued a writ of mandamus to the board of commissioners of the St. Tammany Parish Hospital District to admit Dr. Giles to active staff membership at the St. Tammany Parish Hospital. *160 So. 2d at 618*.

The Board, MEC, and Credentials Committee are not corporations. Thus, these entities fall under the category of "all other parties" in *Rule 17(b)(3)*, and their capacity to be sued is governed by the law of Louisiana, the state in which this Court sits. In Louisiana, "[a]n entity must qualify as a juridical person to have the capacity to be sued." *Dejoie v. Medley, 945 So. 2d 968, 972 (La. App. 2006)* (citing *Dugas v. City of Breaux Bridge Police Dep't, 757 So. 2d 741 (La. App. 2000)*). "A juridical person is an entity to which the law attributes personality, such as a corporation or a partnership. The personality of a juridical person is distinct from that of its members." *La. Civ. Code art. 24*. The Louisiana Code of Civil Procedure lists specific juridical persons with capacities to be sued, including corporations and unincorporated associations. *La. Code Civ. P. arts. 738* & *739*. Unincorporated associations are "created in the same manner as a partnership, by a contract between two **[**23]** or more persons to combine their efforts, resources, knowledge or activities for a purpose other than profit or commercial benefit." *Ermert v. Hartford Ins. Co., 559 So. 2d 467, 473 (La. 1990)*. Political subdivisions of the state are also considered juridical persons with the capacity to be sued. *See Roberts v. Sewerage & Water Bd. of New Orleans, 634 So. 2d 341, 347 (La. 1994)*; *see also La. Const. art. 12, § 10*.

Here, TRMC is a hospital service district created pursuant to Louisiana law, which authorizes and empowers parish police juries to create and form hospital service districts. *La. R.S. 46:1051*. It is well-established that hospital service districts are political subdivisions of the state. *Id. 46:1064(A)*; *Bertrand v. Sandoz, 260 LA. 239, 255 So. 2d 754, 756-59 (La. 1971)*. *Louisiana Revised Statute 46:1060* **[*200]** grants corporate powers, such as "perpetual existence," "the power and right to incur debts and contract obligations" and "to sue and be sued," to hospital service districts. *See Wash. Par. Police Jury, 152 So. 2d at 367-69* (interpreting *La. R.S. 46:1060* to mean that a hospital service district cannot be terminated by a police jury once it is created absent express constitutional or legislative authorization).

Once a hospital district is formed or created, a "board of five commissioners," also referred to as "the commission," is appointed by the police jury of the parish. *La. R.S. 46:1053*. Each commissioner must be a qualified voter and resident of the district, and each serves varying limited terms. *Id. Section 46:1055* sets out duties **[**24]** and authorities of the commission "[i]n addition to the duties defined elsewhere in this Chapter [concerning hospital service districts]," including "[t]o represent the public interest in providing hospital and medical care in the district"; "[t]o advise the police jury and the hospital director on problems concerning the operation of the hospital"; "[t]o make, alter, amend, and promulgate rules and regulations governing the conduct of the hospital"; "[t]o conduct hearings and pass upon complaints by or against any officer or employee of the district"; "[t]o review and modify, or set aside any action of the officers or employees of the district which the commission may determine to be desirable or necessary in the public interest"; "[t]o appoint, with approval of the medical staff, a director of the hospital"; "[t]o appoint necessary standing and special committees which may be necessary to carry out the purposes of this Chapter"; and "[t]o enter into lease agreements with recognized and duly constituted nonprofit associations which are primarily engaged in the operation of hospitals." *La. R.S. 46:1055*.

Both the "hospital service districts," such as TRMC, "and the governing bodies created under the **[**25]** provisions of this chapter," such as the Board, MEC, and Credentials Committee, have the "objects and purposes" of "own[ing] and operat[ing] hospitals"; "administer[ing] other activities related to rendering care to the sick and injured"; "promot[ing] and conduct[ing] scientific research and training ... in connection with the hospital"; "promot[ing] the general health of the community"; and "cooperat[ing] with other public and private institutions and agencies engaged in providing hospital and other health services to residents of the district." *La. R.S. 46:1052*.

a. The Board

Comm'rs for Vermilion Hosp. Serv. Dist. No. 1, 378 So. 2d 919, 922 (La. 1979); ***Giles v. Breaux, 160 So. 2d 608 (La. App. 1964)***; *Wash. Par. Police Jury v. Wash. Par. Hosp. Serv. Dist. No. 1, 152 So. 2d 362 (La. App. 1963)*).

The Board is plainly not an unincorporated association because it was not created by parties through contract, but by the appointment of a police jury authorized to do so by statute. *La. R.S. 46:1053*. A slightly more difficult question is whether the Board has capacity to be sued as a juridical person with distinct personality, separate and apart from the political subdivision of TRMC. *See* *La. Civ. Code art. 24*. In *Roberts*, the Louisiana Supreme Court held that "[i]n the absence of positive law to the contrary, a local government unit may be deemed to be a juridical person separate and distinct from other government entities, when the organic law grants it the legal **[**26]** capacity to function independently and not just as the agency or division of another governmental entity." *634 So. 2d at 347*. "Such a determination will depend on an analysis of specifically what the entity is legally empowered to do." *Id.*

Using this "functional approach," the supreme court held that the Sewerage and Water Board of New Orleans had a juridical personality with capacity to be sued under the *Louisiana Workers Compensation Act*. **[*201]** *Id.* Despite the fact that the political subdivision of the Sewerage and Water Board was "closely related" to the political subdivision of the City of New Orleans, the supreme court found that the Sewerage and Water Board was "legally independent of the City, state and other governments in its source of revenues; the employment, deployment, direction and control of its work force; and the comprehensive management of its public utility operations." *Id. at 346-47*. While composed of appointed citizens and local government officials, the Sewerage and Water Board was authorized to "elect an executive director" and general superintendent and fix their salaries; to "employ all ... employees necessary to operate the public sewerage, water and drainage systems"; to "dispense with the services **[**27]** of unnecessary employees"; to establish and regulate employee pension funds; to acquire and expropriate property; to conduct and make rules and regulations regarding underground construction; to enter into consumer contracts; and to fix rates to consumers, some subject to approval by other local governmental entities. *Id. at 347-48*.

Applying the "functional approach" used in *Roberts*, this Court concludes that the Board is merely a governing body of TRMC without an independent capacity to be sued. Unlike the Sewerage and Water Board in *Roberts*, the Board here does not directly employ a staff or manage their pay, acquire or expropriate property, enter into consumer contracts, or set rates for hospital services. Rather, the Board's primary function is to govern the hospital as the representative of the public interest. In so doing, the Board sets regulations for hospital conduct, selects a competent director, and monitors the physicians to ensure that the hospital provides for the public welfare as contemplated in *La. R.S. 46:1052*. Moreover, as with the police department in *Dugas*, "[s]tate law is silent on whether [the Board] has the capacity to sue or be sued and no local ordinance was introduced to show that [the **[**28]** Board] is granted this capacity." *Dugas, 757 So. 2d at 744*. Rather, the power to sue and be sued is explicitly vested in TRMC. *La. R.S. 46:1060*.

While Dr. Morice cites several cases in which a board of commissioners was named a defendant, these cases are distinguishable or easily explained. First, none of the cases addresses the capacity to be sued, and, indeed, capacity is a waivable defense. *Myers v. Manchester Ins. & Indem. Co., 572 F.2d 134, 134 (5th Cir. 1978)* (failure to object to lack of capacity until post-trial conference constituted waiver of challenge to capacity); *Kennard v. St. James Par. Sch. Bd., 218 So. 3d 680, 683-84 (La. App. 2017)* (upholding waiver of dilatory exception of lack of procedural capacity not pleaded prior to or in answer). Second, the federal cases do not indicate that the commission was a defendant in the case, even if named in the caption. In *Leckelt*, the defendants were "the Board of Commissioners of Hospital District No. 1, Terrebone Parish, Louisiana, [and] the individual commissioners." *909 F.2d at 824*. Thus, the board was referenced only in relation to the defendant hospital district, the real party in interest. Similarly, in *Fremaux*, the court treated the named defendant, "the Board of Commissioners of Hospital Service District No. 3 of Lafourche Parish d/b/a Thibodeaux Hospital and Health Centers," as one and the same with the hospital service **[**29]** district for purposes of *La. R.S. 46:1064(A)*. *1997 U.S. Dist. LEXIS 4098, 1997 WL 159483, at *2*. Third, the Board here holds the same position with respect to the hospital district (TRMC) as does a board of directors with respect to a corporation. *See, e.g.,* *Wells v. Fandal, 136 So. 3d 83, 85 (La. App. 2014)* (board of directors and its unnamed secretary and treasurer were "not juridical person[s] and lack[ed] the requisite capacity" to be sued, because **[*202]** Louisiana law defines a "juridical person [as] an entity to which the law attributes personality, such as a corporation"). In sum, the proper Defendant is the political subdivision, TRMC, which has the capacity to be sued, not its governing body.

b. The MEC and Credentials Committee

The MEC and Credentials Committee were created in Article XIV of the Bylaws.[71] Thereunder, "[c]ommittee members and committee chairpersons, unless otherwise so designated, will be appointed by the Chief of Staff for one year terms and approved by the Medical Executive Committee."[72] *Section 1* provides that the composition of the MEC "shall consist of the officers of the Medical Staff and two (2) members at large elected by the Medical Staff for one-year terms," and further lists the duties of the MEC, including to act on behalf of the medical staff, coordinate policies of the medical staff, **[**30]** "provide liaison between Medical Staff, Administration, and the Board," "initiate corrective review measures when appropriate," "monitor the effective performance of staff functions as provided in these bylaws or as the Board may reasonably require," and "directly recommends to the ... Board issues relative to performance improvement structure, activities, and participation; through the quality improvement program, practitioners, procedures, and/or diagnoses are reviewed for all patients for provision of the same level of quality patient care by all individuals with delineated clinical privileges."[73]

Section 2 provides that the composition of the Credentials Committee will "consist of five (5) members of the active Medical Staff selected on a basis that will ensure representation of the major clinical specialties of the Staff at large," and lists two duties: (1) "to review the credentials of all applicants and to make recommendations for membership and delineation of clinical privileges"; and (2) "to make a written report to the [MEC] on each applicant for Medical Staff appointment/reappointment, delineation or renewal of clinical privileges."[74] Both committees are required to convene for periodic, **[**31]** members-only meetings and maintain a record of their "recommendations and actions taken."[75]

The Bylaws constitute "a contract between two or more persons to combine their efforts, resources, knowledge or activities for a purpose other than profit or commercial benefit" that evinces an intent to create an unincorporated association. *Ermert, 559 So. 2d at 473*. "[F]or an unincorporated association to possess juridical personality, the object of the contract of association must necessarily be the creation of an entity whose personality 'is distinct from that of its members.'" *Id. at 474* (citing *La. Civ. Code art. 24*). The Bylaws for TRMC were adopted and approved by its medical staff and Board in part to "provide a means whereby issues concerning the Medical Staff and the medical center may be discussed by the Medical Staff with the [Board] and the Chief Administrative Officer."[76] The Bylaws as a whole do not create the committees as independent unincorporated associations having the capacity to be sued. Rather, as alleged by Dr. Morice, the Bylaws constitute a contract between himself, as a member of the medical staff, and Defendants to govern the rights and obligations between the medical staff and TRMC. The committees merely function to help **[**32]** govern this **[*203]** relationship. Therefore, the committees are not unincorporated associations under Louisiana law.

Nor do the committees' powers demonstrate that they are juridical entities capable of being sued under *Roberts*. While the MEC and Credentials Committee are authorized to take initial actions regarding a physician's grant or denial of privileges, their recommendations are ultimately subject to approval by the Board, acting on behalf of TRMC, which may override any committee recommendation.[77] Thus, the scope of power that the MEC and

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[71] R. Doc. 77-3 at 46-48.

[72] *Id.* at 46.

[73] *Id.* at 46-47.

[74] *Id.* at 47-48.

[75] *Id.*

[76] *Id.* at 1, 7.

[77] *Id.* at 28-30, 37-42.

Credentials Committee wields is narrow and advisory. The Bylaws do not purport to give the MEC or Credentials Committee the ability to acquire or alienate property, enter into contracts, set prices, or act in a way that demonstrates independence from TRMC. Rather, the committees function as administrative units or divisions of TRMC to ensure quality performance of the hospital.

In conclusion, the Board, MEC, and Credentials Committee lack the capacity to be sued. TRMC is the proper defendant.

3. Immunity under *HCQIA* and *La. R.S. 13:3715.3(C)*

The *HCQIA* provides immunity to health care providers against certain claims for money damages brought by participants in professional **[**33]** peer review actions. *42 U.S.C. § 1111, et seq.*; *see* *Poliner v. Tex. Health Sys., 537 F.3d 368, 376, 381 (5th Cir. 2008)* (*HCQIA* does not apply to claims for injunctive and declaratory relief); *Monroe v. AMI Hosps. of Tex., Inc., 877 F. Supp. 1022, 1028 (S.D. Tex. 1994)* (noting that *HCQIA* does not apply to *§ 1983* or *Title VII* claims) (citing *Austin v. McNamara, 979 F.2d 728, 733 (9th Cir. 1992)*). Immunity covers claims arising out of "professional review actions" when such action has been taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
> (2) after a reasonable effort to obtain the facts of the matter,
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C. § 11112(a). A "professional review action" is defined, in part, as "an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, **[**34]** or membership in a professional society, of the physician." *Id.* *§ 11151(9)*. "A professional review action shall be presumed to have met the preceding standards necessary for the protection [*viz.*, immunity from monetary liability] set out in *section 1111(a)* of this title unless the presumption is rebutted by a preponderance of the evidence." *Id.* *§ 11112(a)*

Section 13.3715.3 of the Louisiana Revised Statutes shares the same legislative purpose and scope as the *HCQIA* of "promoting effective peer review" by "encourage[ing] the medical profession to police its own activities with minimal judicial involvement." *Smith v. Our Lady of the Lake Hosp., 639 So. 2d 730, 742-43 (La. 1994)*. Immunity from claims for damages **[*204]** extends to a "committee member act[ing] without malice and in the reasonable belief that such action or recommendation is warranted by the facts known to him." *La. R.S. 13:3715.3(C)*. The Louisiana Supreme Court has interpreted this provision to impose upon the plaintiff the initial burden of establishing lack of malice and good faith. *Smith, 639 So. 2d at 746-47, 750*. "[L]ack of 'malice' and 'good faith' exists in this context when the defendants-peer review committee members are shown to have a reasonable basis for their action or recommendation made in the course of the peer review process," a "formulation ... consistent with that set forth in the federal *HCQIA* counterpart provision." **[**35]** *Id. at 749*.

Defendants contend that immunity applies because Dr. Morice's complaint acknowledges that a hearing-and-appeal process was conducted by Defendants in response to five instances of allegedly incompetent or unprofessional behavior upon which his suspension was based.[78] While Dr. Morice concedes that Defendants implemented a hearing-and-appeal process, he contends that it was not premised upon competence or professional conduct. Instead, Dr. Morice alleges that his suspension and denial of privileges were based upon fabricated allegations and that the reviewing committees "rubber-stamped" the recommendations and conclusions without considering the evidence before them.[79] Such allegations, when accepted as true, compromise Defendants' satisfaction of the

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[78] R. Doc. 77-1 at 11.

HCQIA's four-element test. Immunity is thus inappropriate at the motion-to-dismiss stage. *See, e.g.*, Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 879-80 (3d Cir. 1995) (denying motion to dismiss where plaintiff "alleged that the defendants have failed to satisfy the requirements of HCQIA immunity"); Zamanian v. Jefferson Par. Hosp. Serv. Dist. No. 2, 2017 U.S. Dist. LEXIS 128657, 2017 WL 3480993, at *4-5 (E.D. La. Aug. 14, 2017) (denying motion to dismiss even where plaintiff's allegations did not rebut presumption of immunity to provide plaintiff "'with an opportunity to conduct further discovery' given that this matter is still in **[**36]** the early stages of litigation and immunity is often invoked on a motion for summary judgment, not a motion to dismiss") (quoting Onel v. Tenet Healthsystems, 2003 U.S. Dist. LEXIS 20071, 2003 WL 22533616, at *2 (E.D. La. Oct. 31, 2003)).

4. Immunity under La. R.S. 9:2798.1

Defendants submit that they are also entitled to immunity under La. R.S. 9:2798.1, which provides immunity for public entities for "policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties." La. R.S. 9:2798.1(B). However, immunity does not apply "(1) [t]o acts or omissions which are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or (2) [t]o acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct." *Id.* 9:2798.1(C). As discussed above, even setting to one side Dr. Morice's allegations of Defendants' illegitimate anticompetitive acts, his allegations that TRMC's committees disregarded evidence concerning the charges against him raise plausible concerns of misconduct. Therefore, dismissal is inappropriate at this juncture.

[*205] 5. Immunity under the Bylaws

Defendants assert that the Bylaws provide immunity from all of Dr. Morice's claims. Defendants contend that Dr. **[**37]** Morice agreed to abide by the Bylaws when he applied for privileges at TRMC, and so waived his right to sue Defendants, as did the plaintiff in Deming v. Jackson-Madison County General Hospital District, 553 F. Supp. 2d 914, 938 (W.D. Tenn. 2008).[80] Dr. Morice does not challenge his assent to the immunity provision, but argues that the Bylaws provide only for immunity from claims related to the disclosure of information.[81] The disputed provision is Article XVII, "Immunity From Liability," which provides in pertinent part:

> SECTION 1: Privileged Information
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> Any act, communication, recommendation, report, or disclosure, with respect to any individual, performed or ***made in good faith and without malice*** and at the request of an authorized representative of this or any other health care facility, for the purpose of assuring quality patient care, will be privileged to the fullest extent permitted by law.
>
> ...
>
> SECTION 3: Immunity From Liability for Disclosing Information
>
> There will, to the fullest extent permitted by law, be absolute immunity from civil liability arising from ***any such*** communication, recommendation, report, or disclosure, even where the information involved would otherwise be deemed privileged.
>
> SECTION 4: Scope of Immunity

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[79] *See, e.g.*, R. Doc. 64 at 13-16. Although Defendants contend that Dr. Morice's allegations are too conclusory to withstand a motion to dismiss, the Court disagrees. Dr. Morice's allegations recite specific instances in the hearing-and-appeal process in which Defendants are said to have ignored evidence exonerating Dr. Morice from the charges brought against him. The Court is compelled to accept these allegations as true at this stage of the case.

[80] R. Doc. 77-1 at 14 (citing R. Doc. 77-3 at 10).

[81] R. Doc. 82 at 21.

> ***Such immunity*** will apply to all acts, communications, recommendations, reports, or disclosures **[**38]** performed or made in connection with this or any other health care institution's activities related, but not limited to:
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> a. Application for appointment or clinical privileges;
> b. Periodic reappraisals for reappointment or clinical privileges;
> c. Corrective action, including summary, temporary, and automatic suspensions;
> d. Hearings and/or other reviews ....[82]

Under Louisiana's rules for contract interpretation,[83] the Bylaws provide for immunity limited to the disclosure of privileged information. This is apparent by reading the provisions together,[84] each being connected by the word "such." Section 1 of Article XVII defines a privileged communication as "[a]ny Act, communication, recommendation, report, or disclosure, with respect to any individual, performed or made in good faith and without malice and at the request of an authorized representative of this or any other health care facility, for the purpose of assuring quality patient care." Section 2 extends absolute immunity to "***[a]ny such*** communication, recommendation, report, or disclosure." But Section 3 limits the scope of "***[s]uch immunity***" to the disclosure of privileged communications concerning, as relevant here, actions on an application for clinical privileges, the suspension **[**39]** of privileges, or the hearing-and-appeal process. Immunity, then, is limited to claims arising from the disclosure of privileged communications related to the peer review process. Unlike the clause of sweeping immunity in *Deming*, the immunity conferred by the Bylaws **[*206]** does not apply to the gamut of Dr. Morice's claims. Because "privileged communications" are defined in part as those "made in good faith and without malice," the Court cannot determine at the pleadings stage which, if any, constitute those that may be enforced to bar Dr. Morice's claims related to the disclosure of information. Therefore, Defendants' motion to dismiss on this ground must also be denied at this stage of the case.

6. Primary Jurisdiction Doctrine

Defendants next submit that the entirety of the case should be stayed under the primary jurisdiction doctrine pending completion of the hearing-and-appeal process concerning TRMC's decision to deny Dr. Morice's application for reinstatement of his obstetrical privileges.[85] Defendants contend that the circumstances here are similar to those in *Rogers v. Columbia/HCA of Central Louisiana, 961 F. Supp. 960, 968 (W.D. La. 1997)*, where the court stayed, pending exhaustion of his administrative remedies, a physician's suit against a hospital alleging **[**40]** antitrust and defamation claims as well as violations of due process for revoking the physician's privileges. Dr. Morice responds that it would be impractical to "carve out and stay this single claim ... when the claim is closely related to the numerous other claims currently before the Court" that are ripe for decision.[86]

"'The doctrine of primary jurisdiction ... is a doctrine of judicial abstention whereby a court which has jurisdiction over a matter, nonetheless defers to an administrative agency for an initial decision on questions of fact or law within the peculiar competence of the agency.'" *Occidental Chem. Corp. v. La. Pub. Serv. Comm'n, 810 F.3d 299, 309 (5th Cir. 2016)* (quoting *REO Indus., Inc. v. Nat. Gas Pipeline Co. of Am., 932 F.2d 447, 455 (5th Cir. 1991)*). Three prerequisites must exist before a court may exercise its discretion to stay the matter: "(1) the court has original jurisdiction over the claim before it; (2) the adjudication of that claim requires the resolution of predicate issues or the making of preliminary findings; and (3) the legislature has established a regulatory scheme whereby it

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[82] R. Doc. 77-3 at 63-65 (emphasis added).

[83] *See* *La. Civ. Code arts. 2045-2057*.

[84] *Id.* art. 2050 ("Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole.").

[85] R. Doc. 77-1 at 16-17. Again, the Court has not been apprised whether this process is now complete. 27

[86] R. Doc. 82 at 22.

has committed the resolution of those issues or the making of those findings to an administrative body." *Northwinds Abatement, Inc. v. Emp'rs Ins. of Wausau, 69 F.3d 1304, 1311 (5th Cir. 1995)*. "No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for **[**41]** the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Occidental Chem., 810 F.3d at 309* (internal quotation marks and citation omitted). Generally, the court defers to the regulatory forum "based on its determination that the benefits of obtaining aid from that other forum outweigh the need for expeditious litigation." *Id. at 302*.

For instance, in *Rogers*, defendants urged that dismissal under the doctrine of administrative exhaustion was appropriate because the plaintiff had not exhausted the internal review procedures available to him in the hospital bylaws. *961 F. Supp. at 964*. Finding the doctrine of administrative exhaustion inapplicable, the court applied the doctrine of primary jurisdiction. *Id. at 966*. The court reasoned that it could not determine whether defendants were immune under the *HCQIA* and *La. R.S. 13:3715.3* until the peer review process was complete. *961 F. Supp. at 966*. The court further reasoned that "[t]he exhaustion of the **[*207]** administrative process also will allow for the development of a full factual record" and also "give the defendants a chance to discover and correct their own errors, if any exist," thus promoting judicial economy. *Id. at 966, 968*. Additionally, the court explained that the *HCQIA* **[**42]** and its Louisiana counterpart and regulations governing disclosure of information to the National Practitioner Data Bank constituted regulatory schemes that entrusted a professional peer review committee with the responsibility to determine the facts related to the suspension of a physician's privileges. *Id. at 967-68*. The court noted that "the expertise of professional peer review committees makes them specially qualified to make findings as to the competence of fellow physicians," and that "the evaluation of professional proficiency of physicians is best left to their peers, subject only to limited judicial surveillance." *Id. at 968* (citing *Sosa v. Bd. of Managers of Val Verde Mem'l Hosp., 437 F.2d 173, 177 (5th Cir. 1971)*). Finally, the court concluded that no exception existed that would bar the invocation of the primary jurisdiction doctrine. *Id.*

The posture of this case is distinguishable from *Rogers*. Here, Dr. Morice asserts claims that relate to at least one completed peer review process. While Dr. Morice's supplemental and amending complaint also asserts claims related to a peer review process that was ongoing at the time Dr. Morice amended his complaint in March 2019, significant time has passed since that filing, and the peer review process is likely complete. Therefore, unlike **[**43]** *Rogers*, granting a stay here will not promote judicial economy. Additionally, the Court perceives no reason why it cannot resolve this motion to dismiss on the factual allegations in the amended complaint. As discussed above, Dr. Morice has made allegations in his amended complaint that TRMC's reviewing committees ignored evidence when considering his suspension. These allegations may also bear upon the subsequent denial of his application for reinstatement of his obstetrical privileges. Given the procedural posture of the case, the Court declines to apply the primary jurisdiction doctrine at this time. Should any party or parties wish to inform the Court of any proceedings that would materially affect this analysis, they may file a motion for reconsideration.

7. Antitrust Claims (Counts I & II)

Defendants next assert that Dr. Morice fails to properly allege an antitrust claim. Specifically, Defendants argue that Dr. Morice (1) fails to allege an antitrust injury, (2) is not a proper party to assert antitrust claims, (3) fails to allege a restraint of trade, and (4) fails to properly allege a relevant market.[87]

a. Standing under the *Sherman Act*

"Standing to pursue an antitrust suit exists **[**44]** only if a plaintiff shows: 1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit." *Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. All., Inc., 123 F.3d 301, 305 (5th Cir. 1997)*. Accordingly, an "[a]ntitrust injury must be established for the plaintiff to have standing

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[87] R. Doc. 77-1 at 18-22.

under section 1 or section 2 of the Sherman Act." *Id.* (citing Bell v. Dow Chem. Co., 847 F.2d 1179, 1182 (5th Cir. 1988)). The Supreme Court has defined an "antitrust injury" as an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by **[*208]** the violation." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977). Accordingly, "the standing inquiry ... ensures that the plaintiff's demand for relief ultimately serves the purposes of ***antitrust law*** to increase consumer choice, lower prices and assist competition, not competitors." Doctor's Hosp., 123 F.3d at 306. The Fifth Circuit instructs that "antitrust injury for standing purposes should be viewed from the perspective of the plaintiff's position in the marketplace, not from the merits-related perspective of the impact of a defendant's conduct on overall competition." Id. at 305. The **[**45]** "proper plaintiff" inquiry examines "(1) whether the plaintiff's injuries or their causal link to the defendant are speculative, (2) whether other parties have been more directly harmed, and (3) whether allowing this plaintiff to sue would risk multiple lawsuits, duplicative recoveries, or complex damage apportionment." Norris v. Hearst Tr., 500 F.3d 454, 465 (5th Cir. 2007) (quoting McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1341 (5th Cir. 1988)).

Defendants argue that Dr. Morice fails to allege an actionable antitrust injury because he does not allege anything more than personal harm, such as loss of income and loss of patient referrals.[88] Defendants contend that to maintain an antitrust claim, Dr. Morice must allege an injury that "affect[s] the prices, quantity, or quality of goods or services and not just his own welfare."[89] To that end, Defendants also argue that Dr. Morice is not the proper plaintiff to assert antitrust claims against them because he is not a patient or third-party payor, the persons who would be injured by the unlawful anticompetitive conduct he alleges.[90] In opposition, Dr. Morice cites Brader v. Allegheny General Hospital, 64 F.3d 869 (3d Cir. 1995), to contend that dismissal is inappropriate where the pleadings indicate a hospital's termination of privileges excluded a plaintiff-physician from competition in the relevant market.[91] In *Brader*, **[**46]** the Third Circuit rejected arguments that the plaintiff failed to allege an antitrust injury and was a "poor champion of consumers," arguments nearly identical to Defendants' here, finding that the "type of injury alleged by [the plaintiff] (the loss of income due to an inability to practice in the relevant market area) is directly related to the illegal activity in which the defendant allegedly engaged: a conspiracy to exclude [the plaintiff] from the relevant market." Id. at 877. The court further noted that the existence of an antitrust injury is typically resolved after discovery and not on a motion to dismiss. Id. at 876 (citing Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991)).

On this motion to dismiss, the Court finds Brader persuasive. Dr. Morice alleges that "Defendants are acting in a concerted manner to restrain trade and commerce by seeking to effectively restrict, limit, and terminate Plaintiffs' privileges at TRMC, which will have the effect of eliminating him from the competitive OB/GYN market in the region," and that such termination of privileges will result in the termination of his practice, which "employs dozens of local staff," and that his elimination from the market "will increase the price of OB/GYN services in the region." **[**47]** [92] These allegations are sufficient to state a claim under *Brader* of an antitrust injury. "If the plaintiff does not eventually **[*209]** produce evidence to create a material fact issue concerning an antitrust violation, then summary judgment should be granted on that basis." Doctor's Hosp., 123 F.3d at 306.

b. Restraint of trade

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[88] R. Doc. 77-1 at 18.

[89] *Id.*

[90] *Id.* at 19.

[91] R. Doc. 82 at 23.

[92] R. Doc. 64 at 27.

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. To prevail under this section, a plaintiff must show "'(1) the defendants engaged in a conspiracy; (2) that restrained trade; (3) in the relevant market.'" Benson v. St. Joseph Reg'l Health Ctr., 575 F.3d 542, 549 (5th Cir. 2009) (quoting Golden Bridge Tech., Inc. v. Motorola, Inc., 547 F.3d 266, 270 (5th Cir. 2008)).

Invoking *Benson*, Defendants contend that Dr. Morice's allegations that his suspension and the failure to reinstate his privileges do not amount to actionable "restraint of trade."[93] In *Benson*, a physician alleged that the hospital's denial of privileges resulted in anticompetitive effects to reduce consumer choice of providers and services. *Id. at 549-50*. The Fifth Circuit rejected the physician's argument on the merits, reasoning that, despite his inability to practice at the hospital, the physician was "free to provide services at his own clinic" in the **[**48]** same geographic area. *Id. at 549*. "The inability to service patients at the hospital of [plaintiff's] choice does not demonstrate an unreasonable adverse impact on OB/GYN services for the entire county." *Id.* (citing Doctor's Hosp., 123 F.3d at 309) (other citation omitted). Thus, the court affirmed summary judgment in favor of the hospital that did not renew the physician's privileges.

Dr. Morice argues that *Benson* is inapposite at this motion-to-dismiss stage, and further asserts that his allegations reflect those recognized in Bolt v. Halifax Hospital Medical Center, 891 F.2d 810 (11th Cir. 1990), *overruled in part on other grounds by* City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991).[94] In *Bolt*, the Ninth Circuit held that the plaintiff should have been permitted to introduce evidence of the hospital and medical staff's conspiracy to deny a physician's privileges on the basis of a sham peer review. *Id. at 820*. In finding the conspiracy's potential to create an anticompetitive effect under section 1 of the Sherman Act, the court recognized a rational economic motive for the conspiracy was the remaining doctors' ability to charge higher prices and exclude the physician from the profession. *Id.*

Here, Dr. Morice alleges that Defendants conspired to prevent him from providing obstetrical services in the relevant market by excluding him from the sole facility available **[**49]** in the region to provide such services. He further claims that Defendants benefit from his exclusion because they attain a monopoly on obstetrical services in the Thibodaux/Lafourche region and thus can charge higher prices.[95] These allegations align with those recognized in Bolt.

c. Relevant market

"To establish Section 2 violations premised on attempt and conspiracy to monopolize, a plaintiff must define the relevant market." *Doctor's Hosp., 123 F.3d at 311*. "To define a market is to identify producers that provide customers of a defendant firm (or firms) with alternative sources for the defendant's product or services." *Id.* (quotation and citation omitted). **[*210]** "Critically, evidence must be offered demonstrating not just where consumers currently purchase the product, but where consumers could turn for alternative products or sources of the product if a competitor raises prices." *Id.* (citations omitted).

Defendants contend that Dr. Morice's allegations lack "factual support that the relevant product and geographical market is medical entities that offer hospitalized obstetrical care in the Thibodaux/Lafourche region."[96] Defendants imply that Dr. Morice must, at this juncture, introduce evidence to support its allegations that the **[**50]** Thibodaux/Lafourche region is the relevant market for OB/GYN services. The Court disagrees. As Dr. Morice points out, Defendants rely upon cases that define the relevant market at the summary judgment stage.[97] *See, e.g.*,

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[93] R. Doc. 77-1 at 20.

[94] R. Doc. 82 at 27.

[95] R. Doc. 64 at 10-13.

[96] R. Doc. 77-1 at 21.

Doctor's Hosp., 123 F.3d at 312 (considering plaintiff's expert report in rejecting plaintiff's narrow interpretation of the relevant market); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 487-88 (5th Cir. 1984)* (after discovery, determining that "exceptional market conditions" did not exist to support a conclusion that one brand in a market of competing brands constituted a relevant product market). The decision in *PSKS, Inc. v. Leegin Creative Leather Products, Inc., 615 F.3d 412, 418 (5th Cir. 2010)*, the only case cited by Defendants involving a motion to dismiss that was granted, is distinguishable in that the court granted the motion after the case had been fully tried on the merits and vacated. In contrast, this Court has no evidence before it to evaluate whether the alleged relevant market for OB/GYN services is properly said to be the Thibodaux/Lafourche region. On this issue, *Brader* also makes clear that dismissal is inappropriate at the motion-to-dismiss stage where "there is some suggestion in the complaint and in the briefs that [the hospital] may offer unique ... services in the broader geographic ... area served by [the hospital]." *64 F.3d at 878*. Dr. **[**51]** Morice's complaint makes such a suggestion by alleging that "TRMC is the sole community provider of both inpatient and outpatient hospital services in Thibodaux, Louisiana. Other than Plaintiff's clinic, where he cannot provide hospitalized obstetrical care, TRMC is the sole provider of OB/GYN services in Thibodaux, Louisiana."[98] In sum, Dr. Morice's antitrust claims survive Defendants' motion to dismiss.

8. Breach of Contract and Bad Faith Breach of Contract (Counts III & IV)

To succeed on a breach-of-contract claim in Louisiana, a plaintiff must show "(1) the obligor's undertaking an obligation to perform, (2) the obligor failed to perform the obligation (the breach), and (3) the failure to perform resulted in damages to the obligee." *Favrot v. Favrot, 68 So. 3d 1099, 1108-09 (La. App. 2011)*. To prove a bad faith breach of contract, a plaintiff must show the defendant "intentionally and maliciously" failed to perform the obligation. *Olympia Minerals, LLC v. HS Resources, Inc., 171 So. 3d 878, 897 (La. 2014)* (quoting cmt. (b) to *La. Civ. Code art. 1997*). The Louisiana Supreme Court recognizes that the bylaws of a hospital's medical staff may form a contract between the physician and the hospital where the elements of a valid contract are met. *Granger, 144 So. 3d at 760-61*. The supreme court further recognizes that a hospital's performance of its obligations under its **[**52]** bylaws is measured by the "substantial compliance" rule. *Id. at **[*211]** 762-63* (discussing *Smith, 639 So. 2d at 755-56*). The substantial compliance rule teaches that, when evaluating a hospital's alleged breach of its bylaws, a court should view the hospital's conduct as a whole to determine whether the procedures it used undermined the bylaws' guarantees of fair procedure. *Smith, 639 So. 2d at 755-56*. "'Because the central purpose of the bylaws is to provide procedural fairness in reaching decisions regarding staff privileges, merely 'technical' violations or minor deviations in the procedures employed that do not result in material prejudice to the physician or otherwise undermine the result reached by the hospital will not rise to the level of 'breaches' of the hospital's obligation to comply with its bylaws.'" *Id. at 756* (quoting *Owens v. New Britain Gen. Hosp., 32 Conn. App. 56, 627 A.2d 1373, 1380 (Conn. App. Ct. 1993)*).

In neither their motion to dismiss nor their opposition to Dr. Morice's motion for partial summary judgment do Defendants deny the existence of a contract. Therefore, the Court will treat the Bylaws as a contract between Dr. Morice and TRMC for purposes of this motion. Rather, Defendants contend that Dr. Morice's allegations fail to state a breach-of-contract claim because, by alleging that Defendants conducted a hearing and appeal in **[**53]** relation to his suspension, and because it is uncontested that Dr. Morice is entitled to hearing and appeal on a denial of privileges, Dr. Morice has conceded that TRMC substantially complied with the Bylaws.[99] Defendants also assert that these same allegations and circumstances preclude a finding of bad faith because they acknowledge that TRMC attempted to fulfill, rather than circumvent, its obligations.[100] Dr. Morice maintains that the sum of his allegations evinces Defendants' malicious intent to breach the Bylaws and that the peer review process was a

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[97] *Id.* at 20-21.

[98] R. Doc. 64 at 28.

[99] R. Doc. 77-1 at 22-23.

[100] *Id.* at 23-24.

"sham."[101] For example, Dr. Morice alleges that Defendants ignored certain evidence in their decisions concerning his suspension because they were motivated economically to exclude him from the market of obstetrical services. Viewed as a whole, the conduct alleged (which the Court must accept as true on a Rule 12(b)(6) motion) involves more than a minor deviation from or technical violation of the Bylaws. The Court finds, then, that these allegations are sufficient to state a cause of action against TRMC for breach of the Bylaws. The merits of this dispute cannot be resolved on a motion to dismiss but must await consideration on a motion for summary **[**54]** judgment or trial.

9. Tortious Interference with Contract (Count V)

Louisiana recognizes a narrow cause of action for tortious interference with contract against a corporate officer where the following elements are met:

> (1) the existence of a contract or a legally protected interest between the plaintiff and the corporation; (2) the corporate officer's knowledge of the contract; (3) the officer's intentional inducement or causation of the corporation to breach the contract or his intentional rendition of its performance impossible or more **[*212]** burdensome; (4) absence of justification on the part of the officer; (5) causation of damages to the plaintiff by the breach of contract or difficulty of its performance brought about by the officer.

9 to 5 Fashions v. Spurney, 538 So. 2d 228, 234 (La. 1989). In *9 to 5*, the Louisiana Supreme Court adopted this tort with respect to the limited duty owed by a corporate officer to the corporation "to refrain from intentional and unjustified interference with the contractual relation between his employer and a third person." *Id.* Louisiana courts have accordingly construed this cause of action narrowly and, in the broadest of constructions, consistently require a plaintiff to "identify a duty existing between **[**55]** it and the alleged tortfeasor, the violation of which would give rise to delictual liability." Taxicab Ins. Store, LLC v. Am. Serv. Ins. Co., 224 So. 3d 451, 458-60 (La. App. 2017); *see also* Petrohawk Props., L.P. v. Chesapeake La., L.P., 689 F.3d 380, 395-96 (5th Cir. 2012) (the alleged tortfeasor must owe a "narrow, individualized duty" to the plaintiff). Federal courts are particularly hesitant to expand the scope of the tort beyond that articulated in *9 to 5*. *See, e.g.*, Am. Waste & Pollution Control Co. v. Browning-Ferris, Inc., 949 F.2d 1384, 1390-91 (5th Cir. 1991) ("It took the Louisiana Supreme Court almost 90 years to recognize a quite narrow cause of action for tortious contractual interference; it is not for this diversity court to expand that cause of action in the face of Louisiana's expressed unwillingness to do so."); M & D Mineral Consultants, LLC v. Li, 2013 U.S. Dist. LEXIS 32678, 2013 WL 883689, at *4 (W.D. La. Mar. 7, 2013) ("any expansion of Louisiana's tortious interference law is a task properly contemplated by the state supreme court rather than this [c]ourt sitting in diversity"). In light of these considerations, courts find dismissal appropriate where the plaintiff fails to identify a corporate officer or articulate a narrow duty owed by the defendant to the plaintiff. *See, e.g.*, Petrohawk Props., 689 F.3d at 395-96 (corporate defendant owed no particular duty to plaintiff); Am.'s Favorite Chicken Co. v. Cajun Enters., Inc., 130 F.3d 180, 184-85 (5th Cir. 1997) (proper defendant is corporate officer rather than corporations); United States v. Cytogel Pharma, LLC, 2018 U.S. Dist. LEXIS 183172, 2018 WL 5297753, at *15 & n.197 (E.D. La. Oct. 25, 2018) (noting that district court could not apply broad interpretation of *9 to 5* pronounced in **[**56]** Neel v. Citrus Lands of La., Inc., 629 So. 2d 1299, 1301 (La. App. 1993), which permitted suit against corporation, absent intervening ruling from state supreme court); M & D Mineral Consultants, 2013 U.S. Dist. LEXIS 32678, 2013 WL 883689, at * 2-4 (dismissing action against manager of limited liability company).

Defendants contend that Dr. Morice's allegations fail to identify a corporate officer and thus should be dismissed.[102] Dr. Morice responds that his allegations show that "TRMC officers and agents," such as the MEC, acted outside the

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101 R. Doc. 82 at 30-41. Dr. Morice also re-urges the grounds he presented in his motion for preliminary injunction, including the argument that TRMC's failure to reinstate Dr. Morice's privileges upon the end of his suspension violated Article XI of the Bylaws. *Id.* at 37-40. The Court again rejects Dr. Morice's position because a plain reading of the Bylaws reveals that lapsed privileges are only extended if a physician satisfies certain standards and follows the prescribed application process. Dr. Morice did not. R. Doc. 78 at 8-15.

102 R. Doc. 77-1 at 24.

scope of their authority and contrary to the duty they owed to TRMC.[103] For example, Dr. Morice claims that the MEC breached its fiduciary duty to the corporation by breaching its obligation under the Bylaws to conduct an impartial and empirical peer review.[104] These allegations, however, support no plausible claim for tortious interference cognizable within the limited scope of Louisiana jurisprudence. Because Dr. Morice fails to articulate a "narrow, individualized duty between the plaintiff and the alleged tortfeasor" or name a corporate officer, his claim for tortious interference with contract **[*213]** fails and must be dismissed. *See* *Petrohawk Props., 689 F.3d at 395-96*.

10. Abuse of Rights and Negligent Misrepresentation (Counts VI & VII)

The abuse of rights doctrine is a "civilian concept" enforced sparingly because its application "renders **[**57]** unenforceable one's otherwise judicially protected rights." *Truschinger v. Pak, 513 So. 2d 1151, 1154 (La. 1987)*; *see also* *Ill. Cent. Gulf R.R. Co. v. Int'l Harvester Co., 368 So. 2d 1009, 1013-14 (La. 1979)* (explaining origin of doctrine and rarity of application). A plaintiff states a cause of action for abuse of rights "when one of the following conditions is met: (1) the predominant motive for exercise of the right is to cause harm; (2) there is no legitimate motive for exercise of the right; (3) exercise of the right violates moral rules, good faith, or elementary fairness; or (4) exercise of the right is for a purpose other than that for which it was granted." *Mixon v. Iberia Surgical, L.L.C., 956 So. 2d 76, 81 (La. App. 2007)* (internal quotation marks and citation omitted). "If a party has a legitimate and serious interest in exercising a [legal] right, he may do so even if it causes harm to another. However, if a party does not have a legitimate and serious interest in the exercise of the right, and to do so would bring unnecessary harm to another, the doctrine of abuse of rights will bar exercise of the right." *Mass. Mut. Life Ins. Co. v. Nails, 549 So. 2d 826, 829 (La. 1989)* (citing *Breland v. La. Hosp. Servs., Inc., 468 So. 2d 1215, 1223 (La. App. 1984)*).

While Defendants contend that the suspension and denial of Dr. Morice's privileges was exercised in the legitimate and serious interest of patient safety,[105] Dr. Morice contends that Defendants' sole motive was that of financial gain.[106] The Court acknowledges **[**58]** that TRMC's right to regulate physician privileges may be exercised to advance legitimate and serious interests, and evidence of same may be easily developed. But no such record is before the Court, and at this stage, the Court is compelled to limit its review to the allegations in the complaint and, having done so, to deny the Defendants' motion to dismiss Dr. Morice's claim for abuse of rights.

Defendants also assert that Dr. Morice's claim for negligent misrepresentation fails as wholly conclusory.[107] His allegations of negligent misrepresentation are limited to the following: "Alternatively, or in addition, one or more of the Defendants have made negligent misrepresentations, causing harm and damages to Plaintiff. As such, Defendants' actions constitute ... misrepresentation under Louisiana law."[108] Understandably, Dr. Morice makes no argument in opposition to dismissal of this claim. The Court agrees with Defendants that Dr. Morice's negligent misrepresentation claim fails to meet the requisite pleading requirements. Accordingly, it is dismissed.

11. Intentional Infliction of Emotional Distress (Count VIII)

To prove intentional infliction of emotional distress in Louisiana, a plaintiff **[**59]** must show: "(1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and

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[103] R. Doc. 82 at 40.

[104] *Id.* at 40-41.

[105] R. Doc. 77-1 at 25.

[106] R. Doc. 82 at 43.

[107] R. Doc. 77-1 at 25.

[108] R. Doc. 64 at 34.

(3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct." *White v. Monsanto Co., 585 So. 2d 1205, 1209 (La. 1991)*. Extreme and outrageous conduct is that which exceeds "all possible **[*214]** bounds of decency" and is "regarded as atrocious and utterly intolerable in a civilized community." *Id.* "Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.* In the workplace setting, a claim for intentional infliction of emotional distress has been "limited ... to cases which involve a pattern of deliberate, repeated harassment over a period of time." *Nicholas v. Allstate Ins. Co., 765 So. 2d 1017, 1026-27 (La. 2000)* (citing *White, 585 So. 2d at 1205*; *Maggio v. St. Francis Med. Ctr., Inc., 391 So. 2d 948 (La. App. 1980)*). "The distress suffered by the employee must be more than a reasonable person could be expected to endure." *Id. at 1027*; *see also* *Goldberg v. Moses, 811 So. 2d 1165, 1167 (La. App. 2002)*. The distress must be extreme; a "lesser degree of fright, humiliation, embarrassment or worry" is insufficient. *Nicholas, 765 So. 2d at 1027* (citing *White, 585 So. 2d at 1210*); *see also* *Smith v. Amedisys, Inc., 298 F.3d 434, 450 (5th Cir. 2002)* (observing that Louisiana jurisprudence sets a high threshold for the severity prong).

Defendants contend that **[**60]** this claim should be dismissed because Dr. Morice's allegations gloss over any factual support for the nature of the harassment and severe emotional distress he allegedly suffered.[109] In response, Dr. Morice offers little more than a repeat of his allegations and the law.[110] His allegations are devoid of facts that would support actionable distress. Instead, Dr. Morice describes his harm in conclusory fashion as "mental anguish, loss of professional reputation," and "embarrassment."[111] It is reasonable for employees to suffer some degree of emotional distress resulting from an employer's corrective review, and without more, Dr. Morice's allegations fall into this unactionable category. *See* *Nicholas, 765 So. 2d at 1030* ("[A]lthough [plaintiff] genuinely felt humiliated, anxious, confused, upset and worried because of the corrective review process, we cannot say that [plaintiff's] emotional distress was more than a reasonable employee might be expected to endure in the workplace"). As a result, the Court dismisses this claim.

12. Defamation (Count VIII)

To establish a cause of action for defamation in Louisiana, a plaintiff must show: "(1) a false and defamatory statement concerning another; (2) an unprivileged publication **[**61]** to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury." *Lusich v. Capital One, ACP, LLC, 198 So. 3d 1272, 1276 (La. App. 2016)* (citing *Costello v. Hardy, 864 So. 2d 129, 139 (La. 2004)*). "Statements between employees, made within the course and scope of their employment, are not considered publicized for purposes of a defamation claim." *Mitchell v. Tracer Constr. Co., 256 F. Supp. 2d 520, 526 (M.D. La. 2003)* (citing *Cangelosi v. Schwegmann Bros. Giant Super Mkts., 390 So. 2d 196, 198 (La. 1980)*). Moreover, to adequately allege a defamation claim, the plaintiff "must set forth in the [complaint] with reasonable specificity the defamatory statements allegedly published by the defendant." *Lusich, 198 So. 3d at 1276* (quoting *Fitzgerald v. Tucker, 737 So. 2d 706, 713 (La. 1999)*). "It is not necessary for a plaintiff to state verbatim the words on which he bases his cause of action, but he must allege a state of facts or condition of things which would show fault under article 2315." *Badeaux v. Sw. Comput. Bureau, Inc., 929 So. 2d 1211, 1218 (La. 2006)*.

Defendants argue that Dr. Morice fails to state a claim for defamation because he **[*215]** fails "to identify a single, specific publication" made to a person other than the plaintiff or between employees.[112] Dr. Morice claims to have identified statements made to the National Practitioner Data Bank as defamatory.[113] While the cited portions of his

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[109] R. Doc. 77-1 at 26.

[110] R. Doc. 82 at 43-44.

[111] R. Doc. 64 at 35.

[112] R. Doc. 77-1 at 27.

[113] R. 82 at 45.

complaint do not indicate that any defendant disclosed information to the National Practitioner Data Bank,[114] the prayer for relief alleges that Defendants have done so or **[**62]** will do so.[115] Moreover, in denying Dr. Morice's motion for preliminary injunction, the Court previously found that Defendants did in fact issue reports to the National Practitioner Data Bank in connection with Dr. Morice's suspension.[116] However, because a report to the National Practitioners Data Bank is made pursuant to HCQIA's statutory reporting requirements and is therefore conditionally privileged,[117] it cannot be made with the requisite malice as would support a claim for defamation under Louisiana law. *Cf.* *Chudacoff v. Univ. Med. Ctr. of S. Nev., 437 F. App'x 609, 611-12 (9th Cir. 2011)* (applying Nevada law; collecting authorities); *see also* *Soriano v. Neshoba Cty. Gen. Hosp. Bd. of Trs., 486 F. App'x 444, 446 (5th Cir. 2012)*. As a result, Dr. Morice's defamation claim is dismissed.[118]

13. *LUTPA* (Count IX)

LUTPA provides a civil cause of action to recover actual damages to "[a]ny person who suffers any ascertainable loss of money or movable property ... as a result of the use or employment by another person of an unfair or deceptive method, act, or practice declared unlawful by *La. R.S. 51:1405*." *La. R.S. 51:1409*. *Section 51:1405(A)* declares unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." "Trade" or "commerce" is defined as "the advertising, offering for sale, sale, or distribution of any services and any **[**63]** property, corporeal or incorporeal, immovable or movable, and any other article, commodity, or thing of value wherever situated, and includes any trade or commerce directly or indirectly affecting the people of the state." *Id.* **[*216]** *51:1402(10)*. Courts determine "on a case-by-case basis" what conduct constitutes an "unfair trade practice" and "have repeatedly held that, under this statute, the plaintiff must show the alleged conduct offends established public policy and is immoral, unethical, oppressive, unscrupulous, or substantially injurious." *Cheramie Servs., Inc. v. Shell Deepwater Prod., Inc., 35 So. 3d 1053, 1059 (La. 2010)* (internal quotation marks and alteration omitted). A trade practice that amounts to fraud, deceit, or misrepresentation is "deceptive" for purposes of *LUTPA*. *Total Safety v. Rowland, 2014 U.S. Dist. LEXIS 161964, 2014 WL 6485641, at *4 (E.D. La. Nov. 18, 2014)* (citations omitted).

Defendants argue that Dr. Morice fails to state a claim under *LUTPA* because no alleged conduct offends public policy. Defendants contend that because the state's public policy encourages peer review, any actions related to Dr. Morice's peer review cannot be found to violate *LUTPA*.[119] Defendants also cite *Knatt v. Hosp. Serv. Dist. No. 1 of E. Baton Rouge Parish, 2005 U.S. Dist. LEXIS 57594, 2005 WL 8155168, at *4 (M.D. La. Aug. 4, 2005)*, *adopted by* *2006 U.S. Dist. LEXIS 110089, 2006 WL 8432223 (M.D. La. Mar. 7, 2006)*, for the proposition that Dr. Morice's

[114] *Id.* n.166 (citing R. Doc. 1 at 13, 15-16). The Court has also searched the amended complaint for any such allegation. The only mention of the National Practitioner Data Bank is in the prayer for relief. R. Doc. 64 at 40.

[115] *Id.* (Plaintiff seeks "[p]reliminary and [p]ermanent [i]njunctive [r]elief against TRMC and the other Defendants from further proceeding with the prosecution or entry of any actions, charges or decisions which adversely affect Plaintiff's clinical or medical staff privileges at TRMC, or reporting any of the pending charges/allegations of violations, or any rulings or decisions relating to any such charges or allegations of violations by Plaintiff, or any other of Defendants' improperly initiated actions, or resulting decisions, against Plaintiff to the National Practitioners Data Bank or any other entity or person.").

[116] R. Doc. 78 at 17 n.60.

[117] The condition on the privilege is that the reporter must not make the report knowing it to be false. *42 U.S.C. § 1111(a)(2)*. Dr. Morice makes no allegation that the report was known to be false when made to the National Practitioners Data Bank.

[118] Defendants also assert that Dr. Morice waived his right to sue Defendants for "any claims for libel, slander or damages as a result of good faith quality review and peer review activities" in Article III of the Bylaws. R. Doc. 77-3 at 10. As with Article XVII immunity, though, the bar established in Article III applies only upon a determination of "good faith," which cannot be made on the basis of the allegations alone but would have to await the development of an evidentiary record were the defamation claim to otherwise survive the Defendants' motion to dismiss.

[119] R. Doc. 77-1 at 28.

allegations are too conclusory to state a claim under *LUTPA*. In opposition, Dr. Morice merely **[**64]** repeats his allegations and the law, offering no substantive response addressing Defendants' argument.

While Defendants are correct in their assessment that Congress and the Louisiana legislature encourage peer review through the adoption of the qualified immunity in the *HCQIA* and in La. R.S. 13.3715.3(C), *see, e.g., Smith, 639 So. 2d at 742-43* ("The obvious legislative purpose behind this statutory provision is to encourage the medical profession to police its own activities with minimal judicial involvement."), it does not follow that Defendants' conduct, which has not yet been found to merit statutory immunity, cannot fall short of this public policy. Indeed, Dr. Morice alleges that Defendants' "manipulation of the professional review process" deprived him of his right to exercise privileges at TRMC, thereby harming his business which competes with the hospital to provide OB/GYN services.[120] Moreover, Dr. Morice also alleges that "Defendants have attempted to eliminate Plaintiff as a competitor by manipulating referrals of Medicare/Medicaid patients [and] operating outside of their designated hospital service district."[121] For now, these allegations suffice for Dr. Morice's *LUTPA* claim to avoid dismissal.

14. Procedural Due Process [65] (Count X)**

To bring a claim for violation of procedural due process under the U.S. Constitution, a plaintiff must first prove the government's deprivation of a constitutionally-protected interest in one's "life, liberty, or property." *Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-41, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)*. "[O]nce it is determined that the *Due Process Clause* applies, 'the question remains what process is due.'" *Id.* (quoting *Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)*). "The essential requirements of procedural due process under the Constitution are notice and an opportunity to respond." *Finch v. Fort Bend Indep. Sch. Dist., 333 F.3d 555, 562 (5th Cir. 2003)* (citing *Loudermill, 470 U.S. at 542*).

Defendants concede that for the sake of this motion, Dr. Morice had a constitutionally-protected property interest in the obstetric privileges he once had at TRMC.[122] **[*217]** *See Darlak v. Bobear, 814 F.2d 1055, 1061 (5th Cir. 1987)* (doctor had protected property interest in medical staff privileges that would not be revoked absent cause or hearing and such revocation would prevent plaintiff from practicing in area due to harm to reputation and lack of comparable facilities). As to the suspension of his privileges, though, Defendants assert that Dr. Morice received all the process that was due. Defendants emphasize that his suspension was "reviewed by two separate committees, a panel of physicians over a four-day hearing, and the hospital's Board of Directors, and [he] was allowed to **[**66]** present his arguments to the different committees and panels and was afforded a hearing before the ultimate determination regarding his privileges."[123] Indeed, Dr. Morice's allegations support this summary of the proceedings.[124]

Numerous courts in the Fifth Circuit have found such procedures, even when conducted post-deprivation, to be adequate. *See, e.g.*, *Soriano, 486 F. App'x at 446* (no violation of due process where hospital afforded physician "a multi-step peer review and appeal process pursuant to the hospital's medical staff by-laws"); *Darlak, 814 F.2d at 1062-64* (no violation of due process for suspension pending full hearing and opportunity for appeal); *Zamanian v.*

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[120] R. Doc. 64 at 36.

[121] *Id.*

[122] R. Doc. 77-1 at 29. But Defendants deny that Dr. Morice has any property interest in staff privileges that lapsed. *Id.* at 31. To the extent necessary, the Court holds that there can be no constitutionally-protected property interest in lapsed privileges. Therefore, for this reason and the reasons stated for denying Dr. Morice's motion for partial summary judgment, *see* section III(B)(2), *infra*, the Court dismisses Dr. Morice's claim for violation of due process as to the denial of his reappointment of privileges.

[123] *Id.* at 30.

[124] R. Doc. 64 at 17.

Jefferson Par. Hosp. Serv. Dist. No. 2, 2017 U.S. Dist. LEXIS 128657, 2017 WL 3480993, at *3-4 (E.D. La. Aug. 14, 2017) (no violation of due process where physician's "suspension was reviewed by two separate committees, a panel of physicians over a three-day hearing, and the hospital's Board of Directors" and physician "conducted discovery, presented and cross-examined witnesses, submitted affidavits, and gave his statement of the incident through writing and before the different committees/panels"), *aff'd*, *474 Fed. Appx. 982 (5th Cir. 2019)*.

In opposition, Dr. Morice contends that the hearing process was fatally flawed because the Bylaws did not contain provisions governing the burden of proof and evidentiary standards, but left **[**67]** these matters to be established by the hospital's peer review committees.[125] Nonetheless, Dr. Morice alleges that he had the opportunity to submit briefing on what burden of proof and evidentiary standard applied and to advocate for his position on these procedural matters.[126] He argued that Defendants should have been required to prove the charges against him by clear and convincing evidence.[127] Having had his position heard, but not having it adopted, amounts to a due process violation, in Dr. Morice's view. This is a stilted view of due process. To be sure, the Fifth Circuit has expressly found that requiring a physician to bear the burden of proof by clear and convincing evidence in the context of professional peer review does not violate due process. Johnson v. Spohn, 334 F. App'x 673, 684 (5th Cir. 2009). Moreover, Dr. Morice cites no case law in support of his position that the absence of these provisions in a hospital's bylaws would cause the hearing and appeals process itself to violate due process.

[*218] For these reasons, the Court finds that Dr. Morice had failed to state a due process claim as to his suspended privileges.

15. Equal Protection (Count X)

The Equal Protection Clause of the Fourteenth Amendment guarantees that no person be denied equal protection of the law by any state. Unless **[**68]** the challenged action involves a suspect classification or impinges on a fundamental right, the Court applies minimal scrutiny under the rational basis test. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973). A state actor satisfies the rational basis test where "the challenged state action rationally furthers a legitimate state purpose or interest." *Id.*

Dr. Morice alleges that Defendants treated similarly-situated, but TRMC-employed physicians differently than him by not bringing charges against them even though, Dr. Morice claims, their conduct was supposedly worse than his, falling below the standard of care.[128] Defendants urge the court to dismiss Dr. Morice's equal protection claim under the rational basis test because Defendants were justified in undergoing the peer review process as to Dr. Morice out of concern for quality patient care, without regard to the conduct of other physicians.[129] In support of his claim for equal protection, Dr. Morice contends that Defendants' financial motives spurred the Defendants' different treatment of him and the other physicians because they were employed by TRMC.[130] But, even assuming that Dr. Morice was treated differently than other similarly-situated physicians, it is enough that Defendants **[**69]** have articulated a rational basis for having pursued charges against Dr. Morice — namely, concern for patient care. *See* Hayman v. City of Galveston, 273 U.S. 414, 417, 47 S. Ct. 363, 71 L. Ed. 714 (1927) (exclusion of some physicians from hospital privileges did not violate equal protection where "selection ... was based upon a classification not arbitrary or unreasonable on its face"); Shaw v. Hosp. Auth. of Cobb Cty., 507 F.2d 625, 628 (5th Cir. 1975) (rational basis test applies to eligibility requirements for hospital staff privileges).

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125 R. Doc. 82 at 48. Other than these two matters of procedure, Dr. Morice identifies no other alleged violation of due process. Instead, the balance of Dr. Morice's due process allegations are conclusory.

126 R. Doc. 64 at 17.

127 R. Doc. 82 at 48-49.

128 R. Doc. 64 at 16.

129 R. Doc. 77-1 at 31.

130 R. Doc. 82 at 50-51.

Therefore, Dr. Morice's claim for equal protection fails under the rational basis test.

B. Motion for Partial Summary Judgment

1. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (citing *Fed. R. Civ. P. 56(c)*). "*Rule 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Id.* A party moving for summary judgment bears the initial burden of demonstrating **[**70]** the basis for summary judgment and identifying those portions of the record, discovery, and any affidavits supporting the conclusion that there is no genuine issue of material fact. *Id. at 323*. If the moving party meets that burden, then the nonmoving party must use evidence cognizable under *Rule 56* to demonstrate the **[*219]** existence of a genuine issue of material fact. *Id. at 324*.

A genuine issue of material fact exists if a reasonable jury could return a verdict for the nonmoving party. *See* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1996)*. The substantive law identifies which facts are material. *Id.* Material facts are not genuinely disputed when a rational trier of fact could not find for the nonmoving party upon a review of the record taken as a whole. *See* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *Equal Emp't Opportunity Comm'n v. Simbaki, Ltd., 767 F.3d 475, 481 (5th Cir. 2014)*. "[U]nsubstantiated assertions," "conclusory allegations," and merely colorable factual bases are insufficient to defeat a motion for summary judgment. *See* *Anderson, 477 U.S. at 249-50*; *Hopper v. Frank, 16 F.3d 92, 97 (5th Cir. 1994)*. In ruling on a summary judgment motion, a court may not resolve credibility issues or weigh evidence. *See* *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co., 530 F.3d 395, 398-99 (5th Cir. 2008)*. Furthermore, a court must assess the evidence, review the facts, and draw any appropriate inferences based on the evidence in the light most favorable to the party opposing summary judgment. *See* *Tolan v. Cotton, 572 U.S. 650, 656, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014)*; *Daniels v. City of Arlington, 246 F.3d 500, 502 (5th Cir. 2001)*. Yet, a court only draws reasonable inferences **[**71]** in favor of the nonmovant "when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994)* (citing *Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990))*.

After the movant demonstrates the absence of a genuine dispute, the nonmovant must articulate specific facts and point to supporting, competent evidence that may be presented in a form admissible at trial. *See* *Lynch Props., Inc. v. Potomac Ins. Co. of Ill., 140 F.3d 622, 625 (5th Cir. 1998)*; *Fed. R. Civ. P. 56(c)(1)(A)* & *(c)(2)*. Such facts must create more than "some metaphysical doubt as to the material facts." *Matsushita, 475 U.S. at 586*. When the movant will bear the burden of proof at trial on the dispositive issue, the movant "must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial." *Int'l Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1264-65 (5th Cir. 1991)* (quotation omitted). Then, the nonmovant may defeat the motion by showing a genuine dispute of material fact or by "showing that the moving party's evidence is so sheer that it may not persuade the reasonable fact-finder to return a verdict in favor of the moving party." *Id. at 1265*. When the nonmovant will bear the burden of proof at trial on the dispositive issue, the moving party may simply point to insufficient admissible evidence to establish an essential element of the nonmovant's claim in order to satisfy its summary judgment **[**72]** burden. *See* *Celotex, 477 U.S. at 322-25*; *Fed. R. Civ. P. 56(c)(1)(B)*. Unless there is a genuine issue for trial that could support a judgment in favor of the nonmovant, summary judgment must be granted. *See* *Little, 37 F.3d at 1075-76*.

2. Analysis

Dr. Morice's motion for summary judgment on his breach-of-contract claims presents substantially the same argument that the Court rejected in denying his second motion for preliminary injunction.[131] For the same reasons the Court **[*220]** rejected it then, the Court rejects it now. *See* *Morice v. Hosp. Serv. Dist. #3, 2019 U.S. Dist. LEXIS 59943, 2019 WL 1517954, at *4-7 (E.D. La. Apr. 8, 2019)*.[132] To the extent Dr. Morice presents new argument in his reply, the Court need not resolve these arguments because courts in the Fifth Circuit may decline to consider arguments first raised in a reply. *See* *Murillo v. Coryell Cty. Tradesmen, LLC, 2017 U.S. Dist. LEXIS 45300, 2017 WL 1155166, at *3 n.48 (E.D. La. Mar. 28, 2017)* (collecting cases). But even if the Court were to consider the merits of these new arguments, none raises legal issues that would change the Court's interpretation of the Bylaws, but instead present facts that Defendants dispute, thereby precluding summary judgment. Thus, Dr. Morice's motion for partial summary judgment is DENIED.

IV. CONCLUSION

Accordingly, for the foregoing reasons,

IT IS ORDERED that the motion to dismiss (R. Doc. 77) is GRANTED IN PART, insofar as it seeks to dismiss the Board, Credentials **[**73]** Committee, and MEC as defendants for lack of capacity; and to dismiss Dr. Morice's claims for tortious interference with contract (Count V), negligent misrepresentation (Count VII), intentional infliction of emotional distress and defamation (Count VIII), and procedural due process and equal protection (Count X); and it is DENIED IN PART in all other respects.

IT IS FURTHER ORDERED that the Defendants' first motion to dismiss (R. Doc. 21) is DENIED AS MOOT.

IT IS FURTHER ORDERED that Dr. Morice's motion for partial summary judgment (R. Doc. 69) is DENIED.

New Orleans, Louisiana, this 27th day of December, 2019.

/s/ Barry W. Ashe

BARRY W. ASHE

UNITED STATES DISTRICT JUDGE

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[131] *Compare* R. Doc. 73 at 12-17 *with* R. Doc. 69-1 at 9-14.

[132] R. Doc. 78.

Ass'n for Accessible Meds. v. Becerra

United States District Court for the Eastern District of California

December 31, 2019, Decided; December 31, 2019, Filed

No. 2:19-cv-02281-TLN-DB

Reporter

2019 U.S. Dist. LEXIS 223342 *; 2020-1 Trade Cas. (CCH) P81,056; 2019 U.S.P.Q.2D (BNA) 499154; 2019 WL 7370421

ASSOCIATION FOR ACCESSIBLE MEDICINES, Plaintiff, v. XAVIER BECERRA, in his official capacity as Attorney General of the State of California, Defendant.

Subsequent History: Injunction denied by *Ass'n for Accessible Meds. v. Becerra, 2020 U.S. Dist. LEXIS 4636 (E.D. Cal., Jan. 10, 2020)*

Injunction denied by *Ass'n for Accessible Meds. v. Becerra, 2020 U.S. App. LEXIS 5552 (9th Cir. Cal., Feb. 24, 2020)*

Vacated by, Remanded by *Ass'n for Accessible Meds. v. Becerra, 2020 U.S. App. LEXIS 23345 (9th Cir. Cal., July 24, 2020)*

On remand at, Dismissed by, Without prejudice *Ass'n for Accessible Meds. v. Becerra, 2020 U.S. Dist. LEXIS 154399 (E.D. Cal., Aug. 25, 2020)*

Core Terms

settlements, patent, merits, preliminary injunction, generic, anti trust law, as-applied, parties, antitrust, ripe, likelihood of success, pre-enforcement, fine, procompetitive, settlement agreement, anticompetitive, generic drug, preempted, asserts, argues, serious question, judicial notice, speculative, violates, factors, excessive fines, brand-name, invalidate, effects, tip

Counsel: **[*1]** For Association for Accessible Medicines, Plaintiff: Jay P. Lefkowitz, PHV, LEAD ATTORNEY, PRO HAC VICE, Kirkland & Ellis LLP, New York, NY; Matthew D. Rowen, Kirkland & Ellis LLP, Washington, DC.

For Xavier Becerra, in his Official Capacity as Attorney General of the State of California, Defendant: Karli A Eisenberg, LEAD ATTORNEY, California Office of Attorney General, Sacramento, CA.

For American Antitrust Institute, Amicus: Eric B. Fastiff, LEAD ATTORNEY, Adam Gitlin, Lieff Cabraser Heimann and Bernstein, San Francisco, CA.

For Michael Carrier, Amicus: Adam John Zapala, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, Burlingame, CA; Michael A. Carrier, PHV, PRO HAC VICE, Rutgers Law School, Camden, NJ.

Judges: Troy L. Nunley, United States District Judge.

Opinion by: Troy L. Nunley

Opinion

MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court on Plaintiff Association for Accessible Medicine's ("Plaintiff" or "AAM") Motion for Preliminary Injunction requesting the Court enjoin the implementation or enforcement of Assembly Bill 824 ("AB 824"). (ECF No. 10.) Defendant Attorney General Xavier Becerra ("Defendant" or the "State") filed an opposition on December 10, 2019. (ECF **[*2]** No. 24.) Plaintiff filed a reply on December 17, 2019. (ECF No. 27.) The Court also considered Amicus Curiae briefs submitted by various interested parties (ECF Nos. 21, 25), and the Court heard oral argument on December 19, 2020 (*See* ECF No. 28, hearing minutes). After carefully considering all material presented to the Court and for the reasons set forth below, Plaintiff's Motion is DENIED.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

AB 824 creates a presumption that "reverse payment" settlement agreements regarding patent infringement claims between brand-name and generic pharmaceutical companies are anticompetitive and unlawful.

Reverse payment settlements arise primarily — if not exclusively — in the context of pharmaceutical drug regulations and suits brought under the statutory provisions of the Drug Price Competition and Patent Term Restoration Act of 1984, commonly referred to as the Hatch-Waxman Act. Under the *Hatch-Waxman Act*, once a brand-name company has submitted a new prescription drug to the FDA and gained approval to market it, a manufacturer of a generic drug with the same active ingredients that is biologically equivalent to the approved brand-name drug can gain approval to **[*3]** market the generic through an abbreviated FDA process. The New Drug Application ("NDA") process is long, comprehensive, and expensive whereas the Abbreviated New Drug Application ("ANDA") process that a generic drug is subjected to is substantially less expensive and requires far less testing.

In order to gain approval through the FDA, the generic company must file an ANDA. As part of this application, the generic company must assure the FDA that its drug will not infringe on any patents owned by the brand-name drug company. One way to do so is for the generic company to certify that any listed, relevant patent is invalid or will not be infringed by the manufacture, use, or sale of the generic drug. This is called a Paragraph IV certification. Because filing under Paragraph IV indicates that there are current patents that the generic company asserts are invalid or uninfringed by its product, the Paragraph IV certification is *per se* a patent infringement and thus the brand-name company can, and often does, bring suit against the generic drug manufacturer.

Settlements of the resulting lawsuits sometimes include reverse payments in which the plaintiff, the brand-name drug company, pays **[*4]** the defendant, the infringing generic drug company, a sum of money for the promise that the generic drug company will keeps its drug off the market for an agreed-upon length of time.

AB 824 targets these types of settlements. According to the State, AB 824 closes this loophole in the Hatch-Waxman Act and ensures that a brand-name drug company cannot continue to enforce an otherwise weak patent against generics through these reverse payment settlements.

AB 824 imposes a presumption that a settlement agreement involving a brand-name company compensating the generic for keeping its drug off the market is anticompetitive under California ***Antitrust Law***. It also levies a civil penalty against any individual who assists in the violation of the section of three times the value received by the individual due to the violation or $20 million, whichever is greater.

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[1] The following recitation of facts is derived from Plaintiff's Complaint (ECF No. 1), as well as the parties' briefing on the Motion for Preliminary Injunction (ECF Nos. 10, 24, 27). Additionally, the Court gathered general background information from *FTC v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*.

Plaintiff asserts the following causes of action, all in an attempt to invalidate AB 824: (1) Declaratory/Injunctive Relief — *Commerce Clause* — Extraterritoriality; (2) Declaratory/Injunctive Relief — Preemption; (3) Declaratory/Injunctive Relief — *Excessive Fines Clause*; (4) Declaratory/Injunctive Relief — Due Process — Burden Shifting; (5) *42 U.S.C. § 1983* and *42 U.S.C. § 1988*. (ECF No. 1 at 30-51.) More **[*5]** specifically, Plaintiff alleges AB 824 violates the Dormant *Commerce Clause* by directly regulating out-of-state conduct; is preempted by federal patent law and the delicate balance between the competing interests of patent protections and anti-trust law struck by the Supreme Court in *FTC v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*; violates the constitutional prohibition of excessive fines under the *Eight Amendment*; and violates due process in that it creates a burden shift with no meaningful opportunity for defendant to rebut the presumption applied. Presently before the Court is Plaintiff's Motion (ECF No. 10) seeking a preliminary injunction prohibiting the enforcement of this law, which would otherwise take effect January 1, 2020.

II. STANDARD

Injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC, Inc., 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)* (citing *Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997)* (per curiam)). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981)*; *see also* *Costa Mesa City Emps. Ass'n v. City of Costa Mesa, 209 Cal. App. 4th 298, 305, 146 Cal. Rptr. 3d 677 (2012)* ("The purpose of such an order is to preserve the status quo until a final determination following a trial."); *GoTo.com, Inc. v. Walt Disney, Co., 202 F.3d 1199, 1210 (9th Cir. 2000)* ("The status quo ante litem refers not simply to any situation before the filing of a lawsuit, **[*6]** but instead to the last uncontested status which preceded the pending controversy.").

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter, 555 U.S. at 20*. A plaintiff must "make a showing on all four prongs" of the *Winter* test to obtain a preliminary injunction. *Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011)*. In evaluating a plaintiff's motion for preliminary injunction, a district court may weigh the plaintiff's showings on the *Winter* elements using a sliding-scale approach. *Id.* A stronger showing on the balance of the hardships may support issuing a preliminary injunction even where the plaintiff shows that there are "serious questions on the merits . . . so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* Simply put, a plaintiff must demonstrate, "that [if] serious questions going to the merits were raised [then] the balance of hardships [must] tip[ ] sharply in the plaintiff's favor," in order to succeed **[*7]** in a request for preliminary injunction. *Id. at 1134-35* (emphasis added).

III. STANDING

Neither party has raised any issues with respect to standing. Nevertheless, "federal courts are required *sua sponte* to examine jurisdictional issues such as standing." *Chapman v. Pier 1 Imps. (U.S.), Inc., 631 F.3d 939, 954 (9th Cir. 2011)* (quoting *Bernhardt v. Cty. of L.A., 279 F.3d 862, 868 (9th Cir. 2002))*. And "[t]he existence of Article III standing is not subject to waiver." *Chapman, 631 F.3d at 954*. To establish Article III standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)*.

"[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383*

(1977). Further, "[w]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form **[*8]** of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind." *Id.* (citing *Warth v. Seldin, 422 U.S. 490, 515, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975))*.

Here, Plaintiff is a nonprofit, voluntary association representing the leading manufacturers and distributors of generic and biosimilar medicines, manufacturers and distributors of bulk active pharmaceutical ingredients, and suppliers of other goods and services to the generic and biosimilar pharmaceutical industry. (ECF No. 1 ¶ 12.) As clarified at oral argument, Plaintiff asserts representational standing on behalf of its members, alleging that its members have many ongoing cases involving patent infringement, and other members are currently developing generics and/or contemplating filing ANDAs. (ECF No. 1 ¶¶ 14-15.) Plaintiff seeks injunctive relief while claiming its members will be injured by the implementation of AB 824. (ECF No. 1 ¶ 16.) The Court finds Plaintiff has sufficiently alleged the elements of representational standing to bring the instant motion **[*9]** for preliminary injunction.

IV. Request for Judicial Notice

At the outset, Defendant requests the Court take judicial notice of five documents pursuant to *Federal Rule of Evidence 201*: (1) Assembly Committee on Health AB 824 Bill Analysis (March 26, 2019), attached to Defendant's Request for Judicial Notice ("RJN," ECF No. 24-1) as Exhibit A; (2) Assembly Floor Analysis of AB 824 (September 4, 2019), attached to RJN as Exhibit B; (3) Letters of Support for AB 824, attached to RJN as Exhibit C; (4) Table 8: Total All Payers State Estimates by State of Residence (1991-2014) — Drugs and Other Nondurable Products (Millions of Dollars), attached to RJN as Exhibit D; and (5) *Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions*, FTC Staff Study (Jan. 2010), attached to RJN as Exhibit E. The State contends judicial notice of Exhibits A, B, and C is appropriate because they are documents that are part of the legislative history of AB 824. The State asserts Exhibits D and E are appropriate for judicial notice because the documents were "administered by or filed with an administrative agency that is not subject to reasonable dispute and is 'capable of accurate and ready determination by resort to sources whose **[*10]** accuracy cannot reasonably be questioned.'" (ECF No. 24-1 at 2, *quoting* *Fed. R. Evid. 201*.) Plaintiff does not oppose the State's request, and the Court finds all five documents are appropriate for judicial notice.

Exhibits A, B, and C are part of the legislative history of AB 824, and courts routinely take judicial notice of legislative history documents. *Anderson v. Holder, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012)* (citing *Chaker v. Crogan, 428 F.3d 1215, 1223 n. 8 (9th Cir.2005))* ("Legislative history is properly a subject of judicial notice."); *Korematsu v. United States, 584 F. Supp. 1406, 1414 (N.D. Cal. 1984)* (citing *Territory of Alaska v. American Can Co., 358 U.S. 224, 227, 79 S. Ct. 274, 3 L. Ed. 2d 257, 17 Alaska 779 (1959))* ("[C]ourts frequently take judicial notice of legislative history, including committee reports."). Similarly, a court "may take judicial notice of 'records and reports of administrative bodies.'" *Anderson, 673 F.3d at 1094* (citing *Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir.1986))*. Exhibit D — a summary table from the Centers for Medicare and Medicaid Services, Office of the Actuary, National Health Statistics Group, available on CMS.gov; and Exhibit E — an "FTC Staff Study" available on ftc.gov, are such reports.

Defendant's unopposed Request for Judicial Notice (ECF No. 24) is therefore GRANTED and the Court hereby judicially notices Exhibits A through E attached thereto.

V. Preliminary Injunction Analysis

Plaintiff's Complaint asserts five causes of action, the first four of which encompass the present request for preliminary injunction. **[*11]** As explained below, and primarily due to the nature of Plaintiff's pre-enforcement attack on AB 824, the Court finds Plaintiff has failed to establish a likelihood of success on the merits of its claims, nor has it raised serious questions going to those merits. Moreover, the Court finds that absent a constitutional violation Plaintiff has failed to establish an irreparable harm that is both likely and — at this time — imminent. And lastly, even if the Court were to find serious questions going to the merits of Plaintiff's claims, the question of balance of harms and public interest are too speculative at this point for the Court to find that either factor favors Plaintiff, sharply or otherwise.

A. Likelihood of Success on the Merits

In an attempt to enjoin enforcement of AB 824 before it takes effect on January 1, 2010, Plaintiff asserts the bill: (1) violates the Dorman *Commerce Clause*; (2) is preempted; (3) violates the *Excessive Fines Clause* of the *Eighth Amendment*; and (4) violates the *Due Process Clause*. Plaintiff's attack on AB 824 is in part both facial and as-applied. As discussed below, Plaintiff has failed to establish a likelihood of success on the merits of any of these claims and as a result, the Court finds a preliminary injunction is inappropriate **[*12]** at this time.

1. Dormant *Commerce Clause*

In its moving papers, Plaintiff indicates AB 824 — because it is not limited to settlement agreements entered into in California or between California entities — directly regulates out of state commerce and is therefore a *per se* violation of the Dormant *Commerce Clause*. Interpreting this as a facial attack on AB 824, the State argues that because AB 824 can conceivably be applied to settlement agreements contained within California, it has at least one constitutional application and so Plaintiff's facial attack fails.

Indeed, a facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [an] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the *First Amendment*." *United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)*. Facial challenges are disfavored because they often require the court to make constitutional determinations based on hypothetical situations. *Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449-51, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008)* ("Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk **[*13]** of premature interpretation of statutes on the basis of factually barebones records." (internal citation omitted)). Here, Plaintiff poses the hypothetical situation of non-California entities entering into a settlement agreement outside of California, and then asks the Court to assume that California would seek to enforce AB 824 against these hypothetical parties. But invalidating or even preliminarily enjoining the law on this basis would force the Court to not only assume the Attorney General will apply the law unconstitutionally, but also to make a constitutional determination before it is necessary to do so. *Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449-51, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008)* ("Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." (internal quotes and citations omitted)). Such a facial attack therefore fails where, as here, a set of circumstances exists under which AB 824 will be valid.

Plaintiff seems to concede this point, clarifying its position in its reply brief and in oral argument **[*14]** that it is not raising a facial attack against AB 824, but an as-applied attack. (ECF No. 27 at 7.) An as applied challenge looks at a specific plaintiff and set of circumstances and determines if the law is constitutional as applied to that set of circumstances. *Wal-Mart Stores, Inc. v. City of Turlock, 483 F. Supp. 2d 987, 996-97 (E.D. Cal. 2006)* (citing 16 C.J.S. Constitutional Law § 187) ("When faced with a claim that application of a statute renders it unconstitutional, a court must analyze the statute as applied to the particular case, i.e., how it operates in practice against the particular litigant and under the facts of the instant case, not hypothetical facts in other situations"). In other words, Plaintiff claims AB 824 "*as applied* to settlement agreements that were not negotiated, completed, or entered in California," violates the Dormant *Commerce Clause*. (ECF No. 27 at 7.) Indeed, if the Attorney General were to enforce the terms of AB 824 against two out of state parties that entered into a settlement agreement outside of

California, having nothing to do with California, such conduct would likely violate the Dormant Commerce Clause. In this case, however, AB 824 has yet to take effect. As a result, the Court cannot consider the law *as it has been applied* to a particular agreement or party. **[*15]** Rather, Plaintiff raises a "paradigmatic as-applied challenge" to AB 824, urging the Court to find that "the application of the statute to a specific factual circumstance" is in violation of the Dormant Commerce Clause. (*Id.* (citing Hoye v. City of Oakland, 653 F.3d 835, 857 (9th Cir. 2011)).) Plaintiff asserts the fact that AB 824 hasn't been enforced yet is not detrimental to its challenge, citing case law in support of its position that a pre-enforcement as-applied challenge is ripe "so long as [it] present[s] a 'discrete and well-defined' application of the challenged law that is 'likely to occur.'" (*Id.* (citing Gonzales v. Carhart, 550 U.S. 124, 167, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007)).)

In oral argument, the State did not blanketly refute Plaintiff's attempt to raise a pre-enforcement as-applied attack on AB 824, but rather highlighted Plaintiff's failure to meet the standard required under such an attack. Stressing that neither *Hoye* nor *Gonzales* supports Plaintiff's position, the State in oral argument contended that a pre-enforcement as-applied attack requires a showing of three things, none of which Plaintiff has established: (1) a concrete plan to violate the law; (2) a communicated threat of prosecution; and (3) a history of past prosecution or enforcement of the challenged law.

Whether Plaintiff's Dormant Commerce Clause claim as asserted **[*16]** is likely to succeed depends first on whether that claim is ripe. While allowing pre-enforcement, as-applied challenges, Gonzalez does not allow for Plaintiff's broad request. In *Gonzalez*, the Supreme Court denied a request to find a partial-birth abortion ban facially unconstitutional. Instead, it concluded that an as-applied challenge was the "proper means to consider exceptions" to the law because in such an as-applied challenge "it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the prohibited act must be used." *Id. at 167*. In the first instance, it is not clear to the Court that *Gonzalez*' standard applies outside of the narrow context of abortion law. Moreover, *Gonzalez* says nothing about the specificity needed to bring a pre-enforcement as-applied challenge but instead reinforces the general proposition that the court should not reach findings of unconstitutionality based on hypotheticals.[2]

As the State articulated in oral argument, the constitutional test for ripeness consists of three parts: (1) a concrete plan to violate the law; (2) a communicated threat of prosecution; and (3) a history of past prosecution or enforcement **[*17]** of the challenged law. *See, e.g.,* Clark v. City of Seattle, 899 F.3d 802 (9th Cir. 2018) ("Where a plaintiff intends to challenge a statute prior to its enforcement, generalized threats of prosecution do not confer constitutional ripeness. Rather, there must be a genuine threat of imminent prosecution. To determine whether a genuine threat of imminent prosecution exists, we use three factors . . . ." (citations and internal quotation marks omitted); Maldonado v. Morales, 556 F.3d 1037, 1044 (9th Cir. 2009). Moreover, the "prudential inquiry" concerning ripeness weighs "the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration." Maldonado, 556 F.3d at 1044 (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *overruled on other grounds by* Califano v. Sanders, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977)). The former question includes consideration of whether the issue is purely legal or one that requires factual development. *See* San Diego Gun Rights Committee v. Reno, 98 F.3d 1121 (9th Cir. 1996) (not ripe because "the issues in the instant pre-enforcement challenge are not purely legal. A concrete factual situation is necessary to delineate the boundaries of what conduct the government may or may not regulate without running afoul of the Commerce Clause.") Plaintiff has made no attempt to establish these three constitutional elements nor to discuss the prudential concerns.

Even so, applying either *Clarks* three-pronged test or the more general rule as **[*18]** stated in *Gonzalez* to the instant case, Plaintiff has not established a likelihood of success on the merits of its pre-enforcement as-applied

[2] Neither does Hoye v. City of Oakland, 653 F.3d 835 (9th Cir. 2011) stand for the broad proposition that a party can successfully bring an as-applied pre-enforcement challenge to a statute under all circumstances. Rather, aside from articulating that a paradigmatic as-applied approach can be appropriate at least in the context of First Amendment jurisprudence, *Hoye* offers little support for Plaintiff's position and only further confirms that courts "decline[] to entertain as-applied challenges that would require [them] to speculate as to prospective facts." *Id. at 859*.

challenge because it has not established that the issue is ripe for review. Specifically, Plaintiff has not sufficiently shown that AB 824 is likely to be enforced in an unconstitutional manner, nor has Plaintiff stated neither a plan to violate the law or a specific threat that the law will be enforced in the manner they fear. Plaintiff relies heavily on the declarations it submitted in support of its motion for preliminary injunction. (*See* ECF Nos. 10-2-10-7.) Plaintiff's briefs make these declarations out to be bold statements that should AB 824 go into effect, the subject companies will be forced to make drastic changes to their business practices. However, none of the declarations state an intent to violate AB 824, and none lay out a specific circumstance in which AB 824 will be applied. Instead, the declarants make generalized statements that there are many lawsuits arising from ANDA Paragraph IV applications, that many such lawsuits have settled (it is not clear how many settled with reverse payments), and that AB 824 may have some impact **[*19]** on these cases. The declarants claim they will likely be forced to litigate pending patent-infringement lawsuits to judgment out of fear of AB 824's penalties, even if a procompetitive settlement could be reached. Declarants also claim they may keep the new generics they are currently developing off the market, or will be required to reevaluate their plans, rather than risk the cost of litigation or face AB 824 penalties. But no declarant claims its company has a concrete plan to violate the terms of AB 824. (*See id*.) Had Plaintiff submitted evidence of a currently pending reverse payment settlement negotiation in which the parties would not settle as a result of AB 824 or feared prosecution under AB 824, then this case might be ripe for a pre-enforcement, as-applied challenge. However, that is not the case. Rather, and more to the point regarding prudential ripeness, it is clear to the Court that this is not a purely legal issue, and that additional facts are necessary to address the *Commerce Clause* question.

Because the Court finds Plaintiff's pre-enforcement as-applied claim under the Dormant *Commerce Clause* is not ripe for review, the Court finds Plaintiff has not established a likelihood of success on the merits **[*20]** of its claim, nor has Plaintiff raised serious questions going to the merits, and so a preliminary injunction shall not issue on these grounds at this time.[3] Even if Plaintiff had raised serious questions as to the merits of its Dormant *Commerce Clause* claim, the balance of hardships does not tip significantly in Plaintiff's favor, as discussed below, such that a preliminary injunction should be granted.

2. Preemption

Plaintiff makes two primary arguments concerning preemption. First, Plaintiff asserts AB 824 conflicts with the objectives of federal patent law, and specifically the Hatch-Waxman Act. And second, Plaintiff argues AB 824 is directly preempted by both the *Patent Act* and by the delicate balance struck between ***antitrust law*** and patent law, as discussed by the Supreme Court in *FTC v Actavis, 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*. For its part, the State asserts that AB 824 does not conflict with federal patent law and notes that Plaintiff does not identify "a specific patent provision with which AB 824 conflicts." (ECF No. 24 at 7.) The State also contends that AB 824 does not conflict with the Hatch-Waxman Act because it will further the goals of the Act, not frustrate them as Plaintiff claims. And finally, the State argues **[*21]** that *Actavis* does not preempt AB 824 because it weighed in on the interaction between federal, as opposed to state, ***antitrust law*** and patent law and established only that patent settlements were not *per se* exempt from antitrust liability.

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[3] Plaintiff's pre-enforcement as-applied challenge is also problematic because it may be construed as an attempt to extend a facial overbreadth challenge outside the *First Amendment* context. In theory, Plaintiff claims that the language of the law in question is overbroad because it may allow the government to enforce it unconstitutionally. *See, e.g., Sabri v. United States, 541 U.S. 600, 609, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004)* ("It would have been correspondingly clear that if Sabri was making any substantive constitutional claim, it had to be seen as an overbreadth challenge; the most he could say was that the statute could not be enforced against him, because it could not be enforced against someone else whose behavior would be outside the scope of Congress's Article I authority to legislate."). But under Plaintiff's logic, any law regarding commerce passed by the California legislature would have to include language specifically limiting its application to within California. That simply cannot be the case, and Plaintiff cites to no authority indicating otherwise. Moreover, *Sabri* cautioned against overbreadth challenges applied outside the scope of the *First Amendment* and the Supreme Court has regularly declined to extend such an analysis to other constitutional challenges. *Id. at 609-610*.

Plaintiff indeed has not pointed to any provision of the Patent Act that conflicts with AB 824 except to assert in oral argument that federal patent law is entitled to field preemption and states cannot create their own patent-like protections. While this assertion is correct, it does not settle the question of preemption presented to this Court. "[S]tate law is preempted when it enters 'a field of regulation which the patent laws have reserved to Congress.' Where state law offers 'patent-like protection for ideas deemed unprotected under the present federal scheme, [state law] conflicts with the strong federal policy favoring free competition in ideas.'" *Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys., Inc., 7 F.3d 1434, 1439 (9th Cir. 1993)* (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 167, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989))*. But AB 824 is not offering patent-like protection; instead it is imposing a presumption of anti-competitiveness on certain types of patent settlements. A state law claim can survive federal patent law preemption so long as the state claim "contains an element not shared by the federal law; **[*22]** an element which changes the nature of the action so that it is qualitatively different from a copyright [or patent] infringement claim." *Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys., Inc., 7 F.3d 1434, 1439-40 (9th Cir. 1993)* (internal quotation omitted, brackets in original) (considering state law misappropriation claim in light of federal patent laws). AB 824 does not require a court to determine the validity or invalidity of a patent. Instead, it is focused on the payment of a "thing of value" to the generic drug company and attaches a presumption that such a transfer serves anti-competitive purposes. Because AB 824 does not require determination of the validity of a patent and does not create patent-like protections, it does not conflict with federal patent law and is therefore not preempted under this analysis.

Plaintiff's next assertion that AB 824 conflicts with, and is therefore preempted by, the Hatch-Waxman Act is predicated on Plaintiff's claim that the ultimate effect of AB 824 will be to stifle the creation, production, and entry onto the market of cheaper generic medications. The State, by contrast, argues that the intent of AB 824 is to ensure that generic drugs are not kept off the market by the practice of reverse payment settlements and banning these **[*23]** settlements will ensure generics enter the market sooner, ultimately decreasing drug prices and protecting the public's access to affordable medicine. The parties agree that the intent of the Hatch-Waxman Act was to create a pathway for generic medications to enter the market faster and to lower prescription drug prices as a result. The argument of each party turns on how exactly AB 824 will impact these goals. Because AB 824 has not been enacted, nor has any other similar law been enacted in another state, it is impossible to know if this law will have its intended effect, or as Plaintiff argues, will backfire, causing generic drug companies to cease filing ANDA applications and challenging patents held by brand-name drug companies. The Court is not in a position to predict the future impacts of AB 824 before it is enacted and enforced. At this time, it is too speculative for the Court to find one way or another that AB 824 will frustrate or further the aims of the Hatch-Waxman Act. As such, Plaintiff cannot show a likelihood of success on the merits of its conflict preemption claim.

Finally, Plaintiff argues *Actavis* "went out of its way to protect" (ECF No 10-1 at 22) the delicate **[*24]** balance Congress struck between patent law and ***antitrust law***. Plaintiff contends AB 824 disrupts this balance and is therefore preempted by *Actavis*. In support of this assertion, Plaintiff cites *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)*, a case in which the Supreme Court found that "[b]ecause employee organization is central to federal labor policy and regulation of organizational procedures is comprehensive, federal law does not admit the use of state ***antitrust law*** to regulate union activity that is closely related to organizational goals." In *Connell Construction*, the Supreme Court limited the application of state ***antitrust law*** to federal labor laws. In *Actavis*, by contrast, the Supreme Court opened reverse payment patent settlements to antitrust scrutiny rather than limiting the application of ***antitrust law*** to patent settlements. Therefore, *Connell Construction* is inapposite.

Actavis' holding opens patent settlements to antitrust scrutiny by overturning previous circuit court precedent that reverse payment settlements do not present antitrust concerns "so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent." *570 U.S. at 141* (internal quotes omitted). Instead of following the circuit analysis, **[*25]** *Actavis* applied ***antitrust law*** to reverse payment settlements and found that such settlements may violate federal antitrust laws. *Actavis*' analysis is based not on a presumption of validity of the underlying patent, but rather on the balance between the anti- and pro-competitive impacts of the settlement agreement.

Plaintiff notes the California Supreme Court acknowledged that the "United States Supreme Court is the final arbiter of questions of patent law and the extent to which interpretations of ***antitrust law*** — whether state or federal — must accommodate patent law's requirements . . . ." *In re Cipro Cases I & II, 61 Cal. 4th 116, 142, 187 Cal. Rptr. 3d 632, 348 P.3d 845 (2015)*. Plaintiff posits that the finding in *Actavis* therefore precludes California from imposing its own antitrust laws on reverse payment patent settlements. However, the California Supreme Court determined that "the lesson of *Actavis* is that nothing in the patent laws or the Hatch—Waxman Act dictates such a special rule; that a settlement resolves a patent dispute does not immunize the agreement from antitrust attack;" and that if federal ***antitrust law*** can weigh the pro- and anti-competitive effects of a patent settlement without "offense to patent law, then so too can the state ***antitrust law***." *In re Cipro Cases I & II, 61 Cal. 4th at 161*. This **[*26]** Court agrees with the California Supreme Court. The holding in *Actavis* allows the enforcement of ***antitrust law*** on patent settlements rather than foreclosing such enforcement.

Plaintiff argues that because *Actavis* applied a rule of reason test and declined to follow a quick look approach or rely on a presumption, California may not create its own presumption when applying its ***antitrust law*** to patent settlements. However, there is no such limitation presented in *Actavis* and, as the California Supreme Court points out, "*Actavis* is not dispositive on matters of state law . . . [i]nterpretations of federal ***antitrust law*** are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century." *In re Cipro Cases I & II, 61 Cal. 4th at 142*. This Court agrees that *Actavis* turns on questions of ***antitrust law***, not patent law, and federal ***antitrust law*** does not preempt state ***antitrust law***. *California v. ARC Am. Corp., 490 U.S. 93, 101-02, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)* ("Congress has not pre-empted the field of ***antitrust law*** . . . Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies."). Therefore, **[*27]** *Actavis* does not preempt AB 824, nor does it prevent California's imposition of a law establishing a presumption regarding the anticompetitive nature of reverse payment settlements under its own antitrust statutes.

Further, while *Actavis* applies the rule of reason to the analysis of reverse payment settlements under federal ***antitrust law***, it does not establish exactly how and when this test should be applied. Instead, the Court in *Actavis* explicitly leaves the question of how to apply the rule it articulated to the lower courts. "As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question — that of the presence of significant unjustified anticompetitive consequences. We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation." *570 U.S. at 159-60*.

Plaintiff's arguments that AB 824 is preempted by federal law are therefore not likely to succeed. As a result, Plaintiff cannot show that there is a likelihood of **[*28]** success on the merits. Further, even if Plaintiff had raised serious questions as to the merits of the preemption question, the balance of hardships does not tip significantly in Plaintiff's favor, as discussed below, such that a preliminary injunction should be granted.

3. <u>Excessive Fines</u>

In terms of a penalty, AB 824 imposes a fine against any individual who assists in what is deemed to be a violation of the bill of three times the value received by the individual due to the violation or $20 million, whichever is greater. By the terms of the bill, this minimum of $20 million applies to any individual who assists in the party's violation even if that person gained nothing of value as a result of the violation. Presumably, such a penalty could be levied against a junior associate or legal secretary working at the law firm representing one of the settling parties.

Plaintiff raises two arguments that AB 824 imposes excessive fines: (1) that the upper threshold of three times the value received is excessive in relation to the purported anticompetitive harms of any violative settlement agreement; and (2) that a minimum fine of $20 million is excessive as it applies to individuals, as opposed **[*29]** to parties. For its part, the State argues, (1) Plaintiff's claim is not ripe for determination because such a claim is dependent on a number of factual inquiries not presently before the Court; (2) the Court should defer to the State in setting penalties or fixing fines unless they are so grossly excessive as to amount to a due process violation;[4] and (3) because Plaintiff is bringing a facial attack on AB 824, its claim can only succeed if it shows no set of circumstances exist under which the Act would be valid, which it cannot do.

The parties agree that the *Eighth Amendment* prohibits states from imposing "excessive fines" and has been applied where the fine is imposed, in whole or in part, as punishment for an offense. The parties also do not dispute that the fine imposed under AB 824 is intended as a penalty and further agree that a fine is considered excessive if it is disproportionate to the gravity of the offense. In the Ninth Circuit, courts consider four factors in determining whether a penalty is grossly disproportionate to the offense: (1) the nature and extent of the violation; (2) whether the violation was related to other illegal activities; (3) other penalties that may be imposed for **[*30]** the violation; and (4) the extent of the harm caused. (ECF No. 10 at 28; ECF No. 24 at 12; *see* *United States v. $132,245.00 in U.S. Currency, 764 F.3d 1055, 1058 (9th Cir. 2014))*.

It is not entirely clear whether Plaintiff intends to raise a facial or as-applied attack against the penalty portion of AB 824. At least with respect to Plaintiff's claim that the upper threshold is excessive in relation to the purported anticompetitive harms of any violative settlement agreement, Plaintiff's attack — seeking to invalidate the law (or at least enjoin the penalty provision) as applied to any defendant — is necessarily a facial one. *See* *Hoye, 653 F.3d at 857* ("Because the difference between an as-applied and a facial challenge lies only in whether all or only some of the statute's subrules (or fact-specific applications) are being challenged, the substantive legal tests used in the two challenges are 'invariant.'") As discussed above, a facial attack of a law is exceedingly difficult to raise successfully. "[T]he Court's analysis of Plaintiffs' facial excessive fines claims asks whether parts of the penalty structure are always grossly disproportional, or if there are circumstances where the penalties would be valid." *In re Toll Roads Litig., No. SACV1600262AGJCGX, 2018 WL 4945314, at *2 (C.D. Cal. July 31, 2018)* (citing *United States v. Bajakajian, 524 U.S. 321, 336, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998))*; *United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)*. Certainly, the **[*31]** Court can fathom a set of circumstances in the context of massive pharmaceutical settlements under which the imposition of three times the value received due to the violation or $20 million, whichever is greater, might be appropriate. At the most general level, then, Plaintiff's facial attack again fails.

Moreover, and as the parties agree, in evaluating a claim under the *Excessive Fines Clause*, "the standard of gross disproportionality" requires a court to "compare the amount of the forfeiture to the gravity of the [ ] offense. If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *Bajakajian, 524 U.S. at 336-37*. In the Ninth Circuit, this typically requires courts to consider the four factors articulated above: (1) the nature and extent of the violation; (2) whether the violation was related to other illegal activities; (3) other penalties that may be imposed for the violation; and (4) the extent of the harm caused. *See* *United States v. $132,245.00 in U.S. Currency, 764 F.3d 1055, 1058 (9th Cir. 2014)*. Each of these four factors — perhaps with the exception of the third — are all but impossible to assess in the abstract, highlighting the difficulty of a pre-enforcement attack based on the *Excessive Fines Clause*. As one district court noted, "[t]he first factor requires **[*32]** review of the circumstances of the offense 'in great detail.'" *Crawford v. United States Dep't of the Treasury, No. 3:15-CV-250, 2015 U.S. Dist. LEXIS 131496, 2015 WL 5697552, at *14-15 (S.D. Ohio Sept. 29, 2015)*, (citing *Solem v. Helm, 463 U.S. 277, 290-91, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983)* (*Cruel and Unusual Punishments Clause* analysis)). "In this case, there are no circumstances to review, because no . . . penalty has been imposed. A fact-specific determination of excessiveness is impossible where any wrongful conduct is hypothetical." *Id.* The same is true here.

In other words, without examining the factual underpinnings of an *actual violation* the Court can hardly speculate as to the nature and extent of the violation, whether the violation is related to other illegal activities (perhaps unlikely in this scenario, but not impossible), and the extent of the harm caused, if any, as it is yet unknown. Plaintiff's

[4] The Court acknowledges Plaintiff's reference to the recent case of *Timbs v. Indiana, 139 S. Ct. 682, 687-89, 203 L. Ed. 2d 11 (2019)*, which holds the *Excessive Fines Clause* is fully incorporated against the states. The Court need not and does not determine whether such incorporation revokes the deference otherwise afforded to the State to set penalties and fines. Because the Court finds Plaintiff's Excessive Fines claim is unripe, it need not consider the State's argument for deference.

arguments to the contrary hinge on its position that "run-of-the-mill patent settlements" are not at all harmful, and thus such a pricey penalty is excessive. (*See* ECF No. 10 at 28-29.) But it is not so clear to the Court that the settlements impacted by AB 824 will be "run-of-the-mill." Quite clearly, the State's position is that AB 824's goal is to effect only those settlements that are ultimately harming consumers. Without a factual underpinning by which to **[*33]** assess a violation, it is impossible to know if the upper threshold imposed is excessive. Put simply, the Court is not willing at this point to find the upper threshold of AB 824's penalty provision is grossly disproportional to the gravity of every conceivable violation of the statute. The Court therefore agrees with the State that Plaintiff's Excessive Fines claim is not ripe for adjudication as it pertains to Plaintiff's attack of the upper limit imposed under the statute, and Plaintiff has therefore failed to establish a likelihood of success on the merits of this claim.

With respect to the $20 million minimum, Plaintiff attempts to clarify in reply that "[c]hallenges to limitations that appear on the face of state laws are ripe the moment the challenged law is enacted," and further that its "principal Excessive Fines claim is that $20 million is excessive as applied to an individual *under any scenario*." (ECF No. 27 at 12, emphasis in original.) Because Plaintiff seeks to invalidate or enjoin the penalty provision of AB 824 as it might be applied to individuals only, the attack is necessarily an as-applied pre-enforcement attack.

Plaintiff fails to cite to any authority establishing **[*34]** that an as-applied pre-enforcement claim is cognizable under the *Excessive Fines Clause*. But assuming it is, the Court must nevertheless apply the three-part test articulated above with respect to pre-enforcement challenges generally. Specifically, in order to successfully establish that the claim is ripe for review, Plaintiff must show: (1) a concrete plan to violate the law; (2) a communicated threat of prosecution; and (3) a history of past prosecution or enforcement of the challenged law. As discussed above with respect to Plaintiff's claim under the Dormant *Commerce Clause*, Plaintiff does not sufficiently meet this standard. Even more so with respect to Plaintiff's "as-applied to individuals" claim, Plaintiff has made no attempt to proffer evidence that a single individual intends to violate AB 824, nor that the State has communicated a threat of levying a $20 million fine against, for example, a junior associate at a law firm who took notes during settlement negotiations. Further, the prudential inquiry leads the Court to find the claim is unripe as it requires factual development. As a result, the Court finds Plaintiff's pre-enforcement as-applied to individuals attack is not yet ripe, and Plaintiff therefore fails **[*35]** to establish a likelihood of success on the merits of the claim.

Lastly, regardless of whether Plaintiff's Excessive Fines claim is intended as a facial or as-applied attack on the provision as it applies to individuals, any Excessive Fines claim requires a court to consider the four factors articulated above to determine if the fine is disproportionate to the gravity of the offense. Again, those factors are: (1) the nature and extent of the violation; (2) whether the violation was related to other illegal activities; (3) other penalties that may be imposed for the violation; and (4) the extent of the harm caused. *See* *United States v. $132,245.00 in U.S. Currency, 764 F.3d 1055, 1058 (9th Cir. 2014)*; *see also* Hoye, 653 F.3d at 857 ("Because the difference between an as-applied and a facial challenge lies only in whether all or only some of the statute's subrules (or fact-specific applications) are being challenged, the substantive legal tests used in the two challenges are 'invariant.'") In the context of the $20 million fine as applied to individuals, Plaintiff comes closer to establishing possible success on this part of the inquiry. To be sure, the Court is troubled that a law firm's junior associate could theoretically face a $20 million fine for her participation in negotiating **[*36]** a settlement agreement that violates AB 824. But given the posture of this case, the Court cannot say Plaintiff has established a likelihood of success, or even raised serious questions going to the merits of its claim. As explained above, the analysis required to find an *Excessive Fines Clause* violation is fact-specific. Even narrowing the challenge to the statute as it applies to individuals, the Court cannot analyze the circumstances surrounding a violation before any violation occurs. Indeed, if a $20 million fine is levied against an individual in a case in which the four factors articulated above indicate such a fine is excessive, that individual may apply for a temporary restraining order or injunction and seek to invalidate the law as it is applied unconstitutionally to the individual. Absent those facts, the relief requested is premature. For those reasons, the Court finds Plaintiff has failed to establish a likelihood of success on the merits of its Excessive Fines claim. Further, even if Plaintiff had raised serious questions as to the merits of the claim, the balance of hardships does not tip significantly in Plaintiff's favor, as discussed below, such that a preliminary injunction should be **[*37]** granted.

4. Due Process

Finally, Plaintiff argues AB 824 violates due process because (1) it unfairly shifts the burden to the defendant to prove procompetitive effects; (2) the defendant's opportunity to rebut the presumptions imposed are meaningless because the statute presumes anticompetitive effects; and (3) relatedly, a manufacturer will not be able to prove an agreement *has had* procompetitive effects, even if that agreement *will* generate such effects over time. (ECF No. 10 at 30-31.) In opposition, the State argues: (1) the State has the authority to regulate legal procedure, including establishing a burden; (2) AB 824 expressly provides parties a meaningful opportunity to disprove liability once the burden is appropriately shifted; and (3) Plaintiff's position that the presumptions set forth in AB 824 represent a stark departure from established law is unsupported. (ECF No. 24 at 24-25.) In reply, Plaintiff seems to concede that a burden shift in and of itself is not violative of due process, clarifying that AB 824 is unconstitutional "because it shifts the burden of persuasion to the defendant *and also* imposes a presumption of guilt while making it effectively impossible to rebut **[*38]** that presumption." (ECF No. 27 at 13.) More specifically, Plaintiff cites to a scenario in which a generic settles a patent dispute by agreeing to an early but not immediate entry date with an exclusive license. The generic, Plaintiff claims, will have to prove that such an agreement *has* generated procompetitive benefits and that the benefits outweigh the anticompetitive effects presumed by the law. (*Id.*)

Again, Plaintiff is not likely to succeed on the merits of this claim. First, Plaintiff cites to no authority holding that the burden of persuasion can never properly be shifted to the defendant to disprove liability, and the Court is aware of none. Indeed, Plaintiff all but concedes that a burden shift in the first instance is not itself a violation of due process. (ECF No. 27 at 9.) Plaintiff's better argument is that AB 824 does not provide a *meaningful* opportunity to rebut the presumption because it requires a defendant to show the questioned agreement *has already had* procompetitive effects. As the law is written, the fact that a settlement supposedly *will* have procompetitive effects is not sufficient to rebut the antitrust presumption.

While seemingly an accurate statement of AB **[*39]** 824's language, the Court is not convinced that AB 824's express provision allowing a manufacturer to rebut the presumption by showing procompetitive effects is not meaningful. Here, it is Plaintiff's burden to establish a likelihood of success on its due process claim. But Plaintiff offers nothing in the way of caselaw or evidence supporting its stance that the process provided for by the statute is not meaningful. First, there are other means of disproving liability, including showing the value received is fair and reasonable compensation solely for other goods or services provided. Also, the parties remain free to invoke any other standard antitrust defense. And moreover, the fact that AB 824 demands a showing that a settlement "has directly generated procompetitive benefits"[5] does not render that option meaningless. Indeed, the Court can imagine a scenario where a settlement would have an immediately procompetitive effect. AB 824 simply reflects a desire to penalize parties that enter into agreements that — among other requirements — have not generated procompetitive benefits.

To the same point, Plaintiff overstates the changes AB 824 makes to established jurisprudence in the **[*40]** areas of antitrust and patent law. The presumption raised by AB 824 is stronger, and the burden shift may be sharper, but both federal and state antitrust caselaw provides for a similar presumption and burden shift in the context of reverse payment settlement agreements. *See* *FTC v. Actavis, 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*; *In re Cipro Cases I & II, 61 Cal. 4th 116, 187 Cal. Rptr. 3d 632, 348 P.3d 845 (Cal. 2015)*. And both federal and state cases make clear that, (1) agreements must be assessed as of the time they are made; and (2) the relevant baseline for determining whether an agreement is procompetitive is the period of competition that would have been, but for the settlement (as opposed to using the life of a valid patent as a baseline). *See* *In re Cipro, 348 P.3d at 870*. As set forth in *In re Cipro*, "***Antitrust law*** condemns the purchase of freedom from competition; what matters is whether a settlement postpones market entry beyond the average point that would have been expected at the time in the absence of agreement." *348 P.3d at 870*. Importantly, AB 824 provides a mechanism — indeed more than one — by which a defendant can rebut the presumption arising from a reverse payment settlement. Nothing supports the contention that this mechanism is not meaningful simply because it requires an actual showing of

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[5] The State cites to *In re Cipro Cases I & II, 348 P.3d 845, 61 Cal. 4th 116 at 149-150, 187 Cal. Rptr. 3d 632 (Cal. 2015)*, to support its contention that this language "draws on established antitrust jurisprudence and the ex ante framework of pay-for-delay jurisprudence." This "has directly generated" language does not appear in *Cipro*.

procompetitive benefits as of the time the settlement **[*41]** is entered,[6] as opposed to some level of speculation that procompetitive benefits will result at some undetermined time in the future.

Finally, Plaintiff asserts AB 824's presumption that the relevant product market is limited to the branded drug and its generic substitutes renders the anticompetitive presumption irrebuttable because it deprives defendants of the opportunity to present every available defense. (ECF No. 10 at 39.) The Court disagrees. AB 824 simply erects a presumption regarding the relevant market. It does not foreclose the defendant from presenting evidence that the relevant market is broader than the one presumed. Granted, AB 824 seems to stack certain presumptions on top of other presumptions. This may have the effect of making it more difficult to rebut all applied presumptions, but nothing indicates to the Court that it has the effect of depriving potential defendants of their due process rights. As a result, the Court finds Plaintiff has not established a likelihood of success on the merits of its due process claim, nor has it raised serious questions going to those merits. Even if Plaintiff had raised serious questions, as discussed below, the balance of hardships **[*42]** does not tip significantly in Plaintiff's favor such that a preliminary injunction should be granted.

B. Irreparable Injury

Because the Court finds Plaintiff is not likely at this time to succeed on the merits of any of its claims, it need not address the remaining *Winter* factors. *See* *Alliance for the Wild Rockies, 632 F.3d at 1135* (A plaintiff must "make a showing on all four prongs" of the *Winter* test to obtain a preliminary injunction.). Nonetheless, the Court briefly discusses the remaining factors, which further support that issuance of a preliminary injunction is not justified at this time.

Plaintiff alleges its members will suffer irreparable injury because: (1) AB 824 violates Plaintiff's members' constitutional rights and they are therefore *per se* irreparably injured; (2) they will be forced to make a decision to either continually violate AB 824 and expose themselves to significant liability or litigate every patent dispute to judgment and carry the financial burden of doing so; and (3) as a result of AB 824 and the impossible choice presented by (2), Plaintiff's members will have no choice but to cease entering the market, leading to lost goodwill and damage to reputation. Moreover, Plaintiff asserts its members will be **[*43]** irreparably harmed by the imposition of a fine pursuant to AB 824 because the *Eleventh Amendment* prohibits parties from suing state officials, and therefore prevents recoupment of any unjustified payment. In response, the State emphasizes that Plaintiff's claimed injuries are purely speculative, and that any potential harm to Plaintiff's members will be the result of their own business choices, not the result of AB 824 itself. The State also argues that because Plaintiff has failed to demonstrate a likelihood of success on the merits of its constitutional claims, it has failed to demonstrate that it will suffer irreparable harm resulting from a constitutional violation.

The State is of course correct that absent a likelihood of success on the merits of its constitutional claims, Plaintiff's claimed *per se* injury resulting from a constitutional violation necessarily fails. As for Plaintiff's other claimed injuries, the Court finds Plaintiff overstates the certain and impending harm AB 824 will do. First, AB 824 does not prohibit patent settlements; the claim that AB 824 will force Plaintiff's members to either violate the law or litigate to judgment, both at great expense, is therefore based on speculation **[*44]** of how companies will choose to react to AB 824's implementation. But at least one FTC report indicates the majority of patent settlements do not contain a reverse payment at all. (*See* ECF No. 24 at 19, citing *Overview of Agreements Filed in FY 2016*, A Report by the FTC Bureau of Competition.) Surely, then, parties to pharmaceutical patent litigation *can* settle in the aftermath of AB 824.

Moreover, "[s]peculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction." *Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988)* (citing *Goldie's Bookstore, Inc. v. Super. Ct., 739 F.2d 466, 472 (9th Cir.1984))*. "A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must demonstrate immediate threatened injury as a prerequisite to

[6] The Court has no way of knowing how immediate AB 824 enforcement may be after entry of settlement.

preliminary injunctive relief." *Id.* (citing *Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1201 (9th Cir.1980))*. As discussed above in the context of Plaintiff's Dormant *Commerce Clause* claim, nowhere does Plaintiff point to a specific pending case or settlement negotiation in which it will need to act differently as a result of AB 824 (nor is the Court convinced that a change in a drug manufacturer's business practices would constitute irreparable harm in any event). Speculation of how the market will react to the bill's implementation is not enough to support a preliminary **[*45]** injunction.

Most concerning to the Court is Plaintiff's claim that any fine improperly levied — especially with respect to an individual — could not be recouped because of the *Eleventh Amendment's* protection of state officials. But at this time, that injury is also speculative and not imminent. Indeed, if the State were to pursue a $20 million fine against a minor individual participant in a violative settlement agreement, for example, that individual may be able to state a claim that the law violates the *Excessive Fines Clause* as applied to them and may be able to seek a preliminary injunction on those grounds. That, however, is not presently before the Court.

C. Balance of Hardships and Public Interest

The last two factors of the *Winter* test are: "[] that the balance of equities tips in [plaintiff's] favor, and [] that an injunction is in the public interest." *Winter, 555 U.S. at 20*. "When the government is a party, these last two factors merge." *Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1092 (9th Cir. 2014)*. Therefore the Court must analyze the balance between the hardships imposed on AAM and its members and the impact an injunction on the enforcement of AB 824 will have on the public. It is true that there may be some costs and changes to the business practices of Plaintiff's members as a result of AB 824; **[*46]** however, as discussed above, Plaintiff has failed to establish irreparable injury because its claimed injuries are based purely on speculation as to how members might react to the new law. For the same reasons, the analysis of the burden imposed on Plaintiff therefore does not tip the scale heavily in Plaintiff's favor.

As for the public interest, this factor is at best neutral as both parties argue AB 824 will have the opposite effect. Plaintiff argues that not only does AB 824 impose significant burdens on it and its members, but also that the enforcement of AB 824 is not in the interest of the public. Plaintiff posits that should AB 824 go into effect, generic drug companies will be forced to litigate patent disputes to resolution, significantly increasing litigation costs, decreasing budgets for development of new generic drugs, and thereby decreasing the public's access to cheaper generic drug alternatives. Plaintiff also foresees generic drug companies refraining from putting any new generics on the market to avoid litigation or liability under AB 824, similarly limiting access to generic alternatives and increasing the cost of prescription drugs on the whole.

The State, by contrast, **[*47]** asserts that AB 824 will lower prescription drug prices by closing a loophole in the Hatch-Waxman Act whereby brand-name drug companies are able to preserve otherwise weak patents by paying generic drug companies to keep their drugs off the market. Under the State's analysis, closing this loophole will ensure that generic and brand companies no longer have an incentive to keep the generic off the market for longer than would be supported by the underlying patent and thus encourage the entry of cheaper generics onto the market faster. According to the State, AB 824 is designed to curb the high costs of prescription drugs.

At this juncture, how AB 824 will impact the public interest is purely speculative. The Court cannot predict how the market will react to this new law, nor should it. There is no comparable law in another state nor under federal law, so the Court has no facts before it to base such a determination. Therefore, the balance of equities does not tip in one direction or the other, and it certainly does not tip sharply in Plaintiff's favor. Thus, this factor does not support the imposition of an injunction against the enforcement of AB 824.

VI. CONCLUSION

Based on the foregoing, **[*48]** Plaintiff's Motion for Preliminary Injunction (ECF No. 10) is DENIED. Such denial is without prejudice to Plaintiff seeking another preliminary injunction should certain facts develop and/or certain claims become ripe during the pendency of this litigation.

IT IS SO ORDERED.

Dated: December 31, 2019

/s/ Troy L. Nunley

Troy L. Nunley

United States District Judge

Credit Suisse Secs. (USA) LLC v. Carlson

United States District Court for the Southern District of Texas, Houston Division

January 2, 2020, Decided; January 2, 2020, Filed

CIVIL ACTION H-19-1470

Reporter

2020 U.S. Dist. LEXIS 76 *; 2020 WL 32339

CREDIT SUISSE SECURITIES (USA) LLC, Petitioner, v. NEAL DAVID CARLSON, Respondent.

Subsequent History: Reconsideration denied by *Credit Suisse Secs. United States Llc v. Carlson, 2020 U.S. Dist. LEXIS 28847 (S.D. Tex., Feb. 20, 2020)*

Core Terms

arbitration, partiality, argues, contends, bias, promissory note, vacatur, speculative, parties, vacate, arbitration award, appearance, confirm, Antitrust, discovery, plans, arbitration panel, tax treatment, fair hearing, evidentiary, costs, motion to vacate, opposing counsel, impression, hired, petition to confirm, FINRA Rule, questioning, believes, disclose

Counsel: **[*1]** For Credit Suisse Securities (USA) LLC, Petitioner: Marcia Nelson Jackson, Wick Phillips Gould & Martin, LLP, Dallas, TX.

For Neal David Carlson, Respondent: Leonard J Meyer, LEAD ATTORNEY, HooverSlovacek, LLP, Houston, TX.

Judges: Gray H. Miller, Senior United States District Judge.

Opinion by: Gray H. Miller

Opinion

MEMORANDUM OPINION AND ORDER

Pending before the court are (1) a petition to confirm an arbitration award (Dkt. 1) filed by petitioner Credit Suisse Securities (USA) LLC ("CSS"); and (2) a motion to vacate an arbitration award (Dkt. 9) filed by respondent Neal David Carlson. Having considered the petition, motion, responses, replies, and applicable law, the court is of the opinion that the motion to vacate (Dkt. 9) should be DENIED and the petition to confirm (Dkt. 1) should be GRANTED.

I. BACKGROUND

On April 15, 2019, a three-arbitrator panel in a FINRA Dispute Resolution ("FINRA") arbitration between Carlson and CSS rendered an award in favor of CSS. Dkt. 1; Dkt. 1-1 (award). Carlson alleged in the arbitration that CSS made false representations to induce him into joining its wealth management division and failed to disclose that CSS was in the process of eliminating the division Carlson joined. Dkt. 1-1. **[*2]** CSS made a counterclaim for breach of contract, among other claims, alleging that Carlson was obligated to pay the outstanding balance of a promissary note he had entered into with CSS when he took the position. *Id.* The panel denied Carlson's claims and found that he was liable to CSS for the remaining balance of the promissary note together with interest. *Id.*

The presiding chairperson in the FINRA arbitration was Brian James Tagtmeier. *Id.* Tagtmeier had represented to the parties that he had no professional relationships with any of the parties, counsel, or arbitrators, "no matter how remote."[1] Dkt. 15; Dkt. 13-20 (oath of arbitrator). It appears that this was true at the time the arbitration was filed and Tagtmeier was selected in March of 2017. *See* Dkt. 14-2. However, the arbitration did not occur until March of 2019. *See id.* On December 17, 2018, Tagtmeier filed a notice of appearance in a case captioned *Hestia Complete Home Services d/b/a Hestia Home Services v. Daniel Bonville and Christine Parisien*. Dkt.3-4. Tagtmeier's appearance was on behalf of the plaintiff, Hestia Home Services. *Id.* The defendants, Bonville and Parisien, were represented by Courtney E. Palm of Hoover Slovacek, **[*3]** LLP. *See id.* On December 31, 2018, Carlson's team electronically filed a notice with the FINRA[2] arbitration panel that they were changing firms and that Hoover Slovacek, LLP would now be representing Carlson. Dkt. 13-19 (Meyer Aff.). Three days later, on January 3, 2019, Tagtmeier filed a motion to reconsider in *Hestia* in which he requests that the court vacate an order granting summary judgment in Hoover Slovacek's client's favor. Dkt. 13-5. On February 27, 2019, Tagtmeier was listed as counsel for the plaintiff in an agreed motion for continuance (signed by another attorney) that was filed in *Hestia*, which represented his agreement with opposing counsel at Hoover Slovacek, and he also signed several orders to appear in the arbitration that had been requested by Hoover Slovacek attorneys. Dkts. 13-7, 13-8. When the arbitration began on March 4, 2019, Tagtmeier announced he had no new disclosures. Dkt. 13-19. The *Hestia* case was still ongoing. *Id.*

Carlson argues that the court should vacate the arbitration award because Tagtmeier failed to disclose his ongoing representation of an adversary to an client of Carlson's counsel's firm, which Carlson contends is ground **[*4]** for vacatur under the *Federal Arbitration Act ("FAA")*. Dkt. 13. He additionally argues that some of Tagtmeier's evidentiary rulings are evidence of his partiality and that they are also independent grounds for vacatur. *Id.*

CSS argues that the court should confirm the award, as the parties agreed to final and binding arbitration and Carlson cannot meet the heavy burden of satisfying the extraordinarily narrow statutory grounds necessary for vacatur. Dkt. 14. CSS asserts that Carlson's evidence of partiality is remote, uncertain, or speculative and fails to show clearly evident bias. *Id.* CSS further argues that none of Carlson's evidentiary arguments exhibits misconduct by Tagtmeier or the panel. *Id.*

II. LEGAL STANDARD

The FAA reflects "a liberal federal policy favoring arbitration . . . and the fundamental principle that arbitration is a matter of contract. *AT&T Mobility v. Concepcion, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)*. If a party seeks confirmation of an arbitration award within one year of it being awarded, "the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in *sections 10* and *11* of [the FAA]." *9 U.S.C. § 9*. Carlson requests vacatur under subsections *10(a)(2)* and *10(a)(3)*. Subsection *10(a)(2)* permits vacatur "where there **[*5]** is evident partiality or corruption in the arbitrators, or either of them," and subsection *10(a)(3)* permits vacatur "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced." *9 U.S.C. § 10(a)(2)-(3)*.

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[1] The first item on the checklist Tagtmeier completed personal indicates that he did not have any "professional, social, or other relationships or interactions with counsel for any of the parties in this arbitration *or their law firms*." Dkt. 13-20 at 4 (emphasis added).

[2] FINRA stands for Financial Industry Regulatory Authority. *See* Dkt. 13-16.

The Fifth Circuit, in considering the statutory language of subsection *10(a)(2)*, noted that it "seems to require upholding arbitral awards unless bias was clearly evident in the decisionmakers." *Positive Software Sols., Inc. v. New Century Mortg. Corp., 476 F.3d 278, 281 (5th Cir. 2007)*. After considering the terms of the subsection and relevant U.S. Supreme Court caselaw, the Fifth Circuit determined that "nondisclosure alone does not require vacatur of an arbitral award for evident partiality"; instead, the "arbitrator's failure to disclose must involve a significant compromising connection to the parties." *Id. at 282-83*. The "award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding." *Id. at 283*. The court concluded that neither the FAA nor the U.S. Supreme Court "countenances vacatur of FAA arbitral awards for nondisclosure by an **[*6]** arbitrator unless it creates a concrete, not speculative impression of bias." *Id. at 286*.

The arguments Carlson makes under subsection *10(a)(3)* relate to alleged failure by the arbitrators to hear pertinent evidence or other misbehavior. In analyzing these claims, the court must be mindful that "arbitration resolves disputes without confinement to many of the procedural and evidentiary strictures that protect the integrity of formal trials." *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Tex., 915 F.2d 1017, 1022 (5th Cir. 1990)*. While an arbitration panel is not required to hear all evidence offered, it "'must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments.'" *Id. at 1023* (quoting *Hoteles Condado Beach v. Union de Tronquistas Local 901, 763 F.2d 34, 39 (1st Cir. 1985))*. However, arbitrators "'need not follow all the niceties observed by the federal courts'"; they simply must "'grant the parties a fundamentally fair hearing.'" *Totem Marine Tug & Barge, Inc. v. N. Am. Towing, Inc., 607 F.2d 649, 651 (5th Cir. 1979)* (quoting *Bell Aerospace Co. v. Div. of Textron, Inc. v. Local 516, UAW, 500 F.2d 921, 923 (2d Cir. 1974))*; *see also* *Laws v. Morgan Stanley Dean Witter, 452 F.3d 398, 399 (5th Cir. 2006)* ("'To constitute misconduct requiring vacatur of an award, an error in the arbitrator's determination must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing.'" (quoting *El Dorado Sch. Dist. No. 15 v. Cont'l Cas. Co., 247 F.3d 843, 848 (8th Cir. 2001)))*. "Arbitrators have broad discretion to make evidentiary decisions." *Int'l Chem. Workers Union v. Columbian Chems. Co., 331 F.3d 491, 497 (5th Cir. 2003)*.

III. ANALYSIS

A. *Subsection 10(a)(2)* - Evident Partiality [*7]

Carlson's arguments primarily center around his allegations of evident partiality, so the court will begin its analysis there. The court must determine in accordance with *Positive Software Solutions* whether the undisclosed connection was "a significant compromising connection to the parties" that created a "concrete, not speculative impression of bias" or if it was "a trivial or insubstantial prior relationship." It is clear that unlike the relationship in *Positive Software Solutions*, this relationship was not a *prior* relationship. The arbitrator had a professional relationship as an adversary with the firm representing one of the parties while the arbitration was ongoing. The court, however, must determine whether the relationship otherwise meets the *Positive Software Solutions* standard by determining if it was significant and created a concrete impression of bias.

Carlson, relying on Texas state caselaw, including *Burlington Northern Railroad Co. v. Tuco Inc., 960 S.W.2d 629 (Tex. 1997)*, and on the U.S. Supreme Court case, *Commonwealth Coatings Corp. v. Continental Casualty Co.*, argues that the court need only determine if there was a "reasonable impression of bias." Dkt. 17. However, in *Positive Software Solutions*, the Fifth **[*8]** Circuit, in an *en banc* opinion, determined that the "reasonable impression of bias" standard in *Commonwealth Coatings* must be read "holistically" and "interpreted practically rather than with utmost rigor" as a majority of the *Commonwealth Coatings* Court did not endorse the "appearance of bias" standard that was set forth in the plurality opinion.[3] *Positive Software Sols., 476 F.3d at 282-83* (relying on

[3] Judge Reavley, joined by Judge Wiener, Garza, Benavides, and Stewart, dissented, stating that the Fifth Circuit "may not overrule a decision of the Supreme Court"—*Commonwealth Coatings*, which Judge Reavley interpreted as requiring disclosure if there are "dealings that might create only an impression of possible bias." *476 F.3d at 287* (Reavley, J., dissenting). He noted

reasoning in cases from the Sixth, Fourth, Second, Seventh, Tenth, and Eleventh Circuits). The Fifth Circuit's practical and holistic interpretation requires a showing of "a significant compromising connection" and "a concrete, not speculative impression of bias" in a failure to disclose case. *Id. at 283, 286*.

CSS thus attempts to minimize Tagtmeier's connection to the parties, noting that Tagtmeier "briefly represented a party in a Texas state court action, where the attorney for the adverse party in that action happened to be a partner at the law firm that Carlson's counsel joined two months prior to the arbitration hearings." Dkt. 14 at 7. It also points out that for the first twenty-two months of the proceedings, **[*9]** there was "no conflict whatsoever," as Carlson's counsel was at a different firm. *Id.* at 8. CSS contends that there is no reason to believe that Tagtmeier even saw and registered in his mind that Carlson's counsel had changed firms and that counsel was now at his opposing counsel's firm in the *Hestia* lawsuit or even that he had an obligation to disclose "such a tenuous circumstance." *Id.* at 9-10. CSS deems the connection with Carlson's counsel's new firm to be an "insubstantial connection from which to infer partiality." *Id.* It points out that in *Positive Software Solutions* the Fifth Circuit clearly stated that the standard is not the mere appearance of bias and argues that Carlson must produce ""specific facts that indicate improper motives on the part of the arbitrator."" *Id.* at 8 (quoting *Vantage Deep Water Co. v. Petrobras Am. Inc., No 4:18-CV-02246, 2019 U.S. Dist. LEXIS 83766, 2019 WL 2161037, at *4 (S.D. Tex. May 17, 2019)* (Bennett, J.) (quoting *Thomas Kinkade Co. v. White, 711 F.3d 719, 724 (6th Cir. 2013))*.

The Fifth Circuit has required, post-*Positive Software Solutions*, that the party requesting vacatur "'must produce specific facts from which a reasonable person would have to conclude that the arbitrator was partial to'" the other party. *Cooper v. WestEnd Capital Mgmt., L.L.C., 832 F.3d 534, 545 (5th Cir. 2016)* (quoting *Householder Grp. v. Caughran, 354 F. App'x 848, 852 (5th Cir. 2009))*. It also requires the alleged partiality be "'direct, definite, and capable of demonstration **[*10]** rather than remote, uncertain, or speculative.'" *Id.* (quoting *Householder Grp., 354 F. App'x at 852*).

Here, Carlson arguably has shown that the undisclosed and ongoing relationship with Carlson's counsel's new firm creates an appearance of bias, which would be sufficient to vacate the award under the *dissent* in *Positive Solutions* or under the Texas cases cited by Carlson, but it is not sufficient to show that a reasonable person "would *have to conclude* that the arbitrator was partial." *Cooper, 832 F.3d at 545*. The facts that Carlson contend support a finding of evident partiality are (1) Tagtmeier was representing a client in the *Hestia* lawsuit who sought to recover at least $25,000; (2) the adverse party in the *Hestia* lawsuit—represented by Carlson's counsel's firm, Hoover Slovacek—sought at least $25,000 in fees and anticipated an additional $50,000 in fees if it proceeded to trial and $20,000 for an appeal; (3) Tagtmeier wrote a motion to reconsider an order granting partial summary judgment in *Hestia* on January 3, 2019, which was three days after Carlson's counsel told the arbitration panel they had joined Hoover Slovacek; (4) Tagtmeier signed several orders in the arbitration on February 27, 2019 that had been requested by Hoover Slovacek; **[*11]** (5) on the same day, an agreed motion for continuance bearing Tagtmeier's signature block and signed by a Hoover Slovacek attorney was filed in *Hestia*; and (6) Carlson's legal team made an argument regarding the *Sherman Antitrust Act* during the arbitration hearing, and Tagtmeier's opposing counsel in *Hestia* primarily practices antitrust and employment law, which could have led Tagtmeier to conclude that his opposing counsel developed this theory for the arbitration even though she was not listed counsel. Dkt. 13. Carlson further contends that Tagtmeier's adverse evidentiary rulings demonstrate evident partiality, including (1) the denial of Carlson's motion to compel material discovery; (2) the refusal to permit Carlson's experts to testify that the alleged promissory note was not a loan and confining their testimony to tax treatment of the funds; and (3) the refusal to permit CSS's Vice President of Human Resources ("HRVP") to testify about a Department of Justice publication ("DOJ Publication") directed at human resources professionals. *Id.*

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that *Commonwealth Coatings* had "not been well received by some of the circuit courts" and that the majority's holding "might be on a bit firmer ground . . . [i]f circuit courts could overrule the Supreme Court." *Id.* Judge Reavley disagreed with those courts that treated *Commonwealth Coatings* as a plurality or plurality-plus opinion because he believed that the concurrence was not inconsistent with the majority opinion. *Id. at 288*. This court, or course, cannot overrule a Fifth Circuit opinion and must follow the majority's interpretation of *Commonweath Coatings*. Thus, to the extent the Texas caselaw and language from *Commonwealth Coatings* relied upon by Carlson runs contrary to the *Positive Software Solutions* majority's interpretation of the Supreme Court's holding, it is inapposite.

CSS argues that Carlson's allegations of partiality are remote and speculative and that the facts Carlson outlines as supporting improper motives **[*12]** do not meet the *Positive Software Solutions* standard. Dkt. 14. CSS agrees that Tagtmeier filed a notice of appearance in the *Hestia* matter on December 17, 2018, which was before the arbitration hearing, and that the lawyer for the defendants in that matter, Courtney Palm, worked for Hoover Slovacek. *Id.* It concedes that Tagtmeier filed a motion for reconsideration or new trial in *Hestia* three days after Carlson's counsel filed a notice of substitution indicating that they were now with the Hoover Slovacek firm, but CSS argues that these facts do not provide reason to conclude that Tagtmeier even saw and registered that Carlson's counsel had changed firms, made the connection it was the same firm as his adversary in *Hestia*, or, even if he did, thought that such a "tenuous circumstance" obligated him to disclose the connection. *Id.* It also points out that Tagtmeier was only brought into the *Hestia* matter on December 17, so there is no reason to speculate that he harbored ill will or enmity towards opposing counsel in the *Hestia* case. *Id.* As far as the motion for continuance being filed on the same day that Tagtmeier signed some orders in the arbitration, CSS argues that the motion was **[*13]** filed by opposing counsel in *Hestia* and signed by Tagtmeier's co-counsel, not Tagtmeier, and there is "no reason to speculate that Tagtmeier at that point even pieced together in his mind that his opposing counsel in *Hestia* was at the same firm as Carlson's counsel. *Id.* CSS asserts that the speculation that Tagtmeier may have thought his opposing counsel in *Hestia* came up with the Sherman Antitrust argument is "preposterous." *Id.* CSS points out that Tagtmeier is an experienced arbitrator and that his disclosures were extensive. *Id.* It argues that Tagtmeier was diligent and updated his disclosures at least four times while the arbitration was pending. *Id.* Finally, CSS asserts that the arbitration panel was composed of *three* members and issued an *unanimous* award, so the result of the arbitration would not have changed even if Tagtmeier were biased against Carlson's counsel. *Id.*

The court finds that the answer to each of these issues lies somewhere in the middle, but, regardless, Carlson has not met the stringent burden required to overturn an arbitration award for evident partiality. The court cannot conclude that a reasonable person would *have to* conclude that the arbitration panel was **[*14]** partial. While a reasonable person *could* conclude that Tagtmeier was partial and that he somehow influenced the other two arbitrators, a reasonable person could also conclude that the fact that his adversary in a lawsuit that Tagtmeier had recently been pulled into was at the same firm that Carlson's counsel had recently joined is inconsequential, and the fact that the award was unanimous from all three arbitrators supports the opposite conclusion. The adverse evidentiary rulings do provide some minimal additional support for Carlson's theory, but they are not clear cut errors that are sufficient to demonstrate bias. The court does find the nondisclosure troubling and believes that it presents an appearance of bias, but the standard for overturning an arbitral award for evident partiality is more stringent than appearance of bias, and Carlson does not meet his burden of a "concrete, not speculative impression of bias" under *Positive Solutions* and its progeny. The motion to vacate, as it relates to the argument of evident partiality on the part of Tagtmeier, is therefore DENIED.

B. *Subsection 10(a)(3)* - Failure to Hear Pertinent Evidence

The court must now turn to the argument that the **[*15]** court should vacate the award under subsection *10(a)(3)*. The court must determine whether Carlson had a fundamentally fair hearing, keeping in mind the arbitration panel's broad discretion in evidentiary matters. Carlson argues that the award should be vacated under subsection *10(a)(3)* because (1) Tagtmeier denied Carlson's motion to compel discovery of documents regarding CSS's plans to close, sell, or transfer the private banking business in the United States, which allowed damaging testimony to be presented with no opportunity for rebuttal or impeachment; (2) Tagtmeier refused to consider expert testimony regarding the promissory note actually being compensation and instead confined Carlson's experts to discussing tax treatment of the promissory note; and (3) Tagtmeier did not allow Carlson to question CSS's HRVP about CSS's alleged violation of the Sherman Antitrust Act and FINRA Rule 2010. Dkt. 13. The court will consider each of these arguments in turn.

1. Denial of Motion to Compel

Carlson contends that his ability to fully present his claim of fraudulent inducement was "crippled" when Tagtmeier denied his request to compel the production of material evidence. Dkt. 13. Namely, Carlson **[*16]** sought to compel production of documents relating to plans to close, sell, or transfer the CSS banking business in the United States, which Carlson contends he needed to prove that CSS fraudulently induced him to leave his former firm even though CSS knew it was going to close the division he was being induced to join. *Id.* Carlson contends that because Tagtmeier denied the motion to compel, the only evidence he could rely on for this fraudulent inducement theory was a Reuters article from January 2014 that claimed CSS had given the U.S. private wealth business eighteen months to turn around and spare the "'death sentence.'" *Id.* (quoting Dkt. 13, Ex. 11 at Carlson1117). This article was somewhat probative of the theory that CSS planned to close the private wealth management group when it hired Carlson in March 2014, but its evidentiary value was diminished when the person who was CEO of CSS's private banking division in the United States at the time testified during the hearing that the Reuters article mischaracterized and distorted a comment that the division would become profitable in eighteen months with no suggestion it would otherwise close. *Id.* (citing Dkt. 13, Ex. 12 at 1:54-58). **[*17]** Carlson argues that CSS's current CEO was responsible for the fate of the private wealth management group, and documents reflecting when discussions about the closure took place were needed to establish when the decision was made. *Id.* The current CEO, however, was not officially brought on board until 2015, which is long after Carlson was hired. *Id.* Nevertheless, Carlson argues that the current CEO admitted to having multiple meetings with CSS's chairman before he was hired, which Carlson appears to believe raises an inference that the current CEO was planning to close the division and had communicated those plans before he was officially hired. *Id.* Carlson points out that the Reuters article indicates that the restructuring was mapped out before the current CEO was hired. *Id.*

CSS argues that there were no plans to close the private banking business in the United States when Carlson was hired, and that, in fact, the decision was not made until the new CEO was hired in the second half of 2015 and conducted a strategic review of all of CSS's businesses. Dkt. 14. And, regardless, CSS contends that it produced hundreds of documents responsive to the discovery request for which Carlson filed **[*18]** the motion to compel. *Id.* Moreover, CSS notes that Carlson received a full and fair hearing during the arbitration on this issue: he questioned the CEO of CSS's private banking business in the United States at the time of the publication of the Reuters article about the article and CSS's plans. *Id.*

The court finds that the decision not to compel production did not deprive Carlson of a fair hearing. It was within the panel's discretion to determine whether compelling production was necessary, and it was definitely within its discretion to determine whether the production provided by CSS was sufficient. Moreover, Carlson had an opportunity to question the CEO who was in charge at the time, who indicated that the article was erroneous. It was certainly within the panel's discretion to decide the testimony was credible. Carlson was not deprived of a fair hearing due to the denial of the motion to compel. The motion to vacate on this ground is DENIED.

2. Limited Expert Testimony

Carlson next argues that Tagtmeier "placed handcuffs" on Carlson's experts, who would have testified that there was no bona fide loan and that Carlson therefore did not owe CSS anything. Dkt. 13. He contends that he **[*19]** offered Professor Kevin Yamamoto to explain how the promissory note and corresponding monthly bonus provision established that no bona fide loan existed. *Id.* However, CSS's counsel took the expert on voir dire at the hearing and, according to Carlson, commenced to "mischaracterize the anticipated testimony as *solely* limited to the tax treatment of this compensation scheme." *Id.* (citing Dkt. 13, Ex. 12 (MP3 file recordings) at 1:23-34). Carlson complains that Tagtmeier stated that CSS's objections to the expert were overruled, but then he strictly limited the testimony to how the compensation would be treated for taxable purposes. *Id.* (citing Dkt. 13, Ex. 12 at 1:50-51). Tagtmeier limited Carlson's other expert, Lance Stodghill, in the same way—overruling CSS's objections but limiting the testimony to taxable income. *Id.* (citing Dkt. 13, Ex. 12 at 2:47-48). Carlson relies on *Gulf Coast Industries Works Union v. Exxon Co., USA, 70 F.3d 847, 850 (5th Cir. 1995)*, to support his argument that the fact that Tagtmeier overruled CSS's objections but then improperly limited consideration of the testimony to tax purposes and ultimately ignored it with the award is reason to vacate the award.

CSS points out that the promissory note specifically states that if Carlson ceased to **[*20]** be a CSS employee, for any reason, the principal amount and interest would be immediately due and payable.[4] *Id.* (citing Dkt. 13, Ex. 14 at CS 000211-213 (the promissory note)). CSS notes that Carlson argued that the promissory note was not a bona fide loan because the Internal Revenue Service was likely to conclude that the money paid to Carlson in 2014 was taxable income. *Id.* Yamamoto was offered to testify about the following:

> I would like to offer you as an expert on the subject of treatments of transactions for tax purposes whether a loan is properly characterized as a loan or some other form of income, how that plays into the IRS code or the out pool [sic], IRS provisions, IRS, you know, tax court decisions, if any that are applicable, and with respect to the Tax Advisor Memorandum, and the interplay and mechanics between the employment agreement at issue in this case with Mr. Carlson and how that operates, together with the purported promissory note and the characteristics of those two documents when they are run together as opposed to just, you know, separately.

Dkt. 14-10 (Ex. I) at 734-35. Stodghill was offered to testify about the following:

> I would like to offer Mr. Stodghill **[*21]** as an expert to testify about applicable provisions of the Internal Revenue Code and IRS procedure, about the IRS's evaluation of compensation arrangements, and in particular out of the type of arrangement structured through the operation of this promissory note and employment agreement, the IRS's probably [sic.] treatment based on his experience and knowledge, of this — what we believe to be income in year 2014, IRS potential penalties and consequences, in the event that this income is examined by the IRS, whether through audit or through the amendment of Mr. Carlson's taxes, as well as the procedures and potential costs and steps necessary, in the event that this ends up in tax court, what that might involve and the cost thereof.

Dkt. 14-10 (Ex. I) at 796-97. CSS contends that it was reasonable for the panel to limit the expert testimony to tax as they were experts in tax, not securities industry compensation arrangements. Dkt. 14. It relies on *Owen v. Kerr-McGee Corp., 698 F.2d 236, 240 (5th Cir. 1983)* and *Federal Rule of Evidence 702*. *Id.*

The court has reviewed the transcript of the voir dire and testimony of these experts. Yamamoto is a professor at the South Texas College of Law Houston and has been there for twenty-three years. Dkt. 14-10 at 731. Yamamoto has **[*22]** written books on estate and gift taxation and federal tax research and has written five editions of a black letter outline about income taxation. *Id.* at 732. Yamamoto testified that he has never worked in the securities industry, has never been qualified as an expert on financial industry compensation practices or industry practices in the security industry, never been a contracts law professor and is not an expert in contract law, and is not an expert on the enforceability of notes. *Id.* at 736-41. Yamamoto specifically said he was not going to offer an opinion on the enforceability of the note and that the full extent of his opinion was when the funds received were "income." *Id.* at 741-42. CSS objected to Yamamoto testifying about even the tax treatment of the funds since the tax consequences were not determinative of whether it was a loan. *Id.* at 742-43. After going off the record, the arbitrators returned and said that the objection was overruled. However, after Yamamoto started testifying, Carlson's counsel asked if there are situations in which a transaction may look like a bona fide loan but not be properly treated as such, and CSS's counsel objected because Yamamoto was supposed to be opining about tax, not whether a loan **[*23]** is a loan. *Id.* at 749. Tagtmeier pointed out that the question is not what Yamamoto said he was going to testify about and made Carlson's counsel move on. *Id.* Later Tagtmeier clarified with the witness that all of his answers were "from a taxable standpoint" to which the witness responded affirmatively. *Id.* at 750.

Similarly, Stodghill testified that he "was brought in to testify about questions about the IRS procedural aspects of what could happen in this case." *Id.* at 795. Stodghill is an attorney whose practice consists primarily of representing taxpayers in matters involving the IRS. *Id.* Stodghill also teaches a class on federal tax procedures at the South Texas College of Law Houston. *Id.* Stodghill previously worked as an attorney for the IRS for many years. *Id.* Stodghill has never worked in the securities industry and has never been qualified to be an expert before. *Id.* at

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[4] The Promissory Note states that Carlson "agrees to pay to the order of [CSS] . . . the principal amount," which would be made on the last day of the first payroll period of each month for 108 months. Dkt. 13, Ex. 14 at CS 000211. It further states that if Carlson "cease[d], for any reason, to be an employee of [CSS] or one of its affiliates, the principal amount then outstanding and accrued but unpaid interest thereon shall become immediately due and payable." *Id.*

798. CSS objected to Stodghill testifying about evaluation of compensation agreements since he had no industry experience and to his testimony about the IRS probable treatment because it would be duplicative of Yamamoto's testimony. *Id.* at 802-03. CSS also objected to Stodghill testifying about penalties or consequences for not declaring the payment he received **[*24]** from the promissory note as income and the cost in tax court because these issues were not relevant. *Id.* at 803. The panel, after another brief recess, overruled the objection but specifically noted that, like with Yamamoto, the testimony must "be based solely upon taxable income and not on anything else . . . ." *Id.* at 806-07.

While an arbitration panel is not generally bound by all the strictures of the Federal Rules of Evidence, it is worth discussing *Rule 702*, which is also cited by CSS. Under *Rule 702*, a proposed expert must be "qualified as an expert by knowledge, skill, experience, training, or education." *Fed. R. of Evid. 702*. Federal trial courts act as gatekeepers for expert testimony, and while experts do not have to be highly qualified to testify, courts need not admit testimony that is based purely on the *ipse dixit* of the expert. *Daubert v. Merrell Dow Pharms., 509 U.S. 579, 592-93, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*; *Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)*; *Huss v. Gayden, 571 F.3d 442, 452 (5th Cir. 2009)*. Here, both of these experts clearly were experts in tax, not the securities industry. Yamamoto even testified that he was only planning to testify about whether the funds were "income." Under these facts, it would not be surprising if a judge acting as a gatekeeper and enforcing the Federal Rules of Evidence were to limit the expert testimony to tax treatment.

The court will, nevertheless, consider **[*25]** the caselaw cited by the parties. In *Gulf Coast Industries*, during the hearing, Exxon attempted to prove up a report as a business record, but the arbitrator informed Exxon that it did not have to be proved up because it was already in evidence. *70 F.3d at 849*. However, when the arbitrator issued the ruling, the arbitrator found that the report was hearsay that "did not even have the status of a business record." *Id.* (summarizing the ruling). The district court vacated the award, finding that the arbitrator had "lulled Exxon into believing" that the report was admitted and then refused to consider it. *Id. at 849-50* (summarizing the district court's ruling). The Fifth Circuit affirmed, noting that not only did the arbitrator refuse to hear material evidence, "he prevented Exxon from presenting additional evidence by misleading it into believing [the report] had been admitted as a business record." *Id.* The Fifth Circuit held that "such conduct falls squarely within the scope of *Section 10*, and is grounds for vacatur." *Id.*

Here, Carlson attempts to draw parallels with *Gulf Coast* by arguing that Tagtmeier essentially lulled his counsel into believing the testimony of Carlson's experts would be allowed and then proceeded to **[*26]** limit the testimony. This case, however, is not on point at all. Carlson's counsel knew during the hearing that the arbitrator was limiting the scope of the testimony of his experts; the arbitrator did not come back later after it was too late for counsel to do anything about it and change the rules. While the court understands that, at least with Yamamoto, Carlson's counsel may have initially believed his expert was going to be able to testify beyond tax treatment since CSS's objection to the expert was overruled, it quickly became apparent that the arbitrator was limiting the testimony to tax treatment.

CSS cites *Owen v. Kerr-McGee Corp.* for the proposition that the arbitration panel appropriately allowed the experts to testify within their areas of expertise but did not allow them to testify about the ultimate legal issue before the panel—whether the promissory note was an enforceable loan that needed repaid. Dkt. 14. In *Owen*, the Fifth Circuit instructed that "questions which would merely allow the witness to tell the jury what result to reach are not permitted." *698 F.2d at 240*. It pointed out that "allowing an expert to give his [or her] opinion on the legal conclusions to be drawn from the **[*27]** evidence both invades the court's province and is irrelevant." *Id.* This case is on point to the extent that the panel excluded legal opinions about whether the promissory note was an enforceable loan.

The court finds that the panel's refusal to allow the two experts' testimony to go beyond the bounds of the tax treatment of the funds Carlson received from the promissory note did not deprive Carlson of a fair hearing. These two experts had expertise in tax, not the securities industry. The motion to vacate based on this argument is DENIED.

3. Refusal to Allow Human Resources Testimony About a Document

Carlson's final argument is that Tagtmeier refused to permit him to introduce evidence to support his claim that CSS violated FINRA Rule 2010.[5] Dkt. 13. Carlson sought to question CSS's HRVP about the DOJ Publication, which Carlson asserts was a publication specifically for human resources professionals. *Id.* According to Carlson, the publication indicates that sharing compensation information between competitors is contrary to the Sherman Antitrust Act and FINRA Rule 2010. *Id.* Carlson wanted to prove that CSS shared compensation information for approximately 300 of its brokers with Wells Fargo, giving Wells **[*28]** Fargo an undue advantage that depressed the market for Carlson's services. *Id.* Carlson contends that he was offered a less competitive compensation package from Wells Fargo as a result. *Id.* Carlson argues that he was unable to fully develop this argument through testimony during the arbitration hearing because the panel limited his ability to question the HRVP. *Id.* Carlson also contends that Tagtmeier refused to compel discovery of information about the compensation of similarly situated CSS employees who transitioned to Wells Fargo, which he contends further prejudiced him by cutting off the only other reasonable means of proving this theory. *Id.* Carlson believes that Wells Fargo obtained an anticompetitive advantage through its deal with CSS, which he contends violated the Sherman Antitrust Act, resulting in Carlson receiving a significantly lower sign-on bonus than he believes he should have received. *Id.* Carlson asserts that this is not a speculative argument, as the former CEO who testified at the hearing agreed that Wells Fargo's agreement with CSS placed it in a better position than its competitors to recruit CSS's financial advisors. *Id.* Carlson contends, however, that the **[*29]** "glue" he needed for this argument was the testimony of the HRVP showing that the arrangement was illegal under the Sherman Antitrust Act and a violation of FINRA Rule 2010. *Id.*

According the Carlson, CSS did not object to the DOJ Publication as evidence during the hearing but did object to the HRVP discussing it and further asserted that an exception applied to the CSS/Wells Fargo situation. *Id.* Tagtmeier sustained the objection to questioning the HRVP about the document, and Carlson contends that he needed to question the HRVP about the document to show that the carve outs for mergers asserted by CSS were not applicable. *Id.* Carlson complains that he could possibly have used compensation data instead to show that CSS illegally shared with Wells Fargo, but Tagtmeier denied his request to compel that discovery. *Id.*

CSS contends that it was not misconduct for the panel to disallow questioning about the DOJ Publication as Carlson did not even plead an affirmative claim for a violation of FINRA Rule 2010. Dkt. 14. Instead, he made the argument about the alleged violation of the Sherman Antitrust Act which constituted a violation of FINRA Rule 2010 in his opening and closing statements at the hearing. *Id.* The DOJ **[*30]** Publication had not been produced during discovery, which is required under FINRA rules, but CSS did not object to the document itself, only to the questioning of the HRVP about it. *Id.* When Tagtmeier ruled on the objection, he stated that the panel members would read the DOJ Publication and decide what weight to give it, but he did not allow Carlson's counsel to question the HRVP about it. *Id.*

The court has reviewed excerpts of the testimony of the HRVP. It is clear that Carlson's counsel was able to question the HRVP about whether she learned about the risks of sharing compensation information among competitors as a possible violation of ***antitrust law***, and she answered in the affirmative. Dkt. 14-11 at 1192. There were specific objections made when counsel tried to question her about legal issues because the HRVP is not a lawyer. *See id.* at 1192-98. Carlson was, however, able to ask the HRVP if Wells Fargo was given a "leg up on the competition" when it was announced that CSS was leaving the US market, and the HRVP testified that there was an exclusive recruiting agreement with Wells Fargo so as to offer a smooth transition. *Id.* at 1199. Thus, Carlson was not, as he contends, cut off from the only reasonable **[*31]** means of proving his theory. The arbitrators agreed

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[5] FINRA Rule 2010 "requires members, in the conduct of their business, to observe high standards of commercial honor and just and equitable principles of trade. Rule 2010 protects investors and the securities industry from dishonest practices that are unfair to investors or hinder the functioning of a free and open market, even though those practices may not be illegal or violate a specific rule or regulation. Dkt. 13-16 (Financial Industry Regulatory Authority, Regulatory Notice 08-57 (Oct. 2008, effective Dec. 15, 2008)).

to look at the document, Carlson's counsel was able to make his arguments, and he was able to question the HRVP about alleged anticompetitive activity.

CSS argues that the decision not to let Carlson question the HRVP about the DOJ Publication was reasonable because (1) the document is merely a statement of policy from the DOJ; (2) it was not produced during discovery; (3) the HRVP was not familiar with the document; (4) it was admitted into evidence; (5) Carlson was only planning to read parts of the document and ask the HRVP if she agreed; (6) the HR Publication was published in October 2016, which was a year after the events in 2015 that were subject to the arbitration; and (7) even if it were published earlier, Carlson's arguments regarding the document were invalid because the arrangement CSS had with Wells Fargo was a collaboration between the two companies and appropriate precautions were taken, which is an exception in the document. *Id.* Carlson argues in response to these contentions that CSS was permitted to argue it had satisfied a safe harbor but he was not allowed to confront the HRVP with the DOJ's own guidelines, which **[*32]** resulted in an improper impediment to his case. Dkt. 15.

The court disagrees with Carlson's argument that Tagtmeier impeded the development of his case by not allowing him to question the HRVP about the document and not compelling discovery of the compensation data. In his closing arguments, Carlson's counsel noted that he did not plead the Sherman Antitrust Act but went on to assert that CSS gave Wells Fargo their entire book and that while the agreements may not be illegal, they may be subject to civil liabilities if they have an anticompetitive effect. Dkt. 14-15 (excerpts from closing) at 1349-50. Carlson made his arguments and the document was admitted into evidence for the arbitration panel to consider if it deemed it relevant. Of course, as CSS points out, it may not have even deemed it relevant since it was issued after the events at issue in this case.

The court finds that failing to allow Carlson to question the HRVP about this document that she was not even familiar with and had not been disclosed prior to the hearing is not an instance of the arbitrator or the panel depriving Carlson of a fair hearing. Thus, Carlson's motion to vacate based on that ruling and the failure **[*33]** to allow additional discovery into this unpled theory is DENIED.

C. Petition to Confirm

Having denied all the grounds for vacatur, the court now turns to CSS's petition to confirm. *See* Dkt. 1. CSS seeks a judgment that confirms the award, awards CSS costs incurred in connection with the proceedings to confirm the award, and awards pre-judgment and post-judgment interest. *Id.* A motion to confirm an arbitration award is a summary proceeding. *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997)*. A district court's review of an arbitration award is "exceedingly deferential." *Brabham v. A.G. Edwards & Sons, Inc., 376 F.3d 377, 380 (5th Cir. 2004)*. "If an [arbitration] award is rationally inferable from the facts before the arbitrator, the award must be affirmed." *Kergosien v. Ocean Energy, Inc., 390 F.3d 346, 353 (5th Cir. 2009)*.

Under *9 U.S.C. § 9*, "at any time within one year after the award is made any party to the arbitration may apply to the court . . . for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in *sections 10* and *11* of this title." *9 U.S.C. § 9*. Thus, if a party seeks confirmation of an arbitration award within one year of the award, the court must confirm the award unless notice of a motion to vacate, modify, or correct is served on the adverse party within **[*34]** three months of the granting of the award. *9 U.S.C. § 12*.

CSS timely filed its petition to confirm the award, and Carlson has provided no valid ground for vacatur. Accordingly, the award is CONFIRMED pursuant to *9 U.S.C. § 9*.

CSS has requested post-judgment interest pursuant to *28 U.S.C. § 1961* as well as costs. Dkt. 1. Costs may be awarded pursuant to *28 U.S.C. § 1920*. The motion for costs is GRANTED. CSS shall file a bill of costs within fourteen days of judgment as required under the Southern District of Texas *Local Rule 54.2*. *See* S.D. Tex. *L.R. 54.2*; *see also 28 U.S.C. § 1920* (outlining the types of costs the clerk may tax).

Finally, CSS requests an award of interest. "Interest shall be allowed on any money judgment in a civil case recovered in district court." *28 U.S.C. § 1961*. Accordingly, CSS's request for interest pursuant to *§ 1961* is GRANTED, and CSS is AWARDED post-judgment interest as computed under that statute.

IV. CONCLUSION

Carlson's motion to vacate the arbitration award (Dkt. 9) is DENIED. CSS's petition to confirm the award (Dkt. 1) is GRANTED and the award is CONFIRMED. CSS is also AWARDED costs under *28 U.S.C. § 1920* and post-judgment interest pursuant to *28 U.S.C. § 1961*. The court will issue a final judgment concurrently with this order.

Signed at Houston, Texas on January 2, 2020.

/s/ Gray H. Miller

Gray H. Miller **[*35]**

Senior United States District Judge

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Radio Music License Comm., Inc. v. Global Music Rights, LLC

United States District Court for the Central District of California

January 2, 2020, Decided; January 2, 2020, Filed

CV 19-3957 TJH (ASx)

Reporter
2020 U.S. Dist. LEXIS 243375 *; 2020 WL 7636281

Radio Music License Committee, Inc. v. Global Music Rights, LLC

Subsequent History: Motion denied by, Without prejudice, Request denied by, Without prejudice, Request granted, As moot *Radio Music License Comm., Inc. v. Global Music Rights, LLC, 2020 U.S. Dist. LEXIS 243374 (C.D. Cal., Jan. 2, 2020)*

Core Terms

documents, discovery, licenses, radio, songwriter, Music, terrestrial, affiliates, radio station, royalty, entities, nonradio, Interrogatory, rights, antitrust, business strategy, relevant market, negotiates, equity interest, nonterrestrial, broadcast, requests, subpoena, alleges, asserts, rights organization, produce documents, anticompetitive, performing, repertory

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Judges: Alka Sagar, United States Magistrate Judge.

Opinion by: Alka Sagar

Opinion

CIVIL MINUTES - GENERAL

Proceedings (In Chambers): Order DENYING WITHOUT PREJUDICE Radio Music License Committee, Inc.'s Motion to Compel Responses to Requests for Production of Documents and Interrogatories (Dkt. Nos. 178, 179, 180, 181, 183, 188, 192)

On November 26, 2019, the parties filed a Joint Stipulation ("Joint Stip.") regarding Radio Music License **[*2]** Committee, Inc.'s Motion to Compel Responses to Requests for Production of Documents and Interrogatories ("Motion to Compel") (Dkt. No. 178), together with declarations in support of each party's position (Dkt. Nos. 179, 180, 181). On December 20, 2019, the parties filed supplemental memoranda in support of their positions.[1] (Dkt. Nos. 188, 192). The Court finds this discovery dispute appropriate for resolution without a hearing. For the reasons discussed below, the Motion is **DENIED WITHOUT PREJUDICE**.

A. Background

Founded in 2013, Global Music Rights, LLC ("GMR") is a "boutique" performing rights organization ("PRO"), which represents fewer than 100 songwriters and has a repertory of about 40,000 songs. (Joint Stip. at 11). The vast majority of songwriters are represented by one of two PROs: Broadcast Music Inc. ("BMI") or American Society of Composers, Authors, and Publishers ("ASCAP"). (Id. at 6). BMI represents more than 1 million artists and has a repertory of 15 million compositions. (Id. at 11). ASCAP's membership includes over 725,000 artists and has over 11 million licensed works in its repertory. See <ascap.com/about-us> (last visited December 10, 2019). PROs provide valuable services to the **[*3]** music industry: efficient licensing and effective oversight. *Radio Music License Comm., Inc. v. SESAC, Inc., 29 F. Supp. 3d 487, 490 (E.D. Pa. 2014)*. "By obtaining, cataloging, and (in many cases) bundling copyrights into composite licenses, they offer consumers the opportunity to purchase the rights to thousands of musical works without the costly and time-consuming process of negotiating the terms and conditions of each individual performance." *Id. at 490-91*. "Furthermore, PROs police the music industry by investigating and prosecuting unauthorized users—those who publicly perform copyrighted works without a license—an otherwise costly prospect for copyright owners." *Id. at 491*. Given their substantial size, BMI and ASCAP have for decades been subject to a consent decree with the Department of Justice. See *United States v. Broad. Music, Inc., 426 F.3d 91, 93 (2d Cir. 2005)*. Among other provisions, the consent decrees provide a procedure whereby ASCAP, BMI, or their prospective licensees may petition a designated "rate court" in the Southern District of New York for the determination of a reasonable license fee. See id.

Radio Music License Committee, Inc. ("RMLC") is a trade association that negotiates public-performance-right licenses on behalf of terrestrial radio stations in the United States. (Joint Stip. at 1, 11). RMLC has 3,000 members, who collectively **[*4]** account for 10,000 radio stations and 90% of the terrestrial radio market. (Id. at 11). "RMLC seeks to obtain fair and reasonable license fees on behalf of radio stations, negotiates for per-program and blanket-license carve outs that allow stations to achieve further fee discounting, and aims to achieve the broadest possible licenses covering new-media applications, including HD multicasting and streaming." *Radio Music License Comm., 29 F. Supp. 3d at 491* (citation omitted).

In November 2016, RMLC filed a lawsuit against GMR in the Eastern District of Pennsylvania, alleging that GMR has violated the Sherman Antitrust Act. RMLC v. GMR, No. 16-6076 (E.D. Pa. filed Nov. 18, 2016). On March 29, 2019, after finding that it did not have personal jurisdiction over GMR, the Pennsylvania district court transferred the case to this Court. (Dkt. No. 117). In a related case, GMR sued RMLC in this Court, alleging that RMLC conducts an unlawful monopsony in violation of the Sherman Act and California antitrust laws. GMR v. RMLC, No. 16, 9051 (C.D. Cal. filed Dec. 6, 2016). Fact discovery, which closes March 2, 2020, is consolidated in these two cases.

In its Motion, RMLC seeks an order compelling GMR to comply with RMLC's Request for Production Nos. 21, **[*5]** 28, 29, 30, 32, 35, 46 and 47 and Interrogatory No. 3, as modified in the Joint Stipulation. (Motion at 2).[2] Specifically, RMLC seeks financial and business strategy documents and documents evincing GMR's business dealings with nonradio entities. (Joint Stip. at 1-3).

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[1] On December 27, 2019, the Court granted Radio Music License Committee's request to file its supplemental memorandum under seal. (Dkt. Nos. 183, 191).

[2] The Joint Stipulation and related filings were filed in each of the related cases. See GMR v. RMLC, No. 16-9051 (C.D. Cal. filed Nov. 26, 2019) (Dkt. Nos. 106-109, 115, 124).

B. Legal Standards

A party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." *Fed. R. Civ. P. 26(b)(1)*. Nevertheless, information "need not be admissible in evidence to be discoverable." Id. Thus, relevance, for purposes of discovery, is defined broadly, and "[d]iscovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery." *Fed. R. Civ. P. 26(b)(1)* advisory committee's note (2015); see *Garneau v. City of Seattle, 147 F.3d 802, 812 (9th Cir. 1998)*. However, under amended *Rule 26(b)*, discovery must be "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Fed. R. Civ. P. 26(b)(1)*. This proportionality requirement "is **[*6]** designed to avoid . . . sweeping discovery that is untethered to the claims and defenses in litigation." *Mfg. Automation & Software Sys., Inc. v. Hughes, No. CV 16-8962, 2017 U.S. Dist. LEXIS 217699, 2017 WL 5641120, at *5 (C.D. Cal. Sept. 21, 2017)*.

Motions to compel are governed by *Rule 37*, which allows a party to "move for an order compelling disclosure or discovery." *Fed. R. Civ. P. 37(a)(1)*. "A party seeking discovery may move for an order compelling... production... if ... a party fails to produce documents . . . as requested under *Rule 34*." *Fed. R. Civ. P. 37(a)(3)(B)(iv)*. *Rule 34* provides that a party may serve on any other party a request to produce documents or electronically stored information within the party's possession, custody, or control that is otherwise within the scope of *Rule 26*. *Fed. R. Civ. P. 34(a)(1)(A)*. "Upon a motion to compel discovery, the movant has the initial burden of demonstrating relevance." *United States v. McGraw-Hill Companies, Inc., No. CV 13-0779, 2014 U.S. Dist. LEXIS 59425, 2014 WL 1647385, at *8 (C.D. Cal. Apr. 15, 2014)*. Further, district courts have "broad discretion" to control discovery and in determining relevancy for discovery purposes. See *Hallett v. Morgan, 296 F.3d 732, 751 (9th Cir. 2002)* (citation and alteration omitted).

C. Discussion

"The antitrust laws of the United States aim to protect consumers by maintaining competitive markets." *In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1191 (9th Cir. 2015)*. To that end, the Sherman Act bars "[e]very contract, combination in the form of trust or otherwise, or conspiracy, **[*7]** in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. Nevertheless, the Supreme Court has long recognized that *§ 1* "outlaw[s] only unreasonable restraints." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. Thus, the "rule of reason is the accepted standard for testing whether a practice restrains trade in violation of *§ 1*." *Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. In analyzing agreements under the rule of reason, "courts examine 'the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed,' to determine the effect on competition in the relevant product market." *In re Musical Instruments, 798 F.3d at 1191-92* (quoting *Nat'l Soc. of Prof'l Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978))*. Some restraints of trade are so inherently anticompetitive, however, that they are subject to the per se rule, under which they are "deemed to be unlawful in and of themselves." *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*; accord *In re Musical Instruments, 798 F.3d at 1191*. By "treating categories of restraints as necessarily illegal," the per se rule "eliminates the need to study the reasonableness of an individual restraint." *Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*.

1. GMR's Financial and Business Strategy Documents (RFP Nos. 30, 32, 46, and 47)

RMLC seeks to compel GMR to produce certain **[*8]** financial and business strategy documents, which are designed to determine GMR's financial and business strategies when it formed in 2013, what it told potential investors about those strategies, and how its strategies have subsequently changed or evolved. (Joint Stip. at 13). Specifically, RMLC seeks the following documents from 2011 through June 2019: (1) Any financial budgets or forecasts for GMR or the performing rights organization that eventually formed as GMR (RFP No. 30); (2) Any projections, assessments, or predictions relating to future rates, revenues, growth, and profitability for GMR or the performing rights organization that eventually formed as GMR (RFP No. 32); (3) All prospectuses, financial materials, or other business documents concerning the sale of, or offer to sell, any ownership interest in GMR or the performing rights organization that eventually formed as GMR, including voting and non-voting shares (RFP No. 46); and (4) All business plans, strategic plans, marketing plans or other financial or business strategy documents for GMR or the performing rights organization that eventually formed as GMR (RFP No. 47). (Id. at 14-15).

RMLC asserts that GMR has "refused[ed] to produce **[*9]** any of its financial or business strategy documents." (Joint Stip. at 1; see Dkt. No. 192 at 1-3). RMLC fails to acknowledge, however, that GMR has already agreed to produce "voluminous" financial and business strategy documents. (Joint Stip. at 21-25). Indeed, GMR has agreed to produce documents within the following categories from its designated document custodians:

(1) Agreements with GMR's past and present equity owners (RFP No. 2);

(2) Organizational charts and other corporate governance documents, as well as notes and minutes from meetings of GMR's governing bodies (RFP Nos. 3, 4);

(3) Documents from January 1, 2011, concerning the nature and purpose of GMR's creation (RFP No. 5);

(4) Documents concerning any agreement between or among Global Music Rights' affiliates concerning GMR or any new PRO in which Mr. Grimmett or Mr. Azoff was involved (RFP No. 9);

(5) Agreements with GMR's songwriters, and documents concerning the negotiation of those agreements (RFP Nos. 10, 12);

(6) Documents since January 1, 2010 concerning communications between Mr. Azoff and Mr. Grimmett on the one hand and any person who became a GMR affiliate on the other hand concerning the licensing of public performance **[*10]** rights (RFP No. 13);

(7) Documents since January 1, 2010 concerning actual or proposed agreements concerning the licensing of public performance rights between Mr. Azoff or Mr. Grimmett on the one hand and anyone who became a GMR affiliate on the other hand (RFP No. 14);

(8) Documents since January 1, 2010 discussing, reflecting, or identifying the terms of any agreement concerning the licensing of public performance rights between Mr. Azoff, Mr. Grimmett, or GMR on the one hand, and any GMR affiliate on the other that are not reflected in the affiliate agreement (RFP No. 15);

(9) Documents concerning Mr. Azoff's, Mr. Grimmett's, or GMR's strategies related to which potential affiliates to include in (or add to) GMR's repertory, and communications and documents exchanged with those potential affiliates, including internal or external communications about the possibility of the songwriters who hold nonvoting shares of GMR joining GMR as affiliates (RFP No. 16);

(10) Documents sent to affiliates and potential affiliates concerning compensation they will or could receive if they join a new PRO involving Mr. Azoff or Mr. Grimmett (RFP Nos. 17, 19);

(11) Documents identifying royalties paid **[*11]** to each GMR songwriter that are attributable to terrestrial radio (RFP No. 20);

(12) Documents concerning the amount of terrestrial radio royalties paid to GMR songwriters, both individually and in the aggregate, including how GMR determines those royalty rates and GMR's projections of terrestrial radio royalties (RFP No. 21);

(13) Documents concerning alternatives to blanket licenses (including adjustable-fee blanket licenses and per-program licenses) in the terrestrial radio context, including, *inter alia*, documents concerning whether or why GMR offers, has offered, will offer, or has not offered such licenses (RFP Nos. 24-26);

(14) Documents identifying the revenue and profit margin GMR derives from each songwriter in connection with terrestrial radio licenses (RFP No. 27);

(15) Documents identifying accounting data for terrestrial radio, including costs, revenue, profits, and losses, since GMR's formation (RFP No. 28);
(16) Monthly, quarterly, and annual financial statements with respect to terrestrial radio, for each year of GMR's existence (RFP No. 29); and
(17) Documents concerning GMR's marketing efforts to radio entities (RFP No. 75).

(Dkt. No. 181 (McIntyre Decl.) at ¶ 18(a)-(q)). **[*12]** RMLC does not explain why it needs more than the "thousands" of documents responsive to these 17 categories, which GMR has agreed to produce. (Joint Stip. at 21-22). Indeed, given that discovery is ongoing, RMLC should review GMR's production before asserting that GMR's production is insufficient.

RMLC also fails to make a specific demonstration of relevancy for the additional documents it seeks. See *Kaseberg v. Conaco, LLC, No. 15 CV 1637, 2016 U.S. Dist. LEXIS 97581, 2016 WL 3997600, at *10 (S.D. Cal. July 26, 2016)* (denying motion to compel where party failed to make a "specific showing that the requested documents would lead to relevant evidence") (quoting *Nugget Hydroelectric, L.P. v. Pac. Gas & Elec. Co., 981 F.2d 429, 438-39 (9th Cir. 1992))*; *Fed. R. Civ. P. 26(b)(1)*. While RMLC argues that the requested documents "are highly likely to contain proof of the anticompetitive scheme that [it] alleges" (Joint Stip. at 15), RMLC does not describe how budgets, forecasts, projections, marketing plans, or strategies would contain this information. RMLC further contends that GMR's "own documents" will demonstrate that radio stations had never heard of GMR and those that had heard of GMR did not believe they needed a license from it. (Joint Stip. at 18). But it is not clear which document request at issue would answer this question. Moreover, RMLC does not explain why it needs GMR documents to determine whether its **[*13]** own member radio stations had heard of GMR or believed they did not need a license. In any event, GMR has already agreed to produce documents related to its marketing efforts to radio entities. (McIntyre Decl. ¶ 18(q)). Finally, RMLC vaguely asserts that "materials prepared to attract investors" will evince "how [GMR affiliates] came to be investors, why they decided to do so, and what commitments they made as investors are all highly relevant to proving the concerted action that RMLC has alleged." (Joint Stip. at 17). But GMR has already agreed to produce "documents and communications exchanged with songwriter affiliates who became equity owners; documents concerning equity interests that Global Music Rights offered to or paid any songwriter affiliate; agreements between Global Music Rights and its equity owners; and documents concerning the negotiation of its songwriter affiliate agreements." (Joint Stip. at 26-27; see McIntyre Decl. ¶¶ 18-19).

Nor are RMLC's requests for additional documents proportional to the needs of the case. Even if RMLC could demonstrate that the additional documents have some marginal relevancy—which it has not done—RMLC has not satisfied the proportionality **[*14]** requirement. GMR has attested that it would need to review more than 150,000 additional documents, costing between $100,000 and $700,000, to respond in full to RFP Nos. 30, 32, 46, and 47. (Joint Stip. at 29; McIntyre Decl. ¶¶ 31-32). Given that GMR has already committed to substantial production of its financial and strategic documents, RMLC has failed to demonstrate that any marginal relevance of the four additional requests outweighs the substantial burden to produce.

RMLC's request to compel documents responsive to RFP Nos. 30, 32, 46, and 47 is **DENIED WITHOUT PREJUDICE**. If, after reviewing GMR's production, RMLC still believes that material gaps remain, it should raise the issues with GMR. Thereafter, if the issues remain unresolved, RMLC may raise its concerns with the Court, preferably via the Court's informal discovery dispute resolution process.

2. GMR's Dealings with Nonradio Entities (RFP Nos. 19, 21, 28, 29, 35 and Interrogatory No. 3)

RMLC seeks to compel GMR to produce details regarding its "dealings with entities other than broadcast radio stations." (Joint Stip. at 30; see Dkt. No. 192 at 3-5). Specifically, RMLC seeks the following information from GMR's formation through **[*15]** June 2019 (except at noted):

(1) Documents sufficient to show how GMR calculates the rates that it charges (or attempts to charge) nonradio entities for licenses to GMR's Repertory, and the reasons for any changes to those rates. This would include producing the actual license agreements with these entities (RFP No. 35).

> (2) Documents sufficient to show GMR's accounting data—including costs, revenue, profits, or losses (both net and gross) relating to nonmusic entities for all years since GMR was formed (RFP No. 28).
> (3) GMR's quarterly and annual financial statements—including any statements concerning nonmusic entities (RFP No. 29).
> (4) From January 1, 2010, to June 5, 2019, documents sufficient to identify any and all advances, upfront payments, bonuses, royalty guarantees or equity interests that GMR, Azoff, or Grimmett proposed to pay any Affiliate, including any condition, stipulation, or expectation accompanying any such advance or up-front payment (RFP No. 19).[3]
>
> (5) Documents sufficient to show (or an interrogatory response identifying) the amount of annual compensation, on both an aggregate and individual basis, that GMR has paid to each of its Affiliates, including both royalties **[*16]** and other payments in the form of advances, bonuses, royalty guarantees, or equity interests (RFP Nos. 19, 21; Interrogatory No. 3).
> (6) Documents sufficient to show how GMR calculates, elects, determines, or decides upon the rate or amount of royalties that it pays to each of its Affiliates, and any projections or estimates made or contributed to regarding the amount of royalties it must pay each of its Affiliates in the future (RFP No. 21).

(Id. at 33-34) (footnotes omitted).

RMLC has not demonstrated that its requests are relevant. In an antitrust case, courts generally limit discovery to the ambit of the applicable market. See *Vident v. Dentsply Int'l, Inc., No. SA CV 06-1141, 2008 U.S. Dist. LEXIS 110399, 2008 WL 4384124, at *2 (C.D. Cal. Aug. 29, 2008)* (finding no abuse of discretion in magistrate judge's ruling that "the definition of the relevant market in [this antitrust] case determines the scope of allowable discovery"); *Bal Seal Eng'g, Inc. v. Nelson Prod., Inc., No. 13 CV 1880, 2017 U.S. Dist. LEXIS 231324, 2017 WL 10311212, at *1 (C.D. Cal. Oct. 19, 2017)* (finding that "the definition of the 'relevant market' defines the scope of relevant discovery"); *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., No. 05-2164, 2007 U.S. Dist. LEXIS 66159, 2007 WL 2668742, at *11 (D. Kan. Sept. 6, 2007)* (finding that discovery outside the relevant geographic market "not relevant on its face"); see generally *Jones v. Metzger Dairies, Inc., 334 F.2d 919, 922 (5th Cir. 1964)* ("discovery procedures must be limited if antitrust cases are to be kept within 'reasonable bounds'"). Here, both parties' complaints identify terrestrial radio licenses as the **[*17]** applicable market. In its Second Amended Complaint ("RMLC SAC"), RMLC alleges that GMR has monopoly power because "*radio stations* have no choice but to take a license from all the PROs'" (RMLC SAC at ¶ 18 n.5) (emphasis added). This "shakedown" occurs because "*[r]adio stations* often do not know what songs will appear on their programming and certainly do not control the choice of music they broadcast in a wide range of scenarios." (Id. ¶ 44) (emphasis added). Thus, the foundation of RMLC's market theory—that radio stations cannot avoid playing GMR's licensed songs—is specific to *terrestrial radio stations*. Further, the basis for RMLC's allegation that GMR seeks to charge "supracompetitive" rates is that the fees requested—although never imposed—are not commensurate with GMR's "'spinshare' of U.S. *radio music*." (Id. ¶¶ 49-50) (emphasis added). Further, RMLC's own expert in this case asserts that "the relevant product market for the bundle of performance rights that GMR licenses includes the other performance rights that *radio stations* view as good *substitutes* for a GMR license." (RMLC v. GMR, No. 19-3957, Dkt. No. 85-4 (Petersen Decl.) at ¶ 32) (first emphasis added).

GMR agrees that **[*18]** the buyers in the relevant market are terrestrial radio stations. In its First Amended Complaint ("GMR FAC"), GMR alleges that the relevant market is "the market for licenses to broadcast copyrighted music on terrestrial commercial radio stations in the United States." (GMR FAC ¶ 82). This assertion is based in part on RMLC's former chairman, who testified to Congress that "[i]t's important to distinguish here between pure webcasters (or internet radio), satellite radio, and terrestrial radio." (Id. ¶ 88). The former chairman explained that "terrestrial radio is unique not only from the vantage point of music listeners, but from copyright holders as well." (Joint Stip. at 51; see GMR FAC at ¶ 88; McIntyre Decl. Ex. M). GMR agrees, alleging that "[t]he broadcasting of copyrighted music by terrestrial radio is not reasonably interchangeable with other forms of media distribution, such

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[3] Prior to RMLC filing its Motion to Compel, GMR had already agreed to comply with RFP No. 19. (Joint Stip. at 47; McIntyre Decl. J 16). Thus, RMLC's request to compel compliance with RFP No. 19 is **DENIED AS MOOT**.

as satellite-based or internet transmission," because *inter alia*, "terrestrial radio is freely available to hundreds of millions of listeners and is their primary source of music and those listeners are not likely to switch to another medium." (GMR FAC ¶ 86). Thus, while GMR and RMLC may dispute whether **[*19]** the *sellers* in the relevant market are PROs generally or GMR by itself, they agree that the *buyers* are terrestrial radio stations.

Nevertheless, RMLC asserts that it needs nonradio entity discovery to rebut GMR's alleged relevant market. (Joint Stip. at 34-37). RMLC contends that GMR must produce documents showing how GMR has determined each rate it has charged or attempted to charge any licensee (RFP No. 35), all "accounting data" for its entire existence (RFP No. 28), and all royalties and compensation GMR has ever paid any songwriter (RFP No. 21; Interrog. No. 3), so that RMLC can determine whether terrestrial radio affords "unique promotional support . . . to songwriters, record labels, and artists," and whether, "from the vantage point of a PRO or copyright holder, there is simply no substitute for broadcasting by terrestrial radio." (Joint Stip. at 33-34, 35). But the "unique promotional support" referenced in GMR's complaint is the language that *RMLC's* chairman used when testifying before Congress. (Id. at 55; McIntyre Decl. Ex. M). Further, as discussed above, RMLC has consistently asserted that terrestrial radio stations are the relevant market.

Next, RMLC contends that it needs discovery **[*20]** regarding nonradio entities to rebut GMR's allegations regarding the anticompetitive effects of RMLC's monopsony power. (Joint Stip. at 37-39). RMLC focuses on the following effects alleged in GMR's complaint: (1) the suppression of license fees caused by RMLC's price-fixing; and (2) the resultant diminishing of songwriters' incentives to copyright new compositions. (Id.). But the price effect of monopoly power is generally determined by comparing actual prices to what the prices would be but for the anticompetitive conduct alleged. See Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application ¶ 398(c) (4th ed. 2013-2018) ("the competitive price, which is determined by competitive market forces, is the price but for the illegal price fixing"). In regards to whether RMLC's activities have diminished songwriters' incentive to create new works, GMR has already agreed to produce information response to RFP No. 19, which seeks documents concerning "all advances, upfront payments, bonuses, royalty guarantees or equity interests that GMR... proposed to pay any [songwriter]." (Joint Stip. at 31; see McIntyre Decl. ¶¶ 16, 19). Further, GMR **[*21]** has agreed to produce its agreements with songwriters and the compensation songwriters could expect to receive and offered to produce aggregate-level revenue data from nonterrestrial radio music users. (McIntyre Decl. ¶¶ 7, 18(e), 18(j), 18(r)).

RMLC next asserts that it needs nonterrestrial radio discovery to support its affirmative case against GMR. (Joint Stip. at 39-40). RMLC argues that it needs "[i]ndividualized financial information identifying what GMR promised to pay each affiliate and the amounts that GMR actually has paid each affiliate . . . to demonstrate[e] concerted action among and between GMR and its affiliates." (Id. at 39). But according to RMLC's complaint, it was the *promise* of higher compensation that incentivized songwriters to join GMR. (RMLC SAC at ¶¶ 30, 102). And GMR has already agreed to produce documents evincing "all advances, upfront payments, bonuses, royalty guarantees or equity interests that GMR... proposed to pay any [songwriter]," the contracts that lay out songwriters' compensation terms and the negotiations that preceded those contracts, and individualized terrestrial radio royalty payments data for each songwriter. (McIntyre Decl. ¶ 18). RMLC also contends **[*22]** that it needs nonterrestrial radio discovery because "radio certainly is *a* victim in GMR's scheme, but not necessarily the only victim." (Joint Stip. at 40) (emphasis in original). But RMLC's complaint alleges a shakedown of *radio stations* (RMLC SAC at p. 18), and during the meet and confer process, RMLC was unable to identify any allegations of anticompetitive conduct directed specifically at nonterrestrial music users (McIntyre Decl. ¶ 9). Finally, RMLC argues GMR's contention that it is a "lean, cost-efficient operation" (GMR FAC ¶ 36) gives RMLC the right to seek all documents concerning "GMR's costs, revenues, accounting, how it pays its affiliates." (Joint Stip. at 40). But GMR has already agreed to produce a significant trove of financial information, including some employment data. (McIntyre Decl. ¶¶ 17-22). This information should be sufficient for RMLC to analyze GMR's "leanness and efficiency."

Next, RMLC contends that GMR has "admitted" that nonterrestrial radio discovery has a "clear, direct, and deliberate relevance" to this case, noting GMR's motion to quash RMLC's "rate court" subpoena. (Joint Stip. at 40-41) (emphasis omitted). RMLC, however, misapprehends the Court's ruling in that **[*23]** case. In November 2018, RMLC served GMR with a subpoena, ostensibly in relation to RMLC's "rate court" litigation against BMI. (McIntyre

Decl. ¶ 40). GMR objected to the subpoena, including for reasons of overbreadth and irrelevance. (Id. Ex. K). In a joint stipulation filed with this Court, GMR argued that RMLC's subpoena "was little more than a bid for early antitrust discovery, even though [at the time] discovery in this matter was stayed." This Court granted GMR's motion to quash in substantial part. In re Subpoenas to Global Music Rights, No. 18-0170 (C.D. Cal. Jan 18, 2019) (Dkt. No. 32) (order granting in part GMR's motion to quash). While GMR argued that RMLC's subpoena was "relevant" to this litigation, GMR did not "admit" that all of the information requested in the subpoena was proper or appropriate.

Finally, RMLC argues that GMR has sought "the same type of discovery about non-radio entities." (Joint Stip. at 41-42). However, while GMR served interrogatories inquiring how RMLC calculates PROs' market shares (Joint Stip. at 41-42), "we know from RMLC's public filings [that it] uses *radio performances* to measure PRO market shares" (id. at 62). Moreover, RMLC has refused to respond **[*24]** to GMR's market-share interrogatories. (McIntyre Decl. ¶ 2). RMLC does not cite any case in which the service of discovery by one party opened the propounding party to broad discovery arguably related to the subject matter of that request. Instead, the two cases cited by RMLC (Joint Stip. at 41) involve situations where the responding party had previously agreed to the exchange of information and which the court had found "highly relevant." See *Flying J, Inc. v. Pilot Travel Centers LLC, No. 06 CV 0030 TC, 2009 U.S. Dist. LEXIS 55283, 2009 WL 1834998, at *2 (D. Utah June 25, 2009)* ("Plaintiffs effectively concede relevance by their quest for similar information from Defendants and in their willingness to disclose reciprocal transaction databases subject to certain conditions."); *Jang v. Sagicor Life Ins. Co., No. ED CV 17-1563, 2019 U.S. Dist. LEXIS 27077, 2019 WL 699791, at *3 (C.D. Cal. Feb. 20, 2019)* ("Plaintiff does not appear to dispute relevance and in fact implicitly concedes relevance by arguing the issue of whether he contacted his father during that period is case dispositive"). Here, as discussed above, RMLC has not demonstrated the relevance of nonradio discovery.

Moreover, even if RMLC could demonstrate that the nonradio discovery has some marginal relevancy—which it has not done—RMLC has not satisfied the proportionality requirement. **[*25]** GMR has about 2,300 nonradio licenses. (Joint Stip. at 67; Dkt. No. 180 (Grimmett Decl.) at ¶ 5). "And since RMLC also wants documents concerning every license fee Global Music Rights has 'attempted to charge,' RMLC's request would potentially sweep in all *unsuccessful* license negotiations for Global Music Rights' entire history." (Joint Stip. at 67) (emphasis in original). GMR attests that complying in full with RMLC's nonradio requests could add between 100,000 and 200,000 documents to be reviewed. (Joint Stip. at 76; McIntyre Decl. ¶¶ 37-38). The cost to review these additional documents is estimated to range from $175,000 to $700,000. (McIntyre Decl. ¶ 38).

In light of the significant burden for information that is—at best—marginally relevant, RMLC's refusal to entertain GMR's compromise proposal is disconcerting. GMR offered to work with RMLC to identify a "bull's-eye-set" of documents concerning nonradio licenses. (Joint Stip. at 70; McIntyre Decl. ¶ 14). On November 14, 2019, GMR proposed producing: (1) historical aggregate revenue information, broken down by the type of music user (e.g., royalty streaming services); and (2) license agreements with key nonterrestrial radio licensees, **[*26]** with only the price redacted. (Joint Stip. at 70-71; McIntyre Decl. ¶ 14). Further, GMR agreed to produce, as noted above, documents concerning any "advances, upfront payments, bonuses, royalty guarantees or equity interests" that Global Music Rights "paid or proposed to pay" any songwriter; and agreements with songwriters, which will lay the other terms of the songwriters' compensation. (Joint Stip. at 71; McIntyre Decl. ¶ 18(e) & Ex. E). RMLC rejected GMR's proposal the very next day. (McIntyre Decl. ¶ 15). Given that this litigation is about terrestrial radio licenses, RMLC should have given careful consideration to GMR's proposal before dismissing it out of hand. Moreover, RMLC has failed to demonstrate that any marginal relevance of the nonradio discovery requests outweighs the substantial burden to produce.

RMLC's request to compel documents responsive to RFP Nos. 21, 28, 29, 35 and Interrogatory No. 3 is **DENIED WITHOUT PREJUDICE**. If, after reviewing GMR's production, RMLC still believes that material gaps remain, it should raise the issues with GMR. Thereafter, if the issues remain unresolved, RMLC may raise its concerns with the Court, preferably via the Court's informal discovery **[*27]** dispute resolution process.

D. Conclusion

Radio Music License Committee, Inc.'s Motion to Compel Responses to Requests for Production of Documents and Interrogatories [178] is **DENIED**. RMLC's request to compel responses to RFP Nos. 21, 28, 29, 30, 32, 35, 46 and 47 and Interrogatory No. 3 is **DENIED WITHOUT PREJUDICE**. RMLC's request to compel a response to RFP No. 19 is **DENIED AS MOOT**. The hearing set for January 7, 2020, is **STRICKEN**.

The parties MUST avail themselves of the Court's informal discovery dispute resolution process to resolve any remaining discovery issues. (See Judge Sagar's Procedures). If the parties believe that the Court's informal discovery process is insufficient to resolve a particular dispute, they must file a motion requesting leave to file a *Rule 37* Joint Stipulation, describing why the informal dispute resolution process is insufficient.

IT IS SO ORDERED.

Apotex Corp. v. Hospira Healthcare India Private Ltd.

United States District Court for the Southern District of New York

January 6, 2020, Decided; January 6, 2020, Filed

18-CV-4903 (JMF)

Reporter
2020 U.S. Dist. LEXIS 2343 *; 2020-1 Trade Cas. (CCH) P81,048; 2020 WL 58247

APOTEX CORP., Plaintiff, -v- HOSPIRA HEALTHCARE INDIA PRIVATE LTD. and HOSPIRA, Defendants.

Prior History: *Apotex Corp. v. Hospira Healthcare India Private Ltd., 2019 U.S. Dist. LEXIS 116335, 2019 WL 3066328 (S.D.N.Y., July 12, 2019)*

Core Terms

alleges, monopolization, antitrust claim, market share, competitor, drugs, market power, prices, second amended complaint, cefepime, products, Skiing, anticompetitive conduct, relevant market, antitrust, quotation, marks, manufacturer, unfair, breach of contract, anti trust law, monopoly power, anticompetitive, compete, damages, generic, profits, smaller, resort, amend

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Judges: JESSE M. FURMAN, United States District Judge.

Opinion by: JESSE M. FURMAN

Opinion

OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

Plaintiff Apotex Corp. ("Apotex") brings claims **[*2]** against Defendants Hospira Healthcare India Private Ltd. ("Hospira India") and Hospira, Inc. (together with Hospira India, "Hospira"), successors of an entity that had agreed with Apotex to jointly develop and market certain generic pharmaceutical products for sale in the United States. In an earlier Opinion and Order, the Court granted in part and denied in part a motion to dismiss Apotex's claims, and granted Apotex leave to file a second amended complaint. *See* Apotex Corp. v. Hospira Healthcare India Private Ltd., No. 18-CV-4903 (JMF), 2019 U.S. Dist. LEXIS 116335, 2019 WL 3066328 (S.D.N.Y. July 12, 2019). Thereafter, Apotex filed the operative Second Amended Complaint, which includes claims against Hospira for breach of contract; unfair competition under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. Ann. §§ 501.201 et seq.; and monopolization and attempted monopolization under Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. ECF No. 74 ("SAC"). Hospira now moves, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss Apotex's antitrust claims and its claim for punitive damages for breach of contract. ECF Nos. 84-85. For the reasons that follow, Hospira's motion is GRANTED as to the antitrust claims. The Court reserves judgment on the punitive damages claim pending further briefing on subject-matter jurisdiction **[*3]** in light of the dismissal of the antitrust claims.

BACKGROUND

The relevant background is set forth in the Court's prior Opinion and will be summarized only briefly here. In 2003, Apotex entered into an agreement — the Development, Manufacturing, Supply and Commercialization Agreement ("Agreement"), *see* ECF No. 39, at 5 8 — with Hospira's predecessor, Orchid Chemicals and Pharmaceuticals, Ltd. ("Orchid"). SAC ¶ 1. The Agreement provided that Orchid would supply Apotex with certain drugs, including cefazolin, ceftriaxone, cefoxitin, cefepime, and piperacillin-tazobactam ("pip/taz"). *Id.* In addition, the Agreement prohibited Orchid from supplying the covered drugs to Apotex's competitors and from directly competing with Apotex in the United States. *Id.* ¶¶ 47-50; *see also id.* ¶ 53 (describing amendment creating an exception for certain customers). On March 23, 2010, Hospira succeeded Orchid through a contractual novation ("Novation"), *see* ECF No. 39, at 11-13, and thus became subject to the Agreement's exclusive supply provision and other restrictions on competition with Apotex, *see* SAC ¶¶ 58-64.

On June 1, 2018, Apotex sued Hospira India for breach of the Agreement and Novation and a variety **[*4]** of related claims. *See* ECF No. 1. On July 12, 2019, the Court granted in part and denied in part a motion to dismiss these claims. ECF No. 70. In brief, the Court ruled that Apotex's three fraud-based claims and claims for unfair competition, breach of the implied covenant of good faith and fair dealing, tortious interference, and unjust enrichment failed as a matter of law, but its claim under the FDUTPA did not. *See* 2019 U.S. Dist. LEXIS 116335, 2019 WL 3066328, at *4-8. In addition, the Court ruled that Apotex may seek only benefit-of-the-bargain damages, attorney's fees, and costs for its FDUTPA claim; that Apotex is bound by the Agreement and Novation's limitation on damages; and that it was ambiguous whether the limitation on damages precluded lost profit damages for Apotex's contract claim. 2019 U.S. Dist. LEXIS 116335, [WL] at *8-9. Most relevant for present purposes, the Court reserved judgment on whether Apotex adequately pleaded a claim for punitive damages for breach of contract and whether any such claim was barred by the limitation on damages, *see* 2019 U.S. Dist. LEXIS 116335, [WL] at *8 n.5, and granted Apotex leave to file a second amended complaint adding "new allegations and claims . . . regarding monopolization and attempted monopolization," 2019 U.S. Dist. LEXIS 116335, [WL] at *10. Thereafter, Apotex filed the Second Amended Complaint, adding **[*5]** Hospira, Inc. as a new Defendant and alleging claims under the Sherman Antitrust Act. *See* SAC ¶¶ 169-192.

The Second Amended Complaint alleges that Hospira monopolized the U.S. market for cefepime, a type of cephalosporin antibiotic, and attempted to monopolize the U.S. market for several other drugs. *See* SAC ¶¶ 169-192. Apotex alleges that Hospira did so by breaching its obligations under the parties' agreement to act as Apotex's exclusive supplier for these drugs, and by selling its own version of the drugs to Apotex's competitors and directly to Apotex's customers. *See id.* ¶¶ 176, 184. For example, Hospira allegedly cut off Apotex's supply of cefepime and manufactured and sold its own brand-name version of the drug, Maxipime, to Apotex's competitors and customers. *Id.* at ¶¶ 176, 180. Hospira allegedly used "confidential average price" information obtained through the parties' partnership to sell Maxipime "on par with or near Apotex's contract price." *Id.* at ¶ 176(d). Through this alleged scheme, Hospira's share of the cefepime market "soared from negligible to a majority market share," reaching 56.58% in August 2016. *Id.* at ¶¶ 173, 178. In addition, Hospira ultimately closed "the **[*6]** only facility at which it manufactures Products for Apotex," known as the MKT facility, leaving Apotex entirely "unable to compete." *Id.* at ¶¶ 8, 203. Hospira allegedly used the same scheme in an attempt to monopolize the U.S. market for other drugs — namely, ceftriaxone, cefazolin, cefoxitin, and pip/taz. *See id.* at ¶¶ 1, 189-91. Hospira allegedly gained 43.75% of the market for ceftriaxone "as of January 2017," and 30.76% of the market for cefazolin "as of January 2016." *Id.* ¶ 191. (It is unclear what, if any, market share Hospira gained for the other drugs.) On the basis of these allegations, Apotex now seeks, *inter alia*, treble damages, plus costs and attorney's fees, for the alleged antitrust violations and punitive damages for the alleged breach of contract. *See* SAC at Prayer for Relief ¶ 1(a), (c).[1]

LEGAL STANDARDS

In evaluating a motion to dismiss pursuant to *Rule 12(b)(6)*, a court must accept all facts set forth in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *See, e.g., Kashef v. BNP Paribas S.A., 925 F.3d 53, 58 (2d Cir. 2019)*. A claim will survive a *Rule 12(b)(6)* motion, however, only if the plaintiff alleges facts sufficient "to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim is facially plausible **[*7]** "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 556*). A plaintiff must show "more than a sheer possibility that a defendant has acted unlawfully," *id.*, and cannot rely on mere "labels and conclusions" to support a claim, *Twombly, 550 U.S. at 555*. If the plaintiff's pleadings "have not nudged [his or her] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Twombly, 550 U.S. at 570*.

DISCUSSION

The Court begins with the motion to dismiss Apotex's antitrust claims, its sole federal claims. *Section 2* of the Sherman Antitrust Act prohibits "monopoliz[ing], or attempt[ing] to monopolize . . . any part of the trade or commerce among the several States." *15 U.S.C. § 2*. A claim of monopolization "requires, in addition to the possession of monopoly power in the relevant market, the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *In re Adderall XR Antitrust Litig., 754 F.3d 128, 133 (2d Cir. 2014)* (internal quotation marks omitted) (quoting *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004))*. "To state an attempted monopolization claim, a plaintiff must establish '(1) that the defendant has engaged in predatory **[*8]** or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.'" *PepsiCo., Inc. v. Coca-Cola Co., 315 F.3d 101, 105 (2d Cir. 2002)* (per curiam) (quoting *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*. The two claims "are substantially identical, with the exception that attempted monopolization requires a showing of specific intent to monopolize." *New York v. Actavis, PLC, No. 14-CV-7473 (RWS), 2014 U.S. Dist. LEXIS 172918, 2014 WL 7015198, at *35 (S.D.N.Y. Dec. 11, 2014)*, *aff'd sub nom. New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638 (2d Cir. 2015)*.

Hospira argues that Apotex's claims fail for at least two reasons: first, because Apotex fails to make a showing of "anticompetitive conduct," ECF No. 85 ("Defs.' Mem."), at 10-14; and second, because Apotex fails to plausibly

[1] Apotex seeks punitive damages solely in connection with its contract claims. *See* ECF No. 87, at 2 n.2. Thus, the Court need not and does not address Hospira's motion to the extent that it seeks dismissal of a claim for punitive damages under the FDUTPA.

allege that Hospira actually monopolized or dangerously threatened to do so, *id.* 19-22.[2] The Court agrees on both fronts.

A. Anticompetitive Conduct

A claim under the Sherman Act must allege anticompetitive conduct, as federal antitrust laws were "enacted for the protection of competition not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (internal quotation marks omitted). "[A]nticompetitive conduct is conduct without a legitimate business purpose that makes sense only because it eliminates competition." *In re Adderall, 754 F.3d at 133* (internal quotation marks omitted). A "prototypical valid business purpose" is expanding into a new market to compete on the basis of increased efficiency. *See Port Dock & Stone Corp. v. Oldcastle Northeast, Inc., 507 F.3d 117, 124-25 (2d Cir. 2007)* (holding **[*9]** that a manufacturer's breach of a distributorship agreement was not anticompetitive because the manufacturer "expected to perform the second level service more efficiently than the old trading partners"). Conduct undertaken for such a purpose cannot, as a matter of law, be the basis for an antitrust claim.

In this case, Apotex's own allegations reveal that Hospira's conduct was undertaken for legitimate, pro-competitive purposes. The primary conduct alleged in the Second Amended Complaint is Hospira's decision to breach the exclusive supplier agreement with Apotex in order to compete directly with Apotex and to supply Apotex's competitors. *See, e.g.*, SAC ¶¶ 84 ("Hospira has sold or otherwise supplied to third parties in the Territory certain drugs that directly compete with Apotex's sale of the Products."), 88 (describing "Hospira's deliberate decision to divert supply of Products to its own use in competition with Apotex"); *see also id.* ¶ 2 (alleging that "Hospira did compete with Apotex in the United States pharmaceuticals market" prior to the parties' agreement). That decision is consistent with competitive business behavior: "Like any seller of a product," Hospira "would prefer **[*10]** multiple competing buyers unless an exclusive distributorship arrangement provides other benefits." *E&L Consulting, Ltd. v. Doman Indus. Ltd., 472 F.3d 23, 30 (2d Cir. 2006)*. Engaging in competition was especially rational given Hospira's competitive advantage over Apotex. Apotex alleges that "many" firms produce "virtually identical drugs," which means that firms must compete on factors like "consistency of supply." *Id.* ¶¶ 39-40. Hospira, as a manufacturer, has direct access to a consistent supply of products, unlike a reseller like Apotex. Hospira's decision to capitalize on this advantage is not the type of anticompetitive conduct prohibited by federal antitrust laws. *See Port Dock, 507 F.3d at 125* ("[A] complaint pleading that a defendant expanded vertically and as a result, decided to discontinue doing business with its erstwhile trading partners at the next level down, does not plead an actionable refusal to deal.").

In arguing otherwise, Apotex asserts that "there is no legitimate business justification for a campaign to withhold irreplaceable supply from a competitor, misappropriate its confidential information to target customers and sully the competitor's reputation so customers will abandon it." ECF No. 87 ("Pl.'s Opp."), at 14. In support, Apotex relies heavily on *Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342 (5th Cir. 1980)*, for **[*11]** the proposition that "some unfair business practices can be exclusionary." Pl.'s Opp. 15 (quoting *Page Airways, Inc., 624 F.2d at 1354*). But as the Fifth Circuit has stated more recently, the "distinction between unfair conduct and anticompetitive conduct is critical to maintain because the antitrust laws 'do not create a federal law of unfair competition.'" *Retractable Techs., Inc. v. Becton Dickinson & Co., 842 F.3d 883, 892 (5th Cir. 2016)* (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* (noting that "*Brooke Grp.*, of course, postdates *Page Airways*"). The conduct that Apotex alleges may well give use to claims for unfair competition and breach of contract, but it does not give rise to an antitrust claim. *See La. Wholesale Drug Co. v. Shire LLC, 929 F. Supp. 2d 256, 262 (S.D.N.Y. 2013)* ("[N]ot every sharp-elbowed

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[2] Hospira also contends that Apotex fails to allege antitrust injury and, by extension, antitrust standing. *See* Defs.' Mem. 8-10; ECF No. 88 ("Defs.' Reply"), at 2-3 & 3 n.5. Despite its name, antitrust standing is "not jurisdictional in nature but rather relates to the merits of a claim." *Bilinski v. Keith Haring Found., Inc., 96 F. Supp. 3d 35, 43 n.7 (S.D.N.Y. 2015)*. Accordingly, the Court need not and does not address it here. *See, e.g., Biocad JSC v. F. Hoffmann-La Roche, Ltd., 942 F.3d 88, 94 n.5 (2d Cir. 2019)*.

business practice though potentially wrongful as a breach of contract or even fraud — necessarily amounts to an antitrust violation."); *see also, e.g., Hunt v. Mobil Oil Corp., 465 F. Supp. 195, 235 n.102 (S.D.N.Y. 1978)* ("[T]he antitrust laws are not properly invoked every time a party to a contract claims injury because of another party's alleged nonperformance of the agreement"), *aff'd*, *610 F.2d 806 (2d Cir. 1979)*.

Citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*, Apotex also argues that Hospira's conduct constitutes an anticompetitive refusal to deal. Pl.'s Opp. 16-19. Private businesses, however, enjoy a "long recognized right" to exercise "independent discretion as to the parties with whom [they] will deal." *In re Adderall, 754 F.3d at 134* (quoting *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919))*. *Aspen Skiing* ***[*12]*** established a "limited" exception to that principle for situations in which the "unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Trinko, 540 U.S. at 409* (emphasis omitted); *see Charych v. Siriusware, Inc., No. 17-CV-468 (JS) (GRB), 2018 U.S. Dist. LEXIS 128341, 2018 WL 4870906, at *7 (E.D.N.Y. July 30, 2018)* (noting that the *Aspen Skiing* exception is "narrow"). In that case, the Supreme Court upheld an antitrust verdict against a ski resort operator that had discontinued a longstanding agreement with a smaller rival to jointly sell "all-Aspen" resort access tickets. *472 U.S. at 604, 611*. The Court noted that such a decision was "not necessarily anticompetitive," but found that evidence in the record supported the jury's conclusion that "there were no valid business reasons for the refusal" to deal except to eliminate competition. *Id. at 604, 610-11*. Because the larger ski resort's decision was not motivated by efficiency concerns," the Court concluded that the resort was "sacrificing short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id. at 610-11*.

Two key elements of *Aspen Skiing* are absent from this case. First, *Aspen Skiing's* holding was driven by the Court's **[*13]** conclusion that the defendant had discontinued its prior, "presumably profitable" course of dealing in an effort "to forsake short-term profits to achieve an anticompetitive end." *Trinko, 540 U.S. at 409*; *see Aspen Skiing, 472 U.S. at 610-11*. Here, by contrast, Apotex affirmatively alleges that Hospira breached its contractual obligations in pursuit of competitive profits. *See* SAC ¶ 4 (alleging that Hospira was "using its breaches of the Agreement as a means to capture for itself all of the very profits the parties had agreed to share"). A party does not — at least *as a matter of* ***antitrust law*** — have a duty to deal with a competitor when, as here, greater profits are available through direct competition. *See, e.g., In re Adderall, 754 F.3d at 131, 134-35* (dismissing antitrust claims based on a drug maker's breach of "unprofitable" agreements to "give its competitors both the lights and the supplies necessary to participate in the market").

Second, the *Aspen Skiing* decision relied on the fact that the defendant could use its significant market power to exclude its smaller rival. *See In re Adderall, 754 F.3d at 134* (noting that *Aspen Skiing* held "that a business *with market power* may be subject to a duty to deal with a smaller competitor" (emphasis added)). Because the defendant in *Aspen Skiing* controlled three **[*14]** of the four resorts in the area, the defendant was able to sharply curb business for its competitor by selling a "3-area" ticket to its own resorts while denying the smaller operator access, even at retail price. *Aspen Skiing, 472 U.S. at 610*. Here, by contrast, until Hospira allegedly breached the parties' contract, Hospira had almost no presence in the market for cefepime, as Hospira was contractually barred from competing with Apotex and Hospira's brand drug was subject to "generic substitution laws," which ensured that "sales . . . were negligible." SAC ¶¶ 63, 93. In these conditions, Hospira's conduct does not suggest an anticompetitive motive. It suggests the opposite: that Hospira sought to, and did, participate in the market as a competitor.

Finally, Apotex argues that, "[i]n this Circuit, the bar for showing that a party has engaged in unlawful anticompetitive conduct is a low one.'" Pl.'s Opp. 14 (quoting *Provepharm, Inc. v. Akorn, Inc., No. 17-CV-7087 (SJF) (AKT), 2019 U.S. Dist. LEXIS 98719, 2019 WL 2443185, at *10 (E.D.N.Y. June 11, 2019))*. That may be true, but it does not salvage Apotex's claims because Apotex "fails to allege any facts regarding monopolistic conduct — as opposed to selective aggressive conduct against a rival." **[*15]** *Full Circle United, LLC v. Skee-Ball, Inc., Nos. 11-CV-5476 (LB), 11-CV-6277 (LB), 2014 U.S. Dist. LEXIS 202841, 2014 WL 12829195, at *11 (E.D.N.Y. May 13, 2014)* ("The gravamen of [an antitrust] offense is *not* the enlargement of the defendant's market share at the plaintiff's expense or even the destruction of plaintiff by unfair means." (alterations omitted)). That is, Apotex does not meet the bar, however low it may be. *See* Alaska Elec. Pension Fund v. Bank of Am. Corp., 175 F. Supp. 3d 44, 60 n.2 (S.D.N.Y. 2016) ("[A] competitor cannot use the antitrust laws to recover lost profits as a result of being confronted with an *increase* in competition."). In short, Apotex's antitrust claims fail because the Second Amended Complaint alleges harm to a competitor, not harm to competition — the *sine qua non* of an antitrust claim.

B. Actual or Threatened Monopolization

Apotex's antitrust claims fail for a second reason as well: because the Second Amended Complaint makes clear that Hospira never acquired monopolistic market power and that there was no dangerous probability Hospira would acquire it. *See* Spectrum Sports, 506 U.S. at 456. "Market power is the ability: '(1) to price substantially above the competitive level *and* (2) to persist in doing so for a significant period without erosion by new entry or expansion.'" Commercial Data Servers, Inc. v. Int'l Bus. Machines Corp., 262 F. Supp. 2d 50, 73 (S.D.N.Y. 2003) (quoting AD/SAT, Div. of Skylight, Inc. v. Assoc. Press, 181 F.3d 216, 227 (2d Cir. 1999) (per curiam)). Market power "may be proven directly by evidence of the control of prices or the exclusion of competition, or it **[*16]** may be inferred from one firm's large percentage share of the relevant market." Tops Mts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 98 (2d Cir. 1998).

To allege market power, a party first needs to define the relevant market. "The relevant market is defined as all products reasonably interchangeable by consumers for the same purposes, because the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level." Geneva Pharms. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 496 (2d Cir. 2004) (internal quotation marks omitted). The plaintiff must define both "a product market and a geographic market." Concord Assocs., L.P. v. Entm't Props. Trust, 817 F.3d 46, 52 (2d Cir. 2016). In addition, the plaintiff "must offer a theoretically rational explanation for why the boundaries of the market are defined as they are and must define the market according to the rules of interchangeability and cross-elasticity." Bayer Schering Pharma AG v. Sandoz, Inc., 813 F. Supp. 2d 569, 575 (S.D.N.Y. 2011) (internal quotation marks omitted); *see also* AD/SAT, Div. of Skylight, Inc., 181 F.3d at 227 (defining cross-elasticity of demand as an economic measure indicating whether "consumers would respond to a slight increase in the price of one product by switching to another product").

Here, Apotex fails to plausibly allege the relevant market. For its monopolization claim, Apotex alleges that the relevant product market is "that for the drug cefepime, including branded and AB rated generic products." SAC **[*17]** ¶ 170. For its attempted monopolization claim, Apotex alleges the same type of market for each of the other drugs subject to the parties' agreement. *Id.* ¶¶ 184. In all cases, the alleged geographic market is the United States. *Id.* ¶¶ 172, 184. Significantly, however, Apotex fails to "offer any plausible explanation as to why [the] market should be limited" to each individual drug and its AB-rated generic equivalents. *See* Xerox Corp. v. Media Sciences Int'l, Inc., 511 F. Supp. 2d 372, 384 (S.D.N.Y. 2007). Apotex does not allege facts that plausibly rule out potentially interchangeable drugs, especially those within the same "therapeutic classes." SAC ¶ 38. Instead, it simply alleges in conclusory fashion that "[t]here are no products which are interchangeable or substitutable" and that "there is low elasticity of demand." SAC ¶¶ 174, 185. "[M]erely asserting that a commodity is in some way unique," however, "is insufficient to plead a relevant market. Rather, an antitrust complaint must explain why the market it alleges is the relevant, economically significant product market." Concord Assocs., L.P., 817 F.3d at 54 (quoting B.V. Optische Industrie De Oude Delft v. Hologic, Inc., 909 F. Supp. 162, 171 (S.D.N.Y. 1995)). Apotex's failure to do so, by itself, justifies dismissal. *See* Conte v. Newsday, Inc., 703 F. Supp. 2d 126, 143 (E.D.N.Y. 2010).

In addition, even assuming the relevant markets are as Apotex defines them, Apotex fails to allege that Hospira acquired **[*18]** market power. Critically, Apotex itself repeatedly alleges that Hospira could not set prices at a supra-competitive level. *See, e.g.*, SAC ¶¶ 100-01. In fact, one of Apotex's main allegations is that Hospira's scheme depended on using Apotex's confidential pricing data to sell drugs "at prices on par with or near Apotex's contract pricing." SAC ¶¶ 101, 176(d). On top of that, Apotex alleges that there were "many" competing manufacturers producing "virtually identical drugs," including Qilu Pharmaceuticals Co., which Apotex itself ended up selecting as a replacement supplier for some of the relevant drugs. SAC ¶¶ 38-39, 148. Indeed, Apotex goes so far as to admit that the "generic antibiotic and antibacterial injectable Products, including cephalosporins," at issue in this case "belong to therapeutic classes in which generic competition is robust." SAC ¶ 38. Taken together, these allegations establish that Hospira did not, and could not, raise prices above the competitive level for any significant period of time as required to sustain an antitrust claim.

In arguing otherwise, Apotex points to Hospira's alleged market share. Apotex alleges that, as of August 2016, Hospira "had a 56.58 **[*19]** percent share of the cefepime market." SAC ¶ 173; *see also id.* ¶ 190 (alleging that there is a "dangerous probability" of monopolization because Hospira has "already reached monopoly-level shares of that market"). Market share can be a significant factor in the assessment of market power, at least when the alleged market share approaches ninety percent. *See Ortho Diagnostic Sys., Inc. v. Abbott Lab., Inc., 920 F. Supp. 455, 463-64 (S.D.N.Y. 1996)* (discussing *United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945)* (L. Hand, J.) and citing *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992))*. But market share is not dispositive and it cuts the other way when, as here, the alleged percentage falls far short of ninety percent and other factors strongly indicate the absence of market power. *See PepsiCo, 315 F.3d at 109* ("Absent additional evidence, such as an ability to control prices or exclude competition, a 64 percent market share is insufficient to infer monopoly power."); *Natsource LLC v. GFI Grp., Inc., 332 F. Supp. 2d 626, 635 (S.D.N.Y. 2004)* ("Even market shares of approximately 50% are insufficient to demonstrate market power where other factors such as low barriers to entry and strong competition . . . exist").

Here, the most that Apotex alleges is that Hospira controlled 56.68% of the cefepime market for the month of August 2016. *See* SAC ¶ 94 (alleging, contrary to Paragraph 173, 56.68% instead of 56.58%). Elsewhere, Apotex alleges that Hospira had much smaller shares **[*20]** of the cefepime market: 6.79% in March 2013, 16.46% in August 2013, 18.26% in April 2014, and something in excess of 20% in May 2014. *Id.* ¶ 94. Moreover, Apotex alleges that Hospira's market share "fluctuated, often in lock-step with declines in Apotex's own market share." *Id.* Taken together, these allegations make clear that Apotex never reached a sufficiently large or durable market share to create an inference of monopoly power. They also confirm that Hospira lacked the ability to charge supra-competitive prices "for a significant period without erosion by new entry or expansion," *Commercial Data Servers, 262 F. Supp. 2d at 73* (internal quotation marks omitted); *see also, e.g., Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc., 985 F. Supp. 2d 612, 622 (S.D.N.Y. 2013)* (dismissing a monopolization claim on a motion to dismiss where the "plaintiffs' only allegation suggesting that [the defendant] possesses monopoly power is that its market share is 60%").

Whether Apotex plausibly alleges a dangerous probability of Hospira acquiring market power with respect to ceftriaxone, cefazolin, cefoxitin, and pip/taz is a closer question (or, at least, would be if a relevant market were properly alleged), if only because "a lesser degree of market power may establish an attempted monopolization claim than that necessary to establish **[*21]** a completed monopolization claim." *Top Mkts., Inc., 142 F.3d at 100*; *see H.L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1018 (2d Cir. 1989)*. Apotex alleges a 43.75% market share for ceftriaxone "as of January 2017," a 30.76% market share for cefazolin "as of January 2016," and nothing with respect to cefoxitin and pip/taz. SAC ¶ 191. But for similar reasons, here too the Second Amended Complaint falls short. That is, an attempted monopolization claim still requires "some degree of market power," *Top Mkts., Inc., 142 F.3d at 100*, and "[a] company has monopoly power if it can sell a product or service for a supra-competitive price untroubled by market forces; in other words, if it is able to exert power to insulate its prices from competition," *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig., 562 F. Supp. 2d 392, 399 (E.D.N.Y. 2008)*. Taken together, Apotex's own allegations make plain that there was never a "dangerous probability" that Hospira could insulate its prices from competition, given that Hospira was bound to the prices set by Apotex in competition with other major firms. *See Bayer Schering Pharma AG, 813 F. Supp. 2d at 580*.

CONCLUSION

In short, Apotex's own allegations make clear that it cannot state a plausible claim for monopolization or attempted monopolization. In the final analysis, Apotex is essentially trying to recast a claim for breach of contract — a contract that restricts competition, no less — as an antitrust claim, which it **[*22]** may not do. *See, e.g., In re Adderall, 754 F.3d at 135* ("The mere existence of a contractual duty to supply goods does not by itself give use to an antitrust 'duty to deal.'"); *RxUSA Wholesale Inc. v. Alcon Labs., 391 F. App'x 59, 61 (2d Cir. 2010)* (summary order) ("A refusal to deal with competitors does not constitute anticompetitive conduct in violation of *Section 2* except in limited circumstances not present here."). Accordingly, Apotex's antitrust claims must be and are dismissed.

That leaves two interrelated issues: amendment and jurisdiction. Apotex requests, in the event that its antitrust claims are dismissed, "a conference to address next steps, including amendment." Pl.'s Opp. 25. Construing this as a cursory request for leave to amend, the Court concludes that leave to amend would be futile. *See, e.g., Rincon v. Covidien, No. 16-CV-10033 (IMF), 2017 U.S. Dist. LEXIS 77458, 2017 WL 2242969, at *2 (S.D.N.Y. May 22, 2017)* ("Although courts 'should freely give leave when justice so requires,' a court need not grant leave to amend when further amendment would be futile." (quoting *Fed. R. Civ. P. 15(a)(2)*); *see also Ruffolo v. Oppenheimer & Co., 987 F.2d 129, 131 (2d Cir. 1993)* (per curiam) ("Where it appears that granting leave to amend is unlikely to be productive . . . it is not an abuse of discretion to deny leave to amend."). The defects in Apotex's antitrust claims are "substantive" and arise from Apotex's own allegations, not from inadequate or inartful pleading. *See Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000)*. Moreover, **[*23]** Apotex has not pointed to additional facts it could allege that would cure these defects, and it did not do so previously when Hospira challenged its proposed amended allegations. *See* ECF Nos. 60-61. Accordingly, leave to amend the antitrust claims is denied.

Without the prospect of antitrust claims, however, it is not clear that this case should remain in federal court. Dismissal of the antitrust claims leaves only state-law claims and Apotex, a Delaware corporation, destroyed diversity by adding Hospira, Inc., another Delaware corporation, as a Defendant in the Second Amended Complaint. *Compare* SAC, *with* ECF No. 1, *and* ECF No. 34. Under *28 U.S.C. § 1367*, the Court has discretion to exercise supplemental jurisdiction over the remaining state-law claims, and must balance the "traditional 'values of judicial economy, convenience, fairness, and comity'" to determine whether to do so. *Kolari v. New York-Presbyterian Hosp., 455 F.3d 118, 122 (2d Cir. 2006)* (quoting *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988))*. The balance ordinarily does not support exercising jurisdiction "if all federal claims have been dismissed at the pleading stage." *Haynes v. Zaporowski, 521 F. App'x 24, 28 (2d Cir. 2013)* (summary order) (internal quotation marks omitted). Indeed, the Second Circuit recently reiterated that, "in the usual case in which all federal-law claims are eliminated before **[*24]** trial, the balance of factors to be considered under the pendent jurisdiction doctrine — judicial economy, convenience, fairness, and comity — will point toward declining to exercise jurisdiction over the remaining state-law claims." *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 727 (2d Cir. 2013)* (internal quotation marks omitted); *see, e.g., Francis v. Hartford Bd. of Educ., 760 F. App'x 34, 38 (2d Cir. 2019)* (summary order).

Unfortunately, the parties have not adequately briefed the question of subject-matter jurisdiction in the absence of the antitrust claims. In its memorandum of law in support of its motion, Hospira indicated, with little elaboration, that "the Court properly may elect to retain jurisdiction . . . or decline to do so." Defs.' Mem. 24. Apotex did not address the issue at all in its opposition brief, and Hospira provided no further discussion in its reply brief Accordingly, the Court will reserve judgment on whether it should exercise supplemental jurisdiction over the remaining state-law claims (and, by extension, reach Hospira's argument with respect to the punitive damages claim) or dismiss the case without prejudice to refiling the state-law claims in state court pending further briefing. No later than **January 17, 2020**, each side shall submit a supplemental brief, not to exceed five pages, **[*25]** addressing the issue.

The Clerk of Court is directed to terminate ECF No. 84.

SO ORDERED.

Dated: January 6, 2020

New York, New York

/s/ Jesse M. Furman

JESSE M. FURMAN

United States District Judge

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[Ellis v. Salt River Project Agricultural Improvement and Power District](#)

United States District Court for the District of Arizona

January 10, 2020, Decided; January 10, 2020, Filed

No. CV-19-01228-PHX-SMB

Reporter

432 F. Supp. 3d 1070 *; 2020 U.S. Dist. LEXIS 4213 **; 2020-1 Trade Cas. (CCH) P81,054; 2020 WL 122877

William Ellis, et al., Plaintiffs, v. Salt River Project Agricultural Improvement and Power District, Defendant.

Subsequent History: Affirmed by, in part, Reversed by, in part, Remanded by *Ellis v. Salt River Project Agric. Improvement & Power Dist., 24 F.4th 1262, 2022 U.S. App. LEXIS 2719 (9th Cir. Ariz., Jan. 31, 2022)*

Dismissed by *Ellis v. Salt River Project Agric. Improvement & Power Dist., 2022 U.S. Dist. LEXIS 148264 (D. Ariz., Aug. 18, 2022)*

Core Terms

Plaintiffs', electricity, solar, customers, energy, Notice, antitrust, allegations, filed-rate, retail, immunity, anticompetitive conduct, state law claim, install, self-generating, judicial notice, entities, damages, rates, antitrust claim, monopolization, state-action, argues, notice of claim, ratemaking, documents, anti trust law, public entity, state law, Exhibits

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Judges: Honorable Susan M. Brnovich, United States District Judge.

Opinion by: Susan M. Brnovich

Opinion

[*1076] WO

ORDER

Before the Court are Defendant Salt River Project Agricultural Improvement and Power District's ("District") Motion to Dismiss and Request for Judicial Notice.[1] (Doc. 14, "Mot."; Doc. 15, "Req."). Plaintiff customers William Ellis, Robert Dill, **[**4]** Edward Rupprecht, and Robert Gustavis responded to the Motion and the District replied. (Doc. 21, "Resp."; Doc. 22, "Repl."). Plaintiffs also responded to the **[*1077]** Request. (Doc. 20, "R.Resp."). The Court heard oral argument November 18, 2019. (Doc. 28.) Accepting the allegations as true, the Motion and Request are each granted in part as explained below.

I. BACKGROUND

This case arises out of the District's adoption of a new rate structure for its sale of electricity, which includes additional fees and different rates for residential customers, like Plaintiffs, who self-generate some of their electricity through solar energy systems. (Doc. 12, "FAC" ¶¶ 6, 28, 75-76.) In 2014, the District proposed the new rate structure ("Standard Electric Price Plans" or "SEPPs"), which includes a new E-27 price plan required for self-generating solar customers, that its Board of Directors ("Board") approved in 2015. (*Id.* ¶¶ 72-73.) The E-27 price plan applies to customers who began self-generating solar power after December 8, 2014. (*Id.* ¶ 81.) Plaintiffs' claims relate to their financial injuries caused by the SEPPs. (*Id.* ¶¶ 1, 5, 73.)

A. Parties

Plaintiffs are four District residential customers who **[**5]** live in Arizona and self-generate some of their electricity through personal solar energy systems. (*Id.* ¶¶ 20-27.) Three Plaintiffs installed their solar energy systems after the

[1] The District's Memorandum in Support of its Motion is docketed separately. (*See* Doc. 14-1, "Memo.")

District adopted the SEPPs. (*Id.* ¶¶ 21, 23, 25.) Specifically, Ellis, Dill, and Rupprecht installed solar energy systems in May 2018, July 2018, and November 2016, respectively. (*Id.*) Rupprecht bought his home equipped with a solar energy system at an unknown date. (*Id.* ¶ 27.)

The District and the "Association" are two distinct entities comprising the Salt River Project Agricultural Improvement and Power District ("SRP"), a power-and-water utility company in central Phoenix, Arizona.[2] (*Id.* ¶ 28.) Although the District is a political subdivision of Arizona, it (1) "is not recognized by the State of Arizona or by any law as a regulator or regulatory authority in the retail [electricity] market;" (2) "cannot impose ad valorem property taxes or sales taxes or enact laws governing citizens' conduct;" (3) "cannot administer normal governmental functions such as the maintenance of streets, the operation of schools, or sanitation, health or welfare services;" (4) "is not exempt from a city's exercise of eminent domain, **[**6]** nor it is immune from tort liability;" and (5) can only levy taxes against its landowners. (*Id.* ¶¶ 35-36.) Unlike other utility providers, the District's rates, rules, and regulations are exempt from the control of Arizona's public utility regulator, the Arizona Corporation Commission ("ACC"). (*Id.* ¶ 37.)

B. The Retail Electricity Market

The District provides electricity to around two million residential and commercial customers including Plaintiffs in central Phoenix ("Market"). (*Id.* ¶¶ 2, 28, 32, 42.) As Plaintiffs allege, the District provides over 95% of retail customers' electricity in the Market through a variety of plans and sources. (*Id.* ¶¶ 48-49.) Individuals in the Market can either purchase electricity from the District or self-generate electricity through purchased or leased solar energy systems. (*Id.* ¶ 43.) By investing in solar energy systems, customers "significantly reduce the amount of electricity that they need to purchase from [the District]." (*Id.* ¶ 44.) However, "[s]ince technologies that would allow consumers to completely remain off the grid are not yet economically viable," "all customers within **[*1078]** [the Market] generally must purchase some retail electricity from **[**7]** [the District]." (*Id.* ¶ 52.) The District competes with solar energy system installers in the Market to provide electricity and one of its executives allegedly referred to solar energy systems, installers, and advocates as 'the enemy.'" (*Id.* ¶¶ 44-45.)

The District's monopolization is allegedly not caused by any state policy to prevent competition, especially since Arizona's legislature encouraged competition in the retail electricity market through the *Electric Power Competition Act of 1998* ("the Act"). (*Id.* ¶¶ 53-54.) The District acknowledges the legislature's transition to promote competition in the Market in its 2010 rules and regulations, which state "[the District's] service territory is open to competition . . . in accordance with the . . . Act." (*Id.* ¶ 55.) The Act also allegedly subjects public power entities to antitrust liability. (*Id.* ¶ 59 (citing *A.R.S. § 30-813*)).

C. Dispute

The SEPPs are "aimed at maintaining [the District's] monopoly power; impeding solar development despite its recognized benefits; quashing competition for electricity from self-generating customers with solar energy systems; and generating additional revenues for [the District] through exploitation of its monopoly **[**8]** power." (*Id.*) More explicitly, the SEPPs make self-generating solar energy uneconomical and force Market consumers to exclusively purchase the District's electricity. (*Id.* ¶ 87.) Because the District previously encouraged and even incentivized consumer investment in solar energy systems until 2014, (*id.* ¶¶ 63, 71-72), Plaintiffs claim the District adopted and advertised the SEPPs to deter individuals from investing in solar energy systems and fortify its monopoly. (*Id.* ¶¶ 5-10, 46, 71-72, 84.)

The SEPPs differentiate between three types of customers. (*Id.* ¶ 81.) The first category is non-solar customers, who purchase all of their electricity from the District, follow the traditional rate structure, and pay per kilowatt-hour of

[2] The Association formed the District as a "political subdivision of the State of Arizona" in 1937 "for the purpose of refinancing the Association's debt by issuing interest-free municipal bonds." (*Id.* ¶¶ 28, 30, 35.)

electric usage, a $20.00 monthly service charge, and a $4.20 distribution charge. (*Id.* ¶¶ 74-75.) The second category is solar-customers, like Plaintiffs, who began self-generating solar energy after 2014 ("post-2014 solar customers"). (*Id.* ¶ 80.) Post-2014 solar-customers are subject to the E-27 plan, which is a "demand based rate plan" that includes a $32.44 or $45.44 monthly service charge, $16.64 or $29.64 distribution charge, and additional "demand charge" **[**9]** that is not applied to non-solar customers. (*Id.* ¶¶ 75-76.) The District charges post-2014 solar customers roughly $600 more per year than other customers. (*Id.* ¶ 89.) The third category is solar-customers who self-generated solar energy before December 8, 2014 ("pre-2014 solar customers"). (*Id.* ¶ 81.) Pre-2014 solar customers are exempt from the E-27 plan and treated like non-solar customers. (*Id.*)

Plaintiffs allege the SEPPs "made it economically unfeasible for customers to install solar energy systems." (*Id.* ¶ 92.) Plaintiffs further allege "[t]here is no rational basis" for adopting the SEPPs and the District's reason of recouping fixed expenses required to service post-2014 solar customers is pretextual. (*Id.* ¶¶ 96, 100.) Beyond "public policy and logic" warranting relief, Plaintiffs claim the District's "anticompetitive, discriminatory, and unconstitutional conduct" warrants "monetary, injunctive, and declaratory relief" under a variety of federal, state, and constitutional remedies. (*Id.* ¶ 1.) Plaintiffs allege the SEPPs violate (1) federal and state ***antitrust law***; (2) state-law price discrimination; (3) federal and state equal protection; and (4) Arizona's Consumer Fraud Act. **[**10]** (*Id.* ¶¶ 120-195.) The District requests judicial notice and moves to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*. **[*1079]** The Court begins with the District's Request.

II. REQUEST FOR JUDICIAL NOTICE

When a complaint is challenged under *Rule 12(b)(6)*, "[r]eview is limited to the complaint." *Cervantes v. City of San Diego, 5 F.3d 1273, 1274 (9th Cir. 1993)*. However, courts may "consider certain [other] materials—documents attached to the complaint, documents *incorporated by reference* in the complaint, or matters of *judicial notice*—without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)* (emphasis added).

Under the incorporation-by-reference doctrine, a court may consider "certain documents as though they are part of the complaint itself," *Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 1002 (9th Cir. 2018)*, "if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim[s]." *Ritchie, 342 F.3d at 907*. "The doctrine prevents plaintiffs from selecting only portions of documents that support their claims, while omitting portions of those very documents that weaken—or doom—their claims." *Khoja, 899 F.3d at 1002* (citing *Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998)*, superseded by statute on other grounds as recognized in *Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 681-82 (9th Cir. 2006))*. But "if the document merely creates a defense to the well-pled allegations in the complaint, then that document did not necessarily form the basis of the complaint." *Khoja, 899 F.3d at 1002*.

Additionally, **[**11]** a court may also consider certain documents satisfying *Federal Rule of Evidence 201*. Under *Rule 201*, a court may judicially notice a fact "not subject to reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Fed. R. Ev. 201(b)*. "A court may take judicial notice of matters of public record." *Khoja, 899 F.3d at 999*. But "[j]ust because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Id.* In cautioning against taking judicial notice, *Rule 201*'s advisory committee notes emphasize that "taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties." *Fed. R. Ev. 201*. Dispensing with these traditional methods should only be done so in clear cases of "[a] high degree of indisputability." *Rivera v. Philip Morris, Inc., 395 F.3d 1142, 1151 (9th Cir. 2005)* (citing *Fed. R. Ev. 201*). Here, the District requests consideration of ten exhibits under the incorporation-by-reference doctrine and *Rule 201*. (Req. at 4.)

A. Notice of Claims (Exhibit 1)

Exhibit 1 is Plaintiffs' notice of claims pursuant to **[**12]** *A.R.S. § 12-821.01*. (Doc. 15-2 at 2-45, "Notice.") The District requests the Court judicially notice it because its deficiencies compel dismissal of Plaintiffs' state law claims. (Req. at 5.) Plaintiffs claim the request should be denied because "Arizona's notice of claim requirement is procedural [and] does not apply in federal court." (R.Resp. at 3.) Alternatively, Plaintiffs do not object if the notice of claim requirement applies. (*Id.*) Plaintiffs' Notice applies in federal court. *See Mothershed v. Thomson, No. CV-04-2266-PHX-JAT, 2006 U.S. Dist. LEXIS 6968, 2006 WL 381679, *7 (D. Ariz. Feb. 16, 2006)* ("federal courts entertaining state-law claims against state entities are obligated to apply the state law **[*1080]** notice-of-claim provision"); *see also Payne v. Arpaio, No. CV-09-1195-PHX-NVW, 2009 U.S. Dist. LEXIS 110553, 2009 WL 3756679, *11 (D. Ariz. Nov. 4, 2009)* ("*§ 12-821.01* applies to all state law claims."). Accordingly, the Court judicially notices Exhibit 1.

B. Arizona Corporation Commission Staff Report; 2013 Docket Request; 2018 Docket Request (Exhibits 2-4)

Exhibit 2 is a 2010 ACC internal memorandum containing an attachment titled "staff report for generic proceedings concerning electric restructuring issues." (Doc. 15-2 at 47-77, "Staff Report.") Exhibit 3 is a 2013 ACC internal memorandum docket opening request related to the ACC's "inquiry into retail electric **[**13]** commission." (*Id.* at 79, "2013 Docket Request.") Exhibit 4 is a 2018 ACC internal memorandum docket opening request for "possible modifications to the [ACC's] energy rules" related to at least fourteen different energy and energy-related topics. (*Id.* at 81-85, "2018 Docket Request.") The District argues judicial notice is appropriate because Exhibits 2-4 are "public records that directly implicate Plaintiffs' federal and state antitrust [claims] [sic] regarding the Arizona Legislature's intent regarding competition" and relate to the District's state-action immunity defense. (Req. at 5.) The District also cites a case that previously took notice of ACC documents. (*Id.* (citing *Robinson v. Heritage Elementary Sch., No. CV-09-0541-PHX-LOA, 2009 U.S. Dist. LEXIS 50396, 2009 WL 1578313, at *1 n. 3 (D. Ariz. June 3, 2009))*. Plaintiffs argue judicial notice is inappropriate for each Exhibit. They argue the Staff Report was "created as part of proceedings that do not apply to the parties in this case, and contains hearsay and non-expert opinions." (R.Resp. at 6.) Second, they argue the 2013 and 2018 Docket Requests "lack any substance and only reflect the opening of a regulatory docket."[3] (*Id.*) Plaintiffs also cite a court order from this District *not* judicially noticing an ACC staff report and administrative **[**14]** memoranda. (*Id.* at 5) (citing *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist., No. CV-15-00374-PHX-DLR, 2015 U.S. Dist. LEXIS 146904, 2015 WL 6503439, at *3 (D. Ariz. Oct. 27, 2015))*. In general, Plaintiffs dispute the District's characterization of what each Exhibit represents." (R.Resp. at 7.) Considering these Exhibits is inappropriate as they are reasonably disputed by the parties.

C. 2014 Price Proposal Notice; Proposed SEPP Adjustments; Executive Summary; 2018 Price Proposal Notice; Third-Party Report (Exhibits 5-9)

Exhibit 5 is a 2014 self-created SRP price proposal notice. (Doc. 15-2 at 87-88, "2014 Price Proposal Notice.") Exhibit 6 is a 2014 self-created SRP report titled "Proposed Adjustments to SRP's [SEPPs] Effective with the April 2015 Billing Cycle." (*Id.* at 90-276, "Proposed SEPP Adjustments.") Exhibit 7 is a 2015 self-created SRP executive summary related to SRP's price proposal. (Doc. 15-3 at 2-13, "Executive Summary.") Exhibit 8 is a 2018 self-created SRP pricing proposal notice. (*Id.* at 15-16, "2018 Price Proposal Notice.") Exhibit 9 is a 2014 report prepared by Sussex Economic Advisors titled "Review of Proposed Adjustments to [SRP's SEPPs]." (*Id.* at 18-114, "Third-Party Report.") The District requests judicial notice that Exhibits 5-9 "were part of the record during **[**15]** the public ratemaking proceeding." (Req. at 6.). It argues these self-created "public documents . . . have procedural significance to the ratemaking proceeding" and "directly relate to Plaintiffs' **[*1081]** allegations regarding the District's justifications for adopting the challenged E-27 rate." (*Id.*) Plaintiffs again dispute the truth of the matters asserted in these documents, particularly because SRP created these documents and the District has "cherry-

[3] Plaintiffs alternatively do not object to judicially noticing Exhibits 3 and 4 for the assertion that the ACC opened a docket in 2013 and 2018 respectively. (*Id.*)

picked" them from the ratemaking proceeding. (R.Resp. at 7-9.) Exhibits 5-8 are self-created documents, Exhibit 9 is a third-party report, and each Exhibit is reasonably disputed. Even noticing them for the fact that they were "part of the record during the public ratemaking proceeding" is improper because, as Plaintiffs assert, these documents are not the complete record. Accordingly, judicial notice is inappropriate here.

D. Auditor General Report (Exhibit 10)

Exhibit 10 is a 2008 Arizona Auditor General Office report: "Review of Arizona Revised Statutes (A.R.S.) *§§30-806(I)*, and *40-202(B)(3)* and *(5)* related to electric competition." (Doc. 15-3 116-120, "Auditor General Report.") The District argues judicial notice is appropriate because the Auditor General Report **[**16]** "is (1) a public record prepared in the official capacity of the Auditor General at the direction of the legislature, (2) directly relates to Plaintiffs' allegations and the District's defenses, (3) is publicly available through the Auditor General's website, and (4) is not subject to reasonable dispute." (Req. at 7-8.) Plaintiffs argue judicial notice is inappropriate because the Auditor General Report "does not directly relate to the matters at issue, and because the truth of the matters asserted [(the status of electric competition)] is disputed." (R.Resp. at 3, 8.) Because the status of electric competition is at issue, judicially noticing a document on the topic is inappropriate.

Review of each Exhibit (except Exhibit 1) under the incorporation-by-reference doctrine and *Rule 201* reveals their consideration at this stage is inappropriate. For the most part, the Exhibits "merely create[] a defense" for the District. *Khoja, 899 F.3d at 1002*. Further, they lack *Rule 201*'s "high degree of indisputability," *Rivera, 395 F.3d at 1151*, necessary to dispense with the traditional methods of introducing evidence at trial. Notably, we are currently at the motion to dismiss stage. Accordingly, the Court only judicially notices Exhibit 1.

III. LEGAL STANDARD [17]**

When analyzing a complaint under *Rule 12(b)(6)*, well-pled factual allegations are presumed true and construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer, 568 F.3d 1063, 1067 (9th Cir. 2009)*. Dismissal under *Rule 12(b)(6)* "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)*. To survive a *Rule 12(b)(6)* motion to dismiss for failure to state a claim, a complaint must meet *Rule 8(a)(2)*'s minimum requirements. *Rule 8(a)(2)* requires a "short and plain statement of the claim showing that the pleader is entitled to relief," so that the defendant has "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. A complaint setting forth a cognizable legal theory will survive a motion to dismiss if it contains sufficient factual matter stating a claim to relief that is "plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*). Facial plausibility only exists if the pleader sets forth "factual content that allows the court to draw the reasonable inference that the defendant is **[*1082]** liable for the misconduct alleged." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Plausibility does not equal "probability," but instead requires **[**18]** "more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Where a complaint pleads facts that are 'merely consistent' with a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly, 550 U.S. at 557*).

IV. DISCUSSION

The FAC alleges nine causes of action against the District. (FAC ¶¶ 120-195.) These include: (1) monopolization and attempted monopolization in violation of the *Sherman Antitrust Act* and the *Arizona Uniform State Antitrust Act* ("AUSAA"); (2) price discrimination in violation of Arizona's constitution and statutes; (3) violation of equal protection under *42 U.S.C. § 1983* and Arizona's constitution; and (4) violation of *Arizona's Consumer Fraud Act*. (*Id.*) Plaintiffs request compensatory damages, class certification, appointment as class representatives and class counsel, treble damages, attorney fees, injunctive relief, and declaratory relief. (*Id.*)

The District moves to dismiss primarily on seven grounds: (A) the action is barred as an improper collateral attack on retail electricity rates; (B) state-action immunity bars the antitrust claims; (C) the equal protection claims are untimely; **[**19]** (D) *Arizona's Actions Against Public Entities and Public Employees Act* bars the state-law claims; (E) state law bars Plaintiffs' state antitrust claims; (F) the Local Government Antitrust Act ("LGAA") and Arizona statutory immunity bar damages against the District; and (G) the FAC fails to state a claim. (Memo. at 15-16.) The Court begins with the District's defenses before discussing the FAC's sufficiency.

V. THE DISTRICT'S DEFENSES

As further explained below, this action is not barred as an improper collateral attack under the federal or state filed-rate doctrines, nor does state-action immunity bar Plaintiffs' antitrust claims. Further, Plaintiffs' state law claims are barred under *A.R.S. § 12-821* and *§ 12-821.01* and their *Fourteenth Amendment* equal protection claims are untimely. Lastly, the LGAA bars Plaintiffs' potential entitlement to antitrust damages arising out of their remaining federal antitrust claims. After the District's defenses, only Plaintiffs' two federal antitrust claims remain.

A. Plaintiffs' Action is Not an Improper Collateral Attack.

The District asserts the filed-rate doctrine bars Plaintiffs' action.[4] (Memo. at 21.) Relatedly, it claims *A.R.S. §§ 30-810 - 812* effectively codifies the filed-rate doctrine in Arizona and alternatively bars Plaintiffs' state-law claims. (*Id.* at 23.) The Court finds **[**20]** neither argument persuasive at this stage.

1. The Filed-Rate Doctrine is Inapplicable.

"In short, the federal filed rate doctrine applies when federal statutes create a federal regulatory scheme for setting federal rates." *Castillo v. Johnson, No. CV-17-04688-PHX-DLR, 2019 U.S. Dist. LEXIS 151067, 2019 WL 4222289, *3 (D. Ariz. Sept. 5, 2019)*. The filed-rate doctrine "precludes interference with the rate setting authority of an administrative agency." *SolarCity Corp., 2015 U.S. Dist. LEXIS 146904, 2015 WL 6503439, at *14* (quoting *Wah Chang v. Duke Energy Trading & Mktg., 507 F.3d 1222, 1225 (9th Cir. 2007))*. In **[*1083]** particular, the doctrine insulates a federal regulatory agency's reasonable rates from challenge. *Id.* (citing *Ark. La. Gas Co. v. Hall, 453 U.S. 571, 577, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981))*. The doctrine "applies with equal force to challenges brought 'under state law and federal antitrust laws to rates set by *federal agencies*." *E. & J. Gallo Winery v. EnCana Corp., 503 F.3d 1027, 1033 (9th Cir. 2007)* (emphasis added). "To permit recovery under state law would allow a state court (or a federal court applying state law) to undermine the authority of a federal agency[.]" *Cty. Of Stanislaus v. Pacific Gas and Elec. Co., 114 F.3d 858, 863 (9th Cir. 1997)* (citing *Ark. La. Gas Co., 453 U.S. at 582*).

In addition to shielding federal agencies, some states, *excluding* Arizona, apply the filed-rate doctrine to state agencies. *SolarCity Corp., 2015 U.S. Dist. LEXIS 146904, 2015 WL 6503439, at *14* (citing *Qwest Corp. v. Kelly, 204 Ariz. 25, 59 P.3d 789, 800 (Ariz. Ct. App. 2002))*; *see also* *Johnson v. First Am. Title Ins. CO., No. CV-08-01184-PHX-DGC, 2008 U.S. Dist. LEXIS 93415, 2008 WL 4850198, at *4 (D. Ariz. 2008)* (Arizona "has never adopted the filed-rate doctrine"). "Arizona courts have not expressly adopted the filed rate doctrine." *Castillo, 2019 U.S. Dist. LEXIS 151067, 2019 WL 4222289, *4*; *see Id.* at 4-6 (exhaustively discussing how Arizona has *not* adopted **[**21]** the filed-rate doctrine). "When state-law regulatory authority provides the basis of the filed rate doctrine, the doctrine should be based on a careful analysis of the text and purpose of the underlying state law, rather than blanket application of the filed rate doctrine to all challenges which touch a regulated industry."

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[4] The District distinguishes, albeit in a footnote, the federal and state filed-rate doctrines. (*See* Memo. at 22 n.10) ("Arizona has effectively adopted the filed rate doctrine legislatively.")

Perryman v. Litton Loan Servicing, LP, No. 14-CV-221-JST, 2014 U.S. Dist. LEXIS 140479, 2014 WL 4954674, at *6 n.4 (N.D. Cal. Oct. 1, 2014).

The District claims the filed-rate doctrine entirely bars Plaintiffs' lawsuit because each claim "in some way collaterally attacks the E-27 rate on the ground that the rate is too high, discriminatory, or unreasonable." (Memo. at 21.) Plaintiffs claim the doctrine is inapplicable because (1) "[the District] does not file rates with a regulatory agency tasked with determining their reasonableness nor is it a 'regulatory agency' of the type that may implicate the doctrine"; (2) "Arizona has 'never adopted the filed-rate doctrine'"; and (3) "even if Arizona recognized the filed-rate doctrine, [it] is not implicated in this case because Plaintiffs do not challenge the reasonableness [sic] of [the District's] E-27 rates." (Resp. at 15-16). The District acknowledges Arizona has not adopted the filed-rate doctrine for its state **[**22]** agencies, but requests the Court apply it anyway.[5] (Repl. at 12.) The District also acknowledges the doctrine prevents courts from usurping functions assigned to a *federal regulatory body*. (*Id.* at 10.) The Court finds the filed-rate doctrine inapplicable here.

The filed-rate doctrine is inapplicable for three main reasons. First, it generally protects rates supervised by *federal* regulatory agencies, such as the Federal Energy Regulatory Commission. *See* Cty. of Stanislaus, 114 F.3d at 863. There are no allegations that a federal or state agency directly oversees the District's rate setting. Instead, and to the contrary, the FAC alleges the District is exempt from even the ACC's regulatory authority in Arizona. (FAC ¶ 37.) Second, as both parties agree, Arizona has not adopted the filed-rate doctrine to insulate its state agencies' ratemaking authority. *See* Johnson, 2008 U.S. Dist. LEXIS 93415, 2008 WL 4850198, at *4 (Arizona "has never adopted the filed-rate doctrine"). Regardless of why Arizona has not adopted this doctrine, **[*1084]** the Court declines to adopt it on Arizona's behalf. Third, Plaintiffs' claims do not "necessarily hinge on a claim that the . . . approved rate was too high and would, therefore, undermine [ratemaking] authority through the medium of direct court actions," Wah Chang, 507 F.3d at 1226. To be sure, Plaintiffs **[**23]** do not challenge the rate as being too high or too low. Nor do they seek Court assistance recalculating the District's precise electricity rates, which is what the filed-rate doctrine seeks to eliminate. Instead, Plaintiffs' allegations appear to be challenging *how* the District treats its solar generating customers, not *at what rate* they are being charged. Thus, dismissal under this doctrine is inappropriate here.

2. A.R.S. §§ 30-810 - 812 Poses No Bar to Plaintiffs' State - Law Claims.

The District next claims Arizona's legislature codified the filed-rate doctrine's underlying principles by barring collateral attacks under Arizona law on the Board's ratemaking decisions. (Memo. at 23 (citing A.R.S. §§ 30-810 - 812)). In particular, the District claims section 30-810(B) bars Plaintiffs' state law claims.[6] (*Id.*) That section states: "[n]o claim . . . shall accrue in any court to any party or the state *unless the party* or the state makes, before the effective date of the order or decision, application to the governing body of the public power entity for a rehearing." A.R.S. §§ 30-810(B) (emphasis added). Only a "party to the [underlying] action or proceeding . . . may apply for a rehearing." A.R.S. § 30-810(A). Plaintiffs claim exemption from this procedure because they were not a "party to the **[**24]** action or proceeding" since they installed solar panels *after* the E-27 rates were adopted and therefore could not apply for rehearing. (Resp. at 16-17.) Plaintiffs also claim they were not a "party" to the proceeding because they did not register as one with the District. (*Id.* at 18.)

As an initial matter, the Court refuses to resolve the factual question of whether each Plaintiff was a "party to the action or proceeding" at this stage. Moreover, in addition to the notion that Arizona courts have not yet adopted the filed-rate doctrine to insulate its state regulatory agencies, the Court refuses to find, as the District requests, that this statutory scheme codifies the Arizona legislature's intent to adopt the filed-rate doctrine for *every* state law claim brought against the District in the retail electricity market. *See* Castillo, 2019 U.S. Dist. LEXIS 151067, 2019

[5] The District acknowledges this by speculating about why Arizona has not adopted the filed-rate doctrine in arguing that the "issue likely remains unresolved in Arizona courts because state law independently forecloses collateral attacks on filed rates." (Repl. at 12.)

[6] The District cites only A.R.S. § 30-810(A), but it appears it is also citing A.R.S. § 30-810(B).

WL 4222289, at *5 (Even "assuming Arizona has adopted a form of the doctrine, it is unclear whether it would apply to the type of conduct at issue here."). Even assuming the filed-rate doctrine exists under Arizona law because of the cited statutory scheme, the District fails to show how any single state law claim is barred by it, let alone all of Plaintiffs' state law claims. Accordingly, the **[**25]** District has failed to show how this statutory scheme bars Plaintiffs' state law claims.

In conclusion, the federal filed-rate doctrine is inapplicable to this case. Additionally, the District has failed to show how A.R.S. §§ 30-810 - 812 is a disguised attempt by the Arizona legislature at adopting the filed-rate doctrine to insulate Arizona agencies or how determining whether Plaintiffs were a "party" is not a factual question. Accordingly, neither defense is persuasive at this stage.

B. State-Action Immunity is Inapplicable.

Every state action immunity analysis begins with *Parker v. Brown, 317 U.S. 341, 350-51, **[*1085]** 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)* (citing *Parker, 317 U.S. at 350-51*. In *Parker*, the Supreme Court "refused to construe the Sherman Act as applying to the anticompetitive conduct of a State acting through its legislature." *Hallie, 471 U.S. at 38* (citing *Parker, 317 U.S. at 350-51*). "State-action immunity is the exception rather than the rule." *Chamber of Commerce of the United States of Am. v. City of Seattle, 890 F.3d 769, 781 (9th Cir. 2018)*. If applicable, state-action immunity bars antitrust claims against qualifying entities. *Cost Mgmt. Servs. Inc. v. Wash. Nat. Gas Co., 99 F.3d 937, 943 (9th Cir. 1996)* (federal antitrust claims); *Mothershed v. Justices of the Sup. Ct., 410 F.3d 602, 609 (9th Cir. 2005)* (Arizona antitrust claims).

"[W]hen the entity responsible . . . is a literal arm of the state[,] the doctrine's applicability is obvious." *Dakota Territory Tours ACC v. Sedona-Oak Creek Airport Auth. Inc., 383 F. Supp. 3d 885, 896-97 (D. Ariz. Apr. 10, 2019)* (citation omitted). However, "state-action immunity is all the more exacting when . . . the activity at issue is not directly that of the State **[**26]** itself, but rather is carried out by others pursuant to state authorization." *City of Seattle, 890 F.3d at 781* (citing *F.T.C. v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 225, 133 S. Ct. 1003, 185 L. Ed. 2d 43 (2013)* (quotation and citation omitted)). In *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*, the Supreme Court articulated a "two-part test applicable to instances where private parties participate in a price-fixing regime." *F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 633, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)* (citing *Midcal Aluminum, Inc., 445 U.S. at 105*). Under *Midcal*, "[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first the State has articulated a clear and affirmative policy to allow the anticompetitive conduct,[7] and second, the State provides active supervision of anticompetitive conduct undertaken by private actors." *Ticor, 504 U.S. at 631 (1992)* (citing *Midcal Aluminum, Inc., 445 U.S. at 105*). However, "[l]ocal government entities, 'unlike private parties, . . . are not subject to the 'active state supervision requirement' because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney Health Sys., 568 U.S. at 226* (citing *Hallie, 471 U.S. at 46-47*). But "the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade." *North Carolina State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 135 S. Ct. 1101, 1114, 191 L. Ed. 2d 35, 191 L. Ed. 2d 35 (2015)*.

1. *Midcal*'s First Requirement is Not Satisfied: Arizona Has Not Articulated a Clear and Affirmative Policy to Permit the Dis trict's Anticompetitive **[**27]** Conduct.

The Court begins its "uphill" analysis with the understanding that the Supreme **[*1086]** Court narrowly interprets state-action immunity. *See* *City of Seattle, 890 F.3d at 781* ("State-action immunity . . . is 'disfavored.'"). Here, both

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[7] Under *Midcal*'s first factor, "a state legislature need not 'expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects.'" *Dakota Territory Tours ACC, 383 F. Supp. 3d at 897*. (citing *Hallie, 471 U.S. at 43*). Rather, this factor is met where anticompetitive effects are "the foreseeable result of what the statute authorizes." *City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 372-73, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*.

parties dispute whether Arizona has articulated a clear and affirmative policy to allow the District's anticompetitive conduct in the retail electricity market. The parties further dispute whether the District's anticompetitive conduct was a foreseeable result of the Arizona legislature's adoption of various statutes on the issue. *See* Dakota Territory Tours ACC, 383 F. Supp. 3d at 897; *see also* City of Columbia, 499 U.S. at 372-73; *see also* Ticor, 504 U.S. at 631.

The District claims Arizona adopted a clear and affirmative policy to allow anticompetitive conduct by requiring the District to use a ratemaking process that is inherently anticompetitive.[8] (Memo. at 25 (citing Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 64, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985)). The District further argues its status as a "natural monopoly" by Arizona's legislature was Arizona's attempt to foreclose competition in the retail electricity market. (*Id.* at 27 (citing A.R.S. § 9-516)).[9] Furthermore, even if Arizona's policy is unclear, the District claims Arizona intended to oust competition for the District by exempting it from antitrust liability under A.R.S. § 48-247.[10] (Memo. at 27-28.) Plaintiffs argue Arizona's legislature intended to promote competition by requiring **[**28]** that public power entities "open their entire service territories to competition," and "adopt a code of conduct to prevent anticompetitive activities that may result from the public power entity providing both competitive and noncompetitive services to retail electric customers." (Resp. at 23, 25 (citing A.R.S. § 30-803(A) and (F)). Plaintiffs also cite A.R.S. § 40-202, which first acknowledges an existing anticompetitive retail electricity market and then states: "It is the public policy of [Arizona] that a competitive market shall exist in the sale of electric generation service."

The numerous, conflicting statutes cited by the parties belie any adoption of a clear and affirmative policy or foreseeable result of a statute permitting anticompetitive conduct in the retail electricity market. If anything, the statutes signal a shift by Arizona's legislature to *promote* competition in the retail electricity market in the future. *Compare* A.R.S. § 40-202 ("It is the public policy of [Arizona] that a competitive market shall exist in the sale of electric generation service.") *with* A.R.S. § 9-516(A) ("It is declared as a public policy of the state that when adequate public utility service under authority of law is being rendered in an area, **[**29]** . . . a competing service and installation shall not be authorized."). The fact that competition may or may not have materialized is not the question here. (*See* Memo. at 29) ("[T]he ACC has not elected to move forward with retail competition of any sort."). Rather, the Court looks to whether Arizona clearly and affirmatively ousted competition, which these statutes surely do not indicate such a thing.

[*1087] Furthermore, just because Arizona's legislature requires that the District use ratemaking does not necessarily mean a clear and affirmative policy to allow anticompetitive conduct in the retail electricity market exists. *See* City of Seattle, 890 F.3d at 782 ("The state's authorization must be plain and clear."). Regardless of whether ratemaking is "inherently anticompetitive," as the District argues, (Memo. at 25-26), Arizona's requirement that the District use ratemaking does not mean it intended to affirmatively permit the District's allegedly anticompetitive conduct. In light of the conflicting statutes above declaring Arizona's policy relating to retail electricity market competition, the Court is hesitant to infer a policy one way or the other. Although state-action immunity is a legal question, Arizona's legislature, not the Court, must **[**30]** clearly and affirmatively establish a policy to promote the District's anticompetitive conduct. It is not the Court's role to unnecessarily *assume* a policy exists when the test

[8] Section 30-802 defines the procedures for public notice, hearings, comments, and votes before a public power entity adopts terms and conditions for *competition* in the retail sale of electric generation service. *See* A.R.S. § 30-802(A). Entities' rates must also be reasonable. *See* A.R.S. § 30-805.

[9] The District cites § 9-516(A) in support, which states: "It is declared as the public policy of the state that when adequate public utility service under authority of law is being rendered in an area, . . . a competing service and installation shall not be authorized . . . by a city or town[.]" A.R.S. § 9-516(A).

[10] The District cites § 48-247, which exempts "conduct or activity of a district . . . approved by a statute of [Arizona]" from antitrust liability.

requires a "plain and clear" authorization from the state. *See* City of Seattle, 890 F.3d at 782. Accordingly, state-action immunity is inappropriate.[11]

C. Plaintiffs' Fourteenth Amendment Equal Protection Claims are Untimely.

Arizona's statute of limitations governs Plaintiffs' federal equal protection claims.[12] *See* Wilson v. Garcia, 471 U.S. 261, 276-80, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985). Arizona's personal injury statute of limitations is "two years after the cause of action accrues, and not afterward." A.R.S. § 12-542. "A statute of limitations under § 1983 . . . begins to run when the cause of action accrues, which is when the plaintiffs know or have reason to know of the injury that is the basis of their action." RK Ventures, Inc. v. City of Seattle, 307 F.3d 1045, 1058 (9th Cir. 2002) (citing Cabrera v. City of Huntington Park, 159 F.3d 374, 379 (9th Cir. 1998)). To determine when a cause of action accrues, courts look to when the "operative decision" occurred. Chardon v. Fernandez, 454 U.S. 6, 8, 102 S. Ct. 28, 70 L. Ed. 2d 6 (1981). Inevitable consequences resulting from the operative decision are not separately actionable. RK Ventures, 307 F.3d at 1058.

The question is when the "operative decision" occurred. The District argues Plaintiffs' equal protection claims "accrued no later than 2015 when the E-27 rate was adopted." (Memo. at 37-38.) Plaintiffs argue the claims accrued "when they subsequently **[**31]** purchased their solar energy systems and became subject to the discriminatory E-27 [sic] rate." (Resp. at 34.) Plaintiffs further argue "new claims accrue each month that they [are] charged the E-27 rates." (*Id.*) Plaintiffs filed this action on February 22, 2019. (Doc. 1.) The Court agrees with the District.

The "operative decision" is the Board's approval of the SEPPs on February 26, 2015. (FAC ¶ 73.) Plaintiffs, presumably already District customers because "all customers within [the Market] generally must purchase some retail electricity from [the District]," (*id.* ¶ 52), knew or reasonably knew the SEPPs were adopted at that time. *See* RK Ventures, 307 F.3d at 1058. Plaintiffs' statute of limitations does not sit idle until they decide to **[*1088]** install solar panel systems after the SEPPs were adopted. This result would be absurd. District customers could essentially challenge the SEPPs in perpetuity by simply waiting to install solar energy systems until they were ready to file a lawsuit. Similarly, recurring monthly bills are inevitable consequences of the initial "operative decision" and do not toll the statute of limitations. RK Ventures, Inc., 307 F.3d at 1058. This too would allow lawsuits in perpetuity. Thus, Plaintiffs' Fourteenth Amendment equal protection claims **[**32]** are untimely.

D. Arizona's Actions Against Public Entities and Public Employees Act Bars Plaintiffs' State Law Claims.

Section 12-821.01 states:

> Persons who have claims against a public entity . . . shall file claims with the person or persons authorized to accept service for the public entity . . . within one hundred eighty days after the cause of action accrues. The claim shall contain facts sufficient to permit the public entity . . . to understand the basis on which liability is claimed. The claim shall also contain a specific amount for which the claim can be settled and the facts supporting that amount. Any claim that is not filed within one hundred eighty days after the cause of action accrues is barred and no action may be maintained thereon.

A.R.S. § 12-821.01. "The purpose of [§ 12-821.01's] notice requirement is to allow the public entity or employee to 'investigate and assess liability,' to 'permit the possibility of settlement prior to litigation,' and to 'assist the public

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[11] *Midcal*'s second requirement for state-action immunity is not addressed here since Arizona has not adopted a clear and affirmative policy to permit the District's anticompetitive conduct. The Court renders no judgment on whether the District is exempt from *Midcal*'s "active supervision" requirement.

[12] Neither party disputes whether A.R.S. § 12-542 governs Plaintiffs' Fourteenth Amendment equal protection claims brought under 42 U.S.C. § 1983.

entity in financial planning and budgeting.'" *Payne, 2009 U.S. Dist. LEXIS 110553, 2009 WL 3756679, *11* (quoting *Falcon v. Maricopa Cty, 213 Ariz. 525, 527, 144 P.3d 1254, 1256 (2006))*. Section 12-821.01's requirements are strictly applied. *See* *Nored v. City of Tempe, 614 F. Supp. 2d 991, 996 (D. Ariz. Jun. 26, 2008)*; *see also* *Deer Valley Unified Sch. Dist. No. 97 v. Houser, 214 Ariz. 293, 298 n. 6 152 P.3d 490, 496 n.6 (2007)*.

As the statute explicitly states, "*A.R.S. § 12-821.01* requires persons who have claims against a public entity . . . to file a notice of claim with the person **[**33]** authorized to accept service within 180 days after the accrues." *Mothershed, 2006 U.S. Dist. LEXIS 6968, 2006 WL 381679, at *6*. Any claim filed more than 180 days after the cause of action accrues "is barred and no action may be maintained thereon." *See* *Stulce v. Salt River Project Agr. Imp. & Power Dist., 197 Ariz. 87, 90, 3 P.3d 1007, 1010 (Ct. App. 2000)*. In addition to *A.R.S. § 12-821.01*'s time limit, it also requires a notice of claim adhere to certain substantive requirements. *Id.* For instance, the notice of claim "shall contain facts sufficient to permit the public entity . . . to understand the basis on which liability is claimed [and] . . . a specific amount for which the claim can be settled and the facts supporting that amount." *Id.* "[A] genuine issue of material fact . . . as to whether the requirements of this section have been complied with . . . shall be resolved before a trial on the merits and at the earliest possible time." *Id.*

The District claims that *A.R.S. § 12-821.01*'s compels dismissal of Plaintiff's state law claims. (Memo. at 31-32.) Plaintiffs claim *A.R.S. § 12-821.01* does not apply in federal court, but that if it does, it is satisfied here. (Resp. at 27-29.) Again, *§ 12-821.01* applies in federal court. *See* *Mothershed, 2006 U.S. Dist. LEXIS 6968, 2006 WL 381679, at *7* ("federal courts entertaining state-law claims against state entities are obligated to apply the state law notice-of-claim provision"); *see also* *Payne, 2009 U.S. Dist. LEXIS 110553, 2009 WL 3756679, at *11* ("*§ 12-821.01* applies to all state law claims."). The Court **[**34]** agrees with the District.

As a preliminary matter, the FAC omits any allegations that Plaintiffs even filed **[*1089]** the requisite notice of claim. *See* *Mothershed, 2006 U.S. Dist. LEXIS 6968, 2006 WL 381679, at *6* ("The Plaintiff's Complaint does not allege that . . . the Plaintiff has ever filed the requisite notice of claim."). In fact, the Notice is only before the Court because the *District* requested it be judicially noticed. But even if the FAC contained such allegations, Plaintiffs' Notice lacks a "specific amount for which the claim[s] can be settled and the facts supporting that amount." *A.R.S. § 12-821.01*. The Notice instead includes a brief set of facts, a draft of the complaint, and four settlement conditions. (Doc. 15-2 at 2-3.) The settlement conditions require (1) that the District repeal the E-27 rate; (2) declaratory relief *entered by the court* that the District's conduct is illegal; (3) monetary relief of $1.64 per day per individual for an undefined class; and (4) attorney fees to be determined at a later date. (*Id.* at 3.) All four conditions are prerequisites for Plaintiffs' settlement. (*Id.*) Plaintiffs also explicitly state they "are not willing to settle their individual or class claims absent injunctive and declaratory relief for the entire Class." (*Id.*)

[**35] *Estrada v. City of San Luis is especially instructive here. No. CV-07-1071-PHX-DGC, 2007 U.S. Dist. LEXIS 86606, 2007 WL 4025215 (D. Ariz. Nov. 15, 2007)*. In *Estrada*, the court dismissed plaintiffs' state law claims because their notice of claim under *§ 12-821.01* lacked sufficient facts supporting their theory of liability and damages claimed. *2007 U.S. Dist. LEXIS 86606, [WL] at *5*. The *Estrada* court reasoned that *§ 12-821.01* "requires that claimants explain the amounts identified in the claim by providing the government entity with a factual foundation to permit the entity to evaluate the amount claimed." *Id.* (quotations omitted). The *Estrada* court found plaintiffs' notice of claim lacked any indication how they reached the "lump sum" figures included in their notice of claim or what damages stemmed from each of their various fifteen state law claims against defendants. *Id.* The notice of claim's lack of information, the court reasoned, prevented defendant from properly evaluating settlement alternatives and therefore required dismissal of plaintiffs' state law claims. *Id.*

Plaintiffs' Notice similarly lacks sufficient information to permit the District to settle Plaintiffs' claims. Except for the District repealing the E-27 rate, which alone is insufficient to permit settlement, the Notice requests declaratory relief from **[**36]** this Court, monetary relief of an uncertain amount for an unidentified number of class members, and an unspecified amount of attorney fees. (Doc. 15-2 at 3.) Unlike the *Estrada* plaintiffs who actually listed a lump sum, *id.*, Plaintiffs here omit any specific or total amount, let alone describe which damages stem from each of its nine causes of action. Furthermore, Plaintiffs' unwillingness to settle unless an entire unidentified class obtains relief directly contravenes *A.R.S. § 12-821.01*'s purpose of permitting settlement outside of the court, *see* *Payne,* 2009 U.S. Dist. LEXIS 110553, 2009 WL 3756679, *11. This vague Notice falls far short of A.R.S. § 12-821.01's strict standards and purposes.

Nevertheless, Plaintiffs' also claim exemption from identifying a "specific amount" because doing so would be a breach of the putative class representatives' fiduciary duties to the other class members.[13] (Resp. at 28-29 ("attempting to settle on an individual basis, to the exclusion of the absent class members, would be a breach of [a putative class representative's fiduciary] duties."). This is incorrect; the "specific amount" requirement applies to putative class actions as well. *See* City of Phoenix v. Fields, 219 Ariz. 568, 201 P.3d 529, 534 **[*1090]** (2009). As the District correctly argues, even a putative class representative's notice of claim must include **[**37]** a specific amount for which his individual claim can be settled. (Memo. at 31-32 (citing Fields, 201 P.3d at 534). In *Fields*, the Arizona supreme court explicitly held that "there is no exemption [from 821.01] for putative class claims," in rejecting the argument that "the representatives should be excused from including *any* specific settlement demand in their notice of claim." *Id.* (emphasis in original). While Plaintiffs are correct that § 12-821.01 does not demand a class representative to submit a settlement demand on behalf of the class, a class representative is still required to propose a specific amount for settling their own claim. *Id.* Unfortunately for Plaintiffs' state law claims, they do not propose such an amount in their Notice.

The Notice is also untimely under A.R.S. § 12-821 and A.R.S. § 12-821.01. *See* A.R.S. § 12-821 ("All actions against any public entity of public employee shall be brought within one year after the cause of action accrues and not afterward"); *see also* A.R.S. 12-821.01 ("Persons who have claims against a public entity . . . shall file claims . . . within one hundred eighty days after the cause of action accrues."). As discussed above, the cause of action accrued when the District adopted the SEPPs in 2015. Not only are Plaintiffs' claims inadequate under § 12-821's **[**38]** substantive requirements, but they are also untimely. Accordingly, Plaintiffs' state law claims are dismissed.[14]

E. The LGAA Bars Antitrust Damages.

The District claims the LGAA bars Plaintiffs' recovery of antitrust damages. (Memo. at 45.) The LGAA prohibits plaintiffs from recovering "damages, interest on damages, costs, or attorney's fees . . . from any local government." 15 U.S.C. § 35(a). "Local government" includes "a school district, sanitary district, or any other special function governmental unit established by State law in one or more States[.]" 15 U.S.C. § 34(1). The LGAA "provides absolute immunity when the terms of the statute are met" and "courts should strive to resolve the immunity issue as early as possible, with minimum of expense and time to the parties." Sandcrest Outpatient Servs., P.A. v. Cumberland, 853 F.2d 1139, 1148 n. 9 (9th Cir. 1988); *see also* Palm Springs Med. Clinic, Inc. v. Desert Hosp., 628 F. Supp. 454 (C.D. Cal. 1986). "[W]hether a defendant is entitled to absolute immunity is a question of law[.]" *Tennison v. City & Cty. Of S.F., 570 F.3d 1078, 1087 (9th Cir. 2008)*.

The District argues the LGAA shields it from antitrust damages because it is a "local government" entity. (Memo. at 45; Repl. at 25.) Plaintiffs argue the LGAA does not shield the District from antitrust liability and legislative history disfavors it. (Resp. at 44.) The Court agrees with the District and prior precedent finding the District immune from antitrust damages liability under **[**39]** the LGAA. *See* SolarCity, 2015 U.S. Dist. LEXIS 146904, 2015 WL 6503439, at *13-14.

F. Failure to State a Claim

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[13] This case is not certified as a class action, but the Court assumes it is for purposes of this argument.

[14] As a result, the Court need not analyze whether (1) A.R.S. 48-247 bars Plaintiffs' state antitrust claims; or (2) A.R.S. § 12-820.01 immunizes the District from state law damages. Furthermore, the Court does not consider the parties' arguments regarding whether the LGAA bars *state* antitrust damages because Plaintiffs' state antitrust claims are barred by 12-821.01.

After reviewing the District's defenses, only two causes of action (monopolization; attempted monopolization) under 15 U.S.C. § 2 ("Sherman Act") are not barred.[15] (FAC ¶¶ 120-35.) As alleged, neither can **[*1091]** proceed because the FAC inadequately alleges antitrust injury caused by the District, a necessary element for monopolization and attempted monopolization claims.

1. Antitrust Claims

"Section 2 of the Sherman Act makes it unlawful for a person to monopolize or attempt to monopolize 'any part of the trade or commerce among the several States.'" Aerotec Int'l., Inc. v. Honeywell Int'l., Inc., 4 F. Supp. 3d 1123, 1136 (D. Ariz. 2014) (quoting 15 U.S.C. § 2). "The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993). Generally, "a section 2 monopolization claim consists of three elements: [(1)] possession of monopoly power in the relevant market; [(2)] willful acquisition or maintenance of that power; and [(3)] causal 'antitrust injury.'" Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924 (9th Cir. 1980) (quoting Cal. Comput. Prods. v. Int'l Bus. Machines Corp., 613 F.2d 727, 735 (9th Cir. 1979)); *see also* MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1130 (9th Cir. 2004).[16]

a. Plaintiffs Allege Monopoly Power in a Relevant Market.

The District does not challenge whether Plaintiffs allege monopoly power in a relevant market and Plaintiffs do not argue they do. Nevertheless, the FAC plausibly alleges the **[**40]** District's monopoly power in Phoenix's electricity market. (*See* FAC ¶¶ 42-59.) Specifically, the relevant market is the District's service territory in Arizona where they provide 95% of retail electricity; the product market is "the delivery and sale of electric power to residential and commercial consumers within [the District's] service territory"; self-generated solar power serves as a substitute for purchasing electricity from the District; and self-generating solar power customers deprive the District of electricity sales by creating their own electricity. (*Id.*)

b. Plaintiffs Allege Exclusionary Conduct.

In addition to monopoly power in a relevant market, "[i]t is settled law that [an antitrust violation] requires . . . 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)). Mere "possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." Trinko, LLP, 540 U.S. at 398 (emphasis in original); *see* Aerotec Int'l., 4 F. Supp. 3d at 1136-37. In fact, companies "may acquire monopoly power by establishing an infrastructure that renders them uniquely suited **[**41]** to serve their customer [without violating antitrust]." *Id.* "Section 2 claims may be premised upon predatory conduct that is aimed at achieving or maintaining a monopoly in a given market." **[*1092]** ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495, 506 (9th Cir. 2010). Unlawful or exclusionary conduct satisfies this element. Grinnell, 384 U.S. at 576.

The District claims the FAC inadequately alleges this element because (1) higher prices for self-generating electricity customers; (2) above-cost price-setting; and (3) higher prices making solar power system economically unfeasible do not allege exclusionary conduct. (Memo. at 34-37.) The District further argues Plaintiffs' installation of

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[15] Section 4 of the Clayton Act creates a private cause of action for antitrust violations, providing that "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore." 15 U.S.C. § 15(a).

[16] Although attempted monopolization claims under section 2 of Sherman Act require slightly different elements than a pure monopolization claim, "causal antitrust injury" is required under both theories. *See* Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1432-33 (9th Cir. 1995) ("To establish a Sherman Act § 2 violation for attempted monopolization, a private party seeking damages must demonstrate four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving 'monopoly power'; and (4) causal antitrust injury.")

solar energy systems after it adopted the SEPPs indicates the absence of exclusionary conduct. (Repl. at 20-21.) Plaintiffs argue this element is adequately alleged because the District purposely disincentivized consumers from installing solar energy systems by raising prices for post-2014 solar customers like Plaintiffs to maintain its electricity monopoly in Arizona. (Resp. at 31-33.)

The Court finds the FAC sufficiently alleges exclusionary conduct by the District. The FAC alleges a pricing scheme differentiating between self-generating solar energy customers and other customers with the sole purpose of fortifying its monopoly against **[**42]** the rising competitive threat of solar power. (FAC ¶ 81.) The FAC specifically alleges:

> Based on the dramatic pricing increase for solar customers subject to the E-27 plan, it is apparent that the purpose . . . is not to recoup reasonable grid-related costs from solar energy customers, but to prevent competition from solar energy systems by penalizing customers for installing these systems and creating disincentives to purchase or lease them [and] . . . resulted in a significant drop in new applications for the installation of solar energy systems in [the relevant market].

(*Id.* ¶¶ 84, 86.) These allegations adequately allege the District's "willful acquisition or maintenance of power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Trinko, LLP, 540 U.S. 398, at 407, 124 S. Ct. 872, 157 L. Ed. 2d 823*. Moreover, Plaintiffs allege the District adopted the SEPPs to (1) deter the competitive threat of solar energy systems, (FAC ¶¶ 5-6, 84); (2) penalize solar energy investments to fortify the District's monopoly, (*id.* ¶¶ 5-10); (3) and force consumers to exclusively purchase electricity from the District by making solar energy system installation uneconomical, (*id.* ¶ 87). These allegations, **[**43]** if true, rise to the level of exclusionary conduct by the District to oust competition by solar energy system installers and users in the retail electricity market. Accordingly, Plaintiffs adequately allege exclusionary conduct.

c. Plaintiffs Inadequately Allege Antitrust Injury.

"Antitrust injury is defined not merely as an injury caused by an antitrust violation, but more restrictively as 'injury of the type of the antitrust laws were intended to prevent and that flows from that which makes [defendant's] acts unlawful.'" *Glen Holly Entm't, Inc. v. Tektronix, 352 F.3d 367, 371 (9th Cir. 2003)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. Antitrust laws protect against anticompetitive conduct, not competition in the marketplace. *U.S. v. Topco Assoc., Inc., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*. Antitrust injury has four requirements: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1054-55 (9th Cir. 1999)*. As stated by the Supreme Court:

> **[*1093]** Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise systems as the *Bill of Rights* is to the protection of our fundamental personal freedoms.

Topco, 405 U.S. at 608. "One form of antitrust injury is "[c]oercive **[**44]** activity that prevents its victims from making free choices between market alternatives." *Glen Holly Entm't, 352 F.3d at 374* (citing *Amarel v. Connell, 102 F.3d 1494, 1509 (9th Cir. 1996))*. However, "[antitrust] injury, although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anti-competitive practice under scrutiny." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. This is because "[i]t is inimical to [the antitrust] laws to award damages' for losses stemming from continued competition." *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 109-110, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*.

The District argues Plaintiffs would have been harmed regardless of its adoption of the SEPPs. (Memo. at 34) ("even if rooftop solar competition had flourished after E-27, Plaintiffs' alleged injury would be the same."). In other words, the District argues its alleged restraint of competition (adopting the SEPPs) did not cause Plaintiffs' economic injuries. (Repl. at 20.) Plaintiffs argue antitrust injury is adequately alleged because they were (1) injured as electricity consumers and competitor and consumer antitrust injury differs; (2) charged higher rates to deter their solar energy investments; (3) and a prior competitor alleged antitrust injury. (Resp. at 29-31.) None of Plaintiffs' arguments persuade the Court that antitrust injury is alleged.

Instead, the Court agrees with the **[**45]** District that the FAC fails to allege antitrust injury. Undoubtedly, the FAC alleges harm to Plaintiffs occurring after the District adopted the SEPPs. (FAC ¶¶ 87, 90-92, 130.) For instance, the FAC alleges the SEPPs "made it economically unfeasible for customers to install solar energy systems" or, in other words, that self-generating solar energy was economically feasible before the District adopted the SEPPs. (*Id.* ¶ 92.) However, the FAC contains no allegations that the District unlawfully restrained competition, the principal evil of antitrust laws. If anything, the District's higher prices for solar energy customers *encourages* competition in alternative energy investment by allowing for new market entrants with its higher prices. Moreover, the FAC even concedes that "technologies that would allow consumers to completely remain off the grid are not yet economically viable." (*Id.* ¶ 52.) Indeed, the FAC alleges solar energy systems are *still* uneconomical. (FAC ¶ 92.) Thus, as the District correctly argues, its alleged anticompetitive conduct of adopting the SEPPs did not cause Plaintiffs' injury because they would have been harmed anyway from using an uneconomical product. Antitrust **[**46]** laws seek to eliminate injuries arising from anticompetitive conduct, not just market injuries tangentially related to antitrust violations from using uneconomical products. *See* *Topco Associates, Inc., 405 U.S. at 608*. Because the FAC lacks sufficient allegations relating to how Plaintiffs' injuries are attributable to any anticompetitive conduct, antitrust injury is inadequately alleged.[17]

[*1094] VI. LEAVE TO AMEND

"Dismissal is a harsh penalty and is to be imposed only in extreme circumstances." *Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986)* (citing *Raiford v. Pounds, 640 F.2d 944, 945 (9th Cir. 1981)*. In accordance with well-settled law in the Ninth Circuit, the Court will grant Plaintiffs leave to amend their complaint because "it is not 'absolutely clear' that [Plaintiffs] could not cure [the amended complaint's] deficiencies by amendment." *See* *Jackson v. Barnes, 749 F.3d 755, 767 (9th Cir. 2014)* (citations omitted); *Fed. R. Civ. P. 15(a)(2)* ("leave to amend should be "freely" given "when justice so requires[]").

Accordingly, within thirty (30) days from the date of entry of this Order, Plaintiffs may submit an amended complaint addressing the deficiencies in claims 1 and 2. Plaintiffs must clearly designate on the face of the document that it is the "Second Amended Complaint." If Plaintiffs decides to file an amended complaint, they are reminded that an amended complaint **[**47]** supersedes the original complaint, *see* *Lacey v. Maricopa Cty., 693 F.3d 896 (9th Cir. 2012)*, and it must be complete in itself and "must not incorporate by reference any part of the preceding pleading, including exhibits," *L.R.Civ 15.1*. To be clear, Plaintiffs may only amend their complaint as it relates to their antitrust claims under the Sherman Act.

VII. CONCLUSION

In conclusion, the District's defenses are availing to the extent that they bar Plaintiffs' state law and *Fourteenth Amendment* equal protection claims and Plaintiffs cannot recover antitrust damages under the Sherman Act. More explicitly, the filed-rate doctrine and state-action immunity are inapplicable. As to the two residual claims that survive the District's defenses and not barred as a matter of law (monopolization and attempted monopolization

[17] The Court does not address whether Plaintiffs adequately allege antitrust standing because antitrust injury is not alleged. *See* *Glen Holly Entm't, 352 F.3d at 371-73* ("Only those who meet the requirements for 'antitrust standing' may pursue a claim under the Clayton Act; and to acquire 'antitrust standing,' a plaintiff must adequately allege and eventually prove 'antitrust injury.'"). Nevertheless, the Court agrees with the District that the "competitor, not the consumer [like Plaintiffs], is the party with antitrust standing to bring a claim of *attempted monopolization*." *Neagle v. Goldman Sachs Group, Inc., 2019 U.S. Dist. LEXIS 36517, 2019 WL 1102199, at * 12 (D. Or. Mar. 1, 2019)* (emphasis added).

under the Sherman Act), the FAC inadequately alleges antitrust injury, which is an essential element under ***antitrust law***. If Plaintiffs wish to file a second amended complaint to fix the deficiencies above as they relate to their antitrust claims under the Sherman Act, they may do so within thirty (30) days.

Accordingly,

IT IS ORDERED that the District's Motion, (Doc. 14), is **GRANTED** and claims 1 and 2 are dismissed with leave to amend, claims 3-9 are dismissed **[**48]** without leave to amend.

IT IS FURTHER ORDERED that the District's Request, (Doc. 15), is **GRANTED** as it relates to judicially noticing Exhibit 1, but denied as to the remaining exhibits;

IT IS FURTHER ORDERED that Plaintiffs may file a Second Amended Complaint within thirty (30) days of this Order. If Plaintiffs fail to file an amended complaint within thirty (30) days of this Order, the Clerk of Court is directed to terminate this action.

Dated this 10th day of January, 2020.

/s/ Susan M. Brnovich

Honorable Susan M. Brnovich

United States District Judge

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In re Am. Express Anti-Steering Rules Antitrust Litig.

United States District Court for the Eastern District of New York

January 14, 2020, Decided; January 15, 2020, Filed

11-MD-2221 (NGG) (RER)

Reporter

433 F. Supp. 3d 395 *; 2020 U.S. Dist. LEXIS 7095 **; 2020-1 Trade Cas. (CCH) P81,060; 2020 WL 227425

IN RE AMERICAN EXPRESS ANTI-STEERING RULES ANTITRUST LITIGATION;This Document Relates to: The Consolidated Class Action;ANIMAL LAND, INC., IL FORNO, INC., ITALIAN COLORS RESTAURANT, JASA INC., LOPEZ-DEJONGE, INC., PLYMOUTH OIL CORP. d/b/a LIBERTY GAS STATION, CLAM LAKE PARTNERS, LLC, QWIK LUBE, LLC, and LAJOLLA AUTO TECH, INC., on behalf of themselves and all others similarly situated, Plaintiffs, -against-AMERICAN EXPRESS COMPANY and AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., Defendants.

Subsequent History: Affirmed by *Rite Aid Corp. v. Am. Express Travel Related Servs. Co. (In re Am. Express Anti-Steering Rules Antitrust Litig.), 2021 U.S. App. LEXIS 34626 (2d Cir., Nov. 22, 2021)*

Prior History: *In re Am. Express Anti-Steering Rules Antitrust Litig., 2016 U.S. Dist. LEXIS 3332, 2016 WL 748089 (E.D.N.Y., Jan. 7, 2016)*

Core Terms

merchants, antitrust, cards, competitors, arbitration, credit card, damages, networks, anti trust law, factors, consumer, vindication, Subclass, quotation, parties, marks, class action, anticompetitive, speculative, courts, prices, Plaintiffs', enforcer, arbitration agreement, allegations, alterations, injunctive, purchasers, indirect, motion to dismiss

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For Government Plaintiffs in 10-cv-4496, Interested Party: Anne E. Schneider, Attorney **[**11]** General of Missouri, Jefferson City, MO; Mark H Hamer, Department of Justice, Washington, DC.

For Target Corporation, Staples, Inc., The Bon-Ton Stores, Inc., Interested Parties: Alycia Nadine Broz, Michael J. Canter, Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY.

For Willkie Farr & Gallagher LLP, Interested Party: Robert J. Jossen, LEAD ATTORNEY, Dechert LLP, New York, NY.

For Gary Friedman, Interested Party: Samuel Issacharoff, Samuel Issacharoff, Esq., New York, NY; Theresa Trzaskoma, Brune & Richard LLP, New York, NY.

For DFS Services LLC, Interested Party: Jennifer M. Selendy, LEAD ATTORNEY, Selendy & Gay PLLC, New York, NY.

For Discover Home Loans, Inc., Discover Bank, Interested Parties: Jennifer M. Selendy, LEAD ATTORNEY, Selendy & Gay PLLC, New York, NY.

For Squire Patton Boggs (US) LLP, Interested Party: Mitchell Rand Berger, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Thomas Michael Guiffre, LEAD ATTORNEY, Patton Boggs LLP, Washington, DC.

For Hausfeld, LLP, Interested Party: Michael D. Hausfeld, LEAD ATTORNEY, PRO HAC VICE, Hausfeld LLP, Washington, DC; Scott Allan Martin, LEAD **[**12]** ATTORNEY, Hausfeld LLP, New York, NY.

For Prof. Myriam Gilles, Interested Party: Noah Shube, New York, NY.

For Circuit City Liquidating Trust, the RSH Liquidating Trust, Holiday Companies, Gander Mountain Company, Commonwealth Hotels, Inc., Intervenors: K. Craig Wildfang, Ryan W. Marth, Thomas J. Undlin, Robins Kaplan, L.L.P., Minneapolis, MN.

For Keila Ravelo, Intervenor: Lawrence S. Lustberg, LEAD ATTORNEY, Jake F. Goodman, Gibbons, P.C., Newark, NJ.

For 7-Eleven, Inc., Academy, Ltd., Affiliated Foods Midwest Cooperative, Aldo US Inc., American Eagle Outfitters, Inc., Barnes & Noble, Inc., Barnes & Noble College Booksellers, LLC, Bealls, Inc., Best Buy Stores, L.P., Boscovs, Inc., Brookshire Grocery Company, Buc-ees Ltd., The Buckle, Inc., Dillards, Inc., Coborns Incorporated, DAgostino Supermarkets, Inc., Drury Hotels Company, LLC, Objectors: Adam Owen Glist, David Alan Scupp, Gary J. Malone, Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

For Euromarket Designs, Inc., Meadowbrook, L.L.C., Express, LLC, HMSHost Corporation, Ikea North America Services, LLC, Lowes Companies, Inc., Martins Super Markets, Inc., National Grocers Association, Petsmart, Inc., Recreational Equipment, **[**13]** Inc., Republic Services, Inc., Urban Outfitters, Inc., Wal-Mart Stores, Inc., Whole Foods Market Group, Inc., Whole Foods Market Rocky Mountain/Southwest, L.P., Whole Foods Market California, Inc., Mrs. Goochs Natural Food Markets, Inc., Whole Food Company, Whole Foods Market Pacific Northwest, Inc., WFM-WO, Inc., WFM Northern Nevada, Inc., WFM Hawaii, Inc., WFM Southern Nevada, Inc., Objectors: Adam Owen Glist, David Alan Scupp, Gary J. Malone, Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

For Macy's Inc., Kohl's Corporation, The TJX Companies, Inc., J.C. Penney Corporation, Inc., Office Depot, Inc., Objectors: Alycia Nadine Broz, Michael J. Canter, Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY.

For L Brands, Inc., Big Lots Stores, Inc., PNS Stores, Inc., C.S. Ross Company, Closeout Distribution, Inc., Acena Retail Group, Inc., Abercrombie & Fitch Co., OfficeMax Incorporated, Saks Incorporated, Chico's FAS, Inc., Luxottica U.S. Holdings Corp., American Signature, Inc., National Retail Federation, Objectors: Alycia Nadine Broz, Michael J. Canter, Robert N. Webner, Michael J. Canter, **[**14]** Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY.

Kevin S. Scheunemann, Objector, Pro se, Kewaskum, WI.

For Home Depot U.S.A., Inc., Objector: Alison Berkowitz Prout, PRO HAC VICE, Bondurant Mixson & Elmore, LLP, Atlanta, GA; Frank M. Lowrey, LEAD ATTORNEY, Bondurant Mixson & Elmore, LLP, Atlanta, GA.

For The Buckeye Institute for Public Policy Solutions, Objector: Adam E. Schulman, LEAD ATTORNEY, PRO HAC VICE, Hamilton Lincoln Law Institute, Washington, DC.

For Brenda Howell, Objector: Denise H. Gibbon, LEAD ATTORNEY, PRO HAC VICE, Attorney at Law, New York, NY.

For Blue Cross Blue Shield entities, WellPoint, Inc., Objectors: Adam P. Feinberg, Anthony F. Shelley, LEAD ATTORNEYS, Miller & Chevalier Chartered, Washington, DC.

For Unlimited Vacations and Cruises, Inc., Lasko Enterprises, Inc., Annamarie Falvo, Objectors: John Jacob Pentz, III, LEAD ATTORNEY, PRO HAC VICE, John J. Pentz, Esq., Sudbury, MA.

For Alaska Airlines, Inc., Southwest Airlines, Inc., Objectors: David P. Germaine, Joseph Michael Vanek, Paul E. Slater, Sperling & Slater, P.C., Chicago, IL; Jason A. Zweig, Hagens Berman Sobol Shapiro LLP, **[**15]** New York, NY.

For Lord & Taylor Acquisitions, Inc., Objector: Gregory Alan Clarick, LEAD ATTORNEY, Clarick Gueron Reisbaum LLP, New York, NY; Alycia Nadine Broz, Michael J. Canter, Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH.

For United States of America, United States of America, Objector: Gregg I. Malawer, Department of Justice, Antitrust Division, Washington, DC.

For Amazon, Ashley Furniture Industries Inc., Costco Wholesale Corp., Footlocker, Inc., The Gap, Inc., Marathon Petroleum Company LP, Michaels Stores, Inc., National Association of Convenience Stores, Panda Restaurant Group, Inc., Panera, LLC, RaceTrac Petroleum, Inc., Objectors: Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY.

For Willmar Motors, L.L.C., Mills Auto Center, Inc., Fleet and Farm of Alexandria, Inc., Fleet Wholesale Supply of Fergus Falls, Inc., Fleet and Farm of Green Bay, Inc., Fleet and Farm of Menomonie, Inc., Mills Fleet Farm Inc., Fleet and Farm of Manitowoc, Inc., Fleet and Farm of Plymouth, Inc., Fleet and Farm Supply Co. of West Bend, Inc., Fleet and Farm of Waupaca, Inc., Mills E-Commerce Enterprises, Inc., Brainerd Lively Auto, L.L.C., Newegg, Inc., Objectors: Jeffrey **[**16]** Isaac Shinder, Constantine Cannon LLP, New York, NY.

For Newegg, Inc., AirTran Airways, Inc., DSW Inc., Objectors: Joseph Michael Vanek, PRO HAC VICE, David P. Germaine, Sperling & Slater, P.C., Chicago, IL; Jason A. Zweig, Hagens Berman Sobol Shapiro LLP, New York, NY; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL.

Assistech Special Needs, Objector, Pro se, Tucson, AZ.

Les Petits Bisous! LLC, Objector, Pro se, Havre de Grace, MD.

Bailey H. Squier Associates, Objector, Pro se, Burleson, TX.

The Crow Hill Company, Inc., Objector, Pro se, Highland, NY.

Sales Growth Specialists, Objector, Pro se, Long Lake, MN.

Sports Coverage, Inc., Objector, Pro se, Dallas, TX.

SIGMAPAC, Objector, Pro se, Fairfax, VA.

The Fuel Foundation, Objector, Pro se, Fairfax, VA.

Ports Petroleum Company Inc., doing business as, Fuel Mart, Objector, Pro se, Wooster, OH.

Brooks Brothers Group, Inc., Objector, Pro se, New York, NY.

rue21, Inc., Objector, Pro se, Warrendale, PA.

The Estee Lauder Companies, Inc., Objector, Pro se, New York, NY.

New Vista, LLC, Objector, Pro se, North Little Rock, AR.

SIGMA, Objector, Pro se, Fairfax, VA.

Diamond State Oil, LLC, Objector, Pro se, North Little Rock, AR.

Coulson Oil Company, Inc., **[**17]** Objector, Pro se, North Little Rock, AR.

New Neptune, LLC, Objector, Pro se, North Little Rock, AR.

Cumberland Farms, Inc., Objector, Pro se, Framingham, MA.

Gulf Oil Limited Partnership, Objector, Pro se, Framingham, MA.

RR #1 TX, LLC, Objector, Pro se, North Little Rock, AR.

Port Cities Oil, LLC, Objector, Pro se, North Little Rock, AR.

Cracker Barrel Old Country Store, Inc., Objector, Pro se, Lebanon, TN.

Petroplus, LLC, Objector, Pro se, North Little Rock, AR.

New Mercury, LLC, Objector, Pro se, North Little Rock, AR.

Superstop Stores, LLC, Objector, Pro se, North Little Rock, AR.

O'Reilly Automotive, Inc., Objector, Pro se, Springfield, MO.

AutoZone, Inc., Objector, Pro se, Memphis, TN.

Spirit Airlines, Inc., Objector, Pro se, Miramar, FL.

BlueGalaxy Digital, Objector, Pro se, Beavercreek, OH.

The Comic King, Objector, Pro se, Melrose, MA.

Dairy Queen, Objector, Pro se, Kewaskum, WI.

Hot Topic, Inc., Objector, Pro se, City of Industry, CA.

Erich Neumann, Objector, Pro se, Miami, FL.

Skeeter's Automotive Repair, Objector, Pro se, Santa Ana, CA.

Pacific Sunwear of California, Inc., Objector, Pro se, Anaheim, CA.

Prestigiousbullion/Coppercapowns, Objector, Pro se, Millsboro, DE.

Kathy Goodhart-Walker, **[**18]** Objector, Pro se, Benson, AZ.

Christopher & Banks Corporation, Objector, Pro se, Plymouth, MN.

FL Snyder and Son Inc., Objector, Pro se, Albany, OR.

The Children's Place Retail Stores, Inc., Objector, Pro se, Secaucus, NJ.

Akamaru Japanese Restaurant, Objector, Pro se, Visalia, CA.

Family Express Corporation, Objector, Pro se, Valparaiso, IN.

Incredible Creations, Objector, Pro se, Buford, GA.

The Water Brewerey, Inc., Objector, Pro se, Costa Mesa, CA.

For The Water Brewerey, Inc., Objector: Scott A. Kron, LEAD ATTORNEY, PRO HAC VICE, Kron & Card LLP, Laguna Hills, CA.

Belk, Inc., Objector, Pro se, Charlotte, NC.

Andersson Technologies LLC, Objector, Pro se, Phoenixville, PA.

NTT Corporation, Objector, Pro se, Los Angeles, CA.

Swarovski North America Limited, Objector, Pro se, Cranston, RI.

Shabakas, Objector, Pro se, Clinton, MS.

Tiffany and Company, Objector, Pro se, New York, NY.

I.L. "Lonnie" Morris, CPA & Company, Objector, Pro se, Plano, TX.

Siringo Optometry Associates, PLLC, Objector, Pro se, Denver, CO.

Arthur Howard, Ph.D., Objector, Pro se, Hemet, CA.

Judges: NICHOLAS G. GARAUFIS, United States District Judge.

Opinion by: NICHOLAS G. GARAUFIS

Opinion

[*401] MEMORANDUM & ORDER

NICHOLAS G. GARAUFIS, United States District Judge. **[**19]**

Plaintiffs bring claims against Defendants American Express Company and American Express Travel Related Services Company, Inc. (together, "Amex") on behalf of two putative classes: (1) a class of merchants who accept Amex cards pursuant to a Card Acceptance Agreement ("CAA") with Amex (the "Amex Class"); and (2) a class of merchants who do not accept Amex cards and who have no contract with Amex (the "Non-Amex Class"). (See Second Amended Consolidated Class Action Complaint ("SAC") (Dkt. 864).) Currently pending before the court are two motions: (1) Amex's motion to stay proceedings and compel arbitration of all the Amex Class's claims; and (2) Amex's motion to dismiss all of the Non-Amex Class's claims under *Federal Rules of Procedure 12(b)(1)* and *12(b)(6)*. (See Mot. to Compel & Mot. to Dismiss ("Mot.") (Dkt. 875).)

For the following reasons, Amex's motion to compel arbitration is GRANTED and its motion to dismiss is GRANTED as to the Non-Amex Class.

I. **BACKGROUND**

This action challenges non-discrimination provisions (the "Anti-Steering Rules") contained in the CAAs. (SAC ¶ 1.) Plaintiffs allege that the Anti-Steering Rules unreasonably restrain interbrand price competition among general purpose credit and charge card networks **[**20]** ("credit card networks") because they: "(1) stifle competition among the networks; (2) impose supracompetitive merchant fees, with corresponding offsetting credit card user economic benefits; (3) increase the overall price of credit card transactions above competitive levels; and (4) raise consumer retail prices throughout the country, thereby reducing output." (Id.)

The background of this case—including the procedural history, the restraints on competition, the workings of the credit-card market in general, and Amex's platform in particular, etc.—have been discussed at great length in this court's previous opinions in this matter and in the **[*402]** related case brought by the federal government. See *In re Am. Exp. Anti-Steering Rules Antitrust Litig., 361 F. Supp. 3d 324, 331-34 (E.D.N.Y. 2019)*; *In re Am. Exp. Anti-Steering Rules Antitrust Litig., No. 11-MD-2221 (NGG), 2016 U.S. Dist. LEXIS 3332, 2016 WL 748089, at *1-4 (E.D.N.Y. Jan. 7, 2016)*; *United States v. Am. Exp. Co. ("U.S. v. Amex"), 88 F. Supp. 3d 143, 149-67 (E.D.N.Y. 2015)*, rev'd, *838 F.3d 179 (2d Cir. 2016)*, aff d sub nom. *Ohio v. Am. Exp. Co. ("Ohio"), 138 S. Ct. 2274, 201 L. Ed. 2d 678 (2017)*. The court facts and aspects of the procedural history necessary to introduce and to decide the instant motion are laid out below.

A. The Parties

The class representatives fall into two groups. The representatives of the Amex Class, which accept Amex cards, are: (1) Animal Land, Inc., a Georgia corporation; (2) Il Form, Inc., a California **[**21]** corporation; (3) Italian Colors Restaurant, a California business; (3) Jasa Inc., a Louisiana corporation; (4) Lopez-Dejonge, Inc., an Alabama corporation; (5) Plymouth Oil Corp. d/b/a Liberty Gas Station, a Pennsylvania corporation, and (6) Clam Lake Partners, LLC (successor in interest to previous class representative Firefly Air Solutions, LLC), a Minnesota corporation. (Id. II 5-11). The representatives of the Non-Amex Class, which do not accept Amex cards, are: (1) Qwik Lube, LCC, a New York corporation and (2) LaJolla Auto Tech, Inc., a California corporation. (Id. ¶¶12-13.) Plaintiffs also assert the existence of two California Subclasses: A California Amex Subclass and a California Non-Amex Subclass. (Id. ¶ 104(c).) The California Amex Subclass is represented by Il Forno, Inc. and Italian Colors Restaurant, and the California Non-Amex Subclass is represented by LaJolla Auto Tech., Inc. (Id.) All Plaintiffs are merchants. (Id. ¶ 104.)

Defendant American Express Company is a New York corporation. (Id. ¶ 14.) Defendant American Express Travel Related Services Company, Inc. is a Delaware corporation with its principal place of business in New York, New York. (Id., ¶ 15.) It is **[**22]** a wholly owned subsidiary of American Express Company. (Id.)

B. The Relevant Market

Plaintiffs lay out two geographic markets: (1) the United States for Counts One, Two, and Three; and (2) California for Counts Four and Five. (SAC ¶ 22.) The relevant product market is the two-sided credit card market, including all transactions provided by Amex and its competitors, MasterCard, Discover, and Visa. (Id. ¶ 23.)

C. The Credit Card Industry

Amex is one of four significant competitors in the nationwide credit card market. (SAC 25.) The others are Visa, MasterCard, and Discover; in 2018, the Supreme Court described their market shares as Visa 45%, Amex 26.4%, MasterCard 23.3%, and Discover 5.3%. (Id. ¶ 51 (citing *Ohio, 138 S. Ct. at 2282*).) According to Plaintiffs, these market shares have not meaningfully changed in many years. (Id.)

Credit card companies provide services both to cardholders, who use the cards to purchase goods and services, and to merchants, who accept those cards as payment in exchange for goods and services. These credit card companies thus operate a two-sided platform, offering services to two, distinct groups (merchants and consumers) and facilitating transactions between them. See *Ohio, 138 S. Ct. at 2280*. Credit card **[**23]** companies need to make a sale to both sides of the market to succeed; after all, "no credit-card transaction can occur unless both the merchant and the cardholder agree to use the same credit-card network." Id. (See also SAC ¶ 18.) Amex **[*403]** offers services directly to both merchants and consumers. (SAC ¶ 27.)

As Plaintiffs allege, "[w]hen a consumer uses a credit card, the merchant's point of sale terminal transmits a record of the transaction to the card's network." (Id. ¶ 20.) The network then pays, or facilitates the payment of, money for that transaction to the merchant, consisting of the purchase price charged to the customer minus the fee that network or bank charges merchants. (Id.) Consumers may also pay fees to use their credit cards and get rewards for making purchases with a particular card. (Id. ¶ 21.) Unlike its competitors, who charge variable merchant fees depending on the particular card the individual consumer is using, "Amex charges a single, typically higher merchant fee for all Amex credit cards." (Id. ¶ 32.) Plaintiffs further allege that, unlike its competitors, "Amex's revenues are primarily dependent on its merchant fees." (Id. ¶ 34.)

D. The CAA

1. Relevant Version **[**24]** of the Agreement

According to Amex, the "current, operative" form of the CAA between Amex and the merchants in the Amex Class has been in effect since October 2018. (Mot. at 5.) Plaintiffs do not state whether they disagree or disagree with this assertion, but do note:

> In the [SAC], Plaintiffs assert that Amex arbitration agreements also state ". . . the arbitrator's authority to make awards is limited to awards to you and us alone." SAC ¶ 90. For years, this language was contained in the Amex arbitration agreement, but was removed by Amex in the 2018 edition of the agreement. Notwithstanding this change, the 2018 agreement continues to prohibit Plaintiffs from obtaining market-wide injunctive relief against Amex.

(Pls. Resp. Mem. in Opp'n to Mot. ("Opp'n") (Dkt. 879) at 2 n.6.) Amex does not dispute this characterization of the changes made in 2018, and agrees with Plaintiffs that the agreement prohibits Plaintiffs from obtaining market-wide injunctive relief (see Amex May 24, 2019 Letter (Dkt. 894)). The court will therefore cite to the 2018 version of the CAA Amex has provided. All members of the Amex Class are bound by this agreement. (See SAC ¶¶ 47, 90.)

2. Arbitration Provisions

[25]** The CAA provides, inter alia:

> You or we may elect to resolve any Claim by individual, binding arbitration.
> If arbitration is chosen by either party, neither you nor we will have the right to litigate that Claim in court or have a jury trial on that Claim. Further, you and we will not have the right to participate in a representative capacity or as a member of any class pertaining to any Claim subject to arbitration. . . . The arbitrator's decisions are as enforceable as any court order and are subject to very limited review by a court. Except as set forth below, the arbitrator's decision will be final and binding.

(2018 CAA (Dkt. 877-3) § 7.c.) The provision defines "Claim" as:

> [A]ny claim (including initial claims, counterclaims, cross-claims, and third-party claims), dispute, or controversy between you and us arising from or relating to the Agreement or prior Card acceptance agreements, or the relationship resulting therefrom, whether based in contract, tort (including negligence, strict liability, fraud, or otherwise), statutes, regulations, or any other theory, including any question relating to the existence, validity, performance, construction, interpretation, enforcement, or termination of the Agreement or prior Card acceptance agreements, or **[**26]** the **[*404]** relationship resulting thereform, except for the validity, enforceability, or scope of section 7.c of the General Provisions.

(Id. § 1.c.)

3. Anti-Steering Rules

Amex's Anti-Steering Rules provide that merchants may not:

- indicate or imply that they prefer, directly or indirectly, any Other Payment Products over [Amex] Card[s];
- try to dissuade cardholders from using [their Amex] Card;
- criticize or mischaracterize [the Amex] Card or any of [Amex's] services or programs;
- try to persuade or prompt cardholders to use any Other Payment Products or any other method of payment (e.g., payment by check);
- impose any restriction, conditions, or disadvantages when the Card is accepted that are not imposed equally on all Other Payment Products, except for ACH funds transfer, cash, and checks;
- engage in activities that harm [Amex's] business or the American Express Brand (or both);
- or promote any Other Payment Products (except the Merchant's own private label card that they issue for use solely at their Establishments) more actively than the Merchant promotes Amex.

(SAC ¶ 46.)

E. Related Actions

In 2008, some merchants first brought suit against Amex in this court (initiating the "MP Actions"). See *In re Amex, 2016 U.S. Dist. LEXIS 3332, 2016 WL 748089, at *2 & n.3*. **[**27]** Then, in October 2010, the Department of Justice and the attorneys general of eighteen states filed suit against Amex, MasterCard, and Visa (the "Government Action").[1] The Government Action proceeded to a bench trial during the summer of 2014., On February 19, 2015, the court found by a preponderance of the evidence that the specific NDPs challenged by the Government violate *Section 1 of the Sherman Act*. After receiving additional briefing from the parties to the Government Action, as well as other interested parties, the court issued a permanent injunction on April 30, 2015. United States. v. Am. Exp. Co., No. 10-CV-4496 (NGG), 2015 WL 1966352 (E.D.N.Y. Apr. 30, 2015), rev'd, *838 F.3d 179*, aff d sub nom. *Ohio, 138 S. Ct. 2274, 201 L. Ed. 2d 678*. The court denied Amex's motion to stay the permanent injunction pending appeal. United States v. Am. Exp. Co., No. 10-CV-4496 (NGG), 2015 WL 13735045 (E.D.N.Y. May 19, 2015). Amex then filed a notice of appeal and sought a stay pending appeal from the Second Circuit. Although a three-judge panel of the Second Circuit initially denied Amex's motion to stay (Order of USCA (Dkt. 687 in No. 10-CV-4496)), the Second Circuit ultimately entered a temporary stay of the permanent injunction and a temporary stay of the Government Action in this court (Order of USCA (Dkt. 697 in No. 10-CV-4496)).

[28]** On September 26, 2016, the Second Circuit reversed this court's judgment in the Government Action, holding that the court erred in excluding the market for cardholders from its definition of the relevant market. See *U.S. v. Amex, 838 F.3d at 197, 206-07*. Because the Second Circuit found that the Government could not, on the facts of the case, prove net harm to both cardholders and merchants, it directed this court to enter judgment in favor of Amex. *Id. at 207*. Certain state plaintiffs then **[*405]** sought certiorari, which the Supreme Court granted. *Ohio v. Am. Exp. Co., 138 S. Ct. 355, 199 L. Ed. 2d 261 (Mem)* (2017). On June 25, 2018, the Supreme Court affirmed the Second Circuit, holding that this court should have included both sides of the Amex platform when defining the relevant market. *Ohio, 138 S. Ct. at 2285-86*.

Following the Supreme Court's affirmance of the dismissal of the Government Action, matters resumed in the MP Actions. The court granted Amex's motion for partial summary judgment in January of 2019, see *In re Amex, 361 F. Supp. 3d at 347*, and the MP Actions were voluntarily dismissed with prejudice on April 12, 2019. (See Stip. & Order of Dismissal (Dkt. 213 in Case No. 08-CV-2315).)

F. The Consolidated Class Actions

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[1] Visa and MasterCard entered into consent decrees with the Government on the same day that the Government Action was initiated; only Amex remained as a defendant. See *In re Amex, 2016 U.S. Dist. LEXIS 3332, 2016 WL 748089, at *2 n.5*.

The procedural history of the consolidated class actions is complex and need not be repeated in full here. For a detailed accounting of the development of the class action component of the litigation, see the court's 2015 Memorandum and Order denying approval of the Class Settlement Agreement (Aug. 4, 2015 Mem. & Order (Dkt. 657).) After a variety of stays and other proceedings, most notably the Supreme Court's decision in *Ohio, 138 S. Ct. 2274, 201 L. Ed. 2d 678*, Plaintiffs filed their Second Amended Consolidated Class Action Complaint (the "Second Amended Complaint") on December 17, 2018. (SAC.) The Second Amended Complaint asserts **[**29]** the following claims for relief: on behalf of the Amex Class for violation of *§ 1 of the Sherman Act*, based on the Anti-Steering Rules (SAC ¶¶ 111-22); on behalf of the Non-Amex class for violation of *§ 1 of the Sherman Act*, based on the Anti-Steering Rules (SAC ¶¶ 123-26); on behalf of the Amex class for violation of *§ 1 of the Sherman Act*, based on the aspect of the CAA's arbitration provisions disallowing collective action (SAC ¶¶ 127-29); and on behalf of the California subclasses for violation of California Antitrust Laws and the California Unfair Competition Law (SAC ¶¶ 130-40).

On March 15, 2019, Amex filed its fully briefed motion to compel arbitration of the Amex Class's claims and motion to dismiss the Second Amended Complaint. (Mot.; Opp'n; Defs. Reply in Further Supp. of Mot. ("Reply") (Dkt. 882).) On May 22, 2019, Plaintiffs filed a supplemental letter notifying the court of the Supreme Court's decision in Lamps Plus, Inc. v. Varela, *139 S. Ct. 1407, 203 L. Ed. 2d 636 (2019)*. (Pls. May 22, 2019 Letter (Dkt. 893).) Amex responded shortly thereafter. (Amex May 24, 2019 Letter.)

II. MOTION TO COMPEL ARBITRATION

A. Legal Standard

The *Federal Arbitration Act ("FAA")* provides that written agreements to arbitrate are "valid, irrevocable, and enforceable, save **[**30]** upon such grounds as exist at law or in equity for the revocation of any contract." *9 U.S.C. § 2*. The FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)*. "This policy is founded upon 'a desire to preserve parties' ability to agree to arbitrate, rather than litigate, their disputes." *Starke v. SquareTrade, Inc., 913 F.3d 279, 288 (2d Cir. 2019)* (alteration adopted) (quoting *Schnabel v. Trilegiant Corp., 697 F.3d 110, 118 (2d Cir. 2012))*. Under *Section 4 of the FAA*, a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" may file a motion to compel, which a court must grant "upon being satisfied that the making of the agreement **[*406]** for arbitration or the failure to comply therewith is not in issue." *9 U.S.C. § 4*; see also *AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 354-55, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)*. Despite the FAA's "liberal federal policy favoring arbitration agreements," *CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98, 132 S. Ct. 665, 181 L. Ed. 2d 586 (2012)* (citation omitted), "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," *In re Am. Express Fin. Advisors Sec. Litig., 672 F.3d 113, 127 (2d Cir. 2011)* (quoting *Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002))*. "[C]ourts must rigorously enforce arbitration agreements according to their terms," even in cases involving "claims that allege a violation of a federal statute, unless the FAA's **[**31]** mandate has been overridden by a contrary congressional command." *Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013)* (quotation marks and citations omitted)).

In deciding a motion to compel arbitration, "the court applies a standard similar to that applicable to a motion for summary judgment." *Bensadoun v. Jobe-Riat, 316 F.3d 171, 175 (2d Cir. 2003)*; see also *Wachovia Bank, Nat'l Ass'n v. VCG Special Opportunities Master Fund Ltd., 661 F.3d 164, 172 (2d Cir. 2011)*.

B. Discussion

The Supreme Court's decision in *Italian Colors* controls. In that case, the Supreme Court considered the enforceability of the same arbitration provision as that at issue here. *570 U.S. at 231*. The plaintiffs were merchants who accepted Amex cards and brought an antitrust suit against Amex, arguing that Amex impermissibly used its market power to force merchants to accept its credit cards while assessing fees approximately 30% higher than those for competing credit cards. Id. Amex moved to compel arbitration based on the arbitration provision in their contract with the merchants—the same as that at issue here—that required all disputes between the parties to be resolved by arbitration and provided that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis." Id. The Court found that the arbitration provision was enforceable under the FAA.

Plaintiffs argue that this case is different from Italian **[**32]** Colors because, "[u]nlike here, the plaintiffs in Italian Colors did not assert that market-wide injunctive relief was necessary to vindicate their statutory rights." (Opp'n at 6.) In so arguing, Plaintiffs rely on the "effective vindication" exception to the FAA, which allows courts to "invalidate, on public policy grounds, arbitration agreements that operate as a prospective waiver of a party's right to pursue statutory remedies." *Id. at 235* (alterations adopted) (quotation marks, emphasis, and citations omitted). But Italian Colors is clear that *Rule 23* does not establish an entitlement to class proceedings for the vindication of preexisting statutory rights. *570 U.S. at 234*. As the Court observed, a class-action waiver "no more eliminates [ ] parties' rights to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938." *Id. at 236*. The Court continued: "to put it differently, the individual suit that was considered adequate to assure `effective vindication' of a federal right before adoption of class-action procedures did not suddenly become 'ineffective vindication' upon their adoption." *Id. at 236-37*.

Plaintiffs are correct that, under Italian Colors, the effective vindication **[**33]** exception **[*407]** "would certainly cover a provision in an arbitration agreement prohibiting the assertion of certain statutory remedies." *Id. at 236*. But the text of the CAA does not prohibit the assertion of any statutory remedies. Plaintiffs' primary argument seems to be that market-wide equitable relief is necessary for effective vindication of their rights under the *Clayton Act*, and that foreclosing their ability to access that relief effectively prohibits their assertion of those rights. (Opp'n at 34.) This cannot be true. As the Supreme Court observed in Italian Colors:

> The antitrust laws do not evince an intention to preclude a waiver of class-action procedure. . . . The Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of *Federal Rule of Civil Procedure 23*, which was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.

570 U.S. at 234 (alteration adopted) (quotation marks and citations omitted). The parties there had "agreed to arbitrate pursuant to that usual rule," and, the Court held, "it would be remarkable for a court to erase that expectation." Id. (quotation marks omitted). This case is no different. **[**34]** Plaintiffs' claims that class action is necessary to vindicate their rights are nonsensical because, as the Italian Colors Court noted, class wide injunctive relief was not available at the time the Clayton Act was enacted. *Id. at 234*. Plaintiffs have provided no reason for this court to assume that the Clayton Act, at the time of its enactment, provided statutory rights that had no effective means of vindication.

Plaintiffs also submitted a supplemental letter arguing that the Supreme Court's recent decision in Lamps Plus further supports their position that the court should not compel arbitration. (Pls. May 22, 2019 Letter at 1.) It does not. As Amex noted in response (Amex May 24, 2019 Letter), all parties agree that class arbitration is not permitted under the CAA. (See id.; Opp'n at 4.) The Lamps Plus holding—that class arbitration may be compelled under the FAA only when it is affirmatively specified in the parties' agreement—is therefore irrelevant. See *Lamps Plus, 139 S. Ct. at 1412*.

Finally, Plaintiffs argue that the *Seventh Amendment* prohibits irrevocable arbitration agreements. (See Opp'n at 8-9.) This argument is unavailing. It is true that the *Seventh Amendment* "preserve[s]" the right to trial by jury, *U.S. Const. amend. VII*, but the Constitution permits waivers of **[**35]** this right via arbitration agreements between two private parties, see, e.g., *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 206 (2d Cir. 1999)*; *In re*

Currency Conversion Fee Antitrust Litig., 265 F. Supp. 2d 385, 414 (S.D.N.Y. 2003)). Plaintiffs cite no caselaw to the contrary.

The court therefore grants Amex's motion to compel arbitration of the Amex Class's claims.

III. MOTION TO DISMISS

The court will now address Amex's motion to dismiss the Non-Amex Class's claims under both federal and California law.[2]

A. Federal Claims

Section 4 of the Clayton Act establishes a private right of action to enforce *Section 1 of the Sherman Act*. *15 U.S.C. § 15*. At the pleading stage, lamn antitrust plaintiff must show both constitutional standing and antitrust standing." *Gelboim v. Bank of Am. Corp., 823 F.3d 759, 770* ***[*408]*** *(2d Cir. 2016)*. Amex claims that Plaintiffs here have not met either burden. (Mot. at 1120.) Because the court determines that Plaintiffs have not established Antitrust Standing for the Non-Amex class, it does not address constitutional standing.

At the motion to dismiss stage, "a private antitrust plaintiff must plausibly allege (a) that it suffered a special kind of antitrust injury, and (b) that it is a suitable plaintiff to pursue the alleged antitrust violations and thus is an efficient enforcer of the antitrust laws." *In re London Silver Fixing, Ltd., Antitrust Litig., 213 F. Supp. 3d 530, 549 (S.D.N.Y. 2016)* (quoting *Gatt Communs., Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 76 (2d Cir. 2013)* (alterations adopted) (quotation marks omitted)). Because the court finds that Plaintiffs are **[**36]** not efficient enforcers of the ***antitrust law***, it will not address whether they have plausibly alleged antitrust injury.

As the Second Circuit has described:

> The efficient enforcer inquiry turns on: (1) whether the violation was a direct or remote cause of the injury; (2) whether there is an identifiable class of other persons whose self-interest would normally lead them to sue for the violation; (3) whether the injury was speculative; and (4) whether there is a risk that other plaintiffs would be entitled to recover duplicative damages or that damages would be difficult to apportion among possible victims of the antitrust injury.

Gelboim, 823 F.3d at 772. "[These] factors reflect a concern about whether the putative plaintiff is a proper party to perform the office of a private attorney general and thereby vindicate the public interest in antitrust enforcement." *Id. at 780* (quotation marks and citation omitted). Moreover, "[t]hese four factors need not be given equal weight," and "the relevant significance of each factor will depend on the circumstances of the particular case." *IQ Dental Supply, Inc. v. Henry Schein, Inc., 924 F.3d 57, 65 (2d Cir. 2019)*.

1. Directness

This factor cuts against Plaintiffs. "Directness in the antitrust context means close in the chain of causation." *Gatt, 711 F.3d at 78* (citations omitted). **[**37]** "The overall inquiry is akin to proximate cause in tort law—plaintiffs may not be 'too remote' so as to avoid 'duplicative recovery' and limitless0 increase [in] the universe of potential plaintiffs.'" *Harry v. Total Gas & Power N. Am., Inc., 889 F.3d 104, 116 (2d Cir. 2018)* (citing *In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 159, 162 (2d Cir. 2016))*. Amex argues that the Non-Amex Class "cannot be directly harmed by Amex's [Anti-Steering Rules] because they have no interaction with Amex or Amex's [Anti-Steering Rules]" and "are not Amex consumers or competitors." (Mot. at 17.) Amex is correct that, as a general matter, those entities most directly injured by anticompetitive conduct are customers or competitors of the defendant. *Aluminum Warehousing, 833 F.3d at 159*. And, of course, the Non-Amex Class members are by definition not direct customers or competitors of Amex.

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[2] The California law claims are asserted only by the California Non-Amex Sublass.

Nonetheless, a plaintiff who is not a customer or competitor may suffer a direct injury if it is "a participant in 'the very market directly distorted by the antitrust violation" and its injury is "inextricably intertwined with the injury the [defendants] sought to inflict." *Id. at 159, 160* (quoting *Blue Shield of Va. v. McCready, 457 U.S. 465, 484, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*; *SAS of PR, Inc. v. PR Telephone Co., 48 F.3d 39, 46 (1st Cir. 1995))*. And "to assess the plausibility of a putative plaintiff's claim to antitrust injury as being inextricably intertwined with the **[*409]** injury the defendants ultimately sought to inflict," this court must "ask whether **[**38]** the plaintiff was manipulated or utilized by defendant as a fulcrum, conduit[,] or market force to injure competitors or participants in the relevant product and geographical markets." *Id. at 161*. Plaintiffs are indisputably participants in the two-sided credit card market—the very market allegedly distorted by Amex's actions. The question for the court is thus whether their supposed injury is inextricably intertwined with the injury Amex sought to inflict. It is not.

Amex first argues that Plaintiffs have not alleged a direct injury and instead present only a so-called "umbrella" theory of liability. (Mot. at 12-14.) Although the Second Circuit has not directly addressed the question,[3] district courts in this circuit to have considered such a theory of liability—under which "a consumer who deals with non-defendants . . . alleges injury by virtue of the defendants' conspiracy"—have determined that it cannot create antitrust standing. *FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A., 16-CV-5263 (AKH), 2018 U.S. Dist. LEXIS 171999, 2018 WL 4830087, at *6 (S.D.N.Y. Oct. 4, 2018)* (citing *Gelboim, 823 F.3d at 778*); *In re Platinum & Palladium Antitrust Litig., 14-CV-9391 (GHW), 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *22 (S.D.N.Y. Mar. 28, 2017)*; *Sullivan v. Barclays PLC, No. 13-CV-2811 (PKC), 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at *15-16 (S.D.N.Y. Feb. 21, 2017)*; *In re LIBOR-Based Financial Instruments Antitrust Litig. ("LIBOR"), No. 11-MDL-2262 (NRB), 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *16 (S.D.N.Y. Dec. 20, 2016))*. "The concern with so-called umbrella purchasers **[**39]** is that 'significant intervening causative factors, most notably, the independent pricing decisions of non-conspiring retailers, attenuate the causal connection between the violation and the injury.'" *Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC, 366 F. Supp. 3d 516, 545 (S.D.N.Y. 2018)* (quoting *LIBOR, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *15)*.

"Umbrella standing concerns are most often evident when a cartel controls only part of a market, but a consumer who dealt with a non-cartel member alleges that he sustained injury by virtue of the cartel's raising of prices in the market as a whole." *Gelboim, 823 F.3d at 778*. That is precisely the situation Plaintiffs allege here. As Amex notes, Plaintiffs "allege[] that Amex's [Anti-Steering Rules] raise the prices charged by all credit card networks—even for merchants who do not take Amex cards—because [the Anti-Steering Rules] purportedly restrain competition between credit card networks at merchants who accept Amex." (Mot. at 12 (citing SAC ¶¶ 73-75, 82).) The court need not—and will not—rule on whether an umbrella theory of liability may ever create antitrust standing. It is enough to observe those general concerns and note that they are particularly present here, where adopting Plaintiffs' proposed theory of liability would expose Amex to damages for every merchant fee charged by every credit **[**40]** card network in the United States.

Arguments about the umbrella theory of liability aside, Plaintiffs' alleged injuries are indirect. In Gatt, the Second Circuit considered an alleged "bid-rigging" or "bid rotation" scheme regarding the sale of radios to New York City and State government agencies. See *711 F.3d at 72*. Plaintiff, a radio merchant, alleged that Defendants determined which radio merchant **[*410]** would submit the lowest bid and what the price would be. Id. The remaining dealers would then either "refrain from bidding or submit artificially inflated 'dummy quotations' for the contract." Id. Any merchant who refused to cooperate with the process would lose their license to deal the Vertex radios used by both the City and State governments. Id. The plaintiff refused to comply and, as a result, was no longer permitted to sell Vertex-brand radios. Id. The Second Circuit determined that this was an indirect injury because the plaintiff "was only incidentally harmed by the conspiracy" and "[i]t did not pay higher prices by virtue of the conspiracy; it merely lost the right to sell to one brand of radio." *Id. at 78-79*. Here, unlike in *Gatt*, Plaintiffs do

[3] The Second Circuit has not yet explicitly addressed the viability of antitrust claims that rely on an umbrella theory of liability, but it has expressed concerns about allowing such claims to proceed. See *Gelboim, 823 F.3d at 778-79* (noting that allowing claims under an umbrella theory of liability could "vastly extend the potential scope of antitrust liability" and could allow recovery for "damages disproportionate to wrongdoing").

allege that the Non-Amex Class actually paid higher prices **[**41]** because of Amex's conduct. Nonetheless, as in *Gatt*, their alleged injury is only incidental—Amex was not, according to the allegations in the complaint, using its market power to force its competitors to charge higher merchant fees across the board. Nor did it enter into a horizontal price-fixing agreement with those competitors. What it allegedly did, rather, was force those merchants who did accept its cards to refrain from steering customers towards other cards and, in so doing, insulated its ability to charge those merchants ultracompetitive fees. Plaintiffs may be right that this had an effect on the fees other credit card networks charged to the Non-Amex Class, but any such effect was incidental to Amex's alleged anticompetitive behavior.

In arguing to the contrary, Plaintiffs rely on three cases: *In re DDAVP Direct Purchaser Antitrust Litigation, 585 F.3d 677 (2d Cir. 2009)*; *Dennis v. JPMorgan Chase and Company, 345 F. Supp. 3d 122 (S.D.N.Y. 2018)*; and *In re Namenda Direct Purchaser Antitrust Litigation, 331 F. Supp. 3d 152 (S.D.N.Y. 2018)*. (See Opp'n at 19-20.) In DDAVP, the Second Circuit held that "even though the plaintiffs' injuries were derivative of the direct harm experienced by the defendants' competitors, harming competitors was simply a means for the defendants to charge the plaintiffs higher prices." *585 F.3d at 688*. Plaintiffs have not argued—nor could they—that Amex imposing the Anti-Steering Rules on the Amex **[**42]** Class was "simply a means" to increase the fees its competitors charged to the Non-Amex Class. DDAVP is therefore inapposite.

Dennis and Namenda provide somewhat more analogous situations. The relevant plaintiffs in Namenda purchased the generic version of a drug and sued the manufacturer and seller of the name brand version of the drug, alleging that "they paid higher prices for generic memantine because Defendants intentionally restricted and manipulated generic competition" by entering into settlements seeking to delay market entry for some generic versions. *Id. at 190-94, 213*. This is a more direct injury than that alleged by Plaintiffs here: the defendants there directly conspired with one competitor to keep some other competitors out of the relevant market. See id. Amex's Anti-Steering Rules, by contrast, are not a direct agreement with any other party to manipulate or limit entry into the credit network market. At best, Plaintiffs allegations involve Amex's competitors reacting—perhaps in predictable ways—to a contractual provision entered into between Amex and the Amex Class.

In Dennis, the plaintiffs alleged that the defendants conspired to manipulate the Bank Bill Swap Reference Rate (the "BBSW"), **[**43]** a benchmark interest rate used to set the price for some financial derivatives. *343 F. Supp. 3d at 142*. The plaintiffs had all "engaged in U.S.-based transactions for BBSW-based derivatives." Id. Presumably, Plaintiffs here could argue **[*411]** that they engaged in transactions that charged fees based on Amex's merchant fees—but the situations are entirely different. Amex set the price for its merchant fees, which then influenced the fees charged by its competitors, as all price setting does. It did not, however, fraudulently manipulate a benchmark explicitly used by its competitors to set their rates. Instead, the relationship between its rates and those of Visa, Mastercard, and Discover is indirect, and the chain of causation is attenuated by the intervening decisions of those entities that, presumably, consider a great number of factors.

The Second Circuit's most recent decision on the issue, *IQ Dental, 924 F.3d 57*, underscores the difference between the circumstances in Dennis and Namenda and those the court considers here. There, the plaintiff—a small seller of dental supplies—distributed its supplies using an online portal hosted by a third party. *IQ Dental, 924 F.3d at 61*. The plaintiff alleged that larger dental-supply distributors conspired to drive **[**44]** that online portal out of business and that it was harmed as a result. Id. This injury was insufficiently direct, said the Second Circuit, because the plaintiff "was not the target of annihilation; it was simply collateral damage." *Id. at 65-66*. So, too, here: the Non-Amex Class may have been "damaged" by the Anti-Steering Rules, but they, quite obviously, were "not the target of annihilation."

2. Identifiable Class of Other More Direct Victims

"This consideration seems to bear chiefly on whether the plaintiff is a consumer or a competitor." *Gelboim, 823 F.3d at 779*. "Implicit in the inquiry is recognition that not every victim of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced." Id. As previously noted, the Non-Amex Class members and representatives are definitionally not Amex's customers or competitors, but are, rather, consumers participating in the affected market. And while such participants may occasionally be the most well positioned enforcers of the antitrust laws, that is not the case here because there is an obvious class of more direct victims—the Amex Class, who are actually bound by Amex's Anti-Steering Rules.

The court is aware **[**45]** this factor merely requires "an entity most motivated by self-interest, not the entity most motivated by self-interest" and, therefore, that "[i]nferiority to other potential plaintiffs can be relevant, but it is not dispositive." *DDAVP, 585 F.3d at 688-89* (emphasis in original) (quotation marks and citations omitted). And, of course, even the Non-Amex class members here are "significantly motivated due to their 'natural economic self-interest' in paying the lowest price possible," *id. at 689*. This is not enough to sway this factor in Plaintiffs' favor, however, because "denying [them] a remedy on the basis of [their] allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied." *IQ Dental, 924 F.3d at 66* (citation omitted). Obviously, the Amex Class has litigated the same issue, and remains free to do so pursuant to the arbitration process laid out in their agreement with Amex. Moreover, as previously discussed, these provisions have also been the subject of several other lawsuits in front of this court, from the Government, other, larger, merchants, and, now, consumers who shop at stores bound by the Anti-Steering Rules. And at least some of these other litigants are more directly harmed than **[**46]** the Non-Amex Class members. See *IQ Dental, 924 F.3d at 66* ("Given that [the plaintiff] is further removed from the harm caused by the Defendants than the parties directly affected **[*412]** by the boycott that have already sued the Defendants, the second efficient-enforcer factor weighs against [the plaintiff's] antitrust standing.")

3. Speculative Nature of Injury

The existence of only "highly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement." *Gelboim, 823 F.3d at 779*. "At the same time, some degree of uncertainty stems from the nature of ***antitrust law***." Id. "Impediments to reaching a reliable damages estimate often flow from the nature and complexity of the alleged antitrust violation." *Id. at 780*.

In IQ Dental, the Second Circuit determined that the nature of the plaintiff's injuries "render[ed] its potential recovery highly speculative" because its "damages calculation rests on multiple layers of speculation" and "essentially would require the creation of an 'alternative universe.'" *924 F.3d at 67*. Here, too, Plaintiffs' damages calculation would necessarily rest on multiple layers of speculation. Plaintiffs claim that "damages here may be readily measured by the overage paid by all merchants—i.e., the difference between **[**47]** the actual 'price' of merchant fees and the presumed competitive 'price' of merchant fees." (Opp'n at 22 (emphasis in original) (footnote call number omitted).) But that is precisely the problem—calculating the "presumed competitive price" would involve assessing the pricing decision on Amex's non-party competitors, all of whom are competing against one another as well as against Amex on both sides of the two-sided market. As such, the calculation involves several stages of speculation: how much steering would occur if merchants accepting Amex cards were permitted to engage in it? What effect would this have on Amex's merchant fees? What effect would any change in Amex's merchant fees have on the decisions of its competitors regarding their own merchant fees? And, perhaps most important in terms of the speculative nature of this claim, how would those decisions trickle over into the parallel situation of the Non-Amex Class members? Such exogenous factors are, to be sure, insufficient by themselves to defeat antitrust standing; nonetheless, their presence is relevant to the efficient enforcer analysis. See *London Silver Fixing, 213 F. Supp. 3d at 557*.

4. Duplicative Recovery and Complex Apportionment

In IQ Dental, the Second Circuit **[**48]** reiterated the importance of this consideration, noting that "[t]he existence of other plaintiffs who could lay claim to precisely the same damages, whether in theory or in actuality, indicates that the would-be antitrust plaintiff might not be well positioned to vindicate the antitrust laws for the benefit of the public." *924 F.3d at 67*. While that is not obviously the case here, the court does note its concerns about the complex nature of apportionment and the broad nature of the class suggested by Plaintiffs, which presents an "obvious risk of disproportionate damages." *In re London Silver Fixing, Ltd., Antitrust Litig., 332 F. Supp. 3d 885, 906 (2d Cir. 2018)*.

Amex argues that the court should be concerned because at least some of Plaintiffs have already recovered damages for the alleged lack of competition between the credit card networks. (Mot. at 19; Reply at 8-9.) However, as Plaintiffs respond and Amex does not dispute, these settlements resolved disputes regarding similar provisions Visa and Mastercard allegedly imposed on merchants, not Amex's Anti-Steering Rules at issue here. (See Opp'n at 22.) The fact that some wrongdoers have already agreed to settlements, moreoever, "has nothing to do with the efficient enforcer analysis, particularly Gelboim's concern **[*413]** with disproportionate **[**49]** damages." *In re Foreign Exch. Benchmark Rates Antitrust Litig., No. 13-CV-7789 (LGS), 2016 U.S. Dist. LEXIS 128237, 2016 WL 5108131, at *7) S.D.N.Y. Sept. 20, 2016)*. The court is thus unpersuaded by Amex's argument on this point.

The court does note, however, that Gelboim "strongly suggested" that "other enforcement mechanisms were relevant" to this factor when it "stat[ed] that the fact that the defendants' alleged manipulation was 'under scrutiny by government organs, bank regulators[,] and financial regulators bears upon the need for the plaintiffs as instruments for vindicating the *Sherman Act*.' *Sonterra, 277 F. Supp. 3d at 565* (alterations adopted) (quoting *Gelboim, 823 F.3d at 778*). And, as the court has previously discussed, there are certainly other available enforcement mechanisms here. While this would not eliminate antitrust standing by itself, it "does reinforce the conclusion that the remaining plaintiffs are not efficient enforcers of the antitrust laws." Id.

* * *

Because all four of the efficient-enforcer factors cut against Plaintiffs, the court finds that the Non-Amex Class has not established federal antitrust standing.

B. California Claims

Amex argues that the California Non-Amex Subclass lacks standing to sue under California law for essentially the same reasons it lacks standing under federal law. (Mot. at 2021.) Plaintiffs contend that standing **[**50]** under California law must be analyzed independent of federal antitrust standing, and argue that the California Non-Amex Subclass does have standing to pursue their antitrust claims under California law. (Opp'n at 23-24.) As an initial matter, Plaintiffs are correct that dismissal of the Non-Amex Class's Sherman Act claims does not necessarily mandate the dismissal of their claims under the California Unfair Competition Law (the "UCL") and California state ***antitrust law***, known as the *Cartwright Act*. *Samsung Elecs. Co. v. Panasonic Corp., 747 F.3d 1199, 1205 n.4 (9th Cir. 2014)*. However, dismissal is independently appropriate on these claims for substantially the same reasons as it is appropriate on their federal claims.

1. The Cartwright Act

The California Supreme Court has not addressed whether antitrust standing under California state law is properly analyzed under the same framework as that used to determine federal antitrust standing. See *Salveson v. JP Morgan Chase & Co., 166 F. Supp. 3d 242, 257 (E.D.N.Y. 2016)*; *In re Capacitors Antitrust Litig., 106 F. Supp. 3d 1051, 1072-73 (N.D. Cal. 2015)*. While courts have disagreed on the issue—and authority is sparse in either direction—the court is persuaded by those that have found that the same or substantially similar factors apply. See *Salveson, 166 F. Supp. 3d at 258*; *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig., No. 09-CV-3690, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at *8 (N.D. Ill. June 29, 2015)*; *In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1151 (N.D. Cal. 2009)*. But see *Capacitors, 106 F. Supp. 3d at 1073*.

This determination is in accordance with the analysis of at least one of California's intermediate appellate courts. **[**51]** See *Vinci v. Waste Mgmt., Inc., 36 Cal. App. 4th 1811, 43 Cal. Rptr. 2d 337, 338-39 (Cal. Ct. App. 1995)*. It is unclear the extent to which Vinci's holding was altered by the California Supreme Court's observation that "[i]nterpretations of federal ***antitrust law*** are at most instructive, not conclusive, when construing the Cartwright Act," *Aryeh v. Canon Bus. Sols.., Inc., 55 Cal. 4th 1185, 151 Cal. Rptr. 3d 827, 292 P.3d 871, 877 (Cal. 2013)*, but that statement, without more, is insufficient to convince this court that the California Supreme **[*414]** Court would decide the issue contrary to Vinci. See New *York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 210 (2d Cir. 2006)*; see also *Comm'r of Internal Revenue v. Bosch's Estate, 387 U.S. 456, 465, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967)* ("[A]n intermediate appellate state court is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." (quotation marks and citation omitted)).

Lacking more direct guidance from the California courts, and in light of Vinci, the court will thus apply the federal factors to analyze antitrust standing under California law. As laid out by the Supreme Court, then, the relevant factors are: "(1) the nature of the plaintiff's alleged injury, (2) the directness of the injury, (3) the speculative nature of the harm, (4) the risk of duplicative recovery and (5) the complexity in apportioning damages." **[**52]** *Salveson, 166 F. Supp. 3d at 259*; see also *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters ("AGC"), 459 U.S. 519, 535-37, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. The court also observes, however, that California law considers these factors somewhat more liberally than its federal analog. See *Salveson, 166 F. Supp. 3d at 259*.

As to the nature of the alleged injury, the court must consider "whether the nature of the injury asserted by a plaintiff is 'the type the antitrust laws were intended to forestall.'" *Salveson, 166 F. Supp. 3d at 259* (quoting *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987 (9th Cir. 2000))*. In assessing this requirement, courts look to: (1) the defendant's anticompetitive conduct; (2) the plaintiff's "worse position" as a result of defendant's conduct; and (3) a comparison of the anticompetitive effect of defendant's conduct and plaintiffs alleged injury. See *Harry v. Total Gas & Power N. Am., Inc., 889 F.3d 104, 115 (2d Cir. 2018)*. Here, Amex allegedly used its market power to pressure the merchants who accepted its cards to agree to its Anti-Steering Rules. Because this prevented merchants from charging more to consumers using Amex cards and from offering incentives to those who used other credit cards, merchants have no way to increase use of a card that charges less. Amex and its competitors, then, have no incentive to keep prices down. (SAC ¶ 50.) In other words, Plaintiffs "have alleged that Amex's imposition of its [Anti-Steering Rules] stifles interbrand competition **[**53]** in the relevant market . . . [,] thereby causing all merchants to pay higher fees, and raising overall transaction costs above competitive levels." (Opp'n at 13 (emphasis in original).) This is sufficient to have plausibly alleged that Amex engaged in unlawful anticompetitive conduct, at least to meet the "low bar" of the inquiry at the standing stage. See *IQ Dental, 924 F.3d at 63*. Next, the court must "isolate and identify [Plaintiffs'] 'actual injury' or 'the ways in which the plaintiff claims it is in a 'worse position' as a consequence of the defendant's conduct." *Id. at 63* (quoting *Gatt, 711 F.3d at 76*). "Assuming that [Plaintiffs are] operating in a market affected by anticompetitive conduct, the question of actual injury becomes whether [Plaintiffs are] worse off than [they] would be if the market were free of anticompetitive forces." *Id. at 64*. Taking the allegations in the complaint as true, Plaintiffs have alleged sufficient facts to show that they are in a worse position as a result of Amex's alleged conduct. They allege the following:

> On the merchant side of the market, Amex's imposition of increased merchant fees, has, in turn, enabled Visa, MasterCard, and Discover to increase **[*415]** their respective merchants' fees, thereby stifling competition, **[**54]** and causing all credit card accepting merchants to pay supracompetitive merchant fees. This includes merchants who do not accept Amex cards but do accept other credit cards, because the remaining credit card networks do not lower their merchant fees for the generally small merchants that do not accept Amex.

(SAC ¶ 82.) Plaintiffs thus allege that they are charged higher merchant fees and are, as a result, worse off than they would be in a genuinely competitive market.

Finally, Plaintiffs "must demonstrate that the Defendants' anticompetitive behavior caused its actual injury." *IQ Dental, 924 F.3d at 65*; see also *Brunswick Corp. v. Pueblo Bowl-O-Mat. Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (the plaintiff must show that its injury "flows from that which makes defendants' acts unlawful"). This is the least certain of the relevant considerations in this inquiry. It is plausible that the imposition of higher merchant fees, in combination with the Anti-Steering Rules, could stifle competition and allow Amex's competitors to raise their rates across all merchants, rather than just across those merchants who are bound by the Anti-Steering Rules themselves. This is particularly true given that most large merchants, according to Plaintiffs, do accept Amex, meaning **[**55]** that the credit card companies would have little incentive to tailor contracts for relatively insignificant individual merchants who do not. Despite this logical connection, the court cannot ignore the intervening decisions of third parties that weaken the chain of causation from Amex's Anti-Steering Rules to the merchant fees charged by other networks to the Non-Amex Class members.

Even assuming that antitrust injury has been established, however, that does not outweigh the other factors relevant to the antitrust standing analysis, all four of which cut against Plaintiffs. The court has discussed these factors above—as a part of its "efficient enforcer" analysis—but will address directness again because 'the extent to which antitrust injury is recognized under the Cartwright Act is enlarged, by statute, in comparison to federal law' because an action 'may be brought by a person who is injured . . . by reason of anything declared unlawful by [the Cartwright Act], regardless of whether such injured person dealt directly or indirectly with the defendant." *Salveson, 166 F. Supp. 3d at 263* (emphasis omitted) (quoting *Knevelbaard, 232 F.3d at 991*); see also *Dairy Farmers, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at *8* ("California's antitrust-standing provision is broader in some respects than federal antitrust-standing **[**56]** law."); *Cal. Bus. & Prof. Code § 16750(a)*).

Courts applying California law find antitrust standing where, for example, "indirect purchasers of components had satisfied their burden of pleading directness of injury by alleging that the cost of the component was traceable through the product distribution chain." Flash *Memory, 643 F. Supp. 2d at 1155* (collecting cases). In fact, California's statute allowing the expansion of its antitrust standing as compared to federal law was passed in response to *Illinois Brick Company v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, which held that indirect purchasers lacked antitrust standing where their only alleged damages were the overcharges passed on from direct purchasers, *id. at 730-31*; see also *McCready, 457 U.S. at 474* (describing the Illinois Brick decision as finding "unacceptable the risk of duplicative recovery engendered by allowing both direct and indirect purchasers to claim damages resulting from a single overcharge by the antitrust defendant"). See *Dairy Farmers, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at **[*416]** *7* ("The California legislature took action within months . . . (if, prior to the AGC decision) . . . to prevent Illinois Brick from having any effect on judicial interpretation of the Cartwright Act." (alterations adopted) (citations and quotation marks omitted)). The California legislature did not undertake a similar response to AGC just six years later, **[**57]** and has not done so since, despite some state and numerous federal courts applying the AGC factors to California antitrust standing. And, as "Illinois Brick and AGC are separate inquiries," *Dairy Farmers, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at *8* (citing *In re Refrigerant Compressors Antitrust Litig., No. 09-MD-2042, 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at *10 (RD. Mich. Apr. 9, 2013))*, the impact of the statute outside the context of indirect purchasers is unclear.

In any event, California law does not allow recovery for an antitrust injury that is a "secondary, consequential, or remote" result of the allegedly unlawful conduct. *In re WellPoint, Inc. Out-of-Network UCR Rates Litig., No. 09-MD-2074, 2013 WL 12130034, at *10 (C.D. Cal. July 19, 2013)* (quoting *Cellular Plus, Inc. v. Superior Court, 14 Cal. App. 4th 1224, 18 Cal. Rptr. 2d 308, 312 (Cal. Ct. App. 1993))*. Instead, the injury alleged must be "the direct result" of that conduct. Id. (quoting *Cellular Plus, 18 Cal. Rptr. 2d at 312*); see also *Meyer v. Qualcomm Inc., No. 08-CV-655, 2009 U.S. Dist. LEXIS 16533, 2009 WL 539902, at *8 (S.D. Cal. Mar. 3, 2009* ("The California courts have held that a plaintiff whose injuries were not secondary, consequential, or remote, but the direct result of the unlawful conduct and were the kind of injuries the antitrust laws seek to prevent has antitrust standing." (quotation marks and citations omitted)). And, as discussed above, the Non-Amex Class's injury is—definitionally—secondary. Plaintiffs have alleged that they were charged higher merchant fees because of reactions to Amex's rate-setting by independent actors, **[**58]** Amex's competitors. They do not allege that Amex conspired to increase merchant fees across the market, but instead only that Amex's Non-Steering Provisions had that effect. Such allegations, without more, do not sufficiently tie Amex's alleged anti-competitive conduct to the merchant fees of the California Non-Amex Subclass, who did not interact with Amex directly (and, moreover, did not directly interact with any other party that, at any point in the chain of causation, entered into any agreement or transaction with Amex at all).

Even under this more liberal approach to the directness inquiry, therefore, the Non-Amex Class's injuries are simply too remote. This determination, in combination with the factors discussed previously, brings the court to conclude that the California Non-Amex Subclass has failed to allege standing under the Cartwright Act.

2. The UCL

Finally, the California Non-Amex Subclass asserts claims under the UCL (SAC 111136-40), alleging that Amex violated the UCL "by entering into contracts in an unreasonable restraint of trade within the State of California in violation of the Sherman Act and the Cartwright Act" (id. ¶ 137). The UCL does allow a plaintiff to bring **[**59]** a claim based on conduct that violates other laws, *Cal. Bus. & Prof. Code § 17200*, but dismissal of an underlying antitrust claim mandates dismissal of the UCL claim as well, see *Dairy Farmers, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at *18*; *In re Wellpoint, Inc. Out-of-Network UCR Rates Litig., 903 F. Supp. 2d 880, 927-28 (C.D. Cal. 2012)*.

Because the court has dismissed all of the Non-Amex Class's other claims and Plaintiffs have provided no reason that the California Non-Amex Subclass's UCL claims survive independently, the court also dismisses their claims under the UCL.

[*417] IV. CONCLUSION

For the foregoing reasons, Amex's (Dkt. 875) motions to compel arbitration and to dismiss are both GRANTED. The court retains limited jurisdiction to enforce any award resulting from any arbitration between Amex and members of the Amex class.

All claims asserted by the Non-Amex Class are DISMISSED. The Clerk of Court is respectfully DIRECTED to terminate Qwik Lube, LCC and LaJolla Auto Tech, Inc. and to remove them from the caption.

SO ORDERED.

/s/ Nicholas G. Garaufis

NICHOLAS G. GARAUFIS

United States District Judge

Dated: Brooklyn, New York

January 14, 2020

State Bar v. Berry

Court of Appeals of Arizona, Division One

January 16, 2020, Filed

No. 1 CA-CV 18-0661

Reporter

2020 Ariz. App. Unpub. LEXIS 53 *; 2020 WL 260426

THE STATE BAR OF ARIZONA, Plaintiff/Appellee, v. RICHARD S. BERRY, Defendant/Appellant.

Notice: THIS DECISION IS SUBJECT TO FURTHER APPELLATE REVIEW. MOTIONS FOR RECONSIDERATION OR PETITIONS FOR REVIEW TO THE ARIZONA SUPREME COURT MAY BE PENDING. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE. NOT FOR OFFICIAL PUBLICATION.

UNDER *ARIZONA RULE OF THE SUPREME COURT 111(c)*, THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

Subsequent History: Review denied by *State Bar of Ariz. v. Berry, 2020 Ariz. LEXIS 222 (Ariz., July 28, 2020)*

US Supreme Court certiorari denied by *Berry v. State Bar of Az, 2021 U.S. LEXIS 225 (U.S., Jan. 11, 2021)*

Prior History: [*1] Appeal from the Superior Court in Maricopa County. No. CV2017-000456. The Honorable Joseph C. Welty, Judge.

Disposition: AFFIRMED.

Core Terms

state bar, unauthorized practice of law, practice of law, supervision, anti trust law, immunity

Counsel: State Bar of Arizona, Phoenix, By James D. Lee, Counsel for Plaintiff/Appellee.

Richard S. Berry, Tempe, Defendant/Appellant.

Judges: Presiding Judge Kenton D. Jones delivered the decision of the Court, in which Judge James B. Morse Jr. and Judge Diane M. Johnsen joined.

Opinion by: Kenton D. Jones

Opinion

MEMORANDUM DECISION

JONES, Judge:

P1 Richard Berry appeals the superior court's judgment finding he engaged in the unauthorized practice of law, as defined by *Arizona Rule of the Supreme Court (Rule) 31*, and enjoining him from further unauthorized conduct. For the following reasons, we affirm.

LEGAL BACKGROUND

P2 The power to regulate the practice of law in Arizona is vested exclusively in our supreme court, whose authority extends over those admitted to the Arizona bar as well as non-lawyers and disbarred attorneys. *See In re Creasy, 198 Ariz. 539, 541, ¶¶ 7-8, 12 P.3d 214 (2000)*; *Sobol v. Alarcon, 212 Ariz. 315, 319, ¶¶ 18-19, 131 P.3d 487 (App. 2006)*. In a lawful exercise of this power, "the supreme court has promulgated rules defining and describing both the practice of law and the unauthorized practice of law." *Sobol, 212 Ariz. at 319, ¶ 19*; *see generally Ariz. R. Sup. Ct. 31*,[1] *75*. These rules identify the activities that may only be performed by a licensed attorney and seek **[*2]** to "protect the public from the intolerable evils which are brought upon people by those who assume to practice law without having the proper qualifications." *Morley v. J. Pagel Realty & Ins., 27 Ariz. App. 62, 65, 550 P.2d 1104 (1976)* (quoting *Gardner v. Conway, 234 Minn. 468, 48 N.W.2d 788, 794 (Minn. 1951))*.

P3 As such, under Arizona law, subject to certain exemptions not applicable here, "no person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the state bar." *Ariz. R. Sup. Ct. 31(b)*; *see also Ariz. R. Sup. Ct. 31(d)* (identifying exemptions). *Rule 31* specifically prohibits a non-active member of the state bar from using designations such as "lawyer" or "counselor at law," *Ariz. R. Sup. Ct. 31(a)(2)(B)* (defining the unauthorized practice of law), and "providing legal advice or services to or for another" by:

> (1) preparing any document in any medium intended to affect or secure legal rights for a specific person or entity;
> (2) preparing or expressing legal opinions;
> (3) representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation;
> (4) preparing any document through any medium for filing in any court, administrative agency or tribunal for a specific person or entity; or
>
> (5) negotiating legal rights or responsibilities **[*3]** for a specific person or entity.

Ariz. R. Sup. Ct. 31(a)(2)(A) (defining the practice of law).

FACTS AND PROCEDURAL HISTORY

P4 In January 2017, forty years after Berry was disbarred by our supreme court, the State Bar of Arizona (State Bar) filed a complaint against Berry alleging six counts of the unauthorized practice of law.

P5 After a two-day bench trial, the superior court found clear and convincing evidence that Berry engaged in the unauthorized practice of law on four occasions.[2] Specifically, the court found Berry, while affiliated with a paralegal firm called "Why Pay a Lawyer?," had: (1) prepared, signed, and mailed a demand letter on behalf of another person that included legal analysis the person did not specifically direct; (2) represented himself as a lawyer to a second person; drafted a demand letter for the second person that included legal analysis the person did not specifically direct; and prepared a breach of contract complaint for the second person that was later filed in superior court; (3) selected or prepared various bankruptcy documents for a third person that required legal analysis and were ultimately filed in bankruptcy court; and (4) selected or prepared legal documents for a fourth person **[*4]** that addressed legal issues related to a specific landlord-tenant dispute.

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[1] Absent material changes from the relevant date, we cite the current version of rules and statutes.

[2] The State Bar voluntarily dismissed one count; the superior court dismissed another.

P6 The superior court determined Berry's conduct was sanctionable, permanently enjoined Berry from engaging in the unauthorized practice of law in Arizona, and ordered Berry to pay restitution. *See Ariz. R. Sup. Ct. 76(a)* (describing the grounds for sanctions, including "[a]ny act found to constitute the unauthorized practice of law pursuant to *Rule 31*"), *(b)* (describing the available sanctions to include imposition of an injunction and restitution). Berry timely appealed, and we have jurisdiction pursuant to *Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1)* and *- 2101(A)(1)*.

DISCUSSION

I. Sufficiency of the Evidence

P7 Berry first argues the State Bar failed to prove by clear and convincing evidence that he engaged in the unauthorized practice of law as defined by *Rule 31*.[3] However, when an appellant "contend[s] on appeal that a judgment, finding or conclusion[] is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record transcripts of all proceedings containing evidence relevant to that judgment, finding or conclusion." *ARCAP 11(c)(1)(B)*; *see also Myrick v. Maloney, 235 Ariz. 491, 495, ¶ 11, 333 P.3d 818 (App. 2014)* ("An appellant also has an obligation to provide transcripts and other documents necessary to consider the issues raised on **[*5]** appeal.") (citing *Baker v. Baker, 183 Ariz. 70, 73, 900 P.2d 764 (App. 1995))*. "We presume the items not included in the appellate record support a trial court's ruling." *Myrick, 235 Ariz. at 495, ¶ 11* (citing *Baker, 183 Ariz. at 73*).

P8 Berry did not provide transcripts of the two-day bench trial; nor does his appellate case management statement indicate compliance with *ARCAP 11(c)(1)-(3)* (describing the appellant's duty to order transcripts). Berry has thus waived any argument regarding the sufficiency of the evidence to support the superior court's findings. *See Boltz & Odegaard v. Hohn, 148 Ariz. 361, 366, 714 P.2d 854 (App. 1985)* ("Where no transcript of evidence is made part of the record on appeal, a reviewing court will not question the sufficiency of evidence to sustain the ruling.") (citing *Riley v. Jones, 6 Ariz. App. 120, 122, 430 P.2d 699 (1967))*.

II. Constitutionality

P9 Berry next challenges the constitutionality of *Rule 31*. We review constitutional challenges *de novo* and will presume constitutionality unless the challenger convinces us otherwise beyond a reasonable doubt. *See 3613 Ltd. v. Dep't of Liquor Licenses & Control, 194 Ariz. 178, 182, ¶ 17, 978 P.2d 1282 (App. 1999)* (citations omitted).

P10 Berry contends that *Rule 31*'s provisions governing the practice of law and unauthorized practice of law are unconstitutionally overbroad and vague because the rule identifies several exemptions. *See Ariz. R. Sup. Ct. 31(d)*. But none of those exemptions apply to his conduct. Because Berry engaged in the type of conduct *Rule 31* expressly prohibits, he is **[*6]** precluded from challenging *Rule 31* on the grounds that it is unconstitutionally overbroad or vague.[4] *See Martin, 195 Ariz. at 316, ¶ 77* (collecting cases); *Broadrick v. Oklahoma, 413 U.S. 601,*

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[3] Berry presents several arguments not raised before the superior court. However, "matters not raised below . . . will not be considered on appeal." *Murphy v. Town of Chino Valley, 163 Ariz. 571, 578, 789 P.2d 1072 (App. 1989)* (citing *Norcor of Am. v. S. Ariz. Int'l Livestock Ass'n, 122 Ariz. 542, 544-45, 596 P.2d 377 (App. 1979))*; *see also Palmer v. City of Phx., 242 Ariz. 158, 165, ¶ 26, 393 P.3d 938 (App. 2017)* ("[A] party must timely present his legal theories to the trial court so as to give it an opportunity to rule properly.") (quoting *Payne v. Payne, 12 Ariz. App. 434, 435, 471 P.2d 319 (1970))*. And although Berry suggests his actions could have rightfully been undertaken by a certified legal document preparer (CLDP), *see Ariz. R. Sup. Ct. 31(d)(24)* (recognizing that a CLDP may perform services in compliance with Part 7, Chapter 2, of the Arizona Code of Judicial Administration), Berry admits he is not a CLDP, and the court found he was not a CLDP at the relevant time.

608, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) ("[E]ven if the outermost boundaries of [a statute challenged for vagueness] may be imprecise, any such uncertainty has little relevance . . . where appellants' conduct falls squarely within the 'hard core' of the statute's proscriptions.") (collecting cases).

III. Antitrust Laws

P11 Finally, relying upon *N.C. State Bd. of Dental Exam'rs v. FTC (N.C. Dental), 574 U.S. 494, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015)*, Berry contends enforcement of *Rule 31* violates federal ***antitrust law*** because the members of the State Bar who regulate and enforce the rules are "active participants in the same profession as those [they] govern[]." *See* *Ariz. R. Sup. Ct. 32(c)* (outlining parameters for membership in the State Bar).[5] We review legal questions *de novo*. *McNamara v. Citizens Protecting Tax Payers, 236 Ariz. 192, 194, ¶ 5, 337 P.3d 557 (App. 2014)* (citing *Lincoln v. Holt, 215 Ariz. 21, 23, ¶ 4, 156 P.3d 438 (App. 2007))*.

P12 In *N.C. Dental*, the Federal Trade Commission (FTC) filed an administrative complaint alleging the efforts of the North Carolina State Board of Dental Examiners (the Board) to exclude non-dentists from the teeth-whitening services market "constituted an anticompetitive and unfair method of competition under the *[FTC] Act*." *135 S. Ct. at 1108-09*. The FTC rejected the Board's claim that it was immune from antitrust **[*7]** laws. *Id. at 1109*. In affirming, the U.S. Supreme Court recognized that antitrust laws "confer immunity on anticompetitive conduct by the [s]tates when acting in their sovereign capacity." *Id. at 1110* (citing *Parker v. Brown, 317 U.S. 341, 350-51, 63 S. Ct. 307, 87 L. Ed. 315 (1943))*. When a state delegates control over a market to a non-sovereign actor that is controlled by active market participants, it "enjoys *Parker* immunity only if . . . the challenged restraint [is] clearly articulated and affirmatively expressed as state policy, and . . . the policy [is] actively supervised by the [s]tate." *Id.* (quoting *FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 225, 133 S. Ct. 1003, 185 L. Ed. 2d 43 (2013))*; *see also* *Goldfarb v. Va. State Bar, 421 U.S. 773, 788, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)* (recognizing that where an anticompetitive program gets "its authority and its efficacy from the legislative command of the state," there is no antitrust violation because the law "was intended to regulate private practices and not to prohibit a [s]tate from imposing a restraint as an act of government") (citing *Parker, 317 U.S. at 350-52*, and *Olsen v. Smith, 195 U.S. 332, 344-45, 25 S. Ct. 52, 49 L. Ed. 224 (1904))*.

P13 Berry contends Arizona's regulation of the practice of law is analogous to North Carolina's system of regulating dental practices. We disagree.

P14 The Board in *N.C. Dental* admitted it was not actively supervised by the state and therefore, without doubt, ineligible for immunity. *Id. at 1116*. The U.S. Supreme Court nonetheless identified "a few constant **[*8]** requirements of active supervision," namely:

> The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord

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[4] An exception exists where the law's "potential deterrent effect on *First Amendment* activities is 'both real and substantial.'" *Martin v. Reinstein, 195 Ariz. 293, 316, ¶ 78, 987 P.2d 779 (App. 1999)* (quoting *Maricopa Cty. Juv. Action No. JT9065297, 181 Ariz. 69, 73, 887 P.2d 599 (App. 1994))*. Although Berry contends *Rule 31* "outlaw[s]" commercial speech because it bans lawyer advertising, nothing in the text of the rule supports such an interpretation. Nor does he cite any authority suggesting he has a constitutional right to give legal advice in contravention of our supreme court rules prohibiting disbarred attorneys from practicing law.

[5] In conjunction with this argument, Berry argues *Rule 31* creates an illegal monopoly that only "promote[s] lawyer income and eliminate[s] competition [between lawyers and nonlawyers]." *See* *15 U.S.C. § 2* (designating the monopolization of trade or commerce as a felony offense); *see also* *A.R.S. § 44-1403*. Berry does not, however, suggest the State Bar controls pricing for legal services or that he, as a disbarred attorney, is a lawful competitor in the market for legal services. *See* *Pasco Indus., Inc. v. Talco Recycling, Inc., 195 Ariz. 50, 57-61, ¶¶ 22-49, 985 P.2d 535 (App. 1998)* (explaining how the elements of a monopolization claim may be proven). Therefore, we need not and do not address the argument.

> with state policy; and the "mere potential for state supervision is not an adequate substitute for a decision by the [s]tate." Further, the state supervisor may not itself be an active market participant.

Id. at 1116-17 (citing *Patrick v. Burget, 486 U.S. 94, 102-03, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988)*, and then quoting *FTC v. Ticor Title Ins., 504 U.S. 621, 638, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992))*. "In general, the adequacy of supervision . . . will depend on all the circumstances of the case." *Id.*

P15 Examining those factors here, we find the State Bar adequately supervised by our supreme court. Indeed, the U.S. Supreme Court has previously recognized the Arizona Supreme Court's supervisory authority over the State Bar, noting that while "the State Bar plays a part in the enforcement of the rules, its role is completely defined by the [Arizona Supreme] [C]ourt; the [State Bar] acts as the agent of the court under its continuous supervision." *Bates v. State Bar of Ariz., 433 U.S. 350, 361, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)* (holding an antitrust claim against the State Bar was precluded by *Parker* immunity). Our supreme court creates the rules and maintains the authority **[*9]** to veto or modify decisions of the State Bar. *See id. at 359-60* ("[T]he challenged [disciplinary rule] is the affirmative command of the Arizona Supreme Court . . . . That court is the ultimate body wielding the State's power over the practice of law, . . . adopt[s] the rules, and . . . is the ultimate trier of fact and law in the enforcement process."). The Arizona Rules of the Supreme Court govern both the substantive requirements for admission and continued membership in the State Bar and the attendant procedures. *See generally Ariz. R. Sup. Ct. 32 to 45*. Finally, the Arizona Supreme Court is not an active market participant; by definition, judicial members of the State Bar are "not engaged in the practice of law." *Ariz. R. Sup. Ct. 32(c)(6)*. Sufficient state supervision exists here, and antitrust laws do not prohibit the State Bar from enforcing our supreme court's regulations governing the practice of law and unauthorized practice of law.

CONCLUSION

P16 The superior court's judgment is affirmed.

End of Document

FTC v. Surescripts, LLC

United States District Court for the District of Columbia

January 17, 2020, Decided; January 17, 2020, Filed

Civil Action No. 19-1080 (JDB)

Reporter

424 F. Supp. 3d 92 *; 2020 U.S. Dist. LEXIS 8360 **; 2020-1 Trade Cas. (CCH) P81,062; 2020 WL 264147

FEDERAL TRADE COMMISSION, Plaintiff, v. SURESCRIPTS, LLC, Defendant.

Subsequent History: Motion denied by, Request denied by *FTC v. Surescripts, LLC, 2020 U.S. Dist. LEXIS 89517 (D.D.C., May 21, 2020)*

Partial summary judgment granted by, Reserved by, Judgment entered by, in part *FTC v. Surescripts, LLC, 2023 U.S. Dist. LEXIS 55509 (D.D.C., Mar. 30, 2023)*

Prior History: *FTC v. Surescripts, LLC, 2019 U.S. Dist. LEXIS 237763, 2019 WL 11317978 (D.D.C., Apr. 17, 2019)*

Core Terms

proper case, routing, prices, permanent injunction, competitor, markets, customers, alleges, loyalty, eligibility, argues, contracts, anticompetitive, cases, predatory, quotation, monopoly, routine, straightforward, foreclosed, pharmacies, pleadings, effects, exclusive contract, exclusionary, motion to dismiss, suggests, charges, courts, volume

Counsel: **[**1]** For FEDERAL TRADE COMMISSION, Plaintiff: Bradley Albert, LEAD ATTORNEY, FEDERAL TRADE COMMISSION, Washington, DC; Markus H. Meier, LEAD ATTORNEY, FEDERAL TRADE COMMISSION, BUREAU OF COMMISSION, Washington, DC; D. Patrick Huyett, David B. Schwartz, Joseph P. Mathias, Tanya T. O'Neil, FEDERAL TRADE COMMISSION, Bureau of Competition, Washington, DC.

For SURESCRIPTS, LLC, Defendant: Amanda P. Reeves, LEAD ATTORNEY, Allyson M. Maltas, LATHAM & WATKINS LLP, Washington, DC; Alfred C. Pfeiffer, Jr., PRO HAC VICE, LATHAM & WATKINS LLP, San Francisco, CA.

For CHANGE HEALTHCARE, LLC, ERX NETWORK, LLC, Interested Partys: Justin Bernick, LEAD ATTORNEY, HOGAN LOVELLS US LLP, Washington, DC.

For ALLSCRIPTS HEALTHCARE SOLUTIONS, INC., Intervenor: Joel Robert Grosberg, LEAD ATTORNEY, MCDERMOTT WILL & EMERY LLP, Washington, DC; Katherine M. O'Connor, PRO HAC VICE, MCDERMOTT WILL & EMERY LLP, Chicago, IL.

For RELAYHEALTH PHARMACY, INC., MCKESSON CORPORATION, Intervenors: Richard Brian Dagen, LEAD ATTORNEY, AXINN, VELTROP & HARKRIDER LLP, Washington, DC; Daniel S. Bitton, PRO HAC VICE, AXINN, VELTROP & HARKRIDER, LLP, San Fransico, CA.

Judges: JOHN D. BATES, United States District Judge.

Opinion by: JOHN D. BATES

Opinion

[*94] MEMORANDUM OPINION [2]**

The Federal Trade Commission petitions this Court for equitable relief, including a permanent injunction and monetary relief, against Surescripts, LLC pursuant to *Section 13(b) of the FTC Act*. See *15 U.S.C. § 53(b)*. The FTC alleges that Surescripts has violated *Section 2 of the Sherman Act* by maintaining a monopoly in two markets—electronic prescription routing and eligibility (explained below)—through anticompetitive conduct, including an exclusive loyalty- based pricing policy. Surescripts moves to dismiss, arguing (1) that the Court lacks subject matter jurisdiction under *Section 13(b) of the FTC Act*, and (2) that the FTC fails to state a claim under *Section 2 of the Sherman Act* because **[*95]** it does not allege either that Surescripts employed predatory pricing or that Surescripts's market behavior violated the rule of reason. For the reasons explained below, the Court will deny Surescripts's motion.

BACKGROUND

At the pleadings stage, the Court assumes the facts alleged in the complaint are true and presents them in the light most favorable to the plaintiff—here, the FTC. *Felter v. Kempthorne, 473 F.3d 1255, 1257, 374 U.S. App. D.C. 272 (D.C. Cir. 2007)*. Surescripts is a health information technology company operating in two complementary markets: electronic prescription routing ("routing") and eligibility, collectively known as "e-prescribing." Compl. for Injunctive **[**3]** & Other Equitable Relief ("Compl.") [ECF No. 1] ¶ 1. Routing involves the transmission of prescription-related data from a prescriber to a pharmacy via the prescriber's electronic health record ("EHR") system. Id. Eligibility involves the transmission of a patient's formulary and benefit information from a payer (often the patient's pharmacy benefit manager ("PBM")) to a prescriber's EHR. Id. Surescripts charges pharmacies a fee for each routing transaction and charges PBMs a fee for each eligibility transaction. Id. ¶ 49.

According to the FTC, Surescripts maintains at least a 95% share (by transaction volume) in each market using various anticompetitive measures. Id. ¶¶ 2-3. Beginning around 2009, Surescripts implemented a pricing policy that rewarded "loyal" (i.e., exclusive) customers with lower prices. Id. ¶ 2. "To be considered exclusive, Surescripts requires that a pharmacy ... route 100% of its transactions through and only through the Surescripts network." Id. 1166 (internal quotation marks omitted). "The same structure exists for PBMs in eligibility." Id. 1167. For routing, the cost to non-loyal customers varies by volume, but can be as high as [TEXT REDACTED BY THE COURT] more than for loyal **[**4]** customers; for eligibility, as high as [TEXT REDACTED BY THE COURT] more. Id. ¶¶ 70-71. Surescripts structured its contracts with EHR providers such that loyalty in either the routing or eligibility markets resulted in an incentive payment to the EHR provider of [TEXT REDACTED BY THE COURT] of the fees paid by the customers in that market; exclusivity in both markets resulted in an incentive payment of [TEXT REDACTED BY THE COURT] of the fees from both markets. Id. ¶ 77.

The FTC contends that "[t]hose effectively exclusive contracts foreclosed at least 70% of each market, eliminating multiple competitive attempts from other companies ... that offered lower prices and greater innovation." Id. ¶ 3. The FTC notes that these loyalty contracts are especially effective at excluding competition in the routing and eligibility markets because, given Surescripts's dominant position, almost all market entrants must compete for customers who already use Surescripts. Id. ¶ 32. To gain a foothold in either market, entrants must convince customers to engage in "multihoming," or the simultaneous use of Surescripts as well as one or more competitors. Id. The FTC alleges that, by raising the cost of **[**5]** multihoming, Surescripts hindered customers' ability to "multihome" and "significantly elevat[ed] the critical mass [of initial customers] a Surescripts competitor would need to become a viable network in either routing or eligibility." Id.

Beyond the loyalty program, Surescripts employed "threats and other non-merits based competition" to keep its customers from working with its competitors. Id. ¶ 4. For instance, when a competitor, Emdeon, attempted to enter the market through contracts with Allscripts, a large EHR, Surescripts relied on its market power to force Allscripts into exclusive contracts that prevented a renewal of Allscripts's **[*96]** contract with Emdeon. Id. ¶¶ 110-11. Surescripts also entered into a non-compete agreement with another competitor, RelayHealth, which prevented RelayHealth from capturing up to 15-20% of the routing market. Id. if 5; see also id. ¶¶ 88-99. The FTC alleges that these exclusive arrangements have allowed Superscripts to impose heightened prices on large portions of the markets, see, e.g., id. ¶¶ 187-95, and have stifled innovation and reduced quality in the two e-prescribing markets, id. ¶ 196-215.

Surescripts moves to dismiss the FTC's complaint, arguing **[**6]** that this case is both procedurally and substantively defective. Surescripts, LLC's Mot. to Dismiss Compl. ("Def.'s Mot.") [ECF No. 32] ¶¶ 1-3. First, Surescripts argues that the Court lacks subject matter jurisdiction over the request for a permanent injunction because the FTC cannot establish that this case is "proper" under *Section 13(b) of the FTC Act*. Id. ¶ 1; see also *15 U.S.C. § 53(b)*. Second, Surescripts argues that the FTC's complaint fails to state a claim under *Section 2 of the Sherman Act* because it does not allege that the prices offered by Surescripts were predatory or that Surescripts's market practices violated the rule of reason. Def.'s Mot. ¶¶ 2-3.

LEGAL STANDARD

When considering a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*, a court presumes the truth of a complaint's factual allegations, though it is "not bound to accept as true a legal conclusion couched as a factual allegation:" *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal quotation omitted). The court then asks whether the facts alleged suffice "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (internal quotation omitted). The court considers "facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the Court] may take judicial notice." *Mpoy v. Rhee, 758 F.3d 285, 291 n.1, 411 U.S. App. D.C. 94 (D.C. Cir. 2014)* (internal **[**7]** quotation omitted).

Under *Rule 12(b)(1)*, a court has an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority. *Grand Lodge of the Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C. 2001)*. "[The] court must dismiss a case when it lacks subject matter jurisdiction." *Randolph v. ING Life Ins. & Annuity Co., 486 F. Supp. 2d 1, 4 (D.D.C. 2007)*. "[P]laintiff's factual allegations in the complaint ... will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Grand Lodge, 185 F. Supp. 2d at 13-14* (internal quotation marks omitted). And the court may consider material other than allegations in the complaint in determining whether it has jurisdiction to hear the case. See *Settles v. U.S. Parole Comm'n, 429 F.3d 1098, 1107, 368 U.S. App. D.C. 297 (D.C. Cir. 2005)*.

ANALYSIS

I. Subject Matter Jurisdiction Under *Section 13(b)*

Surescripts first contends that the Court lacks subject matter jurisdiction over this dispute. Mem. in Supp. of Surescripts, LLC's Mot. to Dismiss Compl. ("Def.'s Mem.") [ECF No. 32] at 13-29. Surescripts argues that *Section 13(b) of the FTC Act* limits the Court's power to issue permanent injunctions upon request by the FTC to "proper cases," which Surescripts interprets as "routine, straightforward" cases. *Id. at 17-18*; see also *15 U.S.C. § 53(b)*. This case, Surescripts continues, does not qualify as routine or straightforward because it involves complex and novel **[*97]** issues of ***antitrust law***, such as how to understand the two-sided **[**8]** e-prescription markets of routing and eligibility in light of the Supreme Court's recent decision in *Ohio v. American Express Co. ("Amex"), 138 S. Ct. 2274, 201 L. Ed. 2d 678 (2018)*. Def.'s Mem. at 24-29.

The FTC responds in two ways. First, the FTC argues that the "proper cases" language in *Section 13(b)* does not limit courts' jurisdiction to hear cases brought under the Act. Pl. FTC's Mem. of Law in Opp'n to Def. Surescripts, LLC's Mot. to Dismiss Compl. ("Pl.'s Opp'n") [ECF No. 36] at 10-12. The FTC argues that the language of *Section 13(b)* does not clearly speak to courts' power to adjudicate such claims. Pl.'s Opp'n at 11 (citing *Arbaugh v. Y&H Corp., 546 U.S. 500, 515-16, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006))*. Second, the FTC contends that this case is "proper" because that term just means "any case in which a permanent injunction would be `appropriate,' i.e., any case in which a law enforced by the FTC has been violated and equitable remedies are needed to make harmed consumers whole." Id. at 13. The FTC has the stronger argument on both points.

A. Whether "Proper Cases" Is a Jurisdictional Requirement

The Supreme Court has established a clear-statement rule for determining whether statutory elements constitute jurisdictional requirements. See *Arbaugh, 546 U.S. at 515*. "[W]hen Congress does not rank a statutory limitation ... as jurisdictional, courts should **[**9]** treat the restriction as nonjurisdictional in character." *Id. at 516*. Here, the relevant provision reads: "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." *15 U.S.C. § 53(b)*. Neither this specific provision nor *Section 13(b)*'s broader framework for seeking equitable relief even include the word "jurisdiction," let alone a clear statement that any of the statutory requirements are jurisdictional. As the Third Circuit recently concluded when analyzing the same provision, "*Section 13(b)* includes no indicia that Congress intended to rank a statutory limitation ... as jurisdictional." *FTC v. Shire ViroPharma, Inc., 917 F.3d 147, 154 (3d Cir. 2019)* (internal quotation marks omitted).

Surescripts's best textual argument for reading "proper cases" as a jurisdictional requirement comes from the label of *Section 13(a)*—"Power of Commission; jurisdiction of courts." Reply Mem. in Supp. of Surescripts, LLC's Mot. to Dismiss Compl. ("Def.'s Reply") [ECF No. 39] at 4. Because *Section 13(a)* "is identical to *Section 13(b)* in structure," Surescripts argues that the latter section too should be read as jurisdictional. Id. Under Arbaugh, however, the inquiry is whether Congress "clearly states that a threshold limitation on a statute's scope" is jurisdictional, and Surescripts's structural argument **[**10]** from *Section 13(a)*'s label falls short of this high bar. *546 U.S. at 515* (emphasis added). Indeed, *Section 13(b)*—the actual section at issue here—has a separate and distinct label ("Temporary restraining orders; preliminary injunctions") that does not include any reference to jurisdiction. See *15 U.S.C. § 53(a)—(b)*; cf. *Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 164, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010)* (noting that the Copyright Act's registration requirement for bringing an infringement action "is located in a provision `separate' from those granting federal courts subject-matter jurisdiction over those respective claims").

Surescripts also emphasizes that the FTC has itself cited *Section 13(b)* as the basis for personal jurisdiction and as "empower[ing] this Court to issue a permanent **[*98]** injunction." See Def.'s Reply at 4 (internal quotation and emphasis omitted); see also Compl. at 54. But the agency's framing of this language as "empower[ing]" the Court does not thereby transform the language of *Section 13(b)* into a threshold jurisdictional requirement.

Finally, although not dispositive, it is worth noting that the opposite conclusion would create a cumbersome threshold test whenever the FTC seeks a permanent injunction. Pl.'s Opp'n at 20-21; see also Tr. of Mot. Hr'g [ECF No. 41] at 49:3-6 (arguing that the FTC's "interpretation is the one that relies **[**11]** on the plain language of the statute and doesn't saddle the Court with the burden of deciding what a routine case is or not"). Under defendant's jurisdictional interpretation, courts would need to decide whether the claims brought are "straightforward" or "routine" and to assess the novelty or complexity of the claims' merits before deciding whether to hear the case in the first place. Pl.'s Opp'n at 20-21. This requirement is unwieldy and, given the dearth of textual support for a jurisdictional reading, suggests that the "proper cases" element is not jurisdictional.

B. Whether the FTC Pleaded a "Proper Case"

The FTC also prevails on the substance of this issue, for even if "proper cases" is jurisdictional, the agency has pleaded sufficient facts to clear the mark. Cf. Def's Reply at 3 (arguing that the "proper cases" question can be addressed under either *Fed. R. Civ. P. 12(b)(1)* or *Fed. R. Civ. P. 12(b)(6)*).

Surescripts argues for a narrow interpretation of "proper cases" that limits the FTC's power to seek permanent injunctions to instances of routine fraud or other straightforward violations of the FTC's substantive statutes. Def.'s Mem. at 17-18. Surescripts insists that "proper cases" cannot consist of "'all cases' in which **[**12]** the FTC asserts a violation of the laws it enforces" because that would render the phrase superfluous. Id. at 17. Surescripts also points to the legislative history, which suggests that at least one purpose for the permanent injunction provision was to permit the FTC "in the routine fraud case, to merely seek a permanent injunction in those situations in which it does not desire to further expand upon the prohibitions of the Federal Trade Commission Act." *Id. at 18* (internal quotation and emphasis omitted). And Surescripts cites two cases that rely on a narrow interpretation of "proper cases"—*FTC v. Abbott Labs., Civ. A. No. 92 1364, 1992 U.S. Dist. LEXIS 18030, 1992 WL 335442 (D.D.C. Oct. 13, 1992)*, and *FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020 (7th Cir. 1988)*—as well as public statements by former FTC officials framing "proper cases" as involving straightforward violations. Def.'s Mem. at 18-24.

There is thus considerable weight to Surescripts's argument that "proper cases" is not synonymous with "all cases," for such an interpretation would make the phrase superfluous. At the same time, this Court's task is not to define the term "proper cases" for all scenarios, but to determine whether this case is proper. The FTC grounds its legal argument here in Circuit precedent, *United States v. Microsoft Corp., 253 F.3d 34, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (en bane) (per curiam), and does not seek to rely on its agency expertise to develop the law. **[**13]** See Pl.'s Opp'n at 21; Tr. of Mot. Hr'g at 67:12-16 (FTC noting that "Microsoft is the primary authority in this case" and suggesting that the Court will not "have to go much beyond Microsoft"). Under such circumstances, the Court concludes that the complaint adequately alleges a "proper case."

[*99] In terms of the statutory text, the language of *Section 13(b)* affords little evidence one way or the other, but it is at least not necessary to read the phrase "proper cases" so narrowly as to mean "straightforward" or "non-novel" cases, as Surescripts suggests. Def.'s Mem. at 22-24. Given that the phrase "proper cases" is embedded in the second "Provided" portion of *Section 13(b)*, the phrase might be seen as merely distinguishing between those disputes suited for a temporary injunction—the subject of most of *Section 13(b)*—and those cases better suited for a permanent injunction. See *15 U.S.C. § 53(b)*. Or, given the requirement that the FTC must present "proper proof," "proper cases" might be interpreted as involving disputes that do not require the exercise of the FTC's scientific expertise. See J. Howard Beales III & Timothy J. Muris, Striking the ProperBalance: Redress Under *Section 13(b) of the FTC Act*, 79 Antitrust L.J. 1, 31-33 (2013). If a district court determined that the targeted entity did not have **[**14]** fair notice or that an administrative proceeding would be more "proper," then the court might rule against a permanent injunction. See id. at 31; see also id. at 9-13. The text alone, then, thus does not dictate either Surescripts's narrow reading of "proper cases" or the FTC's broader interpretation.

Looking beyond the text, all other factors suggest that a broader reading is correct. In terms of case law, a number of other courts have concluded that "proper cases" include more than "routine" violations. See, e.g., *FTC v. Evans Prods. Co., 775 F.2d 1084, 1086-87 (9th Cir. 1985)* (noting that *Section 13(b)* may authorize a permanent injunction in instances beyond the routine fraud case); *FTC v. AmeriDebt, Inc., 373 F. Supp. 2d 558, 562-63 (D. Md. 2005)* (agreeing with the FTC's reading of "proper case" as "simply one that involves a violation of any provision of law enforced by the Commission" (internal quotation marks omitted)); see also Pl.'s Opp'n at 17 20. Indeed, the FTC states that it has often relied on "*Section 13(b)* in a wide variety of non-'routine' cases. See Pl.'s Opp'n at 18 & n.17 (citing *FTC v. Qualcomm Inc., No. 17-CV-00220 LHK, 411 F. Supp. 3d 658, 2019 U.S. Dist. LEXIS 86219, 2019 WL 2206013 (N.D. Cal. May 21, 2019)*; *FTC v. Cephalon, Inc., No. 2:08-cv-2141 MSG, 2019 U.S. Dist. LEXIS 83199, 2019 WL 2111253 (E.D. Pa. Feb. 21, 2019)*; *FTC v. AbbVie Inc., 329 F. Supp. 3d 98 (E.D. Pa. 2018))*; see also *FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 36 (D.D.C. 1999)* ("[T]his Court finds that the permanent injunction proviso may be used to enjoin violations of any provision of law enforced by the FTC." (internal quotation marks omitted)).

[15]** Surescripts's authorities to the contrary are all wanting. In World Travel, the Seventh Circuit held that "it is quite clear that Congress at least expected that the FTC could rely on *[Section 13(b)]* when it sought to halt a straightforward violation of *section 5 [of the FTC Act]* that required no application of the FTC's expertise to a novel regulatory issue through administrative proceedings." *861 F.2d at 1028* (emphasis added). Abbott Labs., quoting this language from World Travel, noted that "Federal Courts have shied away from accepting direct court actions by the Commission . . . if the offending conduct interjects the court into areas of Commission expertise involving the creation and monitoring of new concepts of unfair competitive trade practice." *1992 U.S. Dist. LEXIS 18030, 1992 WL 335442, at *2*. But Abbott Labs. cites no authority other than World Travel for this gloss on *Section 13(b)*, and World Travel elsewhere acknowledges that "[a] substantial argument can be made that the statutory language, when read with [the] legislative history, permits the FTC to proceed under the last proviso of *13(b)* for any violation of a statute administered by the FTC." *861 F.2d at 1028*.

[*100] Surescripts's other arguments fare no better. To the extent that the Court considers legislative history, the Senate report cited by Surescripts does highlight the ability of the FTC to seek a permanent injunction immediately "in the routine fraud case." Def.'s Mem. at 18 (quoting Senate Committee on Commerce, Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, S. Rep. No. 93-151, at 31 (1973)). But the report does not say that such circumstances are the only time that the FTC can seek such an injunction. See id. Likewise, many of the statements and academic articles that Surescripts marshals from former FTC Commissioners and other agency officials conclude that permanent injunctions are ill suited for cases requiring the FTC's expertise and the development of law through the administrative process, but they do not then go on to preclude a case brought under circuit precedent. See id. at 21-23.

Surescripts's argument thus largely rests on authorities that acknowledge straightforward cases as the paradigm applications of *Section 13(b)*, but do not preclude pursuing **[**16]** other claims. See *Evans Prods., 775 F.2d at 1086-87*. In agreement with the clear weight of relevant cases, the Court concludes that the FTC's complaint sufficiently pleads a "proper" case for a permanent injunction under *Section 13(b)*.

II. Failure to State a Claim Under *Section 2* of the Sherman Act

Surescripts next argues that the FTC's claim should be dismissed under *Fed. R. Civ. P. 12(b)(6)* because the FTC's complaint fails to allege a violation of *Section 2 of the Sherman Act*. See Def.'s Mem. at 29-45. First, Surescripts suggests that the FTC's monopolization claim must fail because Surescripts's loyalty program was entirely optional and, therefore, its low prices could constitute anticompetitive conduct only if they were "predatory," which Surescripts denies. Id. at 30-31. Surescripts emphasizes that the FTC's complaint did not plead the necessary elements of predatory pricing. Id. at 33-34. Second, Surescripts argues that, even under the framework of exclusive dealing, the FTC's claim would fail under the rule of reason because the FTC's complaint did not adequately allege that Surescripts's loyalty programs created any anticompetitive effects. Id. at 34-45. Once again, the FTC has the stronger argument on both fronts.

A. Exclusionary Contracts v. Predatory Pricing

The offense of monopolization has two **[**17]** elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. Surescripts does not challenge the allegation that the company maintains a monopoly over the routing and eligibility markets, see Def.'s Mem. at 29-30, and thus the only question is whether "Surescripts has illegally maintained its monopolies through exclusionary conduct," Pl.'s Opp'n at 22.

For an exclusionary act to be anticompetitive, "it must harm the competitive process and thereby harm consumers." *Microsoft Corp., 253 F.3d at 58* (emphasis omitted). Here, the FTC alleges that Surescripts's loyalty programs—and the implicit threat to charge non-exclusive customers higher prices—prevented the entrance of competitors into e-prescribing markets. Compl. ¶ 58. The absence of competitors, in turn, allegedly led to increased prices for pharmacies and PBMs and lower **[*101]** incentive payments for EHRs. See id. ¶¶ 187-93. At least on the face of its complaint, then, the FTC appears to allege facts sufficient to state a claim under *Section 2 of the Sherman Act*. See *Iqbal, 556 U.S. at 678*.

Surescripts's arguments **[**18]** to the contrary are unavailing. First, the company emphasizes that its loyalty programs are entirely optional and thus do not necessarily constitute exclusive contracts. See Def.'s Mem. at 31. But a contract need "not contain specific agreements not to use the [services] of a competitor" as long as "the practical effect . . . is to prevent such use." *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 326, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)* (quoting *United Shoe Mach. Corp. v. United States, 258 U.S. 451, 457, 42 S. Ct. 363, 66 L. Ed. 708 (1922))*. The FTC alleges that the threat of increased prices had the "practical effect" of preventing customers from working with other e-prescribing platforms, "since doing so would trigger the massive penalty provisions in their contracts with Surescripts . . . and cost routing [and eligibility] customers millions of dollars through increased prices or, for EHRs, decreased incentive payments." Compl. ¶ 129; see also id. ¶ 79 (alleging that EHRs that "violate[] the exclusivity commitment" must "pay back [to Surescripts] the incentive fees for historical transaction volume"). Surescripts highlights that some customers, like Kroger, did manage to "multihome" and have a non-exclusive relationship with Surescripts, Def.'s Mem. at 31, but the test of whether a monopolist forecloses competition "is not total foreclosure, but whether the **[**19]** challenged practices bar a substantial number of rivals or severely restrict the market's ambit." *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 191 (3d Cir. 2005)*; see also *Microsoft, 253 F.3d at 70-71* (noting that the use of exclusive contracts can violate *§ 2* even if the contracts foreclose less than 40% or 50% of the market share). Here, the government has pleaded facts demonstrating such substantial foreclosure. See, e.g., Compl. ¶¶ 3, 135.

Surescripts next suggests that optional low pricing loyalty programs are unlawful only when they constitute "predatory" pricing, which the FTC has not pled. Def.'s Mem. at 31. But none of the authorities Surescripts cites stands for the proposition that a plaintiff must allege predatory pricing to succeed on a *Section 2* claim. For instance, *Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc., 555 U.S. 438, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*, did not concern effectively exclusionary contracts, but price-squeezing. *Id. at 451*. In *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000)*, the court examined a loyalty discount program that required at most 80% compliance in the boat market, making the exclusive pressures created by the program materially different than the dynamics arising from Surescripts's total loyalty scheme. *Id. at 1044*. And in *NicSand, Inc. v. 3M Co., 507 F.3d 442 (6th Cir. 2007)* (en banc), the defendant 3M was not a monopolist. *Id. at 451-52*.

Surescripts also mischaracterizes the holdings in Microsoft. It quotes the court's statement that "offering **[**20]** a customer an attractive deal is the hallmark of competition" unless that price is "predatory," but that statement concerned only Microsoft's offering Internet Explorer free of charge. *Microsoft, 253 F.3d at 67-68*; Def.'s Mem. at 31. The relevant portion of the en banc D.C. Circuit's decision for this case is its ruling that Microsoft's exclusive contracts did violate *Section 2 of the Sherman Act*; the court noted that Microsoft's exclusive dealing with fourteen of the fifteen access providers in North America effectively cut off one of the two major channels by which competitors could enter the internet **[*102]** browser market. *Microsoft, 253 F.3d at 68-71*. These contracts "clearly ha[d] a significant effect in preserving its monopoly; they help[ed] keep usage of [Microsoft's competitor] below the critical level necessary for [it] or any other rival to pose a real threat to Microsoft's monopoly." *Id. at 71*.

Like the behavior at issue in *Microsoft*, Surescripts's alleged practice of charging loyal pharmacies and PBMs less, and paying loyal EHRs greater incentives, do not need to constitute predatory pricing for Surescripts's exclusionary practices to constitute illegal maintenance of a monopoly. See *Grinnell, 384 U.S. at 570-71*. "Where, as here, a dominant supplier enters into exclusive dealing **[**21]** arrangements with every customer in the market, other firms may be driven out not because they cannot compete on a price basis, but because they are never given an opportunity to compete . . . ." *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 281 (3d Cir. 2012)*.

Surescripts argues that Third Circuit cases like ZF Meritor have not been adopted in the D.C. Circuit and that (for this Court) predatory pricing still remains an essential element of proving that a loyalty program is unlawful. Def.'s Mem. at 32-33. However, although the D.C. Circuit has cast doubt on the Third Circuit's decision in *LePage's Inc. v. 3M, 324 F.3d 141 (3rd Cir. 2003)* (en banc), see *FTC v. Church & Dwight Co., 665 F.3d 1312,1316, 398 U.S. App. D.C. 449 (D.C. Cir. 2011)*, much of that criticism was focused on the conclusion that "bundling" rebates (i.e., requiring retailers to carry multiple products to receive certain rebates) are anticompetitive, rather than on the Third Circuit's discussion of the exclusionary practices in question here, see *id. at 1316-17*. And even without these persuasive precedents, the FTC's allegations still state a claim of monopolization under the D.C. Circuit's decision in Microsoft. See *253 F.3d at 69-71*.

B. Rule of Reason

Surescripts next contends that, if its loyalty contracts are viewed as exclusive dealing, the FTC's claims fail under the rule of reason. Def.'s Mem. at 34. Surescripts argues **[**22]** that "the FTC bears the burden of demonstrating that Surescripts'[s] alleged contractual provisions have an anticompetitive effect on competition," which in an exclusive dealing case means that Surescripts's conduct "foreclose[d] competition in a substantial share of the line of commerce affected." *Id. at 35* (quoting *Microsoft, 253 F.3d at 69*). In particular, Surescripts suggests that, because the FTC concedes that both routing and eligibility are two-sided markets, "the FTC must plausibly plead foreclosure of a substantial share of each of those markets as a whole." Id. Surescripts insists that the FTC's complaint fails to allege either anticompetitive effects or foreclosure. Id.

The Court concludes, to the contrary, that the FTC has met its burdens. Exclusivity provisions covering about 40-50% of the relevant market have been found to foreclose competition illegally, see *Microsoft, 253 F.3d at 70*, and Surescripts's loyalty program allegedly places 70-80% of the routing and eligibility markets into effectively exclusive contracts, Pl.'s Opp'n at 35; Compl. ¶¶ 172-76. Surescripts insists that, under the Supreme Court's recent decision in Amex, the FTC must plead facts showing "anticompetitive effects in the market as a whole and cannot focus **[**23]** only on the effects on one side." Def.'s Mem. at 37; see also id. at 35-40. But the FTC's complaint does just what Surescripts wants, alleging that Surescripts's loyalty program "foreclosed at least 70% of each market," i.e., at least 70% of both two-sided markets at issue. Compl. ¶ 3 (emphasis added); see also id. **[*103]** ¶ 187 ("But for Surescripts's anticompetitive course of conduct, the net price (taking into account both sides of the network) of the routing transaction would be lower. Similarly, without Surescripts's loyalty contracts, the net price (taking into account both sides of the network) of the eligibility transaction would be lower.").

Surescripts argues that these statements are conclusory and that the FTC does not plead sufficient facts to survive the motion to dismiss. Def.'s Mem. at 38; see also *Iqbal, 556 U.S. at 678* ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). Surescripts acknowledges, for instance, that the complaint includes an allegation that, "in the routing market, the FTC states that [a competitor] charges [certain] pharmacies lower prices than does Surescripts," **[**24]** but notes that "the FTC does not make any allegations concerning EHRs' incentive payments from Surescripts or [the competitor] for those [same] routing transactions." Def.'s Mem. at 39. Surescripts similarly concedes that the complaint alleges that a competitor charged one PBM a lower price than Surescripts, but highlights the absence of "facts showing higher net-transaction prices across that market as a whole." Id.

This argument is wrong for two reasons. First, Surescripts reads too much into Amex. That case concerned an alleged restraint of trade in violation of *Section 1 of the Sherman Act*, and the Supreme Court determined that plaintiffs failed to offer evidence that the price of credit-card transactions was higher than would be expected in a competitive market because the plaintiffs provided no "reliable measure of Amex's transaction price or profit margins." *138 S. Ct. at 2288*. The Court also concluded that "Amex's increased merchant fees reflected] increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price." Id. Amex was not a monopolist. *Id. at 2282* ("Visa . . . has 45% of the market as measured by transaction volume. Amex and MasterCard trail with **[**25]** 26.4% and 23.3%, respectively . . . .").

Here, on the other hand, the FTC brings a claim of monopolization under *Section 2 of the Sherman Act* against Surescripts, an undisputed monopolist. Regardless of Surescripts's specific above-market fees or below-market incentives, the central question is whether the FTC alleged that Surescripts engaged in exclusionary conduct that "harmed competition, not just a competitor," by blocking entrants into the market. *Microsoft, 253 F.3d at 59*. The FTC has done just that. See, e.g., Compl. ¶¶ 3,135,172-81.

But, even assuming that Surescripts is correct in its interpretation of Amex, the FTC still pleaded sufficient facts addressing the totality of both two-sided markets. In addition to charging lower fees to pharmacies and PBMs, the

FTC alleges that one competitor was also willing to pay higher incentives to EHRs. Id. ¶ 192. Thus, on both sides of the market, Surescripts stood to gain above-market returns, charging higher fees and paying out lower incentives than its competitors. The FTC also alleges that Surescripts engaged in other anticompetitive conduct, like forcing key customers to terminate association with competitors. Id. ¶ 111. The FTC alleges that this conduct hurt innovation, **[**26]** decreased output, and lowered quality. Id. ¶¶ 196-215. Surescripts's response is largely factual, denying the FTC's allegations. Def.'s Mein. at 41-42. But such denials are not adequate grounds for dismissing the FTC's complaint; rather, they speak to the merits and the need for further **[*104]** factual development through discovery.

Finally, Surescripts argues that the FTC failed to plead sufficient facts showing that Surescripts's business practices foreclosed market competition to a "substantial" degree. Id. at 42-45. Surescripts observes that exclusive dealing is illegal only if the arrangement "substantially" weakens competition, see *Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 403-04 (3d Cir. 2016)*, and insists that its contracts, even if facially exclusive, were easily terminable, of short duration, and therefore presumptively lawful, see, e.g. *Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 395 (7th Cir. 1984)*. Def.'s Mem. at 42.

Once again, however, Surescripts's argument turns on a factual dispute ill suited for the pleadings stage. Compare Pl.'s Opp'n at 30-32; Compl. ¶¶ 84-86, with Def.'s Reply at 18-20. Under Supreme Court precedent, the relevant inquiry is fact intensive:

> To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, **[**27]** taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein.

Tampa Elec., 365 U.S. at 329. Even if the contracts were short term and easily terminable, the FTC argues that their exclusive terms, when combined with the nature of the two relevant markets and Surescripts's dominant monopoly position, had the effect of foreclosing large parts of both markets and harming competition. Pl.'s Opp'n at 31-32; cf. *Microsoft, 253 F.3d at 70-71* (analyzing whether Microsoft's exclusive contracts had "a significant effect in preserving its monopoly"). Further factual development may vindicate Surescripts's position, but the FTC's complaint contains sufficient facts to move beyond the pleadings stage.

CONCLUSION

For all the foregoing reasons, Surescripts's motion to dismiss will be denied. A separate order will issue on this date.

/s/ JOHN D. BATES

United States District Judge

Dated: January 17, 2020

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in F. Supp. 3d.]

[*none] ORDER

Upon consideration of [32] defendant Surescripts, LLC's motion to dismiss, and the entire record herein, and **[**28]** for the reasons explained in the accompanying Memorandum Opinion, it is hereby

ORDERED that [32] defendant's motion to dismiss is **DENIED**; and it is further

ORDERED that the parties shall meet and confer, and shall thereafter submit to the Court, by not later than February 14, 2020, either joint or separate proposals as to how the case should proceed, along with proposed schedules for any discovery or summary judgment briefing. A status conference is hereby set for February 19, 2020, at 9:30 a.m. in Courtroom 30.

/s/ JOHN D. BATES

United States District Judge

Dated: January 17, 2020

Inst. for Responsible Alcohol Policy v. State

Supreme Court of Oklahoma

January 22, 2020, Decided

Case Number: 118209

Reporter

2020 OK 5 *; 457 P.3d 1050 **; 2020 Okla. LEXIS 6 ***; 2020 WL 359495

THE INSTITUTE FOR RESPONSIBLE ALCOHOL POLICY, SOUTHERN GLAZER'S WINE AND SPIRITS OF OKLAHOMA, LLLP, J.B. JARBOE II, CENTRAL LIQUOR CO. L.P. d/b/a RNDC OKLAHOMA, JUSTIN NAIFEH, E. & J. GALLO WINERY, SUTTER HOME WINERY INC., d/b/a TRINCHERO FAMILY ESTATES, DIAGEO AMERICAS, INC., LUXCO, INC., RIBOLI FAMILY OF SAN ANTONIO WINERY, INC., JENNIFER BLACKBURN, d/b/a CELLAR WINE AND SPIRITS OF NORMAN, and DALE BLACKBURN d/b/a GRAND CRU WINE AND SPIRITS SUPERSTORE, Plaintiffs/Appellees, v. STATE OF OKLAHOMA, ex rel. ALCOHOLIC BEVERAGE LAWS ENFORCEMENT COMMISSION, and THE HONORABLE KEVIN STITT, GOVERNOR, in his official capacity, Defendants/Appellants, and BRYAN HENDERSHOT, individually, and d/b/a BOARDWALK DISTRIBUTION COMPANY, Intervenor/Appellant.

Prior History: [*1]** ON APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY. The Honorable Thomas E. Prince, Trial Judge.

Disposition: DISTRICT COURT'S JUDGMENT AFFIRMED.

Core Terms

wholesaler, manufacturer, brands, wine, provisions, alcoholic beverage, top, liquor, licensed, constitutional provision, distributor, retailers, tier, alcohol, sales, monopolies, spirits, regulation, repealed, enact a law, products, voters, same price, desires, elects, anticompetitive, plainly, construe, ballot title, harmonize

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > State Regulation

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Constitutional Law > State Constitutional Operation

HN1[] **Trade Practices & Unfair Competition, State Regulation**

Senate Bill 608 is clearly, palpably, and plainly inconsistent with the discretion in Okla. Const. art. 28A, § 2(A)(2) given to a liquor or wine manufacturer to determine what wholesaler sells its product. Senate Bill 608 is also not a proper use of legislative authority as Okla. Const. art. 28A, § 2(A)(2) is not in conflict with the Oklahoma Constitution's anticompetitive provisions.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

HN2[] Agriculture & Food, Distribution, Processing & Storage of Food & Agricultural Products

Oklahoma has a three-tier system for alcohol distribution: alcohol manufacturers (first tier) can only sell to licensed Oklahoma wholesalers (second tier); licensed Oklahoma wholesalers (second tier) can only sell to licensed retailers (third tier); and licensed retailers (third tier) can only sell to consumers.

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

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

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

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

HN3[] Entitlement as Matter of Law, Genuine Disputes

Summary judgment is properly granted when there are no disputed questions of material fact and the moving party is entitled to judgment as a matter of law. An appeal on summary judgment comes to the court as a de novo review, as the matter presents only questions of law, not fact. The Supreme Court of Oklahoma assumes plenary independent and non-deferential authority to reexamine a trial court's legal rulings.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Constitutional Law > State Constitutional Operation

HN4[] Case or Controversy, Constitutionality of Legislation

The Supreme Court of Oklahoma is the final interpreter of Oklahoma's laws, including the Oklahoma Constitution. The court is bound to follow the Oklahoma Constitution, and the court cannot circumvent it because of private notions of justice or because of personal inclinations. In assessing the conformity of a challenged state statute to the court's fundamental law, the court is guided by well-established principles. The Constitution is the bulwark to which all statutes must yield.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

HN5[] Case or Controversy, Constitutionality of Legislation

The objective of construing the Oklahoma Constitution is to give effect to the defendant intent, as well as the people adopting it. When a challenge is limited to the Oklahoma Constitution, the Supreme Court of Oklahoma looks first to its language, which if unambiguous, binds the court. Every provision of the Constitution and statutes of Oklahoma is presumed to have been intended for some useful purpose and every provision should be given effect. Every each portion of the Constitution was intended to be operative and not surplus language. The court, therefore, construes constitutional provisions as a consistent whole in harmony with common sense and reason. The court will uphold a duly enacted statute unless it is clearly, palpably and plainly inconsistent with the Constitution.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Constitutional Law > State Constitutional Operation

HN6[] **Agriculture & Food, Distribution, Processing & Storage of Food & Agricultural Products**

The Supreme Court of Oklahoma must interpret constitutional provisions in conformity with their ordinary significance in the English language-given their commonly accepted and nontechnical meaning. The clear and ordinary language of Okla. Const. art. 28A, § 2(A)(2) allows a liquor or wine manufacturer to select one or more than one wholesaler to distribute its product. The second sentence of the section provides that a manufacturer may sell such brands to any licensed wholesaler who desires to purchase the same. "May" denotes that an action is permissive or discretional, and not mandatory. The third sentence further clarifies the second and states: "Provided, if a manufacturer elects to sell its products to multiple wholesalers, such sales shall be made on the same price basis." By providing direction to manufacturers when they choose to sell to more than one wholesaler, Okla. Const. art. 28A, § 2(A)(2) implies that a manufacturer can also select only one wholesaler. The third sentence is purely conditional based on a manufacturer's decision to elect to sell to more than one wholesaler and forbids price discrimination when a manufacturer elects to do so. the supreme court must conclude then that a manufacturer can elect to sell to only one wholesaler.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

HN7[] **Case or Controversy, Constitutionality of Legislation**

Constitutional construction requires the Supreme Court of Oklahoma to garner the drafter's intent, as well as the people adopting it, from the plain language of the provision.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

HN8[] **Case or Controversy, Constitutionality of Legislation**

An amendment to a constitutional provision that has been judicially interpreted is presumed to have changed the existing law.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Constitutional Law > State Constitutional Operation

HN9[] **Agriculture & Food, Distribution, Processing & Storage of Food & Agricultural Products**

"Shall" is usually given its common meaning of must implying a command or mandate. From its plain language, Senate Bill 608 modifies the alcohol distribution scheme by mandating that all manufacturers of the top 25 brands of liquor and wine-as determined by the ABLE Commission each quarter-sell those products to every licensed wine and spirits wholesaler who desires to purchase the same on the same price basis and without discrimination or inducements. *Okla. Stat. tit. 37A, § 3-116.4* (Supp. 2019). Senate Bill 608 thus infringes on a manufacturer's constitutionally granted discretion to select one wholesaler to the exclusion of all others, as it mandates that a manufacturer of a top 25 brand must sell to all wholesalers. Senate Bill 608's infringement of Okla. Const. art. 28A, § 2(A)(2) is unconstitutional.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Constitutional Law > State Constitutional Operation

HN10[] **Agriculture & Food, Distribution, Processing & Storage of Food & Agricultural Products**

The entirety of the Oklahoma Constitution applies with equal force to statutes enacted pursuant to *Okla. Const. art. V, §§ 44* and *51*. The Oklahoma Constitution prevails over a conflicting statute, and where a statute violates one constitutional provision, another constitutional provision cannot save it.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > State Regulation

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Constitutional Law > State Constitutional Operation

HN11[] **Trade Practices & Unfair Competition, State Regulation**

The passage of Okla. Const. art. 28A confines anticompetitive constitutional provisions. Prior holdings of the Supreme Court of Oklahoma instruct that if there is a conflict between a constitutional amendment and other, earlier passed, provisions of the Oklahoma Constitution, the more recent amendment prevails. Article 28A's change in the manufacturing-wholesaling distribution tier is the most recent constitutional change, and if there is a conflict, it controls over any other constitutional provision.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > State Regulation

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Constitutional Law > State Constitutional Operation

HN12[] **Trade Practices & Unfair Competition, State Regulation**

The plain language of Okla. Const. art. 28A, § 2(A)(2) is not in conflict with the anticompetitive provisions of the Constitution. *Okla. Const. art. V, § 44*. Okla. Const. art. 28A, § 2(A)(2)'s discretion allows liquor and wine manufacturers and wholesalers to have exclusive distributorships, and the Supreme Court of Oklahoma has upheld exclusive distributorships as lawful. Senate Bill 608 is not a proper use of legislative authority under the anticompetitive provisions of the Oklahoma Constitution.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > State Regulation

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

HN13[] **Trade Practices & Unfair Competition, State Regulation**

The plain language of Senate Bill 608 shows that the statute is not an operation of the Legislature's power to combat anticompetitive markets pursuant to *Okla. Const. art. V, § 44*. Senate Bill 608 does not define an unlawful restraint of trade nor does it set forth any punishment for those entities engaging in unlawful restraint of trade. Further, Senate Bill 608 only deals with the top 25 brands of liquor and wine as determined by the ABLE Commission every quarter. To apply the State's argument beyond the top 25 brands specified in Senate Bill 608, the statute would allow for a restraint of trade on thousands of other brands of liquor and wine. If Senate Bill 608 was an anticompetitive measure, it would logically restrict anticompetition on all brands of liquor and wine.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > Inferences & Presumptions

Constitutional Law > State Constitutional Operation

HN14[] **Agriculture & Food, Distribution, Processing & Storage of Food & Agricultural Products**

The Supreme Court of Oklahoma must always presume that a law is constitutional unless clearly, palpably, and plainly inconsistent with the Constitution. Senate Bill 608 is clearly, palpably, and plainly inconsistent with Okla. Const. art. 28A, § 2(A)(2)'s grant of discretion to a liquor or wine manufacturer to determine what wholesaler sells its product.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Constitutional Law > State Constitutional Operation

HN15[] **Agriculture & Food, Distribution, Processing & Storage of Food & Agricultural Products**

The Supreme Court of Oklahoma must uphold the will of the people of Oklahoma who voted to adopt Okla. Const. art. 28A and open the market between the alcohol manufacturing and wholesaling tier-allowing those actors within the tier to make decisions without interference in a force-sale system. Only an amendment to the Constitution can change what the people enshrined.

Counsel: Mithun Mansinghani, Solicitor General, and Zach West, Assistant Solicitor General, Office of the Attorney General, Oklahoma City, Oklahoma, for Defendants/Appellants.

Thomas G. Wolfe, Heather L. Hintz, Fred A. Leibrock, and Martin J. Lopez III, Phillips Murrah P.C., Oklahoma City, Oklahoma, for Intervenor/Appellant.

Robert G. McCampbell, Amelia A. Fogleman, and Travis V. Jett, GableGotwals, Oklahoma City, Oklahoma, for Plaintiffs/Appellees.

D. Kent Meyers, Crowe & Dunlevy, P.C., Oklahoma City, Oklahoma, for Plaintiffs/Appellees.

Judges: Winchester, J. Gurich, C.J., Darby, V.C.J., Winchester, Edmondson, JJ., and Reif, S.J., concur. Kauger (by separate writing), Kane, JJ., Barnes, S.J. (by separate writing), and Goodman, S.J., dissent.

Opinion by: Winchester

Opinion

[*P0] [1052]** Senate Bill 608 mandates that manufacturers of the top 25 brands of liquor and wine sell their product to all licensed wholesalers. Appellees, a group of liquor and wine wholesalers, manufacturers, retail liquor stores, and consumers, challenged Senate Bill 608 as unconstitutional, contending it was in conflict with Okla. Const. art. 28A, § 2(A)(2)'s discretion **[***2]** given to a liquor or wine manufacturer to determine what wholesaler sells its product. The district court agreed and ruled Senate Bill 608 unconstitutional. Appellants appealed, and this Court retained the appeal.

Winchester, J.

[*P1] The Oklahoma Legislature passed Senate Bill 608 ("SB 608") which mandates that liquor and wine manufacturers of the 25 top-selling brands must sell their products to all licensed Oklahoma wholesalers. Appellees, The Institute for Responsible Alcohol Policy; Southern Glazer's Wine & Spirits of Oklahoma, LLLP; J.B. Jarboe II; Central Liquor Co. L.P., d/b/a RNDC Oklahoma; Justin Naifeh; E. & J. Gallo Winery; Sutter Home Winery, Inc., d/b/a Trinchero Family Estates; Diageo Americas, Inc.; Luxco, Inc.; Riboli Family of San Antonio Winery, Inc.; Jennifer Blackburn, d/b/a Cellar Wine and Spirits of Norman; and Dale Blackburn, d/b/a Grand Cru Wine and Spirits Superstore (collectively "Distributors"),[1] challenged SB 608 as unconstitutional, arguing it conflicts with the recently passed Article 28A, § 2(A)(2) of the Oklahoma Constitution (State Question 792).

[*P2] The issues before the Court are (1) whether SB 608 is in conflict with Article 28A, § 2(A)(2), and (2) whether SB 608 is a proper use of legislative authority under **[***3]** the anticompetitive provisions of the Oklahoma Constitution. ***HN1***[] For the reasons stated herein, we hold SB 608 is "clearly, palpably, and plainly inconsistent" with Article 28A, § 2(A)(2)'s discretion given to a liquor or wine manufacturer to determine what wholesaler sells its product. *See EOG Res. Mktg. v. Okla. State Bd. of Equalization, 2008 OK 95, ¶ 13, 196 P.3d 511, 519*. We further rule that SB 608 is not a proper use of legislative authority as Article 28A, § 2(A)(2) is not in conflict with the Oklahoma Constitution's anticompetitive provisions. The district court did not err by granting Distributors' Motion for Summary Judgment and ruling SB 608 unconstitutional.

I. FACTS

[*P3] Since the end of alcohol prohibition, Oklahoma has maintained strict control over the distribution of alcoholic beverages. *See State ex rel. Hart v. Parham, 1966 OK 9, ¶ 11, 412 P.2d 142, 147*. Beginning in 1984, Oklahoma regulated alcohol pursuant to *Article 28 of the Oklahoma Constitution*, which created Appellant Alcoholic Beverage Laws Enforcement Commission ("ABLE Commission"). The centerpiece of this regulation still in place today is ***HN2***[

[1] Appellees are a collection of wholesalers, their principal officers, liquor and wine manufacturers, two Oklahoma retail liquor stores, and consumers.

] Oklahoma's three-tier system for alcohol distribution: alcohol manufacturers (first tier) can only sell to licensed Oklahoma wholesalers (second tier); licensed Oklahoma wholesalers (second tier) can only sell to licensed retailers (third tier); and licensed retailers (third tier) **[***4]** can only sell to consumers. This case involves the relationship between the first and second tiers under the recently passed Article 28A. Until recently, the top two tiers operated under a "forced sale clause" that required a manufacturer to sell its products to every licensed Oklahoma wholesaler. *See* *Central Liquor Co. v. Okla. Alcoholic Beverage Control Bd., 1982 OK 16, ¶ 4, 640 P.2d 1351, 1353* (discussing the forced sale clause). Now repealed *Article 28 of the Oklahoma Constitution* stated:

> Provided, that any manufacturer . . . shall be required to sell such brands . . . to every licensed wholesale distributor who desires to purchase the same, on the same price basis and without discrimination . . . .

Okla. Const. art. 28, § 3(A) (repealed Oct. 1, 2018).

[*P4] In 2016, the Oklahoma Legislature passed a joint resolution to place State Question **[**1053]** 792 on the November 2016 ballot. State Question 792 repealed *Article 28 of the Oklahoma Constitution*, replacing it with Article 28A and fundamentally changed how Oklahoma regulates the sale and distribution of alcohol. The people of Oklahoma approved State Question 792 by a 65.62% vote,[2] and it went into effect on October 1, 2018. The Legislature also passed companion legislation in *Title 37A of the Oklahoma Statutes* to create Oklahoma's new alcohol regulatory scheme. The key provision in Article 28A at issue here permits how a liquor or wine manufacturer can sell products to a licensed **[***5]** Oklahoma wholesaler:

> A manufacturer . . . may sell such brands or kinds of alcoholic beverages to any licensed wholesaler who desires to purchase the same. Provided, if a manufacturer, except a brewer, elects to sell its products to multiple wholesalers, such sales shall be made on the **[**1054]** same price basis and without discrimination to each wholesaler.

Okla. Const. art. 28A, § 2(A)(2).[3]

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[2] *See* Official Results, Federal, State, Legislative and Judicial Races, General Election--November 8, 2016, Oklahoma State Election Board, http://ok.gov/elections/support/20161108_seb.html (last visited Nov. 13, 2019).

The ballot title for State Question 792 provided:

> This measure repeals *Article 28 of the Oklahoma Constitution* and restructures the laws governing alcoholic beverages through a new Article 28A and other laws the Legislature will create if the measure passes.
>
> The new Article 28A provides that with exceptions, a person or company can have an ownership interest in only one area of the alcoholic beverage business--manufacturing, wholesaling, or retailing. Some restrictions apply to the sales of manufacturers, brewers, winemakers, and wholesalers. Subject to limitations, the Legislature may authorize direct shipments to consumers of wine.
>
> Retail locations like grocery stores may sell wine and beer. Liquor stores may sell products other than alcoholic beverages in limited amounts.
>
> The Legislature must create licenses for retail locations, liquor stores, and places serving alcoholic beverages and may create other licenses. Certain **[***6]** licensees must meet residency requirements. Felons cannot be licensees.
>
> The Legislature must designate days and hours when alcoholic beverages may be sold and may impose taxes on sales. Municipalities may levy an occupation tax. If authorized, a state lodge may sell individual alcoholic beverages for on-premises consumption but no other state involvement in the alcoholic beverage business is allowed.

With one exception, the measure will take effect October 1, 2018.

[3] Article 28A, § 2(A)(4) provides the same direction to winemakers:

> Winemakers either within or without this state may sell wine produced at their wineries to any licensed wholesaler who desires to purchase the wine; provided, that if a winemaker elects to sell the wine it produces to multiple wholesalers, then such sales shall be made on the same price basis and without discrimination to each wholesaler. In addition to its sales through one or more licensed wholesalers, a winemaker may be authorized to sell its wine as follows . . . .

[*P5] After passage of State Question 792, Oklahoma's two largest wholesalers, Central Liquor and Jarboe Sales Company, each sold 49% of their respective businesses to the two largest national alcohol distributors, Southern Glazer's Wine & Spirits and Republic National Distribution Co. As a result, these two wholesalers--now known **[***7]** as Appellees Southern Glazer's Wine and Spirits of Oklahoma, LLLP and Central Liquor Co. L.P., d/b/a RNDC Oklahoma--obtained exclusive distribution contracts with the majority of liquor and wine manufacturers, including distribution of the top 25 brands at issue here.[4] The two largest wholesalers controlled the majority of all wholesale distribution in Oklahoma when Article 28A went into effect on October 1, 2018.

[*P6] Intervenor/Appellant Bryan Hendershot, owner of Oklahoma's third-largest wholesaler, Boardwalk Distribution Company, and other wholesalers and liquor stores, advocated for a change to the statutory scheme. The Legislature took up what became SB 608:

> Any wine or spirit product that constitutes a top brand, as defined in this section, shall be offered by the manufacturer for sale to every licensed wine and spirits wholesaler who desires to purchase the same on the same price basis and without discrimination or inducements.[5]

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[4] On July 15, 2019, the ABLE Commission published the top 25 brands of wine and liquor. Southern Glazer's Wine and Spirits of Oklahoma, LLLP is the exclusive distributor of fourteen of the top 25 brands. Central Liquor Co. L.P., d/b/a RNDC Oklahoma is the exclusive distributor of the other eleven top 25 brands.

[5] SB 608 also sets out how the ABLE Commission determines what liquor or wine brand constitutes a "top brand":

> "Top brand" shall mean those brands constituting the top twenty-five brands in total sales of spirits and of wine **[***8]** by all wholesalers during the past twelve-month period, according to the records of the ABLE Commission as revised by the ABLE Commission quarterly. In order to allow the ABLE Commission to determine the top twenty-five brands of spirits and of wine, all wholesalers must submit to the ABLE Commission every sixty (60) days a sworn affidavit listing their top thirty brands of spirits and of wine in sales for the previous sixty (60) days, excluding sales to wholesalers.

Id. The ABLE Commission's list of the top 25 brands of wine and liquor is as follows:

Barefoot Moscato

Barefoot Pink Moscato

Barton Vodka 80 Proof

Beringer White

Zinfandel Burnetts

Crown Royal

Vodka

Evan Williams Black 7

Fireball Cinnamon

Franzia Chardonnay

Years

Whiskey

Franzia Chillable

Red Franzia Crisp White

Franzia Fruity Red

Sangria

Franzia Merlot

Franzia Sunset Blush

Franzia White Zinfandel

S.B. 608, 57th Leg., 1st Sess. (Okla. 2019) (codified as *37A O.S. Supp. 2019, § 3-116.4*). The Legislature passed SB 608, and Governor Stitt signed the bill on May 19, 2019. *Id.*

II. PROCEDURAL HISTORY AND ARGUMENTS

[*P7] Distributors previously requested this Court exercise its original jurisdiction and either issue a writ of prohibition against enforcement of SB 608 or declaratory relief that SB 608 is **[***9]** unconstitutional. This Court declined to exercise its concurrent jurisdiction and transferred the case to district court.

[*P8] The parties moved for summary judgment in district court. Distributors claimed that SB 608 directly conflicts with Article 28A, § 2(A)(2), as SB 608 makes Article 28A, § 2(A)(2)'s discretion to select a single wholesaler a nullity. Had Article 28A allowed the Legislature's actions here, Distributors contended Article 28A would have said "shall sell," which the now-repealed Article 28 had required, not "may sell." Appellants, ABLE Commission, Governor Kevin Stitt, and Bryan Hendershot, individually and d/b/a Boardwalk Distribution Center (collectively "the

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Heaven Hill Vodka 80

Jack Daniels Whiskey

Jim Beam White 80 Proof

Proof

Kentucky Deluxe Blend

McCormick Vodka 80

Seagrams 7 Crown Blend

Proof

SKYY Vodka

Svedka Vodka 80 Proof

Titos Handmade Vodka

Tvarscki Vodka 100

Proof

State"), filed a cross-motion for summary judgment and countered that Article 28A must be read in conjunction with the anticompetitive provisions of the Oklahoma Constitution, specifically *Okla. Const. art. V, § 44* and *§ 51*. The State further argued that Article 28A, § 2(A)(2)'s phrase *a manufacturer . . . may sell* does give manufacturers discretion to sell to one wholesaler, but that discretion must give way where the Legislature passes a law otherwise.

[*P9] Judge Prince granted Distributors' motion, ruling the clear and ordinary language of Article 28A, § 2(A)(2) identifies an intent by the **[***10]** voters to give discretion to liquor and wine manufacturers to decide to sell to only one wholesaler. The district court held the language of SB 608 requiring manufacturers to sell to all wholesalers is "clearly, palpably, and plainly inconsistent with Article 28A," and therefore, unconstitutional. The State appealed. This Court retained the appeal.

III. STANDARD OF REVIEW

[*P10] ***HN3***[] Summary judgment is properly granted when there are no disputed questions of material fact and the moving party is entitled to judgment as a matter of law. *S. Tulsa Citizens Coal., L.L.C. v. Ark. River Bridge Auth., 2008 OK 4, ¶ 10, 176 P.3d 1217, 1220*. An appeal on summary judgment comes to this Court as a *de novo* review, as the matter presents only questions of law, not fact. *In re Estate of Bell-Levine, 2012 OK 112, P5, 293 P.3d 964, 966*; *Carmichael v. Beller, 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053*. This Court assumes "plenary independent and non-deferential authority to reexamine a trial court's legal rulings." *Kluver v. Weatherford Hosp. Auth., 1993 OK 85, ¶ 14, 859 P.2d 1081, 1084*.

[**1055] IV. DISCUSSION

[*P11] ***HN4***[] This Court is the final interpreter of Oklahoma's laws, including the Oklahoma Constitution. *See Monson v. State ex rel. Okla. Corp. Comm'n, 1983 OK 115, ¶ 7, 673 P.2d 839, 843*. We are bound to follow the Oklahoma Constitution, and we cannot "'circumvent it because of private notions of justice or because of personal inclinations.'" *Gurney v. Ferguson, 1941 OK 397, ¶ 12, 190 Okla. 254, 122 P.2d 1002, 1004* (quoting *Judd v. Bd. of Educ., 278 N.Y. 200, 15 N.E. 2d 576, 584 (N.Y. 1938))*. "In assessing the conformity of a challenged state statute to our fundamental law, we are guided by well-established principles. The Constitution **[***11]** is the bulwark to which all statutes must yield." *Liddell v. Heavner, 2008 OK 6, ¶ 16, 180 P.3d 1191, 1199*.

[*P12] ***HN5***[] The objective of construing the Oklahoma Constitution is to give effect to the framers' intent, as well as the people adopting it. *Shaw v. Grumbine, 1929 OK 116, ¶ 30, 137 Okla. 95, 278 P. 311, 315*. When a challenge is limited to the Oklahoma Constitution, the Court looks first to its language, which if unambiguous, binds the Court. *Id.* ¶ 0, *278 P. at 311* (Syllabus by the Court No. 5). "Every provision of the Constitution and statutes of Oklahoma is presumed to have been intended for some useful purpose and every provision should be given effect." *Darnell v. Chrysler Corp., 1984 OK 57, ¶ 5, 687 P.2d 132, 134*; *Cowart v. Piper Aircraft Corp., 1983 OK 66, ¶ 5, 665 P.2d 315, 317* (holding "each portion of the Constitution was intended to be operative and not surplus language"). The Court, therefore, construes constitutional provisions "as a consistent whole in harmony with common sense and reason." *Cowart, 1983 OK 66, ¶ 4, 665 P.2d at 317*. We will uphold a duly enacted statute unless it is "clearly, palpably and plainly" inconsistent with the Constitution. *Lafalier v. Lead-Impacted Cmtys. Relocation Assistance Trust, 2010 OK 48, ¶ 15, 237 P.3d 181, 188*.

[*P13] In determining whether SB 608 is in conflict with the Oklahoma Constitution, the key question before the Court is whether Article 28A, § 2(A)(2) grants to liquor or wine manufacturers the discretion to select a single wholesaler free from legislative interference. A comparison of now-repealed Article 28, § 3(A), Article 28A, § 2(A)(2), and SB 608 is helpful **[***12]** for this discussion:

Okla. Const. art. 28, § (A) (repealed Oct. 1, 2018)	**Okla. Const. art. 28A, § 2(A)(2)**	**S.B. 608, 57th Leg., st Sess. (Okla. 2019)**
Provided, that any	A manufacturer . . .	Any wine or spirit

Okla. Const. art. 28, § (A) (repealed Oct. 1, 2018)	**Okla. Const. art. 28A, § 2(A)(2)**	**S.B. 608, 57th Leg., st Sess. (Okla. 2019)**
manufacturer . . . ***shall be*** required to sell such brands . . . to ***every*** licensed wholesale distributor who desires to purchase the same, on the same price basis and without discrimination	***may sell*** such brands or kinds of alcoholic beverages to any licensed wholesaler who desires to purchase the same. Provided, if a manufacturer, except a brewer, ***elects to*** sell its products to multiple wholesalers, such sales ***shall be*** made on the same price basis and without discrimination to each wholesaler.	product that constitutes a top brand, as defined in this section, shall be offered by the manufacturer for sale to ***every*** licensed wine and spirits wholesaler who desires to purchase the same on the same price basis and without discrimination or inducements.

[*P14] ***HN6***[] This Court must interpret constitutional provisions in conformity with their ordinary significance in the English language--given their commonly accepted and **[**1056]** nontechnical meaning. *See In re Initiative Petition No. 363, State Question No. 672, 1996 OK 122, ¶ 33, 927 P.2d 558, 570*. The clear and ordinary language of Article 28A, § 2(A)(2) allows **[***13]** a liquor or wine manufacturer to select *one* or *more than one* wholesaler to distribute its product. The second sentence of the section provides: "*a manufacturer . . .* ***may*** *sell such brands . . . to any licensed wholesaler who desires to purchase the same*." *May* denotes that an action is permissive or discretional, and not mandatory. *Shea v. Shea, 1975 OK 90, ¶ 10, 1975 OK CR 90, 537 P.2d 417, 418*. The third sentence of Article 28A, § 2(A)(2) further clarifies the second: "Provided, *if* a manufacturer . . . *elects* to sell its products to multiple wholesalers, such sales shall be made on the same price basis . . . ." By providing direction to manufacturers when they choose to sell to more than one wholesaler, Article 28A, § 2(A)(2) implies that a manufacturer can also select only one wholesaler. The third sentence is purely conditional based on a manufacturer's decision to *elect* to sell to more than one wholesaler and forbids price discrimination when a manufacturer elects to do so. We must conclude then that a manufacturer can elect to sell to only one wholesaler.

[*P15] An opinion by the Office of the Attorney General also supports this conclusion:

> Thus, whereas both *Article 28 of the Oklahoma Constitution* and *Section 533* of the Old Act required a manufacturer to sell its products to every wholesaler wishing to purchase them, **[***14]** Article 28A and *Section 3-116* of the New Act permit a manufacturer to choose to sell its products to any or every wholesaler who wishes to distribute its products. Indeed, Article 28A explicitly leaves to the manufacturer's discretion whether to sell to more than one wholesaler. OKLA. CONST. art 28A, § 2(A)(2) ("**If** a manufacturer, except a brewer, **elects** to sell its products to multiple wholesalers . . . .").

Question Submitted by: Harry "Trey" Kouri, III, Chairman, ABLE Commission, 2018 OK AG 6, ¶ 11. Legislation passed after State Question 792 made the same determination that a manufacturer may select one wholesaler to the exclusion of all others. *See 37A O.S. Supp. 2016, §§ 3-123(A)(1)*, *3-116* (repealed May 7, 2019).[6]

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[6] For example, the Legislature prohibited price discrimination to wholesalers only "when that manufacturer has not designated a single wine and spirits wholesaler." *Id. § 3-123(A)(1)*. Similarly, the Legislature provided the post and adjust price-posting system would not apply to a manufacturer that has a designated wholesaler to sell its products in the state. *Id. § 3-116(D)*; *§ 3-116.1(A)*.

[*P16] ***HN7***[] Constitutional construction requires the Court to garner the drafter's intent, as well as the people adopting it, from the plain language of the provision. *Darnell, 1984 OK 57, ¶ 5, 687 P.2d at 134*; *Shaw, 1929 OK 116, ¶ 30, 278 P. at 315*. The now repealed Article 28, § 3(A) further clarifies what the Legislature, through a vote of the people, granted to all manufacturers in Article 28A, § 2(A)(2)--the removal of the "forced sale clause" from *both* the Oklahoma Constitution and statutes and the ability to select a single wholesaler to the exclusion of all other licensed wholesalers.[7] For the Court to construe Article 28A in a vacuum without reference **[***15]** to the repealed Article 28 would turn a blind eye to what the public intended.

[*P17] In contrast, SB 608 states that manufacturers ***shall*** sell the top 25 brands to ***every*** licensed wholesaler. ***HN9***[] *Shall* is usually "given its common meaning of 'must'. . . implying a command or mandate." *Sneed v. Sneed, 1978 OK 138, ¶ 3, 585 P.2d 1363, 1364*. From its plain language, SB 608 modifies the alcohol distribution scheme by mandating that all manufacturers of the top 25 brands of liquor and wine--as determined by the ABLE Commission each quarter--sell those products "to every licensed wine and spirits wholesaler who desires to purchase the same on the same price basis and without discrimination or inducements." S.B. 608, 57th Leg., 1st Sess. (Okla. 2019) (codified as *37A O.S. Supp. 2019, § 3-116.4*). SB 608 thus infringes on a manufacturer's constitutionally granted discretion to select one wholesaler to the exclusion of all others, as it mandates that a **[**1057]** manufacturer of a top 25 brand must sell to all wholesalers. We hold SB 608's infringement of Article 28A, § 2(A)(2) is unconstitutional.

[*P18] The second question before this court is whether SB 608 is a proper use of legislative authority under the anticompetitive provisions of the Oklahoma Constitution. The State contends that Article 28A, § 2(A)(2) must be **[***16]** read in conjunction with the Oklahoma Constitution's provisions against anticompetitive markets, specifically *Okla. Const. art. V, § 44*[8] and *§ 51*.[9] Taken to its logical conclusion, the State's argument that these constitutional provisions grant the Legislature broad powers to combat monopolies or anticompetitive markets confers to the Legislature broad power to overrule or amend another constitutional provision, here Article 28A. The State has pushed this argument too far. ***HN10***[] The entirety of the Oklahoma Constitution applies with equal force to statutes enacted pursuant to *Okla. Const. art. V, § 44* and *§ 51*. *Cf.* *Liddell, 2008 OK 6, ¶ 18, 180 P.3d at 1200* (rejecting the argument that *Okla. Const. art. X, § 8(A)(2)* and *§ 22*'s grant of legislative power to define assessment classifications justified an unconstitutional statute). The Oklahoma Constitution prevails over a conflicting statute, and where a statute violates one constitutional provision, another constitutional provision cannot save it.

[*P19] ***HN11***[] The passage of Article 28A **[***17]** also confines those anticompetitive constitutional provisions. *See, e.g.,* *Naifeh v. State ex rel. Okla. Tax Comm'n, 2017 OK 63, ¶ 14, 400 P.3d 759, 764* (examining other constitutional provisions to help define the constitutional provision at issue). Prior holdings of this Court instructed that if there is a conflict between a constitutional amendment and other, earlier passed, provisions of the Oklahoma Constitution, the more recent amendment prevails. *See* *E. Okla. Bldg. & Constr. Trades Council v. Pitts, 2003 OK 113, ¶ 10, 82 P.3d 1008, 1012*; *In re Initiative Petition No. 259, 1957 OK 167, ¶ 23, 316 P.2d 139, 144*; *Adams v. City of Hobart, 1933 OK 646, ¶ 0, 166 Okla. 267, 27 P.2d 595, 595* (Syllabus by the Court No. 2). Article 28A's change in the manufacturing-wholesaling distribution tier is the most recent constitutional change, and if there is a conflict, it controls over any other constitutional provision. *See id.*

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[7] ***HN8***[] This Court has found that "[a]n amendment to a constitutional provision that has been judicially interpreted is presumed to have changed the existing law." *Williams Nat. Gas Co. v. Perkins, 1997 OK 72, ¶ 14 n.11, 952 P.2d 483, 489 n.11*.

[8] *Okla. Const. art. V, § 44* provides:

> The Legislature shall define what is an unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, and enact laws to punish persons engaged in any unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, or composing any such monopoly, trust, or combination.

[9] *Okla. Const. art. V, § 51* provides: "The Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State."

[*P20] ***HN12***[] We hold, however, that the plain language of Article 28A, § 2(A)(2) is not in conflict with the anticompetitive provisions of the Constitution. *See* *Okla. Const. art. V, § 44* & *§ 51*. Article 28A, § 2(A)(2)'s discretion allows liquor and wine manufacturers and wholesalers to have exclusive distributorships, and this Court has upheld exclusive distributorships as lawful. *Crown Paint Co. v. Bankston, 1981 OK 104, ¶ 13, 640 P.2d 948, 951* (finding an agreement between a manufacturer and a distributor setting up an exclusive territory within which the distributor will have exclusive rights to sell does not in itself violate antitrust provisions); *Teleco, Inc. v. Ford Indus., Inc., 1978 OK 159, ¶ 9, 587 P.2d 1360, 1363* ("It is, however, well settled that it is **[***18]** not a per se violation of ***antitrust law*** for a manufacturer or supplier to agree with the distributor to give him an exclusive franchise or distributorship, even if this means cutting off another distributor."). We, therefore, hold that SB 608 is not a proper use of legislative authority under the anticompetitive provisions of the Oklahoma Constitution.[10]

[1058]** **V. CONCLUSION**

[*P21] ***HN14***[] The Court must always presume that a law is constitutional unless "clearly, palpably, and plainly inconsistent with the Constitution." *Lafalier, 2010 OK 48, ¶ 15, 237 P.3d at 188*. Here, SB 608 is clearly, palpably, and plainly inconsistent with Article 28A, § 2(A)(2)'s grant of discretion to a liquor or wine manufacturer to determine what wholesaler sells its product.

[*P22] ***HN15***[] This Court must uphold the will of the people of Oklahoma who voted to adopt Article 28A of the Oklahoma Constitution and open the market between the alcohol manufacturing and wholesaling tier--allowing those actors within the tier to make decisions without interference in a force-sale system. Only an amendment to the Constitution can change what the people enshrined. We, therefore, affirm the district court's holding SB 608 unconstitutional.

DISTRICT COURT'S JUDGMENT AFFIRMED.

Gurich, C.J., Darby, V.C.J., **[***19]** Winchester, Edmondson, JJ., and Reif, S.J., concur.

Kauger (by separate writing), Kane, JJ., Barnes, S.J. (by separate writing), and Goodman, S.J., dissent.

Dissent by: KAUGER; BARNES

Dissent

KAUGER, J., with whom KANE, J. joins, dissenting:

[*P1] The Oklahoma Legislature drafted the referendum in question. The very first sentence, (A)(1) provides that "[t]he Legislature **shall enact laws** providing for the strict regulation, control, licensing and taxation of the manufacture, sale, distribution, possession, transportation and consumption of alcoholic beverages, consistent with the provisions of this Article."[1] (Emphasis supplied.)

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[10] ***HN13***[] The plain language of SB 608 further shows that the statute is not an operation of the Legislature's power to combat anticompetitive markets pursuant to *Okla. Const. art. V, § 44*. SB 608 does not define an unlawful restraint of trade nor does it set forth any punishment for those entities engaging in unlawful restraint of trade. *Id.* Further, SB 608 **only** deals with the top 25 brands of liquor and wine as determined by the ABLE Commission every quarter. To apply the State's argument beyond the top 25 brands specified in SB 608, the statute would allow for a restraint of trade on thousands of other brands of liquor and wine. If SB 608 was an anticompetitive measure, it would logically restrict anticompetition on **all** brands of liquor and wine.

[1] State Question No. 792, Legislative Referendum No. 370, as adopted at election held on Nov. 9, 2016, is now Art. 28A §2 of the Oklahoma Constitution and it provides in pertinent parts:

[*P2] Subsection (A)(2) also addresses monopolies and common ownership between manufacturing, wholesaling and retailing tiers which is generally prohibited. A manufacturer is not permitted to sell in Oklahoma unless they go through an Oklahoma wholesaler. It also contains two sentences which are at the heart of this cause. A manufacturer and **[**1059]** winemaker may sell to any licensed wholesaler who desires to purchase. Provided if the manufacturer or winemaker elects to sell to multiple wholesalers (more than one), the sales must be the same price basis **and** without discrimination to each wholesaler. (Emphasis supplied.) **[***20]**

[*P3] A cursory reading of these sentences might appear to allow a manufacturer to elect to only sell to one wholesaler or sell to more than one. However, a provision that appears to allow the election to sell to only one is immediately followed by another provision which requires the same price basis to all and that prohibits no discrimination to each wholesaler. It does not say no price discrimination. Rather, it says the "same price basis" and "without discrimination." This implies that any discrimination, including price basis, is prohibited.

[*P4] An immediate ambiguity appears. If one is allowed to sell to only one wholesaler and no others but is also required to sell without any discrimination, how can this provision be met? Selling only to one and no others is a form of discrimination. For example, if there is one manufacturer in the State, and five wholesalers and the manufacturer chooses to sell to only one, but is prohibited from discriminating against the others, how can this provision be satisfied?

[*P5] To further complicate the matter, the same enactment also requires the Legislature to enact further laws as long as they do not conflict with the provisions. Yet, the provisions themselves **[***21]** are in conflict. How is it possible for the Legislature enact anything which doesn't conflict in some way with one or more of the conflicting directions within the provisions? The meaning of language in a statute is construed by courts as internally

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A. The Legislature shall enact laws providing for the strict regulation, control, licensing and taxation of the manufacture, sale, distribution, possession, transportation and consumption of alcoholic beverages, consistent with the provisions of this Article. Provided:

1. a. there shall be prohibited any common ownership between the manufacturing, wholesaling and retailing tiers, unless otherwise permitted by this subsection. Following the effective date of this Article, brewers may obtain beer wholesaler licenses to distribute beer, also known as brewery-owned branches, to up to two (2) territories within the state. Any brewery-owned branch in operation on the date of adoption of this Article may not expand its distribution territory that was in effect on the date of adoption of this Article. If a brewer maintained one or more licenses to distribute low-point beer in the state prior to the effective date of this Article, then up to two (2) of the brewer's low-point beer distribution licenses shall automatically convert to beer distribution licenses upon the effective date of this Article. All low-point distribution licenses shall cease to exist following this conversion date,

b. [*see note below regarding effective date] from the date of adoption of this Article by the voters until the effective date of this Article, brewers may continue to obtain and operate up to two (2) low-point beer brewery-owned branches pursuant to the existing low-point beer laws pertaining to the distribution of low-point beer by brewery-owned branches,

c. only after the effective date of this Article, the Legislature may duly enact legislation to require, by statute, the divestiture of all brewery-branches. If the Legislature requires brewers to divest, it must require full divestiture of every brewery-owned branch in the state, and it shall allow brewers at least (1) year but no more than three (3) years to complete said divestiture. Except as provided in this subsection, and except for a small brewer as defined by law, no other member of one tier may own an interest in a business licensed in a different tier;

2. A manufacturer, except a brewer, shall not be permitted to sell alcoholic beverages in this state unless such sales occur through an Oklahoma wholesaler. A manufacturer, except a brewer, or subsidiary of any manufacturer, who markets his or her product solely through a subsidiary or subsidiaries, a distiller, rectifier, bottler, winemaker or importer of alcoholic beverages, bottled or made in a foreign country, either within or without this state, may sell such brands or kinds of alcoholic beverages to any licensed wholesaler who desires to purchase the same. Provided, if a manufacturer, except a brewer, elects to sell its products to multiple wholesalers, such sales shall be made on the same price basis and without discrimination to each wholesaler; . . .

consistent and externally consistent with the constitution, i.e., the meaning of the statute's language is construed so that it does not contradict either itself or the constitution.[2]

[*P6] While it may seem somewhat illogical, this is the framework with which we are faced in deciphering this cause. Consequently, our primary duty is to ascertain the intention of the framers, and of the people who adopted the same,[3] and construe it in such a way, if possible, that it does not contradict either itself or the constitution.[4] In such construction and determination, technical rules should be disregarded, and as a rule, a mean between a strict and liberal construction followed, and when ascertained, such intent must govern.[5] The same rule applies as to the intent of the Legislature in vitalizing such provisions and in enacting legislation to prevent corruption in making, procuring, and submitting initiative and referendum petitions.[6]

[*P7] On its face, this voter approved referendum is expressly and clearly aimed at: expanding a consumer's availability to purchase **[**1060]** alcoholic beverages; excluding industry monopolies in Oklahoma; and notifying voters that the Legislature will enact further laws governing such sales.

[*P8] How do we know this? The actual resolution as codified in the Oklahoma Constitution,[7] addresses the Legislature's duties in several sections to enact furtherlaws regarding alcohol sales. It also directs the prohibition of

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[2] *Young v. Station 27, Inc., 2017 OK 68, ¶18, 404 P.3d 829*; *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co., 1989 OK 139, 782 P.2d 915, 918*, ("Whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution, and give it the force of law, such construction will be adopted by the courts."), quoting *Williams v. Bailey, 1954 OK 19, 268 P.2d 868, 871*; *Pfister v. Johnson, 1935 OK 824, 173 Okla. 541, 49 P.2d 174, 176-177, 102 A.L.R. 31* (Court's construction which results in consistency in statutory language must be adopted.).

[3] *In re Initiative Petition No. 2 of Cushing v. Harlow, et al., 1932 OK 124, 19, 157 Okla. 54, 10 P.2d 271*.

[4] *Young v. Station 27, Inc., 2017 OK 68, ¶18, 404 P.3d 829*; *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co., 1989 OK 139, 782 P.2d 915, 918*, ("Whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution, and give it the force of law, such construction will be adopted by the courts."), quoting *Williams v. Bailey, 1954 OK 19, 268 P.2d 868, 871*; *Pfister v. Johnson, 1935 OK 824, 173 Okla. 541, 49 P.2d 174, 176-177, 102 A.L.R. 31* (court's construction which results in consistency in statutory language must be adopted).

[5] *In re Initiative Petition No. 2 of Cushing v. Harlow, et al., 1932 OK 124, 19, 157 Okla. 54, 10 P.2d 271*.

[6] *In re Initiative Petition No. 2 of Cushing v. Harlow, et al., 1932 OK 124, 19, 157 Okla. 54, 10 P.2d 271*. When economic legislation is involved, the judiciary extends great deference to the legislature. See, e.g., *Gladstone v. Bartlesville Ind. School Dist. No. 30, 2003 OK 30, ¶12, fn. 30, 66 P.3d 442* and *Ross v. Peters, 1993 OK 8, ¶19, 846 P.2d 1107* where in we explained that to equal protection challenges of economic legislation, the judiciary extends great deference to the legislature's judgment as part of an aspect of legislative function and the democratic process.

[7] Enrolled Senate Joint Resolution 68, Enacted by the 2nd Regular Session of the 55th Legislature of the State of Oklahoma Numbered by the Secretary of State, State Question Number 792, Legislative Referendum Number 370. Now, art. 28A §2 provides:

§ 2. Enactment of laws by Legislature - Direct shipment of alcoholic beverages - Direct sales of wine.

> A. The Legislature shall enact laws providing for the strict regulation, control, **[***23]** licensing and taxation of the manufacture, sale, distribution, possession, transportation and consumption of alcoholic beverages, consistent with the provisions of this Article. Provided:
>
> 1. a. there shall be prohibited any common ownership between the manufacturing, wholesaling and retailing tiers, unless otherwise permitted by this subsection. Following the effective date of this Article, brewers may obtain beer wholesaler licenses to distribute beer, also known as brewery-owned branches, to up to two (2) territories within the state. Any brewery-owned branch in operation on the date of adoption of this Article may not expand its distribution territory that was in effect on the date of adoption of this Article. If a brewer maintained one or more licenses to distribute low-point beer in the state prior to the effective date of this Article, then up to two (2) of the brewer's low-point beer distribution licenses shall

discrimination, both based on price and otherwise.[8] The Final Ballot Title approved **[**1061]** by the Attorney General[9] informed voters that this measure "repeals *Article 28 of the Oklahoma Constitution* and restructures the laws governing alcoholic beverages through a new Article 28A and other laws the Legislature will create if the measure passes." It also informed voters that the laws governing alcoholic beverages will be restructured for the

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automatically convert to beer distribution licenses upon the effective date of this Article. All low-point distribution licenses shall cease to exist following this conversion date,

b. [*see note below regarding effective date] from the date of adoption of this Article **[***24]** by the voters until the effective date of this Article, brewers may continue to obtain and operate up to two (2) low-point beer brewery-owned branches pursuant to the existing low-point beer laws pertaining to the distribution of low-point beer by brewery-owned branches,

c. only after the effective date of this Article, the Legislature may duly enact legislation to require, by statute, the divestiture of all brewery-branches. If the Legislature requires brewers to divest, it must require full divestiture of every brewery-owned branch in the state, and it shall allow brewers at least (1) year but no more than three (3) years to complete said divestiture. Except as provided in this subsection, and except for a small brewer as defined by law, no other member of one tier may own an interest in a business licensed in a different tier;

2. A manufacturer, except a brewer, shall not be permitted to sell alcoholic beverages in this state unless such sales occur through an Oklahoma wholesaler. A manufacturer, except a brewer, or subsidiary of any manufacturer, who markets his or her product solely through a subsidiary or subsidiaries, a distiller, rectifier, bottler, winemaker or importer of alcoholic **[***25]** beverages, bottled or made in a foreign country, either within or without this state, may sell such brands or kinds of alcoholic beverages to any licensed wholesaler who desires to purchase the same. Provided, if a manufacturer, except a brewer, elects to sell its products to multiple wholesalers, such sales shall be made on the same price basis and without discrimination to each wholesaler; . . .

C. All laws passed by the Legislature under the authority of the Article shall be consistent with the provisions of this section. If any provision of this Article applicable to winemakers is ruled to be unconstitutional by a court of competent jurisdiction, then no winemaker shall be permitted to directly sell its wine to restaurants or other retail stores and outlets that may be from time to time authorized by the state to sell wine for off-premise consumption or to consumers in this state.

The Okla. Const. art. 28A §3 provides:

§ 3. Legislature to prescribe licenses - On-premise and off-premise consumption.

A. The Legislature shall, by law, prescribe a set of licenses for the sale of alcoholic beverages to consumers for off-premise consumption, which shall include but not be limited to:

1. A Retail Spirits License, which shall be required in order to sell the following:

a. spirits in their original sealed package, **[***26]** and/or

b. refrigerated and non-refrigerated wine and beer in their original sealed package.

A holder of a Retail Spirits License shall be permitted to sell at retail any item that may be purchased at a grocery store or convenience store, as defined by law, so long as the sale of items other than alcoholic beverages do not comprise more than twenty percent (20%) of the holder's monthly sales;. . .

C. The Legislature shall, by law, prescribe a set of licenses for the sale of alcoholic beverages to consumers for on-premise consumption, which may include the sale of spirits, wine and/or beer, provided that such sales of alcoholic beverages by the individual drink have been authorized by the voters in the specific county where the alcoholic beverages are sold, either prior to or after the enactment of this Article.

The Okla. Const. art. 28A §6 provides:

The Legislature shall, by law, designate the specific days, hours and holidays on which alcoholic beverages may be sold or served to consumers for off-premise and/or on-premise consumption.

[8] The Okla. Const. art 28A, §2, see note 7, supra.

[9] The Secretary of State received the Final Ballot Title for State Question No. 792 on July 7, 2018.

Legislature to: authorize direct shipments to consumers of wine; create licenses; and designate days and hours when alcoholic beverages may be sold.[10]

[*P9] It also expressly informs voters that it targets monopolies as well by providing that: "[t]he new Article 28A provides that with exceptions, a person or company can have an ownership interest in only one area of the alcoholic beverage business -- manufacturing, wholesaling, or retailing." It says absolutely nothing about whether a wholesaler will be allowed to sell to only one retailer or required to sell to multiple retailers.[11]

[*P10] The title of the voter approved proposition **[***27]** notes that alcohol beverage laws will be governed by the new Article 28A **and applicable laws**. (Emphasis supplied.)[12] It **[**1062]** also expressly targets monopolies by

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[10] The Ballot Title provides:

This measure repeals *Article 28 of the Oklahoma Constitution* and restructures the laws governing alcoholic beverages through a new Article 28A and other laws the Legislature will create if the measure passes.

The new Article 28A provides that with exceptions, a person or company can have an ownership interest in only one area of the alcoholic beverage business-manufacturing, wholesaling, or retailing. Some restrictions apply to the sales of manufacturers, brewers, winemakers, and wholesalers. Subject to limitations, the Legislature may authorize direct shipments to consumers of wine.

Retail locations like grocery stores may sell wine and beer. Liquor stores may sell products other than alcoholic beverages in limited amounts.

The Legislature must create licenses for retail locations, liquor stores, and places serving alcoholic beverages and may create other licenses. Certain licensees must meet residency requirements. Felons cannot be licensees.

The Legislature must designate days and hours when alcoholic beverages may be sold and may impose taxes on sales. Municipalities may levy an occupation tax. If authorized, a state lodge may sell individual alcoholic beverages for on-premises consumption but no other state involvement in the alcoholic beverage business is allowed.

With one exception, the measure will take effect October 1,2018.

SHALL THE MEASURE BE APPROVED?

FOR THE MEASURE _ YES

AGAINST THE MEASURE _ NO

A "YES" vote is a vote in favor of this measure. A "NO" vote is a vote against this measure.

[11] The ballot title must reflect the character and purpose of the measure and not be deceptive or misleading. *In re Initiative Petition No. 409 v. Retail Liquor Assoc. of Oklahoma, 2016 OK 51, ¶3, 376 P.3d 250*; *OCPA Impact, Inc. v. Sheehan, 2016 OK 84, ¶9, 377 P.3d 138*. The ballot must be written so that voters are afforded an opportunity to fairly express their will and it must apprise voters with substantial accuracy what they are asked to approve. *OCPA Impact, Inc. v. Sheehan, supra.*

[12] Enrolled Senate Joint Resolution 68, Enacted by the 2nd Regular Session of the 55th Legislature of the State of Oklahoma Numbered by the Secretary of State, State Question Number 792, Legislative Referendum Number 370 provides:

> A Joint Resolution directing the Secretary of State to refer to the people for their approval or rejection a proposed amendment to add a new Article XXVIIIA to the Oklahoma Constitution, and to repeal *Sections 1*, 1.A, *2*, *3*, *4*, *5*, *6*, *7*, *8*, *9* and *10* of Article XXVIII of the Oklahoma Constitution, which relate to alcoholic beverages; providing that all beverages containing alcohol be subject to Article and applicable laws; requiring Legislature to enact laws regulating alcoholic beverages subject to certain provisions; prohibiting **[***28]** certain common ownership; providing exceptions; providing for automatic conversion and cessation of certain licenses; allowing continuation of certain operations for certain time period; authorizing enactment of certain legislation; specifying conditions of certain divesture; stating restrictions applicable to manufacturers, brewers, wholesalers and winemakers; requiring certain sales to be made on same price basis and without discrimination; prohibiting direct shipments of alcoholic beverages except under certain circumstances; prohibiting certain sales if provisions ruled unconstitutional; providing for certain licenses and setting forth restrictions thereon; defining term; prohibiting licensure of certain persons; providing exceptions; allowing license holders to enter into certain agreements; providing exceptions; specifying unlawful acts; requiring Legislature to designate days and hours of sales; providing for

stating that "[c]ommon ownership between tiers of the alcoholic beverage business is prohibited, with some exceptions." It states the same language as the body of the measure, that the Legislature is required to enact laws to regulate alcoholic beverages; prescribe licenses; and designate days and hours for alcoholic beverage sales. It says absolutely nothing about whether a wholesaler will be allowed to sell to only one retailer or required to sell to multiple retailers. The gist notes that the measure is to allow grocery and convenience stores to sell wine and high-point beer.[13]

[*P11] This Court has long held that the purpose of the gist, along with the ballot title, is to "prevent fraud, deceit, or corruption in the initiative process." The gist must explain the proposal's effect without extending or describing policy arguments for or against the proposal."[14] When the resolution, the title, and the gist are read collectively with each other, and with other constitutional provisions such as art. *2 §32*[15] art. *5 §§44*[16] and *51*,[17] and art. *9 §45*,[18] as mentioned in Barnes, S.J., dissent, it clearly appears that the Legislature was primarily concerned with three things:

1) monopolies forming, especially between different types of alcoholic beverage businesses;
2) preventing discrimination, whether based on price or any thing else related to alcoholic beverage sales; and
3) the retention of the Legislature's authority to regulate the sale of alcoholic beverages in Oklahoma.

[*P12] When the resolution, the title, and the gist, are read collectively, it is apparent that the voters were voting on these same three things. The voters were not notified about whether to allow a manufacturer to sell to only one wholesaler and the ballot title certainly did not inform voters of it in the voting booth. **[***30]** The ballot title said:

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taxation of alcoholic beverage sales; prohibiting state or political subdivisions from engaging in alcoholic beverage business; providing exceptions; authorizing certain cities and towns to levy occupation tax; providing effective dates; providing ballot title; and directing **[***29]** filing.

[13] The gist provides:

SQ 792 would amend the Oklahoma constitution to allow grocery and convenience stores to sell wine and high-point beer. Currently these stores are prohibited from selling beer containing above 3.2 percent alcohol by volume, as well as all wine and all liquor. SQ 792 would also allow Oklahoma liquor stores to sell refrigerated beer and alcohol accessories (i.e., sodas, corkscrews). The measure would allow multiple beer and wine stores to be owned by one corporation (ownership would be limited to two stores per person if spirits are sold). Currently individual liquor store owners are not allowed to have more than one store. If SQ 792 passes, these changes would take effect on October 1, 2018.

[14] In re Initiative Petition No. 409 v. Retail Liquor Assoc. of Oklahoma, see note 11, supra.

[15] The *Okla. Const. art. 2 §32* provides:

Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.

[16] The Okla. Const. art 2 §44 provides:

The Legislature shall define what is an unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, and enact laws to punish persons engaged in any unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, or composing any such monopoly, trust, or combination.

[17] The *Okla. Const. art 5 §51* provides:

The Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State.

[18] The *Okla. Const. art 9 §45* provides:

Until otherwise provided by law, no person, firm, association, or corporation engaged in the production, manufacture, distribution, or sale of any commodity of general use, shall, for the purpose of creating a monopoly or destroying competition in trade, discriminate between different persons, associations, or corporations, or different sections, communities or cities of the State, by selling such commodity at a lower rate in one section, community, or city than in another, after making due allowance for the difference, if any, in the grade, quantity, or quality, and in the actual cost of transportation from the point of production or manufacture.

> This measure repeals *Article 28 of the Oklahoma Constitution* and restructures the laws governing alcoholic beverages through a new Article 28A and other laws the Legislature will create if the measure passes.[19]

[*P13] [1063]** One need only look to what happened after the measure was adopted to see that the voter approved measure was not intended to be interpreted in such a manner as sales to one wholesaler which results in discrimination among other wholesalers. Two large wholesalers now control a large part of the market, and they do not compete with one another regarding the top 25 best-selling brands. Currently, 14 of the top 25 brands are exclusively distributed by one distributor and the other 11 brands are distributed by another.

[*P14] The result of the current market? Smaller wholesalers and consequently retailers, are being left with limited options to purchase, and limited options to offer consumers the most popular brands, if they can purchase them at all.[20] According to affidavits in the record, smaller wholesalers are suffering financially and find it nearly impossible to compete. At least one was forced to close.[21] With limited options to purchase the most popular brands, retailers are "hamstrung and face decreased **[***31]** service quality, lower supply and higher prices and fees.[22] Deliveries have dropped and rural retailers have suffered.[23]

[*P15] Once this disparate result became apparent, the Legislature swiftly responded and passed Senate Bill 608 to, consistent with the purpose of the ballot title, the gist and the voter approved measure, modify the way in which the sale of alcoholic beverages occurred. The bill does several things related to this cause. It defines what a "brand" is and what "brand extension" means.[24] It defines "top brand" as those brands constituting the top twenty-five brands in total sales of spirits and of wine by all wholesalers during the past twelve month period. [Of the top 25 brands from July 1, 2018 to June 30, 2019, 10 were wines and the rest were spirits.] It defines a 'manufacturer' as a

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[19] The Ballot Title, note 10, supra.

[20] For instance, in the lead up to SQ 792's implementation, a wholesaler was unable to secure any exclusive distribution agreement with a top brand manufacturer because of the manufacturers pre-existing relationships with the two entities who controlled the market. Record on Accelerated Appeal (ROAA), Vol. I, Tab 4, at 4, ¶9, Ex. 22 Hendershot (Boardwalk) Affidavit ¶5.

[21] ROAA), Vol. I, Tab 4, at 4, ¶9, Hendershot (Boardwalk) Affidavit ¶5, Willima Icke Affidavit, ¶¶4-6, Chris Cathey Affidavit, ¶3.

[22] ROAA), Vol. I, Tab 4, at 5, ¶10, Ex. 21, Glen Brokenbush, *SB 608 Aims to Restore Competition*, The Lawton Constitution (April 21, 2019. Ex. 17, Carmen Forman, *Fierecely debated liquor bill heads to governor's desk*, The Oklahoman (May 7, 2019); Ex. 6, Tres Savage, *Liquor Bicker: Senate send SB 608 to Gov. Kevin Stitt*, Nondoc (May 6, 2019).

[23] ROAA), Vol. I, Tab 4, at 54, ¶10, Ex. 27 Holt Affidavit ¶¶6-9; Jason Sheffield Affidavit ¶¶3-10.

[24] *Title 37A O.S. Supp. 2018 §1-103* provides in pertinent part:

9. 'Brand' means any word, name, group of letters, symbol or combination thereof, that is adopted and used by a licensed manufacturer to identify a specific bear, wine or spirit, and to distinguish that product from another beer, wine or spirit.

10. 'Brand extension' means:

a. after October 1, 018, any brand of bear or cider introduced by a manufacturer in this state which either:

(1) incorporates all or a substantial part of the unique features of a preexisting brand of the same licensed manufacturer, or

(2) relied to a significant extent on the goodwill associated with the preexisting brand, or

b. any brand of beer that a manufacturer, the majority of whose total volume of all brands of beer distributed in this state by such manufacturer on January 1, 2016, was distributed as low-point beer, desires to sell, introduce, begins selling or theretofore has sold and desires to continue selling a strong beer in this state which either:

(1) incorporates or incorporated all or a substantial part of the unique features of a preexisting low- point beer brand of the same licensed manufacturer, or

(2) relies or relied to a significant extent on the goodwill associated with a preexisting low-point beer brand;

brewer, distiller, winemaker, rectifier or bottler of any alcoholic beverage and its subsidiaries, affiliates and parent companies.

[*P16] The legislation also creates a new law which requires "manufacturers" to offer to sell the 'top brands' to every licensed wine **[***32]** and spirits wholesaler who desire to purchase at the same price basis and without discrimination or inducements. The question before the Court is whether this legislation is consistent with the State Question adopted by the voters.

[*P17] **[**1064]** Accordingly, for the statute to be "consistent" internally, and externally, with the newly enacted Article 28A, and the purpose for which it was enacted it must be interpreted to mean that:

> manufacturers and winemakers must offer the "top brand" to all, without discrimination as to price basis or inducements.

Under this construction, there is no conflict between the constitutional provision and the statute. The statute merely adds a requirement that, of the brands offered for sale, top brands must be included. That is it. That is what this whole controversy boils down to ---- offering the top brands to everyone.

[*P18] When a constitutional provision expressly provides that the legislature shall enact laws for further licensing, regulation, taxation, sale and distribution of alcoholic beverages such as this one does, the legislatures function is to enact laws necessary to carry the provision of the amendment into effect. To, in a manner of speaking, provide the meat **[***33]** on the bones of the provision.[25] Actions of the Legislature are presumed to be constitutional unless it is shown beyond a reasonable doubt that the Oklahoma Constitution or the Constitution of the United States expressly prohibit the Legislative action.[26]

CONCLUSION

[*P19] The Legislature's authority to impose such a requirement comes from the constitutional provision itself wherein it requires the Legislature to enact regulatory laws regarding alcoholic beverage sales. The crux of this cause is that the proposed Legislation does nothing more than adding a requirement that the top brands be made available to everyone. Adding a top brand requirement to what manufacturers and winemakers have to offer does not change the function, the meaning, or the mandate of the voter approved provision. Consequently, the law should be upheld as constitutional. If anything, it furthers the purpose of the legislation regarding sales within the heavily regulated alcoholic beverage industry and levels the playing **[***34]** field.

[*P20] Article 28A of the Oklahoma Constitution repeals Article 28, restructures the laws governing alcoholic beverages, and clearly provides that the Legislature will create other laws if the measure passes.[27] The measure is nothing more than a robust antitrust/antidiscrimintion bill. Perhaps portions were inartfully drafted or could have been drafted better. Nevertheless, interpreting the measure to bestow an absolute right for manufacturers to sell to a single wholesaler, regardless of the consequence and discriminatory fallout, collectively ignores the ballot title, the gist, and the resolution. Such an interpretation is fundamentally contrary to everything the measure seeks to restrict. The district court grant of summary judgment should be vacated.

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[25] The *Okla. Const. art. 5, §45* provides:

> The Legislature shall pass such laws as are necessary for carrying into effect the provisions of this Constitution.
>
> *See*, *Shaw v. Grumbine, 1929 OK 116, ¶0, 137 Okla. 95, 278 P. 311*. *See also*, *In re Initiative Petition No. 281, State Question No. 441, v. Rogers, 1967 OK 230, P49, 434 P.2d 941*.

[26] *See*, *State v. Oklahoma Corporation Commission, 1998 OK 118, 14, 971 P.2d 868*; *See also*, *Graham v. D&K Oilfield Services, Inc., 2017 OK 72, 404 P.3d 863*; *In re Askins Properties, L.L.C., 2007 OK 25, 161 P.3d 303*; *Fair Sch. Finance Coun. of Okla. v. State, 1987 OK 114, 746 P.2d 1135*.

[27] The Ballot Title, see note 10, supra.

BARNES, S.J., with whom Goodman, S.J., joins, dissenting:

[*P1] I respectfully dissent. Oklahoma jurisprudence directs that we construe the Oklahoma Constitution as a consistent whole and attempt to harmonize Article 28A, § 2(A)(2) with the robust anti-monopoly provisions of the Oklahoma Constitution combined with the "broad inherent power" of the Oklahoma Legislature to regulate and supervise all phases of the alcoholic beverages industry, *Okla. Alcoholic Beverage Control Bd. v. Seely, 1980 OK 189, ¶ 6, 621 P.2d 534*, a power **[***35]** that "is far broader than the power to regulate or restrict ordinary businesses," *State ex rel. Hart v. Parham, 1966 OK 9, ¶ 11, 412 P.2d 142*, and which is reflected in Article 28A, § 2(A) itself.[1]

[*P2] [1065]** It is "our obligation as a court . . . to give vitality to *all* provisions in the Constitution," *Okla. Auto. Dealers Ass'n v. State ex rel. Okla. Tax Comm'n, 2017 OK 64, ¶ 25, 401 P.3d 1152* (footnote omitted) (emphasis in original), and to "measure legislation not merely against a single constitutional provision. . . . [T]he constitution must be construed as a consistent whole, in harmony with common sense and reason, with all pertinent portions of the constitution being construed together." *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co., 1989 OK 139, ¶ 12, 782 P.2d 915* (citations omitted). As with a Legislative act, which is "to be construed in such manner as to reconcile the different provisions, render them consistent and harmonious, and give intelligent effect to each," *South Tulsa Citizens Coalition, L.L.C. v. Arkansas River Bridge Auth., 2008 OK 4, ¶ 15, 176 P.3d 1217* (footnote omitted), the Oklahoma Constitution must similarly be viewed as a single instrument and construed in a manner that renders all pertinent provisions harmonious and operative:

> It is a universally recognized rule of construction that, in ascertaining both the intent and general purpose, as well as the meaning, of a constitution or a part thereof, it should be construed as a whole. As far as possible, each provision should be construed so as to **[***36]** harmonize with all the others, yet with a view to giving effect to each and every provision in so far as it shall be consistent with a construction of the instrument as a whole.

Jones v. Winters, 1961 OK 224, ¶ 42, 365 P.2d 357 (citations omitted). *See also* *Cowart v. Piper Aircraft Corp., 1983 OK 66, P4, 665 P.2d 315* ("It is not to be supposed that a Constitution contains excess verbiage without force and effect"; "[e]very provision of the Constitution and statutes of Oklahoma is presumed to have been intended for some useful purpose and . . . every provision should be given effect"; and "[i]t is presumed that each portion of the Constitution was intended to be operative and not surplus language.").[2] Thus, the "rule [is] that constitutional provisions are construed to harmonize with each other with a view to giving effect to each and every provision," *Okla. City Urban Renewal Auth. v. Med. Tech. & Research Auth. of Okla., 2000 OK 23, ¶ 17, 4 P.3d 677* (footnote omitted), and, "[i]ndeed, . . . where one constitutional provision[] butts up against another, we must harmonize the two rather than allow one to run roughshod over the other," *Okla. Auto. Dealers Ass'n, 2017 OK 64, ¶ 25, 401 P.3d 1152* (footnote omitted).[3]

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[1] "The Legislature shall enact laws providing for the strict regulation, control, licensing and taxation of the manufacture, sale, distribution, possession, transportation and consumption of alcoholic beverages[.]" Okla. Const. art. 28A, § 2(A).

[2] The Majority, citing *Cowart*, states that it is to "construe[] constitutional provisions 'as a consistent whole in harmony with common sense and reason,'" Maj. Op., ¶ 12; thus, all pertinent provisions must be construed as a consistent whole prior to reaching a determination whether legislation is inconsistent with the Constitution. *See also* *Dobbs v. Bd. of Cnty. Comm'rs of Okla. Cnty., 1953 OK 159, P10, 208 Okla. 514, 257 P.2d 802* (Syllabus by the Court) ("In passing upon the constitutionality of an act of the Legislature all pertinent sections of the Constitution should be considered together in arriving at a correct interpretation.").

[3] Thus, it is my understanding of the reasoning of these cases that even where a conflict appears to exist between two or more constitutional provisions, unless that conflict is truly irreconcilable, the provisions must be harmonized. In addition to the above-cited cases, *see* 16 C.J.S. Constitutional Law § 100 ("A court must reconcile provisions that appear to conflict," and "[i]n construing a constitution, distinct provisions are repugnant to each other only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without substantial conflict. When a court is faced with conflicting policies arising out of multiple constitutional provisions in a specific factual situation, it must strike a balance between the provisions if

[*P3] This method of constitutional interpretation, in which we examine all pertinent provisions of the Oklahoma Constitution and attempt to harmonize them before determining **[**1066]** whether legislation is inconsistent with **[***37]** the Constitution, is especially applicable to the present case involving a referendum. The Oklahoma Constitution states: "The reservation of the powers of the initiative and referendum in this article shall not deprive the Legislature of the right to repeal any law, propose or pass any measure, which may be consistent with the Constitution of the State and the Constitution of the United States." *Okla. Const. art. 5, § 7*.[4]

[*P4] In addition, "[t]his Court does not examine the Constitution to decide whether the Legislature is permitted to act, only whether it is prohibited from acting. If there is any doubt, it should be resolved in favor of the validity of the Legislature's action; restrictions thereon should be strictly construed." *In re Detachment of Mun. Territory from City of Ada, Okla., 2015 OK 18, ¶ 7, 352 P.3d 1196* (citations omitted). "There is a strong presumption which favors legislative enactments. The presumed constitutionality of a legislative enactment is rebutted only when the enactment is prohibited by either the Oklahoma Constitution or federal law." *Graham v. D & K Oilfield Servs., Inc., 2017 OK 72, ¶ 11, 404 P.3d 863* (citations omitted). As stated in *Oklahoma Alcoholic Beverage Control Board v. Parkhill Restaurants, Inc., 1983 OK 77, 669 P.2d 265*, "The Oklahoma Constitution vests in the Legislature the supreme power to enact laws to meet the needs of the State, and its acts should be upheld unless plainly **[***38]** and clearly within the express prohibitions and limitations fixed by the Constitution." *Id. ¶ 27* (citation omitted). The *Parkhill* Court further stated that "a presumption in favor of validity is afforded to state laws regulating intoxicating liquors." *Id. ¶ 11* (footnote omitted).

[*P5] As reflected in Article 28A, § 2(A), which states that "[t]he Legislature shall enact laws providing for the strict regulation, control, licensing and taxation of the manufacture, sale, distribution, possession, transportation and consumption of alcoholic beverages," this Court has explained that the Legislature has "near absolute power to regulate the liquor industry":

> The broad sweep of the *twenty-first amendment to the Constitution of the United States*[5] gives the states near absolute power to regulate the liquor industry as long as they do not act in a discriminatory manner. Wide latitude as to choice of the means to accomplish regulation is accorded . . . .

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possible."). *See also* *In re Okla. Capitol Improvement Auth., 2003 OK 59, ¶ 30, 80 P.3d 109* ("the-purpose-of-borrowing provision must be harmonized with other constitutional provisions"); *Matthews v. Funck, 2007 OK CIV APP 15, P20, 155 P.3d 852 & 24, 155 P.3d 852* ("This interpretation of *section 8C [of Article 10 of the Oklahoma Constitution*] not only harmonizes its provisions with the other sections of Article 10, and particularly *section 8B*, but also allows for a construction of *section 2890.1 [of Title 68 of the Oklahoma Statutes]* that is consistent with the Constitution"; "while there is no lack of confusion and contradiction in the constitutional and statutory provisions at issue in this case, we find this interpretation most consistently harmonizes these provisions with reason and common sense." (citation omitted) (footnote omitted)).

[4] The Oklahoma Constitution also provides: "The authority of the Legislature shall extend to all rightful subjects of legislation, and any specific grant of authority in this Constitution, upon any subject whatsoever, shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever." *Okla. Const. art. 5, § 36*. Further, *sections 36 through 45 of Article 5* are entitled "Powers and Duties" of the Oklahoma Legislature, and *Article 5, § 44*, entitled "Unlawful restraints of trade," discussed below, is contained within this same portion of the Oklahoma Constitution.

[5] "The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. The United States Supreme Court has explained that "[t]he States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders," *Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712, 104 S. Ct. 2694, 81 L. Ed. 2d 580 (1984)*, and "the Twenty-first Amendment limits the effect of the dormant *Commerce Clause* on a State's regulatory power over the delivery or use of intoxicating beverages within its borders," *44 Liquormart, Inc. v. R.I., 517 U.S. 484, 516, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996)*. However, just as, in my view, the mere existence of Article 28A does not insulate the alcohol industry in this state from Legislative powers and duties set forth elsewhere in the Oklahoma Constitution, the United States Supreme Court has similarly held that the *Twenty-First Amendment* "does not license the States to ignore their obligations under other provisions of the [United States] Constitution," such as the *Equal Protection Clause* and the *First Amendment*, *44 Liquormart, Inc., 517 U.S. at 516*.

Okla. Alcoholic Beverage Control Bd. v. Burris, 1980 OK 58, ¶ 6, 626 P.2d 1316.

Indeed, the Oklahoma Alcoholic Beverage Control Act states:

> The *Oklahoma Alcoholic Beverage Control Act* shall be deemed an exercise of the police power of the State of Oklahoma for the protection of the welfare, health, peace, temperance and safety of the people of this state, and all provisions hereof shall be construed **[***39]** for the accomplishment of that purpose.

37A O.S. Supp. 2018 § 1-106. *See also* Okla. Alcoholic Beverage Control Bd. v. Seely, 1980 OK 189, ¶ 6, **[**1067]** 621 P.2d 534 (The liquor industry "is a business which is subject to a high degree of supervision and regulation in the interest of the public welfare.").[6]

[*P6] Pertinent to this case, the Legislature's power in this domain to "enact laws providing for the strict regulation [and] control . . . of [inter alia] the manufacture, sale, distribution, possession [and] transportation . . . of alcoholic beverages," Okla. Const. art. 28A, § 2(A), is combined with the Oklahoma Constitution's express prohibition of monopolies: "[M]onopolies are contrary to the genius of a free government, and shall never be allowed[.]" Okla. Const. art. 2, § 32. This Court has explained that "[i]n 1906-07, the framers of our Constitution held a strong conviction against monopolies . . . and favored encouraging just competition, as shown by clauses, paragraphs, and sections of our organic law." City of Okmulgee v. Okmulgee Gas Co., 1929 OK 472, ¶ 45, 140 Okla. 88, 282 P. 640, overruled on other grounds in Pub. Serv. Co. of Okla. v. Caddo Elec. Coop., 1970 OK 219, 479 P.2d 572.[7] *See also* Okla. Const. art. 5, § 44 (commanding the Legislature to "define what is an unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, and enact laws to punish persons engaged in any unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, or composing any such monopoly, trust, **[***40]** or combination."); Okla. Const. art. 5, § 51 (prohibiting the Legislature from passing any law "granting to any

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[6] *Cf.* Seal v. Corp. Comm'n, 1986 OK 34, 21, 725 P.2d 278 & 45 ("It is well settled that the State may adopt reasonable regulation in the exercise of its police power to protect the correlative rights of owners through ratable taking," and "[t]he State of Oklahoma . . . has extensively and continuously regulated the natural gas industry"; "the parties could not have reasonably expected that their contractual rights were immune from alteration by subsequent State regulation.").

[7] *See also* Keith D. Tracy & Ronald L. Walker, ***Antitrust Law****: Indirect Purchaser Standing to Sue in Oklahoma -- Major v. Microsoft Corp.*, 57 Okla. L. Rev. 727, 727-28 (2004) ("Oklahoma ***antitrust law*** originated in the Oklahoma Constitution, which not only prohibits monopolies [as set forth in Okla. Const. art. 2, § 32], but also authorizes the state legislature [as set forth in Okla. Const. art. 5, § 44] to define each 'combination, monopoly, trust, act, or agreement, in restraint of trade' that should be declared unlawful."); Maurice H. Merrill, *The Administrative Law of Oklahoma*, 4 Okla. L. Rev. 286, 286-87 (1951) ("The convention to frame a constitution for Oklahoma met November 20, 1906," when Theodore Roosevelt was President of the United States and "the dominant political philosophy of the new state [of Oklahoma] envisioned a democratic equality of opportunity protected by governmental process against corporate and monied interests. Naturally, the constitution framed under this philosophy contained provisions designed to facilitate [some amount of] state control over corporate and business activities and to encourage governmental activity as an agency of general welfare." (footnotes omitted)); and Gerard Michael D'Emilio, Comment, *Frontier Feudalism: Agrarian Populism Meets Future Interest Arcana in the Land of Manifest Destiny*, 70 Okla. L. Rev. 943, 982 n.236 (2018) (The Oklahoma Constitution "struck out against monopolization[.]").

We must take into consideration the times and circumstances under which the state constitution was formed -- the general spirit of the times, and the prevailing sentiments among the people. Every constitution has a history of its own, which is likely to be more or less peculiar; and unless interpreted in the light of this history is liable to be made to express purposes which were never within the minds of the people in agreeing to it. This the court must keep in mind when called upon to interpret it; for their duty is to enforce the law which the people have made, and not some other law which the words of the constitution may possibly be made to express.

Thomas v. Reid, 1930 OK 49, ¶ 39, 142 Okla. 38, 285 P. 92 (citation omitted). *See also* Wall v. Marouk, 2013 OK 36, ¶ 4, 302 P.3d 775 ("The Oklahoma Constitution is a unique document. Some of its provisions are unlike those in the constitutions of any other state, and some are more detailed and restrictive than those of other states."). "A Constitution is a Magna Charta of the people's rights, the fundamental law of the land, intended, not for short periods of time, but for all time." City of Okmulgee, 1929 OK 472, P17, 140 Okla. 88, 282 P. 640 (citation omitted).

association, corporation, or individual any exclusive rights, privileges, or immunities within this State."). Also relevant is *Article 9, § 45*, as language from this section of the Oklahoma Constitution -- entitled "Monopoly or destruction of competition - Discrimination prohibited" -- is mirrored in the very language in Article 28A, § 2(A)(2) upon which the Majority bases its conclusion that the Legislature is powerless to enact SB 608.[8]

[*P7] **[**1068]** Article 28A, § 2(A)(2) does not plainly and clearly prohibit or suspend the Legislature's broad anti-monopoly power over the liquor industry in our state; I believe this conclusion is all the more inescapable when Article 28A, § 2(A)(2) is interpreted in the wider context of the instrument of which it is a part. Thus, although I agree the requirement of a "forced sale," as discussed by the Majority, has been removed or deconstitutionalized, I disagree **[***41]** that the Legislature's power to enact laws to undo or prevent monopolies has also been removed or deconstitutionalized in the domain of alcohol sales. I disagree, in other words, that we must go from one extreme to the other, from forced sales to sales completely unlimited by the Legislature's above-described power, and, in my view, the Majority arrives at such an interpretation -- that manufacturers now have an absolute right to sell to a designated wholesaler "free from legislative interference"[9] -- based only on a review of Article 28A, § 2(A)(2) and repealed Article 28.[10]

[*P8] A contrary interpretation is discernable, one which harmonizes the various provisions and construes them as a consistent whole. Article 28A, § 2(A)(2) sets forth, as part of the three-tier structure, a general or default ability on the part of manufacturers to sell to any -- hence, zero, "multiple" or, impliedly,[11] one -- licensed wholesaler who desires to buy, but it does not plainly and clearly prohibit the Legislature from exercising its broad anti-monopoly powers in this domain. This is precisely how we would construe a legislative act containing such various provisions.[12] We should also interpret the Constitution in this manner, **[***42]** giving effect to these various

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[8] *Article 9, § 45* states, in part, that no association or corporation engaged in the production, manufacture, distribution, or sale of any commodity of general use, shall, for the purpose of creating a monopoly or destroying competition in trade, discriminate . . . by selling such commodity at a lower rate in one section, community, or city than in another, after making due allowance for the difference, if any, in the grade, quantity, or quality, and in the actual cost of transportation from the point of production or manufacture.

Cf. Okla. Const. art. 28A, § 2(A)(2) ("such sales shall be made on the same price basis and without discrimination to each wholesaler"). Importantly, Article 28A, § 2(A)(5) similarly states that, as to wholesalers, "[e]very wholesaler, except a beer wholesaler, must sell its products on the same price basis and without discrimination to all on-premise and off-premise licensees, unless otherwise provided by law." Thus, whether or not SB 608 remains in effect, wine and spirit manufacturers already have no control regarding the sale and distribution of their products to the retail tier in Oklahoma as every wholesaler "must sell its products on the same price basis and without discrimination" to retailers. It is essential to keep this in mind to the extent it is relevant to contemplate whether SB 608 deprives manufacturers (i.e., that small fraction of one percent of manufacturers subject to SB 608, *see* n.15, *infra*) of anything of value in the distortions of the highly-regulated three-tier market, and when attempting to analogize SB 608 to industries that do not have this unique structure.

[9] Maj. Op., ¶ 13.

[10] The Majority states it is not "constru[ing] Article 28A in a vacuum" because it construes Article 28A with "reference to the repealed Article 28[.]" Maj. Op., ¶ 16. Indeed, the Majority reaches its conclusion that SB 608 infringes Article 28A, § 2(A)(2) and is unconstitutional based solely on a review of Article 28A and Article 28; only then does it turn to other constitutional provisions. That is, only after "hold[ing] SB 608's infringement of Article 28A, § 2(A)(2) is unconstitutional," Maj. Op., ¶ 17, does the Majority turn to a review of the anti-monopoly provisions of the Oklahoma Constitution. I respectfully disagree with the premise of the Majority's analysis here; in my view, the meaning of Article 28A, § 2(A)(2) must be discerned from a reading of the entire instrument of which it is a part, and only then can any conclusion be reached as to whether SB 608 is inconsistent with the Constitution.

[11] The Majority states that "Article 28A, § 2(A)(2) *implies* that a manufacturer can also select only one wholesaler." Maj. Op., ¶ 14 (emphasis added).

[12] For example, "Where the legislative intent is plainly discernible from the provisions of statute when considered as a whole, the real purpose and intent of the legislative body will prevail over the literal import of the words employed." *Keck v. Okla. Tax Comm'n, 1940 OK 352, ¶ 0, 188 Okla. 257, 108 P.2d 162* (Syllabus by the Court). The primacy of the purpose and intent is even

provisions consistent with a construction of the instrument as a whole. This interpretation also upholds the constitutionality of SB 608:

> **[**1069]** We presume that every statute is constitutional, and we approach a constitutional attack on a statute with great caution and grave responsibility. Our consideration is guided by the general principles that the Legislature is sovereign and that the legislative power has no limitation except by specific declaration in the state or federal constitutions. Constitutional restriction on the Legislature will be strictly construed, and a statute will be upheld against a constitutional attack unless it is clearly and overtly inconsistent with the constitution.

Glasco v. State ex rel. Okla. Dept. of Corrections, 2008 OK 65, P27, 188 P.3d 177 (citations omitted).[13]

[*P9] Importantly, this interpretation does not render Article 28A, § 2(A)(2) into a nullity, as Appellees argue.[14] Rather, this reading leaves the general ability of wine and spirit manufacturers to sell to one, and only one, wholesaler operative with regard to more than 99% of such manufacturers as SB 608 operates to exclude just a small fraction of one percent of the many thousands[15] of wine and spirit manufacturers from the general ability to sell **[***43]** to one, and only one, wholesaler. It is the contrary reading which, in my view, unnecessarily renders provisions of our fundamental law into nullities. In my view, the Majority's interpretation would leave the Legislature powerless to prevent and address the potential scenario in which there remains only one wholesaler who controls all of the popular brands sold and distributed to retailers in this state; it would even leave the Legislature powerless with regard to the potential scenario in which there is only one remaining wholesaler despite Article 28A clearly contemplating the continuing viability of "multiple wholesalers." *See* Okla. Const. art. 28A, § 2(A) ("multiple wholesalers"; "each wholesaler"; "[e]very wholesaler").

[*P10] Thus, in my view, the Majority adopts an overly strict and technical reading of one provision that ultimately threatens the viability of the three-tier structure itself. "The construction of a constitutional provision must not be so strict or technical as to defeat the evident object and purpose of its adoption." *State v. Millar, 1908 OK 124, ¶ 0, 21 Okla. 448, 96 P. 747* (Syllabus by the Court).[16] We must avoid "parsing by lawyers" that moves at cross-purposes

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more pronounced in constitutional analysis, where we look for "the overriding purposes" or "primary purposes." *Fent v. Fallin, 2014 OK 105, ¶¶ 14, 345 P.3d 1113 & 15*. The *Fent* Court explained that "[a] constitutional provision must be construed considering its purpose and given a practical interpretation so that the manifest purpose of the framers and the people who adopted it may be carried out." *Id. ¶ 17* (footnote omitted).

[13] This legal standard is, of course, not relaxed at the summary judgment stage. In *Lafalier v. Lead-Impacted Communities Relocation Assistance Trust, 2010 OK 48, 237 P.3d 181*, the Court explained that even at the summary judgment stage, "there is a presumption that every statute is constitutional. The party seeking a statute's invalidation as unconstitutional has the burden to show the statute is clearly, palpably, and plainly inconsistent with the Constitution. We scrutinize a constitutional attack on a statute with great caution and grave responsibility." *Id. ¶ 15* (footnotes omitted).

[14] As the Majority states, "Distributors claim[] that SB 608 directly conflicts with Article 28A, § 2(A)(2), as SB 608 makes Article 28A, § 2(A)(2)'s discretion to select a single wholesaler a nullity." Maj. Op., ¶ 8.

[15] As the Majority notes, there are "thousands of other brands of liquor and wine." Maj. Op., ¶ 20 n.10. Indeed, the number of wine and spirits manufacturers worldwide would appear to be at least in the tens of thousands. For example, according to the National Association of American Wineries, in January 2019 there were over 10,000 wineries in the United States alone. *See* the National Association of American Wineries, *United States Wine and Grape Industry FAQS*, https://wineamerica.org/policy/by-the-numbers (last updated 2019).

[16] *Accord* *City of Guymon v. Butler, 2004 OK 37, ¶ 11, 92 P.3d 80* ("The construction of a constitutional provision must not be so strict as to defeat the purpose of its adoption." (citation omitted)); *City of Shawnee v. Williamson, 1959 OK 64, ¶ 9, 338 P.2d 355* ("The construction of a constitutional provision must not be so strict or technical as to defeat the evident object and purpose of its adoption."); *Lone Star Gas Co. v. Bryan Cnty. Excise Bd., 1943 OK 228, ¶ 2, 193 Okla. 13, 141 P.2d 83* ("the general principle of law that construction of a constitutional provision must not be so strict or technical as to defeat the object and purpose of its adoption" (citations omitted)); and *Williams v. City of Norman, 1921 OK 337, ¶ 0, 85 Okla. 230, 205 P. 144* (Syllabus by the Court) ("The construction of a constitutional provision must not be so strict or technical as to defeat the evident object and purpose of its adoption.").

with the "practical interpretation" and **[***44]** "manifest purpose" of the Constitution. *Fent v. Fallin, 2014 OK 105, P11,P17, 345 P.3d 1113 & 17, 345 P.3d 1113*.

[*P11] Furthermore, although we are ultimately concerned only with whether the Legislature is clearly prohibited under the Constitution from enacting SB 608 -- and, absent such a clear prohibition, the Legislature's power is not limited to, for example, waiting until after a destruction of competition has **[**1070]** occurred -- it should nevertheless be pointed out that competition among wholesalers in Oklahoma in the sale and distribution of the most popular brands of wine and spirits has already been "destroyed." This was the conclusion reached under very similar circumstances in *State ex rel. Hart v. Parham, 1966 OK 9, 412 P.2d 142*. In *Parham*, the Court explained that "the wholesalers [had] attempted to restrict competition by the voluntary allocation of the major brands of liquor among themselves" such that, with regard to the top brands, the wholesalers had divided up the market and there was no competition at the wholesaler tier with regard to top brands. *Id.* ¶ 27. The *Parham* Court explained it was "clear that" if this arrangement were permitted, then "the extensive competition heretofore existing between wholesalers selling the same [major or top] brands of liquor *would be destroyed*." *Id.* ¶ 17 **[***45]** (emphasis added).

[*P12] As the Majority acknowledges, in the current market only two wholesalers control the sale and distribution to retailers of all of the most popular brands, and those two wholesalers do not even compete with one another with regard to those brands. From the perspective of Oklahoma retailers, any one of the 25 most popular brands -- and as many as 90 of the top 100 brands -- is currently legally obtainable[17] from only one wholesaler. As the Majority notes,

> On July 15, 2019, the ABLE Commission published the top 25 brands of wine and liquor. Southern Glazer's Wine and Spirits of Oklahoma, LLLP is the exclusive distributor of fourteen of the top 25 brands. Central Liquor Co. L.P., d/b/a RNDC Oklahoma is the exclusive distributor of the other eleven top 25 brands.[18]

Thus, Oklahoma retailers have only one place to go to purchase any one of these particular top brands, a scenario that is destructive of competition among the "multiple wholesalers" contemplated under Article 28A, § 2, an Article containing as its most fundamental objective the continued viability of the three-tier structure, including a privately-owned **[***46]** and competitive second tier of multiple wholesalers.[19] Under the Majority's reading, the Legislature is powerless to address this scenario or prevent even more flagrant potential scenarios at the wholesaler tier.[20]

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[17] For example, as to wine and spirits, *37A O.S. Supp. 2019 § 3-101(A)* allows "the possession and transportation of alcoholic beverages *for the personal use of the possessor and his or her family and guests*, so long as the Oklahoma excise tax has been paid thereon," but otherwise states that "[n]o person shall manufacture, rectify, sell, possess, store, import into or export from this state, transport or deliver any alcoholic beverage except as specifically provided in the Oklahoma Alcoholic Beverage Control Act." (Emphasis added.) This is yet one more restriction which well distinguishes the alcohol industry from other industries. While markets in surrounding areas and states can be examined by individuals and businesses shopping, for example, for an automobile, it would be illegal for Oklahoma retailers to shop for wine or spirits outside Oklahoma's borders, and it would be impracticable for most Oklahoma consumers to travel a great distance to shop for a bottle of wine for personal use.

[18] Maj. Op., ¶ 5 n.4.

[19] Although not essential to my reasoning, it is useful to note that, generally, "[i]t is the existence of monopoly power *coupled with* the intent to use it for anticompetitive purposes or with *inevitable anticompetitive effects* that establishes the offense of monopolization." *Bd. of Regents of Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n, 1977 OK 17, ¶ 17 n.26, 561 P.2d 499* (emphasis added). *See also* *Beville v. Curry, 2001 OK 1, ¶ 1 n.1, 39 P.3d 754* ("Monopoly power is defined [in the *Oklahoma Antitrust Reform Act*] as the power to control market prices or exclude competition."). When obscure and less popular brands are sold by only one wholesaler, there are no inevitable anticompetitive effects as the thousands of less popular brands do not have the same power to control market prices and exclude competition as do the most popular brands, and a retailer can, for example, simply opt not to purchase a less popular brand and replace it with another lesser-known brand sold by another wholesaler. However, the business of many retailers is likely dependent on having some, if not all, of the most popular brands in stock, brands that can currently be obtained from only one wholesaler.

Id. ¶ 9 (citation omitted).

[*P13] [1071]** The Majority concludes that "[o]nly an amendment to the Constitution can change what the people enshrined," but, in my view, this conclusion stems from a departure from the fundamental rules of constitutional interpretation discussed above. It is nevertheless illuminating to question what such an amendment would look like. The Legislature could perhaps attempt a new referendum seeking voter approval of SB 608 (i.e., that portion of SB 608 under consideration) as part of the Oklahoma Constitution. However, the Legislature, which might in the future deem it wise to adjust the number of top brands subject to its requirements in order to address monopolization at the wholesaler tier,[21] or even to abolish SB 608 altogether, would be forced to again seek to change the Constitution in order to do so.[22] The Legislature could instead propose language stating, in effect, that its duty to strictly regulate the **[***47]** alcohol industry includes the power to pass anti-monopoly laws in this domain and the ability of manufacturers to sell to one wholesaler is not absolute. However, in my view, such language would be redundant, as it is already discernable from a review of the entire instrument of the Oklahoma Constitution. *See, e.g.,* *Okla. City Urban Renewal Auth. v. Med. Tech. and Research Auth. of Okla., 2000 OK 23, ¶ 17, 4 P.3d 677* ("[N]othing in the language of *art. 10, § 6C* indicates that it is intended to affect any other constitutional provision. It contains no language impacting or altering the debt limitations of art. *10, § 26*," and "[t]o hold differently would require us to strike debt limitation provisions from the Oklahoma Constitution, and to ignore the rule that constitutional provisions are construed to harmonize with each other with a view to giving effect to each and every provision." (footnote omitted)).

[*P14] In *United States v. Sprague, 282 U.S. 716, 51 S. Ct. 220, 75 L. Ed. 640 (1931)*, the United States Supreme Court stated:

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[20] Regarding the importance of examining, in uncertain cases, "the effects and consequences" and "the right being vindicated in the end," the Court in *State v. State Board of Equalization, 1924 OK 682, 107 Okla. 118, 230 P. 743*, stated that "[i]t has been well said" that [n]o feature of the judicial function is of equal dignity with that which requires dealing with what is and what is not really a part of the Constitution, or those things which may have been engrafted upon the original instrument. None requires an equal degree of care to reach a right conclusion, and courage to pronounce it. The court may, and should, and must, on such great occasions, look to the effects and consequences. Not to do so with the thought of hesitation, much less omission to do what duty to the public requires; but as an inspiration to reach the highest attainable degree of certainty of the right being vindicated in the end.

[21] The Majority questions whether SB 608 could even be viewed as an attempt by the Legislature "to combat anticompetitive markets pursuant to *Okla. Const. art. V, § 44*" because SB 608 does not "set forth any punishment for those entities engaging in unlawful restraint of trade," "does not define an unlawful restraint," and "**only** deals with the top 25 brands of liquor and wine[.]" Maj. Op., ¶ 20 n.10 (emphasis in original). However, the Oklahoma Alcoholic Beverage Control Act, at the very least, does provide a punishment for "[a]ny person who shall violate any provision of the Oklahoma Alcoholic Beverage Control Act for which no specific penalty is prescribed[.]" ***37A O.S. Supp. 2018 § 6-125(A)***. Further, SB 608 does, in my view, define an unlawful restraint -- i.e., in the Legislature's wisdom, the definition comprises manufacturers of top brands that sell their wares to one, and only one, wholesaler while refusing to sell to any other wholesaler who desires to buy those top brands. Further, it appears the Majority is asserting that a true anti-monopoly regulation would apply to all manufacturers, even manufacturers of the most obscure, boutique, or small-batch varieties of wines and spirits; however, in my view, not only, as a practical matter, would manufacturers of far less popular brands potentially not have sufficient product to sell to multiple wholesalers, but, more to the point, such a regulation would be targeting brands that have no potential anticompetitive effects. *See* n.19, *supra*. Finally, the Legislature's power is, in my view, not limited to an isolated reading of *Article 5, § 44*; instead, it fundamentally arises from its broad regulatory powers in the area of alcohol sales, a power which, moreover, is coupled with the anti-monopoly provisions, including the prohibition of monopolies set forth in *Article 2, § 32*, as well as the command and legislative duty set forth in *Article 5, § 44*.

[22] *Cf.* *Oklahoma's Children, Our Future, Inc. v. Coburn, 2018 OK 55, ¶ 17 n.33, 421 P.3d 867* (Wyrick, J., and Winchester, J., dissenting) ("[U]nlike constitutional interpretation, if a court erroneously interprets a statute, the Legislature is free to correct the error by amending the statute.").

> If the framers of the instrument had any thought that amendments differing in purpose should be ratified in different ways, nothing would have been simpler tha[n] so to phrase article 5 as to exclude implication or speculation. The fact that an instrument drawn with such meticulous care and by men who so well understood [h]ow to make **[***48]** language fit their thought does not contain any such limiting phrase affecting the exercise of discretion by the Congress in choosing one or the other alternative mode of ratification is persuasive evidence that no qualification was intended.

[1072]** *Id. at 732*. Similarly, here, Article 28A, § 2, which is more than 1,200 words long and contains various mandatory provisions, contains no explicit statement affecting the anti-monopoly provisions of the Oklahoma Constitution or providing that manufacturers have an absolute right to sell to one, and only one, wholesaler. There is certainly no such language anywhere in the ballot title.[23] Rather, the ability to sell to one wholesaler is a mere implication from the two sentences upon which Appellees base their entire argument.[24]

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[23] In *Fent v. Fallin, 2014 OK 105, 345 P.3d 1113*, the Court stated:

Constitutional provisions are not made for parsing by lawyers, but for the instruction of the people and the representatives of government, so that they may read and understand their rights and duties. Words used in a constitutional provision and an accompanying ballot title are to be construed in a way most familiar to ordinary people who voted on the measure.

Id. ¶ 12 (footnotes omitted). "The ballot title is a contemporaneous construction of the constitutional amendment *and weighs heavily in determining its meaning*." *Id.* (emphasis added) (footnote omitted). Thus, the *Fent* Court stated: "With this guidance in mind, the issue becomes what would the ordinary person who voted on [the state question at issue], as explained by its ballot title, understand they were approving[.]" *Id.* ¶ 13. *See also* *McDonald v. City of Chicago, Ill., 561 U.S. 742, 828-29, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010)* ("When interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted," and the focus is on "what the public understood the words chosen by the draftsmen to mean.").

[24] In my view, even an isolated reading of these sentences is less than persuasive regarding a right on the part of manufactures to sell to a designated wholesaler that is completely "free from legislative interference." As I read it, the purpose of the second sentence, for example, is to prevent certain monopolistic tendencies. The only explicitly mandatory language in the two sentences -- certainly the only use of the word "shall" -- is the prohibition of discriminatory pricing contained in the second sentence: "[I]f a manufacturer . . . elects to sell its products to multiple wholesalers, such sales *shall be made on the same price basis and without discrimination to each wholesaler*[.]" Okla. Const. art. 28A, § 2(A)(2) (emphasis added). This language, as indicated above, directly alludes to and mirrors *Article 9, § 45 of the Oklahoma Constitution*, which is entitled "Monopoly or destruction of competition -- Discrimination prohibited." Indeed, other courts have explained that the three-tier system itself is structured so as to "prevent[] . . . monopolistic tendencies . . . ." *S.A. Discount Liquor, Inc. v. Texas Alcoholic Beverage Comm'n, 709 F.2d 291, 293 (5th Cir. 1983)*. In an Oklahoma case confronting language no longer in effect but very similar to that found in Article 28A, including a "require[ment] [that] a manufacturer . . . sell to every licensed wholesaler on the same price basis and without discrimination," "prohibitions against financial assistance from any manufacturer or wholesaler to any retailer," "prohibitions against price discrimination against wholesalers or retailers," and a "constitutional amendment . . . require[ing] each manufacturer to sell to every licensed wholesaler on the same price basis and without discrimination," the Court stated that "[i]t is apparent on the face of all these sections that their general purpose is the prevention of any tendency toward monopoly, or the control of the industry by any segment or special interest group, with the resulting destruction of competition." *Parham, 1966 OK 9, ¶ 16, 412 P.2d 142*. Therefore, in my view, the reason for the existence of the above-quoted sentence from Article 28A, § 2(A)(2) is the prevention of monopolistic tendencies, not the enshrinement of monopoly power. This language, in my view, is aimed at only those scenarios involving sales "to multiple wholesalers" simply because it would be illogical if its requirement (i.e., that such sales shall be made on the same price basis and without discrimination to each wholesaler) sought to embrace other scenarios. Thus, Appellants justifiably assert that the purported right on the part of manufacturers to sell to only one wholesaler completely free from legislative interference would constitute a proverbial "elephant in a mouse hole." *See, e.g.,* *Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001)* ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions -- it does not, one might say, hide elephants in mouseholes. Respondents' textual arguments ultimately founder upon this principle." (citations omitted)); *see also* *Dep't of Commerce v. N.Y., 139 S. Ct. 2551, 2602, 204 L. Ed. 2d 978 (2019)* (Alito, J., concurring in part and dissenting in part) ("Reading [the particular statutory provision] to mean what the District Court thought would turn it into the proverbial elephant

[*P15] Finally, Appellees emphasize that Article 28A, § 2(A) states that "[t]he Legislature shall enact laws" strictly regulating the alcoholic beverages industry "*consistent with the provisions of this Article*." (Emphasis added.) I disagree, however, that this language effectively suspends **[***49]** all other provisions of the Oklahoma Constitution and requires that **[**1073]** Article 28A be interpreted in a vacuum. The Legislature must, of course, enact laws consistent with the provisions of Article 28A, but Article 28A itself must be construed as part of the Oklahoma Constitution. *See* *Calvey v. Daxon, 2000 OK 17, ¶ 14, 997 P.2d 164* ("The Legislature and the voters expect the courts to be familiar with settled rules of constitutional construction and to follow them."). All pertinent provisions of the Oklahoma Constitution must be reconciled and vitalized, not unnecessarily rendered dormant and ineffective.

[*P16] For all these reasons, I respectfully dissent. In my opinion, we must construe the Oklahoma Constitution as a consistent whole, and resist reading Article 28A, § 2(A)(2) in a vacuum with its predecessor. Such a reading reveals, in my view, that the Legislature's broad anti-monopoly power over the highly-regulated alcoholic beverages industry in our state is not plainly and clearly prohibited or suspended. I would reverse the trial court's order finding SB 608 is unconstitutional.

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stuffed into a mouse hole. [The provision], however, is a decidedly mouse-like provision. It was enacted with no fanfare and no real explanation . . . ." (footnote omitted)).

Prime Steakhouse v. Mowi ASA

United States District Court for the District of Maine

January 23, 2020, Decided; January 23, 2020, Filed

No. 2:19-cv-00207-JAW

Reporter
2020 U.S. Dist. LEXIS 13909 *; 2020 WL 403542

PRIME STEAKHOUSE, on behalf of itself and all others similarly situated, Plaintiff v. MOWI ASA, et al., Defendants

Subsequent History: Adopted by, Motion granted by *Steakhouse v. Asa, 2020 U.S. Dist. LEXIS 51739 (D. Me., Mar. 25, 2020)*

Core Terms

salmon, purchaser, Farm-Raised, consolidated, indirect, coordination, quotation, marks, motion to transfer, nationwide class, discovery, products, factors, district court, instant action, defendants', parties, putative class action, class action, duplicative, Venue, cases, suits, convenience of the parties, conflicting judgment, choice of forum, instant suit, transferring, antitrust, witnesses

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Judges: John H. Rich III, United States Magistrate Judge.

Opinion by: John H. Rich III

Opinion

RECOMMENDED DECISION ON MOTION TO TRANSFER VENUE[1]

Seven defendants in this putative class action lawsuit alleging unlawful coordination of the price of farm-raised salmon move pursuant to *28 U.S.C. § 1404(a)* to transfer venue to the United States District Court for the Southern District of Florida ("Southern District of Florida"). *See* Motion of Certain Defendants to Transfer Venue Under *28 U.S.C. § 1404(a)* ("Motion to Transfer") (ECF No. 29); Defendants Grieg Seafood BC Ltd., Marine Harvest USA, LLC, Marine Harvest Canada, Inc., and Ducktrap River of Maine LLC's Joinder in Motion to Transfer Venue Under *28 U.S.C. § 1404(a)* ("Joinder Motion") (ECF No. 47).[2] The plaintiff requests that the court deny the defendants' motion or, in the alternative, stay action on the motion pending the resolution of any Multidistrict Litigation ("MDL") petition that the defendants may wish to file. *See* Response to Motion of Certain Defendants to Transfer Venue Under *28 U.S.C. § 1404(a)* and Motion to Stay ("Response") (ECF No. **[*3]** 39) at 9-10.

Because there is significant overlap between this case and both an earlier and subsequently filed lawsuit in the Southern District of Florida, consideration of other relevant factors favors transfer, and the defendants correctly observe that the filing of an MDL petition is a last resort, I recommend that the court grant the defendants' motion, deny that of the plaintiff, and deem moot the remaining motions pending in this case, ECF Nos. 14, 24, and 26, all of which involve service of process on the defendants, as well as this court's related order to show cause why service has not timely been accomplished on four of the defendants, ECF No. 15.

I. Applicable Legal Standard

Pursuant to *Section 1404(a)*, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought[.]" *28 U.S.C.A. §*

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[1] Pursuant to *28 U.S.C. § 636(b)(1)(A)*, a magistrate judge may, upon referral of a district judge, "grant non-dispositive motions that do not implicate the federal court's jurisdiction to hear a case." *Salzman v. Travelers Home & Marine Ins. Co., 16-CV-04008 (GBD)(SN), 2016 U.S. Dist. LEXIS 94701, 2016 WL 3951206, at *1 (S.D.N.Y. July 20, 2016)*. If, however, a motion is dispositive, a magistrate judge may only recommend its disposition. *See, e.g., Agincourt Gaming LLC v. Zynga Inc., Civil Action No. 11-720-RGA, 2013 U.S. Dist. LEXIS 105602, 2013 WL 3936508, at *2 (D. Del. July 29, 2013)*. Courts are split as to whether a motion to transfer venue pursuant to *28 U.S.C. 1404(a)* is dispositive or non-dispositive. *Compare, e.g., id.* (concluding that "a motion to transfer is not the functional equivalent of an order of dismissal" and, thus, "not a dispositive motion for purposes of *§ 636(b)(1)*" (internal quotation marks omitted)) *with Payton v. Saginaw Cty. Jail, 743 F. Supp. 2d 691, 693 (E.D. Mich. 2010)* (concluding that the grant of a motion to transfer is dispositive because it "is the functional equivalent of a dismissal of the case — albeit without prejudice — in that forum"). Insofar as appears, the First Circuit has not directly addressed the point. *But see Subsalve USA Corp. v. Watson Mfg., Inc., 462 F.3d 41, 47-48 (1st Cir. 2006)* (holding that an order effecting the transfer of an action pursuant to *28 U.S.C. § 1631* was not immediately reviewable as a final decision of the district court because it did "not terminate the litigation on the merits but, rather, ensure[d] its continuation in a different forum" (footnote omitted)). In an abundance of caution, I have treated the instant motion as dispositive.

[2] Those seven defendants are Lerøy Seafood USA Inc., Ocean Quality USA, Inc., Ocean Quality Premium Brands, Inc., Grieg Seafood BC Ltd., Marine Harvest USA, LLC (now known as Mowi USA, LLC), Marine Harvest Canada, Inc. (now known as Mowi Canada West, Inc.), and Ducktrap River of Maine LLC (an assumed name of Mowi Ducktrap, LLC). *See* Motion to Transfer at Page ID # 246; Joinder Motion at 1. The plaintiff sued 15 defendants, *see* Class Action Complaint, Jury Trial Demanded ("*Prime Steakhouse* Complaint") (ECF No. 1) ¶ 1, one of which, Bremnes Seashore AS, it voluntarily dismissed without prejudice, *see* ECF No. 19. Five Norwegian defendants, Mowi ASA, Grieg Seafood ASA, Ocean Quality AS, SalMar ASA, and Lerøy Seafood Group ASA, are the subject of a pending motion by the plaintiff for approval of a plan for alternative service, *see* ECF No. 14, and the remaining two defendants, Ocean Quality North America Inc. and Scottish Sea Farms Ltd. (along with defendants Marine Harvest Canada, Inc. and Grieg Seafood BC, Ltd.) are the subject of an order that the plaintiff show cause why service was not timely accomplished upon them, *see* ECF No. 15. Counsel for Scottish Sea Farms Ltd., entered a notice of appearance on December 23, 2019, *see* ECF No. 50, and I have granted Scottish Sea Farms Ltd.'s motion to extend its time to answer the complaint to April 27, 2020, *see* ECF Nos. 52, 54, the same deadline by which the seven defendants seeking transfer must answer the complaint, *see* ECF Nos. 42, 49, 54.

1404(a). The district court, hence, has "discretion . . . to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness." Bath Iron Works Corp. v. Congoleum Corp., Docket no. 2:18-cv-00405-GZS, 2019 U.S. Dist. LEXIS 80878, 2019 WL 2110499, at *1 (D. Me. May 14, 2019) (citations and internal **[*4]** quotation marks omitted). In so doing, courts examine both public and private factors. *See, e.g.,* Johnson v. VCG Holding Corp., 767 F. Supp. 2d 208, 212 (D. Me. 2011). "Public factors encompass the statutory consideration of the interest of justice, focus on judicial economy and often include the district court's familiarity with the governing law, the local interest in deciding local controversies at home, and the relative congestion of the courts." *Id.* (citation and internal quotation marks omitted). "Private factors include the statutory considerations of convenience of the parties and witnesses, . . . plaintiffs['] forum preference, where the claim arose, and the relative ease of access to sources of proof." *Id.* (citation and internal quotation marks omitted). Courts also consider "the possibility of consolidation" and "the order in which the district court obtained jurisdiction[,]" Bath Iron Works, 2019 U.S. Dist. LEXIS 80878, 2019 WL 2110499, at *1 (citation and internal quotation marks omitted), implicating the degree to which transfer would serve public interests.

The moving party bears the burden of establishing that an action should be transferred, and "there is a strong presumption in favor of the plaintiff's choice of forum." Enercon v. Flextronics Int'l USA Inc., Docket no. 2:18-cv-00258-GZS, 2018 U.S. Dist. LEXIS 214801, 2018 WL 6729774, at *2 (D. Me. Dec. 21, 2018) (citation and **[*5]** internal quotation marks omitted). However, that presumption is overcome when, for example, the district chosen by the plaintiff is not the plaintiff's home forum, *see, e.g.,* Ahmed v. Mohammad, Civil No. 08-257-P-H, 2008 U.S. Dist. LEXIS 80132, 2008 WL 4457866, at *1 (D. Me. Oct. 1, 2008), or the plaintiff brings suit on behalf of itself and a "nationwide class," Johnson, 767 F. Supp. 2d at 213 (citations omitted).

II. Background

The order in which substantially similar lawsuits have been filed, either as "direct purchaser" suits, filed by and on behalf of direct purchasers of salmon, or "indirect purchaser" suits, filed by and on behalf of indirect purchasers of salmon, is as follows.

A. Direct Purchaser Suits

On April 23, 2019, Euclid Fish Company ("Euclid Fish"), on behalf of itself and all others similarly situated, filed a putative class action suit in the Southern District of Florida against the same 15 defendants named in the instant suit, alleging that they had engaged in the

> unlawful coordination of the prices charged to direct purchasers of farm-raised salmon and salmon products derived therefrom (such as salmon fillets or smoked salmon) which were sold directly by Defendants . . . between July 1, 2015 and the present in violation of Sections 1 and 3 of the Sherman Act (15 U.S.C. §§ 1, 3).

Class Action Complaint **[*6]** and Demand for Jury Trial ("*Euclid Fish* Complaint") (ECF No. 1), *Euclid Fish Co. v. Mowi ASA*, No. 1:19-cv-21551-CMA (S.D. Fla., filed Apr. 23, 2019), ¶ 1.[3]

On April 29, 2019, Schneider's Fish and Sea Food Corp. ("Schneider's Fish"), on behalf of itself and all others similarly situated, filed a nearly identical putative class action complaint in the Southern District of Florida, alleging that the same 15 defendants had engaged in unlawful coordination of prices charged to direct purchasers of salmon

[3] The *Euclid Fish* Complaint describes 10 of the defendants as foreign companies headquartered abroad and the remaining four as domestic companies with their respective principal places of business in Florida, Maine, Texas, and North Carolina. *Euclid Fish* Complaint ¶¶ 10-26.

and salmon products. Class Action Complaint and Demand for Jury Trial (ECF No. 1), *Schneider's Fish & Sea Food Corp. v. Mowi ASA*, No. 1:19-cv-21652-CMS (S.D. Fla., filed Apr. 29, 2019).[4]

By order dated May 10, 2019, the Southern District of Florida consolidated the *Euclid Fish* and *Schneider's Fish* actions into *In re: Farm-Raised Salmon and Salmon Products Litigation* ("*Farm-Raised Salmon*"). Order (ECF No. 27), *Euclid Fish* (S.D. Fla. May 10, 2019); *see also* Order of Recusal (ECF No. 4), *Euclid Fish* (S.D. Fla. Apr. 25, 2019) (assigning the case to Judge Cecilia M. Altonaga).

B. Indirect Purchaser Suits

On April 25, 2019, Bagels & Baguettes, on behalf **[*7]** of itself and all others similarly situated, filed a putative class action complaint in the Southern District of Florida against the same 15 defendants named in the instant suit, alleging that they had engaged in the

> unlawful coordination of the price of farm-raised salmon and salmon products derived therefrom which were sold by [the defendants] . . . between July 1, 2015 and the present in violation of federal ***antitrust law*** and various state antitrust and unfair competition, consumer protection and unfair trade practices, and unjust enrichment laws.

Class Action Complaint, Jury Trial Demanded ("*Bagels & Baguettes* Complaint") (ECF No. 1), *Bagels & Baguettes v. Mowi ASA*, No. 1:19-cv-21579-CMA (S.D. Fla., filed Apr. 25, 2019), ¶ 1. Bagels & Baguettes requested that the court certify a nationwide class of those "that purchased farm-raised salmon and/or products derived therefrom . . . other than directly from Defendants . . . from July 1, 2015 to the present[,]" *id.* ¶ 77 — in other words, a class of indirect purchasers.

On the same day, Bagels & Baguettes' counsel, including Samuel J. Dubbin and Daniel Cohen, also filed a notice that "an action alleging antitrust violations related to those **[*8]** found in the instant action is currently pending before the Honorable Cecilia Maria Altonaga: *Euclid Fish Company v. Mowi ASA, et al.*, No. 1:19-cv-21551-CMA." Notice of Pending, Refiled, Related, or Similar Actions (ECF No. 4), *Bagels & Baguettes* (S.D. Fla., filed Apr. 25, 2019). On May 1, 2019, the *Bagels & Baguettes* action was transferred by Judge James Lawrence King to Judge Altonaga. Order of Transfer (ECF No. 5), *Bagels & Baguettes* (S.D. Fla. May 1, 2019). The following day, Judge Altonaga directed that the parties in both *Farm-Raised Salmon* and *Bagels & Baguettes* "be prepared to discuss consolidation and case management issues." Order (ECF No. 6), *Bagels & Baguettes* (S.D. Fla. May 2, 2019). On May 3, 2019, Bagels & Baguettes, by and through its counsel, including Attorneys Dubbin and Cohen, voluntarily dismissed its action without prejudice. Notice of Voluntary Dismissal Without Prejudice (ECF No. 7), *Bagels & Baguettes* (S.D. Fla., filed May 3, 2019).

On May 9, 2019, Prime Steakhouse, located in Falconer, New York, filed the instant action, which appears identical in all material respects to *Bagels & Baguettes. Compare Bagels & Baguettes* Complaint *with Prime Steakhouse* Complaint. **[*9]** Attorney Cohen is among the signatories to the instant complaint. *Prime Steakhouse* Complaint at Page ID # 76. In this case, as in *Bagels & Baguettes*, the plaintiff requests that the court certify a nationwide class of indirect purchasers of farm-raised salmon and/or products derived therefrom. *Id.* ¶ 77.

On May 24, 2019, Wood Mountain Fish LLC ("Wood Mountain") filed a putative class action complaint in the Southern District of Florida against the same 15 defendants named in the instant suit, seeking redress on behalf of itself and 32 proposed classes of plaintiffs grouped by state, territory, or the District of Columbia, "who indirectly purchased Farm-raised salmon and/or products derived therefrom produced by any Defendant . . . during the Class Period." Class Action Complaint and Demand for Jury Trial ("*Wood Mountain* Complaint") (ECF No. 1), *Wood Mountain Fish LLC v. Mowi ASA*, No. 1:19-cv-22128-RS (S.D. Fla., filed May 24, 2019), ¶ 75; *see also id.* ¶ 1

[4] Through joint stipulation, Joint Stipulation for Substitution of Named Defendant Lerøy Seafood Group ASA (ECF No. 178), *Farm-Raised Salmon* (S.D. Fla., filed Nov. 26, 2019), Lerøy Seafood AS has been substituted for Lerøy Seafood Group ASS, and Lerøy Seafood Group ASA has been voluntarily dismissed, Order (ECF No. 184), *Euclid Fish* (S.D. Fla. Jan. 3, 2020).

(alleging that, between July 1, 2015, and the present, the defendants violated "the antitrust and consumer protection laws of each state recognizing a right of action for indirect purchasers harmed by anticompetitive conduct" and also **[*10]** seeking relief pursuant to the Clayton and Sherman acts).[5] The case was assigned initially to Judge Ursula Ungaro and then reassigned to Judge Rodney Smith. ECF Nos. 2, 22, *Wood Mountain* (S.D. Fla., dated May 24, 2019, and June 20, 2019, respectively).

On May 30, 2019, Wood Mountain filed a motion to transfer and coordinate its action with *Farm-Raised Salmon, see* Notice of Pending, Refiled, Related, or Similar Actions and Motion to Transfer and Coordinate with Related Consolidated Actions (ECF No. 8), *Wood Mountain* (S.D. Fla., filed May 30, 2019). However, Judge Ungaro denied the motion without prejudice on the basis that, whereas *Wood Mountain* was an indirect purchaser suit, *Farm-Raised Salmon* was a direct purchaser suit, "[a]nd Judge Altonaga has not indicated a willingness to accept the transfer." Order (ECF No. 14), *Wood Mountain* (S.D. Fla. June 4, 2019). Since then, the court has appointed an interim class counsel for the proposed indirect purchaser class, approved a plan for alternative service on the Norwegian defendants, and issued an order coordinating the timing of an amended complaint in that case with a ruling on *Rule 12(b)* motions in *Farm-Raised Salmon*. ECF Nos. 24, 45, **[*11]** 75, *Wood Mountain* (S.D. Fla., dated June 20, 2019, July 11, 2019, and July 26, 2019, respectively).

Finally, as the plaintiff noted in its response to the instant motion to transfer, *see* Response at 1, on October 1, 2019, Hunt-Alpine Club LLC ("Hunt-Alpine"), a restaurant in Portland, Maine, filed a putative class action suit in this court against 14 of the same defendants (all but Bremnes Seashore AS) that is substantially similar to both *Bagels & Baguettes* and the instant suit, *compare generally* Class Action Complaint, Jury Trial Demanded (ECF No. 1) ("*Hunt-Alpine* Complaint"), *Portland Hunt-Alpine Club LLC v. Mowi ASA*, No. 2:19-cv-00446-JAW (D. Me., filed Oct. 1, 2019) *with Bagels & Baguettes* Complaint; *Prime Steakhouse* Complaint. Attorneys Dubbin and Cohen are among the signatories to the *Hunt-Alpine* complaint. *Hunt-Alpine* Complaint at Page ID # 110.

III. Discussion

The defendants seek to transfer this case to the Southern District of Florida, emphasizing that (i) an action identical to this one was filed and then voluntarily dismissed after Judge Altonaga was assigned to the case, and (ii) two putative nationwide class action lawsuits remain pending in the Southern District of Florida **[*12]** that are predicated on the same core facts as the instant action and seek similar relief. *See* Motion to Transfer at 2-4. For the reasons that follow, after consideration of the relevant factors, I agree that transfer is warranted in this case.

A. Right to Bring Action in Transferee Forum

The parties do not dispute that the plaintiff could have filed this case in the Southern District of Florida, where defendant Marine Harvest USA, LLC, is incorporated and has its primary place of business. *See* Motion to Transfer at 9-10; Response at 3 n.3; *see also Prime Steakhouse* Complaint ¶ 14; *28 U.S.C. § 1332(c)(1)* ("a corporation shall be deemed to be a citizen of every State . . . by which it has been incorporated and of the State . . . where it has its principal place of business"). The defendants, thus, satisfy the threshold requirement of *Section 1404(a)* that the transferee forum be one in which the plaintiff had the right to bring the action at issue.

B. Interests to be Weighed

1. Public Factors

[5] Wood Mountain voluntarily dismissed without prejudice Bremnes Seashore AS as a defendant in the lawsuit. Notice of Voluntary Dismissal of Defendant Bremnes Seashore (ECF No. 85), *Wood Mountain* (S.D. Fla., filed Aug. 20, 2019).

As the defendants persuasively argue, *see* Motion to Transfer at 7-9, analysis of the public interests at stake favors the grant of their motion, in particular, the order in which this court obtained jurisdiction and the possibility of consolidation **[*13]** in the Southern District of Florida.

There is no dispute that two direct purchaser salmon price-fixing suits, *Euclid Fish* and *Schneider's Fish* (later consolidated as *Farm-Raised Salmon)*, as well as one indirect purchaser suit, *Bagels & Baguettes*, were filed in the Southern District of Florida more than a week prior to the filing of the instant suit. The plaintiff, nonetheless, contends that because Bagels & Baguettes voluntarily dismissed its suit without prejudice, and the instant action was the filed prior to *Wood Mountain*, the instant action is the first-filed indirect purchaser suit. *See* Response at 2, 6-7. Yet, in the totality of the circumstances, as the defendants rejoin, "[t]reating the complaint here as the first filed would magnify the exact risks the [first-filed] rule is designed to avoid: wasted resources because of piecemeal litigation, the possibility of conflicting judgments, and a general concern that the courts may unduly interfere with each other's affairs." Defendant's Reply in Support of their Motion to Transfer Venue Under 28 U.S.C. § 1404(a) ("Reply") (ECF No. 40) at 4 (citation and internal quotation marks omitted).

That both *Farm Raised Salmon*, an earlier filed direct purchaser **[*14]** suit, and *Wood Mountain*, a later filed indirect purchaser suit, remain pending in the Southern District of Florida is of significance here. While Bagels & Baguettes voluntarily dismissed its suit, "concurrent federal cases need not be exactly the same to generate a preference for the first-filed action." Bath Iron Works, 2019 U.S. Dist. LEXIS 80878, 2019 WL 2110499, at *3. Instead, analysis focuses on whether permitting concurrent cases to continue "raises concerns about the ills of duplicative litigation." *Id.* (citation and quotation marks omitted).

Such concerns were present in *Bath Iron Works*, in which this court discerned "significant overlap between th[e] case[s]" in this forum and the transferee forum when "both actions require[d] the deciding court to interpret" the same merger agreement, "in the context of the same set of historical corporate transactions, to determine which party [was] liable for the effects of resilient flooring operations conducted on the [same] parcel[.]" *Id.* (footnote omitted). The court determined that, were those cases "to proceed separately, the parties and courts would have to waste resources resolving the same contract issues in two different forums." *Id.* (citations and internal quotation marks omitted). It added that, **[*15]** "because the contract claims in the two actions [we]re so factually intertwined, they raise[d] the specter of conflicting judgments." *Id.* (citations and internal quotation marks omitted).

The same is true here. There is a significant overlap not only between *Bagels & Baguettes* and this suit, but also between *Farm-Raised Salmon* and this suit. Both this suit and *Farm-Raised Salmon* require the resolution of the same underlying factual issue: whether the defendants coordinated the price of farm-raised salmon. Absent a transfer, the "ills of duplicative litigation[,]" *id.* (citation and internal quotation marks omitted), including the waste of resources and the risk of conflicting judgments, would be present.

The plaintiff, nevertheless, contends that this action differs from those in the Southern District of Florida in important ways. *See* Response at 2, 7-8. First, the plaintiff argues that this case is unlikely to be consolidated with *Farm-Raised Salmon*, Judge Altonaga having been unwilling to consolidate an indirect purchaser suit, *Wood Mountain*, with a direct purchaser suit, *Farm-Raised Salmon. See id.* at 2.

Yet, even assuming this suit would not be consolidated with *Farm-Raised Salmon*, I perceive **[*16]** no reason why it could not be consolidated with *Wood Mountain*. Even the mere "possibility of consolidation" must be considered "when adjudicating a venue-transfer request in similar or related cases." Cruz-Acevedo v. Unilever U.S., Inc., Civil No. 15-2175 (ADC), 2016 U.S. Dist. LEXIS 192912, 2016 WL 9460633, at *6 (D.P.R. Sept. 26, 2016) (observing that "the Court can and should consider consolidation in its decision to transfer even though the transferee forum would be the one deciding whether to consolidate the cases") (citation and internal quotation marks omitted); *see also, e.g.,* Bath Iron Works, 2019 U.S. Dist. LEXIS 80878, 2019 WL 2110499, at *3 (transferring case in part because the court "discern[ed] no reason why the claims in this case could not be consolidated" with pending claim in transferee district).

Second, the plaintiff argues that it "seeks to certify a class that appears to be significantly narrower in scope than the putative class set forth in the Wood Mountain complaint." Response at 7. The plaintiff contends that combining this case with *Wood Mountain*, in which lead counsel already has been appointed for a class that seems to subsume the class the plaintiff seeks to represent, jeopardizes its bid for class certification because "a narrower class has a better chance of being certified than does a much broader one." *Id.* Finally, it complains that, if this action is **[*17]** consolidated with *Wood Mountain*, it will become part of a case led by a fundamentally different type of class representative — a wholesaler of farm-raised salmon whose damages claim may differ meaningfully from that of a restaurant selling farm-raised salmon such as itself. *See id.* at 7-8.

The plaintiff cites no authority for the proposition that such class certification issues weigh against a transfer. On the contrary, the pendency of both direct and indirect purchaser suits in one court seemingly would facilitate the resolution of such class certification issues. *See, e.g.*, 7B Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure* § 1798.1, at 231-32 (3d ed. 2005) (noting the "complicated problems of judicial coordination" posed by "competing and duplicative" class actions; observing that a "single nationwide class action seems to be the best means of achieving judicial economy" and ensuring fairness).

At bottom, despite the differences between this case and *Farm-Raised Salmon*, the possibility of the consolidation of this case with at least one other case pending in the Southern District of Florida, *Wood Mountain*, conserving judicial resources and eliminating the risk **[*18]** of conflicting judgments, weighs in favor of the transfer of this case to the Southern District of Florida. That is particularly true given that, in contrast to *Wood Mountain*, in which the District of Florida has appointed interim class counsel for the proposed indirect purchaser class, approved a plan for alternative service on the Norwegian defendants, and issued an order coordinating the timing of an amended complaint with *Rule 12(b)* practice in *Farm-Raised Salmon*, this case remains in its infancy. As noted above, the deadline for eight defendants to answer the complaint has been extended to April 27, 2020, the plaintiff's motion to serve five Norwegian defendants by alternate means is pending, the remaining defendant, along with three others, is the subject of a pending order that the plaintiff show cause for failure to effectuate timely service of the complaint, and no scheduling order has issued.

The relatively minimal effort expended by this court and the parties in this case, combined with the Southern District of Florida's greater familiarity with the parties, facts, and claims, supports transfer of this case to the Southern District of Florida. *See, e.g., Summers-Wood L.P. v. Wolf, No. 3:08-cv-60/RV/MD, 2008 U.S. Dist. LEXIS 108827, 2008 WL 2229529, at *4 (N.D. Fla. May 23, 2008)* **[*19]** (concluding that transfer was in the interests of justice when case was still in its infancy, and the parties had not even begun discovery); *see also, e.g., Kukich v. Electrolux Home Prods., Inc., Civil Action No. ELH-16-3412, 2017 U.S. Dist. LEXIS 9806, 2017 WL 345856, at *10 (D. Md. Jan. 24, 2017)* ("When a similar case is already pending in another district, transfer of related claims is favored because it may facilitate efficient pretrial proceedings and discovery and also because it avoids inconsistent results. Moreover, there is judicial economy in having the same judge consider the same underlying facts and issues only once[.]" (citations and internal quotation marks omitted)); *Tovar v. Indiana, Civil No. 2:12-CV-175-DBH, 2012 U.S. Dist. LEXIS 112103, 2012 WL 3263948, at *1-2 (D. Me. Aug. 9, 2012)* (transferring case to transferee court that was "familiar with the underlying dispute").

2. Private Factors

a. Presumption in Favor of Plaintiff's Choice of Forum

The defendants argue that, in this case, the strong presumption in favor of a plaintiff's choice of forum is overcome by (i) the plaintiff's "transparent forum shopping," (ii) its status as a New York entity with no alleged relationship to Maine, and (iii) the fact that it brings claims on behalf of a proposed nationwide class, rendering **[*20]** its choice of forum even less relevant. *See* Motion to Transfer at 10. The plaintiff rejoins that this showing fails to carry the defendants' burden of overcoming the strong presumption in favor of its choice of this forum. *See* Response at 4-5. It adds that, in any event, several factors militate in its favor: that (i) there are no clear indicia that it engaged in forum shopping, (ii) it has sued one Maine defendant, Mowi Ducktrap, LLC, and (iii) another Maine plaintiff, Hunt-Alpine, has filed a substantially similar indirect purchaser suit in this forum. *See id.*

The defendants have the better argument. The plaintiff's decision to file in Maine indeed appears to have been a tactical one. However, even apart from whether its choice of this forum was the product of "forum shopping," its lack of relationship with Maine, and the fact that it purports to act on behalf of a nationwide class, in themselves undermine the strong presumption in favor of preserving its choice of this forum. *See, e.g.,* *Ahmed, 2008 U.S. Dist. LEXIS 80132, 2008 WL 4457866, at *1* (presumption overcome when forum was not plaintiff's home forum); *Johnson, 767 F. Supp. 2d at 213* (presumption overcome when plaintiff brought suit on behalf of itself and a nationwide class). That a Maine plaintiff subsequently **[*21]** chose to bring a nearly identical suit in this forum has no bearing on whether the defendants have overcome the presumption in favor of this plaintiff's choice of forum.

b. Convenience of Parties and Witnesses

Examination of the convenience of the parties and witnesses supports transfer as well. The plaintiff does not argue that the Southern District of Florida is inconvenient, instead proposing to coordinate the instant action in Maine with the related actions in Florida:

> **Convenience of parties and witnesses:** Counsel for Prime Steakhouse has worked together with counsel for Wood Mountain and counsel for the plaintiff in the direct purchaser action, Euclid Fish Company, in *In re Packaged Seafood Products Antitrust Litig.*, Case No. 15-2670,[6] in which the law firms are lead counsel for different classes. Prime Steakhouse's counsel is willing to coordinate discovery in the pending lawsuits relating to farm-raised salmon price-fixing, so transfer of the Prime Steakhouse action is not required in order to avoid duplicative depositions and discovery. Defendants assert that transferring the Prime Steakhouse to Judge Smith will avoid "any possibility of repeat proceedings." (ECF No. 29 at 9). **[*22]** However, this would only be true of the indirect purchaser actions. The indirect and direct purchaser actions in the Southern District of Florida have not proceeded on the same schedule thus far.

Response at 7. The plaintiff's counsel's offer to coordinate discovery in the related actions does not allay concerns regarding the "ills of duplicative litigation." *Bath Iron Works, 2019 U.S. Dist. LEXIS 80878, 2019 WL 2110499, at *3* (citation and internal quotation marks omitted). First, coordinated discovery does not address the risk of conflicting judgments. Second, engaging in cross-jurisdictional coordinated discovery could itself lead to complication and inconvenience. Third, in making the above proposal, the plaintiff acknowledges that some form of consolidated discovery is necessary to avoid duplicative and repeat proceedings. This factor, accordingly, weighs in favor of transfer.

c. Availability of Documents

Turning, finally, to the availability of documents and other evidence, the parties agree that this factor is not determinative. *See* Response at 6; Reply at 6; *see also, e.g.,* *Johnson, 767 F. Supp. 2d at 216* ("This factor seems like a holdover from a time when businesses kept important records . . . in paper and **[*23]** the difficulty of physically assessing the paper documents and the burden of transporting them across jurisdictions could be onerous.").

In sum, consideration of the totality of the relevant circumstances, including the order in which the actions were filed, the similarity of the instant case to those pending in the Southern District of Florida, that court's familiarity with those cases, the plaintiff's lack of connection to this forum, and the plaintiff's weak showing of prejudice and lack of any showing of inconvenience arising from the transfer, weigh in favor of granting the defendants' motion to transfer this case to the Southern District of Florida.

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[6] I presume that in referring to "*In re Packaged Seafood Products Antitrust Litig.*, Case No. 15-2670," the plaintiff meant to refer to *Farm-Raised Salmon*.

C. Judicial Panel on Multidistrict Litigation ("JPML")

The plaintiff seeks the denial of the Motion to Transfer or, in the alternative, a stay pending the resolution of any MDL petition the defendants might wish to file with the Judicial Panel on Multidistrict Litigation ("JPML") pursuant to *28 U.S.C. § 1407*. *See* Response at 9-10. The plaintiff argues that such a petition is the only way in which to address the defendants' concerns regarding "the multi-forum nature of the present litigation, which will not be eliminated by transfer of the [instant] **[*24]** action under *§ 1404*." *Id.* at 9. The plaintiff adds that transfer pursuant to the MDL statute would allow it to maintain its choice of trial forum, providing for a right of transfer back to the originating court in the event of trial. *See id.* at 9-10.

Nonetheless, as the defendants correctly note, "[t]he JPML has cautioned that the MDL procedure 'should be the last solution after considered review of all other options.'" Reply at 7 (quoting *In re: Best Buy Co., Inc., Cal. Song-Beverly Credit Card Act Litig., 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011))*; *see also* *In re: Best Buy, 804 F. Supp. 3d at 1379* (denying motions for consolidation pursuant to *Section 1407* when "the proponents of centralization ha[d] not met their burden of demonstrating the need for centralization, particularly given the availability of *Section 1404*"); *In re: Michaels Stores, Inc., Pin Pad Litig., 844 F. Supp. 2d 1368, 1368-69 (J.P.M.L. 2012)* (same).

That the plaintiff prefers an MDL approach does not diminish the strength of the defendants' argument that transfer is appropriate pursuant to *Section 1404(a)*.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion to transfer this action to the United States District Court for the Southern District of Florida be **GRANTED**, the plaintiff's motion for a stay pending the resolution of any MDL petition be **DENIED**, and the three remaining motions pending in this case, ECF Nos. 14, 24, and 26, as well as this court's related order to show cause why service **[*25]** has not timely been accomplished on four of the defendants, ECF No. 15, be **DEEMED MOOT**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within fourteen (14) days after being served with a copy thereof. A responsive memorandum shall be filed within fourteen (14) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 23rd day of January, 2020.

/s/ John H. Rich III

John H. Rich III

United States Magistrate Judge

FTC v. Rag-Stiftung

United States District Court for the District of Columbia

January 24, 2020, Decided; February 3, 2020, Filed

Civil Action No. 19-2337 (TJK)

Reporter

436 F. Supp. 3d 278 *; 2020 U.S. Dist. LEXIS 18346 **; 2020-1 Trade Cas. (CCH) P81,075; 2020 WL 532980

FEDERAL TRADE COMMISSION, Plaintiff, v. RAG-STIFTUNG et al., Defendants.

Core Terms

hydrogen peroxide, grade, suppliers, merger, customers, plant, swinging, geographic, pre-electronics, specialty, products, prices, coordination, bidding, markets, effects, relevant market, divestiture, substitution, concentration, competitors, preliminary injunction, anticompetitive, prima facie case, proposed merger, formulations, constrain, compete, vulnerability, chemical

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Opinion by: TIMOTHY J. KELLY

Opinion

[*286] **MEMORANDUM OPINION**

Hydrogen peroxide (H_2O_2) is a veritable swiss army knife of chemicals. Often an environmentally friendly alternative to other substances, it bleaches paper, treats wastewater, disinfects knee scrapes, fuels rockets, and plays **[**5]** a role in manufacturing semiconductors, to name a few of its myriad applications. In November 2018, two of the five North American suppliers of hydrogen peroxide, Evonik and PeroxyChem, announced a proposed $625 million merger, and not long after, the Federal Trade Commission (FTC) launched an investigation into the potential anticompetitive effect of the merger. After a nine-month investigation, the FTC filed both an administrative complaint and this preliminary injunction action under *Section 13(b)* **[*287]** of the Federal Trade Commission Act, *15 U.S.C. § 53(b)*, and *Section 7* of the Clayton Act, *15 U.S.C. § 18*. The Court held a two-week evidentiary hearing in November 2019, during which it heard from twenty fact witnesses and two experts and received hundreds of exhibits.

The FTC seeks a preliminary injunction barring Evonik's acquisition of PeroxyChem, and it has the burden of showing that it is likely the proposed merger will substantially lessen competition in a relevant market. But the FTC made an important misstep. Rather than recognizing how hydrogen peroxide suppliers compete for customers served by its countless end uses—accounting for products' variations in purity, concentration, stabilizer chemicals, profitability, and even regulatory **[**6]** approval—the FTC pleaded and argued for a single market for all "non-electronics" hydrogen peroxide. And because evaluating a merger's competitive effects on a market requires the FTC to properly define a market in terms of both product and geography, that oversimplification all but precludes the Court from siding with it. For the reasons explained below, the Court concludes that the FTC has not made out its prima facie case, which requires it to show undue concentration for a particular product in a particular geographic area, and it has not otherwise shown a likelihood that the proposed Evonik-PeroxyChem merger will substantially harm competition. The Court must therefore deny the FTC's motion for a preliminary injunction, ECF No. 3.[1]

I. Background

A. Hydrogen Peroxide Suppliers

There are five suppliers of hydrogen peroxide in North America: Evonik, PeroxyChem, Solvay, Arkema, and Nouryon. DPFFCL at 13 ¶ 34. Evonik is an international chemical company based in Germany and controlled by Defendant RAG-Stiftung. *Id.* at 5 ¶ 3. Evonik produces hydrogen peroxide at three North American plants located in Mobile, Alabama; Gibbons, Alberta; and Maitland, Ontario. PPFFCL at 1 ¶ 1. Evonik seeks to acquire PeroxyChem, a Philadelphia-based international manufacturer of hydrogen peroxide, persulfates, and peracetic **[**7]** acid. DPFFCL at 5 ¶ 5. PeroxyChem produces hydrogen peroxide at two North American plants in Bayport, Texas, and Prince George, British Columbia. PPFFCL at 1-2 ¶ 2. Solvay has one plant in Deer Park, Texas—fewer than ten miles from PeroxyChem's Bayport plant—and one plant in Longview, Washington; Arkema has one plant in Memphis, Tennessee, and one in Becancour, Quebec; and Nouryon has a plant in Columbus, Mississippi. DPFFCL at 13-14 ¶ 35.

B. The Manufacture of Hydrogen Peroxide Products

To manufacture hydrogen peroxide, suppliers move a working solution through a hydrogenation, oxidation, and extraction process, continuously and nearly 365 days a year. PPFFCL at 4 ¶ 12; DPFFCL at 8 ¶ 16. The process produces "crude" hydrogen peroxide. PPFFCL at 4 ¶ 12. Suppliers stabilize the crude with **[*288]** chemical additives to prevent the product from decomposing and concentrate or distill it to produce a marketable product

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[1] The documents submitted to the Court in this matter include: Complaint, ECF No. 1 ("Compl."); Plaintiff's Memorandum in Support of Motion for Preliminary Injunction, ECF No. 45-1 ("Br."); Defendants' Opposition to Plaintiff's Memorandum, ECF No. 56-1 ("Opp."); Plaintiff's Proposed Findings of Fact and Conclusions of Law, ECF No. 137-1 ("PPFFCL"); Defendants' Proposed Findings of Fact and Conclusions of Law, ECF No. 138-1 ("DPFFCL"). The Court hereby incorporates the FTC's Glossary of Hearing Witnesses, Deponents, and Declarants, PPFFCL at x-xi.

known as "standard grade" hydrogen peroxide, which is the lowest purity sold. *Id.*; DPFFCL at 9 ¶¶ 18-20. Suppliers formulate standard grade hydrogen peroxide at different concentration levels and add stabilizers to serve a variety of end uses, like bleaching pulp and paper (the largest hydrogen peroxide end use) and textiles; it is also used in wastewater treatment and in the mining and oil and gas industries. PPFFCL at 4 ¶ 13; Dumas Hrg. Tr. 235:1-3; **[**8]** Suter Hrg. Tr. 408:8-14; Costanzo Hrg. Tr. 1223:6-13; Montag Hrg. Tr. 1566:5-1567:2, 1600:23-1601:3. Stabilizer packages are proprietary, and a stabilizer like tin that works well for some applications does not for others. DPFFCL at 7-8 ¶ 13; Corson Hrg. Tr. 666:6-667:16; DX0348; PX1522-001 to -002; PX1055-001.

Suppliers can also purify standard grade to make "specialty grade" hydrogen peroxide. PPFFCL at 9 ¶ 27; DPFFCL at 9-10 ¶¶ 21-22. This higher grade or purity level also serves a variety of end uses. For example, in the chemical synthesis space, manufacturers use specialty grade hydrogen peroxide to make sodium chlorite, organic peroxides, and epoxidized soybean oil; in the home and personal care space, specialty grade is used in products for hair and teeth bleaching and in contact lens solutions; and in the food packaging space, manufacturers use it as a disinfectant for aseptic packaging. DPFFCL at 6-7 ¶ 11. These specialty grade applications not only require specific concentrations and stabilizers, but many of them also require FDA or EPA approval before purchasers can put them toward their intended uses. *See* DPFFCL at 8 ¶ 14.

A few suppliers further purify specialty grade to produce "pre-electronics grade" hydrogen peroxide. DPFFCL at 11 ¶ 27. Only **[**9]** Evonik and Arkema sell pre-electronics grade. *Id.* Manufacturing this grade of hydrogen peroxide, a product for which suppliers measure impurities in "parts per billion," Hamann Hrg. Tr. 1281:13, requires additional equipment, including a second reverse osmosis unit, more testing (several times a day), specially trained personnel, a specially equipped room and laboratory, and [TEXT REDACTED BY THE COURT]. Hamann Hrg. Tr. 1282:3-1286:16. PeroxyChem and Solvay produce a purified hydrogen peroxide "feedstock" that is a precursor to their production of *electronics* grade hydrogen peroxide, but the feedstock is not marketed to customers as pre-electronics grade hydrogen peroxide. Montag Hrg. Tr. 1528:1-5; Kramer Hrg. Tr. 1635:19-1636:7; Suter Hrg. Tr. 412:11-17. Over the years, [TEXT REDACTED BY THE COURT] Hancock Decl. ¶¶ 22-23, JX0001-004; Montag Hrg. Tr. 1531:23-1532:1; Suter Hrg. Tr. 434:24-435:11; Hill Hrg. Tr. 2080:22-23; JX0001-001; PPFFCL at 10-11 ¶¶ 32-33.

Some suppliers have the capability to refine pre-electronics grade even further to make the highest purity "electronics grade" hydrogen peroxide. Electronics grade is sold to semiconductor manufacturers to clean and etch silicon microchips. DPFFCL at 11-13 ¶¶ **[**10]** 27, 33. MGC, PeroxyChem, and Solvay sell electronics grade hydrogen peroxide. *Id.* at 13 ¶ 33.

As an engineering matter, a plant can only commit 40 to 50 percent of its output to specialty grade hydrogen peroxide, and only 60 percent of that specialty grade can be purified into pre-electronics grade, leaving around 36 pounds of pre-electronics grade for every 100 pounds of crude. [TEXT REDACTED BY THE COURT]; JX0151-015. Suppliers can shift production between different grades of hydrogen peroxide at a plant merely by adjusting a valve. Hamann Hrg. Tr. 1322:24-1323:13; *see, e.g.*, Suter Hrg. Tr. 406:6-14 ("We get customer input, we look at historical **[*289]** data, and we operate with basically a 90-day rolling forecast. We can make any grade at any time of the month as long as we're forecasting it properly." (cleaned up)).

C. The Sale of Hydrogen Peroxide Products

Hydrogen peroxide suppliers sell their products by the pound from around 30 cents per pound to over a dollar; standard grade is generally the cheapest (and least profitable), then specialty grade, pre-electronics grade, and electronics grade. DPFFCL at 14 ¶¶ 36-38; JX0066-43 fig. 10; JX0151-022; [TEXT REDACTED BY THE COURT]. The annual capacity of hydrogen **[**11]** peroxide plants ranges from around [TEXT REDACTED BY THE COURT] million pounds (Evonik's Maitland plant) to [TEXT REDACTED BY THE COURT] million pounds (PeroxyChem's Bayport plant). PPFFCL at 26-27 ¶¶ 83-93. A significant component of each product's price is transportation cost because hydrogen peroxide is typically heavily diluted with water when it is delivered via railcars and trucks. DPFFCL at 15 ¶ 40. As a result, the distance between customers and plants is a major factor in competition between suppliers. *Id.* ¶ 41.

Hydrogen peroxide suppliers compete for customers across grades and end uses through blind bidding contests for high-volume, long-term contracts. *Id.* ¶ 42. A customer publishes a request for proposal (RFP) for a given location, specifying the hydrogen peroxide product, volume, and contract length sought; suppliers submit confidential bids; and then the customer usually lets one or more of the bidders know how competitive their bid is (without sharing specific prices) so that they will lower their bid price. *See id.* at 15 ¶¶ 42, 44; *id.* at 66-67 ¶ 173. This process produces substantial cost savings for hydrogen peroxide customers, and prices have generally decreased the last few years in part as a result. *See* DPFFCL at 53-55, 66-67 ¶¶ **[**12]** 143-46, 173; Hill Rpt., JX0066-097 to -099 figs. 44-46.

D. Procedural History

Evonik announced its intent to acquire PeroxyChem for $625 million in November 2018. JX0078-011 to -013. The two firms filed a pre-merger notification with the FTC pursuant to the *Hart-Scott-Rodino Improvements Act, 15 U.S.C. § 18a*. Compl. ¶ 20. The FTC then launched a nine-month investigation, during which Defendants produced millions of pages of documents and the FTC interviewed or deposed more than 50 industry participants. Opp. at 2. The FTC voted on August 2, 2019, to commence an administrative proceeding to challenge the acquisition under *Section 5* of the Federal Trade Commission Act, *15 U.S.C. § 53(b)*, and *Section 7 of the Clayton Act, 15 U.S.C. § 18*, alleging that the proposed merger will substantially lessen competition. Compl. ¶ 9. The FTC also filed the instant action and moved for a preliminary injunction, ECF No. 3, and the parties entered into a stipulated restraining order preventing Defendants from closing the proposed transaction until five business days after the Court rules on the motion, ECF No. 9. The parties have delayed the administrative proceeding pending the Court's decision. Mahr Hrg. Tr. 2438:3-10.

Within days of the FTC moving for a preliminary injunction **[**13]** in this action, Evonik and PeroxyChem agreed on a divestiture of PeroxyChem's plant in Prince George, British Columbia. Share Purchase Agreement, JX0147-017. If the merger closes, a new competitor, international chemical producer United Initiators GMBH (UI), will purchase the plant for [TEXT REDACTED BY THE COURT]. *Id.* The Canadian Competition Bureau investigated the proposed merger with PeroxyChem and the divestiture of the **[*290]** Prince George plant to UI and entered into a Consent Agreement with Evonik that approves both. Consent Agreement (Jan. 13, 2020), ECF No. 141-1 at 1-2, 10, 12-13. The proposed divestiture of the Prince George plant means that the FTC's challenge to Evonik's acquisition of PeroxyChem only concerns its other hydrogen peroxide plant in Bayport, Texas, setting aside Evonik's acquisition of PeroxyChem's unrelated assets for other chemicals. *See* DPFFCL at 6 ¶ 7.

II. Legal Standard

Section 7 of the Clayton Act, *15 U.S.C. § 18*, prohibits mergers "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition . . . may be substantially to lessen competition, or tend to create a monopoly." "*Section 7* involves *probabilities*, not certainties or possibilities," **[**14]** *United States v. Baker Hughes, Inc., 908 F.2d 981, 984, 285 U.S. App. D.C. 222 (D.C. Cir. 1990)*, and a plaintiff must show that the substantial lessening of competition will be "sufficiently probable and imminent." *United States v. Marine Bancorp., 418 U.S. 602, 623 n.22, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974)* (internal quotation omitted); *see* *United States v. Gen. Dynamics Corp., 415 U.S. 486, 505, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1974)*.

If the FTC "has reason to believe that a corporation is violating, or is about to violate, *Section 7 of the Clayton Act*, the FTC may seek a preliminary injunction" from a federal district court under *Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b)*, "to prevent a merger pending the Commissioner's administrative adjudication of the merger's legality." *FTC v. H.J. Heinz Co., 246 F.3d 708, 714, 345 U.S. App. D.C. 364 (D.C. Cir. 2001)* (quoting *FTC v. Staples, Inc., 970 F. Supp. 1066, 1070 (D.D.C. 1997)* (*Staples I*)). *Section 13(b)* provides for a preliminary injunction to block a merger when "such action would be in the public interest," after "weighing the equities and considering the Commission's likelihood of ultimate success." *15 U.S.C. § 53(b)*; *see* *Heinz, 246 F.3d at 726*.

To obtain a preliminary injunction, the FTC "is not required to prove, nor is the court required to find, that the proposed merger would in fact violate *Section 7* of the Clayton Act." *Staples I, 970 F. Supp. at 1070*. That determination is reserved for the FTC through its administrative proceeding. *Id.* However, the FTC must show that there is a "reasonable probability" or "appreciable danger" that the acquisition may substantially lessen competition. *Id. at 1072*; *Heinz, 246 F.3d at 713, 719*. It can do so by raising "questions going to the merits so serious, substantial, difficult **[**15]** and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Heinz, 246 F.3d at 714-15* (internal citation omitted). That burden "is not insubstantial, and a showing of a fair or tenable chance of success on the merits will not suffice for injunctive relief." *FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 116 (D.D.C. 2004)* (cleaned up); *see* *FTC v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27, 44 (D.D.C. 2018)* ("A preliminary injunction in this context remains an extraordinarily drastic remedy, especially since as a result of the short life-span of most tender offers, the issuance of a preliminary injunction blocking an acquisition or merger may prevent the transaction from ever being consummated." (cleaned up)).

To assess the FTC's likelihood of success on the merits, the Court applies the D.C. Circuit's burden-shifting framework set forth in *Baker Hughes, 908 F.2d at 982-83*. *See* *Heinz, 246 F.3d at 715*. **[*291]** First, the FTC bears the prima facie burden of showing that the Evonik-PeroxyChem merger will lead to "undue concentration in the market for a particular product in a particular geographic area." *Baker Hughes, 908 F.2d at 982*; *see* *Arch Coal, 329 F. Supp. 2d at 117*. That showing establishes a presumption that the merger will substantially lessen competition. *Baker Hughes, 908 F.2d at 982*. Defendants can then rebut this presumption by demonstrating that the FTC's prima **[**16]** facie case and market-share statistics inaccurately predict the merger's probable effects in the relevant market. *Id. at 991*. If Defendants' rebuttal is successful, the burden of producing further evidence of anticompetitive effects shifts to the FTC "and merges with the ultimate burden of persuasion which remains with the [FTC] at all times." *Id. at 983*.

In addition to assessing the FTC's prima facie case and any rebuttal evidence, in deciding whether to grant preliminary injunctive relief, the Court must weigh the equities. Because the public's interest in effective enforcement of the antitrust laws is paramount, a "showing of likelihood of success creates a presumption in favor of preliminary injunctive relief." *Heinz, 246 F.3d at 726*. "Conversely, absent a likelihood of success on the merits, equities alone will not justify an injunction." *Arch Coal, 329 F. Supp. 2d at 116*.

The Supreme Court has also stressed that courts must judge "the probable anticompetitive effects of the merger" "functionally" and based on "a further examination of the particular market—its structure, history and probable future." *Gen. Dynamics, 415 U.S. at 498* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320-21, 82 S. Ct. 1502, 8 L. Ed. 2d 510 & n.38 (1962))* (cleaned up). Therefore, "antitrust theory and speculation cannot trump facts, and even *Section 13(b)* cases must be resolved on the basis of the record evidence **[**17]** relating to the market and its probable future." *Arch Coal, 329 F. Supp. 2d at 116-17*.

III. Analysis

A. The FTC's Prima Facie Case

For the FTC to show a likelihood of success on the merits and justify a preliminary injunction blocking the Evonik-PeroxyChem merger, it must first meet its prima facie burden by (1) defining a relevant product market, (2) defining a relevant geographic market, and (3) showing undue concentration in that combined market. *Baker Hughes, 908 F.2d at 983*.

1. Defining the Relevant Market

"The relevant market is the 'area of effective competition' within which the defendants operate." United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 649, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957) (quoting Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 299 n.5, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949)). Defining the relevant market is a "necessary predicate" to finding a Clayton Act violation because the proposed merger "must be one which will substantially lessen competition within the area of effective competition." Id. at 593 (internal quotations omitted); *see* Baker Hughes, 908 F.3d at 982 (government must "show[] that a transaction will lead to undue concentration in the market for a particular product"). The scope of the relevant market also dictates the analysis of market power and the merger's anticompetitive effects. *See* United States v. Sungard Data Sys., Inc., 172 F. Supp. 2d 172, 181 (D.D.C. 2001); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 45 (D.D.C. 1998). "The FTC bears the burden of proof and persuasion in defining the relevant market." FTC v. **[*292]** Arch Coal, Inc., 329 F. Supp. 2d 109, 119 (D.D.C. 2004).

A relevant market has two parts: a product market and a geographic **[**18]** market, Marine Bancorp., 418 U.S. at 618. The relevant product market identifies the object of Defendants' competition, and the relevant geographic market identifies where that competition takes place. *See* Arch Coal, 329 F. Supp. 2d at 119.

The parties sharply contest both aspects of the relevant market. The FTC argues that the relevant market is non-electronics grade hydrogen peroxide within two separate geographic markets, the Pacific Northwest and the Southern and Central United States. Defendants argue that both components of the FTC's proposed market are overbroad and inconsistent with the commercial realities of the industry. The Court agrees with Defendants that the FTC has not met its burden of establishing its prima facie case because it has not identified a relevant market within which to analyze the merger's possible anticompetitive effects. That failure begins and ends with the FTC's theory of supply-side substitution, or "swinging," a substantial departure from the typical way in which a product market is defined.

a. The FTC's Product Market and Alternative Product Markets

The Court begins with the FTC's proposed product market for the sale of standard, specialty, and pre-electronics grade hydrogen peroxide, which it calls the "non-electronics" **[**19]** hydrogen peroxide market. PPFFCL at 84 ¶¶ 23-25.

Product markets are almost always defined by demand substitution. *See* Heinz, 246 F.3d at 718; Wilhelmsen, 341 F. Supp. 3d at 45 (demand substitution the "touchstone" of product market definition). Demand substitution describes "customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service." Merger Guidelines § 4. Demand substitution polices the "outer boundaries of a product market" and is governed by either (1) consumers' "reasonable interchangeability of use" or (2) the "cross-elasticity of demand" (price sensitivity) between a product and substitutes for it. Brown Shoe, 370 U.S. at 325. When aggregating products into a relevant market, courts focus on demand substitution because it illuminates whether customers can switch to one product and constrain anticompetitive pricing in another. United States v. Aetna Inc., 240 F. Supp. 3d 1, 20 (D.D.C. 2017); *see* FTC v. Swedish Match, 131 F. Supp. 2d 151, 157 (D.D.C. 2000); Hill Hrg. Tr. 2076:15-25. For instance, if customers would switch from Jif peanut butter to Peter Pan following a price increase, those two products are more likely to be included in a relevant product market.

A relevant product market also "must be drawn narrowly to exclude any other product to which, **[**20]** within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose 'cross-elasticities of demand' are small." Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 612 n.31, 73 S. Ct. 872, 97 L. Ed. 1277 (1953); *see* Arch Coal, 329 F. Supp. 2d at 120 ("Relevant market analysis is based on the 'narrowest market' principle."); Merger Guidelines § 4.1.1 (product market defined based on "smallest relevant market satisfying the hypothetical monopolist test"). For example, Jif may compete with mayonnaise "in the overall marketplace" for sandwich spreads, but that does not necessarily mean both should "be included in **[*293]** the relevant product market for antitrust purposes," Staples I, 970 F. Supp. at 1075.

Courts use two approaches to help define a relevant product market. The first is the "hypothetical monopolist test." *FTC & DOJ Horizontal Merger Guidelines* (2010), § 4.1.1. The test asks whether a hypothetical monopolist controlling the products in the alleged market could profitably impose at least a small but significant and non-transitory increase in price (SSNIP), generally assumed to be about five percent, on at least one product in the market.[2] *FTC v. Staples, Inc., 190 F. Supp. 3d 100, 121-22 (D.D.C. 2016)* (*Staples II*). If a hypothetical monopolist can profitably impose a SSNIP, the products may comprise a relevant market. *Id. at 121*. The second approach weighs the *Brown Shoe* factors: **[**21]** "industry or public recognition of the [relevant market] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe, 370 U.S. at 325*; *see Wilhelmsen, 341 F. Supp. 3d at 47*.[3]

While the Merger Guidelines explicitly state that "[m]arket definition focuses solely on demand substitution factors," § 4, they provide an exception to that general rule when "supply side substitution" may be used to aggregate products that are not demand substitutes into one market, *id.* § 5.1 & n.8. Rather than relying on consumers' ability to constrain prices, supply-side substitution or elasticity focuses on *suppliers'* responsiveness to price increases and their ability to constrain anticompetitive pricing by readily shifting what they produce. *See Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1436 (9th Cir. 1995)*; Rothman Rpt., JX0075-034 (aggregating products that are supply-side substitutes better "reflect[s] suppliers' competitive significance"). According to supply-side substitution theory, the higher the cross-elasticity of supply—"the capability of . . . production facilities to be converted to produce a substitute product"—"the more likely it is that the alternative **[**22]** products are to be counted in the relevant market." *Cardinal Health, 12 F. Supp. 2d at 46*; *see Brown Shoe, 370 U.S. at 325 n.42* ("The cross-elasticity of production facilities may also be an important factor in defining a product market."); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 218, 253 U.S. App. D.C. 142 (D.C. Cir. 1986)* (same).

The Merger Guidelines offer a helpful shorthand for supply side substitution—"swinging." Suppliers are said to have "readily available 'swing' capacity" to "rapidly" enter a product market—and therefore to constrain anticompetitive pricing—if "supply side substitution is" (1) "nearly universal among the firms selling one or more of a group of products," (2) "easy," and (3) "profitable." Merger Guidelines § 5.1 & n.8 (cleaned up); PPFFCL at 84-85 ¶ 24. The parties' experts "agree that proof of each of these three conditions is **[*294]** required before a relevant product market may be defined based on supply-side considerations," DPFFCL at 23 ¶ 68, and the Court sees no reason to disagree.[4] *Rebel Oil* offers a helpful illustration of supply-side substitution. The court in that case grouped the sale of self-serve and full-service gasoline into one relevant product market because it found that "sellers of full-serve gasoline can easily convert their full-serve pumps, at virtually no cost, into self-serve, cash-only pumps, expanding

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[2] The Merger Guidelines, while not binding on courts, offer persuasive guidance in examining competitive effects. *See Heinz, 246 F.3d at 716 n.9*. They also recognize that a SSNIP may be "larger or smaller than five percent" based on industry specifics, § 4.1.2, but the FTC's uncontested position is that a SSNIP of "about five percent" is appropriate. PPFFCL at 2 ¶ 5.

[3] "The *Brown Shoe* practical indicia may indeed be old school, and its analytical framework relegated 'to the jurisprudential sidelines.' But *Brown Shoe* remains the law, and this court cannot ignore its dictates." *FTC v. Sysco Corp., 113 F. Supp. 3d 1, 27 n.2 (D.D.C. 2015)* (quoting ***FTC v. Whole Foods Market, Inc., 548 F.3d 1028, 1059 (2008)*** (Kavanaugh, J., dissenting)) (cleaned up).

[4] The 2010 Merger Guidelines' reference to swinging postdates the very few cases that have considered supply-side substitution, so those cases do not reference the three swinging requirements. Nonetheless, the case law is generally consistent with them. *See, e.g., Brown Shoe, 370 U.S. at 366-68* (Harlan, J., dissenting in part, concurring in part) (swinging between women's and men's shoes); *United States v. Colum. Steel Co., 334 U.S. 495, 510-11, 68 S. Ct. 1107, 92 L. Ed. 1533 (1948)* (swinging production of different rolled steel products); *Rebel Oil, 51 F.3d at 1436* (swinging between offering full-service and self-serve gasoline); *Virtual Maint., Inc. v. Prime Comput., Inc., 11 F.3d 660, 665 (6th Cir. 1993)* (swinging between computer systems with and without software updates included); *FTC v. Elders Grain, Inc., 868 F.2d 901, 907 (7th Cir. 1989)* (swinging between variations of industrial dry corn); *cf. FTC & DOJ Horizontal Merger Guidelines* §§ 1.32-1.322 (1997) (describing similar parameters for defining aggregate product market based on supply side substitution).

output and thus constraining **[**23]** any attempt by [the defendant] to charge [higher] prices for selfserve gasoline." 51 F.3d at 1436.

i. Swinging Between Standard, Specialty, and Pre-Electronics Grade Hydrogen Peroxide

The FTC's only basis for aggregating standard, specialty, and pre-electronics grade hydrogen peroxide into a single market is supply-side substitution. Rhilinger Hrg. Tr. 2272:14-16. The Court therefore turns to the evidence about whether suppliers' swinging between production of these grades is nearly universal, easy, and profitable, as set forth in the Merger Guidelines. The Court finds that the FTC has failed to meet its burden of showing that supplyside substitution across these three grades meets any of the three requirements.

(A) Nearly Universal

The Court cannot conclude, as the FTC urges, that swinging across these grades—while present to some degree—is "nearly universal" among the market participants. Merger Guidelines § 5.1 n.8.

First, and most obviously, three of the five North American suppliers of hydrogen peroxide do not, at present, swing to the production of pre-electronics grade hydrogen peroxide: they simply do not produce that product. PeroxyChem and Solvay produce a purified hydrogen peroxide **[**24]** "feedstock" that is a precursor to their production of electronics grade hydrogen peroxide. Montag Hrg. Tr. 1528:1-5; Kramer Hrg. Tr. 1635:19-1636:7; Suter Hrg. Tr. 412:11-17. But just because they further refine this feedstock to make electronics grade hydrogen peroxide does not mean it is pre-electronics grade for swinging purposes. In fact, PeroxyChem and Solvay do not market or sell their feedstock to customers as pre-electronics grade hydrogen peroxide. JX0001-004, Hancock Declaration ¶¶ 22-23; Montag Hrg. Tr. 1531:23-1532:1; Suter Hrg. Tr. 434:24-435:11. For that reason, they do not constrain the prices of pre-electronics grade hydrogen peroxide sold by Evonik and Arkema. [TEXT REDACTED BY THE COURT] Radlinski Hrg. Tr. 572:4-6, 572:18-23. Swinging is not nearly universal between grades of hydrogen peroxide where a majority of suppliers do not swing into one of the three grades.

[*295] Second, although all suppliers produce hydrogen peroxide for more than one end use, some do not swing into specialty grade hydrogen peroxides formulated for specific end uses. For example, Evonik does not sell an aseptic packaging product in the United States, and Nouryon does not make one at all. Suter **[**25]** Hrg. Tr. 411:18-412:7; Corson Hrg. Tr. 597:14-22, 672:12-16; PX2187-040. The tin stabilizer in Evonik's hydrogen peroxide prohibits it from marketing a chemical synthesis product and from obtaining EPA approval to market hydrogen peroxide biocide products. Corson Hrg. Tr. 666:6-667:16; DX0348; PX1522-001 to -002; PX1055-001. Some suppliers also do not swing into specialty grade hydrogen peroxide formulated for medical sterilization, contact lens solution production, and rocket propulsion. DPFFCL at 87 ¶ 234 n.537.

The FTC tries to waive away this evidence by arguing that specialty grade hydrogen peroxide formulated for those various end uses to which suppliers cannot swing comprises a small percentage "of all H_2O_2 in North America." PPFFCL at 16 ¶ 50. But the FTC decided to include specialty grade hydrogen peroxide in its proposed product market, and this argument says nothing about the ability—or inability—of various suppliers to swing into different specialties. The FTC has not provided evidence, as it must to establish a product market based on swinging *across grades, see* Arch Coal, Inc., 329 F. Supp. 2d at 119, that shows the portion of the *specialty grade* market to which suppliers actually do swing.[5]

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[5] Defendants also argue that swinging is not nearly universal because the hydrogen peroxide manufacturing process limits suppliers from swinging 100 percent of their capacity to specialty or pre-electronics grade hydrogen peroxide. *See* DPFFCL at 25 ¶ 74; *id.* at 32 ¶ 87. While this may distinguish swinging in the hydrogen peroxide industry with swinging from the Fourdrenier paper machine, not all capacity necessarily needs to swing into a substitute market in order to constrain anticompetitive prices. To constrain prices for specialty or pre-electronics grade hydrogen peroxide, a minority of the overall hydrogen peroxide market, *see* Rothman Hrg. Tr. 755:21-25, suppliers need only purify a fraction of their standard grade hydrogen peroxide.

Finally, it bears noting that much **[**26]** of what the FTC characterizes as swinging in the hydrogen peroxide market is not the sort of activity that constrains prices in the way the Merger Guidelines appear to intend. This is so because over time suppliers are moving overwhelmingly in one direction toward higher purity products that are more profitable. In fact, Defendants' expert, Dr. Nicholas Hill, persuasively testified that a supplier's adjustments described above—the "strategic decision to sell more of one of its products and less of another . . . *in one direction*"—is *not* swinging under the Guidelines. Hill Hearing Tr. 2078:7-10 (emphasis added). Rather, swinging "means to move back and forth producing those products"—like a swing. *Id.* 2077:24-2078:6. Dr. Hill's prototypical swinging example is the Fourdrenier paper machine. *Id.* 2079:17-18. The machine shifts between producing containerboard for cardboard boxes and kraft paper for grocery bags. *Id.* 2079:6-2080:1. Of course, cardboard boxes and grocery bags are not demand substitutes, but based on the relative profitability of those two products at any given time, the supplier "swings" between the two "at the touch of a button." *Id.* Dr. Hill's conception of swinging "back **[**27]** and forth" is intuitive and tracks the few cases to recognize supply substitution; the Fourdrenier paper machine is like the retailer swinging between full-service and self-serve gasoline in *Rebel Oil, 51 F.3d at 1436*.

[*296] In contrast, the record suggests that the market for hydrogen peroxide reflects a long-term shift in production *in one direction*, toward high-purity, specialized products that are more profitable. *See, e.g.*, JX0151-016 [TEXT REDACTED BY THE COURT] *id.* -017 [TEXT REDACTED BY THE COURT] Rettig Hrg. Tr. 1047:10-15 (Evonik "focusing on specialty chemicals" because they "promise higher returns in terms of profitability."). At the same time, suppliers are moving away from the shrinking pie that is the pulp and paper industry. As a result, these shifts in production are not as likely to constrain anticompetitive prices downward, for example, for standard grade hydrogen peroxide, as would be the case if suppliers more commonly swung both back *and* forth between grades.

For these reasons, the record does not support the conclusion that swinging across standard, specialty, and pre-electronics grade hydrogen peroxide is nearly universal.

(B) Easy

Similarly, the Court cannot conclude that swinging across all **[**28]** these grades—while in some cases relatively simple—is generally "easy" for purposes of analyzing competition in the hydrogen peroxide market.

The Merger Guidelines' section that references swinging lacks a definition for "easy," § 5.1, but later on, the Guidelines describe "easy" entry into a market as "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern," § 9.[6] These standards reflect why courts consider supply substitution in product market definition—to assess if suppliers can constrain anticompetitive prices.

The record is clear that it is easy for *some* suppliers, merely as a matter of production mechanics, to swing *some* capacity up-grade or down-grade between standard, specialty, and—for the two suppliers who currently market pre-electronics—pre-electronics grade hydrogen peroxide. Suter Hrg. Tr. 406:9-14; Myrick Hrg. Tr. 485:24-486:11; Radlinski Hrg. Tr. 539:16-19; Hamann Hrg. Tr. 1322:3-19; Kramer Hrg. Tr. 1685:8-14, 1686:10-13, 1696:4-10, 1696:25-1698:8. Evonik admitted as much to regulators before the FTC moved for a preliminary injunction. *See* PX0019-010 ("some" diversion from specialty **[**29]** to standard grade hydrogen peroxide "could be easily and quickly accomplished at no significant cost"); PX1201-012 ([TEXT REDACTED BY THE COURT]).

But in many other cases, the evidence is just as clear that it is *not* easy for a given supplier to swing into a given grade. Although suppliers can swing 100 percent of their capacity *down*-grade, Hill Hrg. Tr. 2165:22-2166:4, the manufacturing process limits how much can swing *up*-grade; a plant can only commit [TEXT REDACTED BY THE COURT] to [TEXT REDACTED BY THE COURT] percent of output to specialty grade hydrogen peroxide, and only [TEXT REDACTED BY THE COURT] percent of that specialty grade can be purified into pre-electronics grade,

[6] An earlier version of the Merger Guidelines—which does not use the word "easy" to describe product market definition by supply substitution—suggests that swinging into the "production and sale of the relevant product" must take place "within one year" in response to a SSNIP in the relevant product. *Merger Guidelines* § 1.321-1.322 (1997); *see also id.* § 1.321 n.14.

leaving around [TEXT REDACTED BY THE COURT]pounds of pre-electronics grade hydrogen peroxide for every 100 pounds of crude. [TEXT REDACTED BY THE COURT]; [TEXT REDACTED BY THE COURT]; [TEXT REDACTED BY THE COURT]; JX0151-015. As discussed above, this limitation does not necessarily stop suppliers from constraining prices across grades. That said, it does make it difficult [TEXT REDACTED BY THE COURT][7]

[*297] The FTC argues that it is easy for the three suppliers who do not market pre-electronics grade hydrogen peroxide **[**30]** to swing into that market. Indeed, some of Evonik's submissions to regulators give the same impression: [TEXT REDACTED BY THE COURT] PX0002-031; PX1201-012. And in general, the technology required to produce pre-electronics grade is not substantially different from the technology required to produce lower-grade hydrogen peroxide. *See* [TEXT REDACTED BY THE COURT]; PX1387-010 to -017.

But the reality is much more complicated. Producing pre-electronics grade hydrogen peroxide requires additional equipment, including a second reverse osmosis unit, additional testing (several times a day) to ensure the equipment is working, specially trained personnel, a specially equipped room and laboratory, and [TEXT REDACTED BY THE COURT]. Hamann Hrg. Tr. 1282:3-1286:16. Evonik has years of experience supplying pre-electronics grade hydrogen peroxide to MGC from its plant in Mobile, Alabama, and it *still* cost the company [TEXT REDACTED BY THE COURT] over more than [TEXT REDACTED BY THE COURT] to upgrade its Gibbons, Alberta, plant to supply the same product. *See* Costanzo Hrg. Tr. 1136:5-1137:3, 1144:11-1145:9 ([TEXT REDACTED BY THE COURT]); Hamann Hrg. Tr. 1326:25-1327:14; PX0002-031. And all of that **[**31]** assumes the supplier even has the technical know-how to produce pre-electronics grade hydrogen peroxide, far from a given. Were a supplier like [TEXT REDACTED BY THE COURT]—which has never tried to produce pre-electronics grade, [TEXT REDACTED BY THE COURT], likely because of the complexity and costs just described—to try to swing into that market, the effort would be anything but "timely, likely, [or] sufficient" to constrain prices. Merger Guidelines § 9.

Counterintuitively, it is also not easy for PeroxyChem or Solvay—which make electronics grade hydrogen peroxide—to swing into pre-electronics grade, either. The FTC produced some evidence that PeroxyChem *may* be able to market its electronics feedstock as preelectronics grade hydrogen peroxide. But MGC—"the largest customer for pre-electronics[,] which buys on the order of 99 percent of pre-electronics that's sold," Hill Hrg. Tr. 2080:22-23; *see also* JX0001-001—has never approved [TEXT REDACTED BY THE COURT] feedstock as satisfactory pre-electronics grade hydrogen peroxide after years of trying on their part. *See* PPFFCL at 10-11 ¶¶ 32-33.[8] It is exceedingly difficult for [TEXT REDACTED BY THE COURT] pre-electronics hydrogen peroxide, PX0002-031, a product **[**32]** for which suppliers measure impurities in "parts per billion," Hamann Hrg. Tr. 1281:13. *See* DPFFCL at 26-27, 29 ¶¶ 77-78, 81. That includes PeroxyChem and Solvay, even though they sell electronics grade hydrogen peroxide, it is not easy for them to sell pre-electronics grade. A world-renowned baker may sell birthday cakes; it does not mean he can come close to swinging into the cake-mix market if Betty Crocker decides to raise prices. Mahr Hrg. Tr. 2327:13-16.[9]

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[7] [TEXT REDACTED BY THE COURT] *See* DPFFCL at 25-26 ¶¶ 72, 75.

[8] An internal Evonik document could be construed to suggest that Evonik considers PeroxyChem and Solvay competitors for pre-electronics grade H_2O_2, *see* PPFFCL at 12 ¶ 35 (citing PX1156-010), but the better reading of that chart is that it represents the entire electronics market, with Arkema and Evonik's slices meant to signify the pre-electronics hydrogen peroxide they supply to MGC. *See* DPFFCL at 27 ¶ 79.

[9] The parties also contest the difficulty of Evonik and PeroxyChem's swinging between grades of hydrogen peroxide in a manner that does not necessarily bear on the market's ability to constrain prices post-merger because it does not impact other suppliers' ability to constrain a post-merger Evonik. It is difficult for Evonik to swing into tin-free hydrogen peroxide products and aseptic packaging, but PeroxyChem currently and easily swings into each of these end uses, *see* Montag Hrg. Tr. 1516:20-1517:19, 1522:9-25, and so will a post-merger Evonik. Similarly, it is difficult for PeroxyChem to swing into pre-electronics grade hydrogen peroxide, but Evonik already markets pre-electronics hydrogen peroxide, *see* JX0001-002. Evidence of PeroxyChem's ability to break into that market is therefore only relevant to the extent that it reflects swinging difficulties faced by other suppliers [TEXT REDACTED BY THE COURT] PPFFCL at 10-11 ¶¶ 32-33.

[*298] For these reasons, the Court cannot conclude that swinging across standard, specialty, and pre-electronics grade hydrogen peroxide is easy.

(C) Profitable

Finally, the FTC has not met its burden of showing that swinging between grades of hydrogen peroxide is likely to be profitable, because swinging down-grade is, in general, not profitable. *See* Merger Guidelines § 5.1. In other words, suppliers' average profits increase so much up-grade that even if the price of standard grade or specialty grade increased by five or even ten percent, suppliers are unlikely to switch production down-grade from specialty or pre-electronics grade hydrogen peroxide.

For example, Evonik's average profit margins per pound of hydrogen peroxide are about [TEXT REDACTED **[**33]** BY THE COURT] cents for standard grade, [TEXT REDACTED BY THE COURT] cents for specialty grade ([TEXT REDACTED BY THE COURT] percent higher than standard grade), and [TEXT REDACTED BY THE COURT] cents for pre-electronics grade ([TEXT REDACTED BY THE COURT] percent higher than standard grade and [TEXT REDACTED BY THE COURT] percent higher than specialty grade). JX0066-043 fig. 10; Costanzo Hrg. Tr. 1143:5-1144:1, 1176:14-19 (selling standard grade instead of pre-electronics "would be a disaster on the investment economics" and "the intent [is] to sell it as specialty"). Other suppliers' margins similarly increase up-grade. *See* [TEXT REDACTED BY THE COURT]; JX0151-022 (showing [TEXT REDACTED BY THE COURT] specialty grade with [TEXT REDACTED BY THE COURT] percent higher profit margin than standard grade, pre-electronics grade with [TEXT REDACTED BY THE COURT] percent higher than standard grade and [TEXT REDACTED BY THE COURT] percent higher than specialty grade); Lerner Hrg. Tr. 1377:9-20 (swinging production from specialty to standard grade hydrogen peroxide would be "economic suicide" and "make[] no commercial, business or any logical sense").

The FTC objects to using average profit **[**34]** margins to judge profitability. Its expert, Dr. Dov Rothman, found that some standard and specialty grade hydrogen peroxide products sell at a higher margin than some higher-grade products,[10] likely because of regulatory or customer-focused specifications. There are three reasons why the Court cannot find that this evidence means that swinging down-grade is generally profitable, such that it is appropriate to lump standard, specialty, and pre-electronics grade hydrogen peroxide together in a single product market.

First, the FTC has provided no data on what percentage of the standard and specialty grade markets are comprised of **[*299]** these supposed high-profit-margin products to which suppliers could swing. Second, this subset of high-margin standard and specialty grade products increases the average margins for those products, thereby masking what otherwise would be even *starker* profitability differences between grades. Third—and key for assessing the ability of suppliers to constrain prices—if suppliers wanted to produce more higher-margin standard or specialty grade products, they would not do so by swinging down-grade from their profitable stock of specialty and pre-electronics **[**35]** grade hydrogen peroxide. They would instead try to convert their existing stock of lower-margin standard and specialty grade hydrogen peroxide to higher-margin products. Hill Hrg. Tr. 2083:2-21; *see* [TEXT REDACTED BY THE COURT] (if demand increased for standard grade hydrogen peroxide, "we would just supply them from our production of standard product," not from pre-electronics grade product). This is consistent with

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[10] [F]or [TEXT REDACTED BY THE COURT] percent of Evonik's volume of food grade hydrogen peroxide, Evonik's per unit margin is higher than Evonik's average per unit margin on pre-electronics grade; for [TEXT REDACTED BY THE COURT] percent of Evonik's volume of cosmetics grade hydrogen peroxide, Evonik's per unit margin is higher than Evonik's average per unit margin on pre-electronics grade; for [TEXT REDACTED BY THE COURT] percent of Evonik's volume of hydrogen peroxide for teeth whitening, Evonik's per unit margin is higher than Evonik's average per unit margin on pre-electronics grade. Furthermore, while food grade, cosmetics grade and hydrogen peroxide for teeth whitening are relatively low volume products for Evonik, for every 100 units of pre-electronics grade hydrogen peroxide that Evonik sells, it sells [TEXT REDACTED BY THE COURT] units of standard grade hydrogen peroxide at a per unit margin that is higher than its average per unit margin on pre-electronics grade.

Rothman Rebuttal Rpt., PX7102-017; *see also* Rothman Hrg. Tr. 791:24-792:19.

suppliers' long-term shift in production toward more profitable, specialized, and high-purity products described above.

At closing argument, the FTC argued that swinging does not have to be profitable "between every combination of products" and that a "snapshot in time" of current contracts and profitability could be misleading. Rhilinger, Hrg. Tr. 2395:14-2396:7. The Court does not mean to suggest that swinging must be profitable between *every* combination of products to meet this requirement. But here, there are consistent and significant profitability differences between selling standard, specialty, and pre-electronics grade hydrogen peroxide. And based on that record, including the overall trend in the market, the Court cannot conclude that in response to a SSNIP on **[**36]** standard or specialty grade hydrogen peroxide, suppliers would likely swing downgrade and constrain those prices; the profit margins are, in general, simply too much higher in higher grades.

To be sure, these differences in profitability suggest that suppliers may constrain anticompetitive prices in specialty or pre-electronics grade by swinging *up* from lower-margin standard grade hydrogen peroxide. But as discussed above, suppliers do not swing up-grade nearly universally because it is not easy. *See* Hill Rpt., JX0066-043 ("The rewards to producing pre-electronics grade are already so high that firms that do not produce it likely do not do so for reasons that will not change in response to a small price increase."). And all three swinging requirements must be met to aggregate grades of hydrogen peroxide in a relevant product market.[11]

For all the above reasons, the FTC cannot combine standard, specialty, and pre-electronics grades in a relevant product market to analyze the anticompetitive effects of the proposed merger. Therefore, the FTC's proposed relevant product market does not support its prima facie case.

ii. Alternative Product Markets

Defendants argue that this **[**37]** failure means the Court need go no further: without a relevant product market, the FTC cannot succeed. *See* Mahr Hrg. Tr. 2401:22-2402:13. The FTC could have pleaded or argued for alternative markets, they say, but it did not, and "it's not the Court's job to go around and try to find that correct market." Mahr Hrg. Tr. **[*300]** 2402:8-13 (cleaned up). And the FTC candidly recognizes that it has "not alleged in [the] complaint a market for standard-grade hydrogen peroxide or any other, sort of, combination of products." Rhilinger Hrg. Tr. 2389:16-18; *see* Compl. ¶¶ 23-24 ("The relevant product market in which to assess the effects of the Acquisition is hydrogen peroxide," excluding "electronics grade hydrogen peroxide.").

Defendants' argument is not without support. The FTC has the burden to prove a relevant product market when it seeks a preliminary injunction, *see* *Arch Coal, 329 F. Supp. 2d at 120*, a point with which the FTC does not quibble, *see* Rhilinger Hrg. Tr. 2389:9-10 ("the case law says that we need to prove a relevant market in which we can show harm"). This is so because without a relevant product market, the FTC cannot show a likelihood of ultimate success on its claim under the Clayton Act. *See* *15 U.S.C. § 18* (prohibiting acquisitions **[**38]** whose "effect . . . may be substantially to lessen competition" in "any line of commerce"); *Heinz, 246 F.3d at 719 n.17* ("Courts interpret 'line of commerce' as synonymous with the relevant product market."); *see FTC v. Whole Foods Market, Inc., 548 F.3d 1028, 1036 (2008)* (Brown, J.) ("market definition is . . . necessary in a *§ 7* case" (citing *15 U.S.C. § 18*)).[12]

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[11] The FTC also argues that its proposed market satisfies the hypothetical monopolist test because consumers would not substitute away from non-electronics hydrogen peroxide to other chemicals. *See, e.g.*, PFFCL at 85 ¶ 25. That cannot save the FTC's overbroad market. The hypothetical monopolist test "is designed to ensure that candidate markets are not overly narrow." Merger Guidelines § 4; *see also id.* § 4.1.1 (test "does not lead to a single relevant market"). It says nothing about whether a market is overly broad.

[12] The D.C. Circuit's *Whole Foods* decision lacked a majority opinion. *See* ***Whole Foods, 548 F.3d at 1051 n.1, 1061 n.8*** (Kavanaugh, J., dissenting). Thus, in referring to one of the two concurring opinions or the dissent, the Court will indicate the name of the Judge whose opinion is cited. *See* ***id. at 1032*** (Brown, J.); ***id. at 1041 (Tatel, J.)***; ***id. at 1051*** (Kavanaugh, J., dissenting).

But just because the relevant product market is not "as broad[] as the Government chooses to define it," the record may still contain evidence of an alternative relevant product market in which to analyze the merger's competitive effects. *Brown Shoe, 370 U.S. at 368* (Harlan, J., dissenting in part, concurring in relevant part). "The duty rests with the District Court . . . to determine what is the appropriate market on an appraisal of the relevant economic considerations." *Id.* And despite the FTC's insistence that the relevant product market should not "be defined around individual grades of H_2O_2 or end uses," Br. at 14, it *has* provided quantitative evidence of alleged anticompetitive harm in a narrower alternative market consisting solely of standard grade hydrogen peroxide in the Southern and Central United States. *See* Rothman Rpt., JX0075-052 & n.159, -094 & n.324, -104 & n.350 (providing market concentration statistics, predicted **[**39]** first order approximation price effects, and merger simulation predicted price effects, assuming that PeroxyChem divests its Prince George facility to a new competitor). The parties also agree that hydrogen peroxide formulated for particular end uses could constitute separate product markets, *see* PPFFCL at 3, 5 ¶¶ 11, 15; DFFCL at 21-22 ¶¶ 62-63, though the FTC has not provided any specific data related to end uses with which to evaluate the merger. The Court thus proceeds to consider the evidence in the record as to whether either (1) standard grade hydrogen peroxide or (2) hydrogen peroxide formulated for specific end uses is a relevant product market for purposes of assessing the merger's competitive effects.[13]

[*301] (A) Standard Grade Hydrogen Peroxide

Standard grade hydrogen peroxide serves various end uses, including the bleaching of pulp, paper, and textiles; it is also used in wastewater treatment and in the mining and oil and gas industries. Dumas Hrg. Tr. 235:1-3; Suter Hrg. Tr. 408:8-14; Costanzo Hrg. Tr. 1223:6-13; Montag Hrg. Tr. 1566:5-1567:2, 1600:23-1601:3. It is often referred to as a "commodity"—a product that can be used interchangeably among suppliers with ease, where they compete mainly on price. ***[**40]*** *See* PPFFCL at 34 ¶ 120; DPFFCL at 8 ¶ 15; JX0120-001; Anderson Hrg. Tr. 193:1-18. However, this does not necessarily mean that all standard grade hydrogen peroxide, regardless of end use, constitutes a relevant product market. *See* *Arch Coal, 329 F. Supp. 2d at 120* (describing "the 'narrowest market' principle"). For that, there must be sufficient demand-side substitution among standard grade products, or—as discussed above—supply-side substitution may suffice in the exceptional case if the Merger Guidelines' swinging requirements are met.

On the demand side,"[d]etermination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another." *E. I. du Pont., 351 U.S. at 393*; *see* *Staples I, 970 F. Supp. at 1074*. The FTC has not argued that there is demand-side substitutability across formulations of standard grade hydrogen peroxide.[14] And perhaps for that reason, there is no evidence in the record that buyers are likely "to substitute one commodity for another" in response to a SSNIP for a particular end use. *Staples I, 970 F. Supp. at 1074*. For example, if a customer for standard grade hydrogen peroxide used in in fracking—removing oil and gas from subterranean rocks and fissures—experienced a SSNIP, the record **[**41]** does not show that she is likely to instead purchase standard grade hydrogen peroxide intended for bleaching pulp and paper. While all standard grade hydrogen peroxide has a similar purity and chemical composition, its "character or use" appears sufficiently different across end uses. *Id.* To

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[13] The record lacks evidence of market concentration statistics or other quantitative measures of anticompetitive effects for alternative specialty grade or pre-electronics grade hydrogen peroxide product markets.

[14] While the FTC has consistently pleaded and argued for a product market consisting of non-electronics grade hydrogen peroxide, Defendants contend that the FTC's swinging theory only arose after it moved for a preliminary injunction:

> This supply side approach didn't arise until Dr. Rothman's report after the fact discovery was closed. There is no mention in the complaint of supply side **[**42]** factors informing product market definition, none. There's no mention of the word "swing" or "shift" anywhere in the FTC's complaint. They ask no discovery of any of the five suppliers leading up to -- in the discovery leading up to the hearing, anything about their ability to shift or swing.

Mahr Hrg. Tr. 2321:8-15.

the extent the record contains evidence on this point at all, it suggests that customers primarily view standard grade hydrogen peroxide produced by different suppliers as interchangeable within—but *not* between—end uses. *See, e.g.*, Maeder Hrg. Tr. 170:16-172:5 (pulp and paper end use); Engram Hrg. Tr. 317:2-11, 361:21-362:24 (wastewater treatment end use); PPFFCL at 13 ¶ 42 (oil and gas end use); PPFFCL at 4 ¶ 12 ("The precise combination of purity level, concentration, and stabilization package varies depending on the [end use] of H_2O_2, but within each [end use], H_2O_2 sold by each producer is very similar."). Therefore, the different end-use products are not demand substitutes, and they cannot be aggregated into a single standard grade product market on that **[*302]** basis.[15]

The Court thus turns to the swinging exception to the usual demand-side rule. Merger Guidelines § 5.1; *see Heinz, 246 F.3d at 718* ("The definition of product market focuses solely on demand substitution factors." (cleaned up)). Under the Merger Guidelines, swinging within standard grade hydrogen peroxide formulations must be nearly universal, easy, and profitable before those products may be aggregated into one market. *See* § 5.1 & n.8.

The record is not totally clear on the ease and near universality of swinging between the various formulations of standard grade hydrogen peroxide. This is likely so because the FTC never proposed such a product market; it only argued these points to support swinging between standard, specialty, and pre-electronics grades. But the evidence suggests that as a practical matter, such swinging is possible and happens to some extent. *See* PPFFCL at 4 ¶ 12; PX1201-012. Many of the obstacles to **[**43]** swinging between *grades*, explained above, do not apply to swinging between the various formulations of standard grade. And most suppliers already make the various formulations required for bleaching pulp, paper, and textiles; for treating wastewater; and for use in the mining and oil and gas industries. *See* JX0083-065 to -118 (Evonik's competitor details database).

The problem is the lack of record evidence on profitability. The Court cannot find that standard grade hydrogen peroxide is a relevant product market because the record lacks evidence that swinging between standard grade formulations is likely to be profitable. In fact, the limited evidence in the record suggests substantial differences in profitability across standard grade formulations. Dr. Rothman found that "for every 100 units of pre-electronics grade hydrogen peroxide that Evonik sells, it sells [TEXT REDACTED BY THE COURT] units of standard grade hydrogen peroxide at a per unit margin that is higher than its average per unit margin on pre-electronics grade," Rothman Rebuttal Rpt., PX7102-017; *see also* Rothman Hrg. Tr. 791:24-792:19. The average profit margin for Evonik's standard grade hydrogen peroxide is about [TEXT **[**44]** REDACTED BY THE COURT] cents, and the profit margin for its pre-electronics grade hydrogen peroxide is [TEXT REDACTED BY THE COURT] cents. JX0066-043 fig. 10. That means a subset of standard grade hydrogen peroxide sells at a profit margin [TEXT REDACTED BY THE COURT] *percent higher* than the average for standard grade. And of course, that means that *some* standard grade hydrogen peroxide sells for *even more* than the [TEXT REDACTED BY THE COURT] percent higher profit margin than other standard grade formulations, like that for pulp and paper bleaching, which has some of the lowest margins. *See, e.g.*, Anderson Hrg. Tr. 199:23-25; Lerner Hrg. Tr. 1379:13-24, 1381:6-18. Admittedly, the evidence in the record on this point is minimal.[16] But it is the FTC's burden to **[*303]** define the market and, if relying on supply-side substitutability, show that swinging is likely profitable. The evidence does not suggest that in response to a SSNIP of five percent in lower-profit standard grade hydrogen peroxide, suppliers likely would swing from higher-profit standard grade to constrain the price for the lower-profit formulation.

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[15] The *Brown Shoe* practical indicia also weigh against a standard grade market. The hydrogen peroxide industry recognizes "well-defined submarkets" by end use; end uses within standard grade, by their definition, have "peculiar characteristics and uses"; their customers tend to be different (save for distributors who re-sell hydrogen peroxide into various industries); and prices are distinct. *Brown Shoe, 370 U.S. at 325*; *see, e.g.*, PPFFCL at 4 ¶ 12; Dumas Hrg. Tr. 235:1-3; PX2047-031 (standard grade hydrogen peroxide for mining sells at nearly 15 percent higher price than for pulp and paper bleaching); JX0083-065 to -118 (Evonik's competitor details database).

[16] The record does include some evidence on pricing for standard grade, *see, e.g.*, PX2047-031; Hill Rpt. JX0066-098 fig. 45, but the Court is unable to glean from that data the profit margins for each product, which is the relevant metric to assess whether suppliers are likely to swing. *Cf. Rebel Oil, 51 F.3d at 1436* ("it is immaterial that . . . a price differential exists" between supply-substitutable products).

And as described above, this shortcoming reflects a more fundamental **[**45]** issue with the FTC's overall product market definition. To some degree, suppliers' decisions to make different hydrogen peroxide products does not appear to represent swinging at all, because in general, it is only profitable to shift production in *one direction* to more specialized products that "are more stable in economic downturns" relative to pulp and paper products. Rettig Hrg. Tr. 1047:14-15; *see, e.g.*, JX0151-016 to -017; [TEXT REDACTED BY THE COURT] Once that happens, there is no evidence that, in general, suppliers shift *back*, or that it would be profitable to do so in response to a SSNIP. In other words, this is not an industry of suppliers prepared to swing and constrain prices across lower-profit formulations, even within an alternative market for standard grade hydrogen peroxide.

(B) End Uses of Hydrogen Peroxide

At this point, then, the FTC has not proven its proposed relevant product market for all non-electronics grade hydrogen peroxide. Neither has it shown, in the alternative, a relevant market for standard grade. Moving one last step narrower, the evidence in the record *does* support a relevant product market for hydrogen peroxide based on traditional demand substitutability: **[**46]** hydrogen peroxide products formulated for different end uses, regardless of grade.[17]

The record is reasonably clear that "within any given end-use for H_2O_2, the product offerings of the five H_2O_2 suppliers are largely undifferentiated." PPFFCL at 33 ¶ 118. And in contrast, across end uses, customers do not find the products substitutable. For example, most suppliers make a specialty grade product used to preserve food packaged for sale known as aseptic packaging hydrogen peroxide. Customers for that product do not view standard grade hydrogen peroxide intended for pulp and paper bleaching as interchangeable with it. Similarly, there is no reason to suspect that, in response to a price increase, they would switch from hydrogen peroxide for aseptic packaging to that intended for bleaching. *See* Engram Hrg. Tr. 364:7-13; Suter Hrg. Tr. 429:2-25; Montag Hrg. Tr. 1516:20-1518:6; Rhilinger Hrg. Tr. 2272:11-13 ("Nobody here is arguing that you should bleach your hair or whiten your teeth or clean your cuts with [hydrogen peroxide for] rocket fuel."). Each of these product markets for particular end uses are the "smallest relevant market[s] satisfying the hypothetical monopolist test." Merger Guidelines § 4.1.1 **[**47]** ; *see* PPFFCL at 3, 5 ¶¶ 11, 15; DFFCL at 21-22 ¶¶ 62-63. Accordingly, hydrogen peroxide products formulated for the same end use satisfy a demand-side substitution approach to defining a relevant product market; analysis of the supply side is unnecessary. *See* *Heinz, 246 F.3d at 718*.

b. The FTC's Proposed Geographic Markets

To establish a prima facie case by showing that the merger would cause a highly concentrated market, besides defining a relevant product market, the FTC must also demonstrate a relevant geographic market. *Baker Hughes, 908 F.2d at 982*. **[*304]** The FTC proposes two relevant geographic markets: (1) the Pacific Northwest, which includes Idaho, Oregon, Montana, Washington, and Wyoming in the United States and Alberta, British Columbia, Manitoba, and Saskatchewan in Canada; and (2) the Southern and Central United States, which includes Alabama, Arkansas, Arizona, California, Colorado, the District of Columbia, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Mississippi, North Carolina, North Dakota, Nebraska, New Mexico, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, and West Virginia. PPFFCL at 22-23, 25 ¶¶ 72, 78.

As discussed below, any anticompetitive effects of the merger in the proposed Pacific Northwest geographic market are resolved by PeroxyChem's proposed divestiture of its Prince George plant. And the FTC's failure to show that non-electronics hydrogen peroxide is a relevant product market makes the proposed Southern and Central United States geographic market useless to the FTC in meeting its burden.

[17] [TEXT REDACTED BY THE COURT] PX1201-012 [TEXT REDACTED BY THE COURT]

i. The Pacific Northwest and the Prince George Divestiture

Within days of the FTC moving for a preliminary injunction, Evonik and PeroxyChem agreed on a divestiture that threw a wrench in the FTC's argument that their merger will substantially **[**48]** lessen competition in its proposed Pacific Northwest geographic market. Defendants agreed that if their merger closes, Evonik will not acquire PeroxyChem's only plant in that market, in Prince George, British Columbia. Instead, a new competitor, international chemical manufacturer UI, will purchase the plant for [TEXT REDACTED IN ORIGINAL SOURCE]. Share Purchase Agreement, JX0147-017. Without analyzing the agreement with UI specifically, the FTC's expert, Dr. Rothman, concluded that if PeroxyChem sells its Prince George plant to a new competitor that replaces PeroxyChem's competitive intensity in the Pacific Northwest, competition will not be substantially lessened in that geographic market. Rothman Rpt., JX0075-052 n.156, -104 nn.351-52; Rothman Hrg. Tr. 830:20-831:11.[18] The Court therefore turns to that threshold question first.

Defendants have the burden to show that a proposed divestiture will replace the merging firm's competitive intensity. *Aetna Inc., 240 F. Supp. 3d at 60*. To evaluate whether a divestiture will do so, courts consider the likelihood of the divestiture; the experience of the divestiture buyer; the scope of the divestiture, the independence of the divestiture buyer from the merging seller, and the **[**49]** purchase price. *Id. at 60-74*; *FTC v. Sysco Corp., 113 F. Supp. 3d 1, 72-78 (D.D.C. 2015)*. The Court holds that Defendants have met their burden of showing that UI will replace PeroxyChem's competitive intensity.

(A) Likelihood of the Divestiture's Closing

For starters, the Prince George divestiture to UI is highly likely to occur. The parties to the divestiture, Evonik, PeroxyChem, and UI, have agreed to use all commercially reasonable efforts to ensure the closing conditions are satisfied; UI is capable of closing financially; it is excited to get "a really good business at a really good price"; and just days ago, the Canadian **[*305]** Competition Bureau entered into a Consent Agreement with Evonik approving both its merger with PeroxyChem and the divestiture of the Prince George plant to UI. The Canadian authorities found that the divestiture eliminated what would otherwise have been a likely "substantial lessening of competition" in western Canada. Consent Agreement (Jan. 13, 2020), ECF No. 141-1 at 1-2, 10, 12-13;[19] *see* Cummins Hrg. Tr. 1743:21-25, 1744:8-1746:7, 1770:11-17; DX0142-006; DX0143-002; Share Purchase Agreement, JX0147-035, -038 to - 041, -066. The record lacks any significant obstacles to closing.

(B) UI's Experience

The record shows that UI has **[**50]** the experience necessary to compete effectively in the hydrogen peroxide industry. UI is an international supplier of organic peroxides and persulfates that operates plants around the world, including a hydrogen peroxide plant in Turkey that it bought in August 2019. PPFFCL at 65 ¶ 220; DPFFCL at 48 ¶ 127. Although it does not sell hydrogen peroxide in North America, UI has long been a customer for hydrogen

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[18] Dr. Rothman did not analyze what impact a divestiture to a new competitor would have on the likelihood of anticompetitive coordinated effects in the Pacific Northwest. Even so, there is no basis in the record to conclude that UI would be any more likely than PeroxyChem to coordinate with suppliers in the Pacific Northwest to substantially harm consumers.

[19] Under *Fed. R. Civ. P. 201(b)(2)* and *(c)(2)*, the Court takes judicial notice of the following adjudicative fact apparent from the Consent Agreement signed January 13, 2020, by the Commissioner of Competition and Evonik: The Commissioner of Competition of the Canadian Competition Bureau has reached a Consent Agreement with Evonik to approve its merger with PeroxyChem and the divestiture of the Prince George plant to United Initiators. *See* Consent Agreement, ECF No. 141-1 at 1-2, 10, 12-13, 27; Defendants' Request for Judicial Notice, ECF No. 141. The Commissioner found that UI satisfied these requirements: [TEXT REDACTED IN ORIGINAL SOURCE] Consent Agreement, ECF No. 141-1 at 10, 12-13. The Court takes judicial notice solely for the purpose of evaluating the likelihood of the divestiture's closing; after Canadian regulatory approval, the divestiture is now more likely to do so.

peroxide, using it as a raw material in many of its products and serving many of the same customers that it would serve as a hydrogen peroxide supplier. DPFFCL at 48 ¶ 128. At its three North American chemical plants, UI grapples with challenges much like those that hydrogen peroxide suppliers face, such as security of supply, inventory, tracking, forecasting, and distribution. *Id.* ¶ 129; Cummins Hrg. Tr. 1722:4-10. Jonathan Cummins—UI's Vice President of Manufacturing for the Americas, who will oversee the Prince George plant if the divestiture closes—managed a hydrogen peroxide plant for Nouryon's predecessor for seven years. DPFFCL at 49-50 ¶¶ 131, 135; Cummins Hrg. Tr. 1722:11-21. That wealth of experience is an important component in helping UI replace PeroxyChem's competitive intensity in the Pacific Northwest.

(C) The Divestiture's [51] Scope**

The scope of the proposed divestiture is more than sufficient for UI to replace PeroxyChem in effectively running the Prince George plant. The employees running the Prince George plant's day-to-day operations will continue to do so on UI's behalf. DPFFCL at 50 ¶ 135. UI will receive all tangible and intangible assets that it needs to compete—"key production, sales, market, and distribution assets, sales and marketing personnel, and intellectual property"—and PeroxyChem's customers for the Prince George plant will become UI's customers [TEXT REDACTED IN ORIGINAL SOURCE]. *Id.* ¶ 134.

The FTC challenges the divestiture's scope on several grounds. It argues that UI is buying a "standalone plant" and not a "standalone business" in Prince George. *See* DPFFCL at 50 ¶ 133; Rhilinger Hrg. Tr. 2427:14-22; Mahr Hrg. Tr. 2430:15-2431:3. It is true that Defendants technically only propose a divestiture of the Prince George plant, but the evidence shows that the plant "comes along with . . . everything else that's needed to run a **[*306]** stand-alone business." Mahr Hrg. Tr. 2431:1-3. UI will have the "personnel, customer lists, information systems, [and] intangible assets," that will help to "effectively preserve the competition **[**52]** that would have been lost through the merger." *Aetna, 240 F. Supp. 3d at 60* (internal citation omitted).[20] In that sense, UI is buying something more like an ongoing business than a plant. And in a recent study of merger remedies, the FTC found that "all of the divestitures involving an ongoing business succeeded" in "clearing a high bar—maintaining competition in the relevant market."[21]

The FTC also points out that PeroxyChem recently lost its biggest customer served by the Prince George plant, Suncor. PPFFCL at 67 ¶ 229. But the Suncor issue speaks more to competition already lost by PeroxyChem, rather than to whether UI will "replace the competitive intensity lost as a result of the merger." *Sysco, 113 F. Supp. 3d at 74*. Even setting that point aside, PeroxyChem showed at the evidentiary hearing that it has already exceeded internal 2020 bidding projections for the Prince George plant by replacing more than half of the lost Suncor business. Lerner Hrg. Tr. 1394:21-1395:15; Cummins Hrg. Tr. 1760:22-1761:13. Since the hearing, PeroxyChem has had every incentive to continue these efforts, with the serious risk that this Court or the Canadian Competition Bureau would block the merger and the need for the divestiture **[**53]** to UI. Lerner Hrg. Tr. 1395:5-15. And if there were any remaining doubt about the Prince George plant's sustainability, the divestiture agreement [TEXT REDACTED IN ORIGINAL SOURCE] [TEXT REDACTED IN ORIGINAL SOURCE] PPFFCL at 69 ¶¶ 233-35. The FTC argues that these provisions are red flags raising "serious and substantial questions as to Prince George's

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[20] [TEXT REDACTED IN ORIGINAL SOURCE] *See* PPFFCL at 67-68 ¶ 230. Still, even without UI receiving all of Prince George's "management infrastructure" from PeroxyChem's Philadelphia headquarters, *Aetna, 240 F. Supp. 3d at 60*; *see* Lerner Hrg. Tr. 1360:11-12, UI is likely to replace PeroxyChem's competitive intensity in the Pacific Northwest. *See* Montag Hrg. Tr. 1553:4-7; Kramer Hrg. Tr. 1627:11-17.

[21] *See* FTC, *The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics*, at 1 (Jan. 2017), https://www.ftc.gov/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics (cleaned up).

viability," PPFFCL at 67 (cleaned up), but in fact, these provisions show that UI is set up to compete into the future.[22]

(D) UI's Independence

Next, there is no reason to question whether UI will be an independent competitor in the Pacific Northwest. The FTC challenges UI's independence because it has ongoing commercial relationships with Evonik and PeroxyChem as a customer for hydrogen peroxide, and UI leases the land for its Mobile, Alabama, plant from Evonik.[23] PPFFCL at 70-71 ¶¶ 241-42. But Cummins credibly dispelled this notion of undue influence. Cummins Hrg. Tr. 1742:5-1743:7. The FTC also points out **[*307]** that when UI made its first offer to purchase the Prince George plant, it [TEXT REDACTED IN ORIGINAL SOURCE] PX1515-003. But that is just the nature of selling a business, which is never completely seamless. UI may not—in fact, it *will* not—secure every customer **[**54]** it pursues when it takes over the Prince George plant. But the record does not cast doubt on UI's ability to compete independently, given the protections in the divestiture agreement, UI's experience, and the scope of the divestiture. In fact, Prince George is likely to be operating at capacity in 2020. *See* Cummins Hrg. Tr. 1753:5-21.

(E) Purchase Price

Finally, the proposed purchase price does not cast doubt on the viability of the Prince George plant if it is sold to UI. The FTC argues that the [TEXT REDACTED IN ORIGINAL SOURCE] purchase price is cause for concern because it is far lower than other third-party valuations of the plant. PPFFCL at 71 ¶¶ 243-45. But there are a few explanations for the low price, none of which impact Defendants' showing that they will compete effectively in the Pacific Northwest.

First, to state the obvious, a potential buyer of an asset sold to facilitate a merger under scrutiny by two countries' antitrust authorities has enormous leverage over the seller because it knows the seller must divest the asset quickly to proceed with the merger. DPFFCL at 52 ¶ 139. This short timeframe puts UI's rushed and minimal due diligence into perspective as well, *see* PPFFCL at 66-67 ¶¶ 223-28. Although **[**55]** most companies contemplating such a purchase would conduct more thorough diligence, the limited window for that diligence allowed UI to bargain for a lower price. *See id.*; PX1515-002 to - 003 ([TEXT REDACTED IN ORIGINAL SOURCE]). In short, by bidding the lowest price possible, UI acted like any rational actor in this circumstance. Cummins Hrg. Tr. 1900:16-1901:10.

Second, that UI has no presence in the Pacific Northwest provided Evonik an even stronger incentive to sell the Prince George plant to it, as opposed to a current hydrogen peroxide supplier in the market like [TEXT REDACTED IN ORIGINAL SOURCE] which valued the plant at [TEXT REDACTED IN ORIGINAL SOURCE]. *See* PPFFCL at 71-72 ¶ 246. It stands to reason that Evonik's merger with PeroxyChem would be more likely to survive antitrust scrutiny if it sold the Prince George plant to UI, since doing so would maintain the same number of competitors in the Pacific Northwest.

The FTC suggests that the [TEXT REDACTED IN ORIGINAL SOURCE] purchase price would allow UI to sell off the Prince George plant for parts or drive it into the ground and still turn a profit. *See* PPFFCL at 71 ¶¶ 243-45. To the contrary, the evidence shows that UI is a good-faith purchaser that **[**56]** intends to compete effectively in the hydrogen peroxide market and grow the business, and it has strong incentives to do so.[24] *See, e.g.*, Cummins Hrg.

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[22] *See also* Decision and Order, *In re Linde AG*, FTC Docket No. C-4660 at 15 (Feb. 26, 2019), https://www.ftc.gov/system/files/documents/cases/c4660_decision_and_ordermodified_ 593725_public_redacted.pdf (showing similar non-solicitation provision in FTC consent decree to protect divestiture buyer).

[23] The FTC notes that Evonik can evict UI on short notice from this plant, PPFFCL at 70-71 ¶ 242, implying that Evonik could do so to strongarm UI into coordinating on price or declining to compete for certain customers. But there is no evidence in the record to suggest that the Evonik-UI lease is not beneficial to both parties, and Evonik has denied all such intentions. *See* Cummins Hrg. Tr. 1742:14-20.

Tr. 1742:17-1743:7, 1771:16-1773:17. UI's purchase of another hydrogen peroxide plant in Turkey just last year, which it has maintained over the last six months, speaks to this good faith. DPFFCL at 48 ¶ 127. The FTC also makes much out of UI's lack of specific plans for the Prince George plant, as if UI may decide to ignore the plant's existing operating procedures and fire its employees. *See* PPFFCL at 69 ¶ 236. That seems highly doubtful. *See* DPFFCL at 50-51 **[*308]** ¶ 135. UI is buying a plant from PeroxyChem with all of the key assets and day-to-day operations in place; there was no obvious reason at the time of the evidentiary hearing for it to have developed its own specific plan.

Ultimately, "antitrust deals in 'probabilities, not certainties.'" *Aetna, 240 F. Supp. 3d at 60* (quoting *Brown Shoe, 370 U.S. at 323*). And Defendants' burden is only to show that the divestiture will likely replace PeroxyChem's competitive significance in the Pacific Northwest. Defendants have far exceeded that threshold. For these reasons, just as the Canadian Competition Bureau found when approving the UI divestiture with respect to western Canada, **[**57]** *see* Consent Agreement, ECF No. 141-1 at 10, 12-13,[25] the Court finds that the merger is not likely to "substantially . . . lessen competition" in the FTC's proposed Pacific Northwest market. *15 U.S.C. § 18*. As a result, that proposed geographic market cannot assist the FTC in showing its likelihood of success on the merits.

ii. Southern and Central United States

The FTC's other proposed geographic market is the Southern and Central United States. As already noted, the FTC bears the burden to define a relevant geographic market, *Cardinal Health, 12 F. Supp. 2d at 49*, the region "in which the seller operates, and to which the purchaser can practically turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*; *see also* *Cardinal Health, 12 F. Supp. 2d at 49* (relevant geographic market is the area "to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition" (citation omitted)). As this definition suggests, a geographic market is dependent on a properly defined product market—no court can assess "the area of effective competition" for a product without defining the product itself. *E. I. du Pont de Nemours, 353 U.S. at 593* (quoting *Standard Oil, 337 U.S. at 299 n.5*); *Tampa Elec., 365 U.S. at 328*; *see* Merger Guidelines § 4.2 ("The [Government] applies the principles of [geographic] market definition described here . . . to define a relevant **[**58]** market with a geographic dimension *as well as a product dimension.*"); Merger Guidelines § 4.2.1 ("The hypothetical monopolist test requires that a hypothetical profit-maximizing firm that was the only present or future producer *of the relevant product(s)* located in the region would impose at least a SSNIP from at least one location . . . .") (emphases added).

Here, the Court has already explained that at least on the current record, the only relevant product markets are hydrogen peroxide products formulated for specific end uses. But the FTC argues that its proposed Southern and Central United States geographic market is the area of competition for *all* non-electronics hydrogen peroxide because, in its view, customers for that broader product market can choose from all five "freight-logical" hydrogen peroxide suppliers. *See* PPFFCL at 21 ¶ 68; *id.* at 23 ¶ 74; *id.* at 26-27 ¶¶ 83-84, 87, 90, 93; *id.* at 28 ¶¶ 95, 99. Accordingly, then, the FTC relied on evidence that suppliers of all manner of hydrogen peroxide products bid and compete for customers across the purported "Southern and Central United States." *See, e.g.*, PPFFCL at 23-25 ¶¶ 74-77. Dr. Rothman also conducted the hypothetical monopolist test for **[*309]** "H2O2 sold to customers that are located in **[**59]** these states." *Id.* ¶ 73. But none of that evidence or analysis is tailored to a relevant geographic market for *each* relevant product market—specific end uses of hydrogen peroxide. Because that evidence does not correspond to the relevant product markets, it is of little use to the FTC in meeting its burden of showing an undue concentration in a market for a particular product in a particular geographic area.

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[24] UI's good-faith desire to compete in the hydrogen peroxide industry is one of many features that distinguish it from the failed divestiture in *Aetna, 240 F. Supp. 3d at 72*. *See id.* at 62, 72-73 (proposed divestiture buyer "repeatedly tried to enter" the market in the past and failed); *id. at 63, 65* (buyer would not acquire anything resembling a standalone business); *id. at 65* (buyer showed substantial doubts about its own ability to succeed); *id.* at 72 (purchase price 1/10th of fair market value).

[25] *But see* ECF No. 142 at 3 n.2 (comparing standards for merger remedies in the United States and Canada).

The FTC need look no further than its own challenge to the proposed merger in *Sysco* to see what is missing here. In *Sysco*, the FTC defined relevant product markets based on customer type: "broadline foodservice distribution" to local customers and "broadline foodservice distribution to national customers." *113 F. Supp. 3d at 48-49*. For the national product, as the name indicates, the FTC defined one relevant national geographic market. *Id. at 49*. But for the local product, the FTC defined 32 relevant local geographic markets where the merging firms have dominant market shares. *Id. at 49, 52*. Here, the FTC could have pleaded and argued a Southern and Central United States geographic market for its proposed non-electronics product market and also argued for alternative geographic markets corresponding to each end-use product **[**60]** market. But it did not. So the Court is left with product markets disconnected from any proposed geographic markets in which to analyze competition for those products.

To be sure, a geographical market need not be defined by precise metes and bounds. *Gen. Dynamics, 415 U.S. at 521*. But the record contains substantial evidence suggesting that the Southern and Central United States would not be the relevant area of effective competition for each end-use hydrogen peroxide product. For pulp and paper customers, for instance, because of the narrow profit margins, "it'd be cost prohibitive to ship hydrogen peroxide all the way across the country," Anderson Hrg. Tr. 199:23-25 (cleaned up), whereas customers for specialty end uses like aseptic packaging or chemical synthesis may look to the entire United States for their hydrogen peroxide supply. *See* Lerner Hrg. Tr. 1379:13-24, 1381:6-18 ("freight-logical market for pulp and paper" much narrower than for "specialties," where suppliers "have a much greater ability to ship those specialties literally anywhere on the land surface"); Hill Rpt., JX0066-028 fig. 4 (over [TEXT REDACTED IN ORIGINAL SOURCE] percent of standard grade hydrogen peroxide in North America served by nearest **[**61]** plant); DPFFCL at 89 ¶ 239. Indeed, the parties agree that in some cases, "it is appropriate to define geographic markets in the hydrogen peroxide industry . . . as narrowly as individual customers." DPFFCL at 38 ¶ 102; PFFCL at 21 ¶ 69. Or take the case of pre-electronics grade hydrogen peroxide, an end use and therefore a relevant product market all its own. MGC, a customer in Arizona with plants opening soon in Oregon and Texas, "buys on the order of 99 percent of pre-electronics that's sold," Hill Hrg. Tr. 2080:22-23, which is shipped from [TEXT REDACTED IN ORIGINAL SOURCE]. *See* Hancock Decl., JX0001-001 to - 002; DPFFCL at 13 ¶ 35. It is therefore highly unlikely that the relevant geographic market for pre-electronics is just the Southern and Central United States.

These examples merely illustrate why the Court cannot assume that the Southern and Central United States is a relevant geographic market, especially when the FTC has not pleaded or proved geographic markets that correspond to the relevant product markets, as it must. *See* *Cardinal Health, 12 F. Supp. 2d at 49*. The FTC's failure to sufficiently define a relevant geographic market is another reason it has not met its burden here. *Id.*

[*310] 2. Market Concentration

Because the FTC has failed to show a relevant product **[**62]** market with a corresponding relevant geographic market in which competition occurs, a discussion of the next step of its prima facie case—showing undue concentration in that market—is anticlimactic. The FTC has not met its burden under *Baker Hughes* to show undue concentration "in the market for a particular product in a particular geographic area." *908 F.2d at 982*.

"Market concentration, or the lack thereof, is often measured by the Herfindahl—Hirschman Index (HHI)."[26] *Heinz, 246 F.3d at 716*. The FTC has not provided HHIs or other measurements for Evonik and PeroxyChem's combined

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[26] The HHI is calculated by squaring the market share of each firm in the market and adding up these squares (so, if there are three firms with market shares of 50%, 30%, and 20%, the HHI would be $50^2 + 30^2 + 20^2 = 3{,}800$). Squaring the individual market shares allocates proportionately greater weight to firms with larger shares, reflecting the larger threat to competitive behavior they pose. *See* Merger Guidelines § 5.3. For antitrust purposes, the FTC and the U.S. Department of Justice generally classify markets as "unconcentrated," "moderately concentrated," and "highly concentrated." An unconcentrated market features an HHI of below 1,500. A moderately concentrated market has an HHI of between 1,500 and 2,500, while a highly concentrated market has an HHI that is greater than 2,500. *Id.*

market share in any alternative market for a particular end use—the only relevant product markets with which to examine the merger's competitive effects. That failure is dispositive. The Court is unaware of a single case in which a court has enjoined a merger, even at this preliminary stage, where the Government failed to show undue concentration in a relevant market as its prima facie case requires, almost always through an HHI or similar metric. *Baker Hughes* explicitly places that burden squarely on the FTC. *908 F.2d at 982*; *see* *United States v. Anthem, Inc., 855 F.3d 345, 349, 353, 428 U.S. App. D.C. 403 (D.C. Cir. 2017)* (government has the "burden to demonstrate a highly concentrated post-merger market"); *Heinz, 246 F.3d at 715*; *United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 84 n.35 (D.D.C. 2011)* ("The Court is not aware of any modern *Section 7* case **[**63]** in which the court dispensed with the requirement to define a relevant product market."). And a party's failure to make out a prima facie case is generally considered a "fundamental defect" that dooms its case. *See* *Rose v. Mitchell, 443 U.S. 545, 574, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979)* ("declin[ing] to overlook" party's failure to "make out a prima facie case of discrimination" even where the opposing party conceded otherwise); *Williams v. Boorstin, 663 F.2d 109, 118, 213 U.S. App. D.C. 345 (D.C. Cir. 1980)* ("holding . . . no prima facie case" and reversing judgment finding a Title VII violation); *Baker Hughes, 908 F.2d at 991* ("production-burden-shifting" framework for "discrimination suits under [T]itle VII" "similar" to *Baker Hughes* framework for *Section 7*).

The FTC argues that no matter how the product markets are sliced, "the merger **[*311]** would be presumptively illegal in most, if not all, of such narrower markets." Br. at 14. High concentrations in the Southern and Central United States in the overall standard and non-electronics grade markets suggest that it is possible the FTC could avail itself of that presumption in some more narrowly defined market for a specific end-use product. *See* Rothman Rpt., JX0075-052 to - 053 & n.159; Rothman Rebuttal Rpt., PX7102-010. But those concentrations do not necessarily mean that is likely, given the issues discussed **[**64]** above with delineating relevant geographic markets that correspond to end-use product markets. At bottom, the Court cannot rely on guesswork to get the FTC over the hump. "[A]ntitrust theory and speculation cannot trump facts, and even *Section 13(b)* cases must be resolved on the basis of the record evidence relating to the market and its probable future." *Arch Coal, 329 F. Supp. 2d at 116-17*.

There are also practical reasons why the Court should not deem the FTC to have made out its prima facie case on this record, without an HHI calculated for a relevant product and geographic market that the Court has found viable. The rest of the Court's analysis on the merits runs the risk of devolving into speculation. For example, the "more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." *See* *Baker Hughes, 908 F.2d at 991*; *Arch Coal, 329 F. Supp. 2d at 129* ("Certainly less of a showing is required from defendants to rebut a less-than-compelling prima facie case."). But if the Court has no direct measure of the *strength* of the FTC's prima facie case connected to the relevant market, it cannot weigh whether the evidence offered by Defendants is enough to rebut that case. More generally, evaluating the persuasiveness of the additional evidence offered **[**65]** by Defendants in rebuttal, and by the FTC in support of its ultimate likelihood of success on the merits, becomes all but impossible. Some of that evidence might be relevant (and to some degree) to competition in that narrower relevant market, and some might not. The Court has little way of sorting all that out, when the parties have not tailored their presentations to the relevant market. And, it bears mentioning, even the "mere possibility" of a substantial lessening of competition is not enough to show a violation of the Clayton Act. *Heinz, 246 F.3d at 713* (citation omitted); *see also* *Staples I, 970 F. Supp. at 1072* ("It is not enough for the FTC to show merely that it has a 'fair and tenable chance' of ultimate success on the merits.").

Economists calculate the HHI score of an industry before and after the proposed merger. Transactions that result in an HHI increase of fewer than 100 points "are unlikely to have adverse competitive effects." *Id.* In moderately concentrated markets, a transaction that increases the HHI by more than 100 points "potentially raise[s] significant competitive concerns and often warrant[s] scrutiny." *Id.* Mergers "resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." *Id.* This presumption of anticompetitive effects "may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power." *Id.*

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All of this is not to say that in a subsequent administrative proceeding, the FTC could not calculate HHIs connected to end-use-specific product markets and relevant geographic markets to make out its prima facie case. But the Court cannot say on this record—devoid of particularized data for those relevant markets—that there is a "reasonable probability" that Evonik and PeroxyChem's merger would produce an undue concentration in a relevant market.[27] *Heinz, 246 F.3d at 713* (citation omitted). **[*312]** Accordingly, the FTC has not met **[**66]** its burden of demonstrating a prima facie case.

B. Defendants' Rebuttal Evidence and the FTC's Additional Evidence of Anticompetitive Harm

Nonetheless, to provide as complete a review of the record as possible in this unusual circumstance, the Court will not stop there. The Supreme Court has stressed that courts must judge "the probable anticompetitive effects of the merger" "functionally" and based on "a further examination of the particular market—its structure, history and probable future." *Gen. Dynamics, 415 U.S. at 498* (quoting *Brown Shoe, 370 U.S. at 321-22 & n.38*) (cleaned up). Of course, in *General Dynamics*, the Court only conducted a further examination "of the particular market" after the Government met its prima facie burden, *id. at 497-98*, and the Court has concluded that the FTC has failed to meet that burden. But even assuming that the FTC had made out a prima facie case on this record, the Court could not conclude that it has shown a likelihood of success based on Defendants' rebuttal evidence and the FTC's additional evidence of anticompetitive harm.

In undertaking an evaluation of that evidence, the Court's review is necessarily limited. As explained above, much of this additional evidence—especially the dueling quantitative **[**67]** models developed by Dr. Rothman and Dr. Hill—is grounded in the FTC's proposed product and geographic markets, which the Court has rejected. The Court cannot know much about what, if anything, that evidence might mean for the effects of the proposed merger on different product and geographic markets.[28] The Court notes only that Dr. Hill, who has testified on behalf of the FTC and against proposed mergers on several occasions, asserted based on his models that even in the market as conceived by the FTC, the merger would not result in a substantial reduction of competition. Dr. Rothman took the opposite view.

That said, other evidence applies to how the industry operates as a whole and is therefore less dependent on the FTC's proposed product and geographic market definitions. The Court does its best to assess that evidence below. And after doing so, it concludes that the current hydrogen peroxide industry is not particularly vulnerable to coordination, what vulnerability exists is not likely to increase as a result of the merger, and the evidence does not show a likelihood that the merger will cause substantial unilateral anticompetitive effects.

There is no science to weighing the **[**68]** factors at play in an antitrust analysis. Only an examination of the real-world evidence—including ordinary course documents, bidding data, and testimony from market participants—can supply an accurate picture of the industry and competitive **[*313]** dynamics.[29] That picture in this case reveals that

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[27] One judge has gone so far as to suggest that a plaintiff "may" prove a *Section 7* violation even *without* meeting its prima facie burden under *Baker Hughes* to "defin[e] a market and show[] undue concentration in that market." ***Whole Foods, 548 F.3d at 1036 (Brown, J.)*** (citing *Baker Hughes, 908 F.2d at 982-83*; *United States v. El Paso Natural Gas Co., 376 U.S. 651, 660, 84 S. Ct. 1044, 12 L. Ed. 2d 12 (1964))*. Even if the FTC here could meet its prima facie burden without showing undue concentration in a relevant market—instead relying on other evidence of anticompetitive harm such as predicted price effects, *e.g.*, Rothman Rpt., JX0075-094 & n.324, -097 to - 099 & nn.334, 339, 344; *id.* -104 to - 106 & nn.350, 354, 356, 358—that record evidence would not make out a prima facie case for the reasons already described. The FTC's threshold failure to define a relevant market hamstrings its ability to show (and the Court's ability to evaluate) a likely and substantial lessening of competition.

[28] The FTC introduced data on predicted first order approximation effects and merger simulation predicted price effects for an alternative standard grade hydrogen peroxide product market in the Southern and Central United States and in alternative geographic markets in the Southern, Central, and Western United States—none of which the FTC has shown are relevant markets. *See* Rothman Rpt., JX0075-094 & n.324, -097 to - 099 & nn.334, 339, 344; *id.* -104 to - 106 & nn.350, 354, 356, 358.

hydrogen peroxide prices are falling, and that competition is being promoted by blind bidding, sophisticated customers, and the customary use of large and long-term contracts. The Court concludes that the proposed merger is not likely to substantially change these market characteristics or substantially increase prices.

1. The Market's Vulnerability to Coordination

"Merger law rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels." *Heinz, 246 F.3d at 715* (internal quotations omitted). Coordination is conduct by firms that is profitable for each of them only if the others accommodate it. Merger Guidelines *§ 7*. Tacit coordination, the FTC's theory in this case, is enforced not by an explicit agreement, but by the "detection and punishment of **[**69]** deviations." *Id.* Firms' ability to coordinate "depends on the strength and predictability of rivals' responses to a price change or other competitive initiative." *Id.* Tacit coordination itself is not illegal; it is firms making "independent production decisions to maximize profits. But a core purpose of ***antitrust law*** is to scrutinize mergers that may make it easier for firms to collectively reduce output, and indeed, to prevent mergers that are likely to do so." *FTC v. Tronox Ltd., 332 F. Supp. 3d 187, 208-09 (D.D.C. 2018)*; *see* *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*. The Merger Guidelines advise that even where a market "shows signs of vulnerability to coordinated conduct," before challenging a merger, the FTC must also "have a credible basis on which to conclude that the merger may enhance that vulnerability." § 7.1.

The FTC is right that some features of the hydrogen peroxide industry typically suggest vulnerability to coordination. There are few suppliers, only five in the FTC's proposed product and geographic market. And fewer suppliers usually means that suppliers anticipate "stronger and faster" responses from their rivals, which diminishes the reward from attracting a competitor's customers. Merger Guidelines § 7.2; *see* Rothman Hrg. Tr. 750:20-21 ("maintaining discipline through deterrence **[**70]** is more straightforward when there are fewer firms"). Elasticity of demand in the hydrogen peroxide market is also extremely low, regardless of end use. PPFFCL at 32-33 ¶¶ 113-17. In other words, customers are unlikely to substitute away from hydrogen peroxide to a different chemical if suppliers coordinate to increase prices by a significant amount. Accordingly, **[*314]** the incentives for suppliers to coordinate are stronger.

But taken together, the remaining evidence rebuts the notion that the current hydrogen peroxide market is vulnerable to coordination.

First, blind bidding for hydrogen peroxide customers produces substantial cost savings for customers and "frustrate[s] coordination among producers." *Arch Coal, 329 F. Supp. 2d at 144*; *see* DPFFCL at 53-54, 66-67 ¶¶ 143-46, 173. In general, the bidding process in the industry works as follows: a customer publishes an RFP for a given location, specifying the hydrogen peroxide product, volume, and contract duration sought; suppliers submit confidential bids; and then the customer typically lets one or more of the bidders know how competitive their bid is (without sharing specific prices) so that they will lower their bid price. *See* DPFFCL at 15 ¶¶ 42, 44; *id. at 66-67* ¶ 173. This pitting of suppliers against each other lowers prices, **[**71]** even when there are only two competing suppliers, because suppliers generally do not know which other suppliers have placed bids. *See* *id. at 67* ¶ 175. In this market, without specific knowledge of competing bids, suppliers are incentivized "to submit aggressive bids"

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[29] The Court admitted over 1,300 exhibits en masse at the beginning of the two-week evidentiary hearing. *See* Hrg. Tr. 155:20-157:5; Final Exhibit List, ECF No. 135-2; Joint Report on Defendants' Outstanding Objections, ECF No. 139-1. But the Court did not accord all that evidence equal weight. When a party cited an exhibit in its proposed findings of fact and conclusions of law without laying a foundation for it at the hearing, or where it cited the deposition of a witness who did not testify at the hearing, the Court granted less weight to the evidence (and sometimes no weight). *See, e.g.*, PPFFCL at 77 ¶ 263 (citing JX0021). That weight depended on several factors. *See* Minute Order of October 23, 2019 (denying Defendants' request to exclude certain categories of evidence because the Federal Rules of Evidence do not apply to preliminary injunction hearings, but noting that the Court would accord weight to evidence depending on the manner in which it was presented, whether a foundation for it was laid, and whether the circumstances suggested its relevance and reliability).

because "cheating"—a departure from coordinated higher prices—"would not be detected until well after the fact, if ever, and any punishment would come well after the fact as well." *Arch Coal, 329 F. Supp. 2d at 145*. Accordingly, the average price of standard grade hydrogen peroxide in the Southern and Central United States, measured across all end uses, has *decreased* each of the last three years for three of the five hydrogen peroxide suppliers, Hill Rpt., JX0066-098 fig. 45, and prices have declined for much of the rest of the industry as well, *id.* -097 fig. 44; *see also id.* -099 fig. 46 (annual customer savings from bidding competition for Southern and Central United States customers).

Second, the use of large and long-term contracts in the hydrogen peroxide industry incentivizes firms to "deviate from the terms of coordination," *FTC v. CCC Holdings, 605 F. Supp. 2d 26, 64 (D.D.C. 2009)* (internal quotation omitted), "even if they expect strong responses by rivals," Merger Guidelines § 7.2, because the stakes are so high **[**72]** and there are fewer "opportunities for firms to punish one another." Hill Hrg. Tr. 2059:14-15; *see Arch Coal, 329 F. Supp. 2d at 145*; DPFFCL at 69-70 ¶¶ 179-81. Customers for hydrogen peroxide are typically large manufacturers who consume an enormous volume of hydrogen peroxide annually.[30] DPFFCL at 69 ¶ 180. Contracts for those customers come up for bidding at most once a year, and usually every other or third year. *Id. at 69-70* ¶ 181. If a supplier loses out on too many contracts, it cannot just turn to a customer base outside North America or find other ways to increase demand; total volume in the hydrogen peroxide industry has remained relatively constant, so suppliers understand they are competing for a limited base of customers. *See* PPFFCL at 32 ¶ 114. In this small and stagnant pond of customers, competition for the bigger fish is fierce. It is unlikely that suppliers would **[*315]** coordinate and decline to cast their rod for the chance to reel any one of them in. Indeed, the record shows that suppliers typically bid aggressively for those big contracts, as the Court discusses below when evaluating suppliers' recognition of their interdependence.

Third, even if suppliers did try to coordinate their bidding behavior to increase prices, the hydrogen peroxide industry **[**73]** is marked by sophisticated and powerful customers that are well equipped to defeat coordination. *See* Merger Guidelines § 8; *Wilhelmsen, 341 F. Supp. 3d at 70*; *CCC Holdings, 605 F. Supp. 2d at 64* ("A sophisticated customer base makes price coordination more difficult."). Many hydrogen peroxide customers have dedicated procurement personnel who are experienced at conducting RFPs, minimizing costs, and leveraging competing bids to secure the best contract terms. *See* DPFFCL at 70-71 ¶¶ 183-85.

Fourth, while previous collusion in an industry can give rise to a presumption that a market is vulnerable to coordination, that presumption does not hold if "competitive conditions in the market have since changed significantly." Merger Guidelines § 7.2. Here, competitive conditions in the hydrogen peroxide industry *have* changed significantly since some suppliers engaged in price fixing nearly 20 years ago. *See* PPFFCL at 42-43 ¶ 143; DPFFCL at 72 ¶ 188. The FTC argues that because the industry products, plants, actors, and capacity are roughly the same now, nothing has changed. PPFFCL at 43-44 ¶¶ 144-48. But the very features of the industry that enabled suppliers to fix prices—public price announcements, swap agreements, and meet-or-release clauses, *see* DPFFCL at 73 ¶¶ 190-92—are largely nonexistent now, and there is no reason to think they **[**74]** are likely to return soon.[31]

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[30] The FTC notes that some pulp and paper customers award business on a mill-by-mill basis, so those large-volume buyers do not "inherently impede coordinated conduct." PPFFCL at 99 ¶ 80; *see id.* at 78 ¶ 268. Although this may mitigate the effect of large and long-term contracts somewhat, each of those mills are still purchasing high volumes of hydrogen peroxide, and competition is progressively stronger for this "shrinking pie" of pulp and paper customers. Rhilinger Hrg. Tr. 2414:18; *see* Hill Hrg. Tr. 2205:20-2206:4; JX0089-003 (almost 19 million pounds of hydrogen peroxide volume for [TEXT REDACTED IN ORIGINAL SOURCE] pulp and paper mill).

[31] For example, the record reflects only one public price announcement since 2016. *See* PX2055-004; PPFFCL at 44 ¶ 149; DPFFCL at 73 ¶ 190. The FTC argues that [TEXT REDACTED IN ORIGINAL SOURCE] attempted to raise prices in 2018, an allegation it first leveled after the hearing in its proposed findings of fact, PPFFCL at 44 ¶ 149 (citing [TEXT REDACTED IN ORIGINAL SOURCE] JX0054 [TEXT REDACTED IN ORIGINAL SOURCE]; PX3028-001), and without questioning the relevant witnesses about it at the evidentiary hearing: [TEXT REDACTED IN ORIGINAL SOURCE] Even so, it appears the attempted price increase was only communicated to customers, not to the public. *See* PX3028-001; Mahr Hrg. Tr. 2421:23-2422:3. In addition, when suppliers fixed prices two decades ago, they frequently reached swap agreements with each other. DPFFCL at

There is mixed evidence in the record relating to other factors that courts consider to evaluate industry vulnerability to coordination. But on balance, the Court concludes that Defendants have the better argument in each case, or at least that the factor is essentially neutral.

One factor is market transparency, on which coordination depends. A market is more vulnerable to coordination if (1) "the terms offered to customers are relatively transparent," (2) there is "[p]rice transparency," or (3) there is "transparency regarding **[*316]** the identities of the firms serving particular customers" (which can give rise to "customer or territorial allocation"). Merger Guidelines § 7.2. Here, the terms offered to customers in blind bids are opaque; aside from knowing the basic terms requested in an RFP, suppliers have little way of knowing what their competitors are offering. *See* DPFFCL at 66-67 ¶ 173. Price is also mostly opaque. Suppliers have information about general pricing trends in the industry and each other's production costs, but systematic attempts by suppliers to track each other's prices have largely failed. *See* DPFFCL at 66-68, 77-78 ¶¶ 173, 176-77, 201; PPFFCL at 36-38 ¶¶ 127-130, 132; Corson Hrg. **[**75]** Tr. 658:8-11 ("I know that the pricing information, we, kind of, stopped even trying to maintain that because there was never a consistency, nor is this information available." (cleaned up)). On the other hand, suppliers gain a general idea of the relationships that develop between certain suppliers and certain customers from the bidding process and their conversations with customers. PPFFCL at 36-38 ¶¶ 130-31, 133.

Another factor is product and pricing homogeneity; the more homogenous products and prices are, the more vulnerable the market is to coordination. *CCC Holdings, 605 F. Supp. 2d at 61*. Although hydrogen peroxide products are relatively homogenous—within end uses, but not between them—pricing is heterogeneous and unpredictable for each product, largely due to the substantial role that freight plays into pricing decisions. *See* PPFFCL at 33-34 ¶¶ 118-20; DPFFCL at 65 ¶ 170; Hill Rpt. JX0066-028 fig. 4; *id.* -098 fig. 45 (average standard grade price varies from 23 cents to 37 cents); *id.* -097 n.254 (standard grade hydrogen peroxide "typically has less variation in price within it than do other grades"). These variations in price make it difficult for suppliers to predict how consumers will react to their pricing decisions, which would facilitate coordination. **[**76]**

In addition, plants operating at capacity can sometimes suggest a reduced incentive to compete for customers aggressively, because suppliers can only serve so many of them. *See* PPFFCL at 39 ¶ 136; JX0032-086; PX2484-001; *cf.* DPFFCL at 55 ¶ 147 (Solvay undercut suppliers on price in 2017 after they expanded capacity). And the evidence here shows that [TEXT REDACTED IN ORIGINAL SOURCE] hydrogen peroxide suppliers are operating their plants nearly at capacity. Even so, other features of the market—a significant portion of contracts up for bidding every year, large volume contracts, and the need to keep plants running at capacity due to the high fixed costs of running them—should still incentivize competition. *See* DPFFCL at 71 ¶ 184. Indeed, for those reasons, every bidding cycle is crucial for suppliers. *See, e.g.*, *id. at 70* ¶ 181; Corson Hrg. Tr. 652:14-19 ("[T]he large volumes that come up . . . at the end of the year . . . expose us to a lot of risk as we plan our production; our terminals; our whole logistics network around those customers. So if there is a change, it affects us dramatically.").

Finally, a market is conducive to tacit coordination "where producers recognize their 'shared economic interests and their interdependence **[**77]** with respect to price and output decisions.'" *Arch Coal, 329 F. Supp. 2d at 131* (quoting *Brooke Group, 509 U.S. at 227*)). The FTC's theory of such coordination presupposes suppliers with an acute awareness of each other's interdependence, withholding bids to avoid downward "price spirals" or retaliation from competitors. PPFFCL at 38-42 ¶¶ 134-41. But the evidence in the record on this point is mixed at best. In most cases when suppliers expressed concern about retaliation from competitors, **[*317]** those same suppliers proceeded to ignore that risk and undercut their competitors on price anyway, in large part due to the large and

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73 ¶ 191. A swap agreement occurs "when there's a customer that's relatively distant from its supplier, and that supplier makes a deal with a closer supplier to instead serve the customer on its behalf." Hill Hrg. Tr. 2066:19-22. A swap agreement lessens the incentive to compete for customers in the first place because both parties to the swap benefit from a single customer. *Id.* 2065:22-2067:1. And finally, suppliers used to include meet-or-release clauses in their customer contracts. DPFFCL at 73 ¶ 192. That clause allows a customer under contract who is offered a better price elsewhere to tell its current supplier, "[m]atch that price or I'm going to make the contract invalid and switch to the other supplier." *Id.* 2065:18-22. Meet-or-release clauses also lowered suppliers' incentive to compete aggressively in the first place, and they served as "an early warning system for detecting deviations" from coordination. *Id.* 2065:23-2066:7.

long-term contracts at stake. *See, e.g.*, PX1027-008 (Evonik recognizing "Competitive Repercussions" of taking Suncor business from PeroxyChem); PPFFCL at 67 ¶ 229 (Evonik successfully bid on Suncor anyway); JX0112 (supplier "bit off a little more than they expected . . . in retaliation for [Evonik] picking up . . . additional business"); PX2339-001 ("It's really critical that we push for whatever extra share we can get at [TEXT REDACTED IN ORIGINAL SOURCE]"); PX1307; PX1440.

Moreover, in the few instances when suppliers appeared to withhold bids after acknowledging the potential for retaliation, those decisions also reflected legitimate business considerations: **[**78]** for example, the supplier did not believe the contract at issue was large or long enough to justify offering a lower price, or the supplier recognized it was not likely to be competitive due to its location and the high cost of transporting hydrogen peroxide. DPFFCL at 76 ¶ 198; *see, e.g.*, Montag Hrg. Tr. 1569:2-1570:19; *id.* 1574:14-1576:5 (discussing PX2190-001 and that PeroxyChem sought a long-term commitment to justify the investment necessary to serve the customer); PX1074; PX2337-001; PX2501-001.

In summary, the evidence does not show that suppliers are coordinating in the hydrogen peroxide market to keep prices artificially high. As Defendants argued, "a market in which the prices are falling is one in which it's very unlikely that coordination is happening among suppliers. If they are [coordinating], they're doing a terrible, terrible job of it." Mahr Hrg. Tr. 2312:24-2313:2. Rather, despite the relatively few suppliers and low demand elasticity, suppliers appear to bid aggressively to win large and long-term contracts from sophisticated customers. While the "structure and dynamics of the . . . market may *permit* coordination," in this case they "do not make coordination *likely*." *Arch Coal, 329 F. Supp. 2d at 140*.

2. The [79] Proposed Merger's Effect on Coordination**

The Merger Guidelines advise that even where a market "shows signs of vulnerability to coordinated conduct," before challenging a merger, the FTC must also "have a credible basis on which to conclude that the merger may enhance that vulnerability." § 7.1. The proposed merger of Evonik and PeroxyChem is unlikely to do so. None of the above-described features of the industry currently inhibiting coordination in the hydrogen peroxide market are likely to change post-merger. DPFFCL at 78 ¶ 203. In other words, there is no reason to suspect that suppliers will not continue to participate in a blind bidding system for long-term and large contracts to win the business of sophisticated buyers.

The biggest change the proposed merger would bring about is to reduce the number of suppliers who own plants in the Southern and Central United States from five to four. PPFFCL at 45 ¶ 151. That change relates directly to market concentration and the FTC's prima facie case, and the Merger Guidelines suggest that the FTC must have an independent basis to conclude that a merger will increase the likelihood of coordination, apart from whatever evidence it offers to show undue market concentration. **[**80]** *See* § 7.1. In any event, there is no reason to think that reducing the number of hydrogen peroxide suppliers from five to four will likely lead to coordination. As described above, the industry is not especially vulnerable to it, and the record contains no evidence that suppliers are coordinating to raise prices or withhold supply in the FTC's other proposed geographic market of the Pacific **[*318]** Northwest, in which only three suppliers operate.

The FTC also argues that Evonik, which has historically maintained a "price over volume" strategy, will be a market leader post-merger that can more easily discipline competitors. PPFFCL at 45-46 ¶ 154-57. Setting aside whether such market asymmetry in fact increases the likelihood of coordination, *see* Hill Rpt., JX0066-110 to - 111, the FTC's argument is speculative and inconsistent with the record. Evonik is already the market leader in the Southern and Central United States, Rothman Rpt., JX0075-168, and so the scenario the FTC anticipates should have already come to pass. In fact, the evidence suggests the opposite. Evonik has consistently undercut other suppliers in the bidding process, *see, e.g.*, PPFFCL at 67 ¶ 229; JX0112. And market-wide prices are *decreasing* even with Evonik **[**81]** as the dominant player, *see* Hill Rpt., JX0066-097 to - 099.

Moreover, even if suppliers act contrary to that evidence and try to coordinate, Nouryon remains positioned to disrupt that behavior. "[C]ollective market power is diminished by the presence of other market participants with small market shares and little stake in the outcome resulting from the coordinated conduct, if these firms can rapidly expand their sales in the relevant market." Merger Guidelines § 7.2. Nouryon is well situated to expand its hydrogen peroxide sales in the event of a price increase because it (1) is "the smallest of all of the competitors," Radlinski Hrg. Tr. 538:15; (2) has won business from suppliers in the past, [TEXT REDACTED IN ORIGINAL SOURCE] ; and (3) has over [TEXT REDACTED IN ORIGINAL SOURCE] pounds of excess capacity at its Columbus, Mississippi, plant with only an [TEXT REDACTED IN ORIGINAL SOURCE] utilization rate, Radlinski Decl., JX0009-002; Radlinski Hrg. Tr. 545:17-21; Hill Rpt. JX0066-109.[32]

While "the risk that a merger will induce adverse coordinated effects may not be susceptible to quantification or detailed proof," the FTC must still "have a credible **[**82]** basis on which to conclude that the merger may enhance that vulnerability." Merger Guidelines § 7.1. It does not come close to meeting that standard.

3. The Proposed Merger's Unilateral Effects

The FTC has also failed to show that the proposed merger is likely to have substantial unilateral effects. "A merger is likely to have unilateral anticompetitive effect if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms." *H & R Block, 833 F. Supp. 2d at 81*. In industries like hydrogen peroxide where buyers negotiate with sellers and play sellers off each other, "[a]nticompetitive unilateral effects . . . are likely in proportion to the frequency or probability with which, prior to the merger, one of the merging sellers had been the runner-up when the other won the business." Merger Guidelines § 6.2. To be sure, the evidence suggests that Evonik and PeroxyChem compete head-to-head for *some* hydrogen peroxide customers, for *some* end uses. *See* PPFFCL at 49-50 ¶ 167. As a result, the loss of PeroxyChem as a competitor may lead to a price increase for *some* customers. But the question for the Court is whether the proposed merger, as a whole, is likely to **[**83]** "substantially . . . lessen competition." *15 U.S.C. § 18*. The evidence does not show that to be so.

[*319] A quantitative analysis of the unilateral effects, like market concentration, is impossible without data reflecting a properly defined relevant market, bounded by both product and geography. The FTC's expert, Dr. Rothman, offered two economic models to illuminate the merger's likely unilateral effects, the "GUPPI" and the "second-score procurement merger simulation model," Rothman Rpt., JX0075-088, -100, both of which rely on markets the Court has rejected. The GUPPI model—which predicts "upward pricing pressure" or "the magnitude of the changes in incentives to compete aggressively"—relies on market shares of those ill-defined markets to measure customers' preferences for Evonik or PeroxyChem.[33] *Id.* -089, -091.

Likewise, Dr. Rothman's second-score procurement merger simulation model—which "estimate[s] the likelihood that Evonik and PeroxyChem are the two-highest surplus bidders for customers"—relies on (1) "market shares," and (2) transaction data aggregated "for all . . . non-electronics hydrogen peroxide, as well as for . . . standard grade hydrogen peroxide only", *id.* -102, both of which are **[**84]** based on the FTC's ill-conceived product and geographic markets. The model then predicts price increases for all non-electronics grade hydrogen peroxide—and

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[32] The FTC relies on a benign remark by Nouryon's Paul Radlinski to argue that [TEXT REDACTED IN ORIGINAL SOURCE] PPFFCL at 54 ¶ 179. But Radlinski testified that Nouryon—[TEXT REDACTED IN ORIGINAL SOURCE] Hrg. Tr. 545:22-546:16. [TEXT REDACTED IN ORIGINAL SOURCE], *[TEXT REDACTED IN ORIGINAL SOURCE] See id.* 545:17-21 ([TEXT REDACTED IN ORIGINAL SOURCE]).

[33] Even setting aside the GUPPI's market-share input, the model is unreliable here because: (1) the Merger Guidelines only recommend using the GUPPI to predict upward pricing pressure for "differentiated products," § 6.1, and the products here are homogenous within each relevant product market (hydrogen peroxide formulated for a specific end use), *see* Hill Rpt., JX0066-084 to - 085; (2) the GUPPI "assumes that customers have little or no bargaining power," Rothman Rpt., JX0075-088, which is not the case with hydrogen peroxide customers; and (3) accurate GUPPI results "require[] precise information on pass-through behavior," and Dr. Rothman provides no evidence to support his .8 pass-through rate of cost to price, *see* Hill Rpt., JX0066-086 to - 089.

for an alternative standard grade hydrogen peroxide product market—in the Southern and Central United States as well as in alternative geographic markets in the Southern, Central, and Western United States. *Id.* -103 to - 106 & nn.349-50, 354, 356, 358. The problem is that the FTC has not shown that the model's "inputs" or "outputs" are grounded in relevant product or geographic markets. The Court cannot assume that suppliers compete just as closely in smaller product-geography cross-sections of the market; in fact, in many situations, that is clearly not the case. And for these reasons, there is no basis for the Court to assume that the total predicted effect of the merger calculated by Dr. Rothman is merely the sum total of these smaller product-geography cross-sections. Because the Court has found the FTC's proposed product and geographic markets wanting, Dr. Rothman's models are of little use to the FTC in showing likely unilateral effects of the merger.

The remaining qualitative evidence in the record, to the extent that it **[**85]** is instructive given the lack of a properly defined market, suggests that the proposed merger is unlikely to cause unilateral effects that substantially lessen competition. This is so in large part because in general, Evonik and PeroxyChem are not close competitors. Evonik's Mobile, Alabama plant and PeroxyChem's Bayport, Texas plant—their two facilities in the Southern and Central United States—largely sell hydrogen peroxide intended for different end uses. Hill Rpt., JX0066-057; *see* DPFFCL at 86-88 ¶¶ 230-35. For example, about [TEXT REDACTED IN ORIGINAL SOURCE] percent of Evonik's production at Mobile is standard grade hydrogen peroxide sold to pulp and paper customers, while only about [TEXT REDACTED IN ORIGINAL SOURCE] percent of PeroxyChem's Bayport production serves the pulp and paper industry, **[*320]** and that number is shrinking. *See* DPFFCL at 85, 88 ¶ 229, 235. Evonik and PeroxyChem also have different geographic focuses, largely because of the significant freight costs for the shipment of hydrogen peroxide and the location of their plants over 450 miles apart. *See id.* at 88-90 ¶¶ 236-41. The closest possible market competitors for Evonik's Mobile plant are Nouryon's plant in Columbus, Mississippi, and Arkema's plant in Memphis, **[**86]** Tennessee. *Id.* at 89 ¶ 240. The closest possible competitor for PeroxyChem's Bayport plant is Solvay's in Deer Park, Texas, fewer than 10 miles away. *Id.*

After Evonik and PeroxyChem merge, those three competitors are well positioned to check Evonik during the bidding process. Executives for Nouryon, Arkema, and Solvay testified that because of the blind bidding system and the sophistication of their customers, they compete just as aggressively to win contracts no matter how many bidders are involved. *See* Radlinski Hrg. Tr. 574:18-25; Myrick Hrg. Tr. 507:17-508:6; Suter Hrg. Tr. 439:7-17. Nouryon's Paul Radlinski, General Manager for Bleaching Chemicals in North America, Europe, and Asia, has 38 years of experience with Nouryon and its predecessor company. Hrg. Tr. 536:19-24. He explained at the evidentiary hearing that suppliers do not know "whether it's one, two or three or four" suppliers bidding on a given customer. *Id.* 587:14-17. "So my assumption is it's always four when we go in to bid. And if it's only one there, the customer's not going to tell us, [w]ell, you were the second of four bids. They're going to say, [y]our bid was not the lowest bid. You need to sharpen your pencils and bring **[**87]** us back a new offer." *Id.* 587:17-21. "We don't have transparency," so "it's just as competitive with one other competitor as it is with three." *Id.* 588:3, 588:9-11. Because blind bidding in the hydrogen peroxide is "all or nothing," "to win the business, you have to beat everybody," whether it is one or three competitors. *Id.* 588:17, 589:6.

Finally, unlike many cases in which the FTC alleges that a proposed merger would be anticompetitive, the record contains *no* evidence that Evonik intends to raise prices post-merger. DPFFCL at 62-63 ¶¶ 162-63; *cf., e.g.*, *Tronox, 332 F. Supp. 3d at 208* (merging company planned to "slow down" or "manag[e]" production so that "prices will rise"); *Wilhelmsen, 341 F. Supp. 3d at 63* (internal document noted that if merger closed, it would "increase our ability to charge far better prices"). Of course, such a smoking gun is not necessary for the FTC to meet its burden. But here, the evidence reflects a perfectly legitimate reason why Evonik and PeroxyChem would want to merge that has nothing to do with raising prices: the businesses complement each other. The Chairman of Resource Efficiency for Evonik, Claus Rettig, credibly testified that the reason the proposed merger is attractive to Evonik is that it wants to expand into the specialty **[**88]** grade hydrogen peroxide market on which PeroxyChem focuses. *See* Rettig Hrg. Tr. 1047:13-17, 1053:1-9. Those specialty grade products "promise higher returns in terms of profitability" and "are more stable in economic downturns" relative to pulp and paper products, *id.* 1047:14-15, particularly given the number of newsprint customers that have gone out of business. *See* Corson Hrg. Tr. 640:14-641:2, 651:18-21.

Lacking a smoking gun, the FTC fires away with a few squirt guns: (1) a poorly informed third-party consultant's report, based on transaction data only from [TEXT REDACTED IN ORIGINAL SOURCE], predicting a price increase, JX0140; *see* PPFFCL at 47-48 ¶ 161; DPFFCL at 62-63 ¶ 163; (2) a 2019 Evonik internal presentation with a demand curve reflecting that *if* Evonik chose to **[*321]** raise prices, its sales quantity would decrease, JX0129-037 to - 038; *see* PPFFCL at 46 ¶ 156; DPFFCL at 77 ¶ 200; (3) emails exchanged between a competitor's employees, shortly after Evonik and PeroxyChem announced the proposed merger, expressing hope that the industry's falling prices would finally plateau;[34] and (4) out-of-court declarations by customers reflecting "a truism of economics: a decrease in the number of suppliers *may* lead to a decrease in the level of **[**89]** competition in the market." *Arch Coal, 329 F. Supp. 2d at 146*; *see* PPFFCL at 51 ¶ 170. But customers "do not, of course, have the expertise to state what *will* happen in the [hydrogen peroxide] market, and none have attempted to do so." *Arch Coal, 329 F. Supp. 2d at 146*. These declarations are not enough to outweigh the overall trends in the hydrogen peroxide market reflected in the record: decreasing prices, aggressive competition for sophisticated customers with large and long-term contracts, and substantial cost savings from blind bidding. *See* DPFFCL at 57-62 ¶¶ 150-61.[35]

As with the FTC's shortcomings in showing undue concentration in a relevant market, the Court does not mean to suggest that in a later administrative proceeding, it would be impossible for the FTC to show coordinated or unilateral effects, based on a properly defined product and geographic market, that could call the merger into question. But it does not win the day on the record here. "*Section 7* involves *probabilities*, not . . . possibilities," *Baker Hughes, 908 F.2d at 984*, and on this record the Court cannot say it is probable that the merger will substantially harm competition.

For all these reasons, the FTC has not met its burden of showing a likelihood of success on the merits.

C. The Equities

The Federal Trade Commission **[**90]** Act provides for a preliminary injunction to block a merger when "such action would be in the public interest," after "weighing the equities and considering the Commission's likelihood of ultimate success." *15 U.S.C. § 53(b)*; *see* *Heinz, 246 F.3d at 726*. "The primary public interest favoring preliminary injunctive relief in a *Section 13(b)* case, which Congress specifically contemplated, is the effective enforcement of the antitrust laws. . . . Absent a likelihood of success on the merits, however, equities alone will not justify an injunction." *Arch Coal, 329 F. Supp. 2d at 159*.

The parties devote little discussion to the equities. They recognize that the propriety of a preliminary injunction typically rises and falls with the FTC's likelihood of success on the merits and the public interest in enforcing antitrust laws. PPFFCL at 99-100 ¶ 81-82; DPFFCL at 100 ¶ 269. Even so, the FTC argues that without a preliminary injunction, Defendants can "'scramble the eggs'—that is, combine **[*322]** their operations and make it difficult, if not impossible, for competition to be restored to its previous state." PPFFCL at 100 ¶ 82. For their part, Defendants represent that if the Court grants the FTC a preliminary injunction, "the final closing date will pass on February 3, 2020, and commercial imperatives will force the merging **[**91]** parties to terminate their merger agreement." DPFFCL at 16 ¶ 45; *see* Mahr Hrg. Tr. 2439:4-5. But there is no need for the Court to resolve these competing equities. For all the reason explained above, the FTC has not carried its burden of showing that it is

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[34] Defendants objected to the admission of these two exhibits, PX3000 and PX3020, emails exchanged by [TEXT REDACTED IN ORIGINAL SOURCE] employees. *See* ECF No. 139-1. The Court overrules the objections and admits them, but gives them little weight. Documents such as these appear highly speculative, and because most of their authors did not testify, the Court has little basis to assess their reliability. Indeed, the FTC did not even bother to ask [TEXT REDACTED IN ORIGINAL SOURCE]—the only author who *did* testify—about them. *See* DPFFCL at 62 n.378.

[35] Defendants argue that efficiencies or "logistics savings" from their merger may *reduce* the price of hydrogen peroxide or offset any predicted price increase, DPFFCL at 96-97 ¶ 258, but those purported savings are unverifiable and did not weigh into the Court's analysis. *See* PPFFCL at 76-77 ¶¶ 260-61; *Aetna, 240 F. Supp. 3d at 94* ("the estimate of the predicted saving must be reasonable verifiable by an independent party").

likely that the proposed merger will substantially lessen competition for a particular product in a particular geographic market. The Court must therefore deny its request for a preliminary injunction.

Conclusion

For all of the above reasons, the Court will deny the FTC's Motion for Preliminary Injunction, ECF No. 3. A separate order will issue.

/s/ Timothy J. Kelly

TIMOTHY J. KELLY

United States District Judge

Date: January 24, 2020

Chandler v. Phoenix Servs.

United States District Court for the Northern District of Texas, Wichita Falls Division

January 30, 2020, Decided; January 30, 2020, Filed

Civil Action No. 7:19-cv-00014-O

Reporter

2020 U.S. Dist. LEXIS 15702 *; 2020 WL 487503

RONALD CHANDLER, et al., Plaintiffs, v. PHOENIX SERVICES, et al., Defendants.

Prior History: *Chandler v. Phoenix Servs., 419 F. Supp. 3d 972, 2019 U.S. Dist. LEXIS 217008 (N.D. Tex., Dec. 17, 2019)*

Core Terms

inequitable conduct, crime-fraud, Disqualify, documents, deposition, patent, attorney-client, disqualification motion, sham, trial counsel, disqualification, infringement, work product, communications, deposed, opposing counsel, prima facie case, in camera, privileged, advice, unenforceable, pre-suit, courts

Counsel: **[*1]** For Ronald Chandler, Chandler Mfg., LLC, Newco Enterprises LLC, SuperTherm Heating Services, LLC, Plaintiffs: Theodore G Baroody, LEAD ATTORNEY, Carstens & Cahoon, LLP, Dallas, TX; Don Ross Malone, Malone Law Firm, Vernon, TX.

For Phoenix Services LLC, Mark H Fisher, Defendants: Devan V Padmanabhan, LEAD ATTORNEY, PRO HAC VICE, Padmanabhan & Dawson P.L.L.C., Minneapolis, MN.

Jeffrey Kaplan, Mediator, Pro se, Dallas, TX.

Judges: Reed O'Connor, UNITED STATES DISTRICT JUDGE.

Opinion by: Reed O'Connor

Opinion

MEMORANDUM OPINION AND ORDER

Before the Court are Plaintiffs Ronald Chandler's, Chandler Manufacturing, LLC's, Newco Enterprises, LLC's, and Supertherm Heating Services, LLC's (collectively, the "Chandler Plaintiffs") Motion to Compel Production of Documents Subject to Waiver of Privilege Pursuant to the Crime/Fraud Exception, and for Attorney Depositions, and Brief ("Motion to Compel") and Appendix in Support (ECF Nos. 29-30), filed November 12, 2019; Defendants Phoenix Services, LLC's and Mark H. Fisher's (collectively, the "Phoenix Defendants") Response and Appendix in Support (ECF Nos. 34, 36), filed December 3, 2019; and Plaintiffs' Reply and Appendix in Support (ECF Nos. 40-41), filed December 12, 2019. Also **[*2]** before the Court are Plaintiffs' Motion to Disqualify Devan Padmanabhan, Esq. and Paul Robbennolt, Esq., as Trial Counsel, and Brief ("Motion to Disqualify") (ECF No. 31), filed November 12, 2019; Defendants' Response and Appendix in Support (ECF Nos. 35-36), filed December 3, 2019; and Plaintiffs' Reply and Appendix in Support (ECF Nos. 42-43), filed December 16, 2019.

Having reviewed the motions, briefing, and applicable law, the Court finds that the Chandler Plaintiffs' Motion to Compel should be and is hereby **GRANTED in part** and **DENIED in part.** The Court further finds that the Chandler Plaintiffs' Motion to Disqualify should be and is hereby **GRANTED in part** and **DENIED in part.** In accordance with the Court's instructions below, the Phoenix Defendants are **ORDERED** to produce to the Court "all legal advice provided by the attorneys for HOTF and Phoenix related to the assertion of the '993 Patent against Plaintiffs in the underlying litigation, which remains stayed in this Court," for the Court's *in camera* review. Pls.' Mot. Compel 2, ECF No. 29. The Phoenix Defendants are **further ORDERED** to make attorney Devan Padmanabhan ("Padmanabhan") available for a deposition during the month of February **[*3]** 2020. The Court **HOLDS** that Padmanabhan is hereby disqualified from participating as the Phoenix Defendants' counsel before the jury at the parties' upcoming jury trial.

I. FACTUAL BACKGROUND

In its December 17, 2019 Order ruling on the Phoenix Defendants' Motion to Dismiss, the Court laid out the extensive factual background of this case and the related *Energy Heating* litigation in the District of North Dakota and Federal Circuit courts. *See* *Chandler v. Phoenix Servs., F. Supp. , 419 F. Supp. 3d 972, 2019 U.S. Dist. LEXIS 217008, 2019 WL 6894687, at *1-3 (N.D. Tex. Dec. 17, 2019)*. The Court assumes familiarity and only adds additional facts pertinent to the Chandler Plaintiffs' Motion to Compel and Motion to Disqualify.

In 2018, the Federal Circuit "affirm[ed] the district court's conclusion that the ['993 P]atent is unenforceable for inequitable conduct." *Energy Heating, LLC v. Heat On-The-Fly, LLC, 889 F.3d 1291, 1299 (Fed. Cir. 2018)* [hereinafter *Energy Heating*]. As a result, the Phoenix Defendants "waived privilege" in this litigation "with respect to inequitable conduct and the facts that gave rise to the inequitable conduct finding." Defs.' Resp. Mot. Compel 1, ECF No. 34. The Phoenix Defendants "have not withheld as privileged any documents or information pertaining to the prosecution of [the '993 Patent]; the Defendants' knowledge of or discussions with counsel about the facts and circumstances giving rise **[*4]** to the inequitable conduct finding; and any consideration or discussion of inequitable conduct in connection with the decision to file a patent infringement suit against the Plaintiffs." *Id.* But they withhold all privileged information not related to the inequitable conduct. *See generally id.*

The Phoenix Defendants' attorneys, Padmanabhan and Paul Robbennolt ("Robbennolt"), also represented Phoenix Services, LLC ("Phoenix") subsidiary Heat On-The-Fly, LLC ("HOTF") in the *Energy Heating* litigation. Pls.' Mot. Disqualify 4, ECF No. 31. In their roles as HOTF's counsel, Padmanabhan and Robbennolt were central to the litigation underlying this lawsuit—that in which the Federal Circuit concluded the '993 Patent was unenforceable as a matter of law. *See* *Energy Heating, 889 F.3d at 1303*. Currently, in addition to serving as trial counsel in this case, Padmanabhan represents HOTF against the Chandler Plaintiffs in *Newco Enterprises, LLC v. Super Heaters North Dakota, LLC*, 7:14-CV-87-O, which is stayed in this Court. In spite of the Federal Circuit's ruling that the '993 Patent is unenforceable, HOTF maintains its patent-infringement claims against the Chandler Plaintiffs. *See id.* Countercl., ECF No. 33.

On December 6, 2019, the Chandler Plaintiffs **[*5]** deposed Mark H. Fisher ("Fisher"), who testified as the corporate representative of Phoenix. *See* Pls.' App. Supp. Reply Mot. Disqualify Ex. A, ECF No. 43-2. During his deposition, Fisher testified that "the first time Phoenix Services, LLC found out about the 61 prior frac jobs referenced by the Federal Circuit[, which] could be the basis for inequitable conduct to render the '993 Patent unenforceable[,] was after the judgment in the Energy Heating litigation was rendered" *Id.* at 4. Fisher further stated he did not have "any knowledge of any inequitable conduct," he did not have any "belief there was any inequitable conduct," and there was no "advice provided to [him] that would lead [him] to think there was any risk of inequitable conduct." *Id.* at 6-7. When asked which lawyers he relied on at that time, Fisher mentioned Padmanabhan first. *Id.* at 7.

II. LEGAL STANDARD

A. The Crime-Fraud Exception to Attorney-Client and Work-Product Privileges

"Under the crime-fraud exception to the attorney-client privilege, the privilege can be overcome where communication or work product is intended to further continuing or future criminal or fraudulent activity." *In re Grand Jury Subpoena, 419 F.3d 329, 335 (5th Cir. 2005)* (internal citation omitted). Courts recognize this privilege "to assure **[*6]** that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." *United States v. Zolin, 491 U.S. 554, 563, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989)* (internal citation omitted).

"To invoke the crime-fraud exception, a party must establish a *prima facie* case that a crime has been committed." *Indus. Clearinghouse, Inc. v. Browning Mfg. Div. of Emerson Elec. Co., 953 F.2d 1004, 1008 (5th Cir. 1992)*. To make out a prima facie case, the movant "must produce evidence 'such as will suffice until contradicted and overcome by other evidence . . . a case which has proceeded upon sufficient proof to that stage where it will support [a] finding if evidence to the contrary is disregarded.'" *In re Grand Jury Subpoena, 419 F.3d at 336* (quoting *In re Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir. 1982))*.

B. Deposing Opposing Counsel

"Generally, federal courts have disfavored the practice of taking the deposition of a party's attorney," so courts in the Fifth Circuit employ the practice "only in limited circumstances." *Theriot v. Parish of Jefferson, 185 F.3d 477, 491 (5th Cir. 1999)*. "In order to determine when it is proper to allow opposing counsel to be deposed, the Fifth Circuit applies a three factor test that the party seeking the deposition must meet." *Davis-Lynch, Inc. v. Weatherford Int'l, Inc., 6:07-cv-559, 2009 U.S. Dist. LEXIS 62464, 2009 WL 2174925, at *2 (E.D. Tex. July 21, 2009)*. The movant must show: "'(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought **[*7]** is relevant and non-privileged; and (3) the information is crucial to the preparation of the case.'" *Id.* (quoting *Nguyen v. Excel Corp., 197 F.3d 200, 208 (5th Cir. 1999))*.

C. Disqualifying Opposing Counsel

"[D]isqualification cases are governed by state and national ethical standards adopted by the court." *In re Am. Airlines, 972 F.2d 605, 610 (5th Cir. 1992)*. The Fifth Circuit has stated that "[w]hen considering motions to disqualify, courts should first look to the local rules promulgated by the local court itself." *In re ProEducation Int'l, Inc., 587 F.3d 296, 299 (5th Cir. 2009)* (internal citation omitted). In the Northern District of Texas, attorneys "are subject to the Texas Disciplinary Rules of Professional Conduct [('Texas Rules')]." *Asgaard Funding LLC v. ReynoldsStrong LLC, 3:19-CV-1823-B, 426 F. Supp. 3d 292, 2019 U.S. Dist. LEXIS 211406, 2019 WL 6702119, at *3 (N.D. Tex. Dec. 9, 2019)* (citing *N.D. Tex. Civ. R. 83.8(e)*). The Fifth Circuit has also "recognized the ABA Model Rules of Professional Conduct (Model Rules) as the national standards to consider in reviewing motions to disqualify." *In re ProEducation Int'l, Inc., 587 F.3d at 299*.

Pursuant to both the Model Rules and the Texas Rules, if a lawyer is likely to be a necessary witness in a trial, he typically should not serve as an advocate during that trial. *See* Model Rules of Prof'l Conduct r. 3.7(a) (West 2019) ("A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested **[*8]** issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client."); *Tex. Disciplinary Rules Prof'l Conduct R. 3.08(a)*, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2019) ("A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless . . . ."). These rules avoid "[c]ombining the roles of advocate and witness," which "can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client." Model Rules of Prof'l Conduct r. 3.7 cmt. 1.

The Model Rules and Texas Rules "may furnish some guidance in those procedural disqualification disputes where the party seeking disqualification can demonstrate actual prejudice to itself resulting from the opposing lawyer's service in the dual roles," but disqualification "should not be used as a tactical weapon to deprive the opposing party **[*9]** of the right to be represented by the lawyer of his or her choice." *Tex. Disciplinary Rules Prof'l Conduct R. 3.08 cmt. 10*; *see also* Model Rules of Prof'l Conduct r. 3.7 cmt. 4 ("[I]n determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.").

III. ANALYSIS

In their Motion to Compel and Motion to Disqualify, the Chandler Plaintiffs ask the Court to do three things: (1) compel the Phoenix Defendants to produce documents "regarding pre-suit investigations regarding the '993 Patent, and the decision to assert the '993 Patent in litigation, and the decision to maintain the litigation," Pls. Mot. Compel 9, ECF No. 29; (2) compel the Phoenix Defendants to "make Devan Padmanabhan, Esq. and Paul Robbennolt, Esq. available for an oral deposition," *id.* at 10; and (3) order that Padmanabhan and Robbennolt "shall not participate as advocates in the presence of the jury at the trial of this matter," Pls.' Mot. Disqualify 6, ECF No. 31. The Court addressed each request in turn.

A. Motion to Compel Production of Documents

"A finding of inequitable **[*10]** conduct may . . . spawn antitrust and unfair competition claims . . . [and] may also prove the crime or fraud exception to the attorney-client privilege." *Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276, 1289 (Fed. Cir. 2011)*. The Chandler Plaintiffs invoke this principle and assert that the District of North Dakota's finding of inequitable conduct, affirmed by the Federal Circuit, "proves the fraud that supports application of the crime/fraud exception to pierce the attorney-client and work product privileges of Defendants as to the assertion of the fraudulently procured '993 Patent." Pls.' Mot. Compel 2, ECF No. 29. They argue the exception applies to "all legal advice provided by the attorneys for HOTF and Phoenix related to the assertion of the '993 Patent against Plaintiffs in the underlying litigation, which remains stayed in this Court." *Id.*

The Phoenix Defendants do not dispute that the finding of inequitable conduct invoked the crime-fraud exception. In fact, they have "already waived privilege with respect to inequitable conduct and the facts that gave rise to the inequitable conduct finding." Defs.' Resp. Mot. Compel 1, ECF No. 34. They instead dispute the scope of the exception. The Phoenix Defendants contend that "[p]rivileged information to the pre-suit investigation **[*11]** and the decision to assert a patent infringement claim against Plaintiffs that is **not** related to inequitable conduct should not be the subject of an order compelling production." *Id.* (emphasis in original). According to the Phoenix Defendants, "[t]he only fraud that provides a basis for Plaintiffs' motion is inequitable conduct in the proceedings before the United States Patent and Trademark Office [('PTO')] to obtain the '993 Patent, and the Defendants' assertion of a patent that they allegedly knew was unenforceable against Plaintiffs." *Id.* Thus, the issue is whether the crime-fraud exception to attorney-client and work-product privilege extends beyond HOTF's inequitable conduct to the fraud Defendants allegedly committed by asserting the '993 Patent against Plaintiffs through litigation.

1. Prima Facie Case of Fraud

When reviewing the evidence, the Court must determine whether "the party seeking to breach the walls of privilege [has] ma[de] out a prima facie case" of fraud. *In re Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d at 1242*. "To make the necessary *prima facie* showing for the application of the crime-fraud exception here, the [movant] must produce evidence 'such as will suffice until contradicted and overcome by other evidence . . . a case which has proceeded **[*12]** upon sufficient proof to that stage where it will support [a] finding if evidence to the contrary is disregarded.'" *In re Grand Jury Subpoena, 419 F.3d at 336* (quoting *In re Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d at 1242*).

Here, there is no question that the Chandler Plaintiffs made a prima facie case of fraud based on HOTF's inequitable conduct in procuring the '993 Patent—nor do the Phoenix Defendants contest it. But the Court also finds that, based on the Federal Circuit's ruling in the *Energy Heating* litigation and the additional evidence presented, the Chandler Plaintiffs have made the requisite prima facie showing of fraud based on both sham patent litigation and *Walker Process* fraud.

a. *Sham Patent Litigation*

The Court first addresses the crime-fraud exception with regard to the alleged sham patent litigation. Though the Federal Circuit has not addressed the crime-fraud exception in the sham-patent-litigation context, several circuits—including the Fifth—have addressed the exception in similar contexts. For example, in *Burlington Northern*, the Fifth Circuit applied the exception to attorney-client communications and work product in the context of sham *antitrust* litigation. *822 F.2d 518 (5th Cir. 1987)*. There, the Fifth Circuit held that "[t]o the extent the [defendants] sought out their attorneys to bring lawful **[*13]** suits and consulted with them in connection with such suits, they were within the scope of th[e] protection" of attorney-client privilege and work-product immunity. *Id. at 525*. The Fifth Circuit distinguished those lawful suits from "sham" litigation, which "was itself a violation of the antitrust laws" and thus unprotected by the privileges. *Id.* The Second Circuit came to the same conclusion in *Richard Roe. 168 F.3d 69 (2d Cir. 1999)*. The court first noted that "one may violate the antitrust laws by bringing baseless litigation intended to delay entry into a market by a competitor." *Id. at 71*. If, under those circumstances, "the litigation objectively lacked a factual or legal basis," the court stated that "some communications or work product generated in the course of such litigation might, after a rigorous *in camera* review by a court for relevance, fall within the crime-fraud exception." *Id.*

The Court sees no reason why the exception should apply differently when the sham litigation involves patent infringement. The Chandler Plaintiffs have established a prima facie case of sham patent litigation by applying the Federal Circuit's conclusions—that HOTF engaged in "equitable conduct" and "bad faith" representation of an invalid patent—to **[*14]** the assertion of the '993 Patent through the Phoenix Defendants' patent-infringement claims against the Chandler Plaintiffs. *See Energy Heating, 889 F.3d at 1305*. Thus, the crime-fraud exception applies to all attorney-client communications and work product made in furtherance of the Phoenix Defendants' assertion of '993 Patent through the alleged sham patent litigation.

b. *Walker Process Fraud*

The Court next addresses the crime-fraud exception with regard to the alleged *Walker Process* fraud. The Federal Circuit has explicitly held that a party can "successfully pierce the attorney-client privilege under the crime-fraud exception" by establishing *Walker Process* fraud. *Unigene Labs., Inc. v. Apotex, Inc., 655 F.3d 1352, 1358 (Fed Cir. 2011)* (citing *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965))*. And when discussing Federal Circuit precedent, the Fifth Circuit recently stated that "[i]nequitable conduct resembles the fraud element of *Walker Process*, in that it requires proof of misrepresentation, scienter, and a showing of materiality or causation. Over time, it has evolved to be virtually congruent with intentional fraud under *Walker Process.*" *Xitronix Corp. v. KLA-Tencor Corp., 916 F.3d 429, 439 (5th Cir. 2019)* (citing *Therasense, 649 F.3d at 1290*; J. Thomas Roesch, *Patent Law and* ***Antitrust Law****: Neither Friend nor Foe, but Business Partners*, *13 Sedona Conf. J. 95, 100* (2012)).

Given that inequitable conduct—which the District of North Dakota found **[*15]** and the Federal Circuit affirmed, *Energy Heating, 889 F.3d at 1299*—constitutes fraud under the crime-fraud exception, the logical extension is that *Walker Process* fraud also constitutes fraud sufficient to negate the privilege. Further, the Federal Circuit's affirmance of HOTF's inequitable conduct establishes the requisite prima face case of fraud based on *Walker Process* fraud. Accordingly, insofar as the Phoenix Defendants' otherwise privileged attorney-client communications and work product were made in furtherance of the alleged *Walker Process* fraud violations, the crime-fraud exception applies.

2. *In Camera Review*

The Phoenix Defendants oppose the Chandler Plaintiffs' entire request by referring to specific types of documents that should remain privileged. They say "[d]ocuments regarding Defendants' pre-suit investigation, decision to assert the '993 Patent against Plaintiffs, and assertion of the '993 Patent against Plaintiffs, conceivably cover documents that have nothing to do with the alleged fraud that provides the basis for Plaintiffs' motion." Defs.' Resp. Mot. Compel 7, ECF No. 24. The Phoenix Defendants provide two examples of privileged documents not encompassed by the exception: (1) their infringement analyses and (2) their **[*16]** validity analysis. *See id.* at 7-8. The Court agrees: Plaintiffs' request is likely overbroad. But limiting the evidence discoverable under the crime-fraud exception to documents related to the inequitable conduct before the PTO is too narrow.

To strike the correct balance, the Court will conduct an *in camera* review of the potentially responsive documents. *Cf.* *Zolin, 491 U.S. at 574-75* (holding that a district court "may engage in *in camera* review at the request of the party opposing the privilege" if that party has "present[ed] evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability."). Indeed, when a party asserts privilege, "the only way the district court *can* determine if any of the documents are subject to a subpoena under the crime-fraud exception is by reviewing them. Ordering production *en masse* creates the potential that some material not within the scope of the crime-fraud exception could be ordered produced." *In re Antitrust Grand Jury, 805 F.2d 155, 168 (6th Cir. 1986)* (internal emphasis added).

The Court therefore **ORDERS** Defendants to produce documents "regarding pre-suit investigations regarding the '993 Patent, and the decision to assert the '993 Patent in litigation, and the decision to maintain the litigation." **[*17]** Pls.' Mot. Compel 9, ECF No. 29. However, the Court **LIMITS** this instruction to only attorney-client communications and work product relating to the stayed *Newco Enterprises*, 7:14-CV-87-O litigation. The Phoenix Defendants should not include technical analyses regarding infringement or information regarding the validity of the '993 Patent (as related to prior art). The Court **further ORDERS** Defendants to submit with their responsive documents a cover letter explaining the documents and instructing the Court regarding how to review them.

B. Motion to Compel Depositions

The Chandler Plaintiffs also move to compel the Phoenix Defendants to make their trial attorneys, Padmanabhan and Robbennolt, available for depositions. Padmanabhan and Robbennolt were both counsel for HOTF in the *Energy Heating* litigation, in which the Federal Circuit affirmed the district court's finding that HOTF obtained the '993 Patent through inequitable conduct. *See* Pls.' Mot. Compel 7, ECF No. 29 (depicting Padmanabhan's and Robbennolt's electronic signatures on court filings). The Phoenix Defendants argue that "the Plaintiffs cannot demonstrate that the Defendants' trial counsel are 'necessary' witnesses to an essential fact; they therefore **[*18]** should not be compelled to testify." Defs.' Resp. Mot. Compel 8, ECF No. 34. The Phoenix Defendants say "Plaintiffs have other means available to obtain the information they seek," such as "seek[ing] the same information from Defendants and their employees who will have knowledge regarding their decision to assert the '993 Patent and the basis for their claims." *Id.* at 9. They contend "Mark Fisher and other employees of Phoenix . . . are equally capable of testifying to the legal advice they were given and their basis and reason for filing suit." Defs.' Resp. Mot. Disqualify 10, ECF No. 35.

According to the Chandler Plaintiffs, "[o]ne of the key issues at trial will be for Plaintiffs to prove before the jury that if the infringement allegations brought by HOTF as to the '993 Patent in the *Energy Heating* litigation were brought in 'bad faith[,'] the same must be true for the virtually identical allegations of infringement of the '993 Patent in the underlying litigation by HOTF against Plaintiffs." Pls.' Mot. Disqualify 4-5, ECF No. 31. Plaintiffs contend Defendant Fisher made Padmanabhan a necessary witness during his December 6, 2019 deposition, during which he stated he did not have "any knowledge of any inequitable conduct," **[*19]** did not have any "belief there was any inequitable conduct," and there was no "advice provided to [him] that would lead [him] to think there was any risk as to inequitable conduct." Pls.' App. Supp. Reply Mot. Disqualify 7, ECF No. 43-2. When asked which lawyers he relied on at that time, Fisher mentioned Padmanabhan first. *Id.* at 7. Though Fisher said he did not "f[ind] out [that] the 61 prior frac jobs referenced by the Federal Circuit could be the basis for inequitable conduct," *id.* at 4, until the Federal Circuit's ruling, prior *Energy Heating* filings showed that Padmanabhan and Robbennolt did have knowledge of the inequitable conduct claim before filing the infringement claim against Plaintiff Supertherm, *see* Pls.' Reply Mot. Disqualify 5-6, ECF No. 42.

"In order to determine when it is proper to allow opposing counsel to be deposed, the Fifth Circuit applies a three factor test that the party seeking the deposition must meet." *Davis-Lynch, Inc., 2009 U.S. Dist. LEXIS 62464, 2009 WL 2174925, at *2*. The party must show: "'(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case.'" *Id.* (quoting *Nguyen, 197 F.3d at 208*). Though the Phoenix **[*20]** Defendants claim the Chandler Plaintiffs cannot satisfy the first element of the test because they can obtain the same information from the Phoenix Defendants themselves, the deposition testimony of Fisher—Phoenix CEO and sole employee of HOTF—belies that assertion. Fisher's testimony demonstrates that Padmanabhan had knowledge that he did not share with HOTF and Phoenix. As Fisher stated he was not privy to the key information the Chandler Plaintiffs seek, Padmanabhan should be required to testify as to the decision to proceed with the patent-infringement claims.

Finally, though Robbennolt was also listed as counsel on several *Energy Heating* filings related to the inequitable conduct claim, the Chandler Plaintiffs do not allege or even suggest that he may have knowledge that Padmanabhan does not also have. Because Fisher stated he relied on Padmanabhan, and because exercising this authority should be used as sparingly as possible, Padmanabhan is the more relevant—and thus necessary—of the two attorney-witnesses. Accordingly, Padmanabhan is a necessary witness, and Robbennolt is not. The Court **ORDERS** the Phoenix Defendants to make Padmanabhan available for a deposition during February **[*21]** 2020.

C. Motion to Disqualify

Based on their argument that Padmanabhan is a necessary witness, the Chandler Plaintiffs argue that Padmanabhan's testimony will include "hotly contested fact issues . . . and under *[Texas Disciplinary Rule of Professional Conduct] 3.08*, there is simply no way to avoid confusion of the jury," if he "act[s] as [an] advocate[] before the jury, as well as providing contested evidence to be considered by the jury as to liability of the Defendants." Pls.' Mot. Disqualify 2, ECF No. 31. The Phoenix Defendants first respond by reiterating that Padmanabhan is not a necessary witness. *See* Defs.' Resp. 9-13, ECF No. 35. Then, they argue that "[e]ven if Plaintiffs had proven that Defendants' trial counsel were 'necessary' witnesses, their motion would fail because Plaintiffs waived their right to seek disqualification by unreasonably delaying their motion." *Id.* at 13. Finally, they argue that the Court should deny Plaintiffs' Motion to Disqualify because it would unduly prejudice Defendants and deprive them of their chosen trial counsel. *Id.* at 14-15.

First, for the reasons discussed above, the Phoenix Defendants' necessary-witness argument fails. Padmanabhan is a necessary witness.

The **[*22]** Phoenix Defendants' unreasonable-delay argument also fails. The Phoenix Defendants claim that the Chandler Plaintiffs have no excuse for "failure to file this motion at the very outset of this case, as soon as they knew of the facts that gave rise to the motion, and before Defendants would suffer hardship if trial counsel were disqualified in the midst of the litigation." *Id.* at 14. But considering Padmanabhan's role in the underlying *Energy Heating* litigation, he and the Phoenix Defendants should have been aware that there was a potential for disqualification—and he arguably should have recused earlier. *See* Model Rules of Prof'l Conduct r. 3.7(a); *Tex. Disciplinary Rules Prof'l Conduct R. 3.08(a)*. Under *Texas Rule 3.08*, when a lawyer who "knows or believes that he or she may be a necessary witness" considers retaining his position as an advocate, he "is obligated . . . to consider the possible consequences of those dual roles for both the lawyer's own client and for opposing parties." *Tex. Disciplinary Rules Prof'l Conduct R. 3.08 cmt. 1*. As Padmanabhan was lead counsel in the *Energy Heating* litigation—the basis for Plaintiffs' sham patent litigation claims—he should have immediately been aware that **[*23]** his involvement and conduct would be at issue such that he could be called as a necessary witness in this case. Moreover, on December 6, 2019, Padmanabhan's own client made him a necessary witness by suggesting that he did not keep HOTF and Phoenix apprised of the details of the ongoing lawsuits. Thus, given the circumstances, the Phoenix Defendants should have anticipated their *Energy Heating* and *Newco Enterprises* counsel could likely be called to testify as necessary witnesses.

Finally, because Robbennolt is not a necessary witness and will not be disqualified from participating as trial counsel, the Phoenix Defendants' prejudice argument also fails. The Phoenix Defendants argue that Padmanabhan and Robbennolt "have obtained a detailed and thorough understanding of the complex issues underlying this case during the ten months of litigation" and "[i]t would be highly prejudicial to Defendants if they were deprived of their chosen counsel, particularly at this late stage of the litigation." Defs.' Resp. 15, ECF No. 35. But importantly, the Texas Rule "does not prohibit the lawyer who may or will be a witness from participating in the preparation of a matter for presentation to a tribunal." **[*24]** *Tex. Disciplinary Rules Prof'l Conduct R. 3.08 cmt. 8*. Instead, it "prohibits any testifying lawyer who could not serve as an advocate from taking an active role before the tribunal in the presentation of the matter." *Id.* And "[e]ven in those situations . . . another lawyer in the testifying lawyer's firm may act as an advocate, provided the client's informed consent is obtained." *Id.*; *see also* Model Rules of Prof'l Conduct R. 3.7(b) ("A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.").

Though disqualification "should not be used as a tactical weapon to deprive the deposing party of the right to be represented by the lawyer of his or her own choice," *Tex. Disciplinary Rules Prof'l Conduct R. 3.08 cmt. 10*, the Chandler Plaintiffs have demonstrated that Padmanabhan is a necessary witness, and the Court is persuaded that his "[c]ombin[ed] roles of advocate and witness" would likely confuse the jury and cause prejudice to either or both sides, Model Rules of Prof'l Conduct r. 3.7 cmt. 1. However, the Court only disqualifies Padmanabhan from representing the Phoenix Defendants **[*25]** before the jury; his colleague, Robbennolt, may still serve as trial counsel. Moreover, Padmanabhan is not disqualified from participating in pre-trial preparation. Accordingly, Padmanabhan can continue to represent the Phoenix Defendants and can help Robbennolt prepare for trial. Thus, the Phoenix Defendants should not be unduly prejudiced.

IV. CONCLUSION

Having reviewed the Chandler Plaintiffs' Motion to Compel and Motion to Disqualify, related briefing, and applicable law, the Court **HOLDS** that the Motion to Compel (ECF No. 29) should be and is hereby **GRANTED in part** and **DENIED in part** and the Motion to Disqualify (ECF No. 31) should be and is hereby **GRANTED in part** and **DENIED in part.**

The Court **HOLDS** that the crime-fraud exception extends beyond the finding of inequitable conduct to all attorney-client communications and work product related to the alleged sham patent litigation and *Walker Process* fraud. Accordingly, the Court **ORDERS** the Phoenix Defendants to produce documents pertaining to the *Newco Enterprises*, 7:14-CV-87-O litigation—specifically, those that involve the Phoenix Defendants' and HOTF's (1) pre-suit investigations, (2) decision to assert the '993 Patent in litigation against **[*26]** the Chandler Plaintiffs, and (3) decision to maintain the suit following issuance of the Federal Circuit's *Energy Heating, 889 F.3d 1291* ruling. *See infra* p. 11. The Court **further ORDERS** Defendants to submit with their responsive documents a cover letter explaining the documents and instructing the Court regarding how to review them.

The Court **HOLDS** that Devan Padmanabhan is a necessary witness. Accordingly, the Court **ORDERS** the Phoenix Defendants to make Padmanabhan available for a deposition during February 2020.

The Court **HOLDS** that, as a necessary witness, Padmanabhan should be and is hereby **DISQUALIFIED** from serving as the Phoenix Defendants' trial counsel. He may continue to serve as pre-trial counsel.

The Parties are **ORDERED** to confer and submit to the Court a joint motion proposing an extended discovery deadline on or before **February 6, 2020.** All other deadlines shall remain in place.

SO ORDERED on this **30th day** of **January, 2020.**

/s/ Reed O'Connor

Reed O'Connor

UNITED STATES DISTRICT JUDGE

LexisNexis®

United States v. Vega-Martínez

United States Court of Appeals for the First Circuit

January 31, 2020, Decided

Nos. 18-1189, 18-1395; 18-1258

Reporter

949 F.3d 43 *; 2020 U.S. App. LEXIS 3078 **; 2020-1 Trade Cas. (CCH) P81,070; 111 Fed. R. Evid. Serv. (Callaghan) 544; 2020 WL 502538

UNITED STATES OF AMERICA, Appellee, v. LUCIANO VEGA-MARTÍNEZ, aka Lucio; RENÉ GARAY-RODRÍGUEZ, aka Gary, Defendants, Appellants.

Subsequent History: As Corrected February 6, 2020.

Prior History: [1]** APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO. Hon. Gustavo A. Gelpí, Jr., U.S. District Judge.

United States v. Rivera-Herrera, 2018 U.S. Dist. LEXIS 62455 (D.P.R., Apr. 12, 2018)

Core Terms

bid, interstate commerce, routes, restitution, district court, auction, defendants', indictment, conspiracy, rigging, prices, funds, municipality, argues, price fixing, mail fraud, nexus, mail, Sherman Act, bid-rigging, contracts, plain error, convict, flowed, buses, interstate, sentencing, instructions, calculation, challenges

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Scope

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Sherman Act

HN1[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act reaches only activities in the flow of interstate commerce or that, while wholly local in nature, would substantially affect interstate commerce if successful. When confronted with horizontal agreements to fix prices within a single state, the U.S. Supreme Court has based jurisdiction on a general conclusion that the defendants' agreement almost surely had a market-wide impact and therefore an effect on interstate commerce. A effect on interstate commerce will be found where the volume of commerce involved was substantial and it was inseparable from the interstate aspects of related transactions.

Criminal Law & Procedure > ... > Indictments > Contents > Content Requirements

Criminal Law & Procedure > ... > Indictments > Contents > Sufficiency of Contents

HN2[] **Contents, Content Requirements**

Appellate courts review de novo the sufficiency of an indictment. In so doing, they do not evaluate the sufficiency of the evidence that the government might have to back up the indictment. Rather, appellate courts will find an indictment sufficient if it apprises the defendant of the charged offense so that the defendant can prepare a defense and plead double jeopardy in any future prosecution for the same offense. *Fed. R. Crim. P. 7(c)(1)* provides: The indictment or the information must be a plain, concise and definite written statement of the essential facts constituting the offense charged. It may parrot the statutory language to describe the offense, but it must also be accompanied by such a statement of facts and circumstances as to inform the accused of the specific offense with which he is charged.

Antitrust & Trade Law > Sherman Act > Scope

HN3[] **Antitrust & Trade Law, Sherman Act**

At trial for a Sherman Act violation, the government had to submit evidence sufficient to establish an interstate nexus beyond a reasonable doubt.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Jury Instructions

HN4[] **Plain Error, Jury Instructions**

While appellate courts ordinarily review the legal correctness of jury instructions de novo, and issues of phrasing and emphasis for abuse of discretion, they review forfeited challenges only for plain error.

Criminal Law & Procedure > ... > Indictments > Amendments & Variances > Constructive Amendments

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

HN5[] **Amendments & Variances, Constructive Amendments**

Appellate courts review constructive amendment claims de novo. A constructive amendment to an indictment occurs where the crime charged has been altered, either literally or in effect, after the grand jury last passed upon it. A variance-or a change in a charge that leaves the substance of the charge unaffected-is permitted unless it affects the defendant's substantial rights, i.e., the right to have knowledge of the charge sufficient to prepare an effective defense and avoid surprise at trial, and the right to prevent a second prosecution for the same offense.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Sherman Act > Scope

HN6[] **Sherman Act, Defenses**

A per se section 1 of the Sherman Act violation is not excused by a showing that the supra-competitive prices were somehow still reasonable.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

HN7[] **Abuse of Discretion, Evidence**

In criminal cases, appellate courts review an evidentiary decision under *Fed. R. Evid. 403* for an abuse of discretion and usually defer to the district court's balancing.

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error

HN8[] **Standards of Review, Plain Error**

Where defendant did not make certain arguments below, appellate courts review them for plain error.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Evidence

HN9[] **Plain Error, Evidence**

Sufficiency challenges that are not preserved through a *Fed. R. Crim. P. 29* motion after trial are reviewed under a particularly exacting variant of plain error review.

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

HN10[] **Mail Fraud, Elements**

Proof of mail fraud does not require proof of an actual mailing by the specific defendant. It requires only that the defendants caused the use of the mails, which includes reasonably foreseeable mailings and used the mails for the purpose, or in furtherance, of executing the scheme to defraud.

Criminal Law & Procedure > ... > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Sentencing > Restitution

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > ... > Appeals > Standards of Review > Clear Error Review

HN11[] **Standards of Review, Abuse of Discretion**

The Mandatory Victims Restitution Act of 1996 (MVRA) requires restitution for any offense against property including any offense committed by fraud or deceit. *18 U.S.C.S. § 3663A*. Restitution is based on actual loss, not intended or expected loss. The defendant's gain is not a substitute measure under the MVRA, and it is the government's burden to establish the loss amount by a preponderance of the evidence, *18 U.S.C.S. § 3664(e)*. In calculating the restitution award, a sentencing court is not held to a standard of absolute precision. Instead, the restitutionary amount need only have a rational basis in the record. Legal conclusions underpinning restitution awards are reviewed de novo, factual findings for clear error, and orders of restitution on the whole for abuse of discretion.

Criminal Law & Procedure > ... > Appeals > Standards of Review > Plain Error

HN12[] **Standards of Review, Plain Error**

Where a sentencing challenge was not preserved, appellate courts review it for plain error.

Criminal Law & Procedure > Sentencing > Restitution

HN13[] **Sentencing, Restitution**

Booker and its antecedents do not bar judges from finding the facts necessary to impose a restitution order.

Criminal Law & Procedure > Sentencing > Restitution

HN14[] **Sentencing, Restitution**

The Mandatory Victims Restitution Act (MVRA) has no statutory maximum amount and instead tasks the district court with determining the factual amount of loss. *18 U.S.C.S. § 3663A(b)*. As a result, in the MVRA context a judge cannot find facts that would cause the amount to exceed a prescribed statutory maximum.

Criminal Law & Procedure > Sentencing > Restitution

HN15[] **Sentencing, Restitution**

Calculation of restitution is not held to standards of scientific precision.

Counsel: Ignacio Fernández de Lahongrais on brief for appellant Vega-Martínez.

Julie Sonderlund for appellant Garay-Rodríguez.

Steven J. Mintz, Attorney, U.S. Department of Justice, Antitrust Division, with whom Makan Delrahim, Assistant Attorney General, Andrew C. Finch, Principal Deputy Assistant Attorney General, Richard A. Powers, Deputy Assistant Attorney General, Michael F. Murray, Deputy Assistant Attorney General, Stratton C. Strand, Attorney, Antitrust Division, Robert B. Nicholson, Attorney, Antitrust Division, Mark C. Grundvig, Attorney, Antitrust Division, Emma M. Burnham, Attorney, Antitrust Division, and Samson Asiyanbi, Attorney, Antitrust Division, were on brief, for appellee.

Judges: Before Torruella, Thompson, Kayatta, Circuit Judges.

Opinion by: KAYATTA

Opinion

[*47] KAYATTA, Circuit Judge. The two appellants in this case are school-bus operators who contracted with the Caguas, Puerto Rico municipal school system to drive school children to and from school each day. Instead of competing with one another in bidding on routes offered by the municipality in 2013, they gathered together with **[**2]** four other school-bus operators in an old-fashioned bid-rigging and market-allocation conspiracy. In brief, they all agreed on which company would submit the lowest bid on each route, thereby protecting themselves from the price-reducing effects of fair competition. Following trial, conviction, and sentencing on charges of mail fraud and violations of *section 1* of the *Sherman Act*, Luciano Vega-Martínez and René Garay-Rodríguez now appeal, claiming an absence of interstate nexus, insufficiency of the evidence, and assorted other issues. For the following reasons, we affirm.

I.

In 2013, Vega-Martínez, Garay-Rodríguez, and their co-defendants owned competing bus companies that sought to provide busing for low-income students from Caguas to public schools in the area. That year, the municipality announced that it would hold an auction for four-year school-bus-transportation contracts. Rather than submitting competing bids, the conspirators met and agreed to divide up the routes among themselves. For each route, a "winner" was pre-designated, and that "winner" was assured that, at most, only one other bidder would bid on the route (to make it look like there was competition). The other bid, if any, **[**3]** would be a high bid (to allow plenty of room for the winner's non-competitive "low" bid).

After the meeting, bids were submitted. The municipality rejected all of the bids and instead negotiated contracts with each of the low bidders without the benefit of knowing that the low bids were undisciplined by fair competition. The municipality then sent award letters to the successful defendants in the mail. Over a year later, news of the bid rigging leaked. Worse yet for the defendants, it turned out that one **[*48]** of the bus-company owners, Raquel Aldea-Rodríguez, had taped the meeting at which the scheme was put together. In May 2015, the defendants were charged in an indictment alleging conspiracy to restrain trade (*15 U.S.C. § 1*), conspiracy to commit mail fraud (*18 U.S.C. § 1349*), and substantive mail fraud counts (*18 U.S.C. § 1341*). After a seven-day trial, all of the defendants were convicted on all of the charged counts. The defendants made *Rule 29* motions, which were all denied. They were each sentenced to a prison term of one year and one day, plus a year of supervised release.

The district court then allowed the parties to separately brief the issue of restitution. To calculate the amount of restitution due from each defendant, the court **[**4]** ultimately compared the price paid for each route under the 2014 contracts with the prices paid for the same routes in 2017 following a competitive auction in 2016. Defendants Garay-Rodríguez and Vega-Martínez now appeal. Garay-Rodríguez challenges several aspects of his conviction, and both challenge the restitution amounts set by the district court.

II.

A.

HN1[] The Sherman Act reaches only activities in the flow of interstate commerce or that, "while wholly local in nature," would substantially affect interstate commerce if successful. *McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 241-42, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980)*; see also *Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 330-32, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991)*. When confronted with horizontal agreements to fix prices within a single state, the Supreme Court has based jurisdiction "on a general conclusion that the defendants' agreement 'almost surely' had a market[-]wide impact and therefore an effect on interstate commerce." *Summit Health, 500 U.S. at 331* (quoting *Burke v. Ford, 389 U.S. 320, 322, 88 S. Ct. 443, 19 L. Ed. 2d 554 (1967))*; see also *Goldfarb v. Va. State Bar, 421 U.S. 773, 784-85, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)* (finding an effect on interstate commerce where the "volume of commerce involved" was "substantial" and it was "inseparab[le] . . . from the interstate aspects of [related] transactions").

Garay-Rodríguez nevertheless contends that his bid rigging was beyond the reach of the Sherman Act for three reasons: either the indictment failed to allege a sufficient nexus **[**5]** to interstate commerce, or the proof fell short, or the jury was not instructed that it was required to find such a nexus. For the following reasons, we find that the indictment alleged that the defendants' conduct flowed in and had an effect on interstate commerce, that the evidence at trial supported those allegations, and that there was no plain error in the jury instructions.

1.

Before trial, Garay-Rodríguez and his co-defendants moved to dismiss the Sherman Act count for failure to allege a nexus between the scheme and interstate commerce.[1] The district court denied the motion. ***HN2***[] We review de novo the sufficiency of an indictment. *United States v. Stepanets, 879 F.3d 367, 369 (1st Cir. 2018)*; *United States v. Guerrier, 669 F.3d 1, 3 (1st Cir. 2011)*. In so doing, we do not evaluate the sufficiency of the evidence that the government might have to back up the indictment. *Guerrier, 669 F.3d at 4-5*. **[*49]** Rather, we will find an indictment sufficient if it "apprise[s] the defendant of the charged offense so that the defendant can prepare a defense and plead double jeopardy in any future prosecution for the same offense." *United States v. Rodríguez-Rivera, 918 F.3d 32, 34 (1st Cir. 2019)* (internal citations omitted) (quoting *Stepanets, 879 F.3d at 372*); see also *Fed. R. Crim. P. 7(c)(1)* ("The indictment or the information must be a plain, concise and definite written statement of the essential facts constituting the offense charged."). It may "parrot **[**6]** 'the statutory language to describe the offense, but it must also be accompanied by such a statement of facts and circumstances as to inform the accused of the specific offense with which he is charged.'" *United States v. Parigian, 824 F.3d 5, 9 (1st Cir. 2016)* (quoting *United States v. Savarese, 686 F.3d 1, 6 (1st Cir. 2012))*.

Here, the indictment did more than was necessary. It plainly set forth the elements of the charged offenses, including that the defendants' activities "were within the flow of, and substantially affected, interstate trade and commerce." It further alleged that the bus contracts were funded or supported at least in part by federal funds, and that the buses used by the defendants had all been shipped via interstate commerce. Whether the evidence was sufficient to back up these assertions was a matter for trial. See *Rodríguez-Rivera, 918 F.3d at 34*; *Guerrier, 669 F.3d at 4-5*.

2.

At trial, the government's burden increased. ***HN3***[] It had to submit evidence sufficient to establish an interstate nexus beyond a reasonable doubt. Cf. *United States v. DiSanto, 86 F.3d 1238, 1246 (1st Cir. 1996)* (requiring interstate-commerce element to be proven beyond a reasonable doubt in the context of a *Commerce Clause* challenge). The government carried this burden. It proved, for example, that the funds used to pay the defendants were provided by the federal government under the No Child Left Behind Act. Raymond Rivera-Pacheco, **[**7]** a CPA hired by the Puerto Rico Department of Education, testified that Caguas used $436,566.32 in federal funds from the No Child Left Behind Act to pay for school transportation in 2013-2014. The conspiracy's grab of those federal funds is likely sufficient by itself to establish an interstate nexus, given that the funds flowed in interstate commerce. See *Goldfarb, 421 U.S. at 783-84* (deeming intrastate price fixing by lawyers for title work on federally guaranteed real estate purchases to have an interstate nexus); *Englert v. City of McKeesport, 736 F.2d 96, 98 n.4 (3d Cir. 1984)* (federal financing of construction projects "would be sufficient to meet the jurisdictional requirement" of the Sherman Act); *United States v. Davis, 707 F.2d 880, 884 (6th Cir. 1983)* (federal funding of sheriff's office was sufficient to put sheriff's alleged racketeering within the flow of interstate commerce in *Hobbs Act* context); *United States v. Am. Soc'y of Anesthesiologists, Inc., 473 F. Supp. 147, 151, 156-57 (S.D.N.Y. 1979)* (insurance payments, including some federal and state funds, flowed in interstate commerce); *De Gregorio v. Segal, 443 F. Supp. 1257, 1267 (E.D. Pa. 1978)* (federal nursing home reimbursements flowed in interstate commerce via the

[1] They also argued that Puerto Rico was not a state for purposes of the Sherman Act, but the district court roundly rejected that argument, and it is not raised on appeal.

state of Pennsylvania's Medicaid program). But see *Loan Store, Inc. v. Indep. Food Stamps Assocs., Inc., 671 F. Supp. 844, 848, 848 n.5 (D. Mass. 1987)* (federal funding of the food-stamp program was "far too speculative" a basis for Sherman Act jurisdiction where the complaint "d[id] not allege [an effect on] the flow of food stamps").

[*50] Here we have more **[**8]** than the federal funds alone. The defendants' bid packages identified by vehicle identification number the specific buses that they planned to use for each route. Those buses were all purchased in Florida, meaning that they flowed in interstate commerce. As the government points out, if prices increased substantially, demand would likely fall. For example, Caguas might have responded by merging bus routes or reducing the bus services it used in other ways, resulting in fewer buses purchased by local companies from the continental United States. Cf. *Katzenbach v. McClung, 379 U.S. 294, 299, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964)* (explaining that race discrimination at restaurants would reduce those restaurants' demand for foodstuffs from outside the state: "The fewer customers a restaurant enjoys the less food it sells and consequently the less it buys.").

Given the evidence that the contracts were funded in at least substantial part by federal funding that had flowed through interstate commerce and that the contracts were carried out by use of goods that flowed through interstate commerce, as well as the resulting inference that the effect of the conspiracy could have been to reduce demand for those goods, the evidence in total was sufficient to establish a nexus with interstate **[**9]** commerce.

3.

Next, Garay-Rodríguez argues for the first time on appeal that the district court's instructions to the jury on interstate commerce were incorrect. ***HN4***[] While we ordinarily review the legal correctness of jury instructions de novo, and issues of "phrasing and emphasis" for abuse of discretion, *United States v. Allen, 670 F.3d 12, 15 (1st Cir. 2012)*, we review forfeited challenges like this one only for plain error, see *Ramirez-Burgos v. United States, 313 F.3d 23, 28 (1st Cir. 2002)*.

Garay-Rodríguez argues that the district court failed to fully explain the requirement that an effect on interstate commerce be "substantial." The district court explained that

> A conspiracy may have an effect on interstate commerce even though some or all of the conspirators do not themselves engage in interstate commerce and have confined their activities within a single state. The precise amount, quantity, or value of interstate commerce involved is unimportant so long as you find that the restraint charged in the indictment or the activities of the parties to the conspiracy had some non-substantial effect upon interstate commerce. The government may establish that there was an effect on interstate commerce in many different ways, and you should take into account all the evidence in determining whether there was, **[**10]** in fact, a substantial effect on interstate commerce.

Trial Tr., Dkt. 235 at 184:3-16, United States v. Rivera-Herrera et al., No. 15-cr-00361 (D.P.R. Feb. 1, 2017) (emphasis added). The district court's statement that the conspiracy needed to have "some non-substantial effect" was obviously incorrect, despite government counsel's sketchy attempt to rewrite the record in its briefing on appeal. See Gov. Br., Appellate Dkt. 60 at 41-42 (quoting the district court as stating that "some no[t] [in]substantial effect" was required (alterations in original)). While it does seem likely to us that the court meant to cite the Supreme Court's statement in McLain that the effect need only be "not insubstantial," the district court plainly stated the opposite. *McLain, 444 U.S. at 246* (emphasis added). Nevertheless, in the very same instruction, and at several other points, the district court repeatedly explained that the **[*51]** effect needed to be substantial. Likely for the same reason that no defense counsel objected to the instruction contemporaneously, a reasonable jury would not have been confused by the district court's isolated and likely apparent mistake considering its numerous correct explanations. On plain-error **[**11]** review, we find no sufficient showing of prejudice.

Garay-Rodríguez also argues that the court should have reiterated the "substantial effect" requirement throughout its jury instructions on interstate commerce. But the court was clear enough. A substantial effect is only one possible way to show a nexus with interstate commerce; activity occurring in the flow of interstate commerce is another. See Summit Health, 500 U.S. at 337 (citing Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)). The court explained both theories, and when it explained the "substantial effect" test it was always clear that the effect needed to be substantial (with the exception of the slight mistake discussed above); it was not required to repeat the word "substantial" in every single instruction -- especially not in instructions explaining the "flow" theory. Garay-Rodríguez has thus failed to show plain error on the interstate-commerce instructions.

B.

Garay-Rodríguez next argues that the government and the district court allowed him and his co-defendants to be convicted for price fixing even though the charges they faced were for bid rigging and market allocation only. He argues both that this was a prejudicial variance from and that it was a constructive amendment to the indictment. ***HN5***[] We **[**12]** review these claims de novo. See United States v. Godfrey, 787 F.3d 72, 78 (1st Cir. 2015). "A constructive amendment 'occurs where the crime charged has been altered, either literally or in effect, after the grand jury last passed upon it.'" Id. at 79 (quoting United States v. Mubayyid, 658 F.3d 35, 49 (1st Cir. 2011)). A variance -- or a change in a charge that "le[aves] the substance of the charge unaffected" --is permitted unless "it affect[s] the defendant's 'substantial rights[,]' . . . i.e., the right[] to have . . . knowledge of the charge [sufficient] to prepare an effective defense and avoid surprise at trial, and [the right] to prevent a second prosecution for the same offense." Id. (first alteration in original) (quoting United States v. Dowdell, 595 F.3d 50, 67-68 (1st Cir. 2010); United States v. Fisher, 3 F.3d 456, 463 (1st Cir. 1993)).

The crux of these claims is Garay-Rodríguez's argument that the government submitted evidence of price fixing even though the indictment referred to "bid-rigging" and did not expressly allege price fixing. But the fact that price fixing might be mentioned in a bid-rigging case strikes us as perfectly appropriate. Most bid-rigging schemes will necessarily include discussions of price. Here, for example, the scheme involved explicitly deciding which companies would submit the high and low bids on each route. To disallow evidence of those conversations would be nonsensical and **[**13]** would prevent the government from making its bid-rigging case. That evidence was probative of bid rigging, and it was clearly set out in the indictment. See United States v. Reeder, 170 F.3d 93, 105 (1st Cir. 1999). Moreover, bid rigging of the type at issue here is simply one pernicious form of price fixing. Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application ¶ 2005b (3d ed. 2012) ("Bid-rigging schemes are commonly thought to be more harmful than ordinary price fixing because bid-rigging is much easier for cartel members to enforce."). And even if that **[*52]** were not the case, the district court was clear with the jury that it could not convict on bid rigging based solely on evidence of price fixing alone. Despite Garay-Rodríguez's claim, then, a reasonable jury would not have believed that it could convict on evidence of price fixing without more. There was no variance from or constructive amendment to the indictment.

C.

Next, Garay-Rodríguez argues that the district court erred in not allowing him to present evidence on the price negotiations that took place between the "low" bidders and the municipality after the auction. Specifically, he points to limitations imposed on his cross-examination **[**14]** of Luz Ortíz-Peña, the auxiliary director of the Caguas Purchasing and Auctions Department. Before trial, the district court granted the government's motion in limine to exclude evidence or arguments that the defendants' "agreements to rig bids and allocate the market for public school bus transportation were reasonable, or that such agreements had economic, business, or personal justifications." During Garay-Rodríguez's cross-examination of Ortíz-Peña, Garay-Rodríguez asked multiple questions about the process of renegotiating the bids after the auction. His attorney finally asked whether Ortíz-Peña had told an FBI agent that in some cases it was more "cost-effective" to merge two routes. She answered, "That is correct," and when Garay-Rodríguez tried to follow up the court told him to "move on."

Essentially, Garay-Rodríguez is arguing that he should have been permitted to show that the final prices decided post-negotiation with the low bidders were not that bad, even reasonable. ***HN6***[] But Garay-Rodríguez and his co-defendants were charged with bid rigging and market allocation, both per se violations of the Sherman Act. See N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958) ("Among the practices which the courts have heretofore deemed **[**15]** to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." (internal citations omitted)); Stop & Shop Supermkt. Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 62 (1st Cir. 2004) (explaining that horizontal bid rigging is a per se violation of antitrust laws). Determining the defendants' liability for that conduct did not require the jury to assess its supposed reasonableness. See United States v. Peake, 804 F.3d 81, 93 n.10 (1st Cir. 2015) ("A per se Section 1 violation is not excused by a showing that the supra-competitive prices were somehow still reasonable."). Garay-Rodríguez did not proffer any other reason why the ultimate cost-effectiveness of the final route allocations was relevant. So, it was well within the district court's discretion under Federal Rule of Evidence 403 to exclude evidence at trial about whether the defendants' conduct really cost Caguas much money.

D.

Garay-Rodríguez argues that the district court abused its discretion by admitting a summary chart depicting the total number and duration of calls and attempted calls between the defendants' telephone numbers daily during the two months within which they were alleged to have planned and implemented the bid rigging. ***HN7***[] Garay-Rodríguez claims that the chart should have been excluded under Rule 403, which allows exclusion of relevant evidence "if **[**16]** its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. We review **[*53]** this evidentiary decision for an abuse of discretion and "usually defer to the district court's balancing." United States v. Whitney, 524 F.3d 134, 141 (1st Cir. 2008) (quoting United States v. Smith, 292 F.3d 90, 99 (1st Cir. 2002)).

There was nothing unfairly prejudicial about the chart. To be sure, it supported an inference that the defendants conspired. But that simply means that the evidence was probative. And to the extent defendants claim that the jurors might have thought the evidence to be more incriminating than that, any such risk was eliminated by the trial judge's instruction pointing out the chart's limitations in not showing who actually was on the calls or what they said.

E.

Garay-Rodríguez's next set of arguments revolves around the overlap between the mail fraud and Sherman Act counts. ***HN8***[] Garay-Rodríguez did not make these arguments below, so we review them for plain error. United States v. Prieto, 812 F.3d 6, 17 (1st Cir. 2016).

First, Garay-Rodríguez seems to argue that the district court should have instructed the jury that it had to find a mail-fraud scheme that was separate and distinct from the Sherman Act conspiracy. That **[**17]** is incorrect. Assuming the jury found that the mail fraud was committed in the process of bid rigging or market allocation, it was free to find that the defendants' conduct both violated the Sherman Act and constituted mail fraud. Cf. United States v. Valdés-Ayala, 900 F.3d 20, 30-34 (1st Cir. 2018) (upholding convictions of both bankruptcy fraud and wire fraud for the same underlying conduct).

Second, Garay-Rodríguez argues that there was not sufficient evidence to convict him for mail fraud. ***HN9***[] Sufficiency challenges like this one that are not preserved through a Rule 29 motion after trial are reviewed under "a particularly exacting variant of plain error review." United States v. Foley, 783 F.3d 7, 12-13 (1st Cir. 2015).

Here the government presented evidence to establish both elements of a mail-fraud conviction: that the defendant "devised or intend[ed] to devise a scheme to defraud (or to perform specified fraudulent acts), and . . . use of the mail for the purpose of executing, or attempting to execute, the fraud (or specified fraudulent acts)." Schmuck v. United States, 489 U.S. 705, 721, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989). The government presented clear evidence of a scheme to defraud through the testimony of Aldea-Rodríguez and documentary evidence of the bids, including the defendants' certifications that their bids were "fair and free of collusion or fraud," a statement that the **[**18]** jury obviously decided was false. The government then showed that the scheme required a relevant and foreseeable use of the mail because the defendants received the object of the conspiracy -- their contract award letters -- by certified mail.

HN10[] Proof of mail fraud does not require proof of an actual mailing by the specific defendant. *United States v. Hebshie, 549 F.3d 30, 36 (1st Cir. 2008)* (requiring only that the defendants "cause[d] the use of the mails, which includes reasonably foreseeable mailings" and "use[d] the mails for the purpose, or in furtherance, of executing the scheme to defraud" (emphasis omitted)). Garay-Rodríguez cites *United States v. Berroa, 856 F.3d 141 (1st Cir. 2017)*, for a more restrictive view of the causation requirement. *Id. at 148-52* (explaining that the defendants' submission of falsified test scores did not sufficiently cause the mailing of their resulting medical licenses, which were not a property **[*54]** interest of the governing board). Berroa does not control here, however, where the awarding of the contracts themselves was an alleged financial loss to the municipality and gain to the defendants. See *id. at 152* (explaining that the defendants in Berroa did not profit from their fraud until "in the ensuing years after becoming licensed, [they] practiced medicine for profit"). The district **[**19]** court thus did not plainly err in allowing conviction on this evidence.

Finally, the same evidence described above also supports the defendants' convictions for conspiracy to commit mail fraud, which in addition to "intent to commit the substantive offense" requires "intent to agree" to do so -- whether or not the substantive offense is ultimately carried out. *United States v. Delgado Figueroa, 832 F.2d 691, 694-96 (1st Cir. 1987)*. Aldea-Rodríguez's testimony and tape recording of the meeting at which the conspiracy was hatched, as well as documentation of the defendants' phone calls and bid submissions, sufficiently supports a finding that the defendants agreed to submit fraudulent bids and cause the municipality to send out award letters based on that fraudulent information.

F.

HN11[] The last set of challenges is to restitution amounts of $114,181 for Garay-Rodríguez and $93,055 for Vega-Martínez. The *Mandatory Victims Restitution Act of 1996 ("MVRA")* requires restitution for any "offense against property . . . including any offense committed by fraud or deceit." *18 U.S.C. § 3663A*. Restitution is "based on actual loss, not intended or expected loss," *United States v. Innarelli, 524 F.3d 286, 295 (1st Cir. 2008)*; see also *United States v. Fair, 699 F.3d 508, 513, 403 U.S. App. D.C. 39 (D.C. Cir. 2012)* (explaining that the defendant's gain is not a substitute measure under the MVRA in most circuits), and it is the **[**20]** government's burden to establish the loss amount by a preponderance of the evidence, *18 U.S.C. § 3664(e)*; *United States v. Prochner, 417 F.3d 54, 65 (1st Cir. 2005)*. In calculating the restitution award, "a sentencing court is not held to a standard of absolute precision." *United States v. Salas-Fernández, 620 F.3d 45, 48 (1st Cir. 2010)*. Instead, "the restitutionary amount [need only] have a rational basis in the record." Id. Legal conclusions underpinning restitution awards are reviewed de novo, factual findings for clear error, and orders of restitution on the whole for abuse of discretion. *Innarelli, 524 F.3d at 293*; *Prochner, 417 F.3d at 65-66*.

The district court based the restitution order on the difference between the prices that Caguas paid the defendants for their routes in 2014 after the rigged 2013 auction, and the amount that it paid for those same routes in 2017 after a presumably fair auction in 2016. The court then allocated the loss between the defendants based on their routes. Garay-Rodríguez was ordered to pay $114,181 and Vega-Martínez, $93,055.

1.

Garay-Rodríguez -- but not Vega-Martínez -- first challenges the restitution award under *Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)*, arguing that the amount of restitution should have been found by the jury instead of by a judge. ***HN12***[] This challenge was not preserved, so we review it for plain error. *Prieto, 812 F.3d at 17*. This circuit has previously held, "like all of the other **[**21]** circuits to consider this question," that *HN13*[] "Booker and its antecedents do not bar judges from finding the facts necessary to impose a restitution order." *United State v. Milkiewicz, 470 F.3d 390, 403-04 (1st Cir. 2006)*. Garay-Rodríguez contends that the Supreme Court has more recently provided **[*55]** guidance to the contrary in *Southern Union Co. v. United States, 567 U.S. 343, 347-50, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012)*, but that case is clearly distinguishable. There, the Supreme Court evaluated a statute that imposed a $50,000 fine for each day of violation and found that because each day increased the statutory maximum fine, the jury was required to find the number of days the defendant was in violation. Id. *HN14*[] The MVRA, however, has no statutory maximum amount and instead tasks the district court with determining the factual amount of loss. *18 U.S.C. § 3663A(b)*. As a result, in the MVRA context "a judge cannot find facts that would cause the amount to exceed a prescribed statutory maximum." *United States v. Bengis, 783 F.3d 407, 412 (2d Cir. 2015)* (emphasis added). While this court has not re-evaluated its reasoning in Milkiewicz since Southern Union was decided, several other courts of appeals have already concluded that Southern Union does not overrule their previous holdings that Apprendi does not apply to restitution calculations.[2] See *United States v. Sawyer, 825 F.3d 287, 297 (6th Cir. 2016)*; *United States v. Thunderhawk, 799 F.3d 1203, 1209 (8th Cir. 2015)*; Bengis, 783 F.3d at 412-13; *United States v. Rosbottom, 763 F.3d 408, 420 (5th Cir. 2014)*; *United States v. Green, 722 F.3d 1146, 1149-50 (9th Cir. 2013)*; *United States v. Wolfe, 701 F.3d 1206, 1216-17 (7th Cir. 2012)*; *United States v. Day, 700 F.3d 713, 732 (4th Cir. 2012)*.

The district court's decision to follow the approach espoused in Milkiewicz, which accords with the more recent decisions of our sister circuits, was not plain error.

2.

Moving on from Apprendi, both defendants challenge whether it was reasonable for the district court to use the ostensibly fair prices from the 2016-2017 auction as a benchmark for what fair prices would have been in the 2013-2014 auction. Vega-Martínez makes two primary arguments on that point. First, he argues that there were no losses because after the renegotiation process the municipality ultimately did not pay more than it had initially budgeted for the routes. This first argument falls flat. The fact that the municipality might have been able to afford higher prices than it paid in 2014, even if true, does not preclude the likelihood that it would have paid less had there been a fair auction, which is the relevant question. Along those same lines, Vega-Martínez also argues that he "[h]ad been servicing the same route for around 27 years for basically the same price" that was reached in 2014. But that is not the proper measure either. The municipality presumably **[**23]** opened up the auction in the hope that it could get lower prices, as it was entitled to do and as it did for 2017. Prices from previous years thus are not a legally dispositive benchmark -- especially when those previous years' prices were not decided by auction.

Second, Vega-Martínez argues that the government failed to present any evidence to show that there were other companies and drivers available and willing to provide the services for less in 2014. This second argument is better but ultimately not persuasive. As Vega-Martínez points out, neither of the two cooperating witnesses testified that they would have bid on the routes in question but for the agreement reached at the bid-rigging meeting. There was thus **[*56]** no express evidence to establish that market conditions were equivalent between 2013 and 2016. To back up this point, Garay-Rodríguez points to a provision in the MVRA that allows courts not to award restitution where determining the loss amount would "complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." *18 U.S.C. § 3663A(c)(3)(B)*. Although the government interprets this provision to suggest **[**24]** that district courts should not concern themselves with complex facts when awarding restitution, it actually suggests that restitution should not be awarded when it is too difficult to estimate accurately. That is, where the facts are too difficult to discern, the sentencing court's option is to forgo restitution, not to fall back on a factually unsupported calculation method.[3]

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[2] For the contrary argument, see William M. Acker, Jr., The Mandatory Victims Restitution Act Is Unconstitutional. Will the **[**22]** Courts Say So After Southern Union v. United States?, *64 Ala. L. Rev. 803 (2013)*.

[3] See Jennifer Gerarda Brown, Robbing the Rich to Feed the Poor, 3 Buff. Crim. L. Rev. 261, 275-81 (1999); see, e.g., *United States v. Fountain, 768 F.2d 790, 802 (7th Cir. 1985)* (Posner, J.) (applying the Victim and Witness Protection Act's parallel

HN15[] That being said, "calculation of restitution is not held to standards of scientific precision." *United States v. Sánchez-Maldonado, 737 F.3d 826, 828 (1st Cir. 2013)*. Absent evidence to the contrary, it was permissible for the court to assume that market conditions were roughly equivalent between 2013 and 2016. Only three years passed between the two auctions, and the defendants point to no intervening events that would have seriously disrupted the supply of or demand for bus servicing in that span of time.[4]

Vega-Martínez also argued below that "[t]he routes that were served by [his company] are currently served differently." In particular, he contended that a provider who obtained a route for 2017 used a different number of buses and picked up a different number of students than he had. But Vega-Martínez provided no direct evidence **[**25]** of those contentions. While he did include affidavits from community members about their experiences with the busing services post-2017, the affidavits failed to include any detailed information about the routes.

Absent an evidence-supported argument from the defendants that the routes auctioned for 2017 were materially different than those for 2014, the district court was entitled to presume that the two auctions were for approximately the same services in pretty much the same market.

III.

For the reasons explained above, the defendants' convictions and restitution requirements are affirmed.

End of Document

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complexity exception to reverse a grant of lost future earnings to a murdered prison guard's family because "projecting lost future earnings has no place in criminal sentencing if the amount or present value of those earnings is in dispute" and such an "elaborate damage calculation requiring expert testimony" was too complicated for the sentencing context (emphasis omitted)).

[4] Hurricane Maria did not land on the island until September 2017, for example.

Success Sys. v. Excentus Corp.

United States District Court for the District of Connecticut

February 1, 2020, Decided; February 1, 2020, Filed

No. 3:19-cv-455 (VAB)

Reporter
439 F. Supp. 3d 31 *; 2020 U.S. Dist. LEXIS 16598 **; 2020-1 Trade Cas. (CCH) P81,080; 2020 WL 509774

SUCCESS SYSTEMS, INC., SMART C-STORES, LLC, Plaintiffs, v. EXCENTUS CORP., SKUPOS, INC., Defendants.

Subsequent History: Appeal terminated, 06/12/2020

Core Terms

Rewards, tobacco, Fuel, relevant market, alleges, venue, Rebates, integration, programs, argues, personal jurisdiction, motion to dismiss, market power, interchangeable, failure to state a claim, prices, antitrust, provider, Reply, fails, Sherman Act, parties, C-stores, products, factual allegations, anticompetitive, e-mails, state law claim, consumers, gas station

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Judges: VICTOR A. BOLDEN, UNITED STATES DISTRICT JUDGE.

Opinion by: VICTOR A. BOLDEN

Opinion

[*41] RULING AND ORDER ON MOTIONS TO DISMISS

Success Systems, Inc. and Smart C-Stores, LLC ("Success Systems," "Success," or "Plaintiffs") have sued Excentus Corp. ("Excentus") and Skupos, Inc. ("Skupos") (collectively, "Defendants")under *§§ 1* and *2* of the *Sherman Act*, *§ 3* of the *Clayton Act* and Connecticut causes of action.

Any state law claims against Excentus will be dismissed because the Court lacks jurisdiction over them. While venue also is improper for these state law **[**2]** claims, because the Court lacks jurisdiction over them and they are dismissed, no further action by this Court is necessary. The federal antitrust claims against Excentus will be dismissed on the merits.

As to Skupos, the federal antitrust claims against them also will be dismissed. Having dismissed the federal claims against them, the Court declines to exercise supplemental jurisdiction over any state law claim against Skupos and that claim will be dismissed as well.

Excentus's motion to dismiss for failure to state a claim or in the alternative transfer venue is **GRANTED** to the extent Excentus argues Success Systems failed to state a claim; the motion is **MOOT** to the extent Excentus seeks to transfer venue. Excentus's motion to dismiss for lack of jurisdiction and improper venue is **GRANTED**. Skupos's motion to dismiss for failure to state a claim is **GRANTED**.

For the following reasons, all motions to dismiss are **GRANTED**.

[*42] I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Allegations

Success Systems, a corporation based in Connecticut, alleges that this Court has jurisdiction under *28 U.S.C. §§ 1337*, *1331*, *1367* as the "case arises under *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*; *Section 3* and *4* of the *Clayton Act*" and the Court may exercise **[**3]** supplemental jurisdiction over the state law claims accordingly. Am. Compl. ¶ 5. The Court also allegedly has jurisdiction under *28 U.S.C. § 1332* and venue is allegedly proper under *28 U.S.C. § 1391*, *Sections 4* and *12* of the Clayton Act, *15 U.S.C. §§ 15* and *22*. *Id.* ¶¶ 6-7. The Court allegedly "has personal [j]urisdiction over the Defendants as a substantial part of the events or omissions giving rise to the claims occurred in Connecticut, Defendants have transacted a substantial amount of business in Connecticut" and the harm from Defendants' anticompetitive and tortious conduct was felt in Connecticut. *Id.* ¶ 8.

1. The Parties

Success Systems "offers automation solutions for convenience, grocery, liquor, tobacco and gasoline service stations (collectively 'C-stores') across the country." Am. Compl. ¶ 9. One of its programs "is a tobacco loyalty program named 'Smokin' Rebates®.'" *Id.* Success Systems alleges that "Smokin' Rebates is the most diversified and complete solution for compliancy-based rebate reporting system through which major tobacco manufacturers . . . offer rebates to C-store owners who agree to share tobacco sale and scan data from their stores." *Id.* ¶ 10. The program allegedly allows participants "to charge their **[**4]** customers as much as $2 per pack of cigarettes less than other C-stores" that do not enroll or engage in the tobacco rewards program. *Id.* ¶ 11.

The savings allegedly are important to C-stores because tobacco suppliers have reported "a 6-11% drop in tobacco category sales for retailers" that do not participate in the rebate programs. *Id* ¶ 12. Even with declining smoking rates, C-stores allegedly "report that they still derive upwards of 50-65% of their revenue from tobacco products," making the lower priced packs of cigarettes "a critical competitive advantage." *Id.* ¶ 13.

"Smokin' Rebates [allegedly] is one of the few providers of the tobacco rewards programs and is compatible with 13 Point of Sale ("POS") registers" C-stores often use. *Id* ¶ 14.

Excentus "develops and operates loyalty programs[.]" *Id.* ¶ 15. Fuel Rewards, a program operated in conjunction with Shell Oil, allegedly is Excentus's flagship product. *Id.* Fuel Rewards allegedly "gathers all data relating to the sale of fuel and all products sold at Shell service stations, including tobacco products" and then provides the data to Shell. *Id.* ¶ 16. According to Success Systems, "Excentus does not offer or support the tobacco loyalty **[**5]** programs provided by the major tobacco manufactures." *Id.* ¶ 17.

For a Shell service station to participate in a tobacco loyalty program, the service station would allegedly require Excentus "to provide the POS data for all tobacco sales to the tobacco loyalty program provider[.]" *Id.* ¶ 18. This is because "Excentus' Fuel Rewards system [allegedly] is the only system that can gather and provide this data in a Fuel Rewards Shell service station." *Id.*

Johnson Oil allegedly "owns and operates several Shell service stations in Illinois and Iowa[.]" *Id.* ¶ 19. Johnson Oil allegedly participates in the Excentus-operated Fuel Rewards program. *Id.*

[*43] 2. Alleged Oral Contract

In 2017, Johnson Oil allegedly began working with Success Systems to use "several of its back-office productivity solutions ...."*Id.* ¶ 20. In September 2018, Johnson Oil allegedly "decided that it would like to participate in the tobacco loyalty rewards program, and asked Success to implement its Smokin' Rebates program in the Johnson Oil Shell service stations." *Id.* ¶ 21. Excentus allegedly agreed to provide Success Systems with the Fuel Rewards data, in order for the tobacco rebate program to work. *Id.* ¶ 22. Excentus allegedly **[**6]** "contacted Success in Connecticut" which allegedly began "the relationship between the parties which led to the agreement to integrate their respective programs." *Id.*

During that initial call and on subsequent calls, Excentus allegedly "agreed to provide the required data and agreed to integrate Smokin' Rebates with the Shell Fuel Rewards program for Johnson Oil, and the Shell Fuel Rewards program in general[.]" *Id.* ¶ 23. The integration allegedly "would make the Smokin' Rebates available to all Shell Fuel Rewards users." *Id.*

According to Success Systems, this was an "oral agreement made between representatives for Excentus—with at least apparent authority—and representatives from Success." *Id.* ¶ 24. Numerous e-mails sent between the parties allegedly "documented the agreement," *id.* ¶ 25, and "provide evidence of the agreement between the parties, as does Excentus' willingness to provide its confidential data to Success as well as its willingness to provide extensive support for integration," *id.* ¶ 26. The effort in the following months that required cooperative work, the e-mails, and the practice and conduct of the parties allegedly demonstrates "a meeting of the minds and an agreement." **[**7]** *Id.* ¶ 27. Although the agreement "did not provide for any payments either from Excentus to Success or vice versa, it nonetheless bears all the hallmarks of an oral contract." *Id.* ¶ 28.

Allegedly, in exchange for providing the Fuel Rewards data to Success Systems, Excentus obtained "the ability to advertise to other locations ...that if they subscribed to Shell Fuel Rewards, they would now also be able to take advantage of the lucrative Smokin' Rebates tobacco rewards program." *Id.* ¶ 29.

Altria Group, a major tobacco manufacturer, *id.* ¶ 10, has data which indicates providers of loyalty solutions, like Excentus, "are having a difficult time competing in the marketplace without rebate reporting module[s]," especially considering the current high demand of rebate programs, *id.* ¶ 30. An integration of the systems allegedly "made Fuel Rewards more valuable to Shell station owners." *Id.*

The allegedly competitive advantage "a tobacco rewards program provides C-store operators[,]" and Excentus's potential "ability to provide such a program as a part of Fuel Rewards was a direct and a real and direct benefit to Excentus." *Id.* ¶ 31. Success Systems also alleges that Excentus's conspiracy "to replace **[**8]** Success with another tobacco rewards provider" before implementing Smokin' Rebates in sixty-eight Johnson Oil locations further demonstrates "the value Excentus placed on the service that Success was providing." *Id.* ¶ 32.

Success Systems allegedly would have benefitted from a partnership with Excentus "by securing set and subscription fees" from the initial sixty-eight Johnson Oil locations "and then from other Shell Fuel Rewards locations." *Id.* ¶ 33.

Success Systems and Excentus allegedly discussed expanding the Smokin' Rewards **[*44]** program to Excentus's "other non-rewards Shell locations beyond the Johnson Oil stores." *Id.* ¶ 34. Both allegedly had begun installing "Smokin' Rewards at another Fuel Rewards location[s]. . .."*Id.* ¶ 35.

Over a month before Excentus allegedly breached its agreement with Success Systems, Success Systems allegedly "published several announcements on prominent social media platforms advertising that it had integrated Smokin' Rebates with the Shell Rewards network[,]" relying on Excentus that full integration was on the horizon. *Id.* ¶ 36. Excentus allegedly objected to the post for the first time then. *Id.*

Success Systems alleges that Excentus's late-hour objection **[**9]** to its announcement "is further evidence of the agreement to make Smokin['] Rewards available to all Fuel Rewards locations after" after integration to the platforms was complete. *Id.* ¶ 37.

3. Parties' Performance

Between November 2018 and March 2019, "Excentus [allegedly had] worked hand in hand with Johnson Oil, Success, and a company called IRI (which certified data for the Altria tobacco loyalty program) to integrate Smokin' Rebates into the Fuel Rewards program." *Id.* ¶ 38.

Through the process of integration, Excentus, Success Systems, and Johnson Oil allegedly exchanged hundreds of e-mails. *Id.* ¶ 39. Success Systems points to language in e-mails between Success Systems and Excentus allegedly demonstrating the agreement between the two:

- On November 16, 2018, Jamie Hudson, VP at Excentus, allegedly received an e-mail from Kathy Peugh stating "they decided to implement Success' Smokin' rebates program." Mr. Hudson allegedly responded, "have them give me a call we can share a file with them and probably get this going pretty quickly." *Id.* ¶ 40(a);

- On January 18, 2019, Anthony Lezzi at IRI allegedly e-mailed Henrik Ampel at Excentus "requesting that Excentus provide Success with the **[**10]** export files necessary for Success to start getting Smokin' Rebates running at the Johnson Oil locations." *Id.* ¶ 40(b). Mr. Ampel allegedly replied to the "Team" "and provided login credentials to the Excentus SFTP server." *Id.*;

- On January 30, 2019, Andrew Iorio at Success Systems allegedly wrote to Todd Kuhlmeyer at Excentus. *Id.* ¶ 40(d). Mr. Iorio allegedly requested "the StoreSiteID for each of the stores, so I can confirm that we are getting all the stores." *Id.* Mr. Kuhlmeyer allegedly provided "a list of each Johnson site with address and site ID." *Id.*;

- On February 15, 2019, Johnson Oil's Rolando Ducoing allegedly sent an e-mail to Success Systems personnel and Mr. Kuhlmeyer approving of a starting with a specific test cite "for a few days before going live everywhere is a great idea." *Id.* ¶ 40(c); and

- On February 26, 2019, Mr. Ducoing allegedly sent an e-mail to Success Systems informing they "[were] live now[,]" and that they could "run the rewards at store 4 [possibly the above referenced test site] for a couple of days for verification before opening it up to everyone." *Id.* ¶ 40(e).

Success Systems allegedly relied on its agreement with Excentus before entering into a written **[**11]** agreement with Johnson Oil requiring Success Systems to "implement the Smokin' Rewards program in all Johnson Oil locations." *Id.* ¶ 41. As consideration, **[*45]** allegedly "Johnson Oil agreed to pay Success to set up the program and also to administer the program on a monthly basis." *Id.* Success Systems and Johnson Oil allegedly "spent considerable time, effort, and capital in coordinating the setup, implementation, and testing of Smokin' Rebates in conjunction with the Excentus Fuel Rewards program." *Id.* ¶ 42. Following the Johnson Oil rollout, Excentus allegedly "asked if Fuel Rewards could be installed in 18 Johnson Oil BP locations...."*Id.* ¶ 43. Excentus allegedly "offered to provide a price quotation." *Id.*

By March 2019, allegedly "Excentus had provided Success with general data for all 68 Johnson Oil locations, and specific testing data for Johnson Oil location #4[.]" *Id.* ¶ 44. And in early March 2019, an allegedly successful test of the Smokin' Rebates/Fuel Rewards integration occurred. *Id.*

According to Success Systems, "information was attached directly to emails that were sent from Excentus in Texas to Success in Connecticut, and ...Excentus provided Success with login credentials to **[**12]** its internal FTP server and invited Success to login and download the data from Texas to Connecticut." *Id.* ¶ 45.

No in-person meetings occurred between the two companies or "employees or representatives of either company." *Id.* ¶ 46. "All of the communication between Excentus and Success took place over the phone or via email[.]" *Id.*

4. The Aftermath

Success Systems alleges that, "unbeknownst to Success or Johnson Oil, Excentus had been working for some time behind[] the scenes" with Skupos, an alleged competitor of Success Systems. *Id.* ¶ 47. Excentus allegedly sought "to provide a tobacco reward program to its clients (including Johnson Oil) in conjunction with Fuel Rewards and in violation [of] its agreement with Success." *Id.* Excentus allegedly worked to "to conspire and breach the agreement" with Success Systems "to give the tobacco rewards business to Skupos." *Id.* ¶ 48.

Success Systems alleges that "while some personnel at Excentus [worked] hand in hand with Success, Johnson Oil, IRI, and Altria pursuant to the agreement to implement tobacco rewards alongside Shell Fuel Rewards, other or the same people at Excentus" worked to conspire and breach the agreement with Success Systems to **[**13]** "give the tobacco rewards business to Skupos." *Id.* ¶ 48.

Through conspiring and collaborating, "Skupos and Excentus [allegedly] were knowingly and tortuously interfering with the business expectancies and contractual relationships between Success and Johnson Oil, and between Success and Excentus." *Id.* ¶ 49.

Success Systems allegedly "has reason to believe that Skupos and Excentus were sharing Success's proprietary processes to improve Skupos' offering, which is [allegedly] far inferior to that of Smokin' Rebates." *Id.* ¶ 50. Excentus terminated the agreement only after "Success [allegedly] had successfully certified the process, and Excentus and Skupos extracted all of Success's information, that Excentus terminated the agreement." *Id.*

Allegedly after Skupos and Excentus finalized their own agreement, "Excentus abruptly informed Success that it had no intention of living up to its agreement to integrate Smokin' Rebates with Fuel Rewards." *Id.* ¶ 51.

Then, Excentus allegedly "informed Johnson Oil that despite its agreement with Success, the only way it would be able to integrate tobacco rewards with Shell **[*46]** Fuel Rewards" was with Skupos, "Success' direct competitor[.]" *Id.* ¶ 52.

Success Systems **[**14]** allegedly "invested over four months ...of time and effort in integrating and gaining certification of Smokin' Rebates into the Fuel Rewards program not only for the sixty-eight Johnson Oil locations, but to offer the newly integrated Smokin' Rebates program to all of the Shell Fuel Rewards location[s]." *Id.* ¶ 54. According to Success Systems, anything less than integrating with all Shell Fuel Rewards locations "would not justify the investment." *Id.*

Success Systems allegedly "proceeded with the understanding that" after spending time and effort on the Fuel Rewards/Smokin' Rebates integration, "Excentus would allow it to offer the program to other Shell Fuel Rewards locations." *Id.* ¶ 55.

Success Systems allegedly lost significant revenue from the inability to offer its program to other Shell Fuel Rewards locations. *Id.*

5. The Alleged Antitrust Violations

As the sole provider of the Shell Fuel Rewards programs, Excentus allegedly "gathers all data relating to the sales of fuel and all products sold at Shell Fuel Rewards service stations, including tobacco products, and provides the same to Shell." *Id.* ¶ 57. Excentus then allegedly "is thecustodianof12%ofallC-storesalesdataintheUnitedStates...and **[**15]** 100% of the sales data from the 12,000 Shell Oil stations that use Fuel Rewards." *Id.* ¶ 58. For Shell Oil service stations to remain competitive they "must participate in a tobacco rewards program, [they] must arrange for a tobacco rewards provider—such as Success or Skupos—to receive the data collected by Excentus with respect to the sale of tobacco products and use said data to report sales to major tobacco manufacturers." *Id.* ¶ 59.

After allegedly "entering into this anticompetitve conspiracy and agreement with Skupos," Excentus allegedly notified Johnson Oil and other Fuel Rewards participants that, in order to implement a tobacco rewards program, they allegedly "would have to partner with Skupos and could not use Success' Smokin' Rebates, even though Smokin' Rebates had just [allegedly] successfully undergone a [four] month proofing test with Johnson Oil and was the only tobacco rewards program that actually worked with Fuel Rewards." *Id.* ¶ 62.

Success Systems allegedly has learned from other C-store owners "that Skupos is offering predatory and economically unjustified rates to Fuel Rewards customers" to persuade customers "who would rather use Smokin' Rewards or another provider" **[**16]** to instead use Skupos. *Id.* ¶ 63.

Success Systems alleges "that once it spent four months of time and effort integrating Smokin' Rewards, Excentus would allow it to offer the program to the other Shell Fuel Rewards locations." *Id.* ¶ 55. Success Systems allegedly has lost significant revenue "as a result of being prohibited from offering Smokin' Rebates to other Shell Fuel Rewards users ...."*Id.* Indeed, Success Systems allegedly "agreed to absorb the bulk of its development and implementation cost involved in the Shell Fuel Rewards/Smokin' Rebates integration with the understanding by both Johnson Oil and Excentus that said costs would be recouped through the long-term operation of Smokin' Rebates in the Shell Fuel Rewards network." *Id.* ¶ 56.

Excentus's effective monopoly on 12,000 Shell Oil locations means Excentus "effectively control[s] who can provide tobacco rewards regardless of which tobacco rewards provider the individual Shell Fuel Rewards location wants to use." *Id.* ¶ 60. By restricting the tobacco reward provider **[*47]** to Skupos, "Excentus and Skupos conspired to create a vertical monopoly by which Skupos would be the only provider of tobacco rewards programs to all 12,000 Fuel Rewards **[**17]** locations." *Id.* ¶ 61.

For a Shell C-store to remain competitive "it must participate in a tobacco rewards program" and must have a tobacco rewards provider, like Success Systems or Skupos, "receive the data collected by Excentus with respect to the sale and use said data to report sales to the major tobacco manufacturers." *Id.* ¶ 59.

Success Systems alleges that "both Excentus and Skupos ...deliberately used Success's resources, reputation and cache with Altria and RJ Reynolds for an expedited certification, knowing that that certification would transferred to Skupos." *Id.* ¶ 64. Skupos, even now, allegedly "struggles with RJ Reynolds and ITG certifications, only having a small percentage of their customer base certified on those platforms." *Id.*

Skupos allegedly can implement "predatory and economically unjustifiable pricing as a means of pushing others out of the tobacco rebates market because it is backed by investors" who can absorb the short-term loss "in exchange for a monopoly wherein Skupos is the only viable player in the market and competitors like Success are squeezed out." *Id.* ¶ 65.

Excentus and Skupos allegedly "engage in unethical, unfair, and anticompetitive schemes and strategies **[**18]** in restraint of trade." *Id.* ¶ 66. This activity allegedly suppresses competition and prevents "Success from contracting with any of the 12,000 Shell Rewards locations." *Id.* ¶ 67. Furthermore, this activity allegedly raises "barriers to entry in the relevant Shell Fuel Rewards tobacco rewards market" and ensures Skupos's establishment and perpetuation in the Shell Fuel Rewards market. *Id.* ¶ 68.

Success Systems further alleges that there is "no valid or legitimate business justification" for this anticompetitive and exclusionary conduct. *Id.* ¶ 69. It allegedly evinces a "specific intent to monopolize the Shell Fuel Rewards tobacco rewards market by eliminating, destroying, or foreclosing any meaningful competition[,]" then allowing "Excentus and Skupos to dictate the prices and the terms of the tobacco rewards" provided. *Id.* ¶ 70. Excentus and

Skupos, through their allegedly "intentional, sweeping, and disruptive conduct...[are]willful, malicious, and oppressive." *Id.* ¶ 72.

6. The Alleged Relevant Market

Success Systems alleges that, for the purposes of its antitrust claims, the relevant product market "is the Shell Fuel Rewards tobacco rewards market[,]" allegedly unique, distinct, and **[**19]** not in competition with the broader general tobacco rewards market. *Id.* ¶¶ 73-74. Excentus "control[s] entry and access to the Shell Fuel Rewards market because it controls the data necessary to make a tobacco rewards program function as part of the Shell Rewards program." *Id.* ¶ 75. Excentus allegedly controls entry into the provider of the tobacco rewards program, *id.* ¶ 76, and, similarly, a Shell Fuel Rewards gas station or chain "must purchase a tobacco rewards provider who is part of the Shell Fuel Rewards tobacco rewards market[,]" *id.* ¶ 77. As a result, "tobacco rewards programs which are generally available to gas stations and C-stores cannot be included in the same relevant market," as these tobacco rewards programs are excluded from all Shell Fuel Rewards locations. *Id.* ¶ 78.

The relevant geographic market allegedly includes "the nationwide Shell Fuel Rewards tobacco rewards market and the **[*48]** world-wide tobacco rewards market." *Id.* ¶ 82.

The nature of the limited and controlled market allegedly results in considerable cost "for a Shell Fuel Rewards location to switch to another tobacco rewards provider...."*Id.* ¶ 87. In order for a Shell Rewards user to employ "a tobacco rewards **[**20]** program not sanctioned by Excentus, it [allegedly] would likely have to quit the Shell Fuel Rewards network which would be expensive, administratively onerous, and extremely time consuming." *Id.* It allegedly "would be cumbersome, expensive, inefficient, and in all probability economically unfeasible" for any tobacco rewards provider to integrate without Excentus's systems and data. *Id.* ¶ 88.

Switching providers without Excentus's consent also allegedly "would entail a high information cost." *Id.* ¶ 91. The tobacco rewards programs "are often inherently confusing and opaque" and programs that work with the Excentus program without interfering "would necessarily be experimental, temperamental, and may end up costing more in the short run than a program run with Excentus' permission." *Id.* ¶ 92.

Because of Excentus's alleged market power, "locked-in Shell Fuel Rewards locations are either being exploited by Excentus and Skupos working in concert, or are [in] danger of such an exploitation." *Id.* ¶ 94. "[C]ompetition from the greater tobacco rewards market cannot control or prevent anticompetitive or exclusionary activity in the Shell Fuel Rewards tobacco market." *Id.* ¶ 96. Finally, within **[**21]** the Shell Fuel Rewards tobacco rewards market, allegedly "there is no significant elasticity of demand." *Id.* ¶ 99.

"Excentus and Skupos [allegedly] have market power in the Shell Fuel Rewards tobacco rewards market." *Id.* ¶ 100. Success Systems alleges Excentus has used "its market power to exclude Success and others from the relevant market and instead give its approval and cooperation [to] Skupos[.]" *Id.* ¶ 102. The alleged market power also allegedly means that Excentus and Skupos are "able to dictate fees and costs which are not competitive in the larger tobacco rewards market." *Id.* ¶ 103.

B. Procedural History

On March 27, 2019, Success Systems, Inc., and Smart C-Stores, LLC filed a Complaint against Excentus and Skupos. Compl., ECF No. 1 (Mar. 27, 2019).

On July 17, 2019, after Defendants submitted motions to dismiss for lack of personal jurisdiction and failure to state a claim, Plaintiffs filed an Amended Complaint. Am. Compl., ECF No. 58 (July 17, 2019).

On August 20, 2019, Excentus filed a motion to dismiss for failure to state a claim and, in the alternative, transfer under the first-filed rule. Mot., ECF No. 62 (Aug. 20, 2019) "Mot. to Dismiss Failure to State a Claim"). The filing **[**22]** included a memorandum of law, Excentus Mem., ECF No. 62-1 (Aug. 20, 2019) ("Excentus Failure to State a Claim Mem."), and accompanying exhibits, Exs. 1-9. ECF Nos. 2-10 (Aug. 20, 2019).

On August 20, 2019, Excentus also filed a motion to dismiss for lack of jurisdiction and improper venue. Mot., ECF No. 63 (Aug. 20, 2019) ("Mot. to Dismiss Personal Jur."). The filing included a memorandum of law, Excentus Mem., ECF No. 63-1 (Aug. 20, 2019) ("Excentus Jurisdiction Mem."), and accompanying exhibits, Exs. 1-7. ECF Nos. 2-8 (Aug. 20, 2019).

On September 12, 2019, Skupos submitted a motion to dismiss. Mot., ECF No. 69 (Sept. 12, 2019). The filing included a memorandum, Skupos Mem., ECF No.69-1 (Sept. 12, 2019) ("Skupos Mem."), and a **[*49]** declaration and accompanying exhibits, Exs., ECF No. 69-2 (Sept. 12, 2019).

On September 30, 2019, Plaintiffs timely filed oppositions to both of Excentus's motions to dismiss. *See* Mem. in Opp'n Failure to State a Claim, ECF No. 74 (Sept. 30, 2019) ("Pl. Opp'n Failure to State a Claim"); Mem. in Opp'n Jurisdiction and Venue, ECF No.75 (Sept. 30, 2019) ("Pl. Opp'n Jurisdiction").

On October 15, 2019 Excentus filed two replies to Plaintiffs' opposition memoranda. **[**23]** *See* Reply, ECF No. 76 (Oct. 15, 2019) ("Excentus Reply Failure to State a Claim"); Reply, ECF No. 77 (Oct. 15, 2019) ("Excentus Reply Jurisdiction").

On October 21, 2019, Plaintiffs timely opposed Skupos's motion to dismiss. Opp'n Mem., ECF No. 78 (Oct. 21, 2019) ("Pl. Opp'n Skupos").

On November 11, 2019, Skupos timely submitted its reply to Plaintiffs' opposition. Reply, ECF No. 80 (Nov. 11, 2019) ("Skupos Reply").

On December 20, 2019, Excentus filed a notice of decision in a related case. Notice, ECF No. 82 (Dec. 20, 2019) ("Excentus Notice").

On December 28, 2019, Plaintiffs responded to the notice of decision in a related case. Notice, ECF No. 84 (Dec. 28, 2019) ("Pls.' Notice").

On January 14, 2020, the Court held a hearing on the outstanding motions. Minute Entry, ECF No. 88 (Jan. 14, 2020).

On January 24, 2020, Skupos filed a notice with the Court that the service agreement, although previously expired, had been extended. Notice, ECF No. 91 (Jan. 24, 2020).

On January 27, 2020, Success Systems filed a counter-notice, arguing that because the agreement between Defendants never actually lapsed, there is no reason to consider mootness. Counter-Notice, ECF No. 92 (Jan. 27, 2020).

II. [**24] STANDARD OF REVIEW

A. *Rule 12(b)(2)*

On a motion to dismiss for lack of personal jurisdiction under *Federal Rule of Civil Procedure 12(b)(2)*, the "plaintiff bears the burden of showing that the court has jurisdiction over the defendant." *In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 206 (2d Cir. 2003)*. The plaintiff therefore must make a prima facie showing that jurisdiction exists. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 59 (2d Cir. 2012)*.

"The prima facie showing must include an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant." *Id.; see also* *Glenwood Sys., LLC v. Med-Pro Ideal Sols., Inc.,* No. 3:09-cv-956 (WWE), 2010 U.S. Dist. LEXIS 151427, 2010 WL 11527383, at *2 (D. Conn. May 4, 2010) ("At this stage of the proceedings, if the court relies upon pleadings and affidavits, the plaintiff must make out only a prima facie showing of personal jurisdiction, and the affidavits and pleadings should be construed most favorably to the plaintiff."), *aff'd*, 438 F. App'x 27 (2d Cir. 2011) (citing CutCo Indus., Inc. v. Naughton, 806 F.2d 361, 365 (2d Cir. 1986)). A court considers the facts as they existed when the plaintiff filed the complaint. *See id.* (citing *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 937 F.2d 44, 52 (2d Cir. 1991))*.

A court must apply Connecticut's long-arm statute, which provides that "a trial court may exercise jurisdiction over a foreign defendant only if the defendant's intrastate activities meet the requirements both of [the state's long-arm] statute and **[*50]** of the due process clause of the federal constitution." Thomason v. Chem. Bank, 234 Conn. 281, 285-86, 661 A.2d 595 (1995). If the court has personal jurisdiction over the **[**25]** defendant under the long-arm statute, the court will consider whether jurisdiction would comport with the Due Process Clause of the United States Constitution. *See* Licci ex rel. Licci v. Lebanese Canadian Bank, 732 F.3d 161, 168 (2d Cir. 2013); *see also* Lombard Bros., Inc. v. Gen. Asset Mgmt. Co., 190 Conn. 245, 250, 460 A.2d 481 (1983) (explaining that the court need only address due process considerations if it determines that jurisdiction exists under the long-arm statute).

B. *Rule 12(b)(3)*

"In deciding a motion to dismiss based on improper venue, [t]he court must take all allegations in the complaint as true, unless contradicted by defendants' affidavits, and [w]hen an allegation is challenged [a] court may examine facts outside the complaint to determine whether venue is proper." Quinn v. Fishkin, 117 F. Supp. 3d 134, 2015 WL 4635770, at *3 (D. Conn. 2015) (internal quotation marks and citation omitted). "[T]he court must draw all reasonable inferences and resolve all factual conflicts in favor of the plaintiff, who has the burden of showing that venue in the forum is proper." *Id.* (internal quotation marks and citations omitted). "If the venue is not proper, the district court 'shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.'" *Id.* (quoting 28 U.S.C. § 1406(a)). "Whether dismissal or transfer is appropriate lies within the sound discretion of the district court." Minnette v. Time Warner, 997 F.2d 1023, 1026 (2d Cir. 1993).

C. *Rule 12(b)(6)*

A complaint **[**26]** must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Any claim that fails "to state a claim upon which relief can be granted" will be dismissed. Fed. R. Civ. P. 12(b)(6). In reviewing a complaint under Rule 12(b)(6), a court applies a "plausibility standard" guided by "two working principles." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

First, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.; see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations...a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (internal citations omitted)). Second, "only a complaint that states a plausible claim for relief survives a motion to dismiss." Iqbal, 556 U.S. at 679. Thus, the complaint must contain "factual amplification ...to render a claim plausible." Arista Records LLC v. Doe 3, 604 F.3d 110, 120 (2d Cir. 2010) (quoting Turkmen v. Ashcroft, 589 F.3d 542, 546 (2d Cir. 2009)).

When reviewing a complaint under Federal Rule of Civil Procedure 12(b)(6), a court takes all factual allegations in the complaint as true. Iqbal, 556 U.S. at 678. A court also views the allegations in the light most favorable to the plaintiff and draws all inferences in the plaintiff's **[**27]** favor. Cohen v. S.A.C. Trading Corp., 711 F.3d 353, 359 (2d Cir. 2013); *see also* York v. Ass'n of the Bar of the City of N.Y., 286 F.3d 122, 125 (2d Cir. 2002) ("On a motion to dismiss for failure to state a claim, we construe the complaint in the **[*51]** light most favorable to the plaintiff, accepting the complaint's allegations as true.")).

A court considering a motion to dismiss under Rule 12(b)(6) generally limits its review "to the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007). A court may also consider "matters of which judicial notice may be taken" and "documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." Brass v. Am. Film Techs., Inc., 987 F.2d 142, 150 (2d Cir. 1993); Patrowicz v. Transamerica HomeFirst, Inc., 359 F. Supp. 2d 140, 144 (D. Conn. 2005).

III. DISCUSSION

There are three motions before the Court: (1) a motion to dismiss for failure to state a claim and, in the alternative, transfer venue under the first-filed rule submitted by Excentus; (2) a motion to dismiss for lack of personal jurisdiction and improper venue submitted by Excentus; and (3) a motion to dismiss for failure to state a claim submitted by Skupos.

Although Excentus requests that the Court consider the motion to dismiss on the merits, the Court will first consider whether the Court has personal jurisdiction over the **[**28]** Plaintiffs' state law claims. Mot. to Dismiss Personal Jur. at i n.1 ("[T]he Court should consider Excentus Corporation's 12(b)(6) motion first in this case because Excentus' personal-jurisdiction and venue arguments turn, in part, on whether Plaintiffs adequately pled their claims."). Because the Plaintiffs' Amended Complaints suggests diversity of citizenship between the parties, *see* Am. Compl., the Court may have jurisdiction over Plaintiffs' state law claims, even if the federal claims are dismissed. *See* Arbaugh v. Y&H Corp., 546 U.S. 500, 513, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006) (A plaintiff invokes diversity of citizenship under 28 U.S.C. § 1332 "when she presents a claim between parties of diverse citizenship that exceeds the required jurisdictional amount, currently $75,000." (citing 28 U.S.C. § 1332(a)). After considering the jurisdictional issue, the Court will determine if transfer of any state law claims brought against Excentus is appropriate. Next, the Court will examine the substantive claims brought against Excentus and Skupos, to the extent necessary.

If the federal claims are dismissed, and the Court does not otherwise have jurisdiction over any state law claim, the Court will decline to exercise supplemental jurisdiction.

A. Personal Jurisdiction

Under Connecticut's long-arm **[**29]** statute, "a trial court may exercise jurisdiction over a foreign defendant only if the defendant's intrastate activities meet the requirements both of [the state's long-arm] statute and of the due process clause of the federal constitution." Thomason, 234 Conn. at 285-86. If a court has personal jurisdiction over the defendant under the long-arm statute, the court then will consider whether jurisdiction would comport with the Due Process Clause of the United States Constitution. *See* Licci ex rel. Licci, 732 F.3d at 168; *see also* Lombard Bros., Inc., 190 Conn. at 250 (explaining that the court need only address due process considerations if it determines that jurisdiction exists under the long-arm statute).

Connecticut's long arm statute provides that a foreign corporation will be amenable to a suit in this state based on a cause of action arising out of: (1) a contract **[*52]** made or to be performed in Connecticut; (2) business solicited in the state; (3) the production, manufacture, or distribution of goods with the reasonable expectation that they will be used or consumed in the state; or (4) tortious conduct in the state. Conn. Gen. Stat. § 33-929(f). It does not require "that a party transact business within the state to be subject to suit nor does it require a causal connection between the plaintiff's cause of action and the defendant's presence in the state." Tomra of N. Am., Inc. v. Envtl. Prods. Corp., 4 F. Supp. 2d 90, 93 (D. Conn. 1998) (footnote omitted) (citing Thomason, 234 Conn. at 295-97, and Lombard Bros., Inc., 190 Conn. at 253-54). The statute **[**30]** instead requires "a nexus between the cause of action alleged and the conduct of the defendant within the state." Donner v. Knoa Corp., No. 3:01-cv-2171 (JCH), 2002 U.S. Dist. LEXIS 17618, 2002 WL 31060366, at *3 (D. Conn. July 29, 2002).

A court considers several factors

> to determine whether a contract can serve as the basis for personal jurisdiction: (1) "whether the defendant entered into an ongoing contractual relationship with a Connecticut-based plaintiff; (2) whether the contract was negotiated in Connecticut; (3) whether, after executing a contract with the defendant, the defendant visited Connecticut to meet with the plaintiff or communicated with the plaintiff as part of the contractual relationship; and (4) whether the contract contains a Connecticut choice-of-law provision."

*Dunne v. Doyle, No. 3:13-cv-1075 (VLB), 2014 U.S. Dist. LEXIS 102389, 2014 WL 3735619, at *7 (D. Conn. July 28, 2014)* (quoting *Nusbaum & Parrino, P.C. v. Collazo De Colon, 618 F. Supp. 2d 156, 161 (D. Conn. 2009))*.

Excentus argues that there are "no contacts with Connecticut giving rise to personal jurisdiction." Excentus Jurisdiction Mem. at 1. Excentus notes, however, that its memorandum only touches on Success Systems's state law claims, as the Clayton Act authorizes nationwide service for antitrust claims. *Id.* at 1 n.3. In Excentus's view, the Complaint barely mentions personal jurisdiction and makes little effort to connect the factual allegations to this Court's **[**31]** jurisdiction. *Id.* at 9.

Excentus points to Connecticut law which allows a Connecticut court to "exercise personal jurisdiction . . . only if Success can show execution or performance of a contract, or tortious conduct in Connecticut." *Id.* at 10 (citing Conn. Gen. Stat. § 33.929(f)). According to Excentus, no contract was executed or performed in Connecticut, *id.* at 10-11, and no tortious conduct occurred, *id.* at 12-13. For that reason, exercising personal jurisdiction, general or specific, would violate the *Due Process Clause* and would not "comport with notions of fair play and substantial justice." *Id.* 13-14.

Success Systems responds that Connecticut's long-arm statute permits jurisdiction over both its contract and tort claims. Pl. Opp'n Jurisdiction at 3-5. In its view, because Connecticut courts examine whether a contract was made within the state or to be performed within in the state, this Court has jurisdiction. *Id.* at 4. Success Systems points to the fact that Excentus, although in Texas, began the relationship by calling Success Systems in Connecticut, and Excentus also sent data into Connecticut. *Id.* at 5-6. Regarding Excentus' argument that the agreement was created in Texas because Excentus accepted it in Texas, Success Systems responds that this argument is "without support, as the **[**32]** agreement required performance by both parties and entailed no exchange of goods or services for money." *Id.* Moreover, the employees and officers of Success Systems capable of entering an agreement all live **[*53]** in Connecticut. *Id.* Finally, Success Systems argues that it did perform in Connecticut. *Id.* at 6. In its view, the tort claims create jurisdiction in Connecticut because "[f]alse representations emanating from out of state into Connecticut have consistently constituted tortious acts of conduct in Connecticut" for jurisdictional purposes and "Success has alleged numerous tortious acts in Connecticut." *Id.* at 6.

Success Systems also argues that because "the defendant corporation purposefully engaged in the transaction with the plaintiffs, which was to be performed, in part, in Connecticut and that litigation has risen as a result of this transaction" the minimum contacts requirement under the *Due Process Clause* has been satisfied. *Id.* at 8-9. Success Systems argues that traditional notions of fair play and substantial justice would not be offended because Excentus is a larger company, better suited to "the burden of litigation in a foreign state[,]" whereas litigation in a foreign state for Success "would have dire financial **[**33]** implications for the company." *Id.* at 10. Connecticut also "has an interest in protecting its residents from tortious conduct" and "Success clearly has an interest in obtaining relief in Connecticut." *Id.*

In response, Excentus reiterates that any alleged contract was not made or performed in Connecticut. Excentus Reply Jurisdiction at 2. The scope of the alleged agreement, in which Excentus allegedly "agreed to integrate [its] entire Fuel Rewards Program with Success' Tobacco Program[,]" then limits conduct and communications that could support personal jurisdiction. *Id.* at 2. In its view, the relevant conduct and communications do not demonstrate the contract was made in Connecticut, nor is there evidence of performance because "Success simply has no evidence that Success or Excentus performed work or shared information related to any Excentus Fuel Rewards client other than Johnson Oil." *Id.* at 3-4. Excentus notes that Success Systems's response referred only to its misrepresentation-tort based claims and so "failed to meet its burden of establishing [personal jurisdiction]...as to its tortious-interference and CUTPA claims[,]" so those claims should be dismissed. *Id.* at 5.

Excentus further argues that no personal jurisdiction **[**34]** exists under the *Due Process Clause*. *Id.* In its view, Success Systems presents no "evidence that Excentus sought out or otherwise initiated any integration agreement[,]" Excentus' phone calls or emails are nothing "more than mere communications into Connecticut[,]" the communications pertained "only to work requested by" Illinois company Johnson Oil, and "the mere existence of a contract is insufficient to confer personal jurisdiction" over Excentus. *Id.* at 6.

The Court agrees.

Under *Conn. Gen. Stat. § 33-929(f)*, the Court must examine the elements of Plaintiff's cause of action and the totality of the Defendants' contacts with the forum to determine "whether the defendant could reasonably have anticipated being haled into court here." *Am. Wholesalers Underwriting, Ltd. v. Am. Wholesale Ins. Grp., Inc., 312 F. Supp. 2d 247, 253 (D. Conn. 2004)* (quoting *Lombard Bros., Inc., 190 Conn. at 254-55*)). Success Systems is a Connecticut corporation and Smart C-Stores is a Delaware corporation with its place of business in Connecticut. Am. Compl. ¶¶ 1-2. While both parties agree that no formal contract document was signed or agreed upon, Success Systems alleges that an agreement was reached, while Excentus vehemently denies this. The companies were all initially brought together to integrate Smokin' Rebates into sixty-eight Johnson Oil locations. Am. Compl. ¶¶ 20-23.

[*54] In support of its argument **[**35]** that an agreement had been reached with Excentus, Success Systems relies on e-mails relating to the integration and testing of the Johnson Oil sites. Am. Compl. ¶ 40(a)-(d). Success Systems argues that phone calls and e-mails directed into Connecticut from Texas created an oral contract and support its claims of personal jurisdiction through contract. Am. Compl. ¶¶ 22, 25, 34.

Success Systems, however, fails to plead specific factual allegations which support its assertion that an oral contract was created. It refers to the creation of an agreement with Excentus without describing the party discussing the details of the agreement (at either Excentus or Success Systems) or describing in more specific or concrete terms the nature and scope of the agreement. "Complete integration with all Excentus Fuel Rewards locations" is vague and indefinite; this phrase describes neither specific performance requirements of either party nor a timeframe in which the contract would be completed. *See Weiss v. Smulders, 313 Conn. 227, 233-35, 96 A.3d 1175 (2014)* (affirming the lower court's finding that defendant was not in breach of an oral contract after discussions of "working together as two separate companies" and the defendant's indications "that [both plaintiff **[**36]** and defendant] would merge their companies to form a new enterprise" if their current relationship proved successful and the execution of distributorship contract, when plaintiff spent time and money "on marketing and research" for the new company which never came to fruition); *Geary v. Wentworth Labs., Inc., 60 Conn. App. 622, 627, 760 A.2d 969 (2000)* ("[A]n agreement must be definite and certain as to its terms and requirements....So long as any essential matters are left open for further consideration, the contract is not complete." (citation omitted)).

Furthermore, Success Systems points to no specific conversation or date of a conversation which took place where a mutual understanding and mutual assent were reached. *See Dunne, 2014 U.S. Dist. LEXIS 102389, 2014 WL 3735619, at *18* (a binding and enforceable contract requires offer, acceptance, and a mutual understanding which "manifest[s] itself by a mutual assent between the parties" (quoting *Housing Auth. v. DeRoche, 112 Conn. App. 355, 370, 962 A.2d 904 (Conn. App. Ct. 2009))*; Am. Compl. ¶ 27 ("In short, given the words, emails, practice and conduct of the parties over the ensuing months is that of [sic] parties working in concert and pursuant to a meeting of the minds and an agreement."). While "there is no bright line rule describing the essential elements of any and all enforceable contracts, [w]hether a term is essential turns 'on the particular **[**37]** circumstances of each case.'" *111 Whitney Ave., Inc. v. Comm'r of Mental Retardation, 70 Conn. App. 692, 701, 802 A.2d 117 (Conn. App. Ct. 2002)* (quoting *Willow Funding Co., L.P. v. Grencom Assocs., 63 Conn. App. 832, 845, 779 A.2d 174 (Conn. App. Ct. 2001))*.

To the extent that Success Systems relies on its partial performance, Success Systems makes no effort to distinguish the work performed to fulfill the terms of its contract with Johnson Oil from the alleged oral contract with

Excentus. Instead, it relies on its partial performance. "The outer boundaries of what qualifies as a contemplated performance are broad...'*incidental* acts of performance of contracts in [Connecticut] would come within [Connecticut's] statute' when the defendant also has other significant contacts with" Connecticut. *Samelko v. Kingstone Ins. Co., 329 Conn. 249, 261, 184 A.3d 741 (2018)* (emphais in original).

While "to be performed" incorporates contemplated work and does not require the work to have actually been performed, **[*55]** *id. at 258*, without more specific allegations as to work done specifically for Excentus, Success Systems's factual allegations of partial performance are too vague to support the existence of an oral contract or that partial performance was begun for an agreement with Excentus, *see* *Twombly, 550 U.S. at 558* ("[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should ...be exposed at the point of minimum expenditure of time and money **[**38]** by the parties and the court." (internal quotation marks and citation omitted)); *see also* *Weiss v. Smulders, 313 Conn. 227, 235 n.4, 96 A.3d 1175 (2014)* (rejecting a breach of oral contract claim finding "that the plaintiffs failed to provide sufficient evidence to demonstrate that there was a meeting of the minds as to the clear and definite terms of the merging of the parties' companies").

It is also significant that a contract allegedly so important or so lucrative to Success System's business was not reduced to a written agreement, suggesting that there was not a meeting of the minds on the essential terms of the oral contract. *See* *111 Whitney Ave., 70 Conn. App. at 701* (comparing the defendant's conduct in the action with the "defendant's undisputed practice of contracting with service providers...on the basis of formal requests for proposal" and finding that provided "further support for the defendant's argument that the essential terms of the [] contracts were not finalized because they were never in a written agreement").

In *Samelko*, under Connecticut's long-arm statute, the court allowed a New York corporation to be haled into Connecticut court because the express terms of the insurance policy required payment for any accident in "any location within the coverage territory, **[**39]** which span[ned] the United States." *329 Conn. at 261*. Here, the absence of a written, formal agreement specifying the terms of performance in Connecticut undercut the significance of whatever work Success Systems alleges was accomplished in Connecticut. *See id.* ("In other words, when the contract expressly contemplates providing a defense and indemnification in Connecticut, it anticipates a host of unavoidable performances in Connecticut.").

Success Systems's attempt to establish personal jurisdiction through tort also falls short. *Conn. Gen. Stat. § 33-929(f)(4)* allows a finding of personal jurisdiction "out of tortious conduct in [Connecticut], whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance." Connecticut courts have rejected the argument that "a tort 'should be deemed to have been committed in Connecticut' simply because 'the injury is felt in Connecticut.'" *Fleming v. HD Supply Waterworks, Ltd., No. 3:16-cv-2081 (AWT), 2018 U.S. Dist. LEXIS 196229, 2018 WL 5993914, *3 (D. Conn. Oct. 15, 2018)* (quoting *Am. Wholesalers Underwriting, Ltd., 312 F. Supp. 2d at 253*)).

Plaintiffs rely on *Teleco Oilfield Servs., Inc. v. Skandia, Ins. Co., Ltd.*, for the proposition that emanations into Connecticut are sufficient to establish personal jurisdiction for tort. *656 F. Supp. 753 (D. Conn. 1987)*. But that case involved an insurance policy with agreed **[**40]** upon terms in place. *Id. at 755*. Personal jurisdiction there was based on (1) the terms of the policy which required payment in Connecticut (making a failure to pay to "occur" in Connecticut); (2) that defendant's "communication of the legal basis for denial of coverage" would have been made into Connecticut; and (3) that "misrepresentations of coverage" also would have been made into Connecticut. *Id. at 758*. Again, as noted **[*56]** above, the existence of a written agreement—the underlying insurance policy—provided the basis for finding personal jurisdiction, something notably absent here.

Accordingly, Success Systems has not met its burden of establishing personal jurisdiction over Excentus.[1]

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[1] Because the Court does not have personal jurisdiction through Connecticut's long-arm statute, it need not analyze whether the long-arm statute comports with the *Due Process Clause*. *See* *Licci, 732 F.3d at 168* ("If jurisdiction lies, we consider whether the

B. Improper Venue

28 U.S.C. § 1391 governs venue for all civil actions filed in federal courts. Under that statute, a civil action may be brought in the judicial district in which any defendant resides or is subject to the court's personal jurisdiction, or in the judicial district in which a substantial part of the events giving rise to the action occurred. *28 U.S.C. § 1391(b)*. "[V]enue is proper so long as the requirements of *§ 1391 (b)* are met...." *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Tex., 571 U.S. 49, 55, 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013)*. But "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall **[**41]** dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." *28 U.S.C. § 1406(a)*.

"Whether venue is 'wrong'...depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws[.]" *Atl. Marine, 571 U.S. at 55*. Whether venue is "wrong" therefore is "generally governed by *28 U.S.C. § 1391*[.]" *Id.* After finding that venue is wrong, "[w]hether dismissal or transfer is appropriate lies within the discretion of the district court." *Minnette v. Time Warner, 997 F.2d 1023, 1026 (2d Cir. 1993)*.

28 U.S.C. § 1391(b) provides:

> A civil action wherein jurisdiction is not found solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b).

Under *Section 1391(b)(1)*, "a corporation is deemed to 'reside' in any judicial district in which it is subject to personal jurisdiction at the **[**42]** time the action is commenced." *Nelson v. Wells Fargo Bank, N.A., No. 17-cv-4045 (LAP), 2019 U.S. Dist. LEXIS 101779, 2019 WL 2514229, at *7 (S.D.N.Y. June 18, 2019)* (quoting *Bell v. Classic Auto Grp., Inc., No. 04 Civ. 0693 (PKC), 2005 U.S. Dist. LEXIS 4413, 2005 WL 659196, at *4 (S.D.N.Y. Mar. 21, 2005))*.

Section 1391(b)(2) requires a "substantial" part, construed strictly, of the events to have occurred in the district where venue is sought. *Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 356 (2d Cir. 2005)*. "[F]or venue to be proper, *significant* events or omissions *material* to the plaintiff's claim must have occurred in the district in question, even if other material events occurred elsewhere." *Id. at 357* (emphasis in the original). For a plaintiff **[*57]** to defeat a venue challenge with *§ 1391(b)(2)*, the court must (1) "identify the nature of the claims and the acts or omissions that the plaintiff alleges give rise to those claims" and (2) determine "whether 'significant events or omission to [those] claims . . . have occurred in the district in question.'" *NovaFund Advisors, LLC v. Capitala Grp., LLC., No. 3:18-cv-1023 (MPS), 2019 U.S. Dist. LEXIS 40433, 2019 WL 1173019, at *12 (D. Conn. Mar. 13, 2019)* (alterations in the original) (quoting *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 431 (2d Cir. 2005))*.

Section 1391(b)(3) "indicates that venue may be on [this] subsection only if venue cannot be established in another district pursuant to any other venue provision." *Daniel, 428 F.3d at 434*; *see also* *Rose v. Myers, No. 3:13-cv-419 (MPS), 2013 U.S. Dist. LEXIS 163385, 2013 WL 6073627, at *1 (D. Conn. Nov. 18, 2013)* (finding venue under *§ 1391(b)(3)* improper where plaintiff did "not contend that there is no district in which [the] action may otherwise be brought").

Excentus argues that **[**43]** venue is improper for Success Systems's contract claim under *Rule 12(b)(2)*. Specifically, the alleged contract "would have required nationwide performance from both parties," but this contract

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district court's exercise of personal jurisdiction over a foreign defendant comports with due process protections established under the United States Constitution.").

claim "hinges on whether Excentus' conduct gave rise to a contract." Excentus Jurisdiction Mem. at 20 (emphasis omitted). And had a contract been formed, breach could only have occurred in Dallas "because Dallas is where Excentus executives decided to do what Success complains about—(1) not partner with Success and (2) not provide Success with confidential Fuel Rewards Program data[.]" *Id.*

Excentus also argues that venue is improper for Success Systems's misrepresentation-based claims and tortious interference claims. The Amended Complaint refers to "decisions Excentus made in Texas and events that unfolded in Illinois," because Success Systems has not pled facts which indicate "Connecticut is a proper venue for its misrepresentation-based claims." *Id.* at 21. Success Systems' tortious-interference claims similarly lacks any factual allegations establishing "any legal connection to Connecticut." *Id.* at 21-22.

Success Systems responds that venue is proper because (1) "Excentus reached out to Success in Connecticut to initiate the **[**44]** integration of the systems" and (2) "all of the work Success performed in furtherance of the agreement between the parties was conducted in Connecticut." Pl. Opp'n Jurisdiction at 13. Because these constitute a substantial part of the underlying events, Plaintiffs believe venue is proper in Connecticut. *Id.*

According to Excentus, "Success bears the burden of establishing that venue is proper" in Connecticut and has failed to do so. Excentus Reply Jurisdiction at 6.

The Court agrees.

Venue is improper under *Section 1391(b)(1)* because the Court lacked personal jurisdiction over either defendant at the start of this action, nor do any of the defendants reside in Connecticut. Plaintiff does not argue that there is no other venue in which this action can be brought, making *Section 1391(b)(3)* inapplicable.

Success Systems relies on *28 U.S.C. § 1391(b)(2)* for proper venue. But *Section 1391(b)(2)* permits venue in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . ." While Success Systems describes Excentus reaching out into Connecticut to execute the agreement, the alleged communication relates to the execution of the agreement with Johnson Oil. Am. Compl. ¶ 40; *see also* *Gulf Ins. Co., **[*58]** 417 F.3d at 357* (cautioning district courts "to **[**45]** take seriously the adjective 'substantial'" and "to construe the venue statute strictly"). The "substantial part" of performance determination for venue does not mirror the minimum contacts test employed in determining personal jurisdiction. *Gulf Ins. Co., 417 F.3d at 357* (citing *Jenkins Brick Co. v. Bremer, 321 F.3d 1366, 1372 (11th Cir. 2003))*. Furthermore, to the extent that omissions or misrepresentations occurred over the phone by Excentus executives, those omissions or misrepresentations would have occurred in Texas and any breach of an oral contract also would have occurred in Texas.

While Success Systems focuses its argument on the propriety of venue based on its contract claims, relying on the fact that "Excentus reached out to Success in Connecticut to initiate the integration of the systems" and that "Excentus sent data and confidential and proprietary information" to Connecticut, Pl. Opp'n Jurisdiction at 12-13, Plaintiffs fail to establish a prima facie showing of venue under either their contract, tort, or misrepresentation claims, *see* *MAK Marketing, Inc. v. Kalapos, 620 F. Supp. 2d 295, 310 (D. Conn. 2009)* (In a *28 U.S.C. § 1404(a)* venue inquiry, "misrepresentations and omissions are deemed to occur in the district where they are transmitted or withheld, not where they are received." (internal quotation marks omitted) (quoting *In re Nematron Corp. Secs. Litig., 30 F. Supp. 2d 397, 404 (S.D.N.Y. 1998)))*; *Alzal Corp. v. Emporio Motor Grp., L.L.C., No. 13 Civ. 2636 (LTS), 2013 U.S. Dist. LEXIS 105037, 2013 WL 3866633, at *3 (S.D.N.Y. July 26, 2013)* (finding venue improper **[**46]** for a tortious interference claim where a plaintiff did not proffer "sufficient facts to show its tort claim is substantially related to any acts that occurred in New York").

The Court thus dismisses the state law claims against Excentus without prejudice to renewal in the proper venue. *See* *Minnette v. Time Warner, 997 F.2d 1023, 1026 (2d Cir. 1993)* ("Whether dismissal or transfer is appropriate lies within the sound discretion of the district court.").

C. The Clayton Act Claims [2]

Section 3 of the Clayton Act prohibits:

> [A]ny person engaged in commerce . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . for use, consumption, or resale within the United States . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14 **[**47]** .

This section of the Clayton Act applies to exclusive-dealing contracts, but "two pre-requisites must be met: the exclusive dealing arrangement must be one for goods or other commodities, as opposed to services, and the agreement putting in place the arrangement must be a lease, sale or contract for sale." *Maxon Hyundai Mazda v. Carfax, Inc., No. 13-cv-2680 (AJN), 2014 U.S. Dist. LEXIS 139480, 2014 WL 4988268, at *6 (S.D.N.Y.* **[*59]** *Sept. 29, 2014)*. Section 3 does not apply to sales of services. *Id.* (citing *Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co., Inc., 510 F.2d 1140, 1145 (2d Cir. 1975))*; *see also* *Innomed Labs, LLC v. ALZA Corp., 368 F.3d 148, 156 (2d Cir. 2004)* (a combination tangible sales of product and services contract is covered by the Clayton Act "if its 'dominant nature' or purpose is the sale of tangible products rather than the transfer of intangible rights or services").

Success Systems alleges violations under the Clayton Act against both Excentus and Skupos for conspiracy to restrain trade and exclusive dealing.

The Court addresses the claim against each defendant in turn.

1. Excetus

Excentus argues that the Clayton Act covers goods, supplies, and commodities and because "Success mentions no commodity offered for sale or lease by Excentus" the claim should be dismissed. Excentus Mem. to Dismiss Failure to State Claim at 30.

Success Systems does not respond to this argument in its opposition memorandum. Pl. Opp'n Excentus Failure **[**48]** to State a Claim.

In its reply, Excentus notes Success Systems's failure to "allege a sale of lease or commodities" and Success Systems's opposition "in no way attempts to address or cure its claims' deficiency because the deficiency is incurable." Excentus Reply Failure to State a Claim at 6.

The Court agrees.

Success Systems's claims revolve around a contract to gather, collect, and report data from convenience stores attached to gas stations. Success Systems, however, has failed to allege in its Complaint or its memorandum in opposition how the antitrust violations it complains of relate to goods or commodities.

Accordingly, Success Systems' Clayton Act claim against Excentus will be dismissed.

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[2] Because Excentus and Skupos have amended and extended the terms of the underlying agreement, the Court will not consider whether Success Systems's Clayton Act and Sherman Act claims against these defendants are moot. *See* Notice, ECF No. 91 (Jan. 24, 2020).

2. Skupos

Skupos likewise argues that *Section 3* of the Clayton Act applies only to tangible goods. Skupos Mem. at 7. Because nothing in Plaintiffs' Complaint "alleged 'Shell Fuel Rewards tobacco rewards market' bears any resemblance to a tangible good" the claims should be dismissed. *Id.* at 8.

Again, Success Systems does not respond to this argument. Pl. Opp'n Skupos.

In its reply, Skupos contends "Plaintiffs have abandoned their Clayton Act allegations entirely, having made no attempt to address Skupos' arguments **[**49]** that the Clayton Act does not apply, and having scarcely mentioned the Clayton Act at all." Skupos Reply at 2.

As discussed above with respect to Success' claim against Excentus, Success Systems similarly fails to allege a plausible Clayton Act claim against Skupos.

Accordingly, Success' Clayton Act claim against Skupos will be dismissed.

D. The Sherman Act Claims

The remaining claims all relate to *Sections 1* and *2* of the Sherman Act. Under *Section 1* of the Sherman Act, Success Systems alleges a conspiracy to restrain trade in the tobacco rewards market against both Excentus and Skupos. Under both *Sections 1* and *2* of the Sherman Act combined, Success Systems alleges exclusive dealing in the tobacco rewards market against both Excentus and Skupos. Finally, under *Section 2* of the Sherman Act alone, Success Systems alleges monopolization of the tobacco rewards market against Skupos only.

[*60] The Court will address each of these claims in turn.

1. The *Sherman Act § 1* Claims

Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in the restraint of trade and commerce. . . ." *15 U.S.C. § 1*. Necessary to a *Section 1* violation is the establishment of "a combination or some form of concerted action between **[**50]** at least two legally distinct economic entities." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 542 (2d Cir. 1993)*. "'In restraint of trade' has been read by the Supreme Court to be limited to 'unreasonable restraints' that are prohibited." *U.S. Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43, 54 (2d Cir. 2019)* (citing *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*).

Per se unreasonable restraints "include mostly prominently 'horizontal' agreements among competitors to fix prices for their goods or services.'" *Id. at 54-55*. "Restraints that are not unreasonable *per se* are judged under the [fact-specific] 'rule of reason.'" *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284, 201 L. Ed. 2d 678 (2018)* ("*Amex II*"). The rule of reason attempts "to 'distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.'" *Id.* (alterations in the original) (quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007))*.

"[T]he plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Id.* If the plaintiff establishes a restraint, "then the burden shifts to the defendant to show a procompetitive rationale for the restraint." *Id.* If the defendant establishes a procompetitive rationale, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could reasonably be achieved through **[**51]** less anticompetitive means." *Id.* Anticompetitive effects may be proven directly or indirectly; "[i]ndirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition." *Id.*

Defining the relevant market and consumers in the relevant market occurs during the first step. *U.S. Airways, 938 F.3d at 55*; *see also* *Amex II, 138 S. Ct. at 2285* ("[C]ourts usually cannot properly apply the rule of reason without an accurate definition of the relevant market."). "A relevant product market consists of 'products that have reasonable interchangeability for the purposes for which they are produced—price, use, and qualities considered[,]'" *PepsiCo, Inc. v. Coca-Cola, Co., 315 F.3d 101, 105 (2d Cir. 2002)* (quoting *United States v. E.I. du Pontde Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*, or an "arena within which significant substitution in consumption or production occurs," *Amex II, 138 S. Ct. at 2285* (citation omitted). Within a broad market, "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. "The goal in defining the relevant market is to identify the market participants and competitive pressures that restrain an individual firm's ability to raise prices or restrict output." *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 496 (2d Cir. 2004)*.

Exclusive dealings arrangements or contracts can satisfy a plaintiff's initial burden of proof demonstrating coordinated **[*61]** action. *Geneva Pharms., 386 F.3d at 508*. "Exclusive **[**52]** dealing arrangements implicate *Section 1* because they have the potential unreasonably to exclude competitors or new entrants from a needed supply, or to allow one supplier to deprive other suppliers of a market for their goods." *Id.* (citing *Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*, *abrogated on other grounds by* *Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006))*. "Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal." *Jefferson Par., 466 U.S. at 45*.

Proof of market power is not a requirement in all *Section 1* cases. *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 129 (2d Cir. 1995)*. "If a plaintiff can show an actual adverse effect on competition," demonstrating market power is not required. *Id.* "'[W]here the plaintiff is unable to demonstrate such actual effects' . . . 'it must at least establish that defendants possess the requisite market power' and thus the capacity to inhibit competition market-wide." *Id.*

Market power "can be proven directly through evidence of control over prices or the exclusion of competition, or it may be inferred from a firm's large percentage share of the relevant market." *Geneva Pharms., 386 F.3d at 500*. "One traditional way to demonstrate market power is by defining the relevant product market and showing defendants' percentage share of the market." *Todd v. Exxon Corp., 275 F.3d 191, 199 (2d Cir. 2002)*. It also "may be shown by evidence **[**53]** of 'specific conduct indicating the defendant's power to control prices or exclude competition." *K.M.B. Warehouse, 61 F.3d at 129*. It is typically a fact-intensive inquiry. *Id. at 199-200*.

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co., 370 U.S. at 325*. Interchangeability means roughly equivalent products exist, even if a consumer might have a preference between products the consumer could use either product and it would work effectively. *Queen City Pizza, Inc. v. Domino's Pizza, Inc. 124 F.3d 430, 436 (3d Cir. 1997)*; *see also* *E.I. Du Pont De Nemours, 351 U.S. at 395* ("commodities reasonably interchangeable by consumers for the same purposes"). "Cross-elasticity of demand exists if consumers would respond to a light increase in the price of one product by switching to another product.'" *Todd, 275 F.3d at 201-02* (quoting *AD/SAT v. Assoc. Press, 181 F. 3d 216, 227 (2d Cir. 1999))*. "'[A] single brand of a product or service" may "be a relevant market under the Sherman Act" if no substitute exists for the brand's products or services." *U.S. Airways, 938 F.3d at 66* (quoting *Kodak, 504 U.S. at 482*).

2. The *Sherman Act § 1* Conspiracy to Restrain Trace Claim Against Excentus

Excentus begins its argument discussing the potential relevant market. According to Excentus, "Success pleads no facts indicating that tobacco-loyalty programs provided to **[**54]** Shell gas stations are different from tobacco loyalty programs provided to other brands of gas stations." Excentus Mem. to Dismiss Failure to State a Claim at 23. The relevant question is "whether convenience stores in general might use tobacco-loyalty programs interchangeably." *Id.* at 24. With regards to *Section 1* specifically, Excentus argues that "*Section 1* of the Sherman Act require[s] **[*62]** a plaintiff to show that the defendant has market power in the relevant market" and Success Systems has pled "that Excentus owns only 12% of the market." *Id.* at 26. A 12% market share is insufficient to create an alleged harm to competition, considering "the Supreme Court has held that a 30% market share" is insufficient to allege the same kind of harm to competition. *Id.* In Excentus's view, "Success has not and cannot plausibly allege that Excentus controls prices for tobacco-loyalty programs in general because Excentus has no control over non-Shell gas stations." *Id.* The small percentage of the relevant market and the inability to control prices indicates Excentus does not control "enough of a relevant market for it to have monopoly power." *Id.* at 27.

Additionally, in Excentus's view, Success Systems fails to plead an antitrust injury. *Id.* at 28. "[T]he **[**55]** only injury Success claims to have suffered in that market is losing the competition for a contract with Excentus." *Id.* at 29. This is a loss "from competition[, it] is not an antitrust injury[,]" *id.* at 29, nor is it the "kind of injury Congress enacted the antitrust laws to prevent[,]" *id.* at 28.

Success Systems responds by arguing that "[t]he relevant market refers to the relevant product market and the relevant geographic market" and often requires a fact-intensive inquiry. *Id.* at 22 (citing *PepsiCo, Inc., 315 F.3d at 105*). At the motion to dismiss stage, Success Systems argues that it need only plead a market that is plausible and rational. *Id.* In its view, part of the relevant market inquiry examines the interchangeability and cross-elasticity which Success Systems has adequately pled. *Id.* at 22-23. According to Success Systems, because it "has alleged a relevant market of Shell Fuel Rewards tobacco rewards market" and that "Excentus and Skupos control 100% of this market[,]" Success Systems has adequately pled Excentus's and Skupos's market control to survive a motion to dismiss. *Id.* at 29.

To the extent Excentus argues Success Systems' claim "must fail because it has [plead] a single-brand market[,]" Success Systems responds that a single brand markets can exist **[**56]** "when other branded products may not be reasonably interchangeable[,]" *id.* at 24 (citing *Eastman Kodak Co. v. Image Tech Servs., Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992))*, and that it has sufficiently alleged the *Kodak* factors, *id.* at 25.

Finally, Success Systems argues that it "has alleged full exclusion from the stated relevant market by Excentus and Skupos and has therefore alleged a valid antitrust injury." *Id.* at 31.

Excentus replies that Success System's relevant market claims do not fit into the single brand market, nor has it alleged facts remotely similar to *Kodak*, and again relies on the actual agreement between Excentus and Skupos. Excentus Reply Failure to State a Claim at 6-8.

The Court agrees.

Even if "the [allegedly] exclusive dealing arrangement itself satisfies the *§ 1* requirement of coordinated action[,]" *Geneva Pharms., 386 F.3d at 508*, Success Systems fails "to show how defendants' activities comprised an unreasonable restraint of trade[,]" *Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 96 (2d Cir. 1998)*, and fails to adequately allege a relevant market.[3]

[*63] The rule of reason requires a demonstration of both a relevant market and an unreasonable restraint on trade. *Id.* Success Systems fails on both elements. Success Systems vaguely refers to the "effects on competition" produced by the arrangement between Skupos and Excentus. *See* Am. Compl. ¶¶ 67, 70, 79, 96, 114, 133. **[**57]**

[3] Excentus also argues that it lacks monopoly power in defense of Success Systems's Sherman Act *§ 1* claim. *See* Excentus Mem. to Dismiss Failure to State a Claim at 26-27. This argument will be more fully addressed in the Court's analysis of any alleged monopoly power by Excentus with respect to Success System's *§ 2* claims.

Success Systems discussed Excentus' "high market share and the competitive advantages that could have resulted in *potentially* higher prices, but significantly did not allege that prices were *actually* higher" because of the agreement. Tops, 142 F.3d at 96 (emphasis in original). "The fact that the defendant's actions prevent a plaintiff from competing in a market is not enough, standing alone, to satisfy [the] initial burden of proof." Virgin Atl. Airways, Ltd. v. British Airways PLC, 257 F.3d 256, 264 (2d Cir. 2001). Courts look to factors "like reduced output, increased prices and decreased quality" to determine "whether an actual effect has occurred . . . ." *Id.*

Success Systems, however, merely alleges that Skupos "provides services at a quality and rate out of step with the broader tobacco rewards market and has the ability to dictate rates without the influence of the broader market." Am. Compl. ¶ 112. It offers only slightly more detailed explanations as to quality. Success Systems mentions, again imprecisely, the alleged impact on price. *See* Am. Compl. ¶¶ 114 (Excentus and Skupos "have driven prices and fees out of step with the broader market"); 70 (Excentus and Skupos can "dictate the prices and the terms of the tobacco rewards services provided to the Shell Rewards locations"); **[**58]** 99 (if Excentus and Skupos raise prices "there will be no increased demand for tobacco rewards programs in the general market because the tobacco rewards providers in the general market are barred from participating in the Shell Fuel Rewards tobacco rewards market"). As discussed further below, none of these factual allegations support an actual adverse effect on competition and suggest that Success Systems complains of injury as a competitor and incorrectly defines the relevant market.

Success Systems distinguishes between the general tobacco rewards market and the Shell Fuel Rewards tobacco market in that "Excentus controls entry and access to the Shell Fuel Rewards market because it controls the data necessary to make a tobacco rewards program function as part of the Shell Rewards program." Am. Compl. ¶ 75. In its view, the market is separate and distinct from tobacco rewards programs generally available to gas stations and C-stores because other tobacco rewards programs are not available to Shell Fuel Rewards locations "and the providers of these other tobacco rewards programs cannot offer these programs to Shell Fuel Rewards locations." *Id.*at 78. "[D]emand and competition in the general **[**59]** tobacco rewards markets will not affect the prices charged or the prices paid for tobacco rewards services in the Shell Fuel Rewards tobacco rewards market." *Id.* ¶ 79. And Success alleges that "there is no significant elasticity of demand[,]" increased prices from Excentus and Skupos would not affect the general market "because the tobacco rewards providers in the general market are barred from participating in the Shell Fuel Rewards tobacco rewards market." Am. Compl. ¶ 99.

But Success Systems fails to make any plausible allegations on the critical issue of interchangeability.

While defining a relevant market is a fact intensive inquiry, if a

> **[*64]** plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

Chapman v. New York State Div. for Youth, 546 F.3d 230, 238 (2d Cir. 2008) (quoting Queen City Pizza, 124 F.3d at 436). "The test for a relevant market is not commodities reasonably interchangeable by a particular plaintiff, but 'commodities reasonably **[**60]** interchangeable by consumers for the same purposes.'" Queen City Pizza, 124 F.3d at 438 (quoting E.I. du Pont de Nemours, 351 U.S. at 395)). Any "restriction of intrabrand competition must be balanced against any increases in Interbrand competition" because the analysis considers "the relevant market as a whole[.]" K.M.B. Warehouse, 61 F.3d at 128. Success Systems fails to demonstrate how the Shell Fuel Rewards tobacco rewards market is different from the larger market for tobacco rewards generally and should be considered a separate and distinct market. *Cf.* Chapman, 546 F.3d at 238 (finding plaintiffs failed to define a relevant market where plaintiffs "failed to show the market for restraint training services to *child care providers* is any different from the larger market for restraint training services to other businesses, agencies, and organizations" (emphasis in original)).

Success Systems thus alleges harm to a competitor in a market that has interchangeable suppliers (tobacco rewards programs) and interchangeable buyers (c-stores, gas stations, supermarkets). *See* Queen City Pizza, 124

F.3d at 438 ("[T]he dough, tomato sauce, and paper cups that meet Domino's Pizza, Inc. standards and are used by Domino's stores are interchangeable with dough, sauce and cups available from other suppliers and used by other pizza companies . . . Thus, the **[**61]** relevant market . . . cannot be restricted solely to those products currently approved by Domino's Pizza, Inc. for use by Domino's franchisees."); *Cf.* K.M.B. Warehouse, 61 F.3d at 127-28 ("Restrictions on intrabrand competition can actually enhance market-wide competition by fostering vertical efficiency and maintaining the desired quality of a product.").

Moreover, "[m]arket power is the power 'to force a purchaser to do something that he would not do in a competitive market.'" Eastman Kodak, 504 U.S. at 462 (citations omitted). "One traditional way to demonstrate market power is by defining the relevant product market and showing defendants' percentage share of the market." Todd, 275 F.3d at 199. While Success Systems rightly alleges that Excentus has 100% of the market share of the Shell Fuel Rewards market, Success Systems fails to allege Excentus's market power over the properly defined relevant market, encompassing more than just the Shell Fuel Rewards program and including the entire market of convenience, grocery, liquor, tobacco and gasoline service stations. Success Systems thus has not adequately pled Excentus's market power.

Success Systems argues that the Shell Fuel Rewards market is a single-brand market, but Success Systems's argument fares no better under **[**62]** a single-brand market analysis.

Courts rely on the *Kodak* factors to determine if a single brand market is appropriate. The first *Kodak* factor is the "high switching costs faced by a substantial number of customers[.]" Lima LS PLC **[*65]** v. PHL Variable Ins. Co., No. 3:12-CV-1122 (WWE), 2013 U.S. Dist. LEXIS 91849, 2013 WL 3327037, at *5 (D. Conn. July 1, 2013) (citing Commercial Data Servers, Inc. v. In'tl Business Mach. Corp., 262 F. Supp. 2d 50, 71 (S.D.N.Y. 2003)). The second *Kodak* factor requires a plaintiff to plead the "high information costs faced by a substantial number of customers[.]" Lima, 2013 U.S. Dist. LEXIS 91849, 2013 WL 3327037 at *5. The third *Kodak* factor examines the "exploitation of the 'locked-in' customers." Lima, 2013 U.S. Dist. LEXIS 91849, 2013 WL 3327037 at *5.

As to these factors, Success Systems first alleges that "switching to an un-sanctioned company would entail a high information cost" at Shell Fuel Rewards locations. In its view, Excentus has created considerable barriers such that if a user wanted to switch "it would likely have to quit the Shell Fuel Rewards network which would be expensive, administratively onerous, and extremely time consuming." Am. Compl. ¶ 91, 95. Success Systems then alleges that administering or switching to an unsanctioned tobacco rewards program "would entail a high information cost." Am. Compl. ¶ 91. Success Systems alleges that the "inherently confusing and opaque" nature of tobacco rewards programs and "a program that would **[**63]** work on top of and in conjunction with the Excentus program without interfering with the same would necessarily be experimental, temperamental, and may end up costing more in the short run than a program run with Excentus' permission." Am. Compl. ¶ 92. Finally, Success Systems alleges that "the market power of Excentus" has "locked-in Shell Fuel Rewards locations" and are exploited by Excentus and Skupos. Am. Compl. ¶ 94. Success Systems refers back to high switching costs and high information costs in supporting its claim that customers are "locked-in." *Id.* ¶ 97.

But the Shell Fuel Rewards Program is not a single-brand market. Unlike *Kodak*, which dealt with "market power in the primary market" which precluded "the possibility of market power in derivative aftermarkets[,]" no such aftermarket exists here. Eastman Kodak, 504 U.S. at 454-55. Excentus correctly notes that the relevant inquiry is "whether convenience stores in general might use tobacco-loyalty programs interchangeably." Excentus Mem. Failure to State a Claim at 24.

Because the tobacco rewards programs are interchangeable, the relevant market cannot plausibly be limited to Shell gas stations participating in the Shell Fuel Rewards program, and must include **[**64]** all convenience stores, grocery stores, liquor stores, tobacco stores and gasoline service stations capable of using tobacco rewards programs. Success Systems thus has failed to plausible allege its Sherman Act § 1 claim against Excentus. *See* Iqbal, 556 U.S. at 678 ("The plausibility standard is not akin to a probability requirement ....Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." (internal quotation marks omitted) (quoting Twombly, 550 U.S. at 555-57);

Twombly, 550 U.S. at 558 ("So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." (internal quotation marks and citation omitted)).

Accordingly, Success' claim of unreasonable restraint of trade against Excentus will be dismissed.[4]

[*66] 2. The Sherman Act § 1 Conspiracy to Restrain Trace Claim Against Skupos

As for Success Systems' Section 1 claims, Skupos argues that Success Systems fails to define any relevant market, which "requires identifying both the relevant product market as well as the relevant geographic market." **[**65]** Skupos Mem. at 11 (citation omitted). "[T]he fact that gas stations and convenience stores that choose to align themselves with the Shell Fuel line must operate under the Fuel rewards program . . . and must then operate under Excentus' terms is irrelevant to defining a relevant market." *Id.* at 14. Skupos further argues that Success Systems fails to "plead facts to support [the] narrow theory" of a single-brand market, supported by alleged "lock-in" factors. *Id.* The Amended Complaint "attempts to define a product market that fits Plaintiffs' personal injury as opposed to a relevant market that meets antitrust pleading standards . . . ." *Id.* at 17 (emphasis omitted).

Skupos argues that Success Systems fails to plead harm to competition, as required to establish an antitrust injury. *Id.* at 8-9. In its view, Success Systems pleads factual allegations that "relate to potential harm to themselves in the particular rewards programs implemented in the Shell stations for which Excentus offers a fuel rewards program." *Id.* Skupos characterizes Success Systems's injury as harm from competition and not to competition generally. *Id.*

Success Systems again argues that defining a relevant market is a fact-intensive injury, unsuitable **[**66]** at this stage of litigation. Pls.' Opp'n Skupos at 6. Success Systems contends that it has alleged "(a) how Shell Fuel Rewards members face high costs to leave the Excentus/SkuPos monopoly on tobacco rewards program . . . (b) the opacity of the tobacco rewards pricing and discount scheme and the overall difficulty in ascertaining relevant information, and (c) the exploitation and potential exploitation" of customers locked into the Skupos tobacco rewards program. *Id.* at 9-10.

Success Systems also states it has alleged a valid antitrust injury by pleading its "full exclusion from the relevant market by Excentus and Skupos.[,]" *id.* at 16, and notes it has pled conspiracy and notes Skupos relies on summary judgment case law, *id.* at 18.

Skupos replies that Success Systems attempts "to define the relevant market as 'Shell Fuel Rewards tobacco rewards market' without factual allegations regarding reasonable interchangeability and cross-elasticity of demand." Skupos Reply at 2. Success Systems's attempt to create a "lock-in theory" market fails because they "do no more than speculate and offer legal conclusions." *Id.* at 4. In its view, Skupos "cannot rely on their conclusory allegations of information and switching costs alone, **[**67]** and there is no question of fact about cross-elasticity." *Id.*

Skupos thus reiterates its arguments that Success Systems has failed to allege an antitrust injury. *Id.* at 6-7.

The Court agrees.

For the same reasons that Success Systems's restraint of trade claim under § 1 of the Sherman Act fails against Excentus, Success Systems also fails to allege plausibly a viable unreasonable restraint of trade claim under § 1 of the Sherman Act against Skupos.

[*67] Accordingly, Success Systems's unreasonable restraint of trade claim under § 1 of the Sherman Act against Skupos will be dismissed.

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[4] The Court further considers whether Success Systems has sufficiently pled an antitrust injury below in the context of Success Systems's exclusive dealing claim against Excentus.

3. The Sherman Act § 1 and §2 Exclusive Dealing Claims

"An exclusive dealing agreement is 'a contract between a [supplier] and a buyer that forbids the buyer from purchasing the contracted [service] from any other seller." *Conn. Ironworkers Employers' Ass'n v. New England Regional Council of Carpenters, 324 F. Supp. 3d 293, 306 (D. Conn. 2018)* (citations omitted). It is not a *per se* violation of ***antitrust law***, unlike group boycott. *Id.* Exclusive dealing contracts are analyzed under the same rule of reason. *Id.* (quoting *Minn. Ass'n of Nurse Anesthetists v. Unity Hosp., 208 F.3d 655, 660 (8th Cir. 2000))*. Because exclusive dealing arrangements can have pro-competitive purposes and effects, "courts must take care to consider the competitive characteristics of the relevant market." *Geneva Pharms., 386 F.3d at 508*. Not all injuries constitute an antitrust injury, "[f]or instance, **[**68]** an 'exclusive-dealing partner whose business relationship was terminated in favor of another exclusive-dealing partner' is '[c]learly not a victim of antitrust injury." *Conn. Ironworkers, 324 F. Supp. 3d at 306* (citation omitted); *see also* *Geneva Pharms., 386 F.3d at 508* ("Exclusive dealing is an unreasonable restraint of trade and a *§ 1* violation only when the agreement freezes out a significant fraction of buyers or sellers from the market.").

Success Systems alleges that the exclusive agreement entered into by Excentus and Skupos regarding the Shell Fuel Rewards program violates both *Sections 1* and *2* of the Sherman Act. Excentus and Skupos argue that the alleged exclusive agreement was, in fact, non-exclusive

The Court will address each of these claims in turn.[5]

i. The Exclusive Dealing Claim Against Excentus

Excentus again argues Success Systems has failed to plead any plausible antitrust violations. Excentus Mem. Failure to State a Claim at 22. It includes the agreement with Skupos "which explicitly states that [the agreement] is not exclusive." *Id.*; Ex. 3 - Skupos Agreement, ECF No. 62-4 at 2 (Aug. 20, 2019). In its view, Success Systems fails to plead a relevant market, instead limiting the market to the tobacco-loyalty programs only at Shell gas stations. **[**69]** *Id.* at 23. And Success Systems fails to allege that a relevant market exists based on "lock-in factors." *Id.* at 25. According to Excentus, "[t]he 'high switching costs, the lack of information and high information costs, and the exploitation of the locked-in customer' . . . [does] not transform the market for tobacco loyalty programs at Shell gas stations into a relevant market." *Id.*

Success Systems responds that the "realities of the relationship between [Excentus] **[*68]** and Skupos is a question of fact" that must ultimately be determined by a trier of fact. Pl. Opp'n Excentus Failure to State a Claim at 21. Success Systems further argues that it has alleged the market and monopoly power of Excentus in a relevant market, the Shell Fuel Rewards tobacco rewards market. *Id.* at 28-29. In it view, Success Systems has alleged, and Excentus does not contest, "that Excentus and Skupos control 100% of this market." *Id.* at 29. "The exclusive conduct of Defendants in creating a monopoly in, and excluding Success from the relevant market is clearly illegal and anticompetitive." *Id.* at 32.

The Court disagrees.

Success Systems's anticompetitive arguments must be considered in this context: they were contemplating forming the same agreement with Excentus that Skupos ultimately formed. *See* Am. Compl. **[**70]** ¶ 37 (Success's

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[5] Significantly, the Court has not identified any caselaw — nor have Success Systems identified any caselaw in its filings suggesting the proper standard of review for this allegedly hybrid *§ 1* and *§ 2* of the Sherman Act claim. *See* *15 U.S.C §§ 1-3* (specifying distinct elements for each individual antitrust claim). Consistent with other exclusive dealing claims, however, the Court will analyze this claim using caselaw applying *§ 1* of the Sherman Act. *See* *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*; (analyzing a challenged restraint of trade, which was not per se illegal, under the rule of reason). At best, one treatise suggests "exclusive dealing is subject to challenge under *Section 1* of the Sherman Act . . . and as conduct evidencing a violation of *Section 2* of the Sherman Act." ABA Section of ***Antitrust Law***, ***ANTITRUST LAW*** DEVELOPMENTS, 215 (Debra J. Peralstein et al. eds., 5th ed. 2002).

marketing the integration of Smokin' Rebates with Shell Fuel Rewards and Excentus's lack of an objection to the ads "is further evidence of the agreement to make Smokin Rewards available to all Fuel Rewards locations after the work to integrate the platforms was complete.").

In any event, as discussed above, Success Systems has failed to allege a plausible claim for exclusive dealing because Success Systems fails to allege a relevant market or the antitrust injury felt within that market. *See* *Tampa Elec. Co. v. Nashville Coal, Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)* ("[E]ven though a contract is found to be an exclusive-dealing arrangement, it does not violate the section unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected."). Indeed, Success Systems's allegations of injury to competition are vague and conclusory. Am. Compl. ¶¶ 67, 70, 114. *See* *Iqbal, 556 U.S. at 678* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." (citing *Twombly, 550 U.S. at 556*)).

Accordingly, Success Systems' exclusive dealing claim against Excentus will be dismissed.

ii. The Exclusive Dealing Claim Against Skupos

Skupos also argues that Success Systems **[**71]** only repeatedly uses the word "conspiracy" without providing accompanying factual allegations, Skupos Mem. at 22, and again relies on the non-exclusive agreement between Skupos and Excentus to claim exclusive dealing between the two, *id.* at 24. In its view, Success Systems presents "no allegations as to how the alleged (but nonexistent) exclusive agreement between Skupos and Excentus . . . unreasonably restrains trade (as opposed to simply Plaintiffs)." Skupos Mem. at 26.

Success Systems again argues it has adequately alleged its Sherman Act claims. Pl. Opp'n Skupos at 16. In its view, the written agreement between Excentus and Skupos "does not prohibit Excentus from dealing exclusively with Skupos, it only states that Exentus is not required to deal exclusively with Skupos." *Id.* at 17. And the parties' behavior suggest exclusive dealings: (1) "after Excentus and Skupos finalized their agreement Excentus pulled the plug on the ongoing integration, 2) Excentus told Johnson Oil it had to continue the integration with Skupos instead, and 3) Excentus stated in a phone call that the reason it was terminating the agreement with Success was that it had entered into an exclusive relationship with Skupos." *Id.* at 17 (citations **[**72]** omitted). In its view, Success Systems has pled a relevant market, which Excentus and Skupos monopolize, and which Success Systems is **[*69]** excluded from because of their "clearly illegal and anticompetitive conduct." *Id.* at 17-18.

The Court disagrees.

As discussed above, Success Systems has failed to plausibly plead a relevant market or that an exclusive agreement exists, dooming the exclusive agreement claim against Skupos, just as the absence of these allegations, doomed this claim against Excentus.

Accordingly, Success Systems's exclusive dealing claim against Skupos will be dismissed.

4. The Sherman Act *§ 2* Claim

Section 2 of the Sherman Act requires a plaintiff to "establish '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *PepsiCo, Inc., 315 F.3d at 105* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*). "[E]valuating market power begins with defining the relevant market." *Geneva Pharms., 386 F.3d at 496*. Market power is "[t]he core element of a monopolization claim." *Id.* (citation omitted).

"Market power is the power 'to force a purchaser to do something that he would not do in a competitive market.'" *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 462, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*.

Alternatively, **[**73]** "the ability of a single seller to raise price and restrict output.'" *Id.* (citations omitted). To determine if monopoly is probable, "a court must inquire 'into the relevant product and geographic market and the defendant's economic power in that market.'" *Queen City Pizza, 124 F.3d at 442* (quoting *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*. A court gauges interchangeability based on factors like "price, use, and qualities" or "by 'cross elasticity of demand between the product itself and substitutes for it.'" *Id. at 437*. "Cross-elasticity of demand exists if consumers would respond to a light increase in the price of one product by switching to another product.'" *Todd, 275 F.3d at 201-02*.

"To have standing to prosecute private antitrust claims, plaintiffs must show more than that the defendants' conduct caused them an injury." *Balaklaw v. Lovell, 14 F.3d 793, 797 (2d Cir. 1994)* (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 n.31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*. The injury alleged "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id.* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. "[I]njuries resulting from competition alone are not sufficient to constitute antitrust injuries." *Id.* "[A]n 'exclusive-dealing partner whose business relationship was terminated in favor of another exclusive-dealing partner' is '[c]learly not a victim of antitrust injury.'" *Conn. Ironworkers Emp'rs. Ass'n v. New Eng. Reg'l Council of Carpenters, 324 F. Supp. 3d 293, 309 (D. Conn. 2018)* (quoting XI Phillip E. **[**74]** Areeda & Herbert Hovenkamp, et al., ***Antitrust Law*** ¶ 1823, at 199 (2d ed. 2005)).

Success Systems brings this *Section 2* claim only against Skupos.

Skupos argues Success Systems cannot meet the threshold requirements of pleading "harm to competition and not merely a competitor" and delineating "a properly defined, relevant market that includes all reasonably interchangeable **[*70]** goods." Skupos Mem. at 7. In its view, determining a relevant market "requires identifying both the relevant product market as well as the relevant geographic market[.]" *Id.* at 11. And the relevant market proposed by Success "consists of one product sold in one type of market—tobacco rewards programs available in convenience stores attached to Shell stations," *id.* at 12-13, to which the "lock-in" theory regarding a single brand relevant market does not apply, *id.* at 15-16. In Skupos's view, Success Systems "attempts to define a product market that fits Plaintiffs' personal injury as opposed to a relevant market that meets antitrust pleading standards—one that includes all reasonably interchangeable products and is thus designed to test harm to competition and not merely a competitor." *Id.* at 17.

Skupos also argues that Success Systems fails to plead the elements required **[**75]** for a violation of *Section 2* of the Sherman Act: "that there is monopoly power in the relevant market and (2) the monopoly was willfully acquired or maintained through anticompetitive means." *Id.* at 18. In its view, nothing in the Complaint alleges that Skupos has monopoly power over a market share of more than 50%. *Id.* Skupos also argues that Success Systems fails to plead "factual allegations to support any monopolistic intent" as required under *Section 2* of the Sherman Act, *id.* at 21, and has no factual allegations supporting monopoly power, *id.* at 8. Finally, "Plaintiffs have no meaningful response to the actual agreement between Skupos and Excentus, which reveals the non-exclusive nature and short-term duration of the agreement." *Id.* at 9. In Skupos's view, despite knowing the nature of the agreement, Success Systems claims it is entitled to discovery on the conspiracy and exclusive dealing claims, relying on allegations pled on information and belief. *Id.*

Success Systems argues in response that "the relationship between Excentus and Skupos is a question of fact that will be explored in discovery and ultimately determined by a trier of fact[,]" that defining a relevant market is a fact-intensive inquiry, that it has plead a relevant **[**76]** market with reference to interchangeability and cross-elasticity, and that a single-brand market exists here. Pl. Opp'n Skupos at 5-12. In its view, by pleading a relevant market (the Shell Fuel Rewards tobacco rewards market) and alleging Excentus and Skupos "control 100% of this market," Success Systems has adequately alleged monopoly and market power. *Id.* at 13-14.

The Court disagrees.

"Monopoly power under *§ 2* requires, of course, something greater than market power under *§ 1*." *Eastman Kodak, 504 U.S. at 481*. "Monopoly power is 'the power to control prices or exclude competition.'" *Geneva Pharms., 386*

F.3d at 500 (citation omitted). "It can be proven directly through evidence of control over prices or the exclusion of competition, or it may be inferred from a firm's large percentage share of the relevant market." *Id.*

As discussed above, however, Success Systems has failed to plausibly allege a single-brand relevant market. While Success Systems alleges that "Excentus and Skupos' practices have harmed competition in Shell Fuel Rewards tobacco rewards market ...[and] have driven prices and fees out of step with the broader market," Am. Compl. ¶ 114, this conclusory allegation is entitled to no weight and fails to provide the plausible entitlement to relief required, **[**77]** *see* *Iqbal, 556 U.S. at 679* ("[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth."). Indeed, Success **[*71]** Systems's arguments regarding monopolization fail for the same reasons that its arguments about market power and the relevant market have failed above: the absence of plausible and actionable allegations regarding Skupos's share of the relevant general tobacco rewards market, a market, as discussed above, that extends far beyond the Shell Fuel Rewards program. *See id.* ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.").

Accordingly, Success Systems's claim under *Section 2* of the Sherman Act against Skupos will be dismissed.

E. State Law Claims

Supplemental or pendant jurisdiction is a matter of discretion, not of right. *See* *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*. Under federal law, "district courts may decline to exercise supplemental jurisdiction" if, as is the case here, "the district court has dismissed all claims over which it has original jurisdiction." *28 U.S.C. § 1367(c)(3)*; *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)* ("[W]hen the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims **[**78]** remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.").

Because the Court will dismiss any viable federal claim brought against Skupos, the Court declines to exercise supplemental jurisdiction over any remaining state law claim against Skupos. *See* *Kolari v. New York-Presbyterian Hosp., 455 F.3d 118, 122 (2d Cir. 2006)* ("[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims.").

As a result, Success Systems's state law claim against Skupos will be dismissed.

IV. CONCLUSION

For the foregoing reasons, Excentus's motion to dismiss for failure to state a claim or in the alternative transfer venue is **GRANTED** to the extent Excentus argues Success Systems failed to state a claim; the motion is **MOOT** to the extent Excentus seeks to transfer venue. Excentus's motion to dismiss for lack of jurisdiction and improper venue is **GRANTED**. Skupos's motion to dismiss for failure to state a claim is **GRANTED**.

The Clerk of Court is respectfully directed to close this case.

SO ORDERED at Bridgeport, Connecticut, this 1st day of February, 2020.

/s/ Victor A. Bolden

VICTOR A. BOLDEN

UNITED **[**79]** STATES DISTRICT JUDGE

Fonseca v. Hewlett-Packard Co.

United States District Court for the Southern District of California

February 3, 2020, Decided; February 3, 2020, Filed

Case No.: 19cv1748-GPC-MSB

Reporter
2020 U.S. Dist. LEXIS 193343 *; 2020 WL 6083448

BRYANT FONSECA, an individual, on behalf of himself and all others similarly situated, and on behalf of the general public, Plaintiffs, v. HEWLETT-PACKARD COMPANY, a Delaware Corporation; HP ENTERPRISE SERVICES, LLC, a Delaware Limited Liability Company; HP, Inc., a Delaware corporation; and DOES 1-100, inclusive, Defendants.

Core Terms

alleges, employees, antitrust, conspiracy, no-poach, Sherman Act, judicial notice, counts, hire, terminated, anticompetitive, anti trust law, Cartwright Act, competitor, poach, motion to dismiss, illegality, courts, additionally, documents, pleadings, argues, ceased, second amended complaint, per se standard, rule of reason, factors, markets, eBay

Counsel: **[*1]** For Bryant Fonseca, an individual, on behalf of himself and all others similarly situated, and on behalf of the general public, Plaintiff: Jeffrey L. Hogue, LEAD ATTORNEY, Hogue & Belong, APC, San Diego, CA; Marisol Jimenez Gaytan, LEAD ATTORNEY, Hogue & Belong, San Diego, CA; Tyler Jay Belong, Hogue & Belong APC, San Diego, CA.

For Hewlett-Packard Company a Delaware Corporation, Defendant: Meryl C Maneker, LEAD ATTORNEY, Wilson Turner Kosmo LLP, San Diego, CA.

For HP Enterprise Services, LLC, a Delaware Limited Liability Company, HP Inc., a Delaware corporation, Defendants: Claudette G Wilson, Meryl C Maneker, LEAD ATTORNEYS, Christina Camille Kwoka Semmer, Valerie Phan, Wilson Turner Kosmo LLP, San Diego, CA.

Judges: Hon. Gonzalo P. Curiel, United States District Judge.

Opinion by: Gonzalo P. Curiel

Opinion

ORDER GRANTING MOTION TO DISMISS COUNTS FIVE, SIX, AND EIGHT OF THE SECOND AMENDED COMPLAINT

[ECF No. 10]

Before the Court is Defendant HP Inc.'s ("HP" or "Defendant") motion to dismiss counts five, six, and eight of the second amended complaint ("SAC"). ECF No. 10. Bryant Fonseca ("Plaintiff" or "Fonseca") filed an opposition on October 18, 2019. ECF No. 12. HP filed a reply on October 25, 2019. ECF No. 13. For **[*2]** the reasons discussed below the Court **GRANTS** HP's motion to dismiss counts five, six, and eight.

PROCEDURAL BACKGROUND

On November 29, 2017, an action was commenced in the Superior Court for the State of California, County of San Diego, entitled *Bryant Fonseca v. Hewlett-Packard Company, a Delaware Corporation; HP Enterprise Services, LLC, a Delaware Limited Liability Company; HP, Inc., a Delaware Corporation; and Does 1-100, inclusive*, Case No. 37-2017-00045630-CU-WT-CTL. ECF No. 1-2, Ex. A ("State Complaint").

This case was first removed to this Court on January 11, 2018 (3:18-cv-0071-BEN-JLB) and was remanded back to the Superior Court for the County of San Diego on September 5, 2018. ECF No. 12-1, Ex. 2, Order.

On January 28, 2019, Defendant moved for a stay of the entire action in Superior Court. ECF No. 12-2 (Declaration of Jeffrey L. Hogue or "Hogue Decl.") ¶ 3. On April 12, 2019, the Superior Court for the County of San Diego entered an order staying the case "except with respect to the two 'no poach' antitrust counts (counts 5 and 6)" in light of *Forsyth v. HP Inc., et al.* which is currently pending in the U.S. District Court for the Northern District of California, Civil Action **[*3]** No. 5:16-cv-04775-EJD. *Id.* ¶ 4; ECF No. 1-10 at 38.

On April 22, 2019, Plaintiff filed a First Amended Complaint ("FAC") in response to Defendant's then-pending demurrer to Counts Five and Six for violations of the Cartwright Act and *Section 16600*. ECF 12-2, Hogue Decl. ¶ 4. On August 2, 2019, the Superior Court for the County of San Diego sustained Defendant's demurrer. Order, ECF No. 12-1 at 112.

On August 12, 2019, Plaintiff filed a Second Amended Complaint in San Diego Superior Court (37-2017-00045630-CU-WT-CTL). ECF No. 1-2, Ex. E ("Second Amended Complaint" or "SAC"). The SAC re-alleges the counts in the FAC and additionally alleges an eighth count for violation of the Sherman Act, *15 U.S.C. § 1*. SAC ¶¶ 182-88. In sum, the SAC contained the following eight counts: (1) Disparate Treatment — *California Government Code §§ 12900 et seq.*; (2) Disparate Impact — *California Government Code §§ 12940(A)*, *12941*; (3) Wrongful Termination In Violation Of Public Policy; (4) Failure To Prevent Discrimination — *California Government Code §§ 12900 et seq.*; (5) Violation of the Cartwright Act, *California Bus. & Prof. Code §§ 16720 et seq.*; (6) Violation of *California Bus. & Prof. Code §§ 16600 et seq.*; (7) Unfair Competition — *California Bus. & Prof. Code § 17200, et seq.*; and (8) Violation of the Sherman Act, *15 U.S.C. § 1*. ECF No. 1-2 ¶¶ 101-188. Plaintiff alleges that the SAC also includes additional legal assertions — including Sherman Act violations and that the "no poach" agreement was **[*4]** a *per se* injury to competition — and additional factual allegations regarding Defendant's conduct and their 10-K filing. ECF No. 12 at 9-10.

On September 11, 2019, Defendant removed the case to this Court. ECF No. 1.

FACTUAL BACKGROUND

Plaintiff is a resident of the County of San Diego and was an employee of HP at HP's San Diego site. SAC ¶¶ 3, 18. Defendants are Hewlett-Packard Company, HP Enterprise Services, LLC, and HP Inc. (collectively, "HP"). *Id.* ¶ 1. HP's headquarters and principal place of business are in Palo Alto, California. *Id.* ¶ 4. Non-party 3D Systems Inc. ("3D Systems") is HP's major competitor in the 3D printing industry. *Id.* ¶ 49. Plaintiff also names Does 1 through 100 as defendants as agent, servant, alter ego, and/or employee of the other defendants. *Id.* ¶ 10.

Plaintiff brings this class action on behalf of all individuals employed by HP from January 1, 2016 to present and all current, former, or prospective employees who were at least 40 years old at the time that HP terminated them under HP's 2012 U.S. Workforce Reduction Plan ("WFR"). *Id.* ¶ 84. At the time that he filed the SAC, Plaintiff was fifty-five years old. *Id.* ¶ 17. Plaintiff alleges that HP eliminated the **[*5]** jobs of older, age-protected employees in November 2015 in order to begin replacing them with younger employees; plaintiff additionally alleges that, due to HP's "no-poach" agreement with 3D Systems, Plaintiff and other HP employees were unable to obtain employment at 3D Systems. *Id.* ¶¶ 27-28.

Plaintiff worked for HP's printing and engineering groups for nearly thirty-six years. *Id.* ¶¶ 18-21. According to the SAC, HP purported to use the WFR to terminate employees on a neutral basis. *Id.* ¶ 23. However, Plaintiff alleges that HP used the WFR to terminate older, higher-paid employees and replace them with younger, lower-paid employees. *Id.* On May 8, 2017, Plaintiff's employment with Defendant terminated pursuant to the WFR. *Id.* ¶ 44. HP informed Plaintiff that he would have two weeks as part of his "redeployment period" to find another job with HP. If he were unsuccessful, then HP would provide him with a 60-day "Preferential Rehire Period" during which time Plaintiff would be allowed to apply for jobs within HP and if re-hired, could bypass the conventional rehiring process. *Id.* ¶ 45.

After Plaintiff's termination, he applied for two different positions at HP but did not receive offers. **[*6]** *Id.* ¶ 49. Plaintiff also participated in a four-month career transition program with a career counseling firm, which was offered to him as part of his benefits package under the WFR. *Id.* ¶ 50. In 2017, Plaintiff applied for a job at 3D Systems but did not receive an offer. *Id.* ¶¶ 56, 69. Plaintiff alleges that he, like other HP employees, were denied offers from 3D Systems due to the "no-poach agreement" between HP and 3D Systems. *Id.* ¶¶ 58-63, 67-69.

The SAC alleges that the "no-poach" agreement began in 2016 after 3D Systems poached several of HP's most talented employees. *Id.* ¶¶ 67-69. In 2016, Vyomesh Joshi, a former HP executive, was hired by 3D Systems to become its new CEO. *Id.* ¶ 58.[1] Joshi began poaching HP's top executives and began hiring many top-level HP employees. *Id.* ¶ 59. Plaintiff alleges that Joshi developed a close business relationship with a number of top-level executives at HP, including, Stephen Nigro, who was promoted to become President of HP's 3D Printing unit once Joshi became the CEO of 3D Systems. *Id.* ¶ 60.[2]

However, the SAC alleges that soon after Joshi poached away several of HP's employees, HP and 3D Systems' executives entered into a "cease-fire." And as **[*7]** a result of this "cease-fire," the SAC alleges that both 3D Systems and HP ceased cold calling each other's employees in order to solicit them, and dissuaded their current employees from applying for work at the other company. *Id.* ¶ 61.

As a result of this agreement between HP and 3D Systems, Plaintiff alleges that in August 2016 a group of HP managers informed HP employees that they were required to notify HP if they were offered a position at 3D Systems and that any HP employee offered a position with 3D Systems would be deprived of the severance check provided under the WFR. *Id.* ¶ 65. The SAC additionally alleges that in at least one group meeting, Plaintiff and other HP employees were informed that one of their coworkers "interviewed with 3D Systems" and "that is why HP terminated him." *Id.* ¶ 66. Plaintiff also alleges that an HP manager told Plaintiff and other employees that HP would help them with their job searches if they were laid off, but if they were applying or talking to 3D Systems, the manager did not "want to know about it, because if [he] or [other] managers know about it, you will get 'escorted out'" meaning you will "be immediately terminated and forfeit your right" **[*8]** to the severance package benefits. *Id.* Plaintiff asserts that he would have applied for a job with 3D Systems earlier, but refrained from doing so due to HP managers' warnings that Plaintiff would face repercussions if he applied to 3D Systems. *Id.* ¶ 69.

Plaintiff also alleges that as part of their agreement, HP and 3D Systems ceased hiring one another's employees through third-party recruiters and shared their pay scales to avoid entering a bidding war with one another. *Id.* ¶¶ 62-63.

LEGAL STANDARD

Federal Rule of Civil Procedure ("Rule") 12(b)(6) permits dismissal for "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. Dismissal under *Rule 12(b)(6)* is appropriate where the complaint lacks a

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1 Defendant notes that Joshi left HP in 2012. ECF No. 10-1 at 9.

2 Plaintiff also alleges that Meg Whitman served as a top executive at HP during the time of the "no-poach agreement," and notes that Whitman was involved in a 2014 settlement with the Department of Justice regarding eBay Inc.'s separate no-poach agreement with Intuit Inc. SAC ¶ 53.

cognizable legal theory or sufficient facts to support a cognizable legal theory. *See* *Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1990)*. Under Rule 8(a)(2), the plaintiff is required only to set forth a "short and plain statement of the claim showing that the pleader is entitled to relief," and "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

A complaint may survive a motion to dismiss only if, taking all well-pleaded factual allegations as true, it contains enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*). "A claim has facial **[*9]** plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* "In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009)* (quotations omitted). In reviewing a *Rule 12(b)(6)* motion, the Court accepts as true all facts alleged in the complaint, and draws all reasonable inferences in favor of the plaintiff. *al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009)*. The Court evaluates lack of statutory standing under the *Rule 12(b)(6)* standard. *Maya v. Centex Corp., 658 F.3d 1060, 1067 (9th Cir. 2011)*.

Where a motion to dismiss is granted, "leave to amend should be granted 'unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" *DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992)* (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986))*. In other words, where leave to amend would be futile, the Court may deny leave to amend. *See* *Desoto, 957 F.2d at 658*; *Schreiber, 806 F.2d at 1401*.

DISCUSSION

Defendant asserts that the fifth, sixth, and eighth counts should be dismissed. Plaintiff also seeks judicial notice **[*10]** of seven exhibits. ECF No. 12-1. The Court first addresses Plaintiff's request for judicial notice, and then addresses Defendant's arguments in turn.

I. Request for Judicial Notice

Plaintiff seeks judicial notice of seven exhibits, which are all either orders or motions filed in the underlying state court action or filed previously in this Court. As a general rule, "a district court may not consider any material beyond the pleadings in ruling on a *Rule 12(b)(6)* motion." *Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)*. However, two exceptions to this rule exist. First, a district court may consider "material which is properly submitted as part of the complaint." *Id.* If the documents are not attached to the complaint, an exception exists if the documents' "authenticity . . . is not contested" and "the plaintiff's complaint necessarily relies" on them. *Id.* (citations omitted). Second, a court may take judicial notice of "matters of public record" under *Federal Rule of Evidence ("Rule") 201*. *Id. at 688-89*. However, under *Rule 201*, a court may not take judicial notice of a fact that is "subject to reasonable dispute." *Fed. R. Evid. 201(b)*. If the contents of a matter of public record are in dispute, the court may take notice of the fact of the document at issue but not of the disputed information contained within. *See* *id. at 689-90*.

Since **[*11]** these documents are either pleadings or documents otherwise recorded by the court, they are the proper subject of judicial notice. *See Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998)* (granting judicial notice of pleadings filed in a related state court action); *Reynolds v. Applegate, No. C 10-04427 CRB, 2011 U.S. Dist. LEXIS 14740, 2011 WL 560757, at *1 n.2 (N.D. Cal. Feb. 14, 2011)* (granting judicial notice of documents recorded in the county recorder office since "the Court may properly see them"); *Ewing v. Superior Court of California, 90 F. Supp. 3d 1067 (S.D. Cal. 2015)* (granting judicial notice of documents filed in state court case, including trial court's judgment and opinion of state appellate court); *Amato v. Narconon Fresh Start, No. 3:14-CV-0588-GPC-BLM, 2014 U.S. Dist. LEXIS 150724, 2014 WL 5390196, at *4 (S.D. Cal. Oct. 23, 2014)* ("Orders in federal court cases and state licenses are matters of public record and are capable of accurate and ready determination.").

On a *Rule 12(b)(6)* motion to dismiss, when a court takes judicial notice of another court's opinion, it may do so "not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity." *Lee, 250 F.3d at 690*. Accordingly, Plaintiff's request for judicial notice for all seven exhibits is **GRANTED**. The Court takes notice of these documents for the fact of their existence, but not for the truth of the content therein.

II. Sherman Act and Cartwright Act

Under *section 1* of the Sherman Act, "every contract, **[*12]** combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. To state a *section 1* claim, a plaintiff must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove:

> (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition.

Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008) (citing *Les Shockley Racing Inc. v. National Hot Rod Association, 884 F.2d 504, 507 (9th Cir.1989)*; *see also* *Bell Atlantic v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "In addition to these elements, plaintiffs must also plead (4) that they were harmed by the defendant's anti-competitive contract, combination, or conspiracy, and that this harm flowed from an 'anti-competitive aspect of the practice under scrutiny.' This fourth element is generally referred to as 'antitrust injury' or 'antitrust standing.'" *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012)* (citations omitted).

The analysis under California ***antitrust law*** — i.e., the Cartwright Act - "mirrors the analysis under federal law because the Cartwright Act was modeled after the Sherman Act." *Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir.2001)*; *see also* *Nova Designs, Inc. v. Scuba Retailers Ass'n, 202 F.3d 1088, 1091 (9th Cir.2000)*. "[I]f Plaintiffs plead a valid Sherman **[*13]** Act claim, they likewise plead a valid Cartwright Act claim." *In re High-Tech Employee Antitrust Litig., 856 F. Supp. 2d 1103, 1114 (N.D. Cal. 2012)*

1. Contract, Combination, or Conspiracy

The "crucial question" in antitrust claims under *section 1* of the Sherman Act is whether "the challenged anticompetitive conduct stem[s] from independent decision or from an agreement, tacit or express." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 553, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540, 74 S. Ct. 257, 98 L. Ed. 273 (1954))* (internal quotation marks omitted). To allege an agreement between antitrust co-conspirators, a complaint must "contain enough factual matter (taken as true) to suggest that an agreement was made." *Id. at 556*. In other words, "the complaint must allege facts such as a 'specific time, place, or person involved in the alleged conspiracies' to give a defendant seeking to respond to allegations of a conspiracy an idea of where to begin." *Kendall, 518 F.3d at 1047*. "A bare allegation of a conspiracy is almost impossible to defend against, particularly where the defendants are large institutions with hundreds of employees entering into contracts and agreements daily." *Id. at 1047*. The Ninth Circuit has noted that "discovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case." *Id.*

Defendant argues that Plaintiff's **[*14]** claim under the Sherman Act must be dismissed for failure to state a claim and for lack of subject-matter jurisdiction. Specifically, Defendant asserts that Plaintiff has failed to meet the standard as set forth by *Kendall* since Plaintiff has provided insufficient facts regarding "who, did what, to whom (or with whom), where, and when." *Id. at 1048*. Defendant observes that Plaintiff has failed to allege any specific communications, meetings, or interactions between Joshi and Nigro; has failed to allege where, when, or how the alleged agreement was reached; which companies were a party to the alleged agreement; and whether the agreement was verbal or written.

Plaintiff responds that he has offered sufficient facts and relies on two cases from the Northern District of California - *In re High-Tech Employee Antitrust Litig., 856 F. Supp. 2d 1103 (N.D. Cal. 2012)* and *In re Animation Workers Antitrust Litig., 123 F. Supp. 3d 1175 (N.D. Cal. 2015)*. In both *High-Tech* and *Animation Workers*, the court held that the plaintiffs sufficiently alleged their Sherman Act claims.

In *High-Tech*, plaintiffs alleged a conspiracy consisting of express bilateral agreements between employers seeking to suppress compensation and restrict employees' mobility in violation of, *inter alia*, the Sherman Act and the Cartwright Act. According to the plaintiffs, senior executives for **[*15]** the defendant companies participated in negotiating, executing, monitoring compliance with, and policing violations of the bilateral agreements. *Id. at 1110*. The *High-Tech* plaintiffs set forth how the "nearly identical agreements, of identical scope, were entered into in various cities and counties in California . . . how these agreements were the subject of a DOJ investigation in which the DOJ found the agreements to be 'per se unlawful' and in which Defendants agreed that the DOJ stated a federal antitrust claim." *Id. at 1117*. The court concluded that the plaintiffs' allegations were sufficient to survive a motion to dismiss.

Similarly, in *Animation Workers*, the plaintiffs pled their allegations with great factual support and detail — including discussion of who drafted the agreement, the specific involvement of the top executives in the drafting of said agreement, and a multitude of email communications describing the enforcement of the no-poach agreement. *Animation Workers, 123 F. Supp. 3d at 1182*.

Plaintiff has alleged in the SAC that HP "agreed not to compete with a specific company (3D Systems), starting at a specific time (2016), pursuant to specific terms, the key players (Joshi and Nigro), and during the corporate culture set by HP's CEO **[*16]** — Meg Whitman — who had a history of entering into these no-poach arrangements." ECF No. 12 at 17. Plaintiff alleges only that HP and 3D Systems' "executives" entered into the no-poach agreement in 2016, without providing details as to who drafted or entered the agreement, or when and where it was agreed upon. SAC ¶ 61. Although Plaintiff references the relationship between Joshi and Nigro, he fails to point to any specific connection or communication between the two with respect to a no-poach agreement. Further, Plaintiff's reference to Meg Whitman's involvement with the 2014 DOJ settlement regarding the agreement between eBay Inc. and Intuit Inc. fails to bolster Plaintiff's Sherman Act claims with respect to HP and 3D Systems. These allegations fall short of the standard of specificity as required by *Kendall*.

a. Parallel Conduct

A plaintiff must allege facts at the pleading stage "tending to exclude the possibility of independent action." *Twombly, 550 U.S. at 544* (internal citation omitted). "[W]hen allegations of parallel conduct are set out in order to make a *§ 1* claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be **[*17]** independent action." *Id. at 557*. Examples of an allegation that would suffice under this standard include "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." *Id. at 556 n. 4* (internal quotation marks omitted). The Ninth Circuit has distinguished permissible parallel conduct from impermissible conspiracy by looking for certain "plus factors." *See, e.g., In re Citric Acid Litig., 191 F.3d 1090, 1102 (9th Cir. 1999)* ("Parallel pricing is a relevant factor to be considered along with the evidence as a whole; if there are sufficient other 'plus' factors, an inference of conspiracy can be reasonable."). Whereas parallel conduct is as consistent with independent action as with conspiracy, plus factors are economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action. *See Twombly, 550 U.S. at 557 n. 4*. If pleaded, they can place parallel conduct "in a context that raises a suggestion of preceding agreement." *In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1194 (9th Cir. 2015)*.

In support of his argument on parallel conduct, Plaintiff relies on the following allegations: (1) HP had no safeguards in place that would prevent it from entering a no-poach **[*18]** agreement (SAC ¶ 70); (2) HP and 3D Systems did not have any type of joint venture agreement subject to legitimate collaboration (SAC ¶ 72); (3) HP immediately terminated and denied severance packages to any employee who interviewed with 3D Systems (SAC ¶¶ 65, 66); (4) HP and 3D Systems ceased cold-calling and hiring each other's employees (SAC ¶¶ 61, 62); and (5) HP and 3D Systems shared their pay scales with each other to assure that they would not be in a bidding war with one another (SAC ¶ 63). ECF No. 12 at 19-20. Plaintiff additionally points to the circumstantial evidence that Nigro and Joshi worked together at HP before Joshi left to work for 3D Systems.

The first allegation does not identify any parallel actions by HP and 3D Systems but instead reveals a unilateral action — or, lack of action — on the part of HP. The second allegation also fails since the absence of joint concerted activity is insufficient to establish covert joint activity. The third allegation reveals unilateral actions by HP which would suggest that there was no agreement between HP and 3D Systems.[3] Additionally, HP offers that rational business reasons can explain this behavior — namely, that HP would want **[*19]** to discourage their employees from applying to 3D Systems since they did not want their employees to leave for a competitor and HP also wanted to protect their proprietary information.

On the fourth allegation, Plaintiff alleges that both 3D Systems and HP ceased cold-calling and hiring each other's employees; however, Plaintiff only provides this bare allegation with respect to HP without providing any further factual detail about HP's actions. With respect to 3D Systems' actions, Plaintiff alleges that 3D Systems had previously been engaged in a campaign of aggressively poaching HP employees but stopped doing so in or around 2016. In response, HP first argues that Plaintiff's allegations are contradictory, pointing to the fact that 3D Systems continued to interview HP's employees, which undermines the notion that the two companies had an agreement to refrain from poaching the others' employees. However, even taking Plaintiff's allegations as true, HP offers two alternate explanations for 3D Systems' decision to cease cold-calling and hiring HP's employees: (1) when Joshi first started working at 3D Systems in early 2016 he managed to hire the top HP employees and therefore no longer **[*20]** needed to hire from HP's workforce; and (2) 3D Systems could hire any of the numerous former HP employees who had been terminated under the WFR, and therefore had no need to poach current HP employees. The Court agrees that the behavior of 3D Systems can be justified by either of the rational business reasons offered by Defendant and follows the reasoning of other courts who have found that courts cannot "infer an anticompetitive agreement when factual allegations just as easily suggest rational, legal business behavior." *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers, 795 F.3d 1124, 1130 (9th Cir. 2015)* (citations omitted) (dismissing plaintiff's allegations that an anticompetitive agreement existed since the company's alleged conduct, though contrary to its business model, were not "illogical or suspicious"). *See also* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597 n. 21, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* ("[C]onduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy."); *Eclectic Props. E., LLC v. Marcus & Millichap Co., 751 F.3d 990, 996 (9th Cir. 2014)* (explaining that courts must consider obvious alternative explanations for a defendant's behavior when analyzing plausibility).

The fifth allegation on sharing pay scales is insufficiently supported by Plaintiff's factual pleadings. In *Kelsey K. v. NFL Enterprises, LLC*, plaintiffs argued that **[*21]** defendants engaged in parallel conduct by suppressing the wages of National Football League cheerleaders. *254 F. Supp. 3d 1140, 1146 (N.D. Cal. 2017)*, *aff'd*, *757 F. App'x 524 (9th Cir. 2018)*. The *Kelsey* plaintiffs provided exact figures of wages across different teams and additionally alleged that no NFL team paid cheerleaders for rehearsals. However, the *Kelsey* court held that the plaintiffs had nevertheless failed to provide more than "a mere allegation" and therefore could not "nudge the overall conspiracy

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[3] The Court additionally notes that Plaintiff's allegations appear contradictory; if HP and 3D Systems did agree to refrain from poaching each other's employees, not only would 3D Systems have been unlikely to interview an HP employee, there would have also been no need for HP to fire employees who were hired by 3D Systems, or to warn HP's employees against seeking employment with 3D Systems.

across the line from *conceivable* to *plausible*." *Id.* (emphasis in original). Here, Plaintiff has only alleged that HP and 3D Systems shared pay scales and suppressed wages, without providing any further factual detail to support these claims. Plaintiff's mere allegations fail to show parallel conduct that would support an inference of conspiracy between HP and 3D Systems.

In sum, Plaintiff's allegations are either insufficient or otherwise can be independently explained by rational business decisions on the part of HP or 3D Systems and therefore do not meet the standard as set out by the Ninth Circuit, requiring that the plus factors exclude the possibility that defendants' actions were possibly the result of independent conduct. *See In re Citric Acid Litig., 191 F.3d 1090, 1094 (9th Cir. 1999)*. Without more of **[*22]** the "plus" factors, an inference of conspiracy would be unreasonable. *See e.g., In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1189 (9th Cir. 2015)* (allegation that manufacturers adopted similar advertisement policies was an insufficient "plus factor" to state a claim under *section 1* of the Sherman Act).

Accordingly, Plaintiff's claims under the Sherman and Cartwright Acts — counts five and eight — are **DISMISSED**.

III. Per Se Illegality and Standing

Plaintiff argues that the no-poach agreement is *per se* illegal, and therefore, he is not required to plead an anticompetitive injury in order to meet the requirements for standing. Defendant disputes the *per se* illegality, but further argues that even if Plaintiff could prove that the agreement is *per se* illegal, he would still be required to prove the antitrust and Article III pleading requirements. The Court has already dismissed Plaintiff's Sherman Act and Cartwright Act claims, but the Court will nevertheless address this issue.

In considering claims made under *Section 1* of the Sherman Act, courts have applied either (1) the "rule of reason" standard, which "weighs legitimate justifications for a restraint against any anticompetitive effects," *Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1156 (9th Cir. 2003)*, or (2) the *per se* standard, which applies to a category of agreements which **[*23]** have been determined to be *per se* illegal, *see United States v. Brown, 936 F.2d 1042, 1045 (9th Cir. 1991)*.

The latter *per se* rule is applied "when the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100 (1984)* (internal quotation marks omitted). The following practices are typically considered to be *per se* illegal: (1) horizontal agreements between actual or potential competitors to fix or stabilize prices; (2) horizontal territorial, customer, output, and other market restraints between competitors; and (3) horizontal group boycotts by competitors with shared market power or control over a scarce resource or facility. *See* William Holmes & Melissa Mangiaracina, ***ANTITRUST LAW*** HANDBOOK § 2:9. These practices are "conclusively presumed to be unreasonable" because of their "pernicious effect on competition and lack of any redeeming virtue." *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958)*.

Although the *per se* standard has a limited scope, courts have previously been tempted to expand its reach:

> "The absence of any requirement that a per se plaintiff make specific market allegations creates the danger that an unwary court might allow a plaintiff in a market unlikely to have been affected by the practice he challenges to pursue a treble-damages **[*24]** claim. Such errors permit the *per se* standard to impose greater penalties on a defendant than those he would have suffered had his practice been judged by the rule of reason. The consequences of such errors are especially great because of the extent to which plaintiffs rely upon *per se* theories and the ease with which arguably *per se* practices often can be identified. Courts can avoid this danger by recognizing that each *per se* rule presumes a particular practice harms particular markets, and by then permitting only plaintiffs within those markets to pursue per se claims. The failure of many courts to appreciate this limited nature of the per se standard accounts for much of the confusion that has long plagued standing doctrine in antitrust cases."

Daniel C. Richman, *Antitrust Standing, Antitrust Injury, and the Per Se Standard*, 93 YALE L.J. 1309, 1313-14 (1984).

Per se illegality can apply to agreements, such as a no-poach agreement, that depress competition in the employment market since "[a]ntitrust law does not treat employment markets differently from other markets." *United States v. eBay,* Inc., 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013). *See also* Roman v. Cessna Aircraft Co., 55 F.3d 542 (10th Cir.1995) (an airplane engineer adequately pled antitrust standing in a suit challenging two airline manufacturers' no-hire **[*25]** agreement). "***Antitrust law*** addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there." *Id.* (internal citations omitted). "Just as ***antitrust law*** seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services." *Id.*

However, merely alleging a no-poach agreement is insufficient; the agreement must also "facially appear[] to be one that would almost always tend to restrict competition and decrease output," in other words, it must be "a naked restraint on trade." eBay, 968 F. Supp. 2d at 1039 (citing National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma, 468 U.S. 85, 100, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)). If "a defendant advances plausible arguments that a practice enhances overall efficiency and makes markets more competitive, per se treatment is inappropriate, and the rule of reason applies." Paladin Assoc., Inc. v. Montana Power Co., 328 F.3d 1145, 1155 (9th Cir. 2003). Thus, to make a determination, a court must consider whether the alleged no-solicitation or no hire agreement is ancillary to a procompetitive business purpose. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-22, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979).

a. Discussion

Plaintiff alleges that HP and 3D Systems entered in a no-poach agreement in or around 2016 and thereafter ceased cold-calling **[*26]** each other's employees, which ultimately "stopped or greatly limited" 3D Systems from attempting to hire outgoing HP employees. ECF No. 1-2 at 18; SAC ¶ 67. Plaintiff alleges that this no-poach agreement is *per se* illegal since it has no legitimate competitive justification. Defendant counters that Plaintiff has failed to allege facts showing the existence of such an agreement altogether, and that even taking Plaintiff's allegations as true, the alleged agreement can be justified by HP and 3D Systems' rational business decisions.

In *United States v. eBay,* Inc., 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013), the court declined to apply *per se* treatment to a non-poach agreement where parties supplied "substantial legal argument" on the non-poach agreement but "without sufficient factual evidence." 968 F. Supp. 2d at 1040. The *eBay* court held that even taking plaintiffs' allegations as true, it could not determine whether to apply *per se* analysis. *Id. See also* California Dental Ass'n v. F.T.C., 526 U.S. 756, 779, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999) ("[T]here is often no bright line separating *per se* from Rule of Reason analysis, since considerable inquiry into market conditions may be required before the application of any so-called *per se* condemnation is justified.").[4] At this stage, it would be premature for the Court to find the agreement to be **[*27]** *per se* illegal given the lack of factual evidence and therefore, the Court declines to apply *per se* treatment.

b. *Per Se* Illegality Does Not Affect Standing Requirements

Regardless of the outcome for *per se* illegality, the Court notes that the standing analysis would not be affected. Plaintiff argues that since the no-poach agreement is *per se* illegal, he is not required to plead an anticompetitive

[4] Plaintiff cites the 2016 guidance from the Department of Justice and Federal Trade Commission, which states that no-poach agreements are *per se* illegal. *See* DOJ/FTC Antitrust Guidance for HR Professionals, October 2016. However, although this guidance cites a number of DOJ and FTC prosecutions that ended in consent judgments, it does not cite any judicial opinions on the question of whether no-poach agreements are always *per se* illegal.

injury. This is incorrect. Even after establishing that an agreement is *per se* illegal, a plaintiff is still required to meet the Article III and antitrust standing requirements, including the requirement of proving an antitrust injury.

"[E]ven if the challenged conduct is per se illegal, the particular plaintiff may still lack standing to assert a claim." William Holmes & Melissa Mangiaracina, ***ANTITRUST LAW*** HANDBOOK § 2:9. "The *per se* rule is a presumption of unreasonableness based on business certainty and litigation efficiency . . . [t]he purpose of the antitrust injury requirement is different." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (a competitor lacked standing to challenge a *per se* illegal agreement where the nature of the competitor's alleged injury was not the type of injury for which the antitrust laws provide **[*28]** protection).

"The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Id. at 344* (emphasis in original). "The need for this showing is *at least as great* under the *per se* rule as under the rule of reason." *Id.* (emphasis added). "[P]rocompetitive or efficiency-enhancing aspects of practices that nominally violate the antitrust laws may cause serious harm to individuals, but this kind of harm is the essence of competition and should play no role in the definition of antitrust damages." *Id.* (citing William H. Page, *The Scope of Liability for Antitrust Violations*, *37 Stan. L. Rev. 1445, 1460 (1985)*). "Thus, proof of a per se violation and of antitrust injury are distinct matters that must be shown independently." *Id.*

Here, Plaintiff has conflated the pleading requirements for standing with the pleading requirements for the substantive antitrust violation. A finding of *per se* illegality does impact the pleading requirements for a substantive antitrust violation; for example, plaintiffs are not required to plead the element of intent to produce anticompetitive effects when an agreement is deemed *per se* illegal. *See* *United States v. Brown, 936 F.2d 1042, 1046 (9th Cir. 1991)*. However, **[*29]** even if Plaintiff's allegations with respect to *per se* illegality were sufficient, Plaintiff would still be required to prove he has standing under the general standard set out by ***antitrust law*** and Article III of the Constitution.[5]

II. *Section 16600*

The *California Business and Professions Code § 16600* ("*Section 16600*") provides that, in absence of a statutory exception, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." *Cal. Bus. & Prof. Code § 16600*. Under *Section 16600*, "an employer cannot by contract restrain a former employee from engaging in his or her profession, trade, or business unless the agreement falls within one of the exceptions to the rule." *Edwards v. Arthur Andersen LLP, 44 Cal. 4th 937, 946-47, 81 Cal. Rptr. 3d 282, 189 P.3d 285 (2008)*. For example, this statute invalidates provisions in employment contracts that prohibit an employee from working for a competitor, unless such provisions are necessary to protect trade secrets. *See* *Muggill v. Reuben H. Donnelley Corp., 62 Cal. 2d 239, 242, 42 Cal. Rptr. 107, 398 P.2d 147 (1965)*.

Plaintiff bases his *Section 16600* claim on the alleged no-poach agreement between HP and 3D Systems. ECF NO. 12 at 29. Defendant argues that Plaintiff has failed to allege a violation of *Section 16600* since he has failed to adequately allege the existence of any such no-poach agreement. As discussed at length in the preceding sections, Plaintiff has failed to sufficiently plead allegations regarding the existence of the **[*30]** no-poach agreement; therefore, insofar as the *Section 16600* claim is solely premised on the existence of the no-poach agreement by HP and 3D Systems, Plaintiff's sixth cause of action is **DISMISSED**.[6]

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[5] Since the Court has already held that the insufficiency of Plaintiff's allegations regarding Defendant's violation of the Sherman and Cartwright Acts merits granting of Defendant's motion to dismiss, the Court declines to address the issue of Article III standing.

[6] Defendant also argues that (1) Plaintiff's claim fails since ***Section 16600*** does not confer a statutory cause of action, and (2) Plaintiff lacks standing to seek declaratory and injunctive relief. Since Plaintiff's claim has been denied for the reasons described above, the Court declines to address these issues here.

CONCLUSION

Defendant's motion to dismiss counts five, six, and eight of the second amended complaint is **GRANTED**. Plaintiff is granted leave to amend within the next 20 days.

IT IS SO ORDERED.

Dated: February 3, 2020

/s/ Gonzalo P. Curiel

Hon. Gonzalo P. Curiel

United States District Judge

Sumotext Corp. v. Zoove, Inc.

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

February 3, 2020, Decided; February 3, 2020, Filed

Case No. 16-cv-01370-BLF

Reporter
2020 U.S. Dist. LEXIS 17253 *; 2020-1 Trade Cas. (CCH) P81,081; 2020 WL 533006

SUMOTEXT CORP., Plaintiff, v. ZOOVE, INC., et al., Defendants.

Prior History: Sumotext Corp. v. Zoove, Inc., 2016 U.S. Dist. LEXIS 44061 (N.D. Cal., Mar. 31, 2016)

Core Terms

Defendants', damages, motion in limine, antitrust, witnesses, numbers, customer, Mobile, termination, products, leasing, tortious interference, anticompetitive, contracts, entities, market power, unprofitable, calculation, Skiing, usage, monopolization, consumer, estimate, markets, reasons, anti trust law, valid business, disaggregation, reliability, monopolist

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Judges: BETH LABSON FREEMAN, United States District Judge.

Opinion by: BETH LABSON FREEMAN

Opinion

ORDER RE MOTIONS IN LIMINE

[Re: ECF 384, 385, 386, 387, 388, 390, 391, 392]

Plaintiff Sumotext Corporation ("Sumotext") brings this suit against Defendants Zoove, Inc. ("Zoove"), Virtual Hold Technology LLC ("VHT"), VHT StarStar, and StarSteve, LLC ("StarSteve"), alleging that Defendants have violated the federal antitrust laws in connection with the leasing and servicing of "StarStar numbers." After substantial motion practice, two claims remain in the operative third amended complaint ("TAC"): Count IV for restraint of trade in violation of *Section 1 of the Sherman Act*, and Count V for conspiracy to monopolize and monopolization in violation of *Section 2 of the Sherman Act*. Trial in this case is scheduled to begin on February 24, 2020.

On January 16, 2020, in advance of the Final Pretrial Conference, Defendants jointly filed five motions in limine, ECF 384, 385, 386, 387, 388, and Plaintiff filed three motions in limine, ECF 390, 391, 392. Each side responded to the other's motions on January 23, 2020. ECF 396, 397, 398, 399, 400, 401, 402, 403. The Court held the Final Pretrial Conference in this case **[*3]** on January 30, 2020, during which the Court heard oral argument on the motions in limine and issued its rulings on the record. This order memorializes those rulings. For the reasons stated on the record, and as summarized below, the Court orders as follows:

I. LEGAL STANDARD

Motions in limine are a "procedural mechanism to limit in advance testimony or evidence in a particular area." *United States v. Heller, 551 F.3d 1108, 1111 (9th Cir. 2009)*. Like other pretrial motions, motions in limine are "useful tools to resolve issues which would otherwise clutter up the trial." *City of Pomona v. SQM N. Am. Corp., 866 F.3d 1060, 1070 (9th Cir. 2017)*. Accordingly, "a ruling on a motion in limine is essentially a preliminary opinion that falls entirely within the discretion of the district court." *Id.*; *see* *Luce v. United States, 469 U.S. 38, 41 n. 4, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984)* (explaining that a court may rule in limine "pursuant to the district court's inherent authority to manage the course of trials").

In many instances, however, rulings "should be deferred until trial, so that questions of foundation, relevancy, and potential prejudice may be resolved in proper context." *United States v. Pac. Gas & Elec. Co., 178 F. Supp. 3d 927, 941 (N.D. Cal. 2016)*. After all, in order to exclude evidence on a motion in limine, "the evidence must be inadmissible on all potential grounds." *McConnell v. Wal-Mart Stores, Inc., 995 F. Supp. 2d 1164, 1167 (D. Nev. 2014)*. Thus, denial of a motion in limine to exclude certain evidence does not mean that all evidence **[*4]** contemplated by the motion will be admitted, only that the court is unable to make a comprehensive ruling in advance of trial. *Id.* Even if a district court does rule in limine, moreover, the court may "change its ruling at trial because testimony may bring facts to the district court's attention that it did not anticipate at the time of its initial ruling." *City of Pomona, 866 F.3d at 1070*; *see also* *Ohler v. United States, 529 U.S. 753, 758 n.3, 120 S. Ct. 1851, 146 L. Ed. 2d 826 (2000)* ("[I]n limine rulings are not binding on the trial judge, and the judge may always change his mind during the course of a trial.").

II. PLAINTIFF'S MOTIONS IN LIMINE

Plaintiff brings three motions in limine. The Court addresses each in turn below.

A. Plaintiff's Motion in Limine No. 1

Plaintiff's first motion in limine seeks to "preclude Defendants from arguing that their anticompetitive conduct is justified because they sought to make more profits and prevent Zoove from failing." ECF 390 ("Pl. MIL No. 1") at 2. To provide some context, Defendants argued at the summary judgment stage that "Zoove has never made money, Defendants made a legitimate business decision to pivot to a different business model, and such a decision cannot give rise to antitrust liability." ECF 382 at 23-24; *see, e.g.*, ECF 336 at 17, 22-23. The Court **[*5]** acknowledged that a legitimate business justification can avert antitrust liability in some cases but concluded that Defendants were not entitled to summary judgment on those grounds. ECF 382 at 24. Plaintiff now contends that Defendants should not be able to present their business justification defense to the jury because the business justification is not "legitimate." Defendants, of course, disagree. They maintain that "Zoove was perfectly entitled to terminate its deal with Sumotext to increase Zoove's profits and make it a more viable company." ECF 397 ("Opp. to Pl. MIL No. 1").

As a general matter, Plaintiff is correct that "the promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." *Otter Tail Power Co. v. United States, 410 U.S. 366, 380, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*. Thus, "the desire to make Zoove profitable," Opp. to Pl. MIL No. 1 at 2, is not, by itself, enough to justify "anticompetitive uses of [a company's] dominant economic power," *Otter Tail Power Co., 410 U.S. at 380-81*. It is not, in the parlance of the Rule of Reason, a "procompetitive benefit." That is because the Sherman Act "assumes that an enterprise will protect itself against" unprofitability "by operating with superior service, lower costs, and improved efficiency" rather than "predatory **[*6]** practices." *Id.*

Plaintiff, however, mischaracterizes Defendants' defense. The legitimate business justification issue properly arises with regard to Plaintiff's claim of actual monopolization under *Section 2* against VHT StarStar.[1] *See* ECF 398 at 15. Plaintiff "alleges that after obtaining monopoly power in both relevant markets, VHT StarStar maintained its monopoly power through . . . a practical refusal to deal . . . or a denial of access to an essential facility." ECF 409 at 53 (Plaintiff's proposed jury instruction for claim of actual monopolization). In other words, Plaintiff's theory of liability is based on VHT StarStar's alleged unilateral refusal to deal.[2] *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1184 (9th Cir. 2016)* ("The essential facilities doctrine . . . is a variation on a refusal to deal claim."). "As a general rule, a monopolist has no duty to deal with its competitors." *High Tech. Careers v. San Jose Mercury News, 996 F.2d 987, 990 (9th Cir. 1993)*. On the contrary, the Supreme Court has repeatedly emphasized the "high value" it "place[s] on the right to refuse to deal with other firms." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*; *see also* *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* ("[A]s a general matter, the Sherman Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with **[*7]** whom he will deal.") (internal quotation marks and alterations omitted). And although that right is not "unqualified," the Supreme Court has "been very cautious in recognizing . . . exceptions." *Trinko, 540 U.S. at 408*.

Plaintiff apparently appeals to the "narrow exception," *Aerotec Int'l, 836 F.3d at 1184*, recognized by the Supreme Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. *See also* *Trinko, 540 U.S. at 408* ("The leading case for *§ 2* liability based on refusal to cooperate with a rival . . . is *Aspen Skiing*."). In *Aspen Skiing*, as here, the Court considered "the defendant's decision to cease participation" in a course of dealing with the plaintiff. *Trinko, 540 U.S. at 408*. Specifically, "the defendant—who owned three of the four ski resorts in the market—discontinued a joint lift-ticket package with a smaller rival, the only other competitor in the market, and then flatly refused to sell the rival any lift tickets so it could create its own bundles." *Aerotec Int'l, 836 F.3d at 1184* (citing *Aspen Skiing, 472 U.S. at 592-94*). The jury was properly instructed that the defendant's actions did not violate *Section 2* "if valid business reasons exist for that refusal." *Aspen Skiing, 472 U.S. at 604-05*. The Court upheld the jury's verdict in favor of the plaintiff, which implied that "the jury concluded there were no valid business reasons for the refusal." *Id. at 605*. The Court explained: "The jury may well have concluded that **[*8]** [the defendant] elected to forgo these short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor." *Id. at 608*.

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[1] Plaintiff stated at the Final Pretrial Conference that it has dismissed certain defendants from certain of its claims. These changes are reflected in Plaintiff's proposed verdict form and proposed jury instructions. *See* ECF 407 (Plaintiff's verdict form). Relevant here, Plaintiff brings its claim for actual monopolization under *Section 2* of the Sherman Act against VHT StarStar (and its wholly-owned subsidiary, Zoove) only. *Id.* at 6.

[2] Plaintiff originally alleged a "group boycott" in violation of *Section 1* of the Sherman Act. *See* TAC ¶¶ 274-75. However, Plaintiff is apparently no longer pursuing a group boycott theory, which is a theory of per se illegality, *see* TAC ¶ 274, *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*. Instead, Plaintiff is only pursuing its *Section 1* claim under the Rule of Reason. ECF 409 at 19 (Plaintiff's proposed jury instruction for *Section 1*).

The Supreme Court has since made clear, however, that "*Aspen Skiing* is at or near the outer boundary of *§ 2* liability." *Trinko, 540 U.S. at 409*. The key fact in *Aspen Skiing* was that "[t]he unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Id.* (emphasis in original). That is, because the course of dealing the defendant terminated was profitable, it "was apparently motivated entirely by a decision to avoid providing any benefit to" the defendant's competitor rather than any "normal business purpose." *Aspen Skiing, 472 U.S. at 608, 611*. Terminating (or declining to engage in) an *unprofitable* course of dealing, however, is another matter. "Economic necessity" and "business acumen"—and not the acquisition or maintenance of monopoly power—is the rationale for ending a course of dealing that is unprofitable. *Oahu Gas Serv., Inc. v. Pac. Res., Inc., 838 F.2d 360, 369 (9th Cir. 1988)*. That a course of dealing is unprofitable is therefore a valid business reason. *See id.* (finding no *Section 2* liability for Pacific Resources' **[*9]** refusal to produce propane to sell to Oahu Gas where "the investment required of Pacific Resources to produce propane would have resulted in a negative return"); *MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1132 (9th Cir. 2004)* (distinguishing *Aspen Skiing* because defendant "Qwest attempted to change this prior course of dealing after it realized that the resale of Centrex by MetroNet and others was having a 'significantly negative' impact on its own profitability"); *High Tech. Careers, 996 F.2d at 992* ("If Mercury News can prove its assertion" "that it was actually losing money from the insert," "it should prevail."); *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1225 (10th Cir. 2009)* ("[T]he evidence here suggests that Mercy refused to deal with Dr. Bevan to avoid an unprofitable relationship, and that the hospital pursued the course it did to protect and maximize its chances of profitability in the short-term. . . . *Aspen Skiing* does not require more economic justification than this to avoid *Section 2* liability."); *see also Drinkwine v. Federated Publications, Inc., 780 F.2d 735, 740 (9th Cir. 1985)* ("Drinkwine argues that the Statesman was merely trying to make more money. Even that motive is consistent with competition and the reasoning in *Aspen Skiing*.").

Put another way, "there is 'no duty to deal under the terms and conditions preferred by a competitor's rivals,' there is only a duty not to refrain from dealing where the **[*10]** only conceivable rationale or purpose is to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition." *Aerotec Int'l, 836 F.3d at 1184* (quoting *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 457, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009))*.

In sum, once Plaintiff has presented evidence that Defendants' refused to deal with it in order to gain or maintain monopoly power, Defendants' will be entitled to present evidence that it did so because dealing with Plaintiff was unprofitable. *See Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 483, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (explaining that once plaintiffs "have presented evidence that Kodak took exclusionary action to maintain its parts monopoly," "liability turns . . . on whether 'valid business reasons' can explain Kodak's actions"). Plaintiff can certainly contest whether the deal was or would be unprofitable. *See, e.g.*, *High Tech. Careers, 996 F.2d at 992* (whether Mercury News "was actually losing money from the insert" "will be the issue at trial"). But as just explained, ending an unprofitable course of dealing is a "valid business reason" that would inoculate Defendants' refusal to deal—even if the refusal necessarily excluded competition. *Oahu Gas, 838 F.2d at 369* ("[T]he desire to maintain market power—even a monopolist's market power—cannot create antitrust liability if there was a legitimate business justification.").

That said, Defendants **[*11]** cannot proffer evidence or argument that it was merely "more profitable" to exclude Plaintiff. Furthermore, as just explained, the valid business reasons defense has only been recognized as to unilateral refusals to deal; it is inapplicable to Plaintiff's conspiracy claims. Accordingly, Plaintiff's motion is DENIED in part and GRANTED in part.

B. Plaintiff's Motion in Limine No. 2

Second, Plaintiff asks the Court to limit the use of the trade name "StarStar Mobile" to refer only to Defendant VHT StarStar and not to Defendant Zoove. ECF 391 ("Pl. MIL No. 2") at 2. Because "StarStar Mobile" "is the registered fictitious name for VHT StarStar," Plaintiff believes it would be confusing for the jury if Defendants also use "StarStar Mobile" to refer to Zoove. *Id.*

It is undisputed that VHT StarStar and Zoove—a wholly-owned subsidiary of VHT Star-Star—are distinct legal entities. At the Final Pretrial Conference, however, Defendants asserted that "StarStar Mobile" is not a registered dba name for either entity. In Defendants' telling, the name "StarStar Mobile" "actually does refer to both" entities: "[T]hey operate a single business venture that is referred to internally and holds itself out **[*12]** to the public as 'StarStar Mobile.'" ECF 396 ("Opp. to Pl. MIL No. 2") at 2. "VHT StarStar is the entity that pays employees and makes contracts with customers, while Zoove is the entity that holds contracts with mobile phone operators and owns the relevant technology." *Id.* But if, say, a company wants to lease a StarStar number, it would visit the website https://starstarmobile.com. *Id.* Employees likewise "use starstarmobile.com email accounts and boast StarStar Mobile signature lines." *Id.* at 2-3. Hence, say Defendants, "it is logical to refer to the entities by their technical legal names when describing only one or the other and then to refer to them collectively by their common name." *Id.* at 3.

In light of the foregoing, Plaintiff's motion is DENIED as to the request to use "StarStar Mobile" to refer to VHT StarStar. Nevertheless, it is eminently clear that precision will be necessary to avoid confusing the jury. The parties shall use the legal names for VHT StarStar and Zoove to refer to those entities; the parties shall not use "StarStar Mobile" to refer to either VHT StarStar or Zoove alone. Hence, the Court agrees with Plaintiff that Defendants cannot tell the jury "that StarStar Mobile . . **[*13]** . terminated its business relationship with Sumotext (presumably referring to Zoove), but yet is also the same company that had no course of dealing with Sumotext (presumably referring to VHT StarStar)." Pl. MIL No. 2 at 2. At the same time, the Court will not preclude the Defendants from explaining to the jury that "StarStar Mobile" was a fictitious name used by both VHT StarStar and Zoove. Plaintiff is free to clarify or contest the respective roles of VHT StarStar and Zoove on cross-examination (or re-direct examination, as the case may be).

In addition, in order to aid the jury, the parties shall prepare a chart identifying the name that will be used to refer to each of the relevant entities. That chart must make clear that "StarStar Mobile" is not an independent entity. The deadline for that submission is **February 12, 2020**.

C. Plaintiff's Motion in Limine No. 3

In its third motion in limine, Plaintiff seeks to bar Defendants from (1) arguing that the dismissal of the contract and tortious interference claims "impacts the legal viability of Plaintiffs' antitrust claims" or (2) introducing evidence "that Mblox was originally named as a defendant." ECF 392 ("Pl. MIL No. 3") at 2-3. **[*14]** As the Court confirmed at the Final Pretrial Conference, the parties agree that the fact of the dismissals—of the contract claim, of the tortious interference claim, and of Mblox—is not relevant to Defendants' liability *vel non* for the antitrust claims. *See also* ECF No. 384 ("Def. MIL No. 1") at 1 ("To be sure, Sumotext still can claim that Zoove's termination of its contracts with Sumotext violated ***antitrust law***."). Defendants may have violated the antitrust laws regardless of whether Plaintiff's have claims for breach of contract or tortious interference. Likewise, the current Defendants' liability in unaffected by the Court's dismissal of Mblox. Accordingly, the Court GRANTS Plaintiff's motion, recognizing its limited scope.

Defendants' opposition also raises issues that exceed the scope of Plaintiff's motion but are squarely presented by Defendants' first and second motions in limine. The Court addresses those issues below.

III. DEFENDANTS' MOTIONS IN LIMINE

The Court now turns to Defendants' five motions in limine.

A. Defendants' Motion in Limine No. 1

First, as alluded to earlier, Defendants also make a motion regarding references at trial to the parties' stipulated dismissals of **[*15]** the claims for breach of contract (Count I) and breach of the covenant of good faith and fair dealing (Count II) in the TAC. Defendants make two requests, one concerning what Plaintiff may present and another concerning what Defendants may present. The former is GRANTED but the latter is DENIED.

As to what Plaintiff may present, Defendants ask the Court to bar Plaintiff from "making any argument or offering any evidence advancing the theory that Zoove's termination of Sumotext's contracts violated either contract law or the implied covenant of good faith and fair dealing." Def. MIL No. 1 at 2. The Court agrees that such argument would be improper in light of the stipulated dismissals with prejudice. Plaintiff also represents that it "does not seek to relitigate its claim against Defendants for breach of contract, breach of implied covenants, or tortious interference." ECF 398 ("Opp. to Def. MIL No. 1") at 4. As Defendants acknowledge, however, "Sumotext still can claim that Zoove's termination of its contracts with Sumotext violated ***antitrust law***." Def. MIL No. 1 at 1. That is, Plaintiff will be permitted to offer evidence of conduct under the contract, including Zoove's termination **[*16]** of its contracts with Sumotext.

As to what Defendants may present, Defendants seek permission "to inform the jury that it was entitled under contract law to terminate its agreements with Sumotext." Def. MIL No. 1 at 1. No; that would be improper for two reasons. First of all, "voluntary dismissal of a claim prior to any adjudication and without any stipulated findings of fact does not actually litigate any issue." *Amadeo v. Principal Mut. Life Ins. Co., 290 F.3d 1152, 1159 (9th Cir. 2002)*. Consequently, there has been no finding that Zoove did not commit a breach of contract or a breach of the covenant of good faith and fair dealing. Second, as already discussed with regard to Plaintiff's Motion in Limine No. 3, Defendants' liability (or lack thereof) for the contract claims is not relevant to Defendants' liability for the antitrust claims.

However, should Plaintiff introduce evidence that Zoove terminated its contracts with Sumotext in the course of its antitrust case, Defendants may tell the jury that they are not being sued for breach of contract or breach of the covenant of good faith and fair dealing. To be clear, Defendants may not refer to the dismissal of those claims, *see supra* Part II.C., but they may state that there are no such claims currently **[*17]** in the case. Moreover, Defendant is entitled to bring evidence that the termination (or any other conduct under the contract) was permitted by the contracts at issue.

And again, Plaintiff may respond with evidence and argument that such conduct—whether allowed by the contract or not, violated the antitrust laws.

B. Defendants' Motion in Limine No. 2

Defendants' Motion in Limine No. 2 concerns the parties' stipulated dismissals of the claim for tortious interference with contract (Count III) in the TAC. ECF 385 ("Def. MIL No. 2"). As in their Motion in Limine No. 1, Defendants address the evidence Plaintiff may introduce and the evidence Defendants may introduce.

First, as with the contract claims, Plaintiff may not present evidence or argument advancing the tortious interference claim that has been dismissed with prejudice. However, the Court will not bar Plaintiff from making "[a]ny reference to pre-acquisition communications with Sumotext's customers." Def. MIL No. 2 at 2. Defendants believe such references are irrelevant to Plaintiff's antitrust claim, but the Court is persuaded by Plaintiff's briefing and arguments at the Final Pretrial Conference that the communications may bear on **[*18]** Plaintiff's allegation of conspiracy to monopolize. The Court therefore DENIES Defendant's motion to exclude all evidence regarding Defendants' pre-acquisition communications with Sumotext's customers. Defendants may, of course, object on relevance grounds to specific questions at trial.

Second, Defendants seek to argue that its "pre-termination communications with Sumotext's customers were permissible and proper" and it "did not tortiously interfere with Sumotext's customer contracts." Def. MIL No. 2 at 1-2. Again, the voluntary dismissal of the tortious interference claim is not sufficient to support such findings—which are also irrelevant to Plaintiff's antitrust claims. The Court therefore DENIES Defendants' motion as to this request. As with the contract claims, the Court will permit Defendants to tell the jury that they are not currently being sued for tortious interference with contract.

C. Defendants' Motion in Limine No. 3

In their third motion in limine, Defendants challenge the testimony of Plaintiff's damages expert, Dr. Alan Goedde, ECF 386 ("Def. MIL No. 3") at 5. Dr. Goedde provides two damages figures: (1) $3,048,300 for "Defendants' breach of contract" and (2) $9,223,500 **[*19]** for "the alleged antitrust violations." ECF 386-2 ("") ¶¶ 5-6. Defendants contend that neither of these opinions is admissible and that, consequently, Dr. Goedde should not be permitted to testify at trial.

Turning first to Dr. Goedde's testimony that Plaintiff suffered $3,048,300 in damages from Defendants' alleged breach of contract, Defendants argue this testimony is irrelevant. Plaintiff does not oppose exclusion; it states that it "does not intend to offer Dr. Goedde's breach-of-contract damages calculation at trial." ECF 401 ("Opp. to Def. MIL No. 3") at 4. The Court therefore GRANTS Defendants' motion as to Dr. Goedde's opinion regarding breach of contract damages.

Defendants also move to exclude Dr. Goedde's opinion that Plaintiff suffered $9,223,500 in damages from Defendants' alleged antitrust violations. Defendants make two arguments: (i) that Dr. Goedde has failed to apportion damages amongst Plaintiff's different claims and legal theories, and (ii) that Dr. Goedde did not consider data on StarStar number usage. Def. MIL No. 3 at 1. As set out below, the Court DENIES Defendants' motion on both scores.

i. Failure to Apportion Damages

There are several dimensions to Defendants' **[*20]** apportionment argument.

First, Defendants claim that Dr. Goedde's "antitrust calculation includes built-in damages for breach of contract, too" and "offers the jury no way to back out Sumotext's breach-of-contract and tortious-interference damages." Def. MIL No. 3 at 3-4. But there is no need to "back out" these damages. Dr. Goedde has made clear that the entire $9,223,500 in damages is attributable to the alleged antitrust violations. It is not true that Dr. Goedde's antitrust calculation includes damages "for claims that are no longer in this case," Opp. to Def. MIL No. 3 at 4; it simply includes "conduct that is separately actionable for claims of tortious interference with contract and breach of contract," Goedde Report ¶ 5. If the contract claims remained in the case, adding together the $3,048,300 in contract damages and $9,223,500 in antitrust damages might create a double-counting problem—but that is not the present situation.

Second, Defendants object that Dr. Goedde provided a single damages estimate for Plaintiff's antitrust damages, without apportioning the damages amongst Plaintiff's different legal theories under Sections 1 and 2 of the Sherman Act or between the allegedly distinct **[*21]** leasing and servicing markets. Def. MIL No. 3 at 1. Defendants are correct that "where an antitrust plaintiff challenges multiple business practices of a defendant yet fails to disaggregate its proof of damages," the jury is left "without a reasonable basis for determining the amount by which the plaintiff's damage model figure should be reduced in the event that one or more of the challenged business practices are not found to be exclusionary." *Litton Sys. v. Honeywell, Inc., No. CV 90-4823 MRP(EX), 1996 U.S. Dist. LEXIS 14662, 1996 WL 634213, at *2 (C.D. Cal. July 24, 1996)*. Consequently, "[e]xcept in circumstances where disaggregation is shown to be impossible or impractical, an antitrust plaintiff challenging a variety of conduct is required to segregate damages attributable to particular business practices." *Id.* In *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, for example, the Ninth Circuit ordered a new trial on damages stemming from Kodak's monopolization in the service market because the plaintiff's expert did not distinguish between sales lost "due to Kodak's control over the parts market" and sales "lost due to Kodak's service monopoly." *125 F.3d 1195, 1223 (9th Cir. 1997)*; *see also* *Comcast Corp. v. Behrend, 569 U.S. 27, 35-37, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)* (refusing to accept a model for damages that assumed four market distortions when only one remained at issue **[*22]** in the case).

Nevertheless, the Court does not believe Dr. Goedde's aggregated damages figure must be excluded, for three reasons. To begin with, the disaggregation rule pertains to *conduct*, not *legal theories*. The point is that damages may be awarded only for conduct that is unlawful. Where certain conduct is unlawful under multiple theories of liability, a plaintiff need not—and indeed, could not—disaggregate damages across each theory.

Second, the Court is mindful that, once the fact of an antitrust violation is established, the jury has broad latitude in assessing the amount of damages caused by that violation. *See, e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)* (damages are a "matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes"). Defendants worry that "the jury could conclude that Zoove properly terminated Sumotext (and thus did not restrain trade under Count IV) but that the methods by which the defendants acquired were improper (and thus that there was a conspiracy to monopolize under Count V)." Def. MIL No. 3 at 2. But the **[*23]** latter violation may be sufficient to establish the entire damages amount. *Oltz v. St. Peter's Community Hospital, 19 F.3d 1312 (9th Cir. 1994)*, is instructive on this issue. In that case, plaintiff Oltz proved only that an initial exclusive contract between the alleged conspirators violated the antitrust laws, but not that a later, renegotiated contract was also unlawful. *Id. at 1314*. The Ninth Circuit held that Oltz was not required to separate out damages resulting from the renegotiated contract: "Because the initial conspiracy destroyed his practice, Oltz is entitled to seek recovery for all damages resulting from the destruction of his business in Helena." *Id.*; *see also* *Nat'l Farmers' Org., Inc. v. Associated Milk Producers, Inc., 850 F.2d 1286, 1307 (8th Cir. 1988)* ("[I]f an antitrust plaintiff alleges that the defendant engaged in unlawful acts A, B, C, and D, and acts C and D are later rejected as a basis of liability, it does not automatically follow that the damage award must be reduced. Rather, if acts A and B support the entire damage award, it must be sustained.").

The Court is more concerned about Dr. Goedde's failure to apportion damages between the allegedly distinct markets for leasing and serving StarStar numbers in the United States. For instance, the jury could conclude that there is a distinct market for servicing StarStar numbers but **[*24]** not for leasing StarStar numbers. Moreover, "conduct found anticompetitive in one market may not be anticompetitive in another market." *Image Tech. Servs, 125 F.3d at 1224*. Should the jury find in Plaintiff's favor as to only one market, Defendants have a plausible argument that Sumotext's lost profits from re-leasing alone should be disaggregated from its losses from having been excluded from the servicing market. *See* Def. MIL No. 3 at 1-2.

It is premature to litigate such possibilities at this stage, however. The evidence at trial will determine whether Dr. Goedde's damages estimate is incongruous with the jury's liability findings. Furthermore, as alluded to above, it may be that disaggregation is "impossible or impractical." *Litton Sys., 1996 U.S. Dist. LEXIS 14662, 1996 WL 634213, at *2*. Plaintiff is entitled to show that damages cannot be disaggregated across the various markets or courses of conduct in the instant case, at which point "the burden shifts to the defendant to demonstrate the contrary." *Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1243 (7th Cir. 1982)*, *aff'd*, *465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*.

In sum, Defendants' concerns are well-taken, but insufficient to justify excluding Dr. Goedde's damages opinion. If the jury renders a split verdict and awards the full $9,223,500 in damages, Dr. Goedde's damages opinion may very well prove inadequate to support the **[*25]** damages award. But that is properly addressed in a post-trial motion. *See, e.g.*, *Litton Sys., 1996 U.S. Dist. LEXIS 14662, 1996 WL 634213, at *4* (ordering a new trial on damages). The motion in limine is, therefore, DENIED.

ii. Failure to Consider Data on StarStar Number Usage

Defendants also object to Dr. Goedde's antitrust damages calculation on the ground that he "did not look at usage data"—i.e., data on the degree to which the downstream customers were receiving calls on each of the StarStar numbers they were leasing. Def. MIL No. 3 at 4. As background, Dr. Goedde's damages calculation projected the lease revenues Plaintiff would have earned through 2033. *See* ECF 346-6 ¶ 39. That calculation includes an estimate of net growth in lease revenues, which in turn accounts for customer attrition—i.e., customers who would not have renewed their leases with Plaintiff. Opp. to Def. MIL No. 3 at 6; *see* ECF 346-6 ¶ 39. Defendants complain that Dr. Goedde did not base his estimate of customer attrition on usage data. Def. MIL No. 3 at 4 (citing ECF 386-4 ("Goedde Tr.") at 8-9). This is problematic, Defendants say, because Dr. Goedde purportedly acknowledged that customer attrition is affected by usage rates when he testified that "if a downstream customer **[*26]** wasn't getting much use of the number, they would cancel it." Def. MIL No. 3 at 4.[3]

Plaintiff concedes that Dr. Goedde did not consider usage data. In fact, Dr. Goedde did not calculate a customer attrition rate at all; instead, he estimated "net lease growth" rates for each quarter. Those rates represent *net* growth, which means they "already account for cancellations owing to a customer's belief that their **numbers were not getting enough usage." Opp. to Def. MIL No. 3 at 6. Consequently, Dr. Goedde did not need to separately estimate customer attrition.

The Court notes that Plaintiff's representation that Dr. Goedde's net growth rates include "real-world cancellations," *id.*, is not strictly true. According to the footnotes in his report, Dr. Goedde used "actual Q1 2016 growth, with quarterly step-downs through the end of 2017" for 2016 and 2017, but then switched to the 4.0% annual "long term growth rate projected by the Federal Reserve" for 2018 to 2033. ECF 346-6 at 26, 28. In any event, the source of Dr. Goedde's net growth rates goes to the weight of his testimony, not to its admissibility. Again, Defendants' are free challenge the accuracy of Dr. Goedde's estimates on cross-examination **[*27]** and using their rebuttal expert witness. The Court DENIES the motion to exclude Dr. Goedde's damages opinion for failure to consider usage rates.

D. Defendants' Motion in Limine No. 4

Fourth, Defendants move to exclude portions of Plaintiff's expert, Dr. Ryan Sullivan pursuant to *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. ECF 387 ("Def. MIL No. 4"). Dr. Sullivan is an economist who has been retained by Plaintiff to testify on the scope of the relevant markets in this case. ECF 402 ("Opp. to Def. MIL No. 4").

Federal Rule of Evidence 702 provides that a qualified expert may testify if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."

In *Daubert*, the Supreme Court held that *Rule 702* requires the district court to act as a gatekeeper to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *509 U.S. at 589*. The Supreme Court discussed four factors that may be inform the reliability determination: (1) whether **[*28]** the theory or technique used by the expert "can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known or potential rate of error"; and (4) whether there is "general acceptance" of the theory or technique in the "relevant scientific community." *Id. at 593-94*; *see also Estate of Barabin v. AstenJohnson, Inc., 740 F.3d 457, 463 (9th Cir. 2014)* (reciting factors). Then, in *Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*, the Supreme Court clarified that the "basic gatekeeping obligation" articulated in *Daubert* applies not only to scientific testimony but to all expert testimony. The Supreme Court also emphasized that the reliability inquiry is a flexible one, and "whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Id. at 153*.

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[3] Defendants cite "Goedde Tr. 123:9-19" for this quote but have failed to attach that portion of the deposition to their motion. In any event, the Court does not rely upon the quoted testimony to rule on the motion.

Pursuant to _Rule 702_ and *Daubert*, the district court must also "ensure that the proposed expert testimony is relevant and will serve to aid the trier of fact." _United States v. Finley, 301 F.3d 1000, 1008 (9th Cir. 2002)_ (citing _Daubert, 509 U.S. at 592-93_).

Importantly, however, the district judge's role under *Daubert* is as "a gatekeeper, not a fact finder." *Primiano v. Cook, 598 F.3d 558, 564-65 (9th Cir. 2010)* (internal quotation marks and citation omitted). "When an expert meets the threshold established by _Rule 702_ as explained in Daubert, the expert **[*29]** may testify and the jury decides how much weight to give that testimony." *Id. at 565*. "Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Id. at 564*.

Here, Defendants raise three objections to Dr. Sullivan's proffered testimony. As explained below, the Court agrees with Plaintiff that none of these justifies excluding or limiting Dr. Sullivan's testimony and DENIES Defendants' motion.

iii. Dr. Sullivan's Opinions Regarding the Functionality of StarStar Numbers

First, Defendants argue that Dr. Sullivan should not be able to opine on "why **numbers are different from other consumer engagement products" because (1) he "is not an expert on consumer engagement" and (2) his opinions are not "beyond the common knowledge of the average layman." Def. Mot. No. 4 at 1. The opinions at issue identify the attributes that purportedly distinguish StarStar numbers from competing consumer engagement products such as short codes for texting, apps and websites, and 1-800 phone numbers. *See* ECF 387-2 ("Sullivan Report") ¶¶ 91-98. For instance, Sullivan states that (i) StarStar numbers are "short, unique, and easy to remember," (ii) they **[*30]** "can be used with any mobile phone, require no additional software to use, are easy for the brand to set up, are easy to use and free for the consumer, offer variable length namespaces, and provide text, voice, and multimedia responses," and (iii) are consequently "functionally distinct" from various alternatives. Def. Mot. No. 4 at 1 (citing Sullivan Report ¶¶ 91, 93-95).

As to Defendants' argument regarding the scope of Dr. Sullivan's expertise, Plaintiff responds that Dr. Sullivan did not need specific expertise on StarStar numbers or the consumer engagement industry to provide the opinions at issue. Opp. to Def. Mot. No. 4 at 3. Rather, as an economist with a Ph.D from UC San Diego, he "applied his industrial organization economic training" to the relevant products. *Id.*; *see* Sullivan Report ¶¶ 6-7. The Court agrees. The threshold for expert qualifications under _Federal Rule of Evidence 702_ is "low: a minimal foundation of knowledge, skill, and experience suffices*."* _PixArt Imaging, Inc. v. Avago Tech. Gen. IP (Sing.) Pte. Ltd., No. C 10-00544 JW, 2011 U.S. Dist. LEXIS 133502, 2011 WL 5417090, at *3 (N.D. Cal. Oct. 27, 2011)_ (citing _Hangarter v. Provident Life & Acc. Ins. Co., 373 F.3d 998, 1015 (9th Cir. 2004))_. In light of this "broad conception of expert qualifications," the Court holds that Dr. Sullivan has the requisite expertise in "the general field" of economics **[*31]** to review data specific to the consumer engagement industry and render an opinion on product differentiation in that industry. _Hangarter, 373 F.3d at 1015, 1015 n. 12_*; see, e.g.*, _In re MyFord Touch Consumer Litig., No. 13-CV-03072-EMC, 2016 U.S. Dist. LEXIS 179487, 2016 WL 7734558, at *5 (N.D. Cal. Sept. 14, 2016)_ ("Although he has not worked specifically with automobiles," expert's testimony about the technical problems with Ford's infotainment system fell within his "broad engineering and human factors expertise."); _Hynix Semiconductor Inc. v. Rambus Inc., No. CV-00-20905 RMW, 2008 U.S. Dist. LEXIS 123822, 2008 WL 73689, at *11 (N.D. Cal. Jan. 5, 2008)_ (finding it was "within his economic expertise" for expert to testify as to "the effect alternative technologies would have had on Rambus's ability to wield market power" in various specific technology markets). In the Court's view, Dr. Sullivan's "lack of particularized expertise goes to the weight accorded [his] testimony, not to the admissibility of [his] opinion as an expert." _United States v. Garcia, 7 F.3d 885, 890 (9th Cir. 1993)_.

The Court likewise rejects Defendants' contention that Dr. Sullivan's opinion will not "assist the trier of fact," _Fed. R. Evid. 702_, because the jury can examine the same documents and testimony cited by Dr. Sullivan and form their own views on the functionality of StarStar numbers. Def. Mot. No. 4 at 1. Generally, "[e]xpert testimony assists the trier of fact when it provides **[*32]** information beyond the common knowledge of the trier of fact." _Finley, 301 F.3d at 1008_. Critically, however, the Ninth Circuit has admonished courts "not to overstate the scope of the average juror's common understanding and knowledge" in determining whether expert testimony would be helpful to the jury. *Id. at 1013*. Although it is certainly possible that a juror could compare the relevant products in this case and identify various similarities and differences, Dr. Sullivan opines on the key dimensions across which the products compete. Furthermore, courts have consistently allowed expert testimony on the differences across products in antitrust cases and other contexts. Hence, the Court finds that his opinions are not so obvious as to be unhelpful to the jury.

iv. Dr. Sullivan's Opinions Regarding Market Definition

Second, Defendants argue that Dr. Sullivan's opinion that "there are distinct antitrust markets for **number re-leasing and servicing" is invalid because he did not determine the "cross-elasticity of demand between **numbers and the various alternative communication methods that are the equivalent of StarStar numbers." Def. MIL No. 4 at 2.

It is true that cross-elasticity of demand—i.e., "whether consumers **[*33]** view the products as substitutes for each other," *Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1435 (9th Cir. 1995)*—is a guiding principle of product market definition. *Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1045 (9th Cir. 2008)* ("The outer boundaries of a product market are determined by . . . the cross-elasticity of demand between the product itself and substitutes for it.") (quoting *Brown Shoe v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. A common method for establishing (or disproving) the substitutability of two or more products is the "SSNIP" test, which "asks whether a [hypothetical] monopolist in the proposed market could profitably impose a small but significant and nontransitory price increase" (or "SSNIP") on a product in the proposed market. *Theme Promotions, Inc. v. News Am. Mktg. FSI, 546 F.3d 991, 1002 (9th Cir. 2008)*. As the Ninth Circuit explained:

> If a significant number of customers would respond to a SSNIP by purchasing substitute products, the SSNIP would not be profitable for the hypothetical monopolist. If a monopolist could not profitably impose a SSNIP, the market definition should be expanded to include those substitute products that constrain the monopolist's pricing.

Id.

Defendants contend that Dr. Sullivan's market definition opinion is unreliable because he failed to perform the SSNIP test or otherwise calculate the cross-elasticity of demand between StarStar numbers and various potential substitutes. Def. MIL **[*34]** No. 4 at 4-5. Instead, Defendants say, Dr. Sullivan looked only to the large price differential across the products. *Id.* At the outset, the Court agrees with Defendants that comparing existing prices is not a "SSNIP test" and that "the scope of the relevant market is not governed by the presence of a price differential between competing products." *Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1274 (9th Cir. 1975)*. What Defendants fail to recognize, however, is that the SSNIP test is a *legal* test; it is not a form of scientific analysis. And Dr. Sullivan's report makes clear that he did apply the SSNIP test, albeit without reference to any empirical analysis. *See* Sullivan Report ¶¶ 103-109.

The heart of Defendants' objection, then, appears to be that Dr. Sullivan failed to substantiate his conclusions under the SSNIP test using empirical analysis. To be sure, it may be desirable to collect data and construct a formal econometric model of the SSNIP test. As Plaintiff correctly emphasizes, however, there is no requirement in this Circuit that an expert use any particular form of analysis in developing an opinion on market definition. Courts in this district and others have often admitted expert testimony on market definition where the expert did not **[*35]** conduct an econometric study. *See, e.g.*, *Apple iPod iTunes Antitrust Litig., No. 05-CV-0037 YGR, 2014 U.S. Dist. LEXIS 136437, 2014 WL 4809288, at *7 (N.D. Cal. Sept. 26, 2014)* (denying *Daubert* motion where economics expert looked to "internal Apple documents, employee testimony, and discovery responses, third-party information such as contemporaneous financial analysis and press coverage"); *Hynix Semiconductor Inc., 2008 U.S. Dist. LEXIS 123822, 2008 WL 73689, at *10* (admitting expert report on market definition though expert did not use the SSNIP test to determine if the technologies are close economic substitutes). That Dr. Sullivan's opinions have a foundation in qualitative data such as employee testimony, third-party industry analyses, and media coverage is enough to establish their admissibility. *See* Sullivan Report ¶¶ 89-100, 108.

Accordingly, the Court DENIES Defendants' motion to exclude Dr. Sullivan's opinions regarding market definition for having failed to conduct an econometric analysis. Defendants' arguments that Dr. Sullivan's opinions are conclusory and unpersuasive are proper subjects for cross-examination.

v. Dr. Sullivan's Opinions Regarding Market Power

Defendants' third objection is to Dr. Sullivan's statement in his report that "Defendants have possessed and exerted market power by way of the alleged anticompetitive conduct." **[*36]** Def. MIL No. 4 at 4 (quoting Sullivan Report ¶ 47). Because "market definition and market power are essentially questions of fact" for the jury, *id.* at 5, Defendants believe this statement runs afoul of the rule that "an expert witness cannot give an opinion as to her legal conclusion, *i.e.*, an opinion on an ultimate issue of law," *id.* (quoting *Hangarter, 373 F.3d at 1016*). In response, Plaintiff assures the Court that Dr. Sullivan will provide "economic opinions only" and not impermissible legal conclusions.

To be precise, *Federal Rule of Evidence 704(a)* provides that "an opinion is not objectionable just because it embraces an ultimate issue." *Legal conclusions*, however, are forbidden. This prohibition recognizes that "when an expert undertakes to tell the jury what result to reach, this does not aid the jury in making a decision, but rather attempts to substitute the expert's judgment for the jury's." *United States v. Diaz, 876 F.3d 1194, 1197 (9th Cir. 2017)* (internal quotation marks and citation omitted). "Similarly, instructing the jury as to the applicable law is the distinct and exclusive province of the court." *Hangarter, 373 F.3d at 1016*. At the same time, the Ninth Circuit has recognized that "it is sometimes impossible for an expert to render his or her opinion on a subject without resorting to language that recurs in **[*37]** the applicable legal standard." *Diaz, 876 F.3d at 1198*. In *Diaz*, for instance, the Ninth Circuit affirmed the district court's decision to permit the Government's medical expert to testify that the defendant's prescribing practices were "outside the usual course of medical practice" and lacking "legitimate medical purpose"—phrases that also appear in the elements of the relevant criminal statute. *Id. at 1199*. In sum, although an expert witness may express facts or opinions using "legal terminology," he may not explain the law to the jury or tell the jury how to apply the law to the facts of the case. *Nationwide Transp. Fin. v. Cass Info. Sys., Inc., 523 F.3d 1051, 1058-59 (9th Cir. 2008)*.

Based on the foregoing principles, the Court holds that Dr. Sullivan may provide his expert economic opinion as to whether Defendants possessed market power, to the extent that opinion is supported by economic analysis. In so doing, he may use the term "market power." Although that term is used in antitrust jurisprudence, it does not have so "separate, distinct and specialized" a meaning in the law as opposed to economics that its use rises to the level of a legal conclusion. *Diaz, 876 F.3d at 1198* (agreeing that "legitimate medical purpose" does not have a "separate, distinct and specialized meaning" in law than it has in medicine). Dr. **[*38]** Sullivan may not, however, give the bare conclusion that "Defendants have possessed and exerted market power by way of the alleged anticompetitive conduct." *See* *Hynix Semiconductor Inc., 2008 U.S. Dist. LEXIS 123822, 2008 WL 73689, at *13* (barring an expert from testifying that the defendant's conduct is "anticompetitive" because he "merely attaches the label 'anticompetitive' to defendant's actions without any "economic analysis"). In addition, Dr. Sullivan may not instruct the jury on how "courts have defined the requisite market power for claims brought under *Sections 1* and *2* of the Sherman Act," Sullivan Report ¶ 45, or otherwise "go beyond providing a legal framework," for his analysis, *Huawei Techs., Co, Ltd v. Samsung Elecs. Co, Ltd., 340 F. Supp. 3d 934, 965 (N.D. Cal. 2018)*.

In the instant motion, the only purportedly objectionable portion of Dr. Sullivan's report that Defendants cite is a single sentence summarizing his findings; Defendants have not attached the sections of the report containing Dr. Sullivan's substantive opinions. Because this record is insufficient to justify the exclusion of particular testimony at the motion in limine stage, the motion is DENIED.

E. Defendants' Motion in Limine No. 5

Last, Defendants are concerned that "Sumotext intends to call all six defense witnesses . . . live as adverse witnesses during Sumotext's case in chief." **[*39]** ECF 388 ("Def. MIL No. 5") at 1. Defendants acknowledge the "general right of a plaintiff to call adverse witnesses," but ask the Court to prohibit Sumotext from "calling *all of* the defense's witnesses adversely" for two reasons: (1) it would inconvenience the five witnesses who live in Florida to travel to San Jose twice, and (2) it would produce "a disjointed trial narrative that would unfairly disadvantage the defendants." *Id.* at 1-2.

The Court is sympathetic to Defendants' concerns. However, Defendants have cited no authority for the proposition that calling all—rather than merely some—of the defense's witnesses is unfairly prejudicial, and the Court sees no principled basis upon which to determine which witnesses may or may not be called. Hence, the Court will not arbitrarily limit the number of defense witnesses Plaintiff may call during its case-in-chief. Instead, the Court will grant Defendants' alternative request to have the option of eliciting evidence for their case-in-chief from their designated witnesses at the time that Plaintiff calls those witnesses; Defendants will not be limited to cross-examining on topics covered during Plaintiff's direct examination. Defendants are also **[*40]** free to advise the jury that it is doing so for the convenience of the witness. Plaintiff has not opposed this commonly-used trial practice. ECF 403 at 2. Defendants are not, of course, required to put on their full case during Plaintiff's case-in-chief; they may call their witnesses a second time if they so choose.

Defendants' motion is DENIED as to the request to limit the witnesses Plaintiff may call but GRANTED as to the request to fully examine the defense witnesses when they are called by Plaintiff.

IV. ORDER

For the foregoing reasons, the Court rules on Plaintiff's motions in limine as follows:

- Motion in Limine No. 1, ECF 390: DENIED in part without prejudice and GRANTED in part.
- Motion in Limine No. 2, ECF 391: DENIED without prejudice.
- Motion in Limine No. 3, ECF 392: GRANTED.

The Court rules on Defendants' motions in limine as follows:

- Motion in Limine No. 1, ECF 384: GRANTED in part and DENIED without prejudice in part.
- Motion in Limine No. 2, ECF 385: DENIED without prejudice.
- Motion in Limine No. 3, ECF 386: DENIED without prejudice.
- Motion in Limine No. 4, ECF 387: DENIED without prejudice.

- Motion in Limine No. 5, ECF 388: DENIED as to the request to limit the witnesses **[*41]** Plaintiff may call but GRANTED as to the request to fully examine the defense witnesses when they are called by Plaintiff rather than call the witnesses a second time.

IT IS SO ORDERED.

Dated: February 3, 2020

/s/ Beth Labson Freeman

BETH LABSON FREEMAN

United States District Judge

[721 Bourbon, Inc v. Willie's Chicken Shack, LLC]

United States District Court for the Eastern District of Louisiana

February 6, 2020, Decided; February 6, 2020, Filed

CIVIL ACTION NO. 19-9069-WBV-MBN SECTION D(5)

Reporter

2020 U.S. Dist. LEXIS 20044 *; 2020-1 Trade Cas. (CCH) P81,087; 2020 U.S.P.Q.2D (BNA) 43005; 2020 WL 587886

721 BOURBON, INC. VERSUS WILLIE'S CHICKEN SHACK, LLC, ET AL.

Subsequent History: Reconsideration denied by *721 Bourbon, Inc. v. Willie's Chicken Shack, LLC, 2020 U.S. Dist. LEXIS 36124 (E.D. La., Mar. 3, 2020)*

Core Terms

affirmative defense, defendants', antitrust, counterclaims, sham, motion to dismiss, allegations, trademark, lawsuit, anticompetitive, baseless

Counsel: [*1] For 721 Bourbon, Inc., doing business as, Tropical Isle, Plaintiff: Gregory D. Latham, LEAD ATTORNEY, Intellectual Property Consulting, LLC, New Orleans, LA; Ian Charles Barras, Intellectual Property Consulting, New Orleans, LA; Kent C. Barnett, Intellectual Property Consulting, New Orleans, LA; Mark Norman Melasky, Intellectual Property Consulting, LLC, New Orleans, LA; Richard Thomas Sahuc, Intellectual Property Consulting, LLC, New Orleans, LA; Stephen M. Kepper, Intellectual Property Consulting, LLC, New Orleans, LA.

For Willie's Chicken Shack, LLC, doing business as, Willie's Chicken Shack, Willie's Canal, LLC, doing business as, Willie's Chicken Shack, Willie's Decatur, LLC, doing business as, Willie's Chicken Shack, Willie's 301 Decatur, LLC, doing business as, Willie's Chicken Shack, Willie's 409 Bourbon, LLC, doing business as, Willie's Chicken Shack, Willie's 630 Bourbon, LLC, doing business as, Willie's Chicken Shack, Willie's 707 Canal, LLC, doing business as, Willie's Chicken Shack, Aaron Motwani, Defendants: Steven M Hannan, LEAD ATTORNEY, Hannan, Giusti & Hannan, LLP, Metairie, LA; George W. Healy, IV, George W. Healy, IV & Associates, Gulfport, MS; Thomas St. Paul Keaty, **[*2]** II, Keaty Law Firm, New Orleans, LA.

For Willie's 409 Bourbon, LLC, Willie's Decatur, LLC, Willie's Chicken Shack, LLC, Willie's Canal, LLC, Willie's 630 Bourbon, LLC, Willie's 707 Canal, LLC, Willie's 301 Decatur, LLC, Willie's 630 Bourbon, LLC, Willie's Chicken Shack, LLC, Aaron Motwani, Willie's 707 Canal, LLC, Willie's 409 Bourbon, LLC, Willie's Canal, LLC, Willie's Decatur, LLC, Willie's 301 Decatur, LLC, Counter Claimants: Steven M Hannan, LEAD ATTORNEY, Hannan, Giusti & Hannan, LLP, Metairie, LA; George W. Healy, IV, George W. Healy, IV & Associates, Gulfport, MS; Thomas St. Paul Keaty, II, Keaty Law Firm, New Orleans, LA.

For 721 Bourbon, Inc., Counter Defendant: Gregory D. Latham, LEAD ATTORNEY, Intellectual Property Consulting, LLC, New Orleans, LA; Ian Charles Barras, Intellectual Property Consulting, New Orleans, LA; Kent C. Barnett, Intellectual Property Consulting, New Orleans, LA; Mark Norman Melasky, Intellectual Property Consulting, LLC, New Orleans, LA; Richard Thomas Sahuc, Intellectual Property Consulting, LLC, New Orleans, LA; Stephen M. Kepper, Intellectual Property Consulting, LLC, New Orleans, LA.

Judges: WENDY B. VITTER, UNITED STATES DISTRICT JUDGE.

Opinion by: WENDY B. VITTER

Opinion

ORDER [*3]

Before the Court is Plaintiff's Motion to Strike Defendants' Affirmative Defenses (R. Doc. 15),[1] Plaintiff's Motion to Dismiss for Failure to State a Claim (R. Doc. 16),[2] and Defendants' Motion for Leave to File Supplemental Memorandum in Support of Opposition to Plaintiff's *Rule 12(b)(6)* Motion to Dismiss Antitrust Counterclaims (R. Doc. 45).[3]

I. Factual Background

This is a trademark infringement case. The plaintiff ("721 Bourbon, Inc. d/b/a Tropical Isle") claims that it was forced to file this lawsuit in April 2019 as a last resort because the defendants refused to stop selling cocktails in a souvenir yard cup that the plaintiff claims mimics the federally registered trade dress design of Tropical Isle's distinctive, green, souvenir yard cup.[4] The defendants answered the plaintiff's complaint with numerous affirmative defenses and antitrust and anticompetition counterclaims.[5] The plaintiff's complaint brings four claims against the defendants: federal trademark infringement; federal unfair competition; state trademark dilution; and state unfair trade practices.

II. Legal Standard and Analysis

The plaintiff seeks to strike the defendants' affirmative defenses and dismiss Counts IV, **[*4]** V, and VI of the defendants' counterclaims.[6]

A. Striking Affirmative Defenses

A court may strike any defense that is insufficient, redundant, immaterial, impertinent, or scandalous either on its own motion, or on motion by a party.[7] "A motion to strike is appropriate when the allegations are prejudicial to the opposing party or immaterial to the lawsuit. An allegation is immaterial to the lawsuit when the challenged allegations do not bear on the subject matter of the litigation."[8] The Fifth Circuit provides that "[a]n affirmative defense is not valid if it appears to a certainty that the plaintiff would succeed despite any set of facts which could be proved in support of the defense."[9] Whether an affirmative defense is insufficient depends on "the nature of the claim for relief and the defense in question."[10] A motion to strike an affirmative defense is generally disfavored.[11] In

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[1] This motion is opposed. *See* R. Doc. 21. The plaintiff filed a reply brief. *See* R. Doc. 33.

[2] This motion is opposed. *See* R. Doc. 22. The plaintiff filed a reply brief. *See* R. Doc. 35.

[3] This motion is opposed. *See* R. Doc. 48.

[4] *See* R. Doc. 16-1, p. 2.

[5] *See* R. Doc. 12.

[6] *See* R. Docs. 15, 16.

[7] *See* *Fed. R. Civ. P. 12(f)*; *see also* *Schlesinger v. Hasco Thibodaux, LLC, 2014 U.S. Dist. LEXIS 15574, 2014 WL 527657, at *1 (E.D. La. Feb. 7, 2014)*.

[8] *Schlesinger, 2014 U.S. Dist. LEXIS 15574, 2014 WL 527657, at *1* (internal citations omitted).

[9] *EEOC v. First Nat'l Bank of Jackson, 614 F.2d 1004, 1008 (5th Cir. 1980)*.

deciding a motion to strike, the Court considers whether the affirmative defenses asserted by the defendant are sufficient as a matter of law.[12] The Court considers whether the defenses are applicable and whether they are sufficiently pled as to give the plaintiff fair notice: "a defendant . . . must plead an affirmative **[*5]** defense with enough specificity or factual particularity to give the plaintiff 'fair notice' of the defense that is being advanced."[13] The requirement is met if the defendant "sufficiently articulated the defense so that the plaintiff was not a victim of unfair surprise."[14]

Plaintiff argues that the second, third, fourth, sixth, ninth, twelfth, and seventeenth affirmative defenses are actually negative arguments against elements of trademark infringement, which the plaintiff bears the burden of proving at trial.[15] After careful consideration of the parties' memoranda, the Court strikes as redundant the second, third, fourth, sixth, thirteenth, and fourteenth affirmative defenses. Because the Court grants the plaintiff's motion to dismiss Counts IV, V, and VI of the defendants' counterclaims, discussed below, the tenth and eleventh affirmative defenses fail and are hereby stricken. The affirmative defenses that are not stricken as detailed in this Order remain.

B. Dismissing Counterclaims

The plaintiff seeks to dismiss Counts IV, V, and VI of the defendants' counterclaims. Count IV alleges an antitrust violation under the Sherman Act, attempted monopolization; **[*6]** Count V alleges unfair competition under Louisiana law; and Count VI alleges negligent interference under Louisiana law.

Under *Federal Rule of Civil Procedure 12(b)(6)*, a defendant can seek dismissal of a complaint, or any part of it, for failure to state a claim upon which relief may be granted.[16] To survive a *Rule 12(b)(6)* motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[17] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[18] "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully."[19]

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[10] *Id.*

[11] *See* *Acadian Diagnostic Laboratories, LLC v. Quality Toxicology, LLC, 2017 U.S. Dist. LEXIS 227538, 2017 WL 9439103, at *4 (M.D. La. Nov. 17, 2017)*.

[12] *See id.*

[13] *Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999)*; *see* *Acadian Diagnostic Laboratories, LLC, 2017 U.S. Dist. LEXIS 227538, 2017 WL 9439103, at *4*.

[14] *Id.* (internal citation and quotation marks omitted).

[15] Elements of a trademark infringement claim is (1) the mark the plaintiff seeks to protect is eligible for protections; (2) the plaintiff is the senior user; and (3) there is a likelihood of confusion between the plaintiff's mark and the defendant's mark. *See* *Union Nat'l Bank of Tex., Laredo, Tex. v. Union Nat'l Bank of Tex., Austin, Tex., 909 F.2d 839, 844 (5th Cir. 1990)*.

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

[17] *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*.

[18] *Gentilello v. Rege, 627 F.3d 540, 544 (5th Cir. 2010)* (quoting *Iqbal, 556 U.S. at 678* (quotation marks omitted)).

[19] *Iqbal, 556 U.S. at 679* (quotation marks omitted).

A court must accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.[20] A court, however, is not bound to accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.[21] "Dismissal is appropriate when the complaint on its face shows a bar to relief."[22] In deciding a *Rule 12(b)(6)* motion to dismiss, a court is generally prohibited from considering information outside the pleadings **[*7]** but may consider documents outside of the complaint when they are: (1) attached to the motion; (2) referenced in the complaint; and (3) central to the plaintiff's claims.[23]

Under *Section 1* of the *Sherman Act*, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[24] For the defendants to prevail on their *Section 1* violation counterclaim, they must show that the plaintiff (1) engaged in a conspiracy (2) that produced some anticompetitive effect (3) in the relevant market.[25] The defendants must also show an actual injury and an antitrust injury, meaning the plaintiff's activities caused an injury to competition.[26]

The plaintiff seeks protection under the *Noerr-Pennington* doctrine for Counts IV, V, and VI of the defendants' counterclaims. This doctrine was established by two Supreme Court cases: *Eastern R.R. Presidents Conference v. Noerr Motor Freight Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*, and *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*. "The essence of the doctrine is that parties who petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent."[27] Pre-suit threats to litigate, *i.e.*, **[*8]** cease-and-desist letters, made in good faith are also exempt.[28] The plaintiff argues that the *Noerr-Pennington* doctrine can apply to Counts V and VI, which are brought under the *Louisiana Unfair Trade Practices Act ("LUPTA")*.[29] The Fifth Circuit provides that

> Although the *Noerr—Pennington* doctrine initially arose in the antitrust field, other circuits have expanded it to protect *first amendment* petitioning of the government from claims brought under federal and state laws, including *section 1983* and common-law tortious interference with contractual relations. We find it easy to agree that the same rationale under ***antitrust law*** that supports [the defendant's] petitions to the City [of Dallas, another defendant] also serves to protect [the defendant] from the tort claim. There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust.

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[20] *Gines v. D.R. Horton, Inc., 699 F.3d 812, 816 (5th Cir. 2012)* (quoting *In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007))*.

[21] *Plotkin v. IP Axess Inc., 407 F.3d 690, 696 (5th Cir. 2005)*.

[22] *Cutrer v. McMillan, 308 Fed. App'x. 819, 820 (5th Cir. 2009)* (internal citation and quotation marks omitted).

[23] *Maloney Gaming Mgmt., LLC v. St. Tammany Parish, 456 Fed. App'x. 336, 340-41 (5th Cir. 2011)*.

[24] *15 U.S.C. § 1*.

[25] *See Veritext Corp. v. Bonin, 417 F. Supp. 3d 778, 2019 U.S. Dist. LEXIS 166701, 2019 WL 4738207, at *3 (E.D. La. Sept. 27, 2019)* (internal citation omitted).

[26] *See id.*

[27] *Video Intern. Prod., Inc. v. Warner-Amex Cable Commc'ns., Inc., 858 F.2d 1075, 1082 (5th Cir. 1988)*.

[28] *See Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1367 (5th Cir. 1983)*.

[29] *See* R. Doc. 16-1, citing ***Capitol House Preservation Co., L.L.C. v. Perryman Consultants, Inc., 47 So. 3d 408 (La. 1 Cir. 2009)***.

Video Intern. Prod., Inc. v. Warner-Amex Cable Commc'ns., Inc., 858 F.2d 1075, 1084 (5th Cir. 1988) (internal citations omitted). The Court finds that the same reasoning applies to the defendants' counterclaims under Louisiana law.

The defendants argue that the plaintiff is not entitled to this immunity. The United States Supreme Court has carved out an antitrust **[*9]** exemption for efforts to influence governmental action through the *Noerr-Pennington* antitrust immunity doctrine.[30] The petitioning of governmental bodies, including judicial bodies,[31] does not qualify for *Noerr-Pennington* immunity "if it is a mere sham to cover an attempt to interfere directly with the business relationships of a competitor."[32] The sham exception applies in this suit if the plaintiff is using litigation as an anticompetitive weapon, rather than genuinely seeking to achieve an intended result.[33]

The Supreme Court has articulated a two-part test for determining whether litigation is a "sham:"

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of the definition a court should focus on whether the baseless suit conceals "an attempt to interfere directly" **[*10]** with a competitor's business relationships, *Noerr, supra, 365 U.S., at 144, 81 S.Ct., at 533*, through the "use [of] the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon[.]" This two-tiered process requires a plaintiff to disprove the challenged lawsuit's legal viability before the court will entertain evidence of the suit's economic viability.

Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 50, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993) (internal citations omitted). "The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation."[34] Probable cause in this sense requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication.[35]

The defendants argue that the plaintiff is not entitled to *Noerr-Pennington* immunity because the plaintiff's actions allegedly fall under the "sham" exception: "[The plaintiff's] actions were objectively baseless and subjectively baseless as [the plaintiff] possessed the requisite intent."[36] Having carefully reviewed the relevant law and applicable memoranda, the Court finds that the defendants fail to prove that this litigation is a "sham." The defendants' continued iteration that the plaintiff's actions are objectively baseless does **[*11]** not make them so. Support for this finding includes the fact that the plaintiff owns a registered trademark and has taken steps to protect that trademark—before and by filing this lawsuit. The Court declines to discuss in detail the technical merits of the plaintiff's claims nor is the Court making a determination on whether the plaintiff will succeed at trial. This Order is limited to the Court's finding that this litigation is not a sham and, therefore, the Court dismisses Counts IV, V, and VI of the defendants' counterclaims.

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[30] Ann K. Wooster, J.D., "*Sham" Exception to Application of Noerr—Pennington Doctrine, Exempting from Federal Antitrust Laws Joint Efforts to Influence Governmental Action Based on Petitioning Administrative or Judicial Body*, 193 A.L.R. Fed. 139 (2004).

[31] *See Gardner v. Clark, 101 F. Supp. 2d 468, 472 (N.D. Miss. 2000)*.

[32] *Id.*

[33] *Veritext Corp. v. Bonin, 417 F. Supp. 3d 778, 2019 U.S. Dist. LEXIS 166701, 2019 WL 4738207, at *5 (E.D. La. Sept. 27, 2019)* (internal citations and quotation marks omitted).

[34] *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 62, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* (internal citations omitted).

[35] *See id.at 62-63*.

[36] R. Doc. 22, p. 7.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff's Motion to Strike Defendants' Affirmative Defenses (R. Doc. 15) is GRANTED;

IT IS FURTHER ORDERED that Plaintiff's Motion to Dismiss for Failure to State a Claim (R. Doc. 16) is GRANTED;

IT IS FURTHER ORDERED that Defendants' Motion for Leave to File Supplemental Memorandum in Support of Opposition to Plaintiff's *Rule 12(b)(6)* Motion to Dismiss Antitrust Counterclaims (R. Doc. 45) is DENIED.

New Orleans, Louisiana, this the 6th day of February, 2020.

/s/ Wendy B. Vitter

WENDY B. VITTER

UNITED STATES DISTRICT JUDGE

End of Document

Maui Jim v. Smartbuy Guru Enters.

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

February 7, 2020, Decided; February 24, 2020, Filed

No. 1:16 CV 9788

Reporter
459 F. Supp. 3d 1058 *; 2020 U.S. Dist. LEXIS 209608 **; 2020 WL 4435320

MAUI JIM, INC., Plaintiff and Counterclaim Defendant, v. SMARTBUY GURU ENTERPRISES, MOTION GLOBAL LTD., SMARTBUYGLASSES SOCIETA A RESPONSABILITA LIMITATA, SMARTBUYGLASSES OPTICAL LIMITED, Defendants and Counterclaimants.

Prior History: *Maui Jim, Inc. v. SmartBuy Guru Enters., 386 F. Supp. 3d 926, 2019 U.S. Dist. LEXIS 78937, 2019 WL 2076366 (N.D. Ill., May 10, 2019)*

Core Terms

sunglasses, Defendants', customer, retailers, Photographs, warranty, counterclaim, website, trademark, consumers, manufacturer, parties, products, purchasing, summary judgment motion, material difference, summary judgment, counterfeit, material fact, brands, first sale doctrine, authentic, damages, repair, marks, first sale, advertising, contracts, third-party, selling

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

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

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

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

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

HN1[ ] **Summary Judgment, Burdens of Proof**

Summary judgment is appropriate when the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. A genuine issue for trial exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Under *Rule 56*, the movant bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. In responding to a summary judgment motion, the nonmoving party may not simply rest upon the allegations contained in the pleadings but must present specific facts to show that a genuine issue of material fact exists. *Fed. R. Civ. P. 56(e)(2)*.

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Cross Motions

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

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

HN2[] **Entitlement as Matter of Law, Appropriateness**

On cross-motions for summary judgment, the court assesses whether each movant has satisfied the requirements of *Fed. R. Civ. P. 56*. As with any summary judgment motion, a court considers cross-motions for summary judgment construing all facts, and drawing all reasonable inferences from those facts, in favor of the non-moving party. Inferences that are supported by only speculation or conjecture will not defeat a summary judgment motion.

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

HN3[] **Infringement Actions, Determinations**

A plaintiff must establish essentially two elements to prevail on Lanham Act trademark claims: (1) that it has a protectable trademark and (2) that defendants' use of the trademark is likely to cause confusion among consumers.

Trademark Law > ... > Registration Procedures > Federal Registration > Federal Registration as Evidence

HN4[] **Federal Registration, Federal Registration as Evidence**

Registry with the U.S. Patent and Trademark Office constitutes prima facie evidence of the validity of a plaintiff's registered trademarks and of a plaintiff's exclusive right to use the trademarks.

Copyright Law > ... > Criminal Infringement > Defenses > First Sale Doctrine

Trademark Law > ... > Infringement Actions > Defenses > First Use

Copyright Law > ... > Civil Infringement Actions > Defenses > First Sale Doctrine

HN5[] **Defenses, First Sale Doctrine**

The first sale doctrine is a defense to infringement subject to certain well-defined exceptions. Under the doctrine, when a retailer merely resells a genuine, unaltered good under the trademark of the producer, the use of the producer's trademark by the reseller will not deceive or confuse the public as to the nature, qualities, and origin of the good. Rather, the consumer gets exactly what the consumer bargains for, the genuine product of the particular producer. Thus, resale by the first purchaser of the original article under the producer's trademark is generally neither infringement nor unfair competition.

Trademark Law > Trademark Enforcement by US Customs > Importation and Recordation of Gray Market Goods

HN6[] **Trademark Enforcement by US Customs, Importation and Recordation of Gray Market Goods**

Trademarked goods are not considered genuine goods until the trademark owner first authorizes the sale of those goods.

Copyright Law > ... > Criminal Infringement > Defenses > First Sale Doctrine

Evidence > Burdens of Proof > Allocation

Copyright Law > ... > Civil Infringement Actions > Defenses > First Sale Doctrine

HN7[] **Defenses, First Sale Doctrine**

The party asserting the first sale defense bears the initial burden of satisfying its requirements. That means that the party asserting the first sale defense has the burden to show ownership through lawful acquisition.

Evidence > Burdens of Proof > Allocation

HN8[] **Burdens of Proof, Allocation**

Fairness dictates that a litigant ought not have the burden of proof on facts particularly within the knowledge of the opposing party.

Copyright Law > ... > Criminal Infringement > Defenses > First Sale Doctrine

HN9[] **Defenses, First Sale Doctrine**

The first sale doctrine does not apply to products that have been materially altered from their original form. It is incumbent upon the reseller to show that the differences are not of the kind that consumers would likely consider in purchasing the product. An alteration is material if it changes something about a product that is relevant to consumers' decision to purchase the product.

Copyright Law > ... > Criminal Infringement > Defenses > First Sale Doctrine

Copyright Law > ... > Civil Infringement Actions > Defenses > First Sale Doctrine

HN10[] **Defenses, First Sale Doctrine**

Absence of or a different warranty is held to be a material difference for purposes of the first sale doctrine.

Copyright Law > ... > Criminal Infringement > Defenses > First Sale Doctrine

HN11[] Defenses, First Sale Doctrine

Differences in warranties must influence a customer's purchasing decision to overcome the first sale doctrine. It is incumbent upon the re-seller to show that the differences are not of the kind that consumers would likely consider in purchasing the product.

Trademark Law > Likelihood of Confusion > Factors for Determining Confusion > Relationship of Goods

HN12[] Factors for Determining Confusion, Relationship of Goods

Legitimate quality control measures can constitute a material difference in appropriate circumstances. Quality control measures may create subtle differences in quality that are difficult to measure but important to consumers. Courts do not require trademark owners show that the actual quality of the inspected goods is measurably higher than that of the uninspected goods. At the same time, quality control is not a talisman the mere utterance of which entitles the trademark owner to judgment. Rather, the test is whether the quality control procedures established by the trademark owner are likely to result in differences between the products such that consumer confusion regarding the sponsorship of the products could injure the trademark owner's goodwill. Thus, a trademark owner must demonstrate that its quality control procedures create a likelihood that its products are different from those that it does not control. In so demonstrating, the trademark owner need not show that its procedures succeed in preventing virtually all substandard product from reaching the consumer. It is enough that it stops purchases of substandard product to create a material difference between the categories of authorized and unauthorized sales.

Copyright Law > ... > Criminal Infringement > Defenses > First Sale Doctrine

Trademark Law > ... > Infringement Actions > Defenses > First Use

Copyright Law > ... > Civil Infringement Actions > Defenses > First Sale Doctrine

HN13[] Defenses, First Sale Doctrine

Under the sponsorship exception, the first sale doctrine's protections do not extend to resellers who use other entities' trademarks to give the false impression that they are favored or authorized dealers for a product. Thus, use of a plaintiff's trademark in promotional materials, such as advertising or displays, is not protected by the first sale doctrine, but use of a plaintiff's trademark solely to identify a product up for sale is protected. The sponsorship exception is a relevant inquiry because one who resells trademark goods is obligated to do so in a manner that is not likely to cause confusion or imply that the seller is associated with the manufacturer. That means that conduct that goes beyond the mere resale of trademarked goods and its incidental advertising may not be protected by the first sale doctrine.

Evidence > Burdens of Proof > Allocation

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > Burdens of Proof

Trademark Law > Likelihood of Confusion > Factors for Determining Confusion > Relationship of Goods

HN14[] Burdens of Proof, Allocation

A trademark holder must establish that a defendant's use of its trademarks is likely to cause confusion among consumers. A seven-factor test can be used to determine whether a likelihood of confusion exists. Courts can presume likelihood of confusion where a defendant produces counterfeit goods in an apparent attempt to capitalize upon the popularity of, and demand for, another's product. The party asserting infringement bears the burden of proving confusion.

Trademark Law > ... > Registration Procedures > Federal Registration > Degree of Protection

Trademark Law > ... > Factors for Determining Confusion > Intent of Defendant to Confuse > Inferences & Presumptions

HN15[] Federal Registration, Degree of Protection

Under the counterfeit presumption test, a court presumes likelihood of confusion when a defendant has produced counterfeit goods to capitalize on the popularity of another's product. To be counterfeit, the goods must have been produced by an entity that was not authorized to use the mark at the time the goods were manufactured. *15 U.S.C.S. § 1116(d)(1)(B)*. Additionally, counterfeit goods must bear a spurious mark which is identical with, or substantially indistinguishable from, a registered mark. *15 U.S.C.S. § 1127*. A protected mark need not appear on an item to render it counterfeit; rather, the Lanham Act only requires that the protected mark be used in connection with the sale.

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 3rd Circuit Court

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 7th Circuit Court

Trademark Law > ... > Infringement Actions > Summary Judgment > Appropriateness

Trademark Law > ... > Factors for Determining Confusion > Similarity of Marks > Commercial Impressions

Trademark Law > ... > Factors for Determining Confusion > Intent of Defendant to Confuse > Inferred Intent

HN16[] Circuit Court Factors, 3rd Circuit Court

To determine whether a likelihood of confusion exists, a court considers the following factors: (1) the similarity between the marks in appearance and suggestion; (2) the similarity of the products; (3) the area and manner of concurrent use; (4) the degree and care likely to be exercised by consumers; (5) the strength of the plaintiff's mark; (6) any actual confusion; and (7) the intent of the defendant to palm off his product as that of another. No single factor is dispositive. Courts may assign varying weight to each of the factors depending on the facts presented, though usually the similarity of the marks, the defendant's intent, and actual confusion are particularly important. Where the evidence is so one-sided that there can be no doubt about how the question should be answered, the likelihood of confusion can be resolved on summary judgment.

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 11th Circuit Court

Trademark Law > ... > Factors for Determining Confusion > Similarity of Marks > Commercial Impressions

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 3rd Circuit Court

Trademark Law > Likelihood of Confusion > Factors for Determining Confusion > Relationship of Goods

HN17[] Circuit Court Factors, 11th Circuit Court

The first factor of the seven-factor test for determining whether a likelihood of confusion exists, similarity between marks in appearance and suggestion, is assessed by viewing the similarity of the marks as a whole, not from their elements separated and considered in detail. The test is whether the viewer of an accused mark would be likely to associate the product with which it is connected with the source of products with which an earlier mark is connected.

Trademark Law > ... > Factors for Determining Confusion > Similarity of Marks > Commercial Impressions

HN18[] Similarity of Marks, Commercial Impressions

The test for similarity of products is whether the parties' products are the kind the public might very well attribute to a single source. Consumers are likely to attribute similar products to a single source when the parties compete in the same market, targeting similar consumers.

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 7th Circuit Court

Trademark Law > Likelihood of Confusion > Factors for Determining Confusion > Relationship of Goods

HN19[] Circuit Court Factors, 7th Circuit Court

The third factor of the seven-factor test for determining whether a likelihood of confusion exists, the area and manner of concurrent use, assesses whether there is a relationship in use, promotion, distribution, or sales between the goods or services of the parties.

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 2nd Circuit Court

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 3rd Circuit Court

Trademark Law > Likelihood of Confusion > Factors for Determining Confusion > Relationship of Goods

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 7th Circuit Court

Trademark Law > ... > Factors for Determining Confusion > Similarity of Marks > Commercial Impressions

HN20[] Circuit Court Factors, 2nd Circuit Court

The fourth factor of the seven-factor test for determining whether a likelihood of confusion exists examines the degree of care likely to be exercised by purchasers to determine whether the purchasers would be confused by the defendant's products. The general rule guiding the factor is the more widely accessible and inexpensive the products the more likely that consumers will exercise a lesser degree of care and discrimination in their purchases. Some courts temper the weight given to the factor where there is a strong similarity of marks and identity of goods.

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 2nd Circuit Court

Trademark Law > Subject Matter of Trademarks > Eligibility for Trademark Protection > Strength of Trademark

Trademark Law > ... > Eligibility for Trademark Protection > Distinctiveness > Evidence of Distinctiveness

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 6th Circuit Court

HN21[] **Circuit Court Factors, 2nd Circuit Court**

The fifth factor of the seven-factor test for determining whether a likelihood of confusion exists inquires into the mark's strength. The stronger the mark, the more likely it is that encroachment on it will produce confusion. The strength of a trademark refers to the mark's distinctiveness, meaning its likelihood to identify the product as something emanating from a specific source.

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 11th Circuit Court

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 2nd Circuit Court

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 6th Circuit Court

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 4th Circuit Court

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 9th Circuit Court

HN22[] **Circuit Court Factors, 11th Circuit Court**

The sixth factor of the seven-factor test for determining whether a likelihood of confusion exists looks towards any evidence of actual consumer confusion. A plaintiff does not need evidence of actual confusion to demonstrate a likelihood of confusion.

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 11th Circuit Court

Trademark Law > ... > Factors for Determining Confusion > Intent of Defendant to Confuse > Inferred Intent

HN23[] **Circuit Court Factors, 11th Circuit Court**

The final factor of the seven-factor test for determining whether a likelihood of confusion exists focuses on evidence that a defendant attempted to pass off its product as having come from the plaintiff. Evidence of bad faith intent to confuse consumers is particularly relevant.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Elements of False Advertising

HN24[] **False Advertising, Lanham Act**

A false advertising claim requires proof of five elements: (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a loss of goodwill associated with its products. The first element requires proof that the defendant made a false statement of fact in a commercial advertisement about its own or another's product. Two types of false statements can violate the Lanham Act: (1) claims that are literally false as a factual matter or (2) claims that may be literally true or ambiguous that implicitly convey a false impression, are misleading in context, or likely to deceive consumers. Literally false statements give rise to a presumption of deception and materiality.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Elements of False Advertising

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Scope

HN25[] **False Advertising, Lanham Act**

The false advertising remedy under the Lanham Act does not cover all deceitful business practices.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > False Designation of Origin

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Trade Dress Protection > Causes of Action

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Reverse Palming Off

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Palming Off

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

HN26[] **Likelihood of Confusion, False Designation of Origin**

Any person who uses in commerce any false designation of origin that is likely to cause confusion shall be liable to any person who believes that he or she is likely to be damaged by such act. *15 U.S.C.S. § 1125(a)*. To establish a reverse passing off claim, a plaintiff must establish that: (1) the defendant used a false designation of origin, or a false description or representation in connection with the goods or services; (2) the defendant caused the goods or services to enter interstate commerce; and (3) the plaintiff is a person who believes that he or she is likely to be damaged as a result. Reverse passing off is where a party misrepresents someone else's goods' as their own.

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

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Scope

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

HN27[] **Trade Practices & Unfair Competition, State Regulation**

A plaintiff must establish the same two elements for Lanham Act and Illinois Uniform Deceptive Trade Practices Act claims: (1) that it has a protectable trademark; and (2) that the defendants' use of the trademark is likely to cause confusion among consumers.

Copyright Law > Scope of Copyright Protection > Publication > Copyright Act of 1976

Copyright Law > ... > Civil Infringement Actions > Elements > Ownership

Copyright Law > ... > Ownership Rights > Reproductions > Infringement

Copyright Law > ... > Protected Subject Matter > Graphic, Pictorial & Sculptural Works > Works of Art

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > Scope of Protection

HN28[] **Publication, Copyright Act of 1976**

The owner of a copyright has the exclusive right to use and to authorize reproduction of the copyrighted work in copies, including copies of pictorial and graphic works. *17 U.S.C.S. § 106(1)*, *(5)*; *17 U.S.C.S. § 501(a)*. Not all copying, however, is copyright infringement. To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.

Copyright Law > Scope of Copyright Protection > Publication > Copyright Act of 1976

Copyright Law > ... > Fair Use > Fair Use Determination > Factors

Copyright Law > ... > Ownership Rights > Reproductions > Limitations

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > Scope of Protection

HN29[] **Publication, Copyright Act of 1976**

The fair use doctrine is a statutory defense codified at *§ 107* of the Copyright Act. *17 U.S.C.S. § 107*. Under the doctrine, using another's copyrighted work is fair for purposes such as criticism, comment, news reporting, teaching, scholarship, or research and is therefore not an infringement of copyright.

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Burdens of Proof

Copyright Law > ... > Fair Use > Fair Use Determination > Factors

Copyright Law > ... > Ownership Rights > Reproductions > Limitations

HN30[] **Civil Infringement Actions, Burdens of Proof**

To determine whether the fair use doctrine, codified in *17 U.S.C.S. § 107*, saves a defendant in a copyright infringement lawsuit, courts consider the following factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. *17 U.S.C.S. § 107*. The burden of proof is on the defendant because fair use is an affirmative defense.

Copyright Law > ... > Fair Use > Fair Use Determination > Factors

HN31[] **Fair Use Determination, Factors**

The first factor of the fair use doctrine considers the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. *17 U.S.C.S. § 107(1)*. Central to determining the purpose and character of a work is whether the new work merely supersedes the original work, or instead adds something new with a further purpose or of a different character.

Copyright Law > ... > Fair Use > Fair Use Determination > Factors

Copyright Law > ... > Statutory Copyright & Fixation > Originality Requirement > Quantum of Originality

Copyright Law > ... > Protected Subject Matter > Graphic, Pictorial & Sculptural Works > Photographs

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Originality Requirement

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > Scope of Protection

HN32[] **Fair Use Determination, Factors**

The second factor of the fair use doctrine focuses on the nature of the copyrighted work. *17 U.S.C.S. § 107(2)*. Works that are creative in nature are closer to the core of intended copyright protection than are more fact-based works. But a copyrighted work need only possess at least some minimal degree of creativity. The requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble, or obvious it might be. Courts find that photographs, even if taken partly for informative purposes, can still be creative.

Copyright Law > ... > Fair Use > Fair Use Determination > Factors

Copyright Law > ... > Ownership Rights > Reproductions > Limitations

HN33[] **Fair Use Determination, Factors**

The third factor of the fair use doctrine scrutinizes the amount taken by the alleged infringers in relation to the copyrighted work as a whole. *17 U.S.C.S. § 107(3)*. Courts sometimes ask whether the secondary use took the heart of the original work. Ultimately, the extent of permissible copying varies with the purpose and character of the use.

Copyright Law > ... > Fair Use > Fair Use Determination > Factors

Copyright Law > ... > Ownership Rights > Reproductions > Limitations

HN34[] **Fair Use Determination, Factors**

The fourth factor of the fair use doctrine addresses the effect of the use upon the potential market for or value of the copyrighted work. *17 U.S.C.S. § 107(4)*. The fourth factor is often the most important of the four. In assessing the factor, courts ask whether the contested use is a complement to the protected work rather than a substitute for it. Still, market harm is a matter of degree, and the importance of the factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors. Courts must consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original. The market in fair use cases means the potential market for not only the original work, but also derivative uses and licensing rights.

Copyright Law > ... > Deposit & Registration Requirements > Registration > Application Requirements

Copyright Law > ... > Civil Infringement Actions > Presumptions > Validity of Facts

Copyright Law > ... > Civil Infringement Actions > Presumptions > Validity of Copyright

Copyright Law > ... > Deposit & Registration Requirements > Registration > Registration Certificates

Copyright Law > ... > Civil Infringement Actions > Presumptions > Originality

HN35[] **Registration, Application Requirements**

Under *17 U.S.C.S. § 410(c)*, a certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate.

Copyright Law > Scope of Copyright Protection > Publication > Copyright Act of 1976

Copyright Law > ... > Damages > Types of Damages > Statutory Damages

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Registration Requirement

Copyright Law > ... > Deposit & Registration Requirements > Registration > Registration Certificates

Copyright Law > ... > Civil Infringement Actions > Defenses > Statute of Limitations

HN36[] **Publication, Copyright Act of 1976**

Under *17 U.S.C.S. § 412*, statutory damages for copyright infringement are not available before the effective date of its registration, unless such registration is made within three months after the first publication of the work or one month after the copyright owner has learned of the infringement.

Copyright Law > ... > Elements > Copying by Defendants > Access

Evidence > Inferences & Presumptions > Inferences

HN37[] **Copying by Defendants, Access**

The Copyright Act affords no protection against the independent creation of a work that happens to resemble some prior creation. Recognizing that direct evidence of copying is only rarely available, a plaintiff may also prove copying by showing that the defendant had the opportunity to copy the original and that the two works are substantially similar, thus permitting an inference that the defendant actually did copy the original.

Copyright Law > ... > Substantial Similarity > Intrinsic Tests > Ordinary Observer Test

Copyright Law > ... > Protected Subject Matter > Graphic, Pictorial & Sculptural Works > Photographs

HN38[] **Intrinsic Tests, Ordinary Observer Test**

The United States Court of Appeals for the Seventh Circuit applies the ordinary observer test to determine whether two works are substantially similar. The test asks whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression. With respect to photography, copyright infringement is found where the accused photographer in choosing the subject matter, camera angle, lighting, etc., copies and attempts to duplicate all of such elements as contained in a prior photograph.

Torts > ... > Contracts > Intentional Interference > Elements

HN39[] **Intentional Interference, Elements**

To state a claim for tortious interference, a plaintiff must show: (1) the existence of a valid and enforceable contract between the plaintiff and another, (2) the defendants' awareness of that contract, (3) the defendants' intentional and unjustified inducement of a breach of the contract, (4) a subsequent breach by the other caused by the defendants' conduct, and (5) damages.

Torts > Intentional Torts > Defamation > Defamation Per Quod

Torts > Intentional Torts > Defamation > Defamation Per Se

HN40[] **Defamation, Defamation Per Quod**

A defamatory statement is a statement that harms a party's reputation to the extent it lowers the party in the eyes of the community or deters the community from associating with the party. Under Illinois law, the elements of a defamation per se claim are that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of that statement to a third party, and that the publication caused damages. Illinois' courts recognize four categories of statements that are considered defamatory per se: (1) words that impute the commission of a criminal offense; (2) words that impute infection with a loathsome communicable disease; (3) words that impute an inability to perform or want of integrity in the discharge of duties of office or employment; or (4) words that prejudice a party, or impute lack of ability, in his or her trade, profession, or business. A statement that falls into one of these categories will not be found defamatory per se if it true or is reasonably capable of an innocent construction.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN41[] **Types of Contracts, Quasi Contracts**

If an unjust enrichment claim rests on the same improper conduct alleged in another claim, then the unjust enrichment claim will be tied to the related claim and unjust enrichment will stand or fall with the related claim.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Evidence > Burdens of Proof > Allocation

HN42[] Relief From Judgments, Altering & Amending Judgments

Under *Fed. R. Civ. P. 59(e)*, district courts may entertain motions to alter or amend a judgment. Motions under *Rule 59(e)* will only be granted to correct manifest errors of law or fact. A party moving for reconsideration pursuant to *Rule 59(e)* bears a heavy burden of establishing that the court should reverse its prior judgment. Motions to reconsider sounding under *Rule 59(e)* should only be granted in rare circumstances. A *Rule 59(e)* motion is not appropriately used to advance arguments or theories that could and should have been made before the district court rendered a judgment, or to present evidence that was available earlier.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

HN43[] Relief From Judgments, Altering & Amending Judgments

A *Fed. R. Civ. P. 59(e)* motion is not an appropriate means to advance arguments or theories that could and should have been made before the district court rendered a judgment.

Torts > Intentional Torts > Defamation > Defamation Per Se

HN44[] Defamation, Defamation Per Se

The innocent construction rule has the effect of exculpating an otherwise defamatory per se statement and is considered an exception to the republication rule. Thus, even if republishing one's defamatory statement is defamation per se, if it is subject to an innocent construction, the republished statement is protected.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN45[] Standing, Requirements

Under Knevelbaard, an actual injury has four requirements: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent.

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For Smartbuyglasses Societa a Responsabilita Limitata, an Italian company, Motion Global Ltd., a Hong Kong Company, SmartBuy Guru Enterprises, a Cayman Island Company, SmartBuyGlasses Optical Limited, a Hong Kong company, Counter Claimants: Stephen J. Rosenfeld, LEAD ATTORNEY, McDonald Hopkins LLC, Chicago, IL.

For Motion Global Ltd., a Hong Kong Company, SmartBuy Guru Enterprises, a Cayman Island Company, Smartbuyglasses Societa a Responsabilita Limitata, an Italian company, SmartBuyGlasses **[**2]** Optical Limited, a

Hong Kong company, Counter Claimants: Stephen J. Rosenfeld, LEAD ATTORNEY, Jacob Daniel Radecki, McDonald Hopkins LLC, Chicago, IL; Jennifer D Armstrong, Mcdonald Hopkins Llc, Cleveland, OH.

Judges: Honorable Marvin E. Aspen, United States District Judge.

Opinion by: Marvin E. Aspen

Opinion

[*1069] REDACTED PUBLIC VERSION of MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

This is a voluminous intellectual property lawsuit with over 500 docket entries to date. Plaintiff Maui Jim, Inc. ("Maui Jim") alleges that the defendants sell non-genuine Maui-Jim-branded sunglasses while using its copyrighted photographs to falsely advertise that they are an authorized retailer. The defendants (collectively "Defendants," "SmartBuyGlasses," "SBG," or "Counterclaimants") counterclaim that Maui Jim's statements about their legitimacy amounts to defamation or, alternatively, warrant damages for unjust enrichment. Presently before us are Maui Jim's motions for summary judgment (Pl.'s Counterclaim MSJ (Dkt. No. 420); Pl.'s Copyright MSJ (Dkt. No. 423); Pl.'s MSJ on Lanham Act and Related State Law Claims ("Lanham MSJ") (Dkt. No. 426)) and Defendants' motion for summary judgment in their favor on both Maui Jim's **[**3]** claims and their counterclaims. (Defs.' MSJ (Dkt. No. 412).).[1] Also before us is Defendants' motion for reconsideration of our ruling on their earlier motion to dismiss. (Mot. for Reconsideration (Dkt. No. 378).) For the reasons stated below, Maui Jim's motions for summary judgment are **[*1070]** granted in part and denied in part, Defendants' motion for summary judgment is granted in part and denied in part, and Defendants' motion for reconsideration is denied.

BACKGROUND

Unless otherwise stated, the facts described herein are undisputed and culled from the parties' multiple Local Rule 56.1 submissions.

A. Parties

Maui Jim is a designer, manufacturer, and provider of premium prescription and non-prescription sunglasses. (Defs.' Resp. to Pl.'s Lanham SOF (Dkt. 459) ¶ 1.) Maui Jim's sunglasses are marketed, offered, and sold globally. (*Id.*) Defendants retail designer eyewear and they sell products into the United States through websites like SmartBuyGlasses.com. (Pl.'s Resp. to Defs.' Amend. SOF (Dkt. No. 466) ¶¶ 1, 45.) These sales include eyewear displaying Maui Jim's marks. (Defs.' Resp. to Pl.'s Lanham SOF ¶ 35.) Defendants sold approximately [TEXT REDACTED BY THE COURT] non-prescription and [TEXT REDACTED BY **[**4]** THE COURT] prescription pairs of Maui-Jim-branded sunglasses into the United States between 2009 and 2019. (Pl.'s Resp. to Defs.' Amend. SOF (Dkt. No. 466) ¶ 6.) These prescription sunglasses contained third-party prescription lenses glazed into a Maui-Jim-branded frame. (*Id.*)

B. Intellectual Property

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[1] Maui Jim does not move for summary judgment on its claims for trademark dilution and tortious interference with its third-party contracts. (Pl.'s Mem. Lanham MSJ (Dkt. No. 427) at 39.)

Maui Jim offers over 125 different sunglasses styles under one or more of its marks. (*Id.* ¶ 6.) Maui Jim's sunglasses incorporate Maui Jim's patented, color-infused lens technology that wipe out glare and UV rays, and boosts color via lens treatments. (*Id.* ¶ 7.) Maui Jim's sunglasses all have earned the Skin Cancer Foundation's Seal of Recommendation as an effective UV filter for the eyes and surrounding skin. (*Id.* ¶ 14.) Since at least the early 1980s, Maui Jim continuously used the following marks in selling sunglasses in U.S. commerce:

Mark	Goods	Reg. No.	Reg. Date
MAUI JIM	Clothing, namely t-shirts; sunglasses	1404711	August 12, 1986
	Sunglasses	3443858	June 10, 2008
	Sunglasses	1465234	November 17, 1987
	Clothing, namely, t-shirts, polo shirts, tank tops, hats, visors, sweatshirts and jackets; sunglasses	4547944	June 10, 2014

(*Id.* ¶ 2) (sic.) Maui Jim registered these as trademarks with the U.S. Patent & Trademark Office. (*Id.* ¶ 5.)

The U.S. Copyright Office issued Certificates of Registration for the ninety-three professional photographs ("93 Photographs") at issue in this case. (Defs.' Resp. to Pl.'s Copyright SOF (Dkt. No. 461) ¶¶ 7-9.) Maui Jim published its 93 Photographs **[**5]** either on its website or in print between March 2015 and April 2016. (*Id.* **[*1071]** ¶¶ 20-21.) Each registration was issued within five years of Maui Jim's first publication of the photograph. (*Id.* ¶ 8.) Twenty-two of those photographs ("22 Photographs") were taken between March 27 and October 22, 2015. (Pl.'s Resp. to Defs.' Amend. SOF (Dkt. No. 466) ¶ 108.) Those 22 Photographs were registered on August 8, 2016. (*Id.*)

Since 2009, Maui Jim invested nearly [TEXT REDACTED BY THE COURT] in marketing its Maui Jim sunglasses, including its marks, as a high-quality premium product. (*Id.* ¶ 10.) For example, Maui Jim prominently uses these marks in TV commercials, print advertisements, brochures, social media, and other digital advertising, marketing, and promotional campaigns. (*Id.* ¶ 11.) Maui Jim's TV commercials have aired on major networks like NBC, CBS, ABC, HGTV, Discovery Channel, Food Network, and ESPN. (*Id.*) Maui Jim also promotes its sunglasses on its website, www.mauijim.com, where it publicly displays photographs of the sunglasses. (Defs.' Resp. to Pl.'s Copyright SOF (Dkt. No. 461) ¶ 7.)

Maui Jim's website contains the following notice at the bottom of each page: "© [applicable year] MAUI **[**6]** JIM, INC." (Defs.' Resp. to Pl.'s Copyright SOF (Dkt. No. 461) ¶¶ 9.) Additionally, the "Intellectual Property Notice" section of Maui Jim's Terms of Use webpage states:

> Unless otherwise noted, all materials, including text, illustrations, *photographs*, designs, graphics, logos, button icons, *images*, audio clips, software, written and other material (collectively, the "Contents") are *copyrights* . . . owned, controlled or licensed by Maui Jim, Inc.

(*Id.* ¶ 10) (emphasis added.) But the parties dispute whether these notices are expressly associated with any of the 93 Photographs. (*Id.*)

Defendants had access to Maui Jim's 93 Photographs. (*Id.* ¶ 21.) Although Defendants did not independently take or create any of the relevant Maui Jim-branded sunglasses that it displayed on its website,[2] they dispute whether

[2] For example, when Maui Jim asked Defendants' 30(b)(6) witness whether Defendants took any of the 93 Photographs of Maui Jim sunglasses they displayed on its website, he testified "Not that I can recall." (*Id.* ¶ 18) (internal citation omitted).)

their website displayed Maui Jim's 93 Photographs. (*Id.* ¶¶ 14-16, 18-19, 28.)[3] The parties dispute whether Maui Jim's purported acquiescence granted Defendants a license to use Maui Jim's 93 Photographs. (*Id.* ¶¶ 29-31.)

C. Retail

Maui Jim and its wholly-owned distributors sell Maui Jim sunglasses through an authorized retailer program. (Pl.'s Resp. to Defs.' Amend. SOF (Dkt. No. 466) **[**7]** ¶ 17.) Each authorized retailer enters into a written agreement with Maui Jim and/or Maui Jim USA, Inc. that governs the business relationship, outlines Maui Jim's terms and conditions, and references its U.S. General Policies. (*Id.* ¶ 21.) Defendants do not dispute that Maui Jim purports to have a policy governing its business relationships with authorized retailers. (*Id.*) That authorized retailer program permits certain retail establishments to sell Maui Jim sunglasses to consumers. (*Id.*) The parties dispute whether Maui Jim's authorized U.S. retailers purchase Maui Jim sunglasses exclusively from Maui Jim or whether they obtain Maui-Jim-branded **[*1072]** sunglasses from additional sources. (*Id.* ¶ 20.) It is undisputed that SmartBuyGlasses is not within Maui Jim's authorized retailer program. (*Id.* ¶ 31.) But Defendants do dispute whether they are authorized to sell Maui Jim sunglasses as a matter of law.

Maui Jim states that it requires all Maui Jim sunglasses be sold with authentic Maui Jim lenses, frames, and parts, and not modified in any manner. (*Id.* ¶ 22.) Defendants dispute that averment, citing to the fact that nothing in Maui Jim's European authorized retailer agreements stated that **[**8]** its warranty would be voided if an authorized retailer sold Maui Jim sunglasses to third parties or if third-party lenses were glazed into its frames. (*Id.*) Defendants also dispute this fact by claiming that Maui Jim authorized retailers in the U.S. had glazed third-party lenses into Maui Jim's frames without consequence. (*Id.*)

Maui Jim states that authorized retailers are *required* to direct all consumer repair requests to Maui Jim's trained repair technicians. (*Id.* ¶ 26.) Defendants dispute that fact because of a small font general policy attached to Maui Jim's CFO Paul Lippens' declaration that states "We *recommend* that you or your customer call us on our toll-free number . . . regarding any repair questions." (*Id.* ¶ 26 (citing Lippens Dec. (Dkt. No. 428-4) at 9) (emphasis added).)

It is undisputed that Maui Jim provides warranty protection for its sunglasses. (Defs.' Resp. to Pl.'s Lanham SOF (Dkt. 459) ¶ 27.) But the parties dispute whether Maui Jim's warranty only covers those Maui Jim sunglasses sold by Maui Jim and its authorized retailers. (*Id.*) Maui Jim believes that Defendants' warranty is different from its own. (*Id.* ¶ 63.) Defendants disagree and contend that their own warranty **[**9]** provides identical coverage. (*Id.*) The parties dispute whether Maui Jim's warranty is an integral part of its customer service offering that consumers have come to expect and enjoy from the Maui Jim brand. (*Id.* ¶ 30.) Defendants' dispute is premised on the fact that [TEXT REDACTED BY THE COURT] According to Maui Jim's head of Customer Care, Lynn Campen, customers do use Maui Jim's repair department, at average, three to four non-Maui Jim prescription lenses per week between 2015 and 2018. (Pl.'s Resp. to Defs.' SOF (Dkt. 466) ¶ 70(f).)

Defendants ship all their Maui-Jim-branded sunglasses sold to the United States from Hong Kong, so international shipping regulations and procedures govern their shipments. (*Id.* ¶ 48.) Defendants create commercial invoices for the products they ship. (*Id.* ¶ 49.) An uncertain number of Defendants' shipments of Maui-Jim-branded sunglasses contained a packaging slip that identified [TEXT REDACTED BY THE COURT] as the manufacturer. (*Id.* 51.) [TEXT REDACTED BY THE COURT] does not manufacture Maui-Jim-branded sunglasses, and Defendants know that. (*Id.* ¶ 47.) Defendants blame the [TEXT REDACTED BY THE COURT] identification mishap on faulty computer coding that operated **[**10]** from [TEXT REDACTED BY THE COURT] (*Id.* ¶ 51.) Defendants' sales documents show that it shipped at least [TEXT REDACTED BY THE COURT] pairs of Maui-Jim-branded sunglasses into the

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[3] Maui Jim's Exhibit 9 to its Memorandum in Support of its Copyright Summary Judgment Motion is a chart allegedly showing excerpts from Defendants' website that displays what appears to be Maui Jim's 93 Photographs. (Pl.'s Mem. Copyright MSJ Ex. 9 (Dkt. 425-1).) This chart includes five columns: Style Name, Title of Work, Date of Registration and Registration Number, Maui Jim Copyrighted Image, and Image Reproduced on SmartBuyWebsite. (*Id.*)

U.S. during that time frame. (*Id.* ¶ 52.) Customer complaints brought this error to Defendants' attention. (*Id.* ¶¶ 54-56.) For one example:

> I received [the shipment] from eyeware manufacturer [TEXT REDACTED BY THE COURT] that was initiated by you SmartBuyGlasses.com for a replacement pair of Maui Jim Sunglasses . . . . On [TEXT REDACTED BY THE COURT] website — there is no mention that they sell Maui Jim products or an authorized retailer for Maui Jim...I would like to know if these were manufactured by Maui Jim or are they a copy of Maui Jim product"

(*Id.* ¶ 53 (second ellipsis in original) (sic).) As for another inaccuracy in Defendants' **[*1073]** shipments, Defendants admit that it included a Maui Jim's 2009 Drop Ball Certification (a certification that lenses comply with certain regulatory requirements) in a limited number of shipments to U.S. consumers. (*Id.* ¶¶ 43-45.) These shipments were made without Maui Jim's consent and they were not certified under the 2009 Drop Ball Certification. (*Id.*)

The parties dispute whether **[**11]** they received inquiries from consumers and potential consumers complaining about Defendants' delayed shipment speeds with respect to Maui-Jim-branded sunglasses. (*Id.* ¶ 61.) Nevertheless, Defendants admit to at least twenty examples of delayed shipments to its purchasers of Maui-Jim-branded sunglasses, thirteen of which were delayed due to U.S. Food and Drug Administration ("FDA") or customs issues. (*Id.*)

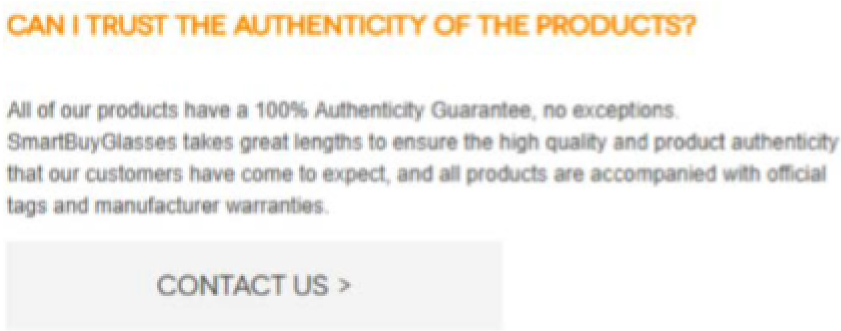
D. Defendants' Advertising

The parties dispute whether customers and potential customers were confused over Defendants' allegedly false and/or misleading statements. (*Id.* ¶ 65.) Defendants' webpage touts the supposed authenticity of eyewear that it sells from "some of the world's leading eyewear manufacturers." (*Id.* ¶ 66.) It also touts their "relationships with some of the world's leading suppliers." (*Id.* ¶ 67.) Defendants' webpage once contained the following diagram:

(*Id.* ¶ 68 (citing Ex. 35).) This diagram suggests that Defendants' supply chain is direct from the manufacturer to the customer rather than the "traditional supply chain" that routes from the manufacturer to an exporter to an importer to a wholesaler to a shop and then to a customer. (*Id.*). That diagram also contained **[**12]** the following accompanying sentence: "By offering the world's largest range of authentic designer eyewear, sourced directly from the world's leading eywear [sic] suppliers, we are here to help you find what you love." (*Id.*) Defendants dispute that this diagram was factually misleading, stating that it "was accurate and consistent with SmartBuyGlasses' practice for the majority of its sales including manufacturers/brands — such as [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY THE COURT] - from which it buys genuine products from the manufacturer of the brands and ships it to its consumers." (*Id.*)

The following statement has appeared on Defendants' website's FAQ, and Maui Jim disputes whether it is truthful:

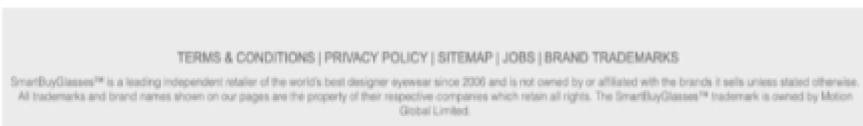
[*1074]



(*Id.* ¶ 69 (citing Ex. 36).)

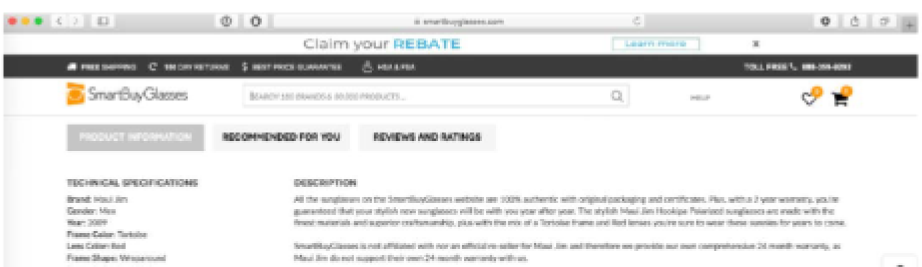
Elsewhere on Defendants' website is a statement that "SmartBuyGlasses is not affiliated with nor an official re-seller for Maui Jim . . . ." (*Id.* ¶ 69.) Maui Jim commissioned a survey coined the Sowers Survey to test whether Defendants' website misleads consumers into believing that Defendants are an authorized retailer of Maui Jim sunglasses. (*Id.* ¶ 70 (citing Ex. 20 (Dkt. No. 428-20 at 6)).) Accounting for "noise," 40.1% of respondents to the Sowers **[**13]** Survey took away the false impression that SmartBuyGlasses is an authorized retailer of Maui Jim sunglasses. (*Id.*)[4]

The following disclaimer appears in small type on the bottom of SmartBuyGlasses.com:



(*Id.* ¶ 48.) That disclaimer states that SmartBuyGlasses is not owned by or affiliated with the brands it sells unless stated otherwise. (*Id.*) The parties dispute the impact of this sentence.

Once a customer selects a Maui-Jim-branded frame on Defendants' website, the customer is confronted with the following website display:



(*Id.* ¶ 51.) The last sentence of the above states in relevant part that "SmartBuyGlasses is not affiliated with nor an official re-seller for Maui Jim and therefore we provide our own comprehensive 24 month warranty, as Maui Jim do not support their own 24 month warranty with us." (*Id.*) But Defendants' Kalinko testified **[*1075]** that he drafted that language after the litigation commenced. (*Id.* (citing Kalinko Dep. 500:13-504:2).) So, we cannot discern from the record how long this disclaimer was posted.

The parties also dispute whether statements on Defendants' website adequately informed consumers that they were purchasing third-party prescription lenses rather than Maui Jim **[**14]** lenses. (*Id.* 54-56.) As two examples:

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[4] Defendants filed a motion to exclude the Sowers Survey. (Dkt No. 417.) We previously denied that motion. (Dkt. No. 494.) We incorporate the analysis and reasoning contained within our Memorandum Opinion and Order denying the Sowers Survey within this summary judgment Memorandum Opinion and Order. (*Id.*)

(*Id.* ¶ 54), and


SMARTBUYGLASSES PREMIUM LENS QUALITY
CONTINUE SHOPPING

Premium Lens
Prescription Lenses Guide
Our Prices
SmartBuyGlasses Policies
100 Best Selling Eyeglasses
100 Best Selling Sunglasses

SmartBuyGlasses Prescription Lenses
SmartBuyGlasses USA is the largest online full-service optical shop in USA. Choose from a huge range of designer eyeglasses and have them professionally fitted by our licensed opticians in the SmartBuyGlasses Optical Lab. At SmartBuyGlasses, we make prescription glasses shopping easy and efficient online. Simply choose your favorite glasses frame and have them fitted with ophthalmic lenses at a fraction of the cost compared to a local eye doctor. Our licensed optical dispensers provide 100% accuracy and quality for each prescription lens fitting.

Lenses Guide
SmartBuyGlasses offers a wide range of prescription lenses from premium lens producer [redacted] as well as our premium quality house brand. The SmartBuyGlasses Optical Lab lenses cover refractive indexes of 1.50, 1.61, 1.67 or 1.74 for single, bifocal or progressive vision correction needs. All of the lenses that we offer are either made of CR39 or High Index plastic material. Please refer to the other Premium Lenses information tabs to learn more about prescription lenses at SmartBuyGlasses USA.

Reasons to Buy Prescription Lenses
Exclusive 24 Month Warranty
FREE Scratch Resistant Coating
FREE Anti-Glare Coating
FREE UV Protection

(*Id.* ¶ 55.) Suggesting that their customers would have viewed these disclaimers, Defendants note that their customers take their time when purchasing sunglasses on their website. (*Id.* ¶ 62.) For example, Defendants contend that their customers visit its website on average [TEXT REDACTED BY THE COURT] over a period of more than [TEXT REDACTED BY THE COURT] days before making a purchase. (*Id.* ¶ 64.)

Defendants also claim that they additionally sent customers who bought prescription Maui-Jim-branded sunglasses a separate envelope along with a lens card explaining that the lenses they received were third-party manufactured. (*Id.* ¶¶ 59, 65-69.)

Defendants' website contained the following world map portrayal suggests that Defendants had an "operation centre" in New York:

[*1076]

(Defs.' Resp. to Pl.'s Lanham SOF (Dkt. No. 459) ¶ 40). Although Defendants do not dispute that they do not have any physical location or physical office in New York, they contend that they do have an "operational dropship location in New York." (*Id.* ¶¶ 40-41.)

E. First Sales of Defendants' Maui-Jim-Branded Sunglasses

Maui Jim claims that it never sold a single pair of Maui Jim sunglasses **[**15]** to Defendants. (*Id.* ¶ 32.) Defendants dispute that, reasoning that Maui Jim sold its sunglasses to a company called "[TEXT REDACTED BY THE COURT] with the full knowledge that these sunglasses would then be sold by SmartBuyGlasses online." (*Id.* ¶ 32.) We find that Defendants' response implicitly admits by omission that Maui Jim never *directly* sold a pair of its sunglasses to Defendants. (*See id.*)

Defendants additionally contend that they source their products through a network of suppliers, manufacturers, distributors, and authorized retailers. (Pl.'s Resp. to Defs.' Amend. SOF (Dkt. No. 466) ¶ 1(d).) But Maui Jim disputes that fact. (*Id.*) Although Defendants contend that they obtained their Maui-Jim-branded sunglasses from [TEXT REDACTED BY THE COURT] or more companies (*id.* ¶ 37 (citing Ex. 49 (Dkt. Nos. 415-65)) Maui Jim claims that it never sold a single pair of its sunglasses to about half of those companies. (*Id.* ¶ 38.)[5] More, Maui Jim claims that it only sold a total of [TEXT REDACTED BY THE COURT] sunglasses to ten of the companies that Defendants claim gave them Maui-Jim-branded sunglasses, while Defendants claim that they received [TEXT REDACTED BY THE COURT] pairs from those **[**16]** ten companies. (*Id.*)

A highlighted example is [TEXT REDACTED BY THE COURT] the company that Defendants claim supplied them with most of their Maui-Jim-branded sunglasses. (*Id.*¶¶ 30-32.) Defendants claim that [TEXT REDACTED BY THE COURT] provided Defendants with [TEXT REDACTED BY THE COURT] pairs of Maui Jim sunglasses (*id.* ¶ 32(d)) while Maui Jim states it sold far less to [TEXT REDACTED BY THE COURT] (Pl.'s Mem. Lanham MSJ (Dkt. 427) at 12.) Defendants' suppliers have submitted letters affirming the authenticity of the Maui-Jim-branded products they suppled to Defendants after this lawsuit was filed. (Pl.'s **[*1077]** Resp. to Defs.' SOF (Dkt. No. 466) ¶ 18.) Related, SmartBuyGlasses CEO Doron Kalinko testified "No" to the question of whether he understood "that all of the Maui Jim-branded sunglasses that [TEXT REDACTED BY THE COURT] was selling to SmartBuy came directly to [TEXT REDACTED BY THE COURT] from Maui Jim." (Defs.' Resp. to Pl.'s Lanham SOF (Dkt. No. 459) at 16.) Thus, there is a material factual dispute over where the difference (potentially [TEXT REDACTED BY THE COURT] pairs of sunglasses) came from.

Maui Jim conducted test purchases from Defendants to test the authenticity of Defendants' **[**17]** Maui-Jim-branded sunglasses between 2011 and 2016. (Pl.'s Resp. to Defs.' Amend. SOF (Dkt. No. 466) ¶¶ 13, 81.) Maui Jim Europe's Hans-Juergen Penzek testified that they also conducted test purchases from Defendants' European websites. (Pl.'s Resp. to Defs.' SOF (Dkt. 466) ¶ 13(a) (citing Penzek Dep. (Dkt. 466-7).) Maui Jim's digital marketing manager Dave Siragusa testified that "beyond a visual inspection, I can't tell if those were or were not manufactured by Maui Jim." (Siragusa Dep. (Dkt. No. 466-3, 51:5-23).) Similarly, Maui Jim's Vice President of Purchasing Christopher McClain testified that he couldn't determine one way or the other when he was asked whether he could "say that any plano sunglasses that Maui Jim purchased from SmartBuyGlasses were not manufactured by Maui Jim." (McClain Dep. (Dkt. No. 415-24, 19:23-20:6).) Related, Maui Jim Vice President Jay Black testified that he was not aware of any evidence that Defendants were selling stolen merchandise, and that Maui Jim did not know whether Defendants ever sold damaged or stolen merchandise. (Pl.'s Resp. to Defs.' SOF (Dkt. No. 466) ¶ 12(b) (citing Black Dep. (Dkt. No. 466-2).) On this point, Maui Jim had a Rule 30(b)(6) witness **[**18]** testify that Maui Jim did receive at least one pair of damaged Maui-Jim-branded sunglasses from Defendants. (Pl.'s Resp. to Defs.' SOF (Dkt. No. 466) ¶ 12(b) (citing Siragusa Dep. (Dkt. 466-3).) But that deponent testified further that he does not know for certain whether Defendants' Maui-Jim-branded sunglasses are stolen because he could not determine from where Defendants sources their products. (*Id.*)

On at least two occasions, a Maui Jim customer service representative told a customer that Defendants' omission from Maui Jim's authorized retailers list does not automatically mean that Defendants' Maui-Jim-branded sunglasses are inauthentic. (Pl.'s Resp. to Defs.' SOF (Dkt. No. 466) ¶ 14.)

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[5] Defendant's explanation for this factual dispute is, in part, that Maui Jim miscounted companies, like [TEXT REDACTED BY THE COURT], that have slightly different names on the list than they do within Maui Jim's system.

Thus, the parties dispute whether the Maui-Jim-branded sunglasses sold by Defendants were 100% genuine and authentic. And therefore, Maui Jim submits that none of the Maui-Jim-branded sunglasses sold by Defendants were once subject to an authorized first sale by Maui Jim.

F. Maui Jim's Statements About SmartBuyGlasses

Defendants claim that Dave Siragusa, Maui Jim's Digital Marketing Manager, instructed Maui Jim's customer service to inform customers that SmartBuyGlasses sold "stolen, used, damaged, **[**19]** gray market or counterfeit products through their site." (Pl.'s Resp. to Defs.' Amend. SOF (Dkt. No. 466) ¶ 97 (citing Ex. 112 of Defs.' Amend. SOF).) Maui Jim admits that Siragusa stated that any site not on Maui Jim's authorized retailer list *may be* selling used, counterfeit, broken or stolen products. (*Id.* ¶ 98.) He also told Maui Jim customer service representatives to respond to customer inquiries about unauthorized retailers "that these sites are not listed and therefore are selling diverted, used, damaged or counterfeit goods and they void our 2 year warranty by purchasing on these sites." (*Id.* (citing Ex. 112 of Defs.' Amend. SOF).)

[*1078] G. Maui Jim's Third-Party Contracts

On September 24, 2008, Maui Jim's employee, Michelle Munson, emailed VisionDirect.com.au, one of Defendants' websites, alleging that that website was tortuously interfering with Maui Jim's contracts by procuring Maui-Jim-branded sunglasses from Maui Jim's authorized accounts. (*Id.* ¶ 23.) In that email, Munson demanded they cease doing so. (*Id.* ¶ 23.) In response, Defendants' Co-Founder David Menning emailed Munson and stated that Defendants would remove the Maui Jim line from their website and requested follow up **[**20]** conversations to better understand the procedure behind becoming authorized distributor. (*Id.*)

Defendants claim that neither Maui Jim nor any of Maui Jim's authorized retailers ever informed Defendants of their contractual terms. (*Id.* ¶ 100.) Maui Jim dispute that fact, contending that on March 8, 2008, Maui Jim wrote to Defendants and stated in part:

> By purchasing Maui Jim sunglasses from any authorized Maui Jim account, you are inducing that retailer to breach its contract with Maui Jim, which will subject you to civil liability for interference with a contractual relationship.
>
> . . . Please cease and desist from attempting to procure Maui Jim products from any Maui Jim authorized accounts in the future. Such interference would likely result in those accounts being terminated and you will be liable for any damage suffered by Maui Jim as a consequence of such termination and diversion of our product.
>
> . . .
>
> Now that you are aware of Maui Jim's policy regarding its authorized retail accounts, you are on notice that future violations will constitute intentional interference with contractual relations.

(*Id.* (internal citation omitted).) Maui Jim echoed this message to Defendants on January 20, **[**21]** 2009. (*Id.*) Nevertheless, the parties disagree as to whether Defendants had knowledge of Maui Jim's contracts with third-party authorized retailers. (*See, e.g.*, *id.* ¶¶ 99-104.) Maui Jim contends that it has produced two of its contracts with its authorized retailers and that those contracts include the relevant anti-diversion clause. (*Id.* ¶ 102 (citing Dkt. No. 465).) Regarding alleged damages stemming from the claimed tortious interference with Maui Jim's third-party contracts, the parties dispute whether unpaid amounts owed to Maui Jim were incurred because of Defendants' conduct. (*Id.* ¶ 103.)

LEGAL STANDARD

HN1[] Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A genuine issue for trial exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)*. Under *Rule 56*, the movant bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes **[**22]** demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986)* (internal quotations omitted). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson, 477 U.S. at 247-48, 106 S. Ct. at 2510*. In responding to a summary judgment motion, **[*1079]** the nonmoving party may not simply rest upon the allegations contained in the pleadings but must present specific facts to show that a genuine issue of material fact exists. *Fed. R. Civ. P. 56(e)(2)*; *see also* *Hemsworth v. Quotesmith.com, Inc., 476 F.3d 487, 489-90 (7th Cir. 2007)*.

HN2[] "On cross—motions for summary judgment, the Court assesses whether each movant has satisfied the requirements of *Rule 56*." *Portalatin v. Blatt, Hasenmiller, Leibsker & Moore, LLC, 125 F. Supp. 3d 810, 813 (N.D. Ill. 2015)* (internal citations omitted); *see also* *Laskin v. Siegel, 728 F.3d 731, 734 (7th Cir. 2013)*. As with any summary judgment motion, we consider cross—motions for summary judgment "construing all facts, and drawing all reasonable inferences from those facts, in favor of the non—moving party." *Laskin, 728 F.3d at 734* (internal citation omitted); *see also* *Anderson, 477 U.S. at 255, 106 S. Ct. at 2513*. "[I]nferences that are supported by only speculation or conjecture will not defeat a summary judgment motion." *Dorsey v. Morgan Stanley, 507 F.3d 624, 627 (7th Cir. 2007)* (citation and quotation marks omitted).

ANALYSIS

I. Motion for Summary Judgment on Lanham Act and Related State Law Claims

A. Trademark Infringement [23] and Counterfeiting**

We first[6] address Maui Jim's **[*1080]** motion for summary judgment in its favor on its trademark infringement claim along with Defendants' related cross-motion. (Pl.'s Lanham MSJ (Dkt. No. 426); Defs.' MSJ).) Maui Jim's basis for

[6] We reject Defendants' laches defense for various reasons. For laches to apply, the defendant must show: (1) the plaintiff had knowledge of the defendant's use of an allegedly infringing mark; (2) the plaintiff inexcusably delayed taking action with respect to the defendant's use; and (3) the defendant would be prejudiced by allowing the plaintiff to assert its rights. *See* *Chattanoga Mfg., Inc. v. Nike, Inc., 301 F.3d 789, 792-93 (7th Cir. 2002)*. Defendants' laches defense is based on the premise that Maui Jim knew at least eight years before filing this lawsuit that Defendants were selling Maui-Jim-branded sunglasses absent an authorized retailer agreement. We hold that Defendants have not shown that Maui Jim inexcusably delayed taking action, nor that they would be prejudiced by allowing this lawsuit to go forward, nor that Maui Jim acquiesced to their conduct for the following reasons. For one, Maui Jim sent a cease and desist letter concerning the core of this case's issue, and Defendants' Co-Founder David Menning's response to that letter indicated a mutual understanding that his company would stop their conduct. (Pl.'s Resp. to Defs.' Amend. SOF (Dkt. No. 466) ¶ 23; Defs.' SOF Ex. 43 (Dkt. No. 415-59) at 2-3.) Maui Jim echoed its cease and desist letter again in 2009. (*See, e.g.*, Pl.'s Resp. to Defs.' Amend. SOF (Dkt. No. 466) ¶ 76, 100 (citing Ex. 112 of Defs.' Amend. SOF).) More, Maui Jim's CFO, Paul Lippens, testified that Maui Jim waited to sue Defendants until their conduct had a significant impact on plaintiff's goodwill and business reputation. (Pl.'s Resp. to Defs.' Amend. SOF (Dkt. No. 466) ¶ 77 (testifying to a culmination of Maui Jim's awareness along with an increased number of related incidences and customer complaints).) *See Am. Eagle Outfitters, Inc. v. Am. Eagle Furniture, Inc.*, No. 11-cv-02242, *2013 U.S. Dist. LEXIS 180912, 2013 WL 6839815, at *11 (N.D. Ill. Dec. 27, 2013)* ("a trademark owner is not forced by the rule of laches to sue until the likelihood of confusion caused by the accused use presents a significant danger to the mark."). Indeed, the record shows that Maui Jim's lawsuit was filed soon after Defendants' sales and marketing of Maui-Jim-branded sunglasses rapidly increased. (*See* Pl.'s Resp. to Defs.' Amend. SOF (Dkt. No. 466) ¶¶ 77-79 (illustrating Defendants' increase in sales and marketing of Maui-Jim-branded sunglasses leading up to this lawsuit's filing).) Nor have Defendants been demonstrably prejudiced by any delay since their alleged infringing conduct continues post-filing of this lawsuit, suggesting that they would have continued their conduct were the lawsuit filed sooner. Last, to the extent that Defendants contend that Maui Jim acquiesced to their conduct through acts

trademark infringement is brought under both Section 32 of the Lanham Act, 15 U.S.C. § 1114(1), and Section 43(a)(1) of the Lanham Act, 15 U.S.C. § 1125(a)(1). **HN3**[] Plaintiff must establish essentially two elements to prevail on its Lanham Act trademark claims: (1) that it has a protectable trademark and (2) that Defendants' use of the trademark is likely to cause confusion among consumers. 15 U.S.C. § 1114(1) and 1125(a)(1); *see also Entm't One UK Ltd. v. 2012Shiliang*, 384 F. Supp. 3d 941, 948 (N.D. Ill. 2019) (citing Packman v. Chicago Tribune Co., 267 F.3d 628, 638 n.8 (7th Cir. 2001)).

1. Protectable Trademarks

First, Maui Jim owns protectable trademarks. Maui Jim's marks are registered with the U.S. Patent and Trademark Office on the Principal Register. (Pl.'s Resp. to Defs.' Amend. SOF (Dkt. No. 466) ¶¶ 2-5.) **HN4**[] Such registry constitutes *prima facie* evidence of the validity of a plaintiff's registered trademarks and of a plaintiff's exclusive right to use the trademarks. 15 U.S.C. § 1057(b); *see also Entm't One*, 384 F. Supp. 3d at 948; *Monster Energy Co. v. Zheng Peng*, No. 17-cv-414, 2017 U.S. Dist. LEXIS 175287, 2017 WL 4772769, at *4 (ND. Ill. 2017). Accordingly, we find that there is no genuine **[**24]** issue of material fact that Maui Jim's trademarks are protectable.

2. First Sale Doctrine

Before addressing likelihood of confusion, we address the first sale doctrine because Defendants contend it saves them from Maui Jim's trademark infringement case altogether. **HN5**[] The first sale doctrine is a defense to infringement subject to certain well-defined exceptions. Hart v. Amazon.com, Inc., 191 F. Supp. 3d 809, 818 (N.D. Ill. 2016), *aff'd*, 845 F.3d 802 (7th Cir. 2017). Under this doctrine, "when a retailer—such as Amazon—'merely resells a genuine, unaltered good under the trademark of the producer, the use of the producer's trademark by the reseller will not deceive or confuse the public as to the nature, qualities, and origin of the good.'" *Id.* Rather, "the consumer gets exactly what the consumer bargains for, the genuine product of the particular producer." *Id.* (quoting Sebastian Int'l, Inc. v. Longs Drug Stores Corp., 53 F.3d 1073, 1074 (9th Cir. 1995)). Thus, resale by the first purchaser of the original article under the producer's trademark is generally neither infringement nor unfair competition. *See id.*; *see also Enesco Corp. v. K's Merch. Mart*, No. 99-CV-1070, 2000 WL 1800640, at *12 (N.D. Ill. Aug. 29, 2000); *Brode v. Tax Mgmt., Inc.*, No. 88 C 10698, 1990 WL 25691, at *4 (N.D. Ill. Feb. 1, 1990).

Defendants believe Maui Jim exhausted its right to control distribution of its sunglasses when it sold them to other retailers. Maui Jim posits three reasons why it believes this defense fails. First, Maui Jim contends that Defendants cannot show **[**25]** that [TEXT REDACTED BY THE COURT] of Maui-Jim-branded sunglasses Defendants sold were subjected to an authorized first sale. (Pl.'s Supp. Mem. (Dkt. No. 496) at 8.) Second, Maui Jim contends that Defendants' Maui-Jim-branded sunglasses are materially different from the ones that Maui Jim sells. Third, Maui Jim argues that Defendants go beyond the boundaries of the first sale doctrine because they mislead customers into believing that they are associated with Maui Jim. (Pl.'s Mem. Lanham MSJ (Dkt. 427) at 26.)

a. First Sale Doctrine: Authorized First Sales

Maui Jim contends that Defendants' first sale doctrine defense fails because they cannot show an authorized first sale of the Maui-Jim-branded sunglasses **[*1081]** they sold. **HN6**[] Trademarked goods are not considered genuine goods until the trademark owner first authorizes the sale of those goods. *See, e.g.*, *Delta Air Lines, Inc. v. TDM Investments, LLC*, No. 18-cv-968, 2018 U.S. Dist. LEXIS 135125, 2018 WL 3819108, at *2 (N.D. Ill. August 10, 2018) (citing Hart, 191 F. Supp. 3d at 817-18 (N.D. Ill. 2016); RFA Brands, LLC v. Beauvais, No. 13-14615, 2014 WL 7780975, at *7 (E.D. Mich. Dec. 23, 2014), *report and recommendation adopted*, No. 13-14615, 2015 WL 519166 (E.D. Mich. Feb. 9, 2015); Ryan v. Volpone Stamp. Co., 107 F. Supp. 2d 369 (S.D.N.Y. 2000)); Liz Claiborne, Inc. v. Mademoiselle Knitwear, Inc., 979 F. Supp. 224, 230 (S.D.N.Y. 1997) ("The question of whether a

committed by certain Maui Jim Italy employees, the record is bereft of any facts suggesting that they had Maui Jim's graces to do so, and any suggestion of acquiescence is directly refuted by Maui Jim's cease and desist letters. (*Id.* ¶¶ 80-81.)

good is genuine, however, presupposes the initial sale was authorized."); Restatement (Third) of Unfair Competition § 24 (1995) ("Trademarked goods produced by a manufacturer under a contract with the trademark owner should not be considered genuine **[**26]** goods until sale of the goods under the mark has been authorized by the trademark owner.")

We begin our analysis by addressing the applicable burden. The parties disagree over who shares the burden of proving whether an authorized first sale occurred. Maui Jim says that the Defendant bears the burden arguing that it is an affirmative defense[7] ; Defendants say that Maui Jim bears the burden as part of its infringement case in chief. The parties cite neither binding case law nor a case within this district on this point. Nor were we able to find one.[8] The Ninth Circuit persuasively addressed the burden of proof applicable to the first sale defense in a 2015 copyright infringement opinion. *See* Adobe Sys. Inc. v. Christenson, 809 F.3d 1071, 1079 (9th Cir. 2015). *Adobe* held that **HN7**[] the party asserting the first sale defense bears the initial burden of satisfying its requirements. *Id.* This means that the party asserting the first sale defense had the burden to "show ownership through lawful acquisition." *Id.* [9] We think that *Adobe*'s reasoning makes sense because it accords with the general notion that **HN8**[] fairness dictates that a litigant ought not have the burden of proof on facts particularly within the knowledge of the opposing party. *See* United States v. N.Y., New Haven & Hartford R.R. Co., 355 U.S. 253, 256 n. 5, 78 S. Ct. 212, 214 n. 5, 2 L. Ed. 2d 247 (1957) ("The ordinary rule, based **[**27]** on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary."); *see also* 2 **[*1082]** McCormick on Evid. § 337 (7th ed.) (2013) ("A doctrine often repeated by the courts is that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue."). Here, Defendants are best suited to know who gave them the Maui-Jim-branded sunglasses they sell on their website. We think it would be absurd to think that fairness would otherwise dictate that an IP holder should be required to prove from where a potential infringer obtained their property to overcome the first sale doctrine. That type of information is not within a trademark holder's knowledge. Pragmatically, holding otherwise would require trademark holders to employ mechanisms outside of the Lanham Act's purview to track their trademarked products' sales throughout the stream of commerce when a reseller could have just revealed their source. Thus, fairness leads us to follow *Adobe*'s holding and so we place the burden on Defendants — the parties asserting the first sale affirmative defense — to show how **[**28]** they obtained ownership of the Maui-Jim-branded sunglasses that they sold.

With an understanding of the applicable burden, we briefly review other first sale doctrine cases. In *RFA Brands*, for example, the defendant claimed that he obtained certain goods through a one-time purchase of auctioned storage units and believed the first sale defense applied to protect his later sales on Amazon.com. RFA Brands, 2014 WL 7780975 at *8. *RFA Brands* held that even if the defendant did find the plaintiffs' products in the storage units that he bought, the defendant at best could only speculate as to the origin of such **[**29]** products. *Id.* So, *RFA Brands* held that the "defendant ha[d] not established that the first sales of the products at issue were 'authorized'" and held

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[7] Defendants asserted the first sale doctrine as an affirmative defense in their Answer. (Answer (Dkt. No. 259) at 31-32.) Curiously, Defendants' legal position flipped to the opposite in their supplemental briefing on this issue. (Defs.' Supp. Mem. (Dkt. No. 499) at 2-3.)

[8] The Supreme Court last scrutinized the first sale doctrine in 2013 without discussing burdens. *See* Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 528, 133 S. Ct. 1351, 1357, 185 L. Ed. 2d 392 (2013). In *Kirtsaeng*, the Supreme Court held that the first sale doctrine applies to copies of works made and sold abroad. *Id.* Central to that decision was the fact that the first sale doctrine has its roots in common law principles that made no geographical distinction. *Id.*

[9] *Adobe* further explained:

> What does this mean in practical terms? In the context of a summary judgment motion in a software case, it simply means that the party asserting a first sale defense must come forward with evidence sufficient for a jury to find lawful acquisition of title, through purchase or otherwise, to genuine copies of the copyrighted software. To the extent that the copyright holder claims that the alleged infringer could not acquire title or ownership because the software was never sold, only licensed, the burden shifts back to the copyright holder to establish such a license or the absence of a sale.

Id.

that the plaintiffs were entitled to summary judgment on their trademark infringement claim. *Id.* Indeed, *RFA Brands* held that those goods were no longer genuine goods since there was no proof of an authorized first sale by the trademark owner. *Id. RFA Brands* went on to grant summary judgment for the plaintiff-IP holders. *Id.*

RFA Brands followed the analytical process set out by other courts. For example, in *Ford Motor Co. v. Heritage Mgmt. Grp., Inc., 911 F. Supp. 2d 616, 620 (E.D. Tenn. 2012)*, the defendants purchased certain goods through eBay and were "unsure where the parts came from or where they were produced before they arrived in their possession." *Id.* That court went on to hold that since those defendants could only speculate that the goods were produced by Ford and purchased within Ford's supply chain that there was a "risk of injury to the reputation of [Ford's] mark." *Id. at 626-27* (internal citation omitted.); *see also Green v. Electric Vacuum Cleaner Co., 132 F.2d 312, 314 (6th Cir. 1942)* (holding that an alleged infringer does not enjoy the first sale doctrine's protection by merely asserting "that the articles are legitimate and, without disclosing their source, were purchased from those **[**30]** who bought from the plaintiff.").

Here, Maui Jim argues that Defendants offer less than *RFA Brands*' insufficient speculation because they "deliberately stayed ignorant of the source of the MAUI JIM-branded sunglasses that it purchase[d] from third parties, half of whom have never been Maui Jim authorized retailers." ((Pl.'s Mem. Lanham MSJ (Dkt. 427) at 27.) Related, Maui Jim argues that Defendants are unable to prove that [TEXT REDACTED BY THE COURT] of pairs of Maui-Jim-branded sunglasses they sold stem from an initial authorized sale. This argument is based on the following purchasing scheme laid out by Maui Jim:

> Maui Jim has never sold a single pair of MAUI JIM sunglasses to [Defendants]. **[*1083]** Because [Defendants] cannot get MAUI JIM sunglasses *from* Maui Jim, [Defendants] ha[ve] chartered a secretive path *around* Maui Jim. [Defendants] contend[ ] that it gets the sunglasses through [TEXT REDACTED BY THE COURT] distributors and affiliates that purchase directly from Maui Jim. Maui Jim, however, has never sold a single pair of MAUI JIM sunglasses to [TEXT REDACTED BY THE COURT] of the companies. Therefore, the MAUI JIM-branded sunglasses that those companies sold to [Defendants] could not **[**31]** have come to those companies "directly from Maui Jim."
> The remaining [TEXT REDACTED BY THE COURT] companies were once authorized retailers of Maui Jim, but Maui Jim sold only [TEXT REDACTED BY THE COURT] pairs of MAUI JIM sunglasses to those companies. Those companies necessarily obtained the other [TEXT REDACTED BY THE COURT] pairs from one or more sources other than Maui Jim. And [Defendants] admit[ ] that [they] neither know[ ] the sources nor care[ ] to know, for fear of being invested with uncomfortable facts."

(Pl.'s Mem. Lanham MSJ (Dkt. 427) at 25.)[10]

Defendants have not shown authorized first sales for each of its Maui-Jim-branded sunglasses beyond blanketed self-serving testimony and testimony from third-parties. (*See, e.g.*, Defs.' Supp. Mem. (Dkt. No. 499) at 5-6 (collecting citations to the record).) Such blanket testimony does not convince us that no question of material fact exists such that we may rule for Defendants at the summary judgment stage. *See Green, 132 F.2d at 314* (holding that an alleged infringer does not enjoy the first sale doctrine's protection by merely asserting "that the articles are legitimate and, without disclosing their source, were purchased from those who bought from the **[**32]** plaintiff."). The non-blanketed evidence fairs no better. For example, Defendants claim that a vast majority of their sunglasses (more than [TEXT REDACTED BY THE COURT] sunglasses) were sold by Maui Jim to a company called [TEXT REDACTED BY THE COURT] (Dkt. Nos. 462 at 3, 458 at 7-8, 466 32(d).) And Defendants further claim that Maui Jim's own sales representatives knew that [TEXT REDACTED BY THE COURT] would turn around and sell those sunglasses to Defendants to be resold. (Defs.' Resp. to Pl.'s SOF Pl.'s MSJ (Dkt. No. 459 ¶ 32.) In fact, there is a dispute between Maui Jim's records show that it sold [TEXT REDACTED BY THE COURT] pairs of sunglasses to [TEXT REDACTED BY THE COURT] and Defendants' contention that they obtained more than [TEXT REDACTED BY THE COURT] pairs from [TEXT REDACTED BY THE COURT] (*See, e.g.*, Pl.'s Mem. Lanham MSJ (Dkt. 427) at

[10] Defendants state that it is actually [TEXT REDACTED BY THE COURT] total suppliers rather than [TEXT REDACTED BY THE COURT] and that the [TEXT REDACTED BY THE COURT] tally was the result of an administrative error. (Dkt. No. 458 at 7.)

12.) Defendants' chief support for this factual claim relies on the declaration submitted by [TEXT REDACTED BY THE COURT] managing director, [TEXT REDACTED BY THE COURT] testimony effectively states that Maui Jim sold some sunglasses to [TEXT REDACTED BY THE COURT] knowing that it would then sell those sunglasses to SmartBuyGlasses. We **[**33]** are unable to know whether a jury would view [TEXT REDACTED BY THE COURT] testimony to mean that the unaccounted-for sunglasses were routed to Defendants after an authorized first sale. (*See, e.g.*, Defs.' Opp. Mem. (Dkt. No. 458 at 7).) Moreover, besides [TEXT REDACTED BY THE COURT] there remains [TEXT REDACTED BY THE COURT] of other sunglasses procured from other sources that lack specific sourcing information. (*See id.*; *see also* (Pl.'s Resp. to Defs.' Amend. SOF (Dkt. No. 466) ¶ 38)). Therefore, we hold that Defendants have failed to overcome their burden with respect to the first sale doctrine at this juncture. Nevertheless, we decline to grant summary judgment on this defense in Maui Jim's favor because Defendants have provided enough source evidence to create a question of material fact as to whether they meet their burden under the first sale doctrine such that **[*1084]** judgment as a matter of law would be inappropriate.

For these reasons, we find a genuine issue of material fact exists such that judgment as a matter of law on the first sale doctrine issue would be inappropriate at the summary judgment stage.[11]

b. First Sale Doctrine: Material Differences

HN9[] The first sale doctrine does not apply **[**34]** to products that have been materially altered from their original form. *See, e.g.*, *Delta Air Lines, Inc., 2018 WL 3819108 at *2* (citing *SoftMan Prods. Co., LLC v. Adobe Sys., Inc., 171 F. Supp. 2d 1075, 1093 (C.D. Cal. 2001))*; *Rockwell Automation, Inc. v. Radwell Int'l, Inc.*, No. CV 15-05246 *(RBK/JS), 2019 U.S. Dist. LEXIS 222361, 2019 WL 7288946, at *3 (D.N.J. Dec. 30, 2019)* ("The 'material differences' doctrine, which is judge-made law, has been an exception to the doctrine that the first sale of a good covered by IP exhausts the IP owner rights in the good.") It is incumbent upon the reseller to show that the differences are not of the kind that consumers would likely consider in purchasing the product. *Hyundai Const. Equip. U.S.A., Inc. v. Chris Johnson Equip., Inc.*, No. 06-cv-3236, 2008 WL 4210785 (N.D. Ill. Sept. 10, 2008). An alteration is material if it changes something about a product that is relevant to consumers' decision to purchase the product. *Id.* (collecting cases).

Maui Jim believes that its branded sunglasses are materially different from those sold by Defendants in several ways. First, Maui Jim contends that Defendants' Maui-Jim-branded sunglasses customers experience inordinate delays. Second, Maui Jim argues that Defendants' sales do not qualify for Maui Jim's warranty program. Third, Maui Jim reasons that "someone who bought MAUI JIM-branded sunglasses from [Defendants] may have received MAUI JIM-branded sunglasses **[**35]** that differed from genuine MAUI JIM sunglasses" because Defendants "sold MAUI JIM-branded sunglasses after removing the original lenses and mounting in the frames prescription lenses that did not come from Maui Jim" but rather were "manufactured using a process over which Maui Jim had no control." (Pl.'s Lanham MSJ at 32; *see also* SOF ¶ 34.). We discuss these three categories of potentially material differences in turn.

i. Material Difference: Shipping Delays

Maui Jim first contends that the first sale doctrine does not save Defendants due to a material difference in shipping speeds and delivery reliability. (Pl.'s Mem. Lanham MSJ (Dkt. No. 427) at 28.) Maui Jim does not cite any case law where a court held that inordinate shipping delays were a material difference. But Maui Jim does direct us to *Bel Canto Design, Ltd. v. MSS HiFi, Inc., 837 F. Supp. 2d 208, 224 (E.D.N.Y. 2011)* and *Beltronics USA, Inc. v. Midwest Inventory Distrib. LLC, 522 F. Supp. 2d 1318, 1327 (D. Kan. 2007)*, *aff'd* *562 F.3d 1067, 1071 (10th Cir. 2009)*. *Beltronics* and *Belcanto* stand for the proposition that "a physically identical product is nevertheless

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[11] Our conclusion would be the same had the burden been Maui Jim's to bear. Had the burden been Maui Jim's, we would have held that they did enough to convince us that a question of material fact existed as to whether an authorized first sale occurred such that judgment as a matter of law would be rendered inappropriate.

'materially different' from the genuine article if 'the bundle of services' that attach to that genuine article is not available to the consumer." Bel Canto, 837 F. Supp. 2d at 224 (citing *Beltronics*, 562 F. Supp. at 1071).

In *Beltronics*, the defendant manufactured automobile radar detectors and sold them through authorized dealers who agreed **[**36]** to minimum price restrictions. *Beltronics, 522 F. Supp. 2d at 1327*, *aff'd* 562 **[*1085]** F.3d at 1071. However, as alleged in this case, the authorized dealers violated their dealership agreements by reselling to an unauthorized retailer, the defendant. That defendant in turn sold Beltronics' products on eBay as "new" Beltronics products. The *Beltronics* defendant altered the product merely be masking the serial number on the products to make unknown the identity of the authorized dealer that supplied them with the radar detector. But Beltronics' policy was that consumers could only receive certain services like software upgrades, rebates, product use information, service assistance, warranties, and recall information if their radar detector had an original serial number. The Tenth Circuit found the altering of serial numbers voided the product's warranty under Beltronics' policy and so the radar detectors the defendant sold were materially different from genuine Beltronics radar detectors. *Id. Bel Canto* followed *Beltronics* and analogously involved alteration of serial numbers. *Bel Canto, 837 F. Supp. 2d 208*. *Bel Canto* held that the defendants' products lacked warranty and other services such as upgrades and recall notices did not constitute a material difference. *Id. Bel* ***[**37]*** *Canto*'s reasoning was premised in the fact that Bel Canto was a New York dealer governed by a New York law that prohibited attempts to limit warranties to direct purchasers only. *Id. at 226* (citing GBL 369-b of the New York General Business Law). Neither *Bel Canto nor Beltronics* directly discuss delivery speeds. *Id*; *see also* *Beltronics, 522 F. Supp. 2d at 1327*, *aff'd* 562 F.3d at 1071.

Here, although the record contains disputed evidence of customer complaints about Defendants' slow and delayed shipments (Defs.' Resp. to Pl.'s Lanham SOF (Dkt. No. 459) ¶ 61), we are unaware of any case law establishing that poor customer service respecting shipment speeds constitutes a "material difference." And shipment speeds are distinguishable from the warranties discussed in *Belcanto* and *Beltronics*, so we refuse to combine the two. We think a holding that different shipping speeds constitute a material difference would be inappropriate since customers should know that shipment speeds are based on the retailer/website from which they purchase their product and are wholly unrelated to the product's brand. Accordingly, we hold that the difference in shipping speeds between Maui Jim's website's sales and Defendants' website's sales is not a material difference **[**38]** barring Defendants' first doctrine defense.

ii. Material Difference: Warranty Program

Maui Jim next contends that differences between Maui Jim's warranty and Defendants' is a material difference that overcomes Defendants' first sale doctrine defense. The analysis into the warranty programs invites two inquiries: (1) whether Maui Jim's warranty extends to a pair of authentic glasses sold by someone other than an authorized vendor like Defendants and, if not, (2) whether Maui Jim's warranty is materially different from Defendants'.

Maui Jim's position is that its warranty "does not apply to sunglasses purchased outside its network of authorized retailers." (Pl.'s Mem. Lanham MSJ (Dkt. No. 427) at 31.) Defendants counter that Maui Jim's "own communications with customers belie that contention." (Defs.' Mem. Opp. to Pl.'s Lanham MSJ (Dkt. No. 458) (citing Dkt. No. 488)); *see, e.g.*, Defs.' Resp. to Pl.'s Lanham SOF (Dkt. No. 459) ¶¶ 28, 63.)

First, Defendants argue that Maui Jim's head of Customer Care, Lynn Campen, specifically advised a customer service representative to tell a customer that Maui Jim would repair and replace a customer's sunglasses as long as they are authentic. **[*1086]** (Defs.' SOAF **[**39]** Opp. Pl.'s Lanham MSJ ¶ 28 (Dkt. No. 488).) The record shows in this instance that a customer emailed Maui Jim asking whether Maui Jim's warranty applied to retailers who are "not authorized." (Defs.' SOAF Opp. Pl.'s MSJ ¶ 28, Ex. S (Dkt. 463-19).) The pertinent customer service representative then asked Campen for advice. (*Id.*) Campen emailed the customer service representative advising her to tell the customer "If your sunglasses are authentic Maui Jim Sunglasses we would offer repair and replacement options as long as parts are available." (*Id.*). Defendants' inference, that Maui Jim would repair all sunglasses under their warranty bears no relationship to this quoted language. Indeed, Campen's internal email simply did not indicate that the repair would be made pursuant to a *warranty*. (*Id.*)

SOAF ¶ 29 echoes ¶ 28. There, a customer asked whether Maui Jim's customer service representative whether they will "do repairs" "even if I get one of ur [sic] glasses from" an unauthorized dealer like Amazon. (Dkt. No. 463-20, Ex. T at 2.) That customer did not ask about Maui Jim's warranty, as Defendants would like us to infer. (*Id.*) The customer service representative there answered in part, **[**40]** "Yes, we will still *offer* repair services on authentic Maui Jim sunglasses, even if they are purchased from an unauthorized retailer." (*Id.* (emphasis added).) The fact that Maui Jim will repair sunglasses is different than whether Maui Jim's warranty would apply. The real question is, would this customer need to *pay* for repairs.

In summary, although Defendants say the emails contained at SOAF ¶¶ 28 and 29 mean that Maui Jim's warranty would cover Maui Jims purchased from unauthorized dealers, the record does not support that alleged fact. For one, Defendants' reading differs from the plain language used in the emails that state only that Maui Jim would merely *offer* certain services. (*see, e.g.*, *id.*) More, Lynn Campen later clarified this policy in her testimony. (Pl.'s Resp. to Defs.' SOAF Opp. Pl.'s MSJ, Ex. 73 (Dkt. No. 488-13) at 3.) She testified that "We don't offer repair service under warranty from an unauthorized reseller." (*Id.*). Campen further testified that any such "repair and replacement options" she referenced in an internal email "would be at a charge." (*Id.* at 170-:4-171:1.) Campen's testimony is corroborated by customer feedback organized in Maui Jim's "Warranty Chart." (*See,* ***[**41]*** *e.g.*, Dkt. No. 428, Ex. 30, Statement No. 156.). There, for example, a customer complained that he bought Maui-Jim-branded sunglasses from SmartBuyGlasses, eventually sent them in to Maui Jim for a repair, and then "found out that they could not repair under warranty since SmartBuy was not a autherrized [sic] store . . . So [I] had to pay for repair which would almost cost more tha[n] new." (*Id.*) Thus, there is no question of material fact in the record that Maui Jim's warranty does not apply to Maui-Jim-branded sunglasses obtained from an unauthorized retailer like Defendants.

We next address whether Maui Jim's warranty is materially different from Defendants' warranty. ***HN10***[] "[A]bsence of or a different warranty has been held to be a material difference." *Hyundai v. Johnson*, No. 06-3238, 2008 WL 4210785 at *2 (N.D. Ill. 2008) (citing *Bourdeau Bros., Inc. v. International Trade Com'n, 444 F.3d 1317, 1325 n. 3 (Fed. Cir., 2006))*; *Beltronics*, 562 F. Supp. at 1071 (holding that warranties fall within the bundle of services that may yield material differences).

The *Hyundai* defendant contended that his customers knew what they were purchasing: a Hyundai product without any warranty. *Id.* at *2-3. The customers deposed in *Hyundai* agreed with the defendant's view that they knew they were purchasing **[*1087]** a Hyundai product without any warranty. *Id.* at *2. Still, the court granted summary judgment against the defendant **[**42]** reasoning that "While it may have been [his] intention to warn all of his customers . . . this would not protect subsequent customers who may purchase the equipment from [his] customers." *Id. Hyundai* continued, "Thus, the record here conclusively establishes that there are material differences between the equipment [he] imported and the equipment distributed by Hyundai in the United States and Canada." *Id.*

Indeed, it is undisputed that the parties have received inquiries from both present and potential customers about their respective warranty coverages. (Defs.' Resp. to Pl.'s SOF (Dkt. 459) ¶ 62, Ex. 30 (Dkt. 428-25).) Yet the parties dispute whether their respective warranties are identical. (Defs.' Resp. to Pl.'s SOF (Dkt. 459) ¶ 63.) Defendants contend that SmartBuyGlasses' warranty provides identical or better coverage. (*Id.*; Defs.' Mem. Opp to Pl.'s MSJ (Dkt. 458) at 14). To demonstrate this, Defendants compare, among other things, Maui Jim's 24-month replace/repair policy and Defendants' 24-month replacement warrant against manufacturer's defects. (Defs.' Resp. to Pl.'s SOF (Dkt. 459) at 14.) But we observe three potential differences in the parties' warranty coverages based **[**43]** on the record: (1) Maui Jim's warranty offers *repair* in addition to replacement, while SmartBuyGlasses' does not; (2) Maui Jim's warranty is tracked from the date the customer receives the product, whereas SmartBuyGlasses' tracks it from the order date, meaning that Maui Jim's is longer (without even accounting for SmartBuyGlasses' alleged slower shipping speeds); and (3) both warranties only cover *manufacturer's defects*, so Maui Jim, as manufacturer, is logically better suited to determine whether an issue is a manufacturer's defect or not.

HN11[] Differences in warranties must influence a customer's purchasing decision to overcome the first sale doctrine. *See Hyundai Const. Equip. U.S.A., Inc.*, 2008 WL 4210785 at *2 (internal citation omitted). It is incumbent upon the re-seller to show that the differences are not of the kind that consumers would likely consider in purchasing the product. *See id.* Here, there is a question of material fact as to whether differences in Maui Jim and Defendants' warranties influence a customer's purchasing decision. [TEXT REDACTED BY THE COURT]n. More, the record contains evidence suggesting that Maui Jim's warranty does influence consumers' purchasing decision as highlighted in consumer complaints and consumer inquiries **[**44]** directed to both Maui Jim and SmartBuyGlasses.[12] More, the fact that warranties and repair services were ranked [TEXT REDACTED BY THE COURT] in consumer priorities when choosing premium sunglasses could support a finding that Maui Jim's warranty is a material part of a consumer's purchasing decision, especially given Defendants do not offer repair services.[13] **[*1088]** Therefore, we hold that the question of whether Maui Jim's warrant is materially different from Defendants' remains a question of material fact such that judgment as a matter of law is inappropriate at this juncture.

iii. Material Difference: Quality Control

Third, Maui Jim argues that even if Defendants' Maui-Jim-branded sunglasses were once authentic, the lack of Maui Jim's ability to control quality of the sunglasses once they arrived in Defendants' hands constitutes a material difference. (Pl.'s Lanham MSJ (Dkt. 427) at 32; Defs.' Resp. to Pl.'s Lanham SOF (Dkt. No. 459) ¶ 34.) ***HN12***[] Legitimate quality control measures can constitute a material difference in appropriate circumstances. *Iberia Foods Corp. v. Romeo, 150 F.3d 298, 304 (3d Cir. 1998)*. Quality control measures may create subtle differences in quality that are difficult to measure but important to consumers. *Id.* So, courts do not require **[**45]** trademark owners show that the actual quality of the inspected goods is measurably higher than that of the uninspected goods. *Id.* (collecting cases). At the same time, 'quality control' is not a talisman the mere utterance of which entitles the trademark owner to judgment. *Id.* (internal citation omitted). Rather, the test is whether the quality control procedures established by the trademark owner are likely to result in differences between the products such that consumer confusion regarding the sponsorship of the products could injure the trademark owner's goodwill. *Id.* (citing *Warner—Lambert Co. v. Northside Dev. Corp., 86 F.3d 3, 6 (2d Cir. 1996)* (trademark holder must show that it uses substantial and nonpretextual quality control procedures such that nonconforming sales will diminish the value of the mark)); *see also R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores Inc.*, No. 99 C 1174, 2000 WL 1923332, at *3 (N.D. Ill. Nov. 15, 2000) (collecting cases). Thus, Maui Jim must demonstrate that its quality control procedures create a likelihood that their sunglasses are different from those that it does not control. *Id.* (internal citation omitted). In so demonstrating, Maui Jim need not show that its procedures succeed in preventing virtually all substandard product from reaching the consumer. *Id.* It is enough that it stops purchases of substandard product to **[**46]** create a material difference between the categories of authorized and unauthorized sales. *Id.* (citing *Iberia, 150 F.3d at 305* (cursory and standardless search for "obvious defects" insufficient to create material difference)). True, Defendants admit that it sold a small amount ([TEXT REDACTED BY THE COURT] pairs) of Maui Jim sunglasses with third-party prescription lenses outside of Maui Jim's control (Defs.' Opp. Mem. (Dkt. 458) at 15) but we are otherwise unable to ascertain based on the record how Maui Jim's other talisman of 'quality control' is enough to allow us to resolve this issue at the summary judgment stage.

Concluding the inquiry into material differences, we hold that there remains questions of material fact that preclude judgment as a matter of law.

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[12] We additionally think that a jury could find that the difference in warranty provider alone could warrant a material difference even if the warranties' terms were identical. For example, we conjecture that a warranty from an institutional manufacturer would certainly be perceived more valuable to a consumer than the same warranty term provided by a discount retailer. We think that that could make sense under the appropriate circumstances, but the parties do not address whether consumers would be more likely to trust an institutional manufacturer's warranty fulfillment promise more than a lesser known discount vendor's.

[13] Campen testified that Maui Jim's repair department received on average three to four nonprescription lenses per week for repair services between 2015 and 2018. (Pl.'s Resp. to Defs.' SOF (Dkt. 466) ¶ 70(f).) The jury is best positioned to determine how that frequency of repair requests reflects on the materiality of the repair service.

c. First Sale Doctrine: Sponsorship

Maui Jim contends that the first sale doctrine's "sponsorship exception" also blocks Defendants from the first sale doctrine defense. (Pl.'s Mem. Lanham MSJ (Dkt. 427) at 32.) ***HN13***[] Under the sponsorship exception, the first sale doctrine's protections do not extend to resellers who use other entities' trademarks to give the false impression that they are favored or authorized dealers for a product. *Delta, 2018 WL 3819108 at 2* (citing *Australian Gold, Inc. v. Hatfield, 436 F.3d 1228, 1241 (10th Cir. 2006)*; *D 56, Inc. v. Berry's Inc., 955 F. Supp. 908, 910-20 (N.D. Ill. 1997)*. Thus, **[**47]** use of a plaintiff's trademark in promotional **[*1089]** materials such as advertising or displays is not protected by the first sale doctrine, but use of a plaintiff's trademark solely to identify a product up for sale is protected. *Id.* The sponsorship exception is a relevant inquiry because "one who resells trademark goods is obligated to do so in a manner that is not likely to cause confusion or imply that the seller is associated with the manufacturer." *Bernina of Am., Inc. v. Fashion Fabrics Int'l, Inc.*, No. 01-cv-585, 2001 WL 128164, at *2 (N.D. Ill. Feb. 9, 2001) (quoting *Quill Corp. v. Nada Scientific Ltd.*, No. 97-cv-7461, *1998 U.S. Dist. LEXIS 8527, 1998 WL 295502 (N.D. Ill. May 21, 1998))*. This means that conduct that goes beyond the mere resale of trademarked goods and its incidental advertising may not be protected by the first sale doctrine. *See, e.g.*, *Enesco Corp. v. K's Merchandise Mart Inc.*, No. 99-cv-1070, 2000 WL 1800640 (N.D. Ill. Aug. 29, 2000) (Pallmeyer, J.) (collecting cases); *D56, Inc.* 955 F. Supp. at 919 (acts such as the use of the producer's trademark on displays and in advertising, and the distribution of the producer's promotional literature constituted conduct that went beyond mere resale and its incidental advertising).

Maui Jim claims that Defendants misled consumers that they were an authorized retailer of Maui Jim sunglasses. Indeed, it **[**48]** is undisputed that Defendants were never part of Maui Jim's authorized retailer program. (Defs.' Resp. to Pl.'s SOF (Dkt. 459) ¶ 64.) Maui Jim chiefly takes issue towards SmartBuyGlasses.com's representation that it works directly with leading eyewear manufacturers and suppliers. (Pl.'s Mem. Lanham MSJ (Dkt. No. 427) at 33.) As an example, the parties do not dispute that SmartBuyGlasses.com previously contained a diagram that advertises that SmartBuyGlasses.com's supply chain is direct from the manufacturer to the customer. (Pl.'s Lanham SOF ¶ 68, Ex. No. 35 (Dkt. No. 428-40). That diagram additionally shows that SmartBuyGlasses.com's supply chain does not include intermediaries like exporters, importers, wholesalers, and retail shops. (*Id.*) Maui Jim reasons that that representation is misleading because it is also a leading eyewear manufacturer, does not associate with SmartBuyGlasses.com, yet SmartBuyGlasses.com nevertheless retails its product. (*Id.at 33-34*.) So, Maui Jim contends that that diagram falsely suggests that sunglasses purportedly bearing Maui Jim's brand on SmartBuyGlasses.com would be sourced directly from Maui Jim, the manufacturer. To that point, even SmartBuyGlasses' Vice **[**49]** President, Mr. Rossetto, testified that this diagram was a poor representation of SmartBuyGlasses' procurement model. (Pl.'s Resp. to Defs.' SOAF (Dkt. No. 488) ¶ 15.)

Maui Jim submitted [TEXT REDACTED BY THE COURT] instances where Defendants' customer service representatives supposedly indicated that they were an authorized Maui Jim dealer. (Pl.'s Lanham SOF ¶ 65, Ex. No. 26 (Dkt. No. 428).) One example is highlighted in their brief. (Pl.'s Lanham MSJ Mem. (Dkt. 427) at 33.). That example shows a customer asking SmartBuyGlasses' customer service representative: "Are you an authorized Maui Jim's dealer?" (Pl.'s Lanham SOF ¶ 65, Ex. No. 26-60 (Dkt. No. 428-28) and its customer service representative responding: "Yes, we are." (*Id.*). Other customer feedback echoes Maui Jim's concern. For example, Maui Jim points to customer feedback organized in a chart where a SmartBuyGlasses representative stated "all our products are 100% authentic[ ] [w]e source the authentic items through authorized distributors." (Pl.'s Lanham SOF 65, Ex. 32, No. 148 (Dkt. No. 428-37 at 12).) That statement was in response to the following Customer's message: "your section 'Authenticity' says you work directly with **[**50]** the manufacturers, in this case Maui Jim, so why is it that they don't know where you get your MJ sunglasses **[*1090]** from. Sh [sic] also told me that they could be counterfeit." (*Id.*) Maui Jim also cites to the example of a SmartBuyGlasses customer who asked its customer service representative how it can "guarantee authenticity when [its] not an authorized dealer of Maui Jim products?" (*Id. at 7-98* (Dkt. No. 428-37 at 8.) To which SmartBuyGlasses' customer service representative responded by stating that it "source[s] it from the manufacturer itself." *(Id.*) That customer responded by telling the representative that Maui Jim had told that customer that they "aren't supplying you guys with glasses," and then the representative changed course and stated "we do not source the item from Maui Jim brand, we source it from the factory or manufacturer on where they also ordered their items." (*Id.*)[14] Defendants downplay these statements as merely mistakes made by customer service representatives rather than depictions of customer confusion.

Maui Jim also argues impermissible sponsorship on the basis that Defendants "fraudulently uses Maui Jim's 2009 Drop Ball Certification, without Maui Jim's knowledge or authorization, **[**51]** to mislead Customs into believing that Maui Jim guaranteed that whatever SBG was shipping to U.S. customers had been tested for impact resistance." (Pl.'s Mem. Lanham MSJ (Dkt. 427) at 35) (citing Pl.'s Lanham SOF ¶ 43); Pl.'s Lanham SOF ¶ 43, Ex. 8 (Dkt. 428-8 at 2.) Exhibit 8 is a one-page document entitled "Drop Ball Test Certification" that states:

> I, Rebecca Myers, hereby guarantee that the articles listed herein are impact resistant within the meaning of *21 CFR 801.410* and have been tested pursuant to that section. Impact resistant lenses are not unbreakable or shatterproof. Record of testing will be maintained for a period of three (3) years from the date of shipment and copies will be furnished to the FDA upon request.
> Company Name: Maui Jim
> Name: Rebecca Meyers
> Title: Logistics Manager
> Date: 6/8/09

(Pl.'s Lanham SOF ¶ 43, Ex. 8 (Dkt. No. 428-8) at 2.) The certification includes Maui Jim's trademark on the top left of the certification page. (*Id.*) Defendants' attempt to downplay this by drawing a distinction between misleading consumers versus misleading U.S. Customs. (*Id. at 18*.) We find that difference unremarkable especially where Defendants admit that at least two consumers received this incorrect **[**52]** Drop Ball Test Certification paperwork. (*Id. at 17-18*.)

Defendants reason that the sponsorship exception does not overcome the first sale doctrine defense due to their website's disclaimers. First, Defendants state that its website has disclaimers stating that SmartBuyGlasses is not owned by or affiliated with any brand it sells unless expressly stated otherwise. (Defs.' Mem. Opp. to Pl.'s Lanham MSJ (Dkt. No. 458) at 16 (citing its SOF (Dkt. No. 446) ¶ 48).). Maui Jim does not dispute that that disclaimer appears in small type on the bottom of SmartBuyGlasses.com. (Pl.'s Resp. to Defs.' Amend. SOF Defs.' MSJ (Dkt. 466 ¶ 48.). Second, Defendants argue that its website advises customers that "SmartBuyGlasses is not affiliated with nor an official re-seller for Maui Jim" when a customer views a Maui Jim specific model on its website. (*Id. at 16* (citing their SOF ¶ 51.) SmartBuyGlasses may have confused customers with its contradictory statements throughout its website that it is authorized by "all" brands rather than a **[*1091]** more accurate word like "most" or "many" brands.

Last, Maui Jim's Sowers Expert Survey suggests that certain disclaimers misled 40% of the survey respondents to incorrectly think that SmartBuyGlasses **[**53]** was an authorized retailer of Maui-Jim-branded sunglasses. (ECF 418, Ex. 1 ¶ 12.) But that could also reasonably suggest that the other 60% of the survey respondents did not perceive any degree of sponsorship.

We cannot say that no question of material fact exists with respect to sponsorship when considering these disclaimers' existence alongside the other evidence in the record. Accordingly, the sponsorship question presented here contains far too many disputed material facts such that adjudication at summary judgment would be inappropriate.

3. Likelihood of Confusion

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[14] Defendants dispute that any of the examples references within Maui Jim's Ex. 32 to its Statement of Facts reflects actual customer confusion from SmartBuyGlasses' statements and actions. (Defs.' Resp. to Pl.'s SOF ¶ 65 (Dkt. No. 459 at 23.)

We need not address the likelihood of confusion question since we have found that a threshold question of material fact exists regarding the first sale doctrine. Nevertheless, for the sake of completion, we next address the likelihood of confusion component of a trademark infringement lawsuit.

HN14[] Maui Jim must establish that Defendants' use of its trademarks is likely to cause confusion among consumers. The Seventh Circuit has set forth seven factors to determine whether a likelihood of confusion exists. *See AutoZone, Inc. v. Strick, 543 F.3d 923, 929 (7th Cir. 2008)*; *see also Entm't One*, 384 F. Supp. 3d at 949. However, the Seventh Circuit also held, in a non-precedential opinion, that courts can presume likelihood **[**54]** of confusion where a defendant "produces counterfeit goods in an apparent attempt to capitalize upon the popularity of, and demand for, another's product." *Microsoft Corp. v. Rechanik, 249 Fed. App'x. 476, 479 (7th Cir. 2007)* (quoting *Polo Fashions, Inc. v. Craftex, Inc., 816 F.2d 145, 148 (4th Cir. 1987))*. We will first analyze the facts under the counterfeit presumption, and then under the full seven factor test. *See Entm't One*, 384 F. Supp. 3d at 949 (quoting *Coach, Inc. v. Treasure Box, Inc.*, No. 3:11 CV 468, *2013 U.S. Dist. LEXIS 76607, 2013 WL 2402922, at *4-5 (N.D. Ind. May 31, 2013)* ("This ... is plainly a case for presuming likelihood of confusion. But in an abundance of caution, [the Court] will take a belt-and-suspenders approach ... and proceed with the seven-factor analysis to determine whether there is a likelihood of consumer confusion.")). The party asserting infringement bears the burden of proving confusion. *See, e.g.*, *Barbecue Marx, Inc. v. 551 Ogden, Inc., 235 F.3d 1041, 1043 (7th Cir. 2000)*.

a. Likelihood of Confusion: Counterfeit Presumption Test

HN15[] Under the counterfeit presumption test, a court presumes likelihood of confusion when a defendant has produced counterfeit goods to capitalize on the popularity of another's product. *Microsoft*, 249 Fed. App'x. at 479; *Ent't One*, 384 F. Supp. 3d at 949. To be "counterfeit," the goods must have been produced by an entity that was not authorized to use the mark at the time the goods were manufactured. *15 U.S.C. § 1116(d)(1)(B)*; *see Specht v. Google, Inc., 660 F. Supp. 2d 858, 865 (N.D. Ill. 2009)* ("Counterfeiting is the act of producing or selling a product with a sham trademark that is an intentional **[**55]** and calculated reproduction of the genuine trademark."). Maui Jim never authorized Defendants to use its trademarks. Additionally, counterfeit goods must bear "a spurious mark which is identical with, or substantially indistinguishable from, a registered mark." *15 U.S.C. § 1127*. And a protected mark need not appear on an item to render it counterfeit; rather, the Lanham Act only requires that the protected mark be used "in connection with" the sale. *15 U.S.C. § 1114(1)(a)*; *see Ent't* ***[*1092]*** *One*, 384 F. Supp. 3d at 949-50; *see also Chloe SAS v. Sawabeh Info. Servs. Co.*, No. CV 11-04147, *2014 WL 4402218, at *7 (C.D. Cal. Sept. 5, 2014)* (finding that using a word mark in the title of a sale listing constitutes counterfeiting even if the mark is not located on the product offered for sale). The Maui Jim marks were imprinted directly on the sunglasses at issue and Defendants used them in the product's website displays.

In support of Maui Jim's position that Defendants used a counterfeit mark, Maui Jim chiefly relies on the undisputed fact that three SmartBuyGlasses executives showed interest in selling Maui Jim-branded sunglasses.[15] Opposing, Defendants point to deposition testimony of Maui Jim's executives. (Pl.'s Resp. to Def's. Amend. SOF Defs.' MSJ (Dkt. 466 ¶ 7 at 9-12.) For example, Maui Jim's CFO, Paul Lippens, **[**56]** testified that he could not identify any particular pair of Maui Jim sunglasses that SmartBuyGlasses sold to a consumer that were not originally sourced from Maui Jim. (*Id. at 10*.) Similarly, Maui Jim's VP of Purchasing, Chris McClain, testified that he could not determine whether any plano sunglasses that Maui Jim purchased from SmartBuyGlasses were not manufactured by Maui Jim. (*Id.*). But, Lippens' and McClain's testimony is contrasted by the testimony of Maui Jim's digital marketing manager, Dave Siragusa, who oversaw secret test purchases of Maui-Jim-branded sunglasses from SmartBuyGlasses.com between 2013-2016. (*Id. at 10*.) Siragusa testified that he could indeed tell that some of the Maui-Jim-branded glasses purchased as part of a secret test were not manufactured by Maui Jim. (*Id.*) Lippens'

[15] In relevant part, one executive said: "Maui Jim will generate top sales for us if we can secure it," "Maui [J]im is a very solid online brand and will mean significant sales if we can secure it," and "when we were online with it even for a week, we were starting to get great sales." (Defs.' Resp. to Pl.'s SOF ¶ 57.)

and McClain's testimony is also contrasted by Maui Jim's VP of Marketing, Mr. Black, who testified that he could tell that some of the glasses sold through SmartBuyGlasses.com were counterfeit because they were sold "without our Maui Jim lenses." (*Id. at 11*.)

These disputed material facts regarding counterfeiting preclude us from resolving whether Defendants' Maui-Jim-branded sunglasses were counterfeits as a matter **[**57]** of law at the summary judgment phase. For example, although there is no evidence tracing Defendants' Maui-Jim-branded sunglass *frames* to a counterfeit manufacturer, there remains some mystery as to where Defendant acquired some of their Maui-Jim-branded sunglasses. And to the extent that Maui Jim's counterfeit claim is couched in the fact that Defendants' insert third-party prescription lenses into Maui-Jim-branded eyeglass frames, as discussed later in this opinion, there remains a question of material fact as to whether Defendants adequately notified its customers that those lenses were manufactured by Defendants, not Maui Jim. Last, the conflicting testimonies of Maui Jim's Lippens, McClain, Siragusa, and Black make us further reluctant to hold that no question of material fact exists as to whether Defendants' Maui-Jim-branded sunglasses are counterfeits. Thus, we do not presume a likelihood of confusion at this juncture under the counterfeit presumption test. So, we turn to address the "likelihood of confusion" seven factor test without relying on a presumption. *See Microsoft*, 249 Fed. App'x. at 479; *see also Ent't One*, 384 F. Supp. 3d at 949.

b. Likelihood of Confusion: Seven Factor Test

HN16[] To determine whether a likelihood of confusion exists we **[**58]** consider the **[*1093]** following factors: (1) the similarity between the marks in appearance and suggestion; (2) the similarity of the products; (3) the area and manner of concurrent use; (4) the degree and care likely to be exercised by consumers; (5) the strength of the plaintiff's mark; (6) any actual confusion; and (7) the intent of the defendant to "palm off" his product as that of another. *AutoZone, 543 F.3d at 929*. No single factor is dispositive. *Id.* Courts may assign varying weight to each of the factors depending on the facts presented, though usually the similarity of the marks, the defendant's intent, and actual confusion are particularly important. *Id.* Where the evidence is so one-sided that there can be no doubt about how the question should be answered, the likelihood of confusion can be resolved on summary judgment. *See, e.g.*, *Door Sys., Inc. v. Pro-Line Door Sys., Inc., 83 F.3d 169, 173 (7th Cir. 1996))*; *NNA Properties, Inc. v. Yan Zhou*, No. 16-cv-11117, *2017 U.S. Dist. LEXIS 148971, 2017 WL 4074020, *2 (N.D. Ill. Sept. 14, 2017)*.

HN17[] The first factor (similarity between the marks in appearance and suggestion) is assessed by viewing the similarity of the marks as a whole, not from their "elements separated and considered in detail." *AutoZone, 543 F.3d at 929*. The test is whether the viewer of an accused mark would be likely to associate the product with which it is connected with **[**59]** the source of products with which an earlier mark is connected. *Id. at 930*. Since Defendants used Maui Jim's exact marks, this factor favors Maui Jim.

HN18[] The test for the second factor (similarity of the products) is whether the parties' products "are the kind the public might very well attribute to a single source (the plaintiff)." *Id. at 931*. Consumers are likely to attribute similar products to a single source when the parties compete in the same market, targeting similar consumers. *AutoZone, 543 F.3d at 932*. Maui Jim produces and sells a wide variety of Maui-Jim-branded sunglasses. Defendants advertise that the sunglasses they sell on their website are branded and produced by a variety of labels, including Maui Jim. Therefore, a reasonable consumer might believe that Maui Jim produced the Maui-Jim-branded sunglasses and authorized their sale on Defendants' website. *AutoZone, 543 F.3d at 932*. This factor weighs in favor of consumer confusion.

HN19[] The third factor (the area and manner of concurrent use) assesses "whether there is a relationship in use, promotion, distribution, or sales between the goods or services of the parties." *Id.* (citation omitted). Defendants sold the products at issue on the internet. Maui Jim sells its sunglasses on its own webpage, **[**60]** its authorized retailers' websites, and in brick and mortar retail stores. (Defs.' Resp. to Pl.'s Lanham SOF (Dkt. No. 459) ¶ 19.) Thus, the parties target an overlapping customer base: people looking to purchase Maui Jim products online. *See AutoZone, 543 F.3d at 932*; *see also Ent't One*, 384 F. Supp. 3d at 951. The third factor favors Maui Jim.

HN20[] The fourth factor examines the degree of care likely to be exercised by sunglass purchasers to determine whether purchasers would be confused by Defendants' products. *CAE, Inc. v. Clean Air Eng'g, Inc., 267 F.3d 660, 682 (7th Cir. 2001)*. The general rule guiding this factor is "the more widely accessible and inexpensive the products . . . the more likely that consumers will exercise a lesser degree of care and discrimination in their purchases." *AutoZone, 543 F.3d at 933* (citation omitted). Some courts have tempered the weight given to this factor where there is a "strong similarity of marks and identity of goods." *Cunningham v. Laser Golf Corp., 222 F.3d 943, 948-49 (Fed. Cir. 2000)*. Maui Jim argues that this factor is **[*1094]** less significant because "no amount of care could distinguish the [Maui Jim] marks that [Defendants] use[ ] from the identical MAUI JIM Marks that Maui Jim owns, particularly where the parties use the marks on identical products." (Pl.'s Mem. (Dkt. No. 427) at 21). In assessing this factor, we consider that Maui Jim sunglasses are both premium **[**61]** (and so relatively expensive) and widely accessible on the internet such that Maui Jim eyewear purchasers can simply search the internet for what they believe to be the exact same product offered by a discount retailer's website like the Defendants' SmartBuyGlasses.com. Accordingly, we find that the expensiveness and wide availability in combination cause this factor to weigh neutrally. *AutoZone, 543 F.3d at 933*. Despite the neutral weight, we temper this factor considering that the marks used on Defendants' website are identical to Maui Jim's.

HN21[] The fifth factor inquires into the mark's strength. The stronger the mark, the more likely it is that encroachment on it will produce confusion. *AutoZone*, 543 at 933. The strength of a trademark refers to the mark's distinctiveness, meaning its likelihood to identify the product as something emanating from a specific source. *CAE, 267 F.3d at 684* (collecting cases); *see, e.g.*, *Ent't One*, 384 F. Supp. at 951 (citing *Coach, 2013 WL 2402922 at *7)*. Maui Jim establishes that its trademarks are strong because the "Maui Jim" mark is consistently recognized by optical retailers and eye care professionals as the Sunglass Company of the Year (Defs.' Resp. to Pl.'s Lanham SOF (Dkt. No. 459) ¶ 13) and Maui Jim has spent millions of dollars advertising, marketing, **[**62]** and promoting its good bearing the marks (Defs.' Resp. to Pl.'s Lanham SOF (Dkt. No. 459) ¶ 10). We also find that the Maui Jim mark is an arbitrary mark that is inherently distinctive because it is two generic words ("Maui" and "Jim") combined in a way that arbitrarily indicates that the branded object is something else. *See, e.g.*, *Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 n.6 (2nd Cir. 1976)* ("To take a familiar example 'Ivory' would be generic when used to describe a product made from the tusks of elephants but arbitrary as applied to soap."). This factor favors Maui Jim.

HN22[] The sixth factor looks towards any evidence of actual consumer confusion. Maui Jim does not need evidence of actual confusion to demonstrate a likelihood of confusion. *See, e.g.*, *CAE, Inc. v. Clean Air Eng'g, Inc., 267 F.3d 660, 685-86 (7th Cir. 2001)*. Both parties have received consumer feedback suggesting actual confusion regarding Defendants' retail of sunglasses bearing Maui Jim's marks. Although disputed, Maui Jim believes there are at least 181 instances of actual confusion. (Defs.' Resp. to Pl.'s Lanham SOF (Dkt. No. 459) ¶ 58.). The chart dubbed as the "confusion chart" (*id.*) submitted by Maui Jim shows examples of customer feedback that indicates customers' actual impressions.[16] **[*1095]** These snippets of customer feedback, along with the other **[**63]** 180 cited in the statements of fact, lead us to weigh the factor for actual consumer confusion weighs favorably to Maui Jim.

HN23[] The final factor focuses on evidence that a defendant attempted to pass off its product as having come from the plaintiff. *Sorensen v. WD-40 Co., 792 F.3d 712, 731 (7th Cir. 2015)*. Evidence of bad faith intent to confuse consumers is particularly relevant. *Id.* Here, there is a question of material fact as to whether Defendants attempted

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[16] Defendants additionally argue that the underlying incidents of "actual confusion" organized into the "Confusion Chart" are inadmissible hearsay. We overrule Defendants' hearsay objection under the business record exception to the rule against hearsay. *Fed. R. Evid. 803(6)(B)*. These documents are records of a regularly conducted activity that were made at or near the time they transpired, were kept in the course of a regularly conducted activity of a business, and making these records was a regular practice. So, these actual statements between customers and customer service representatives are admissible just like emails are commonly admissible and excepted from the rule against hearsay. Based on the record before us, we hold that the communications between customer service representatives and customers fall into this Business Record exception to the rule against hearsay.

to pass off its Maui-Jim-branded sunglasses as having come from Maui Jim for the reasons explained in this opinion's First Sale Doctrine Sponsorship section.

We cannot adequately weigh these factors due to certain disputed material facts. Even ignoring those questions of material facts, we would decline to hold at this juncture that the weight is "so one-sided that there can be no doubt about how the question should be answered" as would be necessary to resolve the likelihood of confusion on summary judgment. *Door Sys., Inc. v. Pro-Line Door Sys., Inc., 83 F.3d 169, 173 (7th Cir. 1996))*; *see also NNA Properties, Inc. v. Yan Zhou*, No. 16-cv-11117, *2017 U.S. Dist. LEXIS 148971, 2017 WL 4074020, *2 (N.D. Ill. Sept. 14, 2017)*.

B. Trademark Dilution

Defendants move for summary judgment in their favor on Maui Jim's trademark dilution claim. (*See, e.g.*, Defs.' Mem. MSJ (Dkt. No. 416) at 50-52.) Maui Jim avers that it need not move for summary **[**64]** judgment on this point because the disposition of its Lanham Motion may render the relief sought in the dilution case duplicative and/or moot as a practical matter. (Pl.'s Mem. MSJ (Dkt. No. 427) at 39.) We agree that the trademark dilution case is largely factually duplicative of the infringement case. Thus, we find that addressing this issue would require factual resolution of the related and overlapping questions of material facts that make summary judgment inappropriate as to the trademark infringement case.[17] We therefore deny Defendants' motion for summary judgment in their favor as to trademark dilution.

C. False Advertising

We turn to the parties' respective motions for summary judgment in their favor on Maui Jim's false advertising claim. ***HN24***[] A false advertising claim requires proof of five elements: (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; **[**65]** and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a loss of goodwill associated with its products. *Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 819 (7th Cir. 1999)*; *Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC, 136 F. Supp. 3d 911, 918 (N.D. Ill. 2015)*, *aff'd*, *870 F.3d 682 (7th Cir. 2017)*. The first element **[*1096]** requires proof that the defendant made a false statement of fact in a commercial advertisement about its own or another's product. *Id.* Two types of false statements can violate the Lanham Act: (1) claims that are literally false as a factual matter or (2) claims that may be literally true or ambiguous that implicitly convey a false impression, are misleading in context, or likely to deceive consumers. *Right Field Rooftops, 136 F. Supp. 3d at 918* (quoting *Hot Wax, 191 F.3d at 820*). Literally false statements give rise to a presumption of deception and materiality (elements two and three). *See id.*

The record suggests that Maui Jim disputes numerous false statements made by Defendants. Maui Jim's memorandum in support of its motion for summary judgment on its false advertising case covers a few allegedly false statements. (Pl.'s Mem. Lanham MSJ (Dkt. No. 427 37-39).) We limit our discussion here to those referenced statements. *See* *Celotex Corp., 477 U.S. at 323, 106 S. Ct. at 2553* (citing *Rule 56* for the proposition that that the movant bears the initial burden of "informing **[**66]** the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact"). The relevant false

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[17] We note the parties' disagreement as to the applicable trademark dilution law. The applicable law for the trademark dilution claim is the Federal Trademark Dilution Act of 1995, as amended by the Trademark Dilution Revision Act of 2006, *15 U.S.C. § 1125(c)*. This requires a showing that the mark is famous, that the defendant adopted an identical or similar mark, that defendant's use likely dilutes the plaintiff's mark by blurring or tarnishment, and commercial use of the mark. *See, e.g.*, *Joshi v. Joshi, No. 18 C 5426, 2019 U.S. Dist. LEXIS 128625, 2019 WL 3554388, at *5 (N.D. Ill. Aug. 1, 2019)* (internal citation omitted).

statements for analysis here, as mentioned in Maui Jim's memorandum are: (1) Defendants' customer service representatives statements as detailed in Exhibit 32 to Statement of Fact ¶ 65, (2) Defendants' website's authenticity guarantee, (3) Defendants' Supply Chain Image, and (4) Defendants' alleged statement that it has a U.S. location. We address each in turn.

1. Defendants' Customer Service Representatives' Statements

Maui Jim attached a 12-page chart entitled "SBG False Representations" as an exhibit to its Lanham Act Statement of Facts. (Pl.'s Lanham SOF ¶ 65, Ex. 32 at 11-148 (Dkt. No. 428-37).) Maui Jim's memorandum of law in support of their false advertising claims based on customer service representative statements points to this chart. (*See* Pl.'s Mem. Lanham Act (Dkt. No. 427) at 37. We addressed a few of these examples above.

Defendants contend that this segment of Maui Jim's false **[**67]** advertising case fails under the first element because, as a matter of law, statements made in response to consumer inquiries are not statements made 'in a commercial advertisement.' ***HN25***[] To this extent, Courts have held that the false advertising remedy under the Lanham Act does not cover all deceitful business practices. *See* *ISI Int'l, Inc. v. Borden Ladner Gervais LLP, 316 F.3d 731, 733 (7th Cir. 2003)*; *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 314 F.3d 48, 57 (2d Cir. 2002)* ("businesses harmed by isolated disparaging statements do not have redress under the Lanham Act; they must seek redress under state-law causes of action."). In *ISI Int'l*, the Seventh Circuit confirmed that letters to customers that misleadingly asserted that the plaintiff lacked rights to license out an invention did not fall within the scope of a Lanham Act false advertising claim. *ISI Int'l, Inc., 316 F.3d at 733 (7th Cir. 2003)* (citing *First Health Grp. Corp. v. BCE Emergis Corp., 269 F.3d 800 (7th Cir. 2001))*. Similarly, in *Sanderson v. Culligan Intern. Co., 415 F.3d 620, 624 (7th Cir. 2005)*, the Seventh Circuit held that three supposedly false statements made person-to-person at trade shows were not actionable as a false advertisement claim under the Lanham Act because they were not "promotional material disseminated to anonymous recipients." *Id.* (citing *First Health Grp. Corp., 269 F.3d at 804*). The customer service representatives' dialogue with customers or potential customers is **[*1097]** thus not actionable as a false advertising claim because they were not 'commercial advertisements.' ***[**68]*** *Id.* Those conversations were person-to-person rather than promotional material disseminated to anonymous recipients. Accordingly, we partially grant Defendants' motion for summary judgment in their favor, and deny Maui Jim's in respective part, to the narrow extent that they seek judgment in their favor on the false advertising claims brought solely under Maui Jim's customer service representatives' false statements.

2. Defendants' Website's Authenticity Guarantee, Supply Chain Image, and U.S. Location Image

We next turn to three portions from Defendants' website that are allegedly literally false statements. These excerpts follow:

(Pl.'s SOF ¶ 65, Ex. 36 (Dkt. No. 428-41) at 5) ("Authenticity Guarantee"), a supply chain graphic,

(Pl.'s Resp. to Defs.' SOF (Dkt. 466) ¶ 68 (citing Ex. 35) ("Supply Chain Image"),[18] and a world map depicting that Defendants had an "operation centre" in New York, USA,

[*1098]

(Defs.' Resp. to Pl.'s Lanham SOF (Dkt. No. 459) ¶ 40) ("U.S Location Image.").[19]

Defendants respond by reasoning that their website additionally contains language disclaiming these generalized terms: "With some of the brands that we sell, the manufacturers' warranty will be available **[**69]** worldwide however for other brands the official warranty may not be available in your country due to territorial limitations and/or brand policies. To cover all scenarios, we offer our own exclusive 24-month warranty against all manufacturers' defects without exception." (Def's. Resp. to Pl.'s SOF ¶ 69 (Dkt. No. 459 ¶ 69). As for another disclaimer, the following appears in small type on the bottom of SmartBuyGlasses.com:

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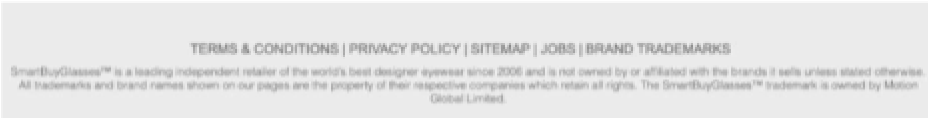
[18] This diagram suggests that Defendants' supply chain is direct from the manufacturer to the costumer rather than the "traditional supply chain" that routes from the manufacturer to an exporter to an importer to a wholesaler to a shop and then to a customer. (*Id.*). That diagram also contained the following accompanying sentence: "By offering the world's largest range of authentic designer eyewear, sourced directly from the world's leading eywear [sic] suppliers, we are here to help you find what you love." (*Id.*) Dispute as to whether this diagram was factually misleading as to the Maui Jim brand exists at least in part because Defendants claim that it "was accurate and consistent with SmartBuyGlasses' practice for the majority of its sales including manufacturers/brands — such as [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY THE COURT] - from which it buys genuine products from the manufacturer of the brands and ships it to its consumers" and that they made consumers aware of this reality through disclaimers. (*Id.* ¶ 68)

[19] Although Defendants do not dispute that they do not have any physical location or physical office in New York (*id.* ¶ 41) they contend that they do have an "operational dropship location in New York." (*Id.* ¶ 40 (citing Defs.' SOAF ¶ 15).) Therefore, a question of material fact remains as to whether this statement is truthful. We were not presented with the factual differences between an 'operational dropship location,' an 'operation centre,' and a physical location. Nor have the parties articulated the difference to us at this summary judgment stage. Thus, the specific factual inquiry left for the jury is whether Defendants' 'operational dropship location' identified as an "operation centre" on the U.S. Location Image was a false statement, given the fact that Defendants do not have a physical location in New York.



(*Id.* ¶ 48.) That disclaimer states that SmartBuyGlasses is not owned by or affiliated with the brands it sells unless stated otherwise. (*Id.*) The parties dispute the impact of this sentence. As for another disclaimer, once a customer pulls up a Maui Jim specific model on the website, the customer is confronted with the following website display:

[*1099]

(*Id.* ¶ 51.) The last sentence of the above states in relevant part that "SmartBuyGlasses is not affiliated with nor an official re-seller for Maui Jim and therefore we provide our own comprehensive 24-month warranty, as Maui Jim do not support their own 24-month warranty with us." (*Id.*) But Defendants' Kalinko testified that he drafted that language after the litigation commenced. (*Id.* (citing Kalinko Dep. 500:13-504:2).) So, **[**70]** the record is unclear as to how long this disclaimer was posted.

True, the Sowers Survey[20] indicates that 40.1% of its respondents had a false impression that Defendants were an authorized retailer of Maui Jim sunglasses. Nevertheless, there remains a threshold question of material fact as to the falsity of Defendants' statements (both whether they are literally false and whether they implicitly convey a false impression) given Defendants' disclaimers[21] and the other reasons discussed above such that this issue should be brought before a jury.[22] Therefore, the parties' respective motions for summary judgment on these issues are denied.

D. Reverse Passing Off

Maui Jim believes that Defendants are liable for reverse passing off under *15 U.S.C. § 1125(a)*. ***HN26***[] Any person who uses in commerce any false designation of origin that is likely to cause confusion shall be liable to any person who believes that he or she is likely to be damaged by such act. *15 U.S.C. § 1125(a)*. To establish a reverse passing off claim, a plaintiff must establish that: (1) the defendant used a false designation of origin, or a false description or representation in connection with the goods or services; (2) the defendant caused the goods or

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[20] Defendants' dispute the results of that survey and asked us to exclude it. (Def.'s Resp. to Pl.'s SOF ¶ 70 (Dkt. No. 459 ¶ 70); Def.'s Mot. to Excl. Surv. and Test. of B. Sowers (Dkt. No. 417).) We denied that motion. (Dkt. No. 496)

[21] We are also not convinced at this juncture that the Sowers Survey is enough to resolve questions of material fact regarding falsity because it does not specifically evaluate the effects of Defendants' disclaimers.

[22] We find that the advertising issue as to third—party lenses also depends on the resolution of a question of material fact. The parties dispute whether Defendants' statements pertaining to third-party prescription lenses (less than 1% of Defendants' sales) were false. (*See* Defs.' Resp. to Pl.'s SOF ¶¶ 54-59.) On one hand, Maui Jim contends that Defendants advertised that their prescription lenses were manufactured by Maui Jim. On the other hand, Defendants contend that SmartBuyGlasses.com did not so advertise because they referred to those prescription lenses on their website with words like "our" rather than "Maui Jim's prescription lenses." (*See id.*) We are unable to say that no question of material fact exists as to whether that statement would be perceived as misleading as to who "our" pertained to (whether Defendants or Maui Jim) so we defer that question to the jury as well.

services to **[**71]** enter interstate commerce; and (3) the plaintiff is a person who believes that he or she is likely to be damaged as **[*1100]** a result. *See, e.g.*, *Hoopla Sports and Ent. v. Nike, Inc., 947 F. Supp. 347, 352 (N.D. Ill. 1996)*. Reverse passing off is where a party misrepresents someone else's goods' as their own. *See Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 27 n.1, 123 S. Ct. 2041, 2045 n.1, 156 L. Ed. 2d 18 (2003)*; *see also Bretford Mfg. v. Smith Sys. Mfg. Corp., 419 F.3d 576, 580 (7th Cir. 2005)* ("reverse passing off . . . is selling someone else's goods under your own mark").[23] Maui Jim's Reverse Passing Off theory is rooted in Defendants' incorrect identification of

[TEXT REDACTED BY THE COURT][24]as the manufacturer of Maui-Jim-branded sunglasses on commercial invoices it sent to its customers. Defendants blame this [TEXT REDACTED BY THE COURT] identification mishap on computer coding that operated from [TEXT REDACTED BY THE COURT] (Pl.'s Resp. to Defs.' SOF (Dkt. 466) ¶ 51.) Thus, Defendants' listing of [TEXT REDACTED BY THE COURT] name rather than Maui Jim's name on its commercial invoices (whether intentional or mistaken) does not constitute reverse passing off since they did not represent those goods as their *own*.[25]

Even if the binding law tracked the Ninth Circuit's *Smith* opinion, we would still come to the same conclusion with respect to Maui Jim's reverse passing off claim. To this point, we additionally **[**72]** hold that Maui Jim has not shown they are likely to be damaged based on the mislabeled invoices. Maui Jim's memorandum on this point only affords the following two sentences to explaining the likelihood for damages element: "The damage to Maui Jim is established by showing a likelihood that consumers will be by SBG's identification of [TEXT REDACTED BY THE COURT] as the manufacturer of MAUI JIM-branded sunglasses. The record has unassailable evidence of actual confusion, which is the best evidence of a likelihood of confusion." (Pl.'s Mem. MSJ.) To the contrary, the handful of customer feedback regarding the invoice's misstatement is not enough for us to resolve the question of whether these mislabeled invoices caused a likelihood for Maui Jim to be damaged.[26]

Accordingly, we deny Maui Jim's motion for summary judgment with respect to its claims for reverse passing off.[27]

[*1101] E. Illinois' Uniform Deceptive Trade Practices Act

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[23] We note that the Ninth Circuit held in 1981 that reverse passing of occurs "when the wrongdoer removes the name or trademark on another party's product and sells that product under *a name chosen by the wrongdoer*," rather than requiring the passed—off—name be the wrongdoer's own. *Smith v. Montoro, 648 F.2d 602, 605 (9th Cir. 1981)* (emphasis added). We follow the precise words used by the Supreme Court and the controlling Seventh Circuit and hold that Defendants must have substituted its own name for the true manufacturer to be liable for reverse passing off. *See Dastar Corp., 539 U.S. at 27 n.1, 123 S. Ct. at 2045 n.1*; *see also Bretford Mfg., 419 F.3d at 580*. This approach harmonizes with Supreme Court's explanatory dicta that illustrated reverse passing off as to prohibit the Coca—Cola Company from filling Coca—Cola branded bottles with Pepsi—Cola, and then selling it as Coca—Cola. *Dastar Corp., 539 U.S. at 32, 123 S. Ct. at 2047*.

[24] According to Maui Jim, [TEXT REDACTED BY THE COURT] is one of Maui Jim's biggest competitors and one of Defendants' main partners. (Pl.'s Mem. Lanham MSJ (Dkt. No. 427) at 38.)

[25] Nothing on the record suggests that Defendants benefited from listing [TEXT REDACTED BY THE COURT] over Maui Jim as the manufacturer through the means of kick-backs paid by [TEXT REDACTED BY THE COURT] increased customer demand, or otherwise.

[26] We note that this situation could be different had the mislabeling of the manufacturer's identity occurred on advertisements rather than post-purchase commercial invoices.

[27] Although Defendants' motion for summary judgment in their favor on the Lanham Act claims requests judgment "on all of Maui Jim's Lanham Act Claims," neither the motion nor memorandum specifically requested summary judgment in their favor on Maui Jim's reverse passing off claims. (*See generally* Defs.' Mot. MSJ (Dkt. No. 412); Defs.' Mem. MSJ (Dkt. No. 416.)) We decline to *sua sponte* raise that argument.

Maui Jim's next seeks summary judgment on its claims for deceptive business practices under Illinois' Uniform Deceptive Trade Practices Act, 815 ILCS 510 ("UDTPA"). ***HN27***[] Plaintiff must establish the same two elements for its Lanham Act and UDTPA claims: (1) that it **[**73]** has a protectable trademark; and (2) that Defendants' use of the trademark is likely to cause confusion among consumers." *Entm't One UK Ltd. v. 2012Shiliang*, *384 F. Supp. 3d 941, 948-49 (N.D. Ill. 2019)* (collecting cases). Thus, the basis for summary judgment on the unfair competition claim is based on the same conduct as Maui Jim's Lanham Act case. (Pl.'s Mem. Lanham MSJ (Dkt. 427) at 38.) We therefore deny the motions for summary judgment for overlapping reasons as our denial of the Lanham Act motions for summary judgment.

II. Maui Jim's Copyright Claim

Maui Jim filed a separate motion for summary judgment on its copyright claim. (Pl.'s Copyright MSJ (Dkt. No. 423); Pl.'s Copyright SOF (Dkt. No. 424); Pl.'s Mem. Copyright MSJ (Dkt. No. 425).) Defendants also move for summary judgment in their favor on the copyright claim. (Defs.' MSJ (Dkt. No. 412); Defs.' Mem. MSJ (Dkt. No. 416); Defs.' SOFs (Dkt. Nos. 415, 446, 461, 463).). In summary, Maui Jim's copyright claim case alleges that it had copyrighted photographs (the "93 Photographs") of its sunglasses, and SmartBuyGlasses used those copyrighted images without Maui Jim's permission.

HN28[] The owner of copyright has the exclusive right to use and to authorize reproduction of the copyrighted **[**74]** work in copies, including copies of pictorial and graphic works. *17 U.S.C. § 106(1)*, *(5)*; *17 U.S.C. § 501(a)*. Not all copying, however, is copyright infringement. "To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publn's, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361, 111 S. Ct. 1282, 1296 (1991)* (internal citation omitted); *Design Basics, LLC v. Lexington Homes, Inc., 858 F.3d 1093, 1099 (7th Cir. 2017)* (quoting *JCW Inv., Inc. v. Novelty, Inc., 482 F.3d 910, 914 (7th Cir. 2007))*.

A. Fair Use Doctrine

Defendants assert that Maui Jim's copyright infringement case fails as a matter of law because of the fair use doctrine. ***HN29***[] The fair use doctrine is a statutory defense codified at *§ 107* of the Copyright Act. *17 U.S.C. § 107*; *see also* *Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014)*. Under this doctrine, using another's copyrighted work is "fair" for purposes such as "criticism, comment, news reporting, teaching, scholarship, or research" and is therefore "not an infringement of copyright." *Id.* These examples "guide[ ]" the analysis under the first factor. *Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578, 114 S. Ct. 1164, 1171, 127 L. Ed. 2d 500 (1994)*; *Red Label Music Publ'g, Inc.*, 388 F. Supp. 3d at 984. ***HN30***[] To determine whether *§ 107* saves a defendant in a copyright infringement lawsuit, courts consider the following factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation **[**75]** to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. *17 U.S.C. § 107*; *see e,g.*, *Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 692-93 (7th Cir. 2012)*; *Red Label Music Publ'g, Inc. v. Chila Prods., 388 F. Supp. 3d 975, 983 (N.D. Ill. 2019)*. The burden of proof **[*1102]** here is on Defendants because fair use is an affirmative defense, meaning that the defendant must present "evidence sufficient to withstand summary judgment." *Chi. Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 629 (7th Cir. 2003)*.

HN31[] The first factor considers the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. *17 U.S.C. § 107(1)*. "Central to determining the purpose and character of a work is whether the new work merely supersedes the original work, or instead adds something new with a further purpose or of a different character." *Brownmark Films, LLC, 682 F.3d at 693* (internal citation omitted). Here, the purpose and character of the use is commercial as the parties use these copyrighted photographs to advertise and sell Maui-Jim-branded sunglasses. Nothing in the record suggests that Defendants add something new to these photographs. This first factor thus weighs against fair use.

HN32[] The second factor focuses on the nature of the copyrighted work. *17 U.S.C. § 107(2)*. Works that are creative in nature are closer to the core of intended copyright protection than are more fact-based works. **[**76]** *Campbell, 510 U.S. at 586, 114 S. Ct. at 1175* (collecting cases). Defendants argue that these 93 Photographs are merely functional, low-creativity works designed to present Maui Jim sunglasses for sale and are not creative or artistic works. But a copyrighted work need only possess "at least some minimal degree of creativity." *Feist Publn's, Inc., 499 U.S. at 345, 111 S. Ct. at 1287*. "[T]he requisite level of creativity is extremely low; even a slight amount will suffice." *Id.* "The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be." *Id.* (internal quotations and citation omitted). Courts have found that photographs, even if taken partly for informative purposes, can still be creative. *See, e.g.*, *Balsley v. LFP, Inc., 691 F.3d 747, 760 (6th Cir. 2012)* (finding that amateur photograph of a wet t-shirt contest had "a mixed nature of fact and creativity"); *Kelly v. Arriba Soft Corp., 336 F.3d 811, 820 (9th Cir. 2003)* ("Photographs that are meant to be viewed by the public for informative and aesthetic purposes . . . are generally creative in nature."). Even photographs of "mundane articles of furniture" have been found to have a creative nature for copyright purposes. *See Ashley Furniture Indus., Inc. v. Am. Signature, Inc.*, No. 2:11-CV-427, 2014 WL 11320708, at *9 (S.D. Ohio 2014) ("although the copyrighted photographs at issue in this case depict comparatively **[**77]** mundane articles of furniture, they are at least as creative as the surreptitious grab shot at issue in *Balsley*.").

Here, although the 93 Photographs are mundane depictions of Maui Jim's sunglasses, we find that the process of creating those photographs necessarily included decisions about lighting, camera angle and distance, shadowing, and post-production editing. Additionally, creative judgment was necessarily exercised in selecting which photographs to use on Maui Jim's advertisements. Therefore, we hold that the second factor weighs in Maui Jim's favor against the fair use doctrine.

HN33[] The third factor scrutinizes the amount taken by the alleged infringers "in relation to the copyrighted work as a whole." *17 U.S.C. § 107(3)*. Courts sometimes ask whether the secondary use took the "heart" of the original work. *Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 544, 564-65, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985)*. Ultimately, "the extent of permissible copying varies with the purpose and character of the use." *Campbell, 510 U.S. at 586-87, 114 S. Ct. at 1175*. Here, Defendants used the **[*1103]** entirety of each photograph at issue. Thus, this factor weighs against the fair use doctrine and in favor of Maui Jim.

HN34[] Last, the fourth factor addresses "the effect of the use upon the potential market for or value of the copyrighted work." *17 U.S.C. § 107(4)*. This factor is often the most **[**78]** important of the four. *See* *Red Label Music Publ'g, Inc., 388 F. Supp. 3d at 986* (citing *Kienitz, 766 F.3d at 758*). In assessing this factor, courts ask whether the contested use is a complement to the protected work (allowed) rather than a substitute for it (prohibited). *See* *Kienitz, 766 F.3d at 758-59*. Still, "Market harm is a matter of degree, and the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors." *Id. at 590 n.21, 114 S. Ct. at 1170 n.21*. Courts must "consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market' for the original." *Id. at 590, 114 S. Ct. 1164* (internal citation omitted). The 'market' in fair use cases means the potential market for not only the original work, but also derivative uses and licensing rights." *Red Label Music Publ'g, Inc., 388 F. Supp. 3d at 987* (citing Thomas Plotkin & Tarae Howell, *"Fair Is Foul and Foul Is Fair:" Have Insurers Loosened the Chokepoint of Copyright and Permitted Fair Use's Breathing Space in Documentary Films*?, *15 Conn. Ins. L.J. 407, 433-34 (2009)* ("Even if the first three factors of the test can be satisfied, the fourth factor pre-supposes a licensing market for the copyrighted work **[**79]** which may render any abrogation of permission harmful, and thus not a fair use.")).

Here, we observe that Maui Jim uses its 93 Photographs for commercial purposes: to promote both its own sales and its authorized retailers' sales of Maui Jim sunglasses. The widespread reproduction of Maui Jim's 93 Photographs by resellers who do not pay to be Maui Jim's 'authorized retailers' certainly affects Maui Jim's market for licensing the right to use these advertising photos. Indeed, Defendants' theory that no market exists for these photographs ignores the reality that a benefit of contracting to act as one of Maui Jim's authorized retailers is the right to use these copyrighted photographs in advertisements. Thus, this factor weighs in Maui Jim's favor and against the fair use doctrine.

There is no question of material fact that the weight of these four factors falls against application of the fair use doctrine. Accordingly, we hold that no reasonable jury could find that Defendants' use of Maui Jim's copyrighted photographs to advertise their resale of Maui-Jim-branded sunglasses was fair use of Maui Jim's copyrights. We next turn to the elements of a copyright infringement claim.

B. Copyright [**80] Ownership Over the 93 Photographs

Maui Jim must prove that it owns a valid copyright over each of the 93 Photographs. ***HN35***[] Under *17 U.S.C. § 410(c)*, the certificate of a registration made before or within five years after first publication of the work shall constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate. *17 U.S.C. § 410(c)*. Here, it is undisputed that the U.S. Copyright Office issued Certificates of Registration for the 93 Photographs. (Defs.' Resp. to Pl.'s Copyright SOF (Dkt. No. 461) ¶ 8 (citing Second Amend. Compl. (Dkt. No. 257) at 145-244.) It is also undisputed that each registration was issued within five years of Maui Jim's **[*1104]** first publication of each of the 93 Photographs. (*Id.*)

Defendants contend that twenty-two of the 93 Photographs ("22 Photographs") at issue cannot be a basis for relief because Maui Jim did not timely register those images. ***HN36***[] Under *17 U.S.C. § 412*, statutory damages for copyright infringement are not available before the effective date of its registration, unless such registration is made within three months after the first publication of the work or one month after the copyright owner has learned of the infringement. *See, e.g.*, *FM Indus., Inc. v. Citicorp Credit Servs., Inc., 614 F.3d 335, 336 (7th Cir. 2010)* (citing *17 U.S.C. § 412*); *Intercom Ventures,* ***[**81]*** *LLC v. City Media Plus Ex-Yu Streaming*, No. 12-cv-10275, *2013 U.S. Dist. LEXIS 110236, 2013 WL 4011052, at * 5 (N.D. Ill. Aug. 6, 2013)*.

On this issue, Maui Jim argues that Defendants' motion for summary judgment on these 22 Photographs should be denied because Defendants offer no evidence that they first reproduced or publicly displayed those photographs before they were registered with the U.S. Copyright office. (Pl.'s Resp. to Defs.' MSJ (Dkt. 464) at 45.) The parties do not dispute that the 93 Photographs were generally published on Maui Jim's website or in print between March 2015 and April 2016, even though they were not registered until August 8, 2016. (Defs.' Resp. to Pl.'s Copyright SOF (Dkt. No. 461) ¶¶ 8, 20-21, 108.) True, even Maui Jim agrees that they "did not register its copyrights in the 22 photographs within three months after their publication." (Pl.'s Reply MSJ (Dkt. No. 490) at 45.) But missing the three-month timeline alone does not mean that Maui Jim cannot possibly recover damages on those photographs. Rather, *17 U.S.C. § 412* also allows damages be recovered within one month after the copyright owner has learned of the infringement. Thus, Maui Jim can still recover statutory damages on the 22 Photographs if Defendants began its infringing conduct after **[**82]** the registration date. *See* *17 U.S.C. § 412(2)*. The evidence on the record lapses in this respect. Therefore, Defendants do not meet their burden to inform us of the basis for its motion in this regard, see *Celotex, 477 U.S. at 323, 106 S. Ct. at 2553*, and we deny Defendants' motion for summary judgment as to these 22 Photographs.[28]

C. Copying

Next, Maui Jim must prove that Defendants copied its copyrighted material without its permission. *See* *Feist Publn's, Inc., 499 U.S. at 361, 111 S. Ct. at 1296*; *see also* *Design Basics, LLC, 858 F.3d at 1099* (quoting *JCW Inv., Inc., 482 F.3d at 914*). ***HN37***[] The Copyright Act affords no protection against the independent creation of a

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[28] Defendants may revisit their argument concerning the 22 Photographs at trial. *See* *17 U.S.C. § 412* ("Registration as prerequisite to certain remedies for infringement.")

work that happens to resemble some prior creation. *See id.*; *see also* Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984) ("Proof of copying is crucial . . . no matter how similar the two works may be (even to the point of identity), if the defendant did not copy the accused work, there is no infringement."). Recognizing that direct evidence of copying is only rarely available, a plaintiff may also "prove copying by showing that the defendant had the opportunity to copy the original (often called 'access') and that the two works are 'substantially similar,' thus permitting an inference that the defendant actually did copy the original." Design Basics, 858 F.3d at 1099 (quoting Peters v. West, 692 F.3d 629, 633 (7th Cir. 2012)).

To prove copying by circumstantial evidence, Maui Jim must show both that Defendants had both access to the 93 **[**83]** Photographs *and* that the photographs are **[*1105]** substantially similar. Although the parties dispute whether Defendants' Rule 30(b)(6) deponent (Kalinko) admitted that their website displayed images of Maui Jim sunglasses, the parties agree that the 93 Photographs were published on Maui Jim's website or in print between March 2015 and April 2016, and that Defendants had access to them. (Defs.' Resp. to Pl.'s Copyright SOF (Dkt. No. 461) ¶¶ 20-21.) Further, the parties agree that Defendants did not independently create any of the 93 images of Maui-Jim-branded sunglasses it displays on its website. (Defs.' Resp to Pl.'s Copyright SOF (Dkt. No. 461) ¶ 16.)[29]

We next address the similarity between the 93 Photographs and the images on Defendants' website. ***HN38***[] The Seventh Circuit applies the 'ordinary observer' test to determine whether two works are substantially similar. *See* Design Basics, 858 F.3d at 1099 (quoting Peters v. West, 692 F.3d 629, 633 (7th Cir. 2012)). This test asks whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression. Weller v. Flynn, 312 F. Supp. 3d 706, 720 (N.D. Ill. 2018) (quoting Design Basics, 858 F.3d at 1101). "With respect to photography, copyright infringement has been found where the [accused] photographer in choosing **[**84]** the subject matter, camera angle, lighting, etc., copies and attempts to duplicate all of such elements as contained in a prior photograph." Bryant v. Gordon, 483 F. Supp. 2d 605, 617 (N.D. Ill. 2007) (internal citations and quotations omitted). For the following reasons, we agree with Maui Jim to the extent that the comparisons shown in Copyright MSJ Exhibit 9 resemble *identical* images of Maui Jim sunglasses used on Defendants' website and Maui Jim's website. (*Compare* Pl.'s Mem. Copyright MSJ Ex. 9 (Dkt. 425-1) Column 4 *with id.* Column 5.) As one example:

(*Id. at 12*.) In this example, Maui Jim Copyright Registration Number VA 2-015-593 is depicted in the fourth column. That depiction is a photograph of a black pair of sunglasses facing the right. (*Id.*) This pair of sunglasses is lying on a white surface with shadows beneath both the sunglass's earpiece and each lens. (*Id.*) The fifth column contains an identical photograph hosted on Defendants' website. (*See id.*) The images of Maui Jim's sunglasses that Defendants host on their webpage are identical to Maui Jim's 93 Photographs in every way: they show the same angle, perspective, shadows and shading, colors, and positioning. Although Defendants ask us to infer that this is merely the same pairs of sunglasses **[**85]** shot at standard angles against a standard white background, we hold that no reasonable jury would find these photos are anything but identical. The fact that all of Exhibit 9's images contained in Column **[*1106]** 4 and 5 appear identical combined with the fact that there is no dispute that Defendants did not independently take or create any of those 93 images leads us to conclude that a reasonable jury could not possibly find them to be unidentical or coincidental. (Defs.' Resp. to Pl.'s Copyright SOF ¶ 16-17.)

[29] Nevertheless, even if 'access' was a disputed fact, we would infer the existence of access because of the striking similarity of the works at issue. *Weller*, 312 F. Supp. 3d at 718 (quoting Design Basics, 858 F.3d at 1100 ("inference of access may also arise from 'proof of similarity which is so striking that the possibilities of independent creation, coincidence and prior common source are, as a practical matter, precluded.'")).

Therefore, we find that they are substantially similar and that a reasonable ordinary observer could not possibly conclude otherwise.

For these reasons, we grant Maui Jim's motion for summary judgment on its copyright infringement claims, and deny Defendants'. We leave the factual issue of calculating damages for trial.

III. Tortious Interference

Defendants move for summary judgment in their favor on Maui Jim's claim for tortious interference with third-party contracts. Maui Jim does not move for summary judgment on its tortious interference claim. ***HN39***[] To state a claim for tortious interference, Maui Jim must show: (1) the existence of a valid and enforceable contract between the plaintiff **[**86]** and another, (2) Defendants' awareness of that contract, (3) Defendants' intentional and unjustified inducement of a breach of the contract, (4) a subsequent breach by the other caused by Defendants' conduct, and (5) damages. *See, e.g.*, *Webb v. Frawley, 906 F.3d 569, 577 (7th Cir. 2018)*; *Hess v. Kanoski & Assocs., 668 F.3d 446, 454 (7th Cir. 2012)*.

The first element that Maui Jim must show is the existence of a valid and enforceable contract between the plaintiff and another. *See* *Cromeens, Holloman, Sibert, Inc. v. AB Vovo, 349 F.3d 376, 398 (7th Cir. 2003)* (rejecting a tortious interference with contract claim where the plaintiffs had "not presented any evidence that [any entity] breached already-existing agreements because of [the defendant's] conduct"). The parties dispute whether Maui Jim can prove the existence of the relevant third-party contracts as a starting point. (*See, e.g.*, Defs.' Resp. to Pl.'s SOAF (Dkt. 485) ¶¶ 101-102.) Therefore, the question of whether Maui Jim produced enough evidence to establish the existence of contracts between it and third-parties is based on disputed questions of material fact such that judgment as a matter of law would be inappropriate.[30]

The second element is Defendants' awareness of that contract. Here, there is no question of material fact that Defendants were aware that Maui **[**87]** Jim contracted with authorized retailers and that those authorized retailers were prohibited from selling to other retailers (like Defendants). For example, in 2008, Maui Jim wrote to Defendants the following:

> By purchasing Maui Jim sunglasses from any authorized Maui Jim account, you are inducing that retailer to breach its contract with Maui Jim, which will **[*1107]** subject you to civil liability for interference with a contractual relationship. Your continued sale of any diverted Maui Jim products will be considered willful and malicious.
>
> . . .
>
> > Please cease and desist from attempting to procure Maui Jim products from any Maui Jim authorized accounts in the future. Such interference would likely result in those accounts being terminated and you will be liable for any damage suffered by Maui Jim as a consequence of such termination and diversion of our product.
> >
> > Now that you are aware of Maui Jim's policy regarding its authorized retail accounts, you are on notice that future violations will constitute intentional interference with contractual relations.

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[30] This necessarily defers the legal question of whether those third-party contracts are valid and enforceable. Insofar as Defendants contend that those contracts are unenforceable under European law: the European Court of Justice ("ECJ") squarely addressed the legality of authorized retailer contracts and distribution networks under TFEU Article 101 in the context of luxury or high-end goods and ruled such contracts are not prohibited when three conditions are met: (1) the product necessitates a selective distribution system because it is high quality or technical; (2) resellers must be chosen on the basis of objective criteria; (3) the criteria defined must not go beyond what is necessary. Case C-230/16, *Coty Germany GmbH v Parfumerie Akzente GmbH*, 2017 EUR-Lex CELEX LEXIS 62016CJ0230, at □ 24. In the words of the ECJ: "[T]he characteristics and conditions of a selective distribution system may, in themselves, preserve the quality and ensure the proper use of such goods." *Id.*, at □ 26. Indeed, the ECJ held that contract terms prohibiting authorized retailers from selling luxury goods through third-party online retailers were not illegal contract terms. *Id.* at □□ 40, 52.

(Pl.'s Resp. to Defs.' Amend. SOF (Dkt. No. 466) ¶ 100 (citing Defs.' Amend. SOF (Dkt. No. 446) Ex. 43 (available at Dkt. No. 415-59 at 2).). Defendants' **[**88]** David Menning responded and recognized a mutual understanding. (Defs.' Amend. SOF Ex. 43 (Dkt. No. 415-59) at 2.) Thus, Defendants fail to show that there is no question of material fact that they were unaware of the relevant third-party contracts.

As to the third and fourth elements, Defendants' intentional inducement of a breach and a subsequent breach, Defendants do not address either in their motion for summary judgment on this issue. (Defs.' Mem. MSJ (Dkt. No. 416) at 57-62.) Thus, Defendants fail to meet their burden as movant at summary judgment on these issues. *See Celotex Corp., 477 U.S. at 323, 106 S. Ct. at 2553*.

Although we need not address the final element of damages, we nevertheless note that that remains a question of material fact as evidence on the record suggests that Maui Jim incurred financial harm due to Maui Jim's alleged interference with its third-party contracts. (*See, e.g.*, Defs.' Resp. to Pl.'s SOAF (Dkt. No. 485) ¶ 103.)

Accordingly, we deny Defendants' motion for summary judgment as to tortious interference.

IV. Defendants' Counterclaims for Defamation and Unjust Enrichment Claims

Defendants filed counterclaims for defamation and unjust enrichment against Maui Jim. (Defs.' MSJ (Dkt. No. 412); *see also* Defs.' **[**89]** Mem. MSJ (Dkt. No. 416) at 62-66.) Maui Jim also filed a motion for summary judgment on Counterclaimants' defamation and unjust enrichment counterclaims. (Pl.'s Counterclaim MSJ (Dkt. No. 420); *see also* Pl.'s Mem. Counterclaim MSJ (Dkt. No. 422).) For the following reasons, Counterclaimants' motion for summary judgment as to its counterclaims is denied.

A. Counterclaim: Defamation *Per Se*

Counterclaimants' defamation *per se* claim is brought under Illinois law based on allegations that Maui Jim knowingly made false statements to both customers and U.S. customs officials. These claims are bases on two incidents. (Defs.' Counterclaims (Dkt. No. 394-1 ¶ 29-30).) First, Defendant—Counterclaims allege that Maui Jim's corporate headquarters and customer service representatives falsely instructed potential SmartBuyGlasses' customers that SmartBuyGlasses sells counterfeit goods, that the Maui-Jim-branded sunglasses they sell are 'fake' or 'not authentic,' and that SmartBuyGlasses 'is not an authentic website.' (*Id.* ¶ 29.) Counterclaimants additionally allege that Maui Jim contacted SmartBuyGlasses' customers directly and claimed that their sunglasses are not genuine. (*Id.*) As for the second incident, **[**90]** Counterclaimants allege that Maui Jim falsely claimed to customs officials that Maui-Jim-branded sunglasses shipped by SmartBuyGlasses to U.S. Consumers **[*1108]** were "not genuine," causing U.S. customs to seize their authentic sunglasses. (*Id.* ¶ 30.)

HN40[🡅] "A defamatory statement is a statement that harms a [party's] reputation to the extent it lowers the [party] in the eyes of the community or deters the community from associating with [the party]." *Doctor's Data, Inc. v. Barrett, 170 F. Supp. 3d 1087, 1102-03 (N.D. Ill. 2016)* (quoting *Green v. Rogers, 234 Ill.2d 478, 491, 917 N.E.2d 450, 459, 334 Ill. Dec. 624 (2009))*. Under Illinois law, the elements of a defamation *per se* claim is "that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages." *Id.* Illinois' courts have recognized four categories of statements that are considered defamatory *per se*: (1) words that impute the commission of a criminal offense; (2) words that impute infection with a loathsome communicable disease; (3) words that impute an inability to perform or want of integrity in the discharge of duties of office or employment; or (4) words that prejudice a party, or impute lack of ability, in his or her trade, profession or business." *Kolegas v. Heftel Broad. Corp., 154 Ill. 2d 1, 10, 607 N.E.2d 201, 206, 180 Ill. Dec. 307 (1992)* (internal citations omitted). **[**91]** Counterclaimants reason that stating that they sold stolen goods imputes the commission of a criminal offense (category 1) and that they sold counterfeit, damaged, or used goods both imputed a want of integrity in their duties of office (category 3) and constituted words that prejudice their business (category 4).

A statement that falls into one of these categories will not be found defamatory *per se* if it true or is reasonably capable of an innocent construction. *See id.* Here, it is undisputed that Maui Jim said that Counterclaimants sold counterfeit, fake, inauthentic, or non-genuine goods through its website. (*See, e.g.*, Defs.' Resp. to Pl.'s SOF (Dkt. No. 460) ¶ 22.) But, since truth is a defense to a defamation claim, the fact that we previously found in this opinion that the legitimacy of Counterclaimants' Maui-Jim-branded sunglasses is a question of material fact for the jury, we decline to reach this question as a matter of law. Therefore, we deny the parties' motions for summary judgment with respect to Counterclaimants' defamation claims. (Defs.' MSJ (Dkt. No. 412); Pl.'s Counterclaim MSJ (Dkt. No. 420).)[31]

B. Counterclaim: Unjust Enrichment

Counterclaimants' **[**92]** unjust enrichment claim seeks to recover the profits **[*1109]** that Maui Jim earned through both its allegedly defamatory statements and improper use of trademark and copyright law. ***HN41***[] "[I]f an unjust enrichment claim rests on the same improper conduct alleged in another claim, then the unjust enrichment claim will be tied to this related claim—and, of course, unjust enrichment will stand or fall with the related claim." *Cleary v. Philip Morris Inc., 656 F.3d 511 (7th Cir. 2011)*. Thus, to the extent that the parties' motions for summary judgment on Counterclaimants' unjust enrichment claim is premised upon the surviving defamation claim, they are denied. (Defs.' MSJ (Dkt. No. 412); Pl.'s Counterclaim MSJ (Dkt. No. 420). Similarly, to the extent those motions are premised on improper use of intellectual property law: they are denied as intellectual property claims also survive the summary judgment stage. (*Id.*)

V. Motion to Reconsider

We next address SmartBuyGlasses' motion to reconsider pursuant to *Fed. R. Civ. P. 59(e)*. (Mot. for Recons. ("Mot.") (Dkt. No. 378).) SmartBuyGlasses seek review of our May 10, 2019 Order that granted Maui Jim's motion to dismiss Counts IV, V, and VI, and Count II (in part) of their second amended counterclaim. (Mem. Op. and Order ("Order") (Dkt. **[**93]** No. 358).) For the reasons set forth below, we deny their motion to reconsider.

A. Background

We assume familiarity with the relevant facts as detailed in our May 10, 2019 Order and thus do not fully recount them here. (Order at 2-5.) On May 10, 2019, we issued our Order granting Maui Jim's motion to dismiss Counts I, III, IV, V, and VI and dismiss in part Count II of SmartBuyGlasses' second amended counterclaim. (*Id. at 40*.) On June 2, 2019, Counterclaimant filed the instant motion for reconsideration of our Order with respect to Count II (defamation); Count IV (violation of California's Cartwright Act, *Cal. Bus. & Prof. Code § 16700, et seq.*); Count V (violation of California's Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200, et seq.*); and Count VI (violation of Article 101 of the Treaty on the Functioning of the European Union). (Mot. at 1.) SmartBuyGlasses contends that

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[31] Maui Jim contends that summary judgment in its favor is additionally appropriate under the unclean hands doctrine because Counterclaimants made false statements to both U.S. Customs and consumers about the manufacturer and/or source of their Maui Jim-branded sunglasses by representing that [TEXT REDACTED BY THE COURT] made them. *See, e.g.*, *Intercon Sols., Inc. v. Basel Action Network, 969 F. Supp. 2d 1026, 1064 (N.D. Ill. 2013)*, *aff'd on other grounds*, *791 F.3d 729 (7th Cir. 2015)* (discussing the doctrine of unclean hands). Maui Jim contends that these false documents prompted them to make some of the statements at issue in this lawsuit. "The bad conduct constituting unclean hands must involve fraud, unconscionability or bad faith toward the party proceeded against, and must pertain to the subject matter involved and affect the equitable relations between the litigants." *Int'l Union, Allied Indus. Workers of Am., v. Local Union No. 589, Allied Indus. Workers of Am., 693 F.2d 666, 672 (7th Cir. 1982)* (internal quotations and citations omitted). We find that this is a factual question for the jury that is inappropriate at this juncture because it turns on, among other things, the factually disputed material question as to whether Counterclaimants' inaccurate statements as to [TEXT REDACTED BY THE COURT] involvement was bad-faith misconduct or a good-faith computer coding error. (Pl.'s Resp. to Defs.' SOF (Dkt. 466) ¶ 51).

we committed manifest errors of law that require us to modify our Order in their favor. (*Id. at 1-2*.) Alternatively, they move to dismiss Count VI of Maui Jim's second amended complaint (tortious interference with contract) for *forum non conveniens* and international comity if we maintain our dismissal of Count VI of the counterclaim. (*Id.*)

Count II of SmartBuyGlasses' second amended counterclaim alleges **[**94]** defamation *per se* in connection with the fifth paragraph in Maui Jim's January 23, 2017 press release and several statements made by Maui Jim to SmartBuyGlasses potential and current customers as well as customs officials. (2d Am. Countercl. ¶¶ 26-30, 43.) We granted in part the motion to dismiss Count II based upon to the press release, finding that the statements in the fifth paragraph were protected under Illinois' innocent construction rule and thus were not actionable as defamation *per se*. (Order at 14-15.) Specifically, we found that "when the press release is read as a whole and the words given their natural and obvious meaning, the statements in the fifth paragraph refer to Maui Jim's lawsuit and its allegations, instead of a defamatory attack that can be separated from the bulk of the press release." (Order at 15 (internal quotation marks omitted) (citation omitted).) We denied in part the motion to dismiss Count II based on other statements. (Order at 11-13.) SmartBuyGlasses now moves us to reconsider our dismissal with respect to the press release. (Mot. at 1.) In the motion for reconsideration, SmartBuyGlasses contends that we committed manifest errors of law when dismissing **[**95]** **[*1110]** part of Count II because we "failed to properly apply the republication rule and erroneously believed republishing the allegations from the complaint was immunized by the litigation privilege or fair report privilege." (Mot. at 1-2.)

Count IV of SmartBuyGlasses' second amended counterclaim alleges that Maui Jim violated California's ***antitrust law***, the Cartwright Act, *Cal. Bus. & Prof. Code § 16700 et seq.* (2d Am. Countercl. ¶¶ 61-76.) Related,[32] Count V alleges that Maui Jim violated California's unfair competition law, *Cal. Bus. & Prof. Code § 16720 et seq.* (2d Am. Countercl. ¶¶ 77-85.) We found that SmartBuyGlasses did not adequately allege actionable injury under the Cartwright Act. The Cartwright act requires "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." (Order at 23 (citing *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987* (9th Cir. 2000 (internal citation omitted)).) SmartBuyGlasses urges that we committed manifest errors of law since we "(i) misapprehended SmartBuyGlasses' Cartwright Act claim because SmartBuyGlasses pled injury from Maui Jim's termination of those suppliers who violate the pricing policy to sell to SmartBuyGlasses and (ii) failed to properly **[**96]** interpret the Ninth Circuit's holding in *Knevelbaard Dairies v. Kraft Foods, Inc.[,] 232 F.3d 979, 988 (9th Cir. 2000)*, with respect to antitrust standing and injury." (Mot. at 2.)

Count VI of SmartBuyGlasses' second amended counterclaim alleges Maui Jim violated the Treaty on the Functioning of the European Union ("TFEU") Article 101. (2d Am. Countercl. ¶¶ 86-90.) SmartBuyGlasses alleged TFEU Article 101(1) prohibits Maui Jim's authorized retailer contracts as unlawful restraints on trade. (*Id.* □ 88.) We dismissed the TFEU claim on the grounds of *forum non conveniens*, relying particularly on the public interest factors counseling against a US court interpreting EU law. (Order at 26, 30-33.) SmartBuyGlasses now moves us to reconsider our dismissal of its EU antitrust claim. (Mot. at 1.) They argue that we misapplied the law of *forum non conveniens*, applied inapposite case law, and should have dismissed Maui Jim's tortious interference claim since we dismissed SmartBuyGlasses' EU antitrust claim. (Mot. at 12-13.)

B. Legal Standard

HN42[] Under *Rule 59(e)*, district courts may entertain motions "to alter or amend a judgment." *Fed. R. Civ. P. 59(e)*. Motions under *Rule 59(e)* will only be granted to correct manifest errors of law or fact. *Divane v. Krull Elec. Co., 194 F.3d 845, 848 (7th Cir. 1999)* (citing *Moro v. Shell Oil Co., 91 F.3d 872, 876 (7th Cir. 1996))*. "A party moving for reconsideration pursuant to *Rule 59(e)* bears a heavy burden **[**97]** of establishing that the court should reverse its prior judgment." *Scott v. Bender, 94 F. Supp. 2d 859, 865 (N.D. Ill. 2013)* (citing *Caisse Nationale de Credit Agricole v. CBI Indus., Inc., 90 F.3d 1264, 1270 (7th Cir. 1996))*. "Motions to reconsider sounding under *Rule*

[32] Because the unfair competition law counterclaim is coterminous with the Cartwright Act counterclaim, dismissal of the latter leads to dismissal of the former. (Order at 25-26.)

59(e) should only be granted in rare circumstances." *Id.* (citing Bank of Waunakee v. Rochester Cheese Sales, Inc., 906 F.2d 1185, 1191 (7th Cir. 1990)). A Rule 59(e) motion "is not appropriately used to advance arguments or theories that could and should have been made before the district court rendered a judgment, . . . or to present evidence that was available earlier." LB Credit Corp. v. **[*1111]** Resolution Tr., 49 F.3d 1263, 1267 (7th Cir. 1995) (citations omitted).

C. Analysis

1. Defamation Claim Related to the Press Release (Count II)

SmartBuyGlasses avers that we "failed to properly apply the republication rule and erroneously believed republishing the allegations from the complaint was immunized by the litigation privilege or fair report privilege." (Mot. at 1-2.) SmartBuyGlasses summarizes the "republication rule" as "republishing one's allegations from a lawsuit to third parties, whether in a press release or other manner, is defamatory if the underlying allegations themselves are false and defamatory" and argues that "under the rule, the press release is not capable of an innocent construction." (Dkt. No. 379-1 at 2-5.) SmartBuyGlasses also assert that they did not concede that the other paragraphs of the press release are not defamatory. **[**98]** (*Id. at 7*.) Lastly, they argue that the Seventh Circuit's *Republic Tobacco* decision confirms that SmartBuyGlasses stated a defamation claim. (*Id. at 11-12*.) We will address each argument in turn.

As an initial matter, SmartBuyGlasses raises new arguments in this motion that it could have made before our prior ruling. ***HN43***[] A Rule 59(e) motion is not an appropriate means "to advance arguments or theories that could and should have been made before the district court rendered a judgment." LB Credit Corp. v. Resolution Tr., 49 F.3d 1263, 1267 (7th Cir. 1995) (citations omitted). SmartBuyGlasses contends that Rule 54(b) governs this case because they seek reconsideration of an interlocutory, non-final order, and as a result SmartBuyGlasses did not waive its reliance on the rule. (Dkt. No. 409 at 2 n.1.) However, the stated proposition applies regardless of whether the movant raises a motion to reconsider under Rule 54(b) or Rule 59(e). *See* Ace Hardware Int'l Holdings Inc. v. Masso Expo Corp., No. 11 C 3928, 2012 U.S. Dist. LEXIS 7337, 2012 WL 182236, at *3 (N.D. Ill. Jan. 23, 2012) (motions to reconsider do "not provide a party with the opportunity to take a second bite at the apple or raise new arguments that it did not make in the first instance.") (citation omitted). SmartBuyGlasses gives no reason why it did not earlier rely on the republication rule and its newly cited cases.

More importantly, the application of the republication rule does not reverse our **[**99]** conclusion regarding the reasonable innocent construction of the fifth paragraph. ***HN44***[] The innocent construction rule has the effect of exculpating an otherwise defamatory *per se* statement and is considered an exception to the republication rule. *See* Tuite v. Corbitt, 224 Ill. 2d 490, 502, 866 N.E.2d 114, 121, 310 Ill. Dec. 303 (Ill. 2006) ("even if a statement falls into one of the categories of words that are defamatory *per se*, it will not be actionable *per se* if it is reasonably capable of an innocent construction.") (internal citation omitted); *Snitowsky*, 297 Ill. App. 3d at 311, 696 N.E.2d at 766 (explaining the innocent construction rule "presents an important qualification to the rule which renders a republisher liable for the original defamation despite referring to the charges of misconduct as allegations"). Thus, even if republishing one's defamatory statement is defamation *per se*, if it is subject to an innocent construction, the republished statement is protected. *See Owens v. CBS Inc.*, 173 Ill. App. 3d at 990, 527 N.E.2d at 1305 ("Before statements will be judged defamatory as a matter of law, they must be considered in light of what has come to be known as the innocent-construction rule." (citing Owen v. Carr, 113 Ill. 2d 273, 278, 497 N.E.2d **[*1112]** 1145, 1147, 100 Ill. Dec. 783 (Ill. 1986)). Thus, merely asserting the republication rule, without an independent showing that the fifth paragraph is not protected by the innocent construction rule, is not enough for us to **[**100]** reconsider our ruling.[33]

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[33] We need not address the litigation and fair report privileges arguments because we already found that the statements are not actionable as defamation *per se*.

We next find SmartBuyGlasses' contention that it did not concede that the other paragraphs of the press release are not defamatory is inconsistent with the record. SmartBuyGlasses' second amended counterclaim refers only to the fifth paragraph of the press release. (2d Am. Countercl. at 28, 41.) And in their opposition to Maui Jim's motion to dismiss, SmartBuyGlasses distinguished the fifth paragraph from the remainder of the press release. (Dkt. No. 231 at 9.) For example, they stated, "[i]n looking at the press release as a whole, the first four paragraphs all relate to the allegations being made in the lawsuit, but the fifth paragraph — which includes the defamatory statements — does not signal to the reader that Maui Jim is referring to allegations in its complaint." (*Id.*)

Finally, SmartBuyGlasses has not provided a single reason why or how our holding runs afoul of the *Republic Tobacco* decision. In *Republic Tobacco*, the Seventh Circuit upheld summary judgment to the plaintiff on its defamation *per se* claim because, among other things, each of the allegedly defamatory letters could only be read to confer liability. *Republic Tobacco*, 381 F.3d at 733. However, different from the letters **[**101]** in *Republic Tobacco*, the fifth paragraph of the press release here clearly refers to the allegations in the suit. Therefore, unlike *Republic Tobacco*, the statements made by Maui Jim in this paragraph are protected by the innocent construction rule. Thus, SmartBuyGlasses has failed to establish that we made a manifest error of law that requires us to reconsider our dismissal of the defamation counterclaim in pertinent to the press release.

2. Dismissal of the California Counterclaims (Counts IV & V)

a. Cartwright Act Counterclaim

SmartBuyGlasses argues that we "(i) misapprehended SmartBuyGlasses' Cartwright Act claim because SmartBuyGlasses pled injury from Maui Jim's termination of those suppliers who violate the pricing policy to sell to SmartBuyGlasses and (ii) failed to properly interpret the Ninth Circuit's holding in *Knevelbaard Dairies v. Kraft Foods, Inc.* [sic] *232 F.3d 979, 988 (9th Cir. 2000)*, with respect to antitrust standing and injury." (Mot. at 2.)

These arguments are misplaced for the following reasons. Following the Ninth Circuit's holding in *Knevelbaard*, we require that SmartBuyGlasses pleaded an actionable injury. *Id.* ***HN45***[] Under *Knevelbaard*, an actual injury has four requirements: "(1) unlawful conduct, (2) **[**102]** causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Id. at 987* (quoting *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1055 (9th Cir. 1999))*. We dismissed this counterclaim because the claimed injury at least failed the second and third requirements. (Order at 23-24.)

SmartBuyGlasses has not shown how the alleged unlawful agreements caused its injury. According to their pleadings, Maui Jim entered into Retailer Agreements with its retailers that "set minimum resale price maintenance prices **[*1113]** and restricts to whom those retailers can sell the product." (2d Am. Countercl. ¶ 65.) SmartBuyGlasses claim that the Retailer Agreements are unlawful because they "(a) created or carried out restrictions in trade or commerce; (b) increased the price of Maui Jim sunglasses; (c) fixed the price of Maui Jim sunglasses intended for sale, barter, use, or consumption in the State of California; (c) controlled Maui Jim's sunglasses price to the public or consumer; (d) kept the price of Maui Jim sunglasses at a fixed value; and/or (e) set the Maui Jim product price to preclude free and unrestricted competition." (*Id.* ¶ 69.) However, they do not allege that they were **[**103]** harmed due to the price fixing agreements. In fact, as we explained in our Order, because SmartBuyGlasses claims that it is Maui Jim's direct competitor, SmartBuyGlasses would stand to gain by such agreements to raise price. (2d Am. Countercl. ¶ 54; Order at 24.)

Furthermore, the claimed injury here does not flow from the unlawful conduct alleged by SmartBuyGlasses: the price fixing practice. *Compare* *Knevelbaard, 232 F.3d at 987-88* ("Since the plaintiffs allegedly were subjected to artificially depressed milk prices, the injury flows 'from that which makes the conduct unlawful,' i.e., from the collusive price manipulation itself.") *with* *Am. Ad Mgmt., Inc., 190 F.3d at 1056* ("[Plaintiff's] injury, its lost commissions, flows from the agreement to eliminate [the] discounts."). Instead, the injury flows either from the breaches of the contracts between Maui Jim and its retailers or from this litigation, neither of which Defendants allege violates ***antitrust law***.

SmartBuyGlasses counters that we dismissed its counterclaim because we misapprehended that their potential gain from an inflated price may offset its harm. (Mot. at 2.) That was not our consideration. Nor did we require the harm to consumers and to SmartBuyGlasses be the same. Rather, we held that **[**104]** the claimed injury is not actionable because it is not caused by and does not flow from the alleged price fixing agreements. (Order at 23-24.)[34]

b. Unfair Competition Law Counterclaim

The parties agree that SmartBuyGlasses' unfair competition counterclaim rises and falls with the Cartwright Act counterclaim. (Dkt. No. 379-1 at 24; Dkt. No. 400 at 16.) And SmartBuyGlasses's request for us to reconsider the unfair competition law counterclaim is based on the same reasons as its request for us to reconsider the Cartwright Act counterclaim. (Dkt. No. 379-1 at 24.) Because we do not change our decision on the Cartwright Act counterclaim, we do not change our decision on the unfair competition law counterclaim. We hold that SmartBuyGlasses has not shown that there was a manifest error of law that warrants reconsideration of our dismissal of the California counterclaims.

3. Dismissal of the European Antitrust Counterclaim (Count VI)

SmartBuyGlasses next asks us to reconsider our decision to dismiss Count VI of its counterclaim. (Mot. at 1.) That claim alleged violations of European Union ***antitrust law*** under TFEU Article 101. (2d Am. Countercl. ¶¶ 86-90.) Specifically, SmartBuyGlasses contend we **[**105]** applied an incorrect balancing test to dismiss their **[*1114]** counterclaim on *forum non conveniens* grounds. (Mot. at 1, 12-13.) As explained in the following, we find no manifest errors of law in our decision and thus deny SmartBuyGlasses' motion for reconsideration on its EU antitrust claim.

First, the balancing factors heavily favored dismissal. In this respect, SmartBuyGlasses suggests that we applied an incorrect "lesser weight" balancing test to determine dismissal of Count VI was appropriate. (Mot. at 12.) But we decidedly *did not* apply a "lesser weight" balancing test to determine this forum was inconvenient. (Order at 30-34.) Rather, we said that the balance tipped *slightly* in favor of Maui Jim *as to private factors*, not the analysis as a whole. (Order at 34.) Since we did not apply an adverb the first time, we clarify that the public interest factors *heavily* tipped in favor of dismissing for *forum non conveniens*. SmartBuyGlasses claim is at best a willful misreading of the wording of our prior order. As such, we remind SmartBuyGlasses' counsel of their obligations under *Fed. R. Civ. P. 11*, and hold that there was no manifest error of law with respect to the *forum non conveniens* balancing factors.

We specifically **[**106]** address the public factor of comity. Comity clearly supports dismissal because SmartBuyGlasses' claim requires our interpretation of EU ***antitrust law*** and creates a significant risk of cross-border conflicts. SmartBuyGlasses argue that EU law invalidates Maui Jim's contract provisions, and thus they believe that our refusal to hear its antitrust claim creates a conflict. EU law does not support SmartBuyGlasses' position on the legality of Maui Jim's anti-diversion contracts. SmartBuyGlasses cite no cases in support of its argument that Maui Jim's contracts are "clearly illegal." Likely this is because they are not. The European Court of Justice ("ECJ") squarely addressed the legality of authorized retailer contracts and distribution networks under TFEU Article 101 in the context of luxury or high-end goods and ruled such contracts are not prohibited when three

[34] SmartBuyGlasses also assert that the harm they suffer due to Maui Jim's termination of its agreements with retailers who violated the pricing policy is the kind of harm the Cartwright Act was designed to prevent. (Dkt. No. 379-1 at 22.) Fundamentally, SmartBuyGlasses contend that the injury meets the fourth requirement of an actionable injury. We need not address this requirement to dismiss the counterclaim because the injury has not met the two requirements explained above.

conditions are met: (1) the product necessitates a selective distribution system because it is high quality or technical; (2) resellers must be chosen on the basis of objective criteria; (3) the criteria defined must not go beyond what is necessary. Case C-230/16, *Coty Germany GmbH v Parfumerie Akzente GmbH*, 2017 EUR-Lex CELEX **[**107]** LEXIS 62016CJ0230, at 24. In the words of the ECJ: "[T]he characteristics and conditions of a selective distribution system may, in themselves, preserve the quality and ensure the proper use of such goods." *Id.*, at 26. Indeed, the ECJ held that contract terms prohibiting authorized retailers from selling luxury goods through third-party online retailers were not illegal contract terms. *Id.* at 40, 52.

The precise contours of SmartBuyGlasses' EU ***antitrust law*** claim is at best unclear. (2d Am. Countercl. ¶¶ 86-90.) It appears their counterclaim flies in the face of an on-point ruling from the ECJ. *Coty Germany*, 2017 EUR-Lex CELEX LEXIS 62016CJ0230 at 72. There is little daylight between their claim and the anti-diversion contracts that prevented sales to online third-party distributors in *Coty*. *Id.* at 52. Regardless, the application of EU ***antitrust law*** to Maui Jim's particular contractual provisions requires a full inquiry into the relative harm to competition, objective necessity of the contractual terms, benefit to competition, and the applicability of the TFEU block exemptions from antitrust liability. *Id.* at 55, 56, 69. Thus, SmartBuyGlasses' argument that its claim mirrors **[**108]** Maui Jim's tortious interference claim is false: there are clearly a number of additional elements at work in SmartBuyGlasses' TFEU claim that require significant independent discovery and engender legal disputes on matters of foreign **[*1115]** law. (*Contra* Mot. at 12-13.) Therefore, there is also no contradiction in dismissing their antitrust counterclaim while keeping Maui Jim's tortious interference claim. Thus, we also decline to dismiss Plaintiff's tortious interference claim based on *forum non conveniens*.

CONCLUSION

For the reasons discussed above, Maui Jim's motion for summary judgment is granted in part and denied in part, Defendants' motion for summary judgment is granted in part and denied in part, and Defendants' motion for reconsideration is denied. Our limited grants of summary judgment are: (1) In Plaintiff's favor on its Copyright claims (with the issue of damages left for trial); and (2) in Defendants' favor to the narrow extent that Maui Jim's false advertising theory is based solely on Maui Jim's customer service representatives' false statements. Questions of material fact exist as to all other pending claims and theories such that judgment as a matter of law is otherwise inappropriate. **[**109]** [35]

Dated: February 7, 2020

Chicago, Illinois

/s/ Marvin E. Aspen

Honorable Marvin E. Aspen

United States District Judge

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[35] As this case moves forward, in order to promote organization and clarity for the remainder of this case's litigation, every citation to the record made in a filing should include an ECF pincite.

Belnap v. Steward Health Care Sys. LLC

United States District Court for the District of Utah

February 10, 2020, Decided; February 10, 2020, Filed

Case No. 2:19-cv-00330-DAK

Reporter

2020 U.S. Dist. LEXIS 23512 *; 2020-1 Trade Cas. (CCH) P81,089

LEGRAND P. BELNAP, M.D., Plaintiff, v. STEWARD HEALTH CARE SYSTEM LLC; JORDAN VALLEY MEDICAL CENTER, LP; and JOHN DOES 1-20, Defendants.

Prior History: *Belnap v. Iasis Healthcare Corp., 2015 U.S. Dist. LEXIS 9907 (D. Utah, Jan. 27, 2015)*

Core Terms

privileges, allegations, antitrust, conspired, patients, conspiracy, appellate review, Defendants', antitrust claim, subsidiaries, surgeon, general surgery, wholly owned subsidiary, amended complaint, motion to dismiss, state law claim, Sherman Act, subject-matter, alleged conspiracy, court concludes, relevant market, anti trust law, competitor, suspension, inpatient, contends, injuries, staffing, motive, hospital privileges

Counsel: **[*1]** For LeGrand P. Belnap, M.D., Plaintiff: Peter Stirba, LEAD ATTORNEY, Ciera Claudine Archuleta, Matthew K. Strout, STIRBA PC, SALT LAKE CITY, UT.

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Judges: DALE A. KIMBALL, United States District Judge.

Opinion by: DALE A. KIMBALL

Opinion

MEMORANDUM DECISION AND ORDER

This matter is before the court on Defendants Steward Health Care System LLC and Jordan Valley Medical Center, LP's Motion to Dismiss Plaintiff Legrand P. Belnap, M.D.'s amended complaint for lack of subject-matter jurisdiction and failure to state a claim pursuant to *Rules 12(b)(1)* and *12(b)(6) of the Federal Rules of Civil Procedure*. The court held a hearing on the motion on January 8, 2020. At the hearing, Defendants were represented by Ashley M. Fischer, Katharine M. O'Connor, and Amy F. Sorenson and Plaintiff was represented by Peter Stirba. The court took the matter under advisement. The court considered carefully the memoranda and other materials submitted by the parties, **[*2]** as well as the law and facts relating to the motion. Now being fully advised, the court issues the following Memorandum Decision and Order.

BACKGROUND

Plaintiff Legrand P. Belnap, M.D. ("Dr. Belnap") is a general surgeon with expertise in organ transplantation, bariatric surgery, and cases involving complex cancers. He has been a practicing physician in the State of Utah since 1974. Defendant Jordan Valley Medical Center, LP ("JVMC") is a medical center located in West Jordan, Utah, which was formerly owned by Iasis Healthcare Holdings ("Iasis"). Steward Health Care System LLC ("Steward") is a health care corporation that acquired Iasis in or around September 2017. Steward currently owns or operates five hospitals in the State of Utah, including JVMC and Salt Lake Regional Medical Center ("Salt Lake Regional"), another hospital formerly owned by Iasis.

From 2009 to 2013, Dr. Belnap enjoyed a successful medical practice at Salt Lake Regional. In March 2013, however, Dr. Belnap's hospital privileges at Salt Lake Regional were summarily suspended for alleged behavior issues by Salt Lake Regional's Medical Executive Committee (the "MEC"). Following the MEC's decision, Dr. Belnap sought review **[*3]** of his suspension, and he took part in a hearing before a Fair Hearing Committee in April 2013. The Fair Hearing Committee determined that Dr. Belnap's suspension had been arbitrary and capricious because the investigation that led to the suspension had been one-sided. Consequently, Dr. Belnap's hospital privileges were reinstated in May 2013. Yet, after his reinstatement, Salt Lake Regional (1) did not notify insurance carriers that Dr. Belnap's suspension had been vacated; (2) communicated to third parties that Dr. Belnap had been the subject of suspension proceedings; and (3) began reviewing Dr. Belnap's medical charts for errors.

Based on his suspension and his subsequent experience at Salt Lake Regional, Dr. Belnap filed suit against Salt Lake Regional and Iasis. Approximately seven months after filing the lawsuit, in September 2014, the MEC denied Dr. Belnap's application to renew his hospital privileges at Salt Lake Regional. Again, Dr. Belnap sought and took part in a hearing before a panel to review the MEC's decision. Following the hearing, the panel upheld the denial of Dr. Belnap's renewal application, and that decision was ultimately upheld by the Board of Trustees.[1] Defendants **[*4]** then reported the denial of Dr. Belnap's renewal application to the National Practitioner Data Bank (the "Data Bank").

In or around September 2013, after his privileges had been reinstated at Salt Lake Regional, Dr. Belnap applied for privileges at JVMC. At JVMC, applications for privileges follow a four-step process: (1) the JVMC Medical Executive Committee (the "JVMC Committee") first considers an application with input from the Credentials Committee; (2) if the application is denied, the applicant may request a hearing before the JVMC Fair Hearing Panel (the "FHP"); (3) if denied again, the applicant may request appellate review before the JVMC Appellate Review Body; and (4) a final determination is made by the JVMC Board of Directors. Nearly a year after submitting his application, and approximately six months after filing the lawsuit against Salt Lake Regional, the JVMC Committee denied Dr. Belnap's application for privileges based on previous behavior issues at other hospitals as well as the number of medical malpractice claims against him. In turn, Dr. Belnap requested a hearing from the FHP, which took place in October 2014. The FHP unanimously concluded that JVMC failed to **[*5]** exercise due diligence in evaluating Dr. Belnap's application. Moreover, the FHP recommended that Dr. Belnap's application should be approved.

Despite the FHP's conclusion, the JVMC Committee held another meeting in January 2015 where they heard from three physicians, including Dr. Steven Mintz ("Dr. Mintz"), a general surgeon and the Chief of General Surgery at Salt Lake Regional who was also a member of Salt Lake Regional's Credentials Committee and Board of Trustees, and Dr. Ben Howard ("Dr. Howard"), an anesthesiologist, the Chief of Medical Staff at Salt Lake Regional, and a member of the MEC. Dr. Belnap was neither notified of the meeting nor invited to attend. Following this meeting, the JVMC Committee reaffirmed the denial of Dr. Belnap's application for alleged poor behavior at other hospitals. Dr. Belnap appealed the JVMC Committee's decision, and JVMC appointed Yocum as the advisor to the Appellate Review Body. Dr. Belnap filed a motion to disqualify Yocum, but the Appellate Review Panel denied his motion.

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[1] Dr. Belnap alleges that the hearing was not fair because Salt Lake Regional employed a panel advisor, William J. Yocum ("Yocum"), who had a conflict of interest and was regarded as a "hospital lawyer." Dr. Belnap claims that Yocum's strong bias in favor of Salt Lake Regional manifested itself throughout the hearing.

After a hearing to review the denial of Dr. Belnap's application, the Appellate Review Board affirmed the JVMC Committee's denial of Dr. Belnap's application for privileges, **[*6]** and that decision was subsequently affirmed by the JVMC Board of Directors. As a result, in June 2015, Defendants reported the denial of Dr. Belnap's application for privileges to the Data Bank.

Since the JVMC Board of Directors' denial of Dr. Belnap's application, Dr. Belnap has been unable to obtain privileges at any other hospital due to the Data Bank reports because hospitals are legally required to check the Data Bank prior to granting privileges to any new doctors. As such, Dr. Belnap has been unable to continue his career in inpatient general surgery, and now assists weight loss surgeries at an outpatient clinic. Yet, even at the outpatient clinic, no insurance company will cover Dr. Belnap's services due to the Data Bank reports and his lack of hospital privileges.

Dr. Belnap commenced the instant suit on May 13, 2019 and has since filed an amended complaint wherein he alleges seven causes of action: (1) a conspiracy to restrain trade in violation of *Section 1* of the *Sherman Act* and *Section 4* of the *Clayton Act*; (2) breach of contract; (3) breach of contract as a third-party beneficiary; (4) breach of the implied covenant of good faith and fair dealing; (5) tortious interference with economic **[*7]** relations; (6) intentional infliction of emotional distress; and (7) civil conspiracy.[2] Dr. Belnap alleges that Defendants conspired to eliminate Dr. Belnap from the Utah inpatient general surgery market for anticompetitive reasons. He alleges that Defendants conspired to deny his application for privileges at JVMC in order to eliminate him from the market and preclude him from obtaining privileges at other hospitals. Further, Dr. Belnap contends that by denying him privileges at JVMC and inhibiting him from obtaining privileges at other Utah hospitals, Defendants have deprived patients in Utah from being able obtain necessary treatment that otherwise could have been rendered by Dr. Belnap. Consequently, he claims that such patients have been forced to seek treatment outside of Utah and settle for substandard care.

DISCUSSION

Defendants now move to dismiss Dr. Belnap's antitrust claim for failure to state a claim and his remaining claims for lack of subject-matter jurisdiction. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Bixler v. Foster, 596 F.3d 751, 756 (10th Cir. 2010)* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009))* (quotation marks omitted). "[A]ll well-pleaded **[*8]** factual allegations in the complaint are accepted as true and viewed in the light most favorable to the nonmoving party." *Acosta v. Jani-King of Oklahoma, Inc., 905 F.3d 1156, 1158 (10th Cir. 2018)* (quoting *Moore v. Guthrie, 438 F.3d 1036, 1039 (10th Cir. 2006))*. "[M]ere 'labels and conclusions,' and 'a formulaic recitation of the elements of a cause of action' will not suffice; a plaintiff must offer specific factual allegations to support each claim." *Kansas Penn Gaming, LLC v. Collins, 656 F.3d 1210, 1214 (10th Cir. 2011)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Furthermore, if, at any time, a "court determines . . . that it lacks subject-matter jurisdiction, the court must dismiss the action." *Fed. R. Civ. P. 12(h)(3)*; *see also* *Full Life Hospice, LLC v. Sebelius, 709 F.3d 1012, 1016 (10th Cir. 2013)* ("A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking.").

I. Antitrust Claim

Under *Section 1* of the Sherman Act, "[e]very contract, combination . . ., or conspiracy, in restraint of trade or commerce . . . is . . . illegal." *15 U.S.C. § 1*. In order to bring a claim under *Section 1*, a plaintiff must first establish that he or she has antitrust standing. *See* *Tal v. Hogan, 453 F.3d 1244, 1253 (10th Cir. 2006)*. Significantly, "the

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[2] This is the third in a series of lawsuits Dr. Belnap has filed against JVMC, Salt Lake Regional, the hospitals' owners, and various physicians who have practiced at the hospitals, all arising out of Dr. Belnap's lack of privileges to practice at these facilities.

standing requirements in the antitrust context are more rigorous than that of the Constitution." *Id.* Indeed, not only must an antitrust plaintiff demonstrate an "antitrust injury," he or she must also show "a direct causal connection between that injury **[*9]** and a defendant's violation of the antitrust laws." *Id.*

After a plaintiff has met the antitrust standing requirements, his or her complaint can only survive if it plausibly alleges a *Section 1* violation. *See Twombly, 550 U.S. at 556*. When analyzing whether a plaintiff has adequately alleged a violation of *Section 1*, "[t]he crucial question is whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement, tacit or express." *Id. at 553* (alterations in original) (internal quotation marks omitted) (quoting *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540, 74 S. Ct. 257, 98 L. Ed. 273 (1954))*. This is because "[i]ndependent action is not proscribed." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. Therefore, "[o]nly after an agreement is established will a court consider whether the agreement constituted an unreasonable restraint of trade." *Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1082 (10th Cir. 2006)*.

In this case, Defendants move to dismiss Dr. Belnap's antitrust claims for two reasons. First, they contend that Dr. Belnap has failed to alleged an antitrust injury and therefore lacks antitrust standing to bring his claim. Second, even if Dr. Belnap has alleged an antitrust injury, Defendants aver that he has failed to adequately allege a conspiracy under *Section 1*. The court will address each of Defendants' arguments in turn.

A. Antitrust Injury

An "antitrust injury" is an "injury of the type the antitrust **[*10]** laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))*. "The primary concern of the antitrust laws is the corruption of the competitive process, not the success or failure of a particular firm." *Tal, 453 F.3d at 1258*. Put differently, "the antitrust laws . . . were enacted for 'the protection of competition, not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. Accordingly, a plaintiff "must allege and prove harm, not just to a single competitor, but to the competitive process, i.e., to competition itself." *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*; *see also Cohlmia v. St. John Med. Ctr., 693 F.3d 1269, 1281 (10th Cir. 2012)* ("An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services, not just his own welfare.") (quoting *Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 641 (3d Cir. 1996))*.

In this case, Dr. Belnap alleges that Defendants' actions have resulted in various antitrust injuries. First, Dr. Belnap avers that Defendants improperly utilized the privileges and credentialing process to drive him out of the Utah inpatient general surgery market and eliminate him as a competitor. Dr. Belnap contends that this has resulted in injury to the relevant market considering he is one of the top surgeons in the market. Thus, because patients no longer have access to one of the top surgeons in the market, **[*11]** Dr. Belnap contends that Defendants have essentially deprived patients of necessary treatment, caused patients to receive lower quality care, and forced patients to seek care outside of the State of Utah. Second, Dr. Belnap claims that his removal from the relevant market has injured the competitive process in that the flow of out-of-state patients, money, and goods that he generated through his surgical practice have been completely eliminated. Third, Dr. Belnap contends that Defendants' actions have precluded him from being able to obtain privileges at any hospitals, severely reduced his income, and caused him substantial financial, reputational, and emotional harm.

To support his claim of antitrust injury, Dr. Belnap relies heavily on *Cohlmia v. Ardent Health Servs., LLC*. There, the plaintiff doctor alleged that there existed an antitrust injury when the defendants "improperly used the peer review process, normally thought to enhance competition, in order to drive [the plaintiff] out of the market and thus harm competition." *Cohlmia v. Ardent Health Servs., LLC, 448 F. Supp. 2d 1253, 1263 (N.D. Okla. 2006)*. The plaintiff further argued that the defendants interfered with the plaintiff's patients "to prevent them from exercising free choice in the market and indeed, **[*12]** to prevent some of them from receiving the best medical care possible."

Id. at 1264. The court concluded that such allegations were sufficient to survive the defendants' motion to dismiss. *Id.*

Having reviewed Dr. Belnap's allegations, the court concludes that he has failed to adequately allege an antitrust injury. As a preliminary matter, Dr. Belnap makes several allegations that Defendants' actions have injured him personally. Such injuries, however, do not constitute antitrust injuries because they are injuries to Dr. Belnap as a competitor, not injuries to the competitive process. Accordingly, the court will disregard Dr. Belnap's allegations that he has been unable to obtain privileges at other hospitals, that his income has suffered, and that he has suffered substantial personal harm as result of Defendants' actions for standing purposes because they do not constitute antitrust injuries.

As for Dr. Belnap's remaining injury allegations, the court likewise finds them insufficient. To start, as the Tenth Circuit has noted, an antitrust injury does not exist "every time someone is excluded from a medical hospital as a result of peer review" or the credentialing process. *Cohlmia, 693 F.3d at 1281*. For example:

> A staffing **[*13]** decision does not itself constitute an antitrust injury. If the law were otherwise, many a physician's workplace grievance with a hospital would be elevated to the status of an antitrust action. To keep the antitrust laws from being so trivialized, *the reasonableness of a restraint is evaluated based on its impact on competition as a whole* within the relevant market.

Id. (emphasis in original) (quotation marks omitted) (quoting *BCB Anesthesia Care Ltd. v. Passavant Mem'l Area Hosp. Ass'n., 36 F.3d 664, 669 (7th Cir. 1994))*. Thus, for Dr. Belnap to have properly stated a *Section 1* claim, he must have set forth plausible allegations that Defendants' actions in denying him hospital privileges negatively impacted the Utah inpatient general surgery market. The court concludes that he has failed to do so. Although Dr. Belnap contends that the Utah inpatient general surgery market has been injured for the various reasons enumerated above, the court finds those allegations to be conclusory and bereft of factual support. Moreover, at least in this case, the court is unconvinced that one general surgeon's denial of privileges at a single hospital has or will have the type of anticompetitive effect on the relevant market that Dr. Belnap so insists.

The court further concludes that Dr. Belnap's reliance **[*14]** on *Ardent Health* to be misplaced given that the facts of that case are readily distinguishable from the present case. First, the physician plaintiff in that case specialized "in cardiovascular, thoracic, vascular and endovascular surgery." *Ardent Health, 448 F. Supp. 2d at 1260*. Second, a significant portion of the physician plaintiff's patients were Native American and considered "high risk," and, as such, were "not always well received by other cardiovascular surgeons and health care facilities." *Id.* Nevertheless, the plaintiff physician "possesse[d] the skill, expertise, and willingness to operate on [them]." *Id.* In sum, the plaintiff physician's patients were a small and narrow subset of the population that required treatment in an-already narrow market but who would almost certainly be deprived of treatment in the physician's absence from the market. That, however, is not the case here. As a general surgeon, Dr. Belnap is a competitor in a market much broader than the relevant market at issue in *Ardent Health*, i.e., the general surgery market vs. the cardiovascular, thoracic, vascular and endovascular surgery market. Furthermore, Dr. Belnap's claims of injury to the relative market—and, particularly, to patients—are **[*15]** much less certain and particularized than the allegations of injury in *Ardent Health*. And, importantly, in *Ardent Health*, the district court reached its decision regarding antitrust injury *because of* the specific patients and how they would be affected if the plaintiff physician was unable to practice. *See id. at 1265* (noting that the court was "willing . . . to give [the plaintiff] the benefit of the doubt, for the sake of [his] patients—i.e., the consumers in [the] market—who [were] . . . high risk and low income, and may therefore have real difficulty securing comparable services"). Consequently, the court is unpersuaded by Dr. Belnap's reliance on *Ardent Health*.[3]

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[3] The court also notes that the district court decided *Ardent Health* before the Supreme Court set forth the plausibility pleading standard in *Twombly* and *Iqbal*. Thus, not only are the facts of that case distinguishable from this case, but the court was operating under a lower standard of pleading.

The court therefore concludes that Dr. Belnap has failed to plausibly allege an antitrust injury sufficient to confer standing. As such, Dr. Belnap's antitrust claim must be dismissed.

B. Conspiracy

Even if Dr. Belnap had adequately alleged an antitrust injury, the court concludes that he has failed to properly allege a conspiracy in violation of *Section 1* of the Sherman Act. As mentioned above, *Section 1* makes contracts, combinations, and conspiracies that restrain trade or commerce illegal. *15 U.S.C. § 1*. "This language has been interpreted **[*16]** . . . to prohibit a 'concerted action.'" *Bell v. Fur Breeders Agric. Co-op., 348 F.3d 1224, 1232 (10th Cir. 2003)*. Indeed, "*Section 1* does not proscribe purely unilateral activity by a single entity." *Systemcare, Inc. v. Wang Lab. Corp., 117 F.3d 1137, 1140 (10th Cir. 1997)*. Accordingly, for there to exist a conspiracy, there must be "two or more entities that previously pursued their own interests separately . . . combining to act as one for their common benefit." *Abraham v. Intermountain Health Care Inc., 461 F.3d 1249, 1256 (10th Cir. 2006)* (quoting *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*. And, as noted above, "*Section 1* requires the existence of an agreement between the allegedly conspiring parties." *Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 899 F.2d 951, 963 (10th Cir. 1990)*; *see also* *Champagne Metals, 458 F.3d at 1082* ("The essence of a claim of violation of *Section 1* of the Sherman Act is the agreement itself."). In other words, a plaintiff must allege that the defendants entered into an agreement wherein they "consciously committed themselves to a common scheme designed to achieve an unlawful objective." *Llacua v. W. Range Ass'n, 930 F.3d 1161, 1179 (10th Cir. 2019)* (quoting *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc., 883 F.3d 32, 40 (2d Cir. 2018))*.

In this case, Dr. Belnap alleges that Steward, JVMC, Salt Lake Regional, members of the JVMC Committee, the Appellate Review Body, Dr. Howard, and Dr. Mintz all conspired to eliminate him from the Utah inpatient general surgery market. He further alleges that a conspiracy can be inferred based on the allegations in the Amended Complaint because he contends that Defendants had rational economic motives to conspire against him.

The court finds Dr. Belnap's allegations **[*17]** to be insufficient for various reasons. At the outset, Steward, JVMC, and Salt Lake Regional are incapable, as a matter of law, of conspiring together for purposes of a *Section 1* claim based on the Supreme Court's decision in *Copperweld*. In *Copperweld*, the Court held that a corporation and "its wholly owned subsidiary . . . are incapable of conspiring with each other for purposes of *§ 1* of the Sherman Act." *Id. at 777*. The Court explained:

> [T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of *§ 1* of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. . . . With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for *§ 1* scrutiny.

Id. at 771. Since *Copperweld*, courts have applied its reasoning to other **[*18]** corporate relationships. For example, the Tenth Circuit has opined that "*Copperweld* supports treating the coordinated acts of *sister subsidiaries* wholly owned by the same parent as those of a single enterprise, such that the subsidiaries are incapable of conspiring under *§ 1* of the Sherman Act." *Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 847 F.3d 1221, 1234 (10th Cir. 2017)* (emphasis added). In reaching this conclusion, the Tenth Circuit noted that "[c]ourts and commentators have long agreed that the logic of this view is plain." *Id.* The court further articulated:

> [A]ll of the reasoning of the Court [in *Copperweld*] . . . equates sibling corporations with subsidiaries. The total unity of the corporate enterprise is equally reflected in both. In refusing to make corporate form determinative and in refusing to treat wholly owned corporations differently from unincorporated divisions, the *Copperweld* holding also denies conspiratorial capacity to sibling corporations' dealings with each other.

Id. (alterations in original) (quoting 7 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1464f, at 225 (3d ed. 2008)). In the Amended Complaint, Dr. Belnap alleges that, at all relevant times, both JVMC and Salt Lake Regional were owned by Iasis, and Iasis was acquired by **[*19]** Steward. Am. Compl. ¶ 5. Therefore, the court concludes that because JVMC and Salt Lake Regional are sister subsidiaries under their parent corporation, Steward, they are incapable of conspiring with each other or Steward for purposes of Dr. Belnap's *Section 1* claim.

To avoid this conclusion, Dr. Belnap attempts to distinguish this case from *Copperweld* by arguing that *Copperweld* and its progeny only apply to cases involving a parent corporation and its *wholly owned* subsidiary. Dr. Belnap points out that neither JVMC nor Salt Lake Regional are wholly owned subsidiaries of Steward, and he has made no allegation advancing such a claim. While it is true that neither JVMC nor Salt Lake Regional are wholly owned subsidiaries, courts have continuously applied *Copperweld* to cases even when the subsidiaries were not wholly owned.[4] *See* *Coast Cities Truck Sales, Inc. v. Navistar Int'l Transp. Co., 912 F. Supp. 747, 764 (D.N.J. 1995)* ("Since [*Copperweld*], several courts have concluded that subsidiaries that are not wholly owned nevertheless cannot be actors in conspiracy with their majority owners."); *Bell Atl. Bus. Sys. Servs. v. Hitachi Data Sys. Corp., 849 F. Supp. 702, 706 (N.D. Cal. 1994)* (applying *Copperweld* when parent company owned only 80% of the subsidiary); *Novatel Commc'ns, Inc. v. Cellular Tel. Supply, Inc., No. CIV.A. C85-2674A, 1986 U.S. Dist. LEXIS 16017, 1986 WL 15507, at *6 (N.D. Ga. Dec. 23, 1986)* (holding that *Copperweld* applied even though the **[*20]** parent company owned only 51% of the subsidiary). The court is therefore unpersuaded by Dr. Belnap's attempt at removing this case from the purview of *Copperweld*.

The court finds Dr. Belnap's conspiracy allegations regarding the JVMC Committee and the Appellate Review Body to be equally unavailing. First, while Dr. Belnap claims that the JVMC Committee and the Appellate Review Body conspired to exclude him, they simply did not have the final authority to deny him privileges. Although they decided to deny Dr. Belnap's application, their decisions functioned as nothing more than recommendations to the JVMC Board of Directors—the final decisionmaker on which physicians will obtain privileges to practice at JVMC. And, here, Dr. Belnap's allegations only establish that the JVMC Board of Directors acted unilaterally in denying Dr. Belnap's application for privileges. Indeed, the Amended Complaint simply suggests that the JVMC Board of Directors did nothing more than adopt the recommendations of the JVMC Committee and the Appellate Review Body. The Amended Complaint is devoid of any allegation that the JVMC Board of Directors engaged in any conduct that would imply a conspiracy. Second, despite **[*21]** Dr. Belnap's contentions, the JVMC Board of Directors had a legitimate economic motive to grant Dr. Belnap privileges because hospitals make more when surgeons perform their surgeries there. *See* *Llacua, 930 F.3d at 1179-80* ("An inference of conspiracy is impermissible if the defendants had no rational economic motive to conspire.") (quotation marks omitted). Consequently, the court concludes that Dr. Belnap has failed to adequately allege a conspiracy involving the JVMC Committee or the Appellate Review Body.[5]

This leaves Dr. Howard and Dr. Mintz as the only remaining parties that could have conspired with Defendants. The court, however, finds Dr. Belnap's conspiracy allegations regarding them to be insufficient. First, the court finds unconvincing Dr. Belnap's allegations that Dr. Howard and Dr. Mintz had rational economic motives to conspire to exclude him from the relevant market. On the one hand, Dr. Howard is an anesthesiologist and thus had no economic motive to exclude Dr. Belnap because he was not a competitor. And on the other, although Dr. Mintz is a general surgeon, he is also the Chair of the Salt Lake Regional Board of Trustees and therefore was incentivized to grant Dr. Belnap privileges **[*22]** at Salt Lake Regional for the hospital to derive more revenue. Second,

[4] Steward owns 90% or more of JVMC. Def. Jordan Valley Med. Ctr., LP's Corp. Discl. Statement, ECF No. 13 (Aug. 30, 2019) ("No other publicly-held corporation owns 10% or more of Jordan Valley Medical Center, LP's stock.").

[5] The court is further persuaded that Dr. Belnap has failed to allege a conspiracy with respect to the JVMC Committee and the Appellate Review Body because, during the privileges and credentialing process, those bodies are essentially acting vicariously for JVMC. *Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 703 (4th Cir. 1991)* ("We think . . . that the staff is acting as an agent of [the hospital] during the peer review process and as such is indistinct from the hospital."). Thus, allegations that the JVMC Committee and the Appellate Review Body conspired with Defendants cannot meet the requirement that there be a concerted action by *independent* entities.

irrespective of Dr. Howard's and Dr. Mintz's economic motives, the court finds that Dr. Belnap has simply failed to plausibly allege a conspiracy between those doctors and Defendants. Importantly, the Amended Complaint makes no allegation that Dr. Howard and Dr. Mintz had any communication with the JVMC Board of Directors. Rather, all of the allegations regarding Dr. Howard and Dr. Mintz suggest that they (1) took part in denying Dr. Belnap's application for privileges at Salt Lake Regional and (2) made false and defamatory statements about Dr. Belnap to the JVMC Committee.[6] Yet, neither set of allegations evinces the existence of a conspiracy, nor do they imply that the parties entered into any type of agreement at all. The court therefore finds that Dr. Belnap's allegations regarding Dr. Howard and Dr. Mintz are insufficient to suggest a conspiracy.[7]

The court concludes that Dr. Belnap has failed adequately allege that Defendants conspired to eliminate him from the market. Thus, based on that additional basis, Dr. Belnap's antitrust claim must be dismissed.

As a final matter, the court once again notes that this case **[*23]** involves nothing more than a single physician being denied privileges at a single hospital. While the hardships that Dr. Belnap has suffered as a result of being unable to obtain privileges at hospital are not lost on the court, the court is persuaded that this case does not present a set of facts that are meant to be covered by the antitrust laws. On this point, the court finds the Seventh Circuit's analysis in *BCB Anesthesia* to be particular pertinent. In the Seventh Circuit's words:

> This case involves one hospital's decisions about staff privileges and staffing patterns. The cases involving staffing at a single hospital are legion. Hundreds, perhaps thousands of pages in West publications are devoted to the issues those circumstances present. Those cases invariably analyze those circumstances under the rule of reason-there is nothing obviously anticompetitive about a hospital choosing one staffing pattern over another or in restricting the staffing to some rather than many, or all. A hospital has an unquestioned right to exercise some control over the identity and number to whom it accords staff privileges. Malpractice concerns, quality of care, market perceptions, cost, and administrative **[*24]** considerations may all impact those decisions.
>
> Those hundreds or thousands of pages almost always come to the same conclusion: the staffing decision at a single hospital was not a violation of *section 1* of the Sherman Act.

BCB Anesthesia, 36 F.3d at 667 (citations omitted).

II. Remaining State Law Claims

Defendants contend that if the court grants their motion to dismiss Dr. Belnap's antitrust claim, the court must also dismiss Dr. Belnap's remaining state law claims for lack of subject-matter jurisdiction. "There are two statutory bases for federal subject-matter jurisdiction: diversity jurisdiction under *28 U.S.C. § 1332* and federal-question jurisdiction under *28 U.S.C. § 1331*." *Nicodemus v. Union Pac. Corp., 318 F.3d 1231, 1235 (10th Cir. 2003)*. "Federal-question jurisdiction exists for all claims 'arising under the Constitution, laws, or treaties of the United States.'" *Id.* (quoting *28 U.S.C. § 1331*). If a federal court has original jurisdiction in a case also involving claims arising under state law, it "shall have supplemental jurisdiction over [the state law] claims that are so related" to the claims within the court's original jurisdiction such "that they form part of the same case or controversy." *28 U.S.C. § 1367(a)*. In a case, however, "[w]hen all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction **[*25]** over any remaining state claims." *Smith v. City of Enid By & Through Enid City Comm'n, 149 F.3d 1151, 1156 (10th Cir. 1998)*; *see* *28 U.S.C. § 1367(c)* ("The district courts may decline to

[6] Dr. Belnap makes much out of the roles that Dr. Howard and Dr. Mintz played in him losing his privileges at Salt Lake Regional. Whatever roles Dr. Howard and Dr. Mintz played in Salt Lake Regional's credentialing process, however, has no bearing on JVMC's credentialing process.

[7] Dr. Belnap also alleges that Defendants conspired with "John Does 1-20." The allegations in the Amended Complaint, however, are too insufficient and vague as to those unnamed defendants to allow Dr. Belnap's antitrust claim to proceed.

exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction.").

In this case, the court has federal-question jurisdiction over Dr. Belnap's antitrust claim and supplemental jurisdiction over Dr. Belnap's state law claims. Yet, because the court has decided to grant Defendants' motion and dismiss Dr. Belnap's antitrust claim, the only remaining claims in this case are state law claims. Therefore, in the absence of any federal causes of action, the court will refrain from exercising supplemental jurisdiction over Dr. Belnap's remaining state law claims and dismiss them for lack of subject-matter jurisdiction.

CONCLUSION

Based on the foregoing reasoning, Defendants' Motion to Dismiss is hereby GRANTED. Accordingly, Dr. Belnap's antitrust claim is dismissed with prejudice for failure to state a claim, and his remaining state law claims are dismissed without prejudice for lack of subject-matter jurisdiction.

Dated this 10th day of February, 2020.

BY THE COURT:

/s/ Dale A. Kimball

DALE A. KIMBALL

United States District Judge

TMT Mgmt. Grp., LLC v. U.S. Bank Nat'l Ass'n

Court of Appeals of Minnesota

February 10, 2020, Filed

A19-0915

Reporter
940 N.W.2d 239 *; 2020 Minn. App. LEXIS 37 **; 2020-1 Trade Cas. (CCH) P81,090; 2020 WL 610458

TMT Management Group, LLC, et al., Appellants, vs. U.S. Bank National Association, et al., Respondents, Wilbur Tate, Respondent, United Credit Recovery, LLC, Respondent, Leonard Potillo, Respondent.

Subsequent History: Review denied by *TMT Mgmt. Grp., LLC v. U.S. Bank Nat'l Ass'n, 2020 Minn. LEXIS 267 (Minn., Apr. 28, 2020)*

Prior History: [1]** Dakota County District Court File No. 19HA-CV-16-991.

Tmt Mgmt. Group v. U.s Bank Nat'l Ass'n, 2018 Minn. Dist. LEXIS 88 (Dec. 21, 2018)

Disposition: Affirmed.

Core Terms

commercial bribery, district court, antitrust, portfolio, refusal-to-deal, summary judgment, Robinson-Patman Act, Sherman Act, anti trust law, oral statement, Clayton Act, bid, definite promise, asserts, federal district court, promissory-estoppel, fabricated, sanctions, alleges, damages, derivative claim, material fact, precluding, analyzed, argues

LexisNexis® Headnotes

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

Civil Procedure > Sanctions

HN1[] **Standards of Review, Abuse of Discretion**

The party challenging a district court's choice of sanction has the difficult burden of convincing an appellate court that the district court abused its discretion-a burden which is met only when it is clear that no reasonable person would agree with the district court's assessment of what sanctions are appropriate.

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

HN2[] **Appellate Review, Standards of Review**

The appellate court reviews the grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law. The appellate court views the evidence in the light most favorable to the party against whom summary judgment was granted.

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

HN3[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is inappropriate when reasonable persons might draw different conclusions from the evidence presented.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN4[] **Consideration, Promissory Estoppel**

Promissory estoppel is an equitable doctrine which requires proof of the following three elements: (1) a clear and definite promise, (2) the promisor intended to induce reliance and the promisee in fact relied to his or her detriment, and (3) the promise must be enforced to prevent injustice.

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

HN5[] **Burdens of Proof, Nonmovant Persuasion & Proof**

A party must present specific admissible facts showing that there was a genuine issue for trial to avoid summary judgment.

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

HN6[] **Deceptive & Unfair Trade Practices, State Regulation**

Minn. Stat. § 325D.53, subd. 1(3), with certain exceptions, makes a contract, combination, or conspiracy between two or more persons refusing to deal with another person unlawful.

Antitrust & Trade Law > Sherman Act > Claims

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

HN7[] **Sherman Act, Claims**

Minnesota's antitrust laws are generally interpreted consistently with federal courts' construction of federal antitrust laws. While there is no direct federal analogue of *Minn. Stat. § 325D.53, subd. 1(3)*, the U.S. Supreme Court has analyzed federal refusal-to-deal claims under *Sections 1* and *2* of the Sherman Act, *15 U.S.C.S. §§ 1*, *2 (2012)*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Sherman Act > Claims

HN8[] **Robinson-Patman Act, Claims**

A claim for commercial bribery is potentially actionable under the Robinson-Patman Act, *15 U.S.C.S. § 13(c) (2012)*, not *Sections 1* and *2* of the Sherman Act.

Governments > Courts

HN9[] **Governments, Courts**

The appellate court, as an error correcting court, is without authority to change the law.

Antitrust & Trade Law > Sherman Act > Claims

HN10[] **Sherman Act, Claims**

Section 2(c) of the Sherman Act was enacted primarily to combat the practice of dummy brokerages, but the sine qua non of a *Section 2(c)* violation is an improper payment, i.e., a payment of a commission, brokerage, or discount other than for services actually rendered.

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN11[] **Robinson-Patman Act, Claims**

The Robinson-Patman Act does not provide a private cause of action for treble damages; instead, a claim must be pursued via Section 4 of the Clayton Act, which authorizes private suits by any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws, *15 U.S.C.S. § 15(a)*. A private litigant seeking treble damages for such a violation under Section 4 of the Clayton Act must nevertheless allege an antitrust injury.

Antitrust & Trade Law > Clayton Act > Claims

HN12[] **Clayton Act, Claims**

To establish antitrust injury, a private litigant must prove injury in its business or property by reason of the violation and that the violation was at least a material cause of the plaintiff's injury. In other words, a plaintiff must show (1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the statute. A plaintiff must not only state a claim for commercial bribery, but must also demonstrate an antitrust injury in order to invoke the jurisdictional provision of Section 4 of the Clayton Act.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN13[] **Clayton Act, Claims**

A claim for commercial bribery is potentially actionable under the Robinson-Patman Act (i.e. *Section 2(c)* of the Clayton Act), but a claim for commercial bribery, standing alone, does not state a claim under the Sherman Act.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN14[] **Clayton Act, Claims**

If a claim for commercial bribery is actionable under federal ***antitrust law***, it is under *Section 2(c)* of the Robinson-Patman Act. In order to maintain a private cause of action under the Robinson-Patman Act, a litigant must establish an antitrust injury in accordance with Section 4 of the Clayton Act.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Sherman Act > Claims

HN15[] **Clayton Act, Claims**

An allegation of a per se violation of *Section 1* of the Sherman Act is distinguished from an allegation of an antitrust injury. The per se rule is a method of determining whether *Section 1* of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus may recover damages under Section 4 of the Clayton Act.

Antitrust & Trade Law > Clayton Act > Claims

HN16[] **Clayton Act, Claims**

The allegation of a per se violation is insufficient to convey a private right of action under the Clayton Act. Instead, the plaintiff must also establish an antitrust injury.

Antitrust & Trade Law > Sherman Act > Claims

HN17[] **Sherman Act, Claims**

An allegation of commercial bribery does not state a claim under the Sherman Act.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Sherman Act > Claims

HN18[] **Clayton Act, Claims**

A claim of commercial bribery neither provides the antitrust injury necessary to convey a private right of action under Section 4 of the Clayton Act, nor is commercial bribery actionable under *Sections 1* and *2* of the Sherman Act.

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN19[] **Robinson-Patman Act, Claims**

If a federal antitrust claim based on commercial bribery lies anywhere, it is pursuant to *Section 2(c)* of the Robinson-Patman Act, not in a state-law claim for refusal to deal.

Syllabus

An allegation of commercial bribery does not relieve a litigant of the need to show targeting and market foreclosure in order to state an antitrust refusal-to-deal claim under *Minn. Stat. § 325D.53, subd. 1(3)* (2018).

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For U.S. Bank, et al., Respondents: Brooks F. Poley, Justin H. Jenkins, Reid J. Golden, Winthrop & Weinstine, P.A., Minneapolis, Minnesota.

Wilbur Tate, III, Respondent, Pro se, Dacula, Georgia.

United Credit Recovery, L.L.C., Respondent, Pro se, Sanford, Florida.

Leonard Potillo, Respondent, Pro se, Longwood, Florida.

Judges: Considered and decided by Johnson, Presiding Judge; Jesson, Judge; and Florey, Judge.

Opinion by: FLOREY

Opinion

[*241] FLOREY, Judge

Appellants TMT Management Group, LLC, et. al. (TMT) assert that the district court erred by: (1) imposing a sanction against TMT that precluded the introduction of evidence relating to alleged oral statements made by respondents U.S. Bank National Association, et. al. (U.S. Bank); (2) determining that TMT could not prove a clear and definite promise to support its promissory-estoppel claim; (3) granting U.S. Bank summary judgment dismissing **[**2]** TMT's failure-to-deal claim; and (4) dismissing TMT's derivative claims for lack of underlying tortious conduct. We affirm.

FACTS

This action involves a dispute between TMT, a debt-purchasing company, and U.S. Bank. TMT asserts that U.S. Bank conspired with another debt-purchasing **[*242]** company, United Credit Recovery, LLC (UCR), to prevent TMT from purchasing portfolios of overdrawn consumer checking accounts, which are referred to as demand deposit accounts (DDAs).

On March 16, 2011, the principals of TMT, Mark Bugni and respondent Thomas Leiferman, met with employees of U.S. Bank for the first time to discuss TMT's desire to purchase DDA portfolios from U.S. Bank. U.S. Bank expressly rejected TMT's proposal for a five-year forward-flow agreement at that time.[1]

On February 18, 2011, prior to meeting with TMT, U.S. Bank executed a forward-flow agreement with UCR for the sale of DDA portfolios whereby U.S. Bank agreed to sell UCR all of its 2011 DDA portfolios. U.S. Bank cancelled its forward-flow agreement with UCR on June 7, 2011, and granted UCR a right of first refusal on the next portfolio sale.

U.S. Bank sold its May 2011 DDA portfolio to UCR pursuant to the entities' forward-flow agreement. **[**3]** TMT bid on U.S. Bank's July 2011 DDA portfolio, but UCR exercised its right of first refusal to purchase it. TMT executed a purchase agreement for U.S. Bank's September 2011 portfolio. In March 2012, U.S. Bank offered its last DDA portfolio for sale, which it also sold to TMT.

On May 8, 2013, TMT's principals again met with U.S. Bank to discuss possible future purchases of DDA portfolios. TMT alleges that U.S. Bank orally agreed to sell TMT $200 million in DDA debt for three cents on the dollar. U.S. Bank denies that it made a clear and definite promise to sell a DDA portfolio to TMT at that meeting.

In June 2014, federal authorities indicted UCR's principal, Leonard Potillo, for defrauding UCR's customers by misrepresenting the value of DDA debt purchased from U.S. Bank and other financial institutions. U.S. Bank was not charged with any wrongdoing. Wilber Tate, a former U.S. Bank employee, pleaded guilty to unrelated bribery charges in Connecticut. However, there is no dispute that Tate received kickbacks from UCR and Potillo from 2007 until his resignation in January 2011 in exchange for inside information and preferential treatment regarding U.S. Bank's DDA sales.

Following the dismissal **[**4]** of TMT's civil federal claims against U.S. Bank by the federal district court in February 2016, TMT initiated the present action in state district court against U.S. Bank, UCR, and various employees and principals of those entities, under the overarching theory that U.S. Bank and UCR conspired to prevent TMT from purchasing U.S. Bank's DDA portfolios. Near the close of discovery, TMT produced an email that it asserted memorialized an oral contract entered into by U.S. Bank and TMT during the initial March 16, 2011 meeting. Following a forensic analysis, the district court determined that Leiferman fabricated the email. The district court sanctioned TMT for perpetrating a fraud upon the court, precluding TMT from introducing any evidence of alleged oral statements made by, or on behalf of, U.S. Bank defendants, among other penalties.

TMT narrowed or withdrew a number of its claims, and the district court granted U.S. Bank summary judgment on all remaining claims, based, in part, on its evidentiary sanction against TMT. TMT appeals.

[*243] ISSUES

I. Did the district court abuse its discretion by imposing an evidentiary sanction on TMT?

II. Did the district court err by granting U.S. Bank summary **[**5]** judgment on TMT's promissory-estoppel claim?

III. Are the extant state-law refusal-to-deal precedents distinguishable when the plaintiff alleges commercial bribery as the basis of the claim?

IV. Did the district court err by dismissing TMT's derivative claims for lack of underlying tortious conduct?

ANALYSIS

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[1] A forward-flow agreement allows the buyer to purchase all of the bank's DDA portfolios for a given period at specified prices.

I. Evidentiary sanction

TMT argues that the district court abused its discretion by precluding TMT from introducing any evidence of alleged oral statements made by, or on behalf of, U.S. Bank defendants as a sanction for TMT's fabrication of evidence related to a purported oral contract. ***HN1***[] The party challenging a district court's choice of sanction "has the difficult burden of convincing an appellate court that the [district] court abused its discretion—a burden which is met only when it is clear that no reasonable person would agree [with] the [district] court's assessment of what sanctions are appropriate." *Patton v. Newmar Corp., 538 N.W.2d 116, 119 (Minn. 1995)* (quotation omitted); *accord In re Kujawa, 270 F.3d 578, 582 (8th Cir. 2001)* (stating that appellate courts review sanctions imposed pursuant to a court's inherent authority for an abuse of discretion).

TMT concedes that Leiferman fabricated evidence, but argues that the district court abused its discretion by failing to narrowly **[**6]** tailor the sanctions it imposed. In support of this proposition, TMT cites the Eighth Circuit's decision in *Kujawa*, but the language TMT relies on refers specifically to monetary sanctions. *270 F.3d at 583* ("The cornerstone of imposing a monetary sanction . . . should be the selection of an amount no greater than sufficient to deter future misconduct by the party.") Here, TMT does not challenge the imposition of monetary sanctions by the district court, only the preclusion of evidence related to alleged oral statements.

TMT also relies on the supreme court's statement that courts "should impose the least severe sanction necessary to effectuate the purpose of deterrence." *Uselman v. Uselman, 464 N.W.2d 130, 145 (Minn. 1990)* (citations omitted). However, in *Uselman*, the supreme court specifically provided for the exclusion of evidence as an available sanction, which it ranked as the sixth most severe sanction out of twelve potential penalties, and stated that the district court "may also consider the presence or absence of bad faith in determining an appropriate sanction." *Id.*

The supreme court also noted in *Seagate Tech., LLC v. W. Digital Corp.* that while preclusion of evidence is a severe sanction, it has been applied in other jurisdictions as a penalty **[**7]** for fabricating evidence. *854 N.W.2d 750, 763-64 (Minn. 2014)*. Here, the record reflects that the district court seriously considered U.S. Bank's request that it dismiss all of TMT's claims as a sanction for TMT's fraud. While the district court noted that significant sanctions were warranted, it decided to impose the less-severe penalty of precluding TMT from introducing evidence of alleged oral statements made by, or on behalf of, U.S. Bank, as the most effective means of deterring TMT from any additional attempts to fabricate evidence of alleged oral statements. We conclude that the district court did not abuse its discretion.

[*244] II. Promissory estoppel

TMT argues that the district court erred by granting U.S. Bank summary judgment on TMT's promissory-estoppel claim. ***HN2***[] "We review the grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Montemayor v. Sebright Prods., Inc., 898 N.W.2d 623, 628 (Minn. 2017)* (quotation omitted). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72, 76-77 (Minn. 2002)*. ***HN3***[] Summary judgment "is inappropriate when reasonable persons might draw different conclusions from the evidence presented." *Montemayor, 898 N.W.2d at 628*.

TMT seeks to estop U.S. **[**8]** Bank from rescinding an alleged oral promise to sell TMT a $200 million DDA portfolio for three cents on the dollar. ***HN4***[] Promissory estoppel is an equitable doctrine which requires proof of the following three elements: "(1) a clear and definite promise, . . . (2) the promisor intended to induce reliance and the promisee in fact relied to his or her detriment, and (3) the promise must be enforced to prevent injustice." *Martens v. Minn. Min. & Mfg. Co., 616 N.W.2d 732, 746 (Minn. 2000)*. The district court granted U.S. Bank summary judgment on the bases that TMT failed to establish a dispute of material fact regarding the existence of a clear and definite promise, and also as a result of the sanction precluding TMT from introducing evidence of U.S. Bank's alleged oral statements.

TMT alleged that a U.S. Bank vice chairman orally promised to sell TMT a DDA portfolio during the May 8, 2013 meeting. TMT asserts that the deposition testimony of its own principals, along with that of a local U.S. Bank employee, created a dispute of material fact regarding whether the U.S. Bank vice chairman made the alleged oral promise.

As an initial matter, the U.S. Bank employee did not testify to the existence of a clear and definite promise. The U.S. Bank employee testified **[**9]** as follows:

> Q: Can you tell me whether you think that a final, finished deal had been reached for U.S. Bank to sell TMT DDA by the end of the lunch meeting?
> A: A final deal, no.
> . . . .
> Q: [D]o you remember [U.S. Bank employees] saying, "Yeah, that price sounds good to us"?
> A: I don't recall that, that they verbally agreed to it. I can't recall 100 percent.
> Q: Do you remember them shaking hands or hugging or giving high fives during the meeting?
> A: I do remember at the end of the meeting . . . they were shaking and hugging making comments that . . . [they were] looking for a way to make a deal happen.

Even when viewed in the light most favorable to TMT, the bank employee's testimony established the existence of a negotiation, not a clear and definite promise upon which TMT could rely.

Furthermore, TMT was precluded from introducing any evidence of oral statements allegedly made on behalf of U.S. Bank. TMT identified no other evidence in the record that could potentially create a dispute of material fact regarding the existence of a clear and definite promise. ***HN5***[] Accordingly, the district court properly granted summary judgment to U.S. Bank on the promissory-estoppel claim. *See* **[*245]** *Leamington Co. v. Nonprofits' Ins., 661 N.W.2d 674, 679 (Minn. App. 2003)* ("A party must **[**10]** present specific admissible facts showing that there was a genuine issue for trial to avoid summary judgment." (quotation omitted)).

III. Refusal to deal

TMT argues that the district court erred by granting U.S. Bank summary judgment on TMT's antitrust refusal-to-deal claim. TMT concedes that it cannot prevail under controlling Minnesota precedent, but asserts that those holdings are distinguishable when the purportedly collusive agreement is the result of commercial bribery.

TMT initially brought a number of antitrust claims, first in federal district court under federal ***antitrust law***, and then following the dismissal of those claims, in state district court under Minnesota ***antitrust law***—all centered around its allegation that a bribery scheme between UCR and Tate operated to artificially control the market for U.S. Bank's DDA portfolio sales. ***HN6***[] However, TMT eventually limited its antitrust allegations to a single claim of refusal to deal under *Minn. Stat. § 325D.53, subd. 1(3)*, which, with certain exceptions, makes "a contract, combination, or conspiracy between two or more persons refusing to deal with another person" unlawful.

A. Refusals to deal under Minnesota *antitrust law*

The parties have identified two cases that **[**11]** interpret the Minnesota refusal-to-deal statute. In *Minn.-Iowa Telev. Co. v. Watonwan T.V. Impr. Ass'n*, the supreme court analyzed a contract between a local ABC affiliate, KAAL, and a broadcasting company, Watonwan, which prevented Watonwan from broadcasting any signal that duplicated KAAL's network programming. *294 N.W.2d 297, 301 (Minn. 1980)*. When Watonwan began carrying the signal of another ABC affiliate, KSTP, KAAL sued to enforce the non-duplication provision, and Watonwan asserted that the provision constituted an invalid refusal to deal. *Id. at 302*. The supreme court held that the non-duplication provision did not constitute a refusal to deal on two principal bases. *Id. at 307*. First, the contract did not target

KTSP, but instead applied to any station carrying ABC network programming. *Id.* Second, because KTSP could still broadcast its signal using a carrier other than Watonwan, it was not foreclosed from the relevant market. *Id.*

In *Hough Transit, Ltd. v. Nat'l Famers Org.*, this court analyzed an exclusive milk-hauling agreement between a dairy cooperative and a former Hough Transit employee, where Hough Transit asserted that the agreement constituted a refusal to deal. *472 N.W.2d 358, 359 (Minn. App. 1991)*. Relying on the analysis set forth in *Watonwan*, this **[**12]** court held that the agreement did not constitute a refusal to deal under the statute on the same two bases. *Id. at 361*. First, because the exclusive arrangement between the co-op and the former employee prevented competition from all other haulers, it did not target Hough Transit for exclusion. *Id.* Second, because Hough Transit was not prevented from hauling for other dairy farmers, it was not foreclosed from the relevant market. *Id.*

Based on *Watonwan* and *Hough*, the district court granted U.S. Bank summary judgment on TMT's refusal-to-deal claim because the undisputed evidence established that the allegedly collusive arrangement between U.S. Bank and UCR applied to all entities seeking to purchase DDA portfolios from U.S. Bank, not just TMT, and TMT could still purchase DDA portfolios from entities other than U.S. Bank.

[*246] TMT asks this court to look to federal ***antitrust law*** in order to distinguish *Watonwan* and *Hough* when a refusal-to-deal claim is premised on commercial bribery. ***HN7***[] "Minnesota's antitrust laws are generally interpreted consistently with federal courts' construction of federal antitrust laws." *Minn. Twins P'ship v. State ex rel. Hatch, 592 N.W.2d 847, 851 (Minn. 1999)*. While there is no direct federal analogue of *Minn. Stat. § 325D.53, subd. 1(3)*, the Supreme Court has analyzed federal refusal-to-deal **[**13]** claims under *sections 1* and *2* of the *Sherman Act*, *15 U.S.C. §§ 1*, *2 (2012)*. *See* *Times-Picayune Publ'g Co. v. United States, 345 U.S., 594, 624-26, 73 S. Ct. 872, 889-90, 97 L. Ed. 1277 (1953)* (analyzing an asserted refusal-to-deal claim under *15 U.S.C. § 1*); *see also* *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407-08, 124 S. Ct. 872, 878-79, 157 L. Ed. 2d 823 (2004)* (analyzing an asserted refusal-to-deal claim under *15 U.S.C. § 2*).

TMT's argument overlooks two important aspects of federal ***antitrust law***. ***HN8***[] As fully set forth below, under the federal precedents identified by the parties, a claim for commercial bribery is potentially actionable under the Robinson-Patman Act, *15 U.S.C. § 13(c) (2012)*, not *sections 1* and *2* of the Sherman Act. Therefore, commercial bribery is an entirely distinct claim from refusal to deal.

Furthermore, none of the federal cases identified by the parties have held that commercial bribery constitutes the antitrust injury necessary to establish standing under *section 4* of the *Clayton Act*, *15 U.S.C. § 15(a) (2012)*, the section under which a litigant must bring a private action for violation of the *Robinson-Patman Act*. Therefore, there is no basis to distinguish the precedential approach to refusal-to-deal claims under state law solely because a plaintiff's claim is premised upon an allegation of commercial bribery. *See* *Lake George Park, L.L.C., v. IBM Mid-Am. Emps. Fed. Credit Union, 576 N.W.2d 463, 466 (Minn. App. 1998)* ***HN9***[] ("This court, as an error correcting court, is without authority to change the law."), *review denied* (Minn. June 17, 1998).

B. Commercial bribery [14] under federal *antitrust law***

Commercial bribery is already potentially actionable under federal ***antitrust law***. Under *section 2(c)* of the Robinson-Patman Act:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

15 U.S.C. § 13(c). "Precision of expression is not an outstanding characteristic of the Robinson-Patman Act . . . ." Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61, 65, 73 S. Ct. 1017, 1020, 97 L. Ed. 1454, 49 F.T.C. 1763 (1953); *see also* Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 218 (2nd Cir. 2004) (providing an overview of the interaction of the various clauses of the act).

HN10[] Section 2(c) of the Robinson-Patman Act was enacted primarily to combat the practice of dummy brokerages, Blue **[*247]** Tree Hotels, 369 F.3d at 221, but "[t]he sine qua non of a § 2(c) violation . . . is an improper payment, i.e., a payment of a commission, brokerage, **[**15]** or discount other than for services actually rendered." Blue Tree Hotels, 369 F.3d at 223. In *Blue Tree Hotels*, the Second Circuit noted that other federal circuits had held that section 2(c) proscribes commercial bribery, but did not actually decide if the section applied because it held that the appellant failed to establish that the purportedly illicit payments constituted commercial bribery. Id. at 221.

HN11[] Even though the Second Circuit did not address the applicability of section 2(c) to a claim for commercial bribery, it noted that the Robinson-Patman Act does not provide a private cause of action for treble damages; instead, a claim must be pursued via section 4 of the Clayton Act, which authorizes private suits by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," 15 U.S.C. § 15(a). Blue Tree Hotels, 369 F.3d at 218. "[A] private litigant seeking treble damages for such a violation under § 4 of the Clayton Act must nevertheless allege an antitrust injury." Id. at 220.

HN12[] "To establish antitrust injury, a private litigant must prove injury in its business or property by reason of the violation and that the violation was at least a material cause of the plaintiff's injury. In other words, a plaintiff must show (1) an injury-in-fact; (2) that has been caused **[**16]** by the violation; and (3) that is the type of injury contemplated by the statute." Blue Tree Hotels, 369 F.3d at 220 (quotations and citation omitted). Therefore, under the Second Circuit's approach, a plaintiff must not only state a claim for commercial bribery, but must also demonstrate an antitrust injury in order to invoke the jurisdictional provision of section 4 of the Clayton Act.

Unlike the Second Circuit's approach, the federal district court of Idaho awarded damages for commercial bribery under the Robinson-Patman Act, but dismissed claims under sections 1 and 2 of the Sherman Act because of the lack of an antitrust violation. Sterling Nelson & Sons, Inc. v. Rangen, Inc., 235 F. Supp. 393 (D. Idaho 1964), *aff'd on other grounds*, 351 F.2d 851 (9th Cir. 1965).[2] This approach appears to be called into question by the more recent decision of the Second Circuit in *Blue Tree Hotels*.

In *Sterling Nelson*, the federal district court of Idaho found that Rangen violated section 2(c) of the Robinson-Patman Act by bribing a state official to influence the state to purchase all of its fish food from Rangen, to the detriment of Sterling Nelson. Id. at 398-99. After reciting the general purpose of the Sherman Act set forth by the Supreme Court in Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311 (1940), the district court characterized the scheme as "a simple case of buying influence, sometimes called commercial **[**17]** bribery, which is cognizable under the anti-trust laws only because of the specific language of 15 U.S.C. § 13(c) . . . . The case falls short of proving actionable wrongs under the Sherman Act." Sterling Nelson, 235 F. Supp. at 400.

The federal district court of Idaho's characterization is relevant because TMT asks this court to alter its analysis of a specific type of antitrust claim—refusal to deal in accordance with Minn. Stat. § 325D.53, subd. 1(3)—because of the presence of an allegation of commercial bribery. Sterling Nelson specifically held that **[*248]** no violation of the Sherman Act occurred, which is the closest federal analogue to Minn. Stat. § 325D.53, subd. 1(3).

The Ninth Circuit relied on this language from *Sterling Nelson* when affirming in part the dismissal of claims under sections 1 and 2 of the Sherman Act premised on commercial bribery. Calnetics Corp. v. Volkswagen of Am., Inc., 532 F.2d 674, 687 (9th Cir. 1976). There, the Ninth Circuit stated that "VW's and Subsidiary's claim of commercial

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[2] The Ninth Circuit's opinion in *Sterling Nelson* was overruled on other grounds by Rotec Indus. v. Mitsubishi Corp., 348 F.3d 1116, 1122 (9th Cir. 2003).

bribery, standing alone, does not constitute a violation of the Sherman Act." *Id.* The Ninth Circuit went on to clarify the impact of *Sterling Nelson*, stating:

> VW's and Subsidiary reliance on the Ninth Circuit opinion in *Sterling Nelson* for the proposition that antitrust claims may be based on commercial bribery is misplaced. This court decided merely that, according to congressional intent, **[**18]** a claim under [§] 2(c) of the Clayton Act, could be based on commercial bribery. The district court holding in *Sterling Nelson* that Sherman Act claims may not be predicated on commercial bribery was never presented to the Ninth Circuit for review . . . .

Id.***HN13***[] Therefore, in the Ninth Circuit, a claim for commercial bribery is potentially actionable under the Robinson-Patman Act (i.e. *section 2(c)* of the Clayton Act), but a claim for commercial bribery, standing alone, does not state a claim under the Sherman Act. TMT has not identified any analogous federal precedent where a refusal-to-deal claim was found to be actionable under the Sherman Act due to an accompanying allegation of commercial bribery. Thus, there is no basis to distinguish *Watonwan* and *Hough* in light of federal refusal-to-deal precedent.

C. Antitrust injury

HN14[] As discussed above, if a claim for commercial bribery is actionable under federal ***antitrust law***, it is under *section 2(c)* of the Robinson-Patman Act. Also discussed above, in order to maintain a private cause of action under the Robinson-Patman Act, a litigant must establish an antitrust injury in accordance with *section 4 of the Clayton Act*. TMT alleges that it suffered an antitrust injury as a result of UCR's commercial bribery of **[**19]** Tate, which it then attempts to use as the basis of its refusal-to-deal claim, despite the fact that these are distinct aspects of ***antitrust law***. TMT asserts that due to the illegal commercial bribery scheme,[3] it was prevented from competing for DDA portfolios offered for sale by U.S. Bank. Even assuming that TMT has sufficiently alleged damages resulting from commercial bribery, the federal caselaw does not support TMT's argument that it has alleged the antitrust injury necessary to bring a private cause of action for violation of the Robinson-Patman Act via *section 4* of the Clayton Act.

HN15[] The United States District Court for the southern district of New York discussed under what aspects of the antitrust laws a claim for commercial bribery may arise in *World Wrestling Entm't, Inc. v. Jakks Pac., Inc., 425 F. Supp. 2d 484, 517-23 (S.D.N.Y. 2006)*, *aff'd*, *328 F. App'x 695 (2d Cir. 2009)*. Notably, the court distinguished an allegation of a per se violation of *section 1* of the Sherman Act from an allegation of an antitrust injury. "The per se rule is a method of determining whether *§ 1* of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus may recover damages under *§ 4* of the Clayton Act." *Id. at 519* (*quoting Atl. Richfield Co. v. USA Petrol. Co., 495 U.S. 328, 341-42,* ***[*249]*** *110 S. Ct. 1884, 1893, 109 L. Ed. 2d 333 (1990))*.

TMT asserts that because a refusal to deal is a per se antitrust **[**20]** violation, the allegation of that violation alone, especially an allegation premised upon a claim of commercial bribery, is sufficient to excuse it from meeting the elements of a state-law claim for refusal to deal, namely, targeting and market foreclosure. ***HN16***[] However, as the Supreme Court made clear in *Atl. Richfield*, the allegation of a per se violation is insufficient to convey a private right of action under the Clayton Act. *Atl. Richfield, 495 U.S. at 341-42, 110 S. Ct. at 1893*. Instead, the plaintiff must also establish an antitrust injury.[4]

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[3] *Minn. Stat. § 609.86* makes commercial bribery illegal under state law.

[4] Again, it is worth noting that TMT has not even alleged the existence of a per se refusal-to-deal antitrust violation. ***HN17***[] As discussed above, the Ninth Circuit held that an allegation of commercial bribery does not state a claim under the Sherman Act. *Calnetics, 532 F.2d at 687*. The United States District Court for the southern district of New York came to a similar conclusion in *World Wrestling Entm't, 425 F. Supp. 2d at 522*.

In *World Wrestling Entm't*, the plaintiff (WWE) alleged that one of its employees conspired with its licensing agent and an action-toy seller, among others, to ensure that the toy seller obtained valuable licenses from WWE. *Id. at 488-89, 515*. The district court characterized this arrangement as "an extensive and, if true, astounding commercial bribery scheme." *Id. at 520*. However, the district court held that the bribery scheme did not state a claim for an antitrust injury, because even if the license-bidding process was rigged as a result of the bribes paid to the employee, WWE was not compelled to accept the artificially low bid. *Id. at 522*. "Indeed, the allegations . . . are even more problematic for [WWE] . . . because the Amended **[**21]** Complaint identifies competitors that were active in the bidding process. . . ." *Id. at 521*. The same is true here, where TMT alleges that it was harmed as a result of the bribes paid by UCR to Tate, which allowed UCR access to inside information. There is no allegation that U.S. Bank was forced to accept UCR's bid instead of TMT's or the bids of other competitors.[5] Therefore, TMT has not alleged the antitrust injury necessary to bring a commercial-bribery claim via *section 4* of the Clayton Act for violation of the Robinson-Patman Act.

In the civil federal litigation initiated by TMT that preceded the present state-court action, the federal district court characterized the commercial-bribery scheme as follows:

> Potillo's [a principal of UCR] plea stated that Tate . . . would provide information to Potillo concerning the highest bids for the DDA Portfolios and the lowest minimum price U.S. Bank would accept. Based on that information, Potillo would submit bids that were slightly higher than the next highest bid and also above the minimum bids deemed acceptable to U.S. Bank. Potillo paid Tate for providing this information.

*TMT Mgmt. Grp., LLC v. U.S. Bank Nat'l Assoc., No. 14-4692, 2016 U.S. Dist. LEXIS 23790, 2016 WL 730254 at *27 (D. Minn. Jan. 4, 2016)*. Nothing in this arrangement relates to an agreement not to deal with TMT. Nothing **[**22]** in the bribery scheme prevented U.S. Bank from accepting a higher bid from TMT.

Here, the alleged antitrust violation involves U.S. Bank's refusal to deal, not UCR's conduct constituting commercial bribery. While TMT points to federal caselaw relating to claims for commercial bribery, nothing in the cases discussed above **[*250]** establishes a basis for excusing a plaintiff asserting a refusal-to-deal claim from establishing that it was singled out for exclusion and was entirely foreclosed from the relevant market. ***HN18***[] Furthermore, as the above cases show, a claim of commercial bribery neither provides the antitrust injury necessary to convey a private right of action under *section 4* of the Clayton Act, nor is commercial bribery actionable under *sections 1* and *2* of the Sherman Act.

HN19[] While TMT is correct that the presence of an allegation of commercial bribery makes this case factually distinguishable from *Watonwan* and *Hough*, TMT does not present any authority that stands for the proposition that the normal analytic framework applied to refusal-to-deal claims does not apply when a plaintiff asserts that the refusal to deal is the result of commercial bribery. If a federal antitrust claim based on commercial bribery lies **[**23]** anywhere, it is pursuant to *section 2(c)* of the Robinson-Patman Act,[6] not in a state-law claim for refusal to deal. Therefore, we decline to distinguish *Watonwan* and *Hough* in the manner urged by TMT when the principal distinguishing fact is an accompanying allegation of commercial bribery.

IV. Derivative claims

Finally, TMT argues that if this court remands either the promissory-estoppel or refusal-to-deal claims, TMT's derivative claims for respondeat superior, civil conspiracy, and punitive damages should be reinstated, as TMT

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[5] During oral argument, counsel stated that there were four or five bidders for the June 2011 DDA portfolio.

[6] We note that the federal district courts possess exclusive jurisdiction over claims arising under *section 4* of the Clayton Act. *General Talking Pictures Corp. v. De Marce, 203 Minn. 28, 279 N.W. 750, 753 (Minn. 1938)* ("[T]he above-quoted provision of the Clayton Act, supplementing a similar one in the Sherman Act (*section 7*, *15 U.S.C.A. §15* note), has been widely construed by both state and federal courts to vest exclusive jurisdiction of issues arising under the anti-trust laws in the federal courts alone." (*citing Blumenstock Bros. Advert. Agency v. Curtis Publ'g Co., 252 U.S. 436, 40 S. Ct. 385, 64 L. Ed. 649 (1920)*)).

would once again have a tort claim to support them. *See* *DeRosa v. McKenzie, 936 N.W.2d 342, 347 n.5 (Minn. 2019)*. Because we affirm the dismissal of the tort claims, the derivative liability-based claims necessarily fail.

DECISION

The district court did not abuse its discretion by precluding TMT from introducing oral statements allegedly made on behalf of U.S. Bank into evidence as a sanction for TMT's fabrication of evidence relating to an alleged oral statement. The district court properly granted summary judgment to U.S. Bank on TMT's promissory-estoppel claim because TMT did not possess any admissible evidence of a clear and definite promise. The district court also appropriately granted U.S. Bank summary judgment on **[**24]** TMT's refusal-to-deal claim because TMT did not establish the existence of a dispute of material fact as to whether it was the sole target of the supposed exclusive agreement between U.S. Bank and UCR or whether it was foreclosed from the entire DDA-portfolio market. Finally, the dismissal of TMT's derivative claims was appropriate following the dismissal of the tort claims upon which they relied.

Affirmed.

Cesar Castillo, Inc. v. Sanofi-Aventis U.S., LLC (In re Lantus Direct Purchaser Antitrust Litig.)

United States Court of Appeals for the First Circuit

February 13, 2020, Decided

No. 18-2086

Reporter

950 F.3d 1 *; 2020 U.S. App. LEXIS 4565 **; 2020-1 Trade Cas. (CCH) P81,083; 2020 U.S.P.Q.2D (BNA) 52597; 2020 WL 728628

IN RE: LANTUS DIRECT PURCHASER ANTITRUST LITIGATION; CÉSAR CASTILLO, INC., on behalf of itself and all others similarly situated; FWK HOLDINGS LLC, on behalf of itself and all others similarly situated, Plaintiffs, Appellants, v. SANOFI-AVENTIS U.S., LLC, Defendant, Appellee, SANOFI GMBH, Defendant.

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Judith G. Dein, U.S. Magistrate Judge.

In re Lantus Direct Purchaser Antitrust Litig., 2018 U.S. Dist. LEXIS 216240 (D. Mass., Oct. 24, 2018)
In re Lantus Direct Purchaser Antitrust Litig., 284 F. Supp. 3d 91, 2018 U.S. Dist. LEXIS 4503 (D. Mass., Jan. 10, 2018)

Core Terms

patent, listing, insulin, regulations, glargine, drug product, pen, manufacturer, antitrust, drive, injector, infringement, competitor, lawsuit, certification, products, dosage, good faith, sNDA, delivery system, anti trust law, approved drug, unambiguous, monopoly, expire, dose, antitrust liability, intended for use, Communications, monopolist's

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN1[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

When a drug manufacturer files an application for FDA approval of a new drug (a new drug application, or NDA) or a supplemental application for approval of changes to an already-approved drug (a supplemental new drug application, or sNDA), the manufacturer must file with the application the patent number and the expiration date of any patent which claims the drug for which the applicant submitted the application or which claims a method of using such drug and with respect to which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner engaged in the manufacture, use, or sale of the drug. *21 U.S.C.S. § 355(b)(1)*. The FDA reviews the submission for completeness and to see whether the patent is not facially ineligible for listing. *21 C.F.R. § 314.53(c)(2)(ii)*. Upon accepting the submission, the FDA then lists the patent in the Orange Book.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN2[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The FDA has expressly declared that it does not review patent information for its accuracy and relevance. Rather, the agency requires the manufacturer to declare that the submitted patent claims the drug substance, drug product (composition/ formulation, or one or more methods of using the drug for which it is listed. *21 C.F.R. § 314.53(c)(2)(i)(M)-(O)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN3[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The FDA does have a limited mechanism for reviewing the accuracy or relevance of patent information submitted for listing in the Orange Book. *21 C.F.R. § 314.53(f)*. Specifically, anyone may notify the Agency in writing about a potential problem. *§ 314.53(f)(1)*. In the case of patents claiming the drug substance or drug product, the NDA holder may then be required either to confirm the correctness of the patent information, or withdraw or amend the patent information. *§ 314.53(f)(1)(i)(A)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN4[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The regulation is clear that unless the NDA holder withdraws or amends its patent information in response to the patent listing dispute, the FDA will not change the patent information in the Orange Book. *21 C.F.R. § 314.53(f)(1)(i)(A)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN5[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The Orange Book listing comes into play when another manufacturer seeks FDA approval to sell a competing drug based on the safety and efficacy studies for the original, already-approved drug. *21 U.S.C.S. § 355(b)(2)*; *21 C.F.R. § 314.54(a)(1)(iii)*. In its application, the aspiring competitor must certify for each patent listed in the Orange Book for the original drug that (1) the patent has expired, (2) the competing manufacturer will wait for the patent to expire before marketing its competing product, or (3) the listed patent is invalid, unenforceable, or will not be infringed. *§ 355(b)(2)(A)(i)-(iv)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN6[] Agriculture & Food, Federal Food, Drug & Cosmetic Act

A 21 U.S.C.S. § 355(b)(2)(A)(iv) (Paragraph IV) certification has two direct effects on the resolution of any patent dispute between the original manufacturer and the putative competitor. First, the statute treats the filing of a Paragraph IV certification as an infringement of the listed patent, allowing the putative competitor to force the patentholder to acquiesce or sue without exposing the competitor to damages for actual infringement. § 355(c)(3)(C); 35 U.S.C.S. § 271(e)(2)(A). Second, if the patentholder initiates an infringement lawsuit within 45 days of receipt of a Paragraph IV certification, the mere filing of the lawsuit triggers an automatic, 30-month stay of FDA approval of the would-be competitor's application. § 355(c)(3)(C). And while that 30-month period may be shortened by resolution of the infringement action or order of the court, § 355(c)(3)(C), the status quo, the allocation of burdens, and the life-span of patent litigation can all work against any such shortening.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN7[] Agriculture & Food, Federal Food, Drug & Cosmetic Act

The plain text of 21 U.S.C.S. § 355(b)(1) calls for the listing of patents which claim the drug for which an application is submitted or which claim a method of using such drug. In its implementing regulations, the FDA makes it clear that only such patents are to be listed. 21 C.F.R. § 314.53(b)(1). The FDA also provides further guidance on what patents qualify as claiming a drug. The FDA has noted that these requirements reflect an attempt to balance two competing interests: promoting competition between brand-name or innovator drugs' and generic drugs, and encouraging research and innovation.

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

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

HN8[] Standards of Review, De Novo Review

In reviewing the dismissal of a complaint, Fed. R. Civ. P. 12(b)(6), the appellate court assumes that all pleaded facts and reasonable inferences drawn from those facts are true.

Patent Law > Claims & Specifications > Claims

HN9[] Claims & Specifications, Claims

In intellectual property law, a patent claim is the portion of the patent document that defines the scope of the patentee's rights.

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

HN10[] Scope, Monopolization Offenses

To make out a violation of § 2 of the Sherman Act, a plaintiff must demonstrate, (1) that the defendant possesses monopoly power in the relevant market, and (2) that the defendant has acquired or maintained that power by improper means.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN11[] Agriculture & Food, Federal Food, Drug & Cosmetic Act

The term "drug" as used in the FDA's regulation includes not just the drug substance itself, but also the drug product. *21 C.F.R. § 314.53(b)(1)*. FDA regulations further define a drug product as a finished dosage form, e.g., tablet, capsule, or solution, that contains a drug substance, generally, but not necessarily, in association with one or more ingredients. *21 C.F.R. § 314.3(b)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN12[] Agriculture & Food, Federal Food, Drug & Cosmetic Act

Under the plain wording of *21 U.S.C.S. § 355(b)(1)*, proper filing of a patent would require not only that it be a patent that claims a drug; it must be a patent that claims the drug (or a method of using the drug) for which the applicant submitted the supplemental new drug application.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN13[] Agriculture & Food, Federal Food, Drug & Cosmetic Act

The regulations clearly require a patent not to be submitted if it does not claim the drug for which the application was filed: For patents that claim a drug product, the applicant must submit information only on those patents that claim the drug product, as is defined in *§ 314.3*, that is described in the pending or approved new drug application. *21 C.F.R. § 314.53(b)(1)*.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN14[] Reviewability of Lower Court Decisions, Preservation for Review

Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN15[] Agriculture & Food, Federal Food, Drug & Cosmetic Act

The general definition of "drug" set forth at *21 U.S.C.S. § 321(g)(1)* states that the term includes, among other things, both articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, and articles intended for use as a component of any article specified in the previous clause. The definitions included at *§ 321* are for the purposes of this chapter, referring presumably to Chapter 9 of Title 21, at which is codified the entire FDCA. The definition likely applies to the requirements of *21 U.S.C.S. § 355*, then, and it very clearly includes "components" of "articles" intended for use in the treatment of disease. *§ 321(g)(1)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN16[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The definition of "drug" in *21 U.S.C.S. § 321(g)(1)* demonstrates that Congress knew that some drugs had components; thus the absence of any mention of components in the provisions setting out which patents should be filed cuts against any attempt to interpret the statute and its implementing regulations as requiring or allowing listing of patents that claim only components of a proposed drug. *21 U.S.C.S. § 355(b)(1)*.

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

HN17[] **Scope, Monopolization Offenses**

Generally in a *§ 2* of the Sherman Act case, the court would examine the effects of a monopolist's improper conduct, rather that the reasons why it engaged in such conduct.

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

HN18[] **Per Se Rule & Rule of Reason, Sherman Act**

The Rule of Reason doctrine developed in the context of § 1 of the Sherman Act claims and is not typically applied to claims under *§ 2* of the Act. The Rule of Reason is a rule of construction which applies to § 1 of the Sherman Act. The need for such a rule arose because a literal reading of § 1 would prohibit virtually every private contract. The Rule of Reason does not directly apply as such to the offense of monopolization under *§ 2* of the Act.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN19[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

Under the Hatch-Waxman Amendments, a manufacturer is subject to Congress's command to submit any patent that claims the drug for which it seeks approval. *21 U.S.C.S. § 355(b)(1)*.

Governments > Legislation > Expiration, Repeal & Suspension

HN20[] **Legislation, Expiration, Repeal & Suspension**

Courts do not frequently find an implied repeal of ***antitrust law***, except where there is a plain repugnancy between the antitrust and regulatory provisions.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN21[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The FDA does not police the accuracy of an applicant's contention that a patent claims a drug, nor does the FDA profess to have any special expertise in construing patents.

Antitrust & Trade Law > Sherman Act > Defenses

HN22[] **Sherman Act, Defenses**

An antitrust defendant is entitled both to raise and to have the jury consider its good faith adherence to regulatory obligations as a legitimate antitrust defense.

Antitrust & Trade Law > Sherman Act > Defenses

HN23[] **Sherman Act, Defenses**

If a defendant can establish that, at the time the various anticompetitive acts alleged here were taken, it had a reasonable basis to conclude that its actions were necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority, then its actions did not violate the antitrust laws.

Antitrust & Trade Law > Sherman Act > Claims

HN24[] **Sherman Act, Claims**

Antitrust causation requires only that the complained-of activity be a material or substantial cause of the injury. It is enough that the antitrust violation contributes significantly to the plaintiff's injury, even if other factors amounted in the aggregate to a more substantial cause.

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Judges: Before Torruella, Thompson, and Kayatta, Circuit Judges.

Opinion by: KAYATTA

Opinion

[*3] KAYATTA, Circuit Judge. The FDA maintains a publication called Approved Drug Products with Therapeutic Equivalence Evaluations, known in the industry as "the Orange Book." The Orange Book lists patents said by their owners to claim FDA-approved drugs. The listing of a patent in the Orange Book arms the patent-owning drug manufacturer with the ability to trigger an automatic, thirty-month **[**2]** suspension of the FDA's approval of a competitive product. The principal questions posed on this appeal are whether Sanofi improperly submitted a patent for listing in the Orange Book and, if so, whether Sanofi is potentially liable under the antitrust laws to drug purchasers who were allegedly harmed by the effective extension of Sanofi's monopoly. We answer "yes" to both questions and vacate the dismissal of the plaintiffs' complaint to the extent that the district court held otherwise.

I.

A.

HN1[] When a drug manufacturer files an application for FDA approval of a new drug (a "new drug application," or NDA) or a supplemental application for approval of changes to an already-approved drug (a "supplemental new drug application," or sNDA), the manufacturer must

> file with the application the patent number and the expiration date of any patent which claims the drug for which the applicant submitted the application or which claims a method of using such drug and with respect to which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner engaged in the manufacture, use, or sale of the drug.

21 U.S.C. § 355(b)(1).[1] The FDA reviews the submission for completeness and to see, in **[**3]** Sanofi's words, whether the patent "is not facially ineligible for listing." See *21 C.F.R. § 314.53(c)(2)(ii)*. Upon accepting the submission, the FDA then lists the patent in the Orange Book. **HN2**[] Pointing to its "scarce resources," the FDA has expressly declared that it does not "review patent information for its accuracy and relevance." *59 Fed. Reg. 50,338, 50,343, 50,345 [*4] (Oct. 3, 1994)*. Rather, the agency requires the manufacturer to declare that the submitted patent claims the "drug substance," "drug product (composition/formulation)," or "one or more methods of using" the drug for which it is listed. *21 C.F.R. § 314.53(c)(2)(i)(M)—(O)*. The plaintiffs characterize the FDA's review of tendered Orange Book listings as purely "ministerial," noting that the FDA has refused to create any additional processes for "review[ing] the scope of [a submitted Orange Book] patent and its application to the approved drug product" or for delisting patents in the *Orange Book. 68 Fed. Reg. 36,676, 36,683 (June 18, 2003)*.[2]

HN5[] The Orange Book listing comes into play when another manufacturer seeks FDA approval to sell a competing drug based on the safety and efficacy studies for the original, already-approved drug. See *21 U.S.C. § 355(b)(2)*; *21 C.F.R. § 314.54(a)(1)(iii)*. In its application, the aspiring competitor must certify for each patent listed in the Orange Book for the original **[**4]** drug that (1) the patent has expired, (2) the competing manufacturer will wait for the patent to expire before marketing its competing product, or (3) the listed patent is invalid, unenforceable,

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[1] The legal obligations of drug manufacturers at issue in this case are set out by the Hatch-Waxman Amendments, or the *Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585* (codified as amended at *21 U.S.C. § 355* and *35 U.S.C. § 271(e)*), which amended the *Federal Food, Drug, and Cosmetic Act ("FDCA"), Pub. L. No. 75-717, 52 Stat. 1040 (1938)* (codified as amended at *21 U.S.C. §§ 301-397*).

[2] **HN3**[] The FDA does have a limited mechanism for reviewing the "accuracy or relevance of patent information submitted" for listing in the Orange Book. *21 C.F.R. § 314.53(f)*. Specifically, anyone may notify the Agency in writing about a potential problem. Id. *§ 314.53(f)(1)*. In the case of patents claiming the drug substance or drug product, the NDA holder may then be required either to "confirm the correctness of the patent information," or "withdraw or amend the patent information." Id. *§ 314.53(f)(1)(i)(A)*. There is no indication that any party attempted to use this process in this case. And in any case, as noted in In re Buspirone Patent Litigation, this process would not provide convincing evidence that "the FDA engaged in substantive review of the information." *185 F. Supp. 2d 363, 371-72 (S.D.N.Y. 2002)*. **HN4**[] In fact, the regulation is clear that "[u]nless the NDA holder withdraws or amends its patent information in response to the patent listing dispute, the Agency will not change the patent information in the Orange Book." *21 C.F.R. § 314.53(f)(1)(i)(A)*.

or will not be infringed. *21 U.S.C. § 355(b)(2)(A)(i)—(iv)*. The last of the foregoing certifications is referred to as a "Paragraph IV certification."

HN6[] A Paragraph IV certification has two direct effects on the resolution of any patent dispute between the original manufacturer and the putative competitor. First, the statute treats the filing of a Paragraph IV certification as an infringement of the listed patent, allowing the putative competitor to force the patentholder to acquiesce or sue without exposing the competitor to damages for actual infringement. See *21 U.S.C. § 355(c)(3)(C)*; *35 U.S.C. § 271(e)(2)(A)*. Second, if the patentholder initiates an infringement lawsuit within forty-five days of receipt of a Paragraph IV certification, the mere filing of the lawsuit triggers an automatic, thirty-month stay of FDA approval of the would-be competitor's application. *21 U.S.C. § 355(c)(3)(C)*. And while that thirty-month period may be shortened by resolution of the infringement action or order of the court, id., the status quo, the allocation of burdens, and the life-span of patent litigation can **[**5]** all work against any such shortening.

HN7[] The plain text of the statute calls for the listing of patents "which claim[] the drug for which [an application is submitted] or which claim[] a method of using such drug." Id. *§ 355(b)(1)*. In its implementing regulations, the FDA makes it clear that "only" such patents are to be listed. *21 C.F.R. § 314.53(b)(1)*. The FDA also provides further guidance, to be discussed, infra, on what patents qualify as claiming a drug. See, e.g., id. The FDA has noted that these requirements "reflect an attempt to **[*5]** balance two competing interests: [p]romoting competition between 'brand-name' or 'innovator drugs' and 'generic' drugs, and encouraging research and innovation." *68 Fed. Reg. at 36,676*.

B.

HN8[] In reviewing the dismissal of a complaint, see *Fed. R. Civ. P. 12(b)(6)*, we assume that all pleaded facts and reasonable inferences drawn from those facts are true, *Breiding v. Eversource Energy, 939 F.3d 47, 49 (1st Cir. 2019)* (quoting *Fothergill v. United States, 566 F.3d 248, 251 (1st Cir. 2009))*. The complaint in this case, as amended, focuses on the drug insulin glargine, sold by Sanofi under the brand name "Lantus." Insulin glargine is a long-lasting and much-favored form of insulin that can be used to manage diabetes. In 2014, annual sales of Lantus products in the United States amounted to $7.87 billion.

Sanofi first obtained approval from the FDA to market Lantus **[**6]** for management of diabetes in 2000. With its original application, Sanofi submitted U.S. Patent No. 5,656,722 ("the '722 patent") for listing in the Orange Book. The '722 patent claimed the drug insulin glargine and was set to expire in August 2014, with its period of regulatory exclusivity ending in February 2015. Had Sanofi filed nothing else with the FDA, other companies would have been able to pursue requests for FDA approval to sell insulin glargine products beginning in 2015 with the end of the '722 patent's grace period of exclusivity.

In 2006, Sanofi filed an sNDA to sell insulin glargine in a disposable injector pen device called the Lantus SoloSTAR. Sanofi had previously sold Lantus only in vials or cartridges for reusable injectors. The FDA reviewer evaluating the SoloSTAR product described it this way:

> The SoloStar injection system is a device that provides a method of accurately injecting a selected dose of insulin . . . . The device is intended to be used for self-injection by patients. . . . The dose is pre-selected by rotating a dosage selector at the rear end of the device. The number of selected insulin units is displayed in the dose window on the side of the pen. The dialing mechanism allows dosage in 1 insulin unit increments. It **[**7]** provides a maximum of 80 insulin units in one dosing. . . . The dose is delivered by pressing the injection button.

Sanofi sells the SoloSTAR pen for use with several active drugs in addition to insulin.

In 2007, the FDA accepted Sanofi's sNDA for the SoloSTAR and categorized it as a change to Lantus's labeling or container. In 2013, Sanofi submitted patents associated with the SoloSTAR to the FDA for listing in the Orange Book. While the complaint references a number of those patents, plaintiffs pare their arguments on appeal to U.S.

Patent No. 8,556,864 ("the '864 patent"), named "Drive Mechanisms Suitable for Use in Drug Delivery Devices," which is set to expire in 2024.

HN9[] In intellectual property law, a "patent claim" is "the portion of the patent document that defines the scope of the patentee's rights." *Markman v. Westview Instruments, Inc., 517 U.S. 370, 372, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996)*. The '864 patent contains ten claims, all concerning aspects of a "drive mechanism" that serves as a part of the SoloSTAR drug injector pen. The "drive mechanism" "enabl[es] the administration of medicinal products from" a pen injector's cartridge. Claim 1 sets out the attributes of the drive mechanism; Claim 2 describes a drive mechanism with slightly different attributes; Claims 3 through 7 describe different constructions of the mechanism **[**8]** in Claim 2; Claim 8 describes yet another variation on **[*6]** the drive mechanism; and Claims 9 and 10 describe alternative variations to the mechanics of Claim 8. The patent does not include a claim for an injector pen more broadly, though it does mention that the drive mechanism is intended for use in a "drug delivery device." Elsewhere the patent states that the technical field of the patent is "drive mechanisms suitable for use in drug delivery devices, in particular pen-type injectors." The patent does not mention insulin glargine or the Lantus SoloSTAR at any point. The patent's specification only briefly mentions diabetes and insulin, the latter as an example of the type of drug the device using the drive mechanism could dispense.

In 2013, competitor Eli Lilly planned to market a competing insulin glargine product, called Basaglar, in its own injector pen, the KwikPen. Confronted with the Orange Book listing of the '864 patent, Lilly submitted a Paragraph IV certification stating that its Basaglar KwikPen product would not infringe that patent. Within forty-five days, Sanofi sued Lilly for patent infringement, seeking to bar Lilly from manufacturing or selling the Basaglar KwikPen until the last **[**9]** of the patents listed in the Orange Book for Lantus and the Lantus SoloSTAR expired in 2024. That lawsuit triggered the thirty-month stay of FDA approval for Basaglar under *21 U.S.C. § 355(c)(3)(C)*. In filing the lawsuit, Sanofi thus protected its monopoly from Lilly's competition for up to thirty months more, even if the KwikPen did not actually infringe any Sanofi patent. In September 2015, the parties settled the lawsuit, and Sanofi granted Lilly a royalty-bearing license to sell Basaglar beginning over a year later in December 2016.

Lilly was not the only would-be competitor in the insulin glargine market. In 2016 and 2017, Merck and Mylan both submitted applications to market insulin glargine in injector pens, along with Paragraph IV certifications on the patents that Sanofi had listed for the Lantus SoloSTAR. After it settled with Lilly, Sanofi also sued Merck and Mylan. The Merck lawsuit settled after a trial on some of the patents at issue. Stipulation of Dismissal (redacted), Dkt. 339, Sanofi-Aventis U.S. LLC v. Merck Sharp & Dohme Corp., No. 16-cv-00812 (D. Del. Nov. 1, 2018). A bench trial was held but not decided in the Mylan lawsuit in December 2019. Minute Entry, Dkt. 528, Sanofi-Aventis U.S. **[**10]** LLC v. Mylan GmbH, No. 17-cv-09105 (D.N.J. Dec. 2, 2019).

The plaintiffs in this case are a putative class of direct insulin glargine purchasers who allege that Sanofi artificially restricted competition in the market for insulin glargine by impermissibly extending its monopoly over insulin glargine products. They allege that Sanofi improperly listed the '864 patent in the Orange Book, thereby delaying competition in the insulin glargine market and resulting in inflated prices. They also allege that Sanofi's lawsuit alleging infringement of the '864 patent was a "sham" that was initiated merely to trigger the automatic stay of FDA's approval of the KwikPen. They bring two claims under *section 2* of the *Sherman Act*, *15 U.S.C. § 2*, based on an unlawful scheme to monopolize and an attempt to monopolize the market for insulin glargine products.

The district court dismissed the plaintiffs' Sherman Act claims, reasoning that as a matter of law Sanofi's decision to list the '864 patent was reasonable and not "objectively baseless" given what the court deemed to be ambiguities in the FDA's listing requirements.[3] *In re Lantus Direct **[*7]** Purchaser Antitrust Litig., 284 F. Supp. 3d 91, 104-05 (D. Mass. 2018)*. This appeal followed.

[3] The district court also determined that the plaintiffs' allegations that Sanofi's lawsuits against Lilly, Merck, and Mylan did not constitute impermissible serial petitioning. The plaintiffs have abandoned those arguments on appeal, so we need not address them.

II.

HN10[] To make out a violation of *section 2* of the Sherman Act, a plaintiff must demonstrate, "(1) that the defendant possesses **[**11]** 'monopoly power in the relevant market,' and (2) that the defendant has acquired or maintained that power by improper means." *Town of Concord v. Bos. Edison Co., 915 F.2d 17, 21 (1st Cir. 1990)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*. Here, all parties assume -- and so do we -- that the complaint adequately alleges that Sanofi possessed monopoly power in the relevant market. Our analysis thus turns on whether the complaint plausibly alleges that the challenged method by which Sanofi allegedly maintained that power, that is to say, submitting the '864 patent for listing in the Orange Book, was an "improper means" of maintaining that power. Id.; see also *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (requiring "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*).

A.

We consider first whether, under the facts alleged by the plaintiffs, it was proper for Sanofi to submit the '864 patent for listing in the Orange Book. At first blush, the answer seems readily apparent: The statute and applicable regulations call for the listing of only patents that claim the pertinent drug or a method of using the drug, and the '864 patent does not even mention, much less claim, either insulin glargine or any method of using it.

HN11[] Sanofi, though, points out that the term "drug" as used in the FDA's regulation includes **[**12]** not just the drug substance itself, but also the "drug product." *21 C.F.R. § 314.53(b)(1)*. FDA regulations further define a "drug product" as "a finished dosage form, e.g., tablet, capsule, or solution, that contains a drug substance, generally, but not necessarily, in association with one or more ingredients." Id. *§ 314.3(b)*. Sanofi argues that the Lantus SoloSTAR is a "drug product" because it is a "finished dosage form," which the regulations define as "the physical manifestation containing the active and inactive ingredients that delivers a dose of the drug product." Id. This reading of the regulations finds support in FDA guidance, which has described the "appendix in the Orange Book" as "list[ing] current dosage forms for approved drug products," including "metered aerosols, capsules, metered sprays, gels, and pre-filled drug delivery systems." *68 Fed. Reg. at 36,680*. Indeed, a "Frequently Asked Questions" page on the FDA website actually lists an "insulin injector pen" as an example of a "[p]refilled drug delivery system[]."

Working backward, then, Sanofi's principal argument goes like this: the Lantus SoloSTAR is an injector pen, and as such is a "pre-filled drug delivery system[]," meaning that it qualifies as a "dosage form," which **[**13]** under the regulations is a "drug product," which in turn is a "drug." Hence, Sanofi concludes that because the FDA approved the Lantus SoloSTAR as a "pre-filled drug delivery system," any patent claiming the Lantus SoloSTAR is a "patent which claims the drug for which" the sNDA was submitted.

[*8] Even if we accept Sanofi's chain of reasoning, however, and thus assume for the sake of argument that the Lantus SoloSTAR is a drug under the statute, there is still a vital link missing: the '864 patent does not claim or even mention the Lantus SoloSTAR. Indeed, though it claims a device intended for use in an injector pen, it does not claim any injector pen, nor even a method of using a pen.

HN12[] Under the plain wording of the statute, proper filing of the '864 patent would require not only that it be a patent that claims a drug; it must be a patent that claims the drug (or a method of using the drug) "for which the applicant submitted" the sNDA. *21 U.S.C. § 355(b)(1)*. It therefore follows that because the claims of the '864 patent do not mention the drug for which the sNDA was submitted, the patent does not "claim the drug," and it was improper for Sanofi to have submitted it for listing in the Orange Book as a drug claiming either insulin glargine or **[**14]** the Lantus SoloSTAR. *HN13*[] The regulations clearly require a patent not to be submitted if it does not claim the drug for which the application was filed: "For patents that claim a drug product, the applicant must submit information only on those patents that claim the drug product, as is defined in § 314.3, that is described in the pending or approved NDA." 21 C.F.R. § 314.53(b)(1) (emphasis added).

Confronted with this gap between its reading of the law and its filing of a patent that does not claim the listed drug, Sanofi argues that the regulations also require listing in the Orange Book any patents that contain "integral components" of an approved drug product. According to this line of reasoning, because the drive mechanism is an integral part of the Lantus SoloSTAR, a patent that claims the drive mechanism claims a part of a drug product, and thus "claims the drug."

We see nothing in the statute or regulations that welcomes such a further expansion of the already stretched statutory terms, whereby an integral part of an injector pen becomes the pen itself, and in turn is a drug. One would not think, for example, that a patent claiming only a transmission system must be read as also claiming any car in which it is **[**15]** used.

The FDA has already passed on opportunities to stretch the statutory terms in this way. In 2003, the FDA addressed commentary to a proposed rule that "would not have allowed an applicant to list a patent that claimed packaging." 68 Fed. Reg. at 36,680. Some of that commentary argued that "patents claiming devices or containers that are 'integral' to the drug product . . . should be submitted and listed." Id. The FDA acknowledged those comments but did not adopt them. See id. Instead it responded by reiterating that: "[t]he key factor is whether the patent being submitted claims the finished dosage form of the approved drug product." Id. And the '864 patent does not. Rather, it claims several versions of a device that can be combined with other components to produce the finished dosage form of the approved drug product.

Sanofi also argues that, because the language of the regulations suggests that multiple patents can be filed with an application, the regulations must contemplate submission of patents claiming components of a drug product[4] -- otherwise, Sanofi reasons, manufacturers would have to claim every part of a drug in a single patent in order to file it, and the plural language in the regulations would be **[**16]** meaningless. See, e.g., 21 C.F.R. § 314.53(b)(1) **[*9]** (referring to "those patents that claim the drug product," and those "patents that claim the drug substance"). But Sanofi does not explain why multiple patents could not all directly claim a drug product. And in any case, the plaintiffs point out that some patents do claim all the components of a combination drug product, even for drug products similar to the Lantus SoloSTAR. Specifically, they point to the patent for Narcan, U.S. Patent No. 9,211,253, as well as the patent for the EpiPen, U.S. Patent No. 8,870,827. So even if in some cases only one patent can legitimately be listed as a patent claiming the drug product, that does not mean that the patent will necessarily be unable to claim all the important components of the drug. And in any event, even if we misunderstand Sanofi's rather cryptic point here,[5] the possibility that the statute does not accommodate all desired listings does not mean that we rewrite it.

At oral argument, Sanofi tried another argument. ***HN15***[] It pointed to the general definition of "drug" set forth at 21 U.S.C. § 321(g)(1), which states that the term includes, among other things, both "articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals," **[**17]** and "articles intended for use as a component of any article specified" in the previous clause. 21 U.S.C. § 321(g)(1). The definitions included at 21 U.S.C. § 321 are "[f]or the purposes of this chapter," referring presumably to Chapter 9 of Title 21, at which is codified the entire FDCA. The definition likely applies to the requirements under section 355, then, and it very clearly includes "components" of "articles intended for use in the" treatment of disease. Id. § 321(g)(1). Nevertheless, it is not clear how far this textual focus on Chapter 9's general definition of "drug" gets Sanofi. ***HN16***[] That definition of "drug" in section 321(g)(1) demonstrates that Congress knew that some drugs

[4] Sanofi does not make the same argument with regard to the statute, which itself employs the term "any patent." 21 U.S.C. § 355(b)(1).

[5] And if this is the case, then it is waived for lack of development. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (***HN14***[] "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

had "components"; thus the absence of any mention of "components" in the provisions setting out which patents should be filed cuts against any attempt to interpret the statute and its implementing regulations as requiring or allowing listing of patents that claim only components of a proposed drug. See *21 U.S.C. § 355(b)(1)*.

More importantly, even assuming that the drive mechanism claimed by the '864 patent is itself a drug, we still find Sanofi falling short of its goal because the drive mechanism is not the "drug for which [Sanofi] submitted" the sNDA. *21 U.S.C. § 355(b)(1)*. For that reason alone the patent for the drive mechanism **[**18]** does not qualify for listing in the Orange Book as claiming the Lantus SoloSTAR.

Sanofi also seeks to find support in communications between other drug manufacturers and the FDA. Sanofi points to requests for advisory opinions submitted by Ropes & Gray in 2006, Forest Laboratories in 2011, Novo Nordisk in 2012, and AstraZeneca in 2007, all asking, in substance, "whether patents directed to drug delivery systems . . . that do not recite the approved active ingredient or formulation should be listed in the [Orange Book]." According to Sanofi, the FDA has not responded satisfactorily to any of the requests. Instead, the FDA has simply acknowledged that the Orange Book "was not designed to separately address combination product listings or to identify the specific type of drug delivery system" and that it "could benefit from enhanced listing capabilities." In response to one request **[*10]** from Forest Laboratories, the FDA also stated that it had "been unable to reach a decision . . . due to the need to address other Agency priorities" and noted the "numerous demands on the Agency's resources."

We find no warrant to read anything into the FDA's non-answer beyond a conclusion that it simply chose **[**19]** not to answer the question. To infer an answer, or even to infer that silence by the FDA indicates that the correct answer is uncertain, would be to force agencies to respond to all inquiries lest their silence be misunderstood. And even if one could infer an answer from silence, Sanofi points to no support for affording any deference to its chosen inference. Moreover, the fact that the Orange Book is not designed to separately address combination product listings hardly helps Sanofi's argument that the '864 patent was listable as claiming a component of a combination product. Nor does the fact that some manufacturers view the FDA's guidance as outdated in that regard. The statute and regulations clearly require that only patents that claim the drug for which the NDA is submitted should be listed in the Orange Book. The '864 patent, which neither claims nor even mentions insulin glargine or the Lantus SoloSTAR, does not fit the bill.

B.

Having determined that the complaint adequately alleges that Sanofi should not have submitted the '864 patent for Orange Book listing, we turn to Sanofi's alternative argument, accepted by the district court, that submitting the '864 patent for listing was reasonable, and that Sanofi cannot be **[**20]** held liable under the antitrust laws for a reasonable mistake. Plaintiffs challenge this argument on both levels: they argue that reasonableness is not a defense, and they argue that the statute was sufficiently unambiguous so as to render Sanofi's filing unreasonable as a matter of law. For the following reasons we find that neither side is quite correct, and that further proceedings beyond a *Rule 12* motion are necessary to determine whether Sanofi should be held liable under the Sherman Act for any antitrust injury caused by its improper submission of the '864 patent.

HN17[] Generally in a *section 2* case, we would examine the effects of a monopolist's improper conduct, rather that the reasons why it engaged in such conduct. See *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1983)* (Breyer, J.) (observing that, though "[s]ome courts have written as if one might look to a firm's 'intent to harm' to separate 'good' from 'bad' [conduct]," this search for "improper intent" in reality "refer[s] to a set of objective economic conditions"); see also *United States v. Microsoft Corp., 253 F.3d 34, 60, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (en banc) ("[I]n considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of *§ 2*, our focus is upon the effect of that conduct, not upon the intent behind it."); **[**21]** Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application ¶ 658f (4th ed. 2019) [hereinafter Areeda & Hovenkamp] ("[I]nquiries into subjective intent should be limited in § 2 cases."). Presumably for this reason, Sanofi does not point us to any section 2 cases holding that reasonableness generally immunizes monopolists from section 2 liability.[6]

[*11] In this regulatory setting, however, there is some reason to consider the rationale for the monopolist's challenged conduct, rather than just the effects of that conduct. ***HN19***[] Under the Hatch-Waxman Amendments, Sanofi is subject to Congress's command to submit any patent that claims the drug for which it seeks approval. See *21 U.S.C. § 355(b)(1)*. And the improper failure to comply with that command could itself arguably have an anticompetitive effect by depriving potential competitors of notice and of the other procedural benefits that result from an Orange Book listing. Sanofi has pointed to one 1996 complaint seeking to charge a manufacturer with antitrust liability for not filing relevant patents in the Orange Book. The plaintiffs in that case alleged that they were damaged by the defendant's failure to list the patent because they spent money developing a potential **[**22]** generic competitor they would not have developed had they known of the original patent through an Orange Book listing. See Complaint, Mut. Pharm. Co. v. Hoechst Marion Roussel, Inc., No. CIV. A. 96-1409, 1996 WL 34406666 (E.D. Pa. Feb. 23, 1996) ("Had the '129 patent been listed in the Orange Book, [the plaintiff] would not have expended over $500,000.00 to develop its generic . . . product . . . .").[7] Sanofi therefore reasons that if liability flowed from improper submission of patents for Orange Book listing, Sanofi and others seeking FDA approval would find themselves "between the horns of an insoluble dilemma: list -- or not -- at risk of treble damage claims" either way.

This may be something of an overstatement. It would appear that a company unsure about whether it must submit a patent for listing might protect itself from liability by submitting the patent and then not suing within forty-five days of any subsequent Paragraph IV certification, thereby ensuring that the mere listing would not slow down final FDA approval of a competitor's submission.

That being said, such a strategy would potentially sacrifice a benefit that Congress gave to patent holders in the Hatch-Waxman Amendments. So, in the end, Sanofi has a fair point in arguing that the plaintiffs' version of what would essentially **[**23]** be strict liability for improper Orange Book submissions could slightly tilt the regulatory balance Congress sought in this bespoke scheme at the intersection of the FDCA and patent law. See *68 Fed. Reg. at 36,676* (seeking a "balance between the innovator companies' intellectual property rights and the desire to get generic drugs on the market in a timely fashion").

The fact that Sanofi must align its conduct with regulatory requirements does not, however, mean that Sanofi gets a free pass from antitrust scrutiny. ***HN20***[] Courts do not frequently find an implied repeal of ***antitrust law***, except where there is a "plain repugnancy between the antitrust and regulatory **[*12]** provisions." *Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659, 682, 95 S. Ct. 2598, 45 L. Ed. 2d 463 (1975)* (quoting *United States v. Phila. Nat'l Bank, 374 U.S. 321, 350-51, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963))*; see also *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1101-02 (7th Cir. 1983)* (finding no immunity where "AT&T is not subject to conflicting requirements, nor would it be held liable for decisions which were not its own business judgment"); *Town of Norwood v. New England Power Co., 202 F.3d 408, 422 (1st Cir. 2000)* (noting "the default rule retaining antitrust liability"). There is no such repugnancy here where, far from seeking a contradictory result from the regulatory regime, the plaintiffs' antitrust claim relies upon obligations created by it.[8] Moreover, ***HN21***[] the FDA does not

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[6] Sanofi does seem to argue that the "rule of reason" doctrine applies, but ***HN18***[] that doctrine developed in the context of *section 1* claims and is not typically applied to claims under *section 2*. See *Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 55-61 (1st Cir. 2002)* (characterizing the rule as "*section 1*'s rule of reason" and discussing whether it could be applied to evaluate claims of conspiracy between distinct members of the same franchise); *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1139 (7th Cir. 1983)* ("The Rule of Reason is a rule of construction which applies to *section 1* of the Sherman Act. The need for such a rule arose because a literal reading of *section 1* would prohibit virtually every private contract. . . . [T]he Rule of Reason does not directly apply as such to the offense of monopolization under *section 2* of the Sherman Act." (internal citations omitted)).

[7] The parties appear to have settled the case after summary judgment briefing. See Stipulation of Dismissal, Dkt. 65, Mut. Pharm. Co. v. Hoechst Marion Roussel, Inc., No. CIV. A. 96-1409, (E.D. Pa. July 1, 1999).

police the accuracy of an applicant's contention that a patent claims a drug, nor does the FDA **[**24]** profess to have any special expertise in construing patents. See *68 Fed. Reg. at 36,683*. Sanofi acknowledges as much: "Orange Book listings are not immune from antitrust scrutiny and might subject a patent holder to liability under certain circumstances."

Nevertheless, antitrust precedent anticipates the possibility that *section 2* liability might work a bit differently in the regulatory context. As Areeda and Hovenkamp note, "even if the challenged conduct is not the proper implementation of regulatory policies, condemning conduct undertaken in a reasonable good faith effort to comply with such policies would punish regulated firms for trying to act consistent with those policies." Areeda & Hovenkamp, supra, ¶ 246a.

Several circuits have identified a defense to antitrust liability where the defendant's action was taken as part of a good faith, reasonable attempt to comply with a regulatory scheme. In MCI Communications, the Seventh Circuit held that "[i]n the particular context of an industry subject to extensive and rapidly changing regulatory demands, we believe that an antitrust defendant is entitled both to raise and to have the jury consider its good faith adherence to regulatory obligations as a legitimate antitrust **[**25]** defense." *708 F.2d at 1109-10*; see also *id. at 1138* ("An ideal instruction would very briefly explain . . . that a carrier has an obligation under the Communications Act to interconnect, but may deny interconnections if it determines that the public interest is to the contrary; and that if the carrier at the time had a reasonable basis in regulatory policy to conclude, and in good faith concluded, that denial of interconnections is required by concrete, articulable concerns for the public interest, then there is no liability under the antitrust laws."). See also *S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co., 740 F.2d 980, 1010 (D.C. Cir. 1984)* ("[W]e agree with the standard articulated by the Seventh Circuit . . . ."); see also *Phonetele, Inc. v. Am. Tel. & Tel. Co., 664 F.2d 716, 737-38 (9th Cir. 1981)* (Kennedy, J.).

Though the aforementioned cases all deal with the Communications Act of 1934, and while recognizing that the regulatory overlay may be less extensive here, we nevertheless see no principled reason why the same defense should not arise from a reasonable, good-faith attempt to comply with the regulatory demands of the Hatch-Waxman Amendments. Deterring reasonable, good-faith attempts at compliance **[*13]** "would obviously impair the achievement of regulatory goals." Areeda & Hovenkamp, supra, ¶ 246a.

The defense recognized in the regulatory context of the communications industry is not quite the defense that Sanofi seeks. **[**26]** Sanofi asks for immunity if its proffered reading of the statute was objectively reasonable. But the precedent we have cited requires that the challenged conduct be both reasonable and in good faith. See *MCI Commc'ns, 708 F.2d at 1138* (allowing the defense "if the [defendant] at the time had a reasonable basis in regulatory policy to conclude, and in good faith concluded," that its actions were required by regulation); *S. Pac. Commc'ns, 740 F.2d at 1010* (quoting the same). We adopt that two-pronged version of the defense here, to be proven by Sanofi on remand. See *MCI Commc'ns, 708 F.2d at 1109-10* ("[W]e believe that ***HN22***[] an antitrust defendant is entitled both to raise and to have the jury consider its good faith adherence to regulatory obligations as a legitimate antitrust defense."); *Phonetele, 664 F.2d at 737-38* (***HN23***[] "If a defendant can establish that, at the time the various anticompetitive acts alleged here were taken, it had a reasonable basis to conclude that its actions were necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority, then its actions did not violate the antitrust laws.").[9] Certainly the dilemma faced by companies seeking to comply with the

[8] As a counter-example, see our recent opinion in *Breiding, 939 F.3d at 54-57*, in which we applied the filed-rate doctrine to claims challenging conduct that was expressly allowed in a FERC tariff. See also, e.g., *In re Celexa & Lexapro Mktg. & Sales Practices Litig., 915 F.3d 1 (1st Cir. 2019)*; *Gustavsen v. Alcon Labs., Inc., 903 F.3d 1 (1st Cir. 2018)*; *In re Celexa & Lexapro Mktg. & Sales Practices Litig., 779 F.3d 34 (1st Cir. 2015)*.

[9] One recent district court decision directly addressed the question of whether antitrust plaintiffs were required to plead facts alleging an absence of good faith in their prima facie case in order to avoid dismissal on the basis of this exception to antitrust liability. See *In re Actos End-Payor Antitrust Litig., No. 13-CV-9244, 417 F. Supp. 3d 352, 2019 U.S. Dist. LEXIS 170178, 2019 WL 4805843, at *14-15 (S.D.N.Y. Sept. 30, 2019)*. At least in part because the defendant had acknowledged at oral argument

Hatch-Waxman Amendments is no greater than the regulatory dilemmas presented by the "extensive and rapidly changing" regulation under the **[**27]** *Communications Act* in the other cases. *MCI Commc'ns, 708 F.2d at 1109*. Nor can we see any good reason to immunize improper, exclusionary conduct by a monopolist unable to show it was acting in good faith -- especially in the *section 2* context, where reasonableness alone has never been considered to be a generally available defense to antitrust liability. See supra n.5.

Plaintiffs seem to argue that the allegations in the complaint necessarily defeat the reasonableness prong of any such defense. At this early stage of the lawsuit, however, the record does not yet contain any evidence about custom and practice in the industry, or what if any legal opinions Sanofi sought and obtained before submitting the patent. Indeed, Sanofi has yet to answer the complaint. And while we are reasonably confident of our reading of the statutory and regulatory texts, we cannot ignore either the complexity of that endeavor or the fact that at least one other district court has found it difficult to arrive comfortably at a similar conclusion. See *Organon, Inc. v. Mylan Pharms., Inc., 293 F. Supp. 2d 453, 459-60 (D.N.J. 2003)* (finding no liability where the defendant listed a patent claiming an "off-label" use of the drug because there was a "reasonable basis for the submission"). But see *In re Buspirone Patent Litig., 185 F. Supp. 2d 363, 375-76 (S.D.N.Y. 2002)* (finding that the defendant's **[**28]** improper listing of a patent in the Orange Book and subsequent litigation to enforce it was "objectively baseless" under the Noerr-Pennington **[*14]** framework).[10] A statute can be unambiguous once carefully construed, yet nevertheless be reasonably susceptible to mis-readings until that unambiguous reading is explained. Occasionally, even courts that find a text unambiguous may split on the meaning of the text. See, e.g., *Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 16, 20-21, 131 S. Ct. 1325, 179 L. Ed. 2d 379 (2011)* (majority finding that a statute supports one interpretation so unambiguously as to preclude use of the rule of lenity, with dissent finding a contrary interpretation of the statute so clear as to obviate any need to consider its purpose); *Staples v. United States, 511 U.S. 600, 604-07, 624-25, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994)* (majority espousing one interpretation of the statute, with dissent arguing that it "unambiguous[ly]" means something different).

Conversely, the fact that the law in this area is complicated does not by itself mean that Sanofi's action was reasonable. Cf. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)* (anticipating that there are impermissible readings even of ambiguous statutes: "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute"). **[**29]** An experienced and sophisticated drug manufacturer routinely works with such complexity. And in this instance no close reader could have reasonably thought that submitting the '864 patent was so clearly proper as to obviate the need for inquiry and advice.

We therefore hold that the facts and reasonable inferences found in the complaint describe an improper submission of the '864 patent for listing in the Orange Book; that the defenses to antitrust liability as a result of such an improper submission include proving that the submission was the result of a reasonable, good-faith attempt to comply with the Hatch-Waxman scheme; and that the record does not now allow for the adjudication of that defense as a matter of law.

C.

Finally, Sanofi briefly argues that even if its submission of the '864 patent was improper and not subject to any reasonableness defense, the plaintiffs could not win on their claims because the improper Orange Book listing could not alone have caused an antitrust injury. ***HN24***[] Antitrust causation, however, requires only that the complained-of activity be a "material" or "substantial" cause of the injury. Areeda & Hovenkamp, supra, ¶ 338a ("It is . . . enough that the antitrust violation contributes significantly to the plaintiff's **[**30]** injury, even if other factors

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that the exception was an affirmative defense to liability, the court determined that the complaint was not required to include allegations of bad faith in order to survive a motion to dismiss. Id.

[10] See *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*. The parties agree that the Noerr-Pennington doctrine does not apply to this issue.

amounted in the aggregate to a more substantial cause."). As best we can tell, Sanofi's premise is that without the Orange Book listing of the '864 patent, the patent infringement litigation between Sanofi and its putative competitors, including its ultimate settlement with Lilly, would have proceeded and concluded exactly the same way as it did, such that the listing itself was not a substantial cause of the extension of Sanofi's monopoly. Even putting aside the sham-litigation claims, which the plaintiffs have abandoned on appeal, nothing in the operative complaint requires us **[*15]** to conclude that the automatic thirty-month freeze on FDA approval of the other companies' products had no plausible effect on the course of the underlying litigation. So we see no basis for affirming the dismissal of the complaint under *Rule 12(b)(6)* on this alternative basis.

III.

We reverse the district court's dismissal of the plaintiffs' claims as to Sanofi's alleged improper Orange Book listing of the '864 patent and remand for further proceedings in accord with this opinion.

Dickey v. NFL

United States Court of Appeals for the First Circuit

February 13, 2020, Entered

No. 19-1097

Reporter
2020 U.S. App. LEXIS 36882 *

JAMES DICKEY, a/k/a Players1st Sports Management Group - SMG, Plaintiff - Appellant, v. NATIONAL FOOTBALL LEAGUE (NFL); NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL (NFLMC); NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION (NFLPA), Defendants - Appellees.

Prior History: *Dickey v. NFL, 2018 U.S. Dist. LEXIS 164934, 2018 WL 4623061 (D. Mass., Sept. 26, 2018)*

Core Terms

three-year, district court, allegations, asserting, Football, Players, selective enforcement, fiduciary duty, exemptions, failure to state a claim, antitrust violation, contract claim, de novo review, federal law, labor union, non-statutory, antitrust, preempted, breached, enforces, advisor, survive, speed

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For National Football League Players Association, (Nflpa), Defendant - Appellee: Jonathan J. Amoona, Jeffrey L. Kessler, Angela A. Smedley, Winston & Strawn LLP, New York, NY; Russell Beck, Hannah Tso Joseph, Beck Reed Riden LLP, Boston, MA.

Judges: Before Torruella, Lynch and Thompson, Circuit Judges.

Opinion

JUDGMENT

This is an appeal from the dismissal, pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, of a complaint featuring antitrust, contract, and other claims. Upon de novo review, we affirm.

Plaintiff-appellant James Dickey was certified to be a contract advisor (basically, a sports agent) to represent football players who were members of the National Football League Players Association (that is, the professional football players' labor union, hereinafter NFLPA) in contract negotiations with the National Football League **[*2]** (NFL) and its management council (NFLMC). Dickey was not able to serve as the representative of any player within a three-year time period, resulting in his certification lapsing under a "three-year rule" in the standard NFLPA agreement with contact advisors. Dickey alleges that this three-year rule is among those that the NFLPA enforces "selectively" to the benefit of more-established agents. Dickey further alleges collusion between the NFLPA and the

NFL and NFLMC to the detriment of less-established agents like himself. He also asserts that the NFLPA shifts its union status for "legal convenience."

Dickey sued the NFLPA, NFLMC and NFL in the United States District Court for the District of Massachusetts, asserting antitrust violations, contractual claims, and breach of fiduciary duty. The district court dismissed Dickey's complaint pursuant to *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim upon which relief could be granted. This appeal followed.

This court applies de novo review to *Rule 12(b)(6)* dismissals. See *Morales-Tanon v. Puerto Rico Elec. Power Auth., 524 F.3d 15, 18 (1st Cir. 2008)*. "To survive a motion to dismiss for failure to state a claim, a complaint must contain factual allegations sufficient to 'raise a right to relief above the speculative level.'" Id. (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "'[A] plaintiff's **[*3]** obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" Id. (quoting *Bell Atl., 550 U.S. at 555*). In order to survive, a claim must be "plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (internal quotations omitted).

On the basis of the alleged unfairness to him, Dickey claims that the named defendants should be liable for antitrust violations, notwithstanding established statutory and non-statutory exemptions for labor unions and their collective-bargaining activities under federal law. See, e.g., *15 U.S.C. § 17*. Dickey's theory is that the alleged favoritism towards the agents he views as more established or powerful is an affront to free competition, and that shielding agents situated like himself from selective enforcement of the three-year rule is necessary to protect a freely-competitive market. However, on appeal, Dickey has failed to identify authority legitimately calling into question the district court's conclusion that statutory and nonstatutory labor exemptions from the application of federal ***antitrust law*** apply to the conduct at the heart of Dickey's claims. See *American Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 536 F.3d 68, 76 (1st Cir. 2008)* (discussing labor exemptions).

Dickey **[*4]** also claims that he had a contractual and fiduciary right to fair treatment that the defendants breached via alleged selective enforcement of the three-year rule and other conduct. The district court concluded that the bulk of these claims are preempted, and, on appeal, Dickey points to no authority legitimately suggesting otherwise. See generally *29 U.S.C. § 185*. Additionally, focusing specifically on Dickey's claim that one or more fiduciary duties have been breached, there is no plausible allegation in the operative complaint of a fiduciary duty running from the named defendants to Dickey. As for any portion of Dickey's contract claims not preempted by federal law, Dickey has elucidated no legally-cognizable basis for Dickey to escape the agreed-upon operation of his contract, according to its written terms, by asserting "selective enforcement." See *Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd., 970 F.2d 273, 279 (7th Cir. 1992)*("The fact that the [plaintiff] may, as [defendants] argue, have treated other franchisees more leniently is no more a defense to a breach of contract than laxity in enforcing the speed limit is a defense to a speeding ticket.").

Subsidiary allegations and assertions made by Dickey in relation to these claims do nothing to alter the result.

The judgment **[*5]** of the district court is summarily **affirmed**. See *1st Cir. Loc. R. 27.0(c)*.

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Hatchett v. Henry Schein, Inc.

United States District Court for the Southern District of Illinois

February 13, 2020, Decided; February 13, 2020, Filed

Case No. 3:19-CV-83-NJR

Reporter
2020 U.S. Dist. LEXIS 25031 *; 2020 WL 733834

R. LAWRENCE HATCHETT, M.D., individually and on behalf of all others similarly situated, Plaintiff, v. HENRY SCHEIN, INC., PATTERSON CO., INC., BENCO DENTAL SUPPLY CO., and UNNAMED BECTON DISTRIBUTOR CO-CONSPIRATORS, Defendants.

Core Terms

antitrust, dental, supplies, class action, purchasers, allegations, injuries, steel, dentists, indirect, Defendants', dental services, anti trust law, traceable, aluminum, prices, substantial rights, distributors, courts, motion to dismiss, conspiracy, products, proposed class, manufacturers, concurrence, inextricably intertwined, relevant market, federal court, overcharged, warehousing

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Judges: NANCY J. ROSENSTENGEL, Chief United States District Judge.

Opinion by: NANCY J. ROSENSTENGEL

Opinion

MEMORANDUM AND ORDER

ROSENSTENGEL, Chief Judge:

Pending before the Court is a Motion to Dismiss pursuant to *Rules 12(b)(1)* and **[*2]** *12(b)(6) of the Federal Rules of Civil Procedure* for lack of standing and failure to state a claim (Doc. 35) and a Motion to Dismiss pursuant to

Rule 12(b)(2) for lack of personal jurisdiction (Doc. 36) filed jointly by Defendants Benco Dental Supply Co., Henry Schein, Inc., and Patterson Co., Inc. For the reasons set forth below, the motion to dismiss for lack of standing is granted, and the motion to dismiss for lack of personal jurisdiction is denied as moot.

BACKGROUND

Plaintiff R. Lawrence Hatchett, M.D., initiated this action on behalf of himself and a proposed class of persons who have purchased dental care in Illinois, alleging they have been overcharged by a long-term, price-fixing conspiracy implemented by dental supply distributors Henry Schein, Inc., Patterson Companies, Inc., and Benco Dental Supply Company (collectively "Defendants") (Doc. 1).

Defendants are the three largest distributors of dental supplies in the United States (*Id.* at ¶ 1). Hatchett alleges Defendants have engaged in anti-competitive schemes, which have allowed them to fix prices at well above competitive levels and earn historically high profit margins (*Id.* at ¶ 2). First, Hatchett claims Defendants have boycotted dental buying groups, which foster competition by **[*3]** endorsing or joint venturing with discounting distributors competing with Defendants and provide these competitors with access to Illinois independent dentists (*Id.*). Second, Hatchett alleges Defendants have expressly agreed to fix their pricing at specific, above-competitive levels that are consistent with maintaining their gross margins in the range of 26 percent to 28 percent or more and well-above competitive returns (*Id.* at ¶ 3). Third, Hatchett asserts Defendants have conspired to prevent the entry and expansion of competing, discounting distributors by boycotting, or threatening to boycott, manufacturers supplying the discounters by denying these manufacturers Defendants' distribution (*Id.* at ¶ 4). They also have colluded to boycott, or threatened to boycott, the trade shows of state dental associations promoting state-wide buying groups seeking to generate supply savings for their independent dentists (*Id.*).

Hatchett claims these actions violate the *Illinois Antitrust Act*, *740 Ill. Comp. Stat. §§ 10/3(2)*, *10/7(2)*, by increasing the price and reducing the supply of dental supplies and by restraining trade and preventing competition in the relevant markets for the distribution of dental supplies in Illinois (*Id.* at **[*4]** ¶ 163). Hatchett further claims the Class members have suffered indirect antitrust price injury in their business or property and have been deprived of the benefits of full competition (*Id.* at ¶ 165). As relief, Hatchett requests actual damages, treble damages, a permanent injunction enjoining Defendants from continuing the alleged unlawful acts, attorneys' fees and costs, and pre-judgment and post-judgment interest.

Defendants have moved to dismiss the Class Action Complaint, in its entirety and with prejudice, pursuant to *Rules 12(b)(1)*, *12(b)(2)*, and *12(b)(6) of the Federal Rules of Civil Procedure*. Defendants argue that the Complaint must be dismissed because Hatchett lacks standing to pursue a class action under the Illinois Antitrust Act and because he lacks standing under Article III of the Constitution. They further assert that he lacks antitrust injury and antitrust standing under the Illinois Antitrust Act. Defendants separately contend that Hatchett has failed to plead any basis for this Court to exercise personal jurisdiction over Defendants. Thus, the Complaint must be dismissed.

LEGAL STANDARD

To survive a motion seeking dismissal under *Rule 12(b)(1)*, a plaintiff must "clearly allege facts demonstrating each element" required to establish standing. *See* *Spokeo, Inc. v. Robins, 136 S.Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)*. Whether a defendant argues that **[*5]** a complaint fails to (1) properly state a claim, or (2) properly plead the elements of standing, courts apply the same analysis. *See* *Silha v. ACT, Inc., 807 F.3d 169, 173 (7th Cir. 2015)*. The factual allegations contained within a complaint must "raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554-55, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal citations omitted).

I. Standing Under the Illinois Antitrust Act

Defendants first assert Hatchett lacks standing to pursue a class action under the Illinois Antitrust Act, which provides "that no person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole exception of this State's Attorney General." 740 Ill. Comp. Stat. §10/7(2). Hatchett maintains, however, that Illinois's restriction on class actions is a procedural limitation that is inapplicable in federal court, where Rule 23 of the Federal Rules of Civil Procedure governs whether a case may be maintained as a class action.

In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*, the Supreme Court addressed whether a New York class action bar conflicted with Rule 23 and, if so, whether the federal rule or the state rule applied. 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010). A majority of the Court **[*6]** agreed that the New York statute conflicted with Rule 23, but a plurality found that the federal rule applied. *Id.* The plurality held that the New York statute did not bar class actions under New York law in federal court because Rule 23 is a procedural and not a substantive rule. Id. at 408. Justice Stevens concurred in the judgment, but reasoned the proper analysis is not whether Rule 23 is procedural, but whether the state law is procedural but "so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy." Id. at 420 (J. Stevens, concurring).

In the wake of *Shady Grove*, there has been a split of authority on the issue of whether the Illinois Antitrust Act's class action prohibition is part of Illinois's "substantive rights or remedies." City of Rockford v. Mallinckrodt ARD, Inc., 360 F. Supp. 3d 730, 763-65 (N.D. Ill. 2019), *reconsideration denied*, No. 17 C 50107, 2019 U.S. Dist. LEXIS 103885, 2019 WL 2763181 (N.D. Ill. May 3, 2019). Many federal district courts have treated Justice Stevens's "framework of substantive rights or remedies" concurrence as controlling because it was decided "on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) (when no rationale of the Supreme Court achieves a majority, the Court's holding is the position taken by those who concurred "on the narrowest grounds"). Those courts have then found that the Illinois Antitrust Act's restriction **[*7]** on indirect purchaser class actions is intertwined with the State's substantive rights and remedies. This is because "the limitations on indirect purchaser actions in the IAA were enacted in the same paragraph of the same statute as the state-created right and are accompanied by other substantive limitations." In re Wellbutrin XL Antitrust Litig., 756 F.Supp.2d 670, 677 (E.D. Pa. 2010). "Furthermore, courts have observed that the Illinois statute represents a policy judgment as to the feasibility of managing duplicative recovery, which the legislature has entrusted to the Attorney General but not to individual indirect purchasers." *Id.* For these reasons, several federal courts have found that applying Rule 23 would "abridge, enlarge or modify Illinois' substantive rights" and have, therefore, dismissed class action claims under the Illinois Antitrust Act. *See, e.g.,* In re Generic Pharms. Pricing Antitrust Litig., 368 F. Supp. 3d 814, 834 (E.D. Pa. 2019); In re Loestrin 24 Fe Antitrust Litig., 410 F. Supp. 3d 352 (D.R.I. 2019); In re Effexor Antitrust Litig., 357 F.Supp.3d 363, 392, 2018 WL 6003893, at *16 (D.N.J. 2018); In re Lipitor Antitrust Litig., 336 F. Supp. 3d 395, 417-18 (D.N.J. 2018); In re Opana ER Antritrust Litig., 162 F.Supp.3d 704, 723 (N.D. Ill. 2016).

Others have taken a more nuanced approach to Justice Stevens's concurrence, however, doubting whether the concurrence controls in the first place. In *In re Aggrenox Antitrust Litigation*, the District of Connecticut explained:

> [T]he doctrine that in a split decision the controlling rationale is that taken by the Justices who concur **[*8]** in the judgment on the narrowest grounds—works only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment. The Stevens concurrence is narrower than the position of the other Justices who made up the *Shady Grove* majority only in the sense that it would reject state procedural rules in fewer cases. It is not logically narrower, however, because it is not a logical subset of the opinion of the other Justices in the majority. Those Justices do not implicitly approve of its rationale for sometimes allowing state procedural rules to control—on the contrary, they explicitly reject that rationale—and it therefore does not represent the common denominator of the Court's reasoning.

In re Aggrenox Antitrust Litig., No. 3:14-MD-2516 (SRU), 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at *5 (D. Conn. Aug. 9, 2016) (internal citation and quotations omitted).

"Although the Seventh Circuit has not squarely addressed which opinion controls, it otherwise has indicated that Justice Scalia's plurality sets forth the controlling legal standard." *In re Dealer Mgmt. Sys. Antitrust Litig., 362 F. Supp. 3d 510, 552-53 (N.D. Ill. 2019)* (citing *Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 642 F.3d 560, 564 (7th Cir. 2011)* (*Shady Grove* "holds that *Rule 23* applies to **[*9]** all federal civil suits, even if that prevents achieving some other objective that a court thinks valuable")). Indeed, district courts in the Northern District of Illinois recently have agreed with the reasoning in *Aggrenox* and concluded that even if Justice Stevens's concurrence was persuasive dicta, the Illinois Antitrust Act did not alter the scope of any substantive right or remedy "because any indirect purchaser procedurally blocked from participation in a class action would still have the same remedy in an individual action." *Mallinckrodt ARD, Inc., 360 F. Supp. 3d at 764* (quoting *Aggrenox, 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at *6)*; *see also* *In re Dealer Mgmt. Sys. Antitrust Litig., 362 F. Supp. 3d 510, 552-53 (N.D. Ill. 2019)* ("Even if Justice Stevens's plurality opinion applied, Defendant has not identified any authority for concluding that the class action bars at issue are so intertwined with a state-created right or remedy as to justify finding that it trumps *Rule 23* . . . ."); *In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 817-18 (N.D. Ill. 2017)* ("The availability of the class action procedure does not change the substantive rights or remedies available to [indirect purchasers] under Illinois law.").

The undersigned agrees with this latter approach. Even if Justice Stevens's concurrence controls, allowing indirect purchasers to bring a class action in federal court under *Rule 23* does not enlarge their substantive rights under Illinois **[*10]** law. Indirect purchasers are allowed to sue in state court under the Illinois Antitrust Act, just not under the procedural device of a class action. *See* *Shady Grove, 559 U.S. at 408* ("A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged."). As explained in *Shady Grove*, the fact that a dispute is brought as a class action—thereby transforming the claim for a $500 penalty into a $5 million penalty—does not change the defendant's aggregate liability. *Id.* While it "is undoubtedly true that some plaintiffs who would not bring individual suits for the relatively small sums involved will choose to join a class action," that has no effect on a defendant or plaintiff's legal rights. *Id.*

Because the Court finds that *Rule 23* permits Hatchett to maintain this matter as a class action, and because doing so does not enlarge the substantive rights or remedies available to Hatchett and the proposed class under Illinois law, the Court finds that Hatchett has standing under the Illinois **[*11]** Antitrust Act to bring a class action. Accordingly, the Court denies Defendants' motion to dismiss on this basis.

II. Article III Standing

Defendants next argue the Complaint should be dismissed for failure to plead facts demonstrating Hatchett has standing to assert his claim under Article III of the Constitution. Defendants specifically challenge Hatchett's allegations regarding his injury in fact and whether that injury is fairly traceable to Defendants' conduct.

With regard to Article III standing, a plaintiff must show (1) injury in fact, meaning an invasion of a legally protected interest that is concrete and particularized, actual or imminent, and not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of such that the injury is fairly traceable to the defendant's actions; and (3) that a favorable decision is likely to redress the injury. *Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. Second, the injury must be fairly traceable to the challenged conduct. *Id.* Third, the injury must be likely to be "redressed by a favorable decision." *Id. at 561*. At the pleading stage, the plaintiff must allege facts demonstrating each element of Article III standing. *Crabtree v. Experian Info. Sols., Inc., No. 18-3405, 948 F.3d 872, 2020 U.S. App. LEXIS 2698, 2020 WL 428938, at *2 (7th Cir. Jan. 28, 2020)*. "At the pleading stage, general factual allegations of injury resulting from the defendant's **[*12]** conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan, 504 U.S. at 561* (internal quotation omitted).

A. Injury in Fact

A "particularized" injury is one that "affect[s] the plaintiff in a personal and individual way." *Crabtree, 2020 U.S. App. LEXIS 2698, 2020 WL 428938, at *3* (quoting *Lujan, 504 U.S. at 560 n.1*). "Concreteness means that the injury must exist: it must be 'real', not abstract." *Id.* (citing *Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548, 194 L.Ed.2d 635 (2016))*. According to Defendants, Hatchett has not alleged a particularized injury because does not say how much he was overcharged, whether his dentists accounted for the costs of those supplies in determining their prices for dental procedures, or whether his dentists billed him for the costs of these supplies.

The Court disagrees. Hatchett alleges that he paid several hundred dollars for dental services and procedures including a crown, molar extraction, and other procedures provided by two independent dentists who purchased supplies, in part, from Defendant Schein (Doc. 1 at ¶ 9). Those supplies included x-ray accessories, materials associated with crown installation (impression materials, instruments, etc.), binding/cement material, core build-up material including pins, topical fluoride, **[*13]** and anti-oxidant rinse (*Id.*). Hatchett further alleges he was overcharged for these services because his dentists obtained at least some of their supplies from Defendant Schein, which he claims conspired with the other Defendants to engage in price fixing (*Id.*). Finally, Hatchett claims that the prices charged by dental supply distributors to dentists constitutes "a substantial and identifiable portion of the pricing for dental services they provide." (*Id.* at ¶ 154). "The above-competitive pricing of such supplies by the Defendant distributors inevitably results in increased pricing for the dental services in which the supplies are used, in an amount that can be determined through econometric analysis." (*Id.* at ¶ 155). While these allegations do not specify the exact amount of any overcharges Hatchett experienced as a result of Defendants' conduct, the Court finds that they are sufficient to establish an injury in fact at the pleading stage.

B. Traceability

To satisfy the causation prong of Article III standing, the injury complained of "must be fairly traceable to the challenged action of the defendant—i.e., there must be a causal connection between the injury and the conduct." *Sterk v. Redbox Automated Retail, LLC, 770 F.3d 618, 623 (7th Cir. 2014)*. According **[*14]** to Defendants, Hatchett has made merely conclusory legal assertions that fail to support his conclusion that his claimed overpayments are traceable to Defendants.

Hatchett alleges, however, that his dentists purchased supplies from Schein, which is alleged to have conspired with the other two defendants. He further alleges facts about the dental supply distribution chain, that Defendants account for 80 to 90 percent of full-service dental supply distribution, and that the products distributed by Defendants can be traced from their manufacturers, to distributors like Defendants, to dental practices. Finally, he alleges, the price for those products is a substantial factor in the prices charged for dental services. Based on these facts, the Court finds that it is plausible that Hatchett's injuries are "fairly traceable" to Defendants' alleged price-fixing conspiracy. *See* *Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 696 (7th Cir. 2015)* (citing *In re Target Corp. Data Sec. Breach Litig., 66 F.Supp.3d 1154, 1159 (D. Minn. 2014)* ("Plaintiffs' allegations plausibly allege that they suffered injuries that are 'fairly traceable' to Target's conduct. This is sufficient at this stage to plead standing. Should discovery fail to bear out Plaintiffs' allegations, Target may move for summary judgment on the issue.")).

While Defendants make no **[*15]** argument that Hatchett's complaints could not be redressed by a favorable decision, the Court also finds that element to be satisfied. Any judgment in favor of Hatchett and his proposed class would serve to redress the alleged overpayment. Accordingly, Hatchett has met the requirements for Article III standing.

III. Antitrust Injury and Standing

Defendants next assert that Hatchett has failed to demonstrate antitrust injury and antitrust standing, both of which are required under the Illinois Antitrust Act. *O'Regan v. Arbitration Forums, Inc., 121 F.3d 1060, 1066 (7th Cir.*

1997) ("Federal antitrust standing rules apply under the Illinois Antitrust Act."); McGarry & McGarry LLP v. Bankr. Mgmt. Sols., No. 17 CV 5779, 2018 U.S. Dist. LEXIS 110264, 2018 WL 3218659, at *2 (N.D. Ill. July 2, 2018), *aff'd sub nom.* McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., Inc., 937 F.3d 1056 (7th Cir. 2019) ("Illinois courts have adopted a common-law harmonization provision, meaning that they interpret their antitrust laws in harmony with federal-court decisions interpreting federal ***antitrust law***.").

A. Antitrust Injury

First, Defendants argue Hatchett does not participate in the dental supply market; thus, he cannot plead antitrust injury from a purported conspiracy in that market.

Federal ***antitrust law*** provides a treble-damages remedy to "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). The Supreme Court has limited those who may **[*16]** bring an antitrust action to "(1) those who have suffered the type of injury that the antitrust laws were intended to prevent and (2) those whose injuries are a result of the defendant's unlawful conduct." Serfecz v. Jewel Food Stores, 67 F.3d 591, 595 (7th Cir. 1995) (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)). "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." Blue Shield of Va. v. McCready, 457 U.S. 465, 476-77, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982). Some injuries are "too remote from the violation and the purposes of the antitrust laws to form the predicate for a suit." Id. at 477, 102 S.Ct. 2540.

Courts "usually presume that competitors and consumers in the relevant market are the only parties who suffer antitrust injuries and are in a position to efficiently vindicate the antitrust laws." McGarry, 937 F.3d at 1065; Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1379 (7th Cir. 1987) (antitrust injury requires a plaintiff to show that it was a participant in the relevant market); *see also* In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 161 (2d Cir. 2016) ("[T]o suffer antitrust injury, the putative plaintiff must be a participant in the very market that is directly restrained.").

If a party is neither a purchaser nor a competitor in the relevant market, however, a narrow exception exists if the party's injuries are "inextricably intertwined" with the injuries of market participants. McCready, 457 U.S. at 484. In *McCready*, the plaintiff **[*17]** sought insurance coverage for treatment by a psychologist, but her insurance plan only provided reimbursement for therapy if provided by a psychiatrist. Id. at 468-69. The plaintiff sued her health insurance provider and a group of psychiatrists alleging they colluded to exclude psychologists from receiving compensation under the plan. Id. at 469-70. While she was not a participant in the group health insurance market or the market for treatment from a psychiatrist, the Supreme Court held that she had stated a claim for antitrust injury because her "clearly foreseeable" injury was "a necessary step in effecting the ends of the alleged illegal conspiracy," and "the very means by which it is alleged that [the health insurance provider] sought to achieve its illegal ends." Id. at 479.

After its decision in *McCready*, the Supreme Court further explained that the plaintiff in that case "alleged that she was a consumer of psychotherapeutic services and that she had been injured by the defendants' conspiracy to restrain competition *in the market for such services*." Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 538, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) (emphasis added) ("ACG"); *see also* IIA Areeda & Hovenkamp, ***Antitrust Law*** ¶ 339, at 145 (4th ed. 2014) (concluding that *McCready* "clearly limited" the meaning of the **[*18]** "inextricably intertwined" exception "to those whose injuries are the essential means by which defendants' illegal conduct brings about its ultimate injury to the marketplace").

Here, Hatchett admits in the Complaint that he and the proposed Class do not directly participate in the market for the distribution of dental supplies (Doc. 1 at ¶ 152). He alleges, however, that the market in which the Class does participate—the purchase of dental *services*—is inextricably intertwined with the relevant markets for distribution of dental supplies, as overcharging for dental supplies affects the price of dental services in Illinois in a traceable way (*Id.* at ¶ 153). Furthermore, he claims, "[f]rom the perspective of the patients using the services of independent dentists, the dental supplies have no value in and of themselves: they only have value to the extent they are used in providing them dental services." (*Id.* at ¶ 151). Thus, Hatchett asserts, "[t]he demand for dental supplies and for the distribution of those supplies directly derive from the demand for dental services for which the supplies are used." (*Id.*).

The Northern District's decision in *Supreme Auto Transport v. Arcelor Mittal* is **[*19]** instructive here. In that case, indirect purchasers of steel brought a putative class action against domestic steel manufacturers, alleging the manufacturers reduced steel production in an effort to drive up the price of steel. *Supreme Auto Transp. LLC v. Arcelor Mittal, 238 F. Supp. 3d 1032, 1036 (N.D. Ill. 2017)*. The direct purchasers of steel then passed on the higher prices to downstream customers like the plaintiffs, who bought consumer products made with steel as well as other materials. *Id.*

In determining whether the plaintiffs had suffered an antitrust injury, the court noted that while the plaintiffs made conclusory allegations about causation, the complaint did not acknowledge the role of interceding parties who purchased and distributed the raw steel from the defendants. *Id. at 1040*. The Court ultimately decided that although the plaintiffs "may have paid inflated prices for steel-containing products, the alleged scheme would have been just as effective from defendants' point of view if direct purchasers of steel paid supracompetitive prices for raw steel and never passed that cost on to consumers." *Id. at 1041*. Because the indirect purchasers only purchased the steel as a component part of mixed material products, plaintiffs failed to demonstrate antitrust injury. *Id.* The Seventh **[*20]** Circuit affirmed. *Supreme Auto Transp., LLC v. Arcelor Mittal USA, Inc., 902 F.3d 735, 744 (7th Cir. 2018)*. In doing so, it contrasted plaintiffs' allegations that they purchased steel as a component of other, more complex products, of which steel was not even a primary or necessary ingredient, with plaintiffs in a related suit who alleged injury based on the purchase of steel items from distributors who had purchased those same items from the defendants. *Id.* In the second instance, the alleged injury was fairly traceable to the defendant steel manufacturers, whereas in the instant case, the claims were too remote to demonstrate causation. *Id.*

The Court also finds *Aluminum Warehousing* to be analogous. *833 F.3d at 162*. In that case, the Second Circuit found that purchasers of aluminum-containing products such as beverages sold in aluminum cans did not establish antitrust standing when they were not participants in the defendant's market (aluminum warehousing). *Id.* Moreover, their injury was not "inextricably intertwined" with the injuries of participants in the aluminum warehousing market. *Id.* The Court explained that plaintiffs' injury was not "a necessary step" in carrying out the alleged anti-competitive conspiracy; instead, the injury was "suffered down the distribution chain of a **[*21]** separate market, and was a purely incidental byproduct of the alleged scheme." *Id.*

The Second Circuit also rejected the indirect purchasers' argument that, without them, there would be no real-world purchasers of aluminum, and without users of physical aluminum, there would be no market for aluminum futures or aluminum warehousing. *Id.* The court noted that "[t]his approach would limitlessly increase the universe of potential plaintiffs, and cannot be squared with *McCready* itself, which held that courts must apply a 'proximate cause' test to alleged antitrust injury." *Id.* (quoting *McCready, 457 U.S. at 477-78*).

Like the indirect steel and aluminum purchasers, the Court finds that Hatchett and the proposed class's alleged injuries as purchasers of dental services were "not a necessary step in carrying out the alleged anti-competitive conspiracy, but rather a 'purely incidental byproduct of the alleged scheme.'" *See Supreme Auto Transp. LLC, 238 F. Supp. 3d at 1040-41*. Nor were their injuries "clearly foreseeable" or the essential means by which Defendants' illegal conduct brought about its ultimate injury to the marketplace. *See McCready, 457 U.S. at 479*.

Assuming the facts as alleged are true, Defendants' scheme would be just as effective if dentists purchased the higher priced supplies but **[*22]** never passed on that cost to Plaintiffs. And, as noted in *Aluminum Warehousing*, the fact that the demand for dental services drives the market for dental supplies is inconsequential, as *McCready* demands proximate—not but-for—causation. For these reasons, the Court finds that the injuries alleged by Hatchett and the proposed class are not inextricably intertwined with the injuries of market participants: the dentists who obtained their supplies from Defendants. Therefore, Plaintiffs have not adequately pleaded antitrust injury.

B. Antitrust Standing

Even if Hatchett had adequately pleaded antitrust injury, he must also demonstrate antitrust standing, *i.e.*, that he is the proper plaintiff to bring the claim.[1] "From the class of injured persons suffering an 'antitrust injury' only those parties who can most efficiently vindicate the purposes of the antitrust laws have antitrust standing to maintain a private action under *§ 4*." *Serfecz, 67 F.3d at 598* (citation omitted). The Seventh Circuit has "recognized the need to balance the interests of deterrence through private antitrust enforcement and avoidance of excessive treble damages litigation," which is achieved by allowing only those who "suffer immediate injuries **[*23]** with respect to their business or property, while excluding persons whose injuries were more indirectly caused by the antitrust conduct." *Id.*

The Supreme Court has identified six factors that courts should weigh in making this assessment:

> (1) [t]he causal connection between the alleged anti-trust violation and the harm to the plaintiff; (2) [i]mproper motive; (3) [w]hether the injury was of a type that Congress sought to redress with the antitrust laws; (4) [t]he directness between the injury and the market restraint; (5) [t]he speculative nature of the damages; (6) [t]he risk of duplicate recoveries or complex damages apportionment.

ACG, 459 U.S. at 537-46.

As discussed above, the causal connection here is weak; Hatchett alleges he overpaid for dental services on account of Defendants' actions, but he has not alleged that any specific charge he paid was related to the costs his dentist paid for specific dental supplies. And Hatchett can only speculate that his dentists passed on any additional charges to him; the actual amount of those charges, if any, certainly is unknown.

Perhaps the most important factor to the analysis in this case though is the risk of duplicate recoveries. Defendants point **[*24]** out that a number of other lawsuits have been filed against them by (1) dental practices and direct purchasers of dental supplies; (2) dental supply distributors that compete directly with Defendants in the sale of dental supplies; (3) an online platform for the sale of dental supplies that competed with Defendants; and (4) a supplier of dental supplies to that online platform. In one of those cases, *In re Dental Supplies Antitrust Litig.*, No. 1:16-CV-00696-BMC-GRB (E.D.N.Y.), a settlement was granted final approval in June 2019 between a proposed class of dental practices and dental laboratories—*i.e.*, the purchasers of dental supplies who have suffered immediate injuries—and Defendants in this case. Thus, the Court agrees with Defendants that Hatchett "is not the party who can most efficiently vindicate the purposes of the antitrust laws in this case." *Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 718 (7th Cir. 2006)* (internal quotation marks and citation omitted). Because Hatchett lacks antitrust standing, his complaint must be dismissed.

Conclusion

For these reasons, the Court **GRANTS** the Motion to Dismiss for lack of standing filed by Defendants (Doc. 35). Plaintiff's Complaint (Doc. 1) is **DISMISSED with prejudice**. Defendants' Motion to Dismiss **[*25]** for lack of personal jurisdiction (Doc. 36) is **DENIED as moot**. This case is closed, and the Clerk of Court is **DIRECTED** to enter judgment.

IT IS SO ORDERED.

DATED: February 13, 2020

/s/ Nancy J. Rosenstengel

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[1] In *Supreme Auto*, the Seventh Circuit eschewed the term "antitrust standing," noting that it is actually a proximate cause requirement. *Supreme Auto Transp., LLC, 902 F.3d at 743*.

NANCY J. ROSENSTENGEL

Chief U.S. District Judge

Alberici v. Recro Pharma, Inc.

United States District Court for the Eastern District of Pennsylvania

February 14, 2020, Decided; February 14, 2020, Filed

CIVIL ACTION NO. 18-2279

Reporter
2020 U.S. Dist. LEXIS 27535 *

JOHN ALBERICI, individually and on behalf of all others similarly situated v. RECRO PHARMA, INC., GERALDINE A. HENWOOD, RYAN D. LAKE, MICHAEL CELANO, STEWART MCCALLUM, and JOHN HARLOW

Subsequent History: Motion denied by *Alberici v. Recro Pharma, Inc., 2021 U.S. Dist. LEXIS 38094, 2021 WL 798299 (E.D. Pa., Mar. 1, 2021)*

Settled by, Costs and fees proceeding at *Alberici v. Recro Pharma, Inc., 2022 U.S. Dist. LEXIS 216482 (E.D. Pa., Dec. 1, 2022)*

Core Terms

allegations, Meloxicam, scienter, soft tissue, amended complaint, efficacy, misleading, motion to dismiss, disclosure, manufacturing, investor, Defendants', omission, causation, clinical, press release, strong inference, particularity, securities fraud, tissue, judicial notice, Memorandum, disclose, pain, clinical trial, confidential, Leadership, meetings, responds, pleaded

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For GERALDINE A. HENWOOD, RYAN D. LAKE, MICHAEL CELANO, STEWART MCCALLUM, JOHN HARLOW, Defendants: ROBERT L. HICKOK, LEAD ATTORNEY, PEPPER HAMILTON LLP, PHILADELPHIA, PA.

Judges: MICHAEL M. BAYLSON, United States District Judge.

Opinion by: MICHAEL M. BAYLSON

Opinion

MEMORANDUM RE MOTION TO DISMISS AMENDED COMPLAINT

Baylson, J.

I. Introduction

In this securities class action, a putative class of shareholders bring claims for violations of Section 10(b) and 20(a) of the *Securities Exchange Act of 1934 (the "Exchange Act")*, alleging that Recro Pharma, Inc. ("Recro") and five Individual **[*2]** Defendants (collectively, the "Defendants") defrauded the class by failing to inform them of various concerns that had been raised to the company by industry professionals regarding the manufacturing and efficacy of Intravenous Meloxicam ("IV Meloxicam"). This drug promised to provide postoperative pain relief without many of the complications of opioids. When the company announced that the FDA declined to approve IV Meloxicam, the price of Recro's stock fell. The Amended Complaint alleges two counts:

- **Count I:** Violation of Section 10(b) of the Exchange Act and *Rule 10b-5*, which is asserted against all Defendants; and
- **Count II:** Violation of Section 20(a) of the Exchange Act, which is asserted against the Individual Defendants.

Defendants collectively move to dismiss the Amended Complaint under *Federal Rule of Civil Procedure ("Rule") 12(b)(6)* and *Rule 9(b)*, and the Private Securities Litigation Reform Act of 1995 ("PSLRA"). The lead Plaintiff responds in opposition, and Defendants reply.

For the reasons discussed below, Defendants' Motion to Dismiss is granted without prejudice.

II. Facts[1]

A. The Parties

The lead plaintiffs are investors Daniel Wessler, Charles Clark, Ronald Davidson, and John Alberici ("Recro Investor Group" or "Plaintiff"). (ECF 21 ¶ 1.)

Defendant Recro, a **[*3]** "specialty pharmaceutical company" headquartered in Malvern, Pennsylvania, "develops non-opioid therapeutics for the treatment of pain in the post-operative setting." (Am. Compl. ¶¶ 2, 3.)

The Amended Complaint names five individuals who allegedly served as members of Recro's Management and Leadership teams at all relevant times:

Defendant Henwood, who founded Recro in 2007 and has served as the company's CEO, President and Director since 2008. (Am. Compl. ¶ 17.)

Defendant McCallum, who has served as Recro's Chief Medical Officer ("CMO") since December 2015. (Am. Compl. ¶ 18.)

Defendant Harlow, who has served as Recro's Executive Vice President, Commercial since 2018 and previously served as Vice President, Marketing. (Am. Compl. ¶ 19.)

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[1] The following factual narrative is drawn from the Amended Complaint and disregards any differences between the Amended Complaint and the Original Complaint. See *W. Run Student Hous. Assocs., LLC v. Huntington Nat'l Bank, 712 F.3d 165, 173 (3d Cir. 2013)* (noting that because "the district court typically may not look outside the four corners of the amended complaint, the plaintiff cannot be bound by allegations in the superseded complaint"). The Court takes the allegations in the Amended Complaint as true and draws all reasonable inferences in favor of Plaintiff, as is required at the motion to dismiss stage. *Phillips v. Cty. of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008)*.

Defendant Celano, who has served as Recro's Chief Operating Officer since January 3, 2018, and previously served as CFO. (Am. Compl. ¶ 20.)

Defendant Lake, who has served as Recro's CFO since January 2018 and previously served as Senior Vice President of Finance and Chief Accounting Officer. (Am. Compl. ¶ 21.)

B. IV Meloxicam

Recro is comprised of two segments, the Acute Care division and the Contract Development and Manufacturing Organization ("CDMO"). (Am. **[*4]** Compl. ¶ 24.) The Acute Care segment is "primarily focused on developing products for hospitals and other acute care settings." (Am. Compl. ¶ 25.) The product that is central to this case, IV Meloxicam, is the lead product in the Acute Care division. (Am. Compl. ¶ 31.)

IV Meloxicam is "a proprietary injectable form of meloxicam, a long-acting, non-opioid drug for the management of moderate-to-severe, acute postoperative pain." (Am. Compl. ¶ 26.) Put simply, IV Meloxicam is a non-opioid drug for post-operation management of pain. Because opioids currently dominate the market for IV acute pain, Plaintiff asserts that "Recro touts IV [M]eloxicam as having the potential to overcome many of the significant complications and side effects associated with commonly-prescribed opioid drugs, including addiction, respiratory depression, constipation, excessive nausea and vomiting." (Am. Compl. ¶ 29.) Recro conducted clinical trials of IV Meloxicam in patients recovering from both hard tissue and soft tissue procedures. (Am. Compl. ¶ 44.)

C. Feedback from the Key Opinion Leaders on IV Meloxicam

Plaintiff asserts that Recro has a "robust list"—200 to 300—of Key Opinion Leaders ("KOLs"). (Am. Compl. **[*5]** ¶ 38.) KOLS are "well-respected, expert physicians in their field who provide thought leadership to their peers and the general public" and assist with marketing pharmaceuticals. (Am. Compl. ¶ 37.) Plaintiff alleges that the KOLs expressed various concerns to Recro regarding the manufacturing and efficacy of IV Meloxicam.[2] Some of the KOLs' concerns were communicated to Recro via a confidential witness, CW1, who was employed in various roles at Recro from June 2017 through May 2018 and had frequent communication with the KOLs. (Am. Compl. ¶ 39.)

The first concern expressed by the KOLs about IV Meloxicam involved the manufacturing process. IV Meloxicam is manufactured overseas pursuant to a supply agreement with an Irish company. (Am. Compl. ¶ 59.) Plaintiff alleges that "CW1 stated that approximately 30% of KOLs expressed their concern to CW1 about IV [M]eloxicam being manufactured overseas." (Am. Compl. ¶ 61.) The KOLs' concern was based on their experience with foreign manufacturing of drugs and the possibility that "a manufacturing plant in Ireland may not have the same standards as the U.S. which could cause the plant to fail the FDA pre-approval plant inspections." (Am. Compl. ¶ **[*6]** 62.) The KOLs also expressed concerns to CW1 about the "level and quality of oversight of the manufacturing process of IV [M]eloxicam." (Am. Compl. ¶ 63.) Plaintiff alleges that "Recro had only one employee, [Chris] Sharr, handling the oversight for manufacturing IV [M]eloxicam and its packaging in Ireland." (Am. Compl. ¶ 63.) According to Plaintiff, "CW1 and CW1's Medical Affairs Team reported the KOLs' concerns regarding ... foreign manufacturing of IV [M]eloxicam to Recro's top leadership," including three of the Individual Defendants. (Am. Compl. ¶ 67.)

The second concern expressed by the KOLs regarding IV Meloxicam involved its efficacy. According to Plaintiff, "while 99.9% of KOLs were convinced that IV [M]eloxicam should be used in orthopedic [hard tissue] procedures, ... <u>KOLs stated that IV [M]eloxicam should not be used in soft tissue procedures</u> ...." (Am. Compl. ¶ 69.) Plaintiff alleges that "the clinical trial data for the efficacy of IV [M]eloxicam in hard tissue procedures ... was far more compelling than the clinical trial data for the drug's efficacy in soft tissue procedures." (Am. Compl. ¶ 69.) This is likely because soft tissue procedures are less painful, so the reduction **[*7]** of pain that results from using IV

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[2] The Amended Complaint contains various allegations related to concerns raised by the KOLs about alleged nepotism at Recro. (Am. Compl. ¶¶ 32-42.) The Court will not address the nepotism allegations because, as acknowledged by Plaintiff, Recro fully "disclose[d] the family relationships" that Plaintiff alleges were suspect. (ECF 41, Plaintiff's Supplemental Submission at 5.)

Meloxicam is less pronounced when the drug is used to treat postoperative pain arising from a soft tissue procedure. (Am. Compl. ¶ 70.) Plaintiff alleges that Defendants were fully aware that "soft tissue physicians were not a receptive market for IV [M]eloxicam," but nonetheless made statements to convey to the market that "soft tissue surgeons and their patients were 'IV [M]eloxicam target opportunities.'" (Am. Compl. ¶ 73.)

D. Recro Files a New Drug Application for IV Meloxicam

On July 31, 2017, Recro announced that it had filed a New Drug Application ("NDA") for IV Meloxicam 30 mg with the Food and Drug Administration ("FDA"). (Am. Compl. ¶ 46.) Recro allegedly conducted "efficacy and safety clinical trials" in preparation for filing its NDA. (Am. Compl. ¶ 43.) Plaintiff alleges that, according to the KOLs, Recro's efficacy data was "far less robust" for the abdominoplasty (soft tissue) clinical trial than it was for the bunionectomy (hard tissue) clinical trial—a result of the difference in the extent to which the different patient classes reported a reduction in pain. (Am. Compl. ¶ 45.)

On September 28, 2017, Recro announced that the FDA had "accepted **[*8]** for review its NDA," and on October 5, 2017, it announced that the FDA had set May 26, 2018 as the date by which the FDA would complete its review (the "PDUFA date"). (Am. Compl. ¶¶ 47, 48.) Plaintiff asserts that "[m]any drug companies choose to disclose their PDUFA dates in the hopes that doing so will lead to an increase in their share prices." (Am. Compl. ¶ 49.)

E. The FDA Rejects Recro's NDA

On May 24, 2018, the FDA rejected Recro's NDA in a Complete Response Letter ("CRL"). (Am. Compl. ¶ 50.) A "CRL[] inform[s] drug companies that the review cycle for an NDA has been completed and that the NDA is <u>not</u> approvable. They lay out deficiencies and outline possible remedies. CRLs can have a devastating effect on a small company's share value" and are "usually confidential." (Am. Compl. ¶¶ 51, 52.)

Recro issued a press release when it received the CRL, stating that the FDA declined to approve the NDA. (Am. Compl. ¶ 53.) The press release explained that

> The CRL states that data from ad hoc analyses and selective secondary endpoints suggest that the analgesic effect does not meet the expectations of the FDA. In addition, the CRL raised CMC [or Chemistry, Manufacturing and Controls]-related **[*9]** questions on extractable and leachable data provided in the NDA.

(Am. Compl. ¶ 103.) Plaintiff alleges that during a morning conference call on May 24, 2018, Defendant Henwood stated that "to the best of our understanding right now, there is a lack of clarity in the reviewer's mind about some of the data." (Am. Compl. ¶ 54.) Plaintiff states that "Recro's share price was decimated as a result of the news. The stock dropped from $6.79, or 54.67%, to close at $5.63 on May 24, 2018." (Am. Compl. ¶ 55.)

According to Plaintiff, it is "very likely" that Recro knew the FDA was going to reject its NDA. (Am. Compl. ¶ 57.) This allegation is based on the fact that after the FDA accepts an NDA for review, it will "send information requests, raise further questions, have meetings, and may make recommendations to the drug company applicant." (Am. Compl. ¶ 56.) Plaintiff alleges that this practice made it likely that "Recro was aware of, but failed to disclose, the two issues raised by the FDA in deciding not to approve the NDA."[3] (Am. Compl. ¶ 57.)

III. Procedural History

[3] The Amended Complaint does not explain "the two issues raised by the <u>FDA."</u> This is presumably a reference to the two concerns raised by the KOLs regarding (a) potential inadequacy in manufacturing oversight and (b) the fact that IV Meloxicam was marketed as a drug to solve pain following soft-tissue procedures when the KOLs were not impressed by the clinical data on efficacy in the soft-tissue context. There is a difference between, on the one hand, Recro being aware that the <u>KOLs</u> raised these concerns prior to the FDA's rejection of the NDA and, on the other, Recro being aware that the <u>FDA</u> raised these concerns in its decision to deny approval. This gap in logic is addressed briefly in subsection V.E.2's analysis of loss causation.

Plaintiff filed his Complaint on May 31, 2018. (ECF 1.) On October 5, 2018, this Court appointed Daniel Wessler, Charles **[*10]** Clark, Ronald Davidson, and John Alberici (collectively "Recro Investor Group" or "Plaintiff") as the Lead Plaintiff. (ECF 21.) Plaintiff filed an Amended Complaint on December 11, 2018. (ECF 26.) Defendants moved to dismiss the Amended Complaint on February 8, 2019, (ECF 31),[4] and Plaintiff responded in opposition on April 9, 2019, (ECF 32.) Defendants replied, (ECF 33), and attached as Exhibit A summary chart of all of the misstatements alleged by Plaintiff to be misleading, together with its defense to each statement, (ECF 33-1.) The Court held oral argument on the Motion to Dismiss on June 26, 2019. (ECF 37; ECF 39, June 26, 2019 Hr'g Tr.)

Following oral argument, the Court invited the parties to submit supplemental briefing. On August 30, 2019, Plaintiff filed a supplemental memorandum in further opposition to Defendants' Motion to Dismiss. (ECF 41.) Attached to Plaintiff's supplemental memorandum as Exhibit A is a counter-chart responding to Defendants' chart. (ECF 41-1.) On September 27, 2019, Defendants filed their supplemental memorandum, (ECF 43), and attached a chart that responded to Plaintiff's counter-chart, (ECF 43-2.)

IV. Legal Standard

A securities fraud complaint must **[*11]** do much more than a typical complaint. In addition to the traditional *Rule 12(b)(6)* standard, a securities fraud complaint must satisfy *Rule 9(b)*'s particularity requirement. Moreover, a securities fraud complaint must comply with the heightened pleading requirements of the PSLRA, which "imposes another layer of factual particularity to allegations of securities fraud." *In re Rockefeller Ctr. Props., Inc. Sec. Litig., 311 F.3d 198, 217 (3d Cir. 2002)*.

A. Pleading Standard Under *Rule 12(b)(6)*

In considering a motion to dismiss under *Rule 12(b)(6)*, the Court "accept[s] all factual allegations as true [and] construe[s] the complaint in the light most favorable to the plaintiff." *Warren Gen. Hosp. v. Amgen Inc., 643 F.3d 77, 84 (3d Cir. 2011)* (internal quotation marks and citations omitted). The Supreme Court has instructed that, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*.

The Court in Iqbal explained that, although a court must accept as true all of the factual allegations contained in a complaint, that requirement does not apply to legal conclusions; therefore, pleadings must include factual allegations to support the legal claims asserted. *556 U.S. at 678, 684*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do **[*12]** not suffice." *Id. at 678*. Accordingly, to survive a motion to dismiss, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

B. Pleading Standard Under *Rule 9(b)* and the PSLRA

All allegations of fraud must meet *Rule 9(b)*'s "particularity" requirement. "*Rule 9(b)*'s heightened pleading standard gives defendants notice of the claims against them, provides an increased measure of protection for their reputations, and reduces the number of frivolous suits brought solely to extract settlements." *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1418 (3d Cir. 1997)*.

Rule 9(b) may be satisfied by describing "the circumstances of the alleged fraud with precise allegations of date, time, or place, or by using some means of injecting precision and some measure of substantiation into [the]

[4] The caption of the action was amended to add two individual defendants, Stewart McCallum and John Harlow. (ECF 27, ECF 28.)

allegations of fraud." Bd. of Trs. of Teamsters Local 863 Pension Fund v. Foodtown, Inc., 296 F.3d 164, 172 n.10 (3d Cir. 2002) (internal quotation marks and citations omitted). Stated differently, the plaintiff must plead the "who, what, when, where, and how" of the fraud. Institutional Inv'rs Grp. v. Avaya, Inc., 564 F.3d 242, 253 (3d Cir. 2009); see Bonavitacola Elec. Contractor, Inc. v. Boro Developers, Inc., No. CIV.A. 01-5508, 2003 U.S. Dist. LEXIS 2190, 2003 WL 329145, at *6 (E.D. Pa. Feb. 12, 2003) (Baylson, J.) ("While a complaint need not set out 'precise words,' it should adequately describe the nature and subject of an alleged misrepresentation."). Rule 9(b)'s particularity requirement is "rigorously applied in securities fraud cases." Burlington, 114 F.3d at 1417. [B]oilerplate **[*13]** and conclusory allegations will not suffice." Id. at 1418.

However, "courts should be sensitive to the fact that application of [Rule 9(b)] prior to discovery may permit sophisticated defrauders to successfully conceal the details of their fraud. Accordingly, the normally rigorous particularity rule has been relaxed somewhat where the factual information is peculiarly within the defendant's knowledge or control." Id. (internal quotation marks and citations omitted).

The PSLRA[5] imposes two distinct, heightened pleading requirements for actions brought under Section 10(b) and Rule 10b-5. First, the PSLRA requires that "the complaint ... specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint [must] state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1). Second, the PSLRA requires that "the complaint ... state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2)(A) (emphasis added). In a nutshell, the PSLRA requires that "securities fraud complaints 'specify' each misleading statement; ... set forth **[*14]** the facts 'on which a belief' that a statement is misleading was 'formed'; and ... 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 345, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005) (quoting 15 U.S.C. §§ 78u-4(b)(1), (2)).

The PSLRA's pleading standard for private securities actions essentially replaced Rule 9(b)'s heightened pleading standard for claims of fraud. The particularity requirement in Rule 9(b) "is comparable to and effectively subsumed by the requirements of ... the PSLRA." Avaya, 564 F.3d at 253 (internal quotation marks and citations omitted). Therefore, securities fraud plaintiffs must "plead the who, what, when, where and how" of the alleged fraud. Id. However, for allegations that are made on information and belief, "the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b); see also Avaya, 564 F.3d at 253 ("[W]hen allegations are made on information and belief, the complaint must not only state the allegations with factual particularity, but must also describe the sources of information with particularity, providing the who, what, when, where and how of the sources, as well as the who, what, when, where and how of the information those sources convey.").

V. Discussion

A. Legal Framework: Section 10(b), Rule 10b-5, and [*15] Section 20(a)

Section 10(b) of the Exchange Act makes it unlawful to "use or employ, in connection with the purchase or sale of any security registered on a national securities exchange ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe ...." 15 U.S.C. § 78j(b). Rule 10b-5,

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[5] The PSLRA was enacted "to curb perceived abuses of the § 10(b) private action—'nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests and manipulation by class action lawyers.'" Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 320, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (quoting Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 81, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006)). The "substantive and procedural controls" imposed by the PSLRA include procedures for the appointment of lead plaintiffs and lead counsel; limitations on damages and attorney's fees; a safe harbor for forward-looking statements; sanctions for frivolous litigation; authorization for a stay of discovery pending decision on a motion to dismiss; and additional pleading requirements. Tellabs, 551 U.S. at 320.

which was created under Section 10(b), makes it unlawful "[t]o make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." *17 C.F.R. § 240.10b-5(b)*. Stating a claim under Section 10(b) and *Rule 10b-5* requires the plaintiff to establish six elements:

(1) A material misrepresentation or omission by the defendant;
(2) Scienter;
(3) A connection between the misrepresentation or omission and the purchase or sale of a security;
(4) Reliance upon the misrepresentation or omission;
(5) Economic loss; and
(6) Loss causation.

Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 37-38, 131 S. Ct. 1309, 179 L. Ed. 2d 398 (2011).

Section 20(a) of the Exchange Act provides that "[e]very person who, directly or indirectly, controls any person liable [for a Section 10(b) violation] shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling **[*16]** person acted in good faith and did not directly or indirectly induce the act ... constituting the violation ...." *15 U.S.C. § 78t(b)*. Therefore, liability under Section 20(a) runs with liability under Section 10(b). *Avaya, 564 F.3d at 280*. If there is no liability under Section 10(b), there is no control person liability under Section 20(a). Id.

B. Statements Alleged to be False and/or Misleading

Plaintiff alleges that Recro made twenty-five false and/or misleading statements over the class period, which runs from July 17, 2017 through May 23, 2018. (Am. Compl. ¶ 1.) Plaintiff separates the allegedly false and misleading statements by the fiscal quarter in which they were made: five statements that were made during the third quarter of 2017 (July 1, 2017-September 30, 2017), (Am. Compl. ¶¶ 74-78); six statements that were made during the fourth quarter of 2017 (October 1, 2017-December 31, 2017), (Am. Compl. ¶¶ 80-85); nine statements that were made during the first quarter of 2018 (January 1, 2018-March 31, 2018), (Am. Compl. ¶¶ 87-95); and five statements that were made during the second quarter of 2018 (April 1, 2018-June 30, 2018), (Am. Compl. ¶¶ 97-101, 103.)

The Appendix to this Memorandum collects the alleged misstatements or omissions, maintaining the language emphasized **[*17]** by Plaintiff. The statements that Plaintiff alleges violate the Exchange Act can be grouped into five basic categories:[6]

• (1) **Investor Presentation Statements:** Statements in investor presentations suggesting that IV Meloxicam is suitable for use in soft-tissue procedures, (Am. Compl. ¶¶ 74, 77, 78, 81, 84, 85, 87, 88, 89, 90, 94, 95, 100, 101.)

• (2) **Sarbanes-Oxley Act (SOX) Certifications:** Certifications of mandatory disclosures (e.g., Form 10-Q and Form 10-K) pursuant to SOX, (Am. Compl. ¶¶ 75, 82, 91, 97.)

• (3) **Contract Manufacturer Statement:** One statement in Recro's 2017 10-K noting that Recro has "internal managers" overseeing manufacturing, (Am. Compl. ¶ 92.)

• (4) **Revenue Statements:** Statements in mandatory disclosures noting that the Acute Care segment does not bring in revenue and has costs associated with IV Meloxicam's clinical trials, (Am. Compl. ¶¶ 76, 83, 93, 98.)

• (5) **Investor Relations Statements:** Statements in press releases and on earnings calls suggesting that IV Meloxicam is suitable for use in soft tissue procedures, (Am. Compl. ¶¶ 80, 99.)

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[6] Although Plaintiff takes issue with two broad omissions (omissions related to the degree of oversight of foreign manufacturing and omissions related to the KOLs' concerns about the efficacy of IV Meloxicam in soft tissue procedures), the vast majority of the twenty-five misrepresentative statements deal with the latter category of omission.

Plaintiff alleges that these statements are misleading or false because they failed to disclose "that: (i) KOLs told the Company **[*18]** that the clinical data for IV [M]eloxicam did not have a sufficient analgesic effect for soft tissue procedures and should not be used in soft tissue procedures; and (ii) Recro did not have a handle on the manufacturing process for IV [M]eloxicam, even though KOLs had raised concerns about Sharr's qualifications and his lack of oversight of manufacturing." (Am. Compl. ¶¶ 79, 86, 96, 102.)

C. Judicial Notice

Plaintiff and Defendants have each requested that the Court take judicial notice of certain materials.

First, Plaintiff requests that the Court take judicial notice of a March 22, 2019 press release announcing Recro's receipt of a second CRL in which the FDA declined to approve IV Meloxicam, as well as a webcast of a conference call in which Henwood stated that "[t]he FDA did focus on the ... fact that some patients have a reduction in pain relief in the waning hours of the dosing period. We believe that the product does perform well, that it has a role, that it could be useful in multi-model analgesia. That's based on KOL feedback ...." (ECF 32, Plaintiff's Opposition at 11.) This request need not be evaluated because Defendants do not oppose the Court taking judicial notice of the **[*19]** March 22, 2019 press release. (ECF 43, Defendants' Supplemental Submission at 8-9.)

Second, Defendants request that the Court take judicial notice of a press release that was issued by Recro on October 31, 2019 announcing that "it ... received a written decision from the [FDA] granting its appeal of the [CRL] relating to the ... [NDA] seeking approval for ... IV [M]eloxicam." (ECF 44, Ex. A.) Defendants argue that the press release is "integral" to the issues in the Amended Complaint as well as the Motion to Dismiss. (ECF 44, Request for Judicial Notice at 3.) Plaintiff responds in opposition, asserting that the FDA's decision to grant Recro's appeal fifteen months after the denial is irrelevant to whether Defendants committed securities fraud violations during the class period. (ECF 45 at 1.)

A district court evaluating a motion to dismiss under *Rule 12(b)(6)* may take judicial notice of (1) exhibits attached to the complaint; (2) matters of public record; and/or (3) undisputedly authentic documents integral to or explicitly relied upon in the complaint without violating the principle that "matters extraneous to the pleadings" should not be considered. *Burlington, 114 F.3d at 1426*; see also *In re Egalet Corp. Secs. Litig., 340 F. Supp. 3d 479, 496 (E.D. Pa. 2018)* (Baylson, J.) (listing exceptions). **[*20]** Moreover, *Federal Rule of Evidence 201(b)(2)* permits courts to "judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The October 31, 2019 press release was not attached to or relied on in the Amended Complaint (indeed, the press release was not published until many months after the filing of the Amended Complaint), so the first and third exceptions do not apply. Judicial notice is only proper if the press release is a public record.

Documents approved by the Third Circuit as "public records" that may be judicially noticed include "SEC filings, published reports of administrative bodies, ... criminal case dispositions and decision letters of government agencies." *Egalet, 340 F. Supp. 3d at 496* (internal quotation marks and citations omitted). By contrast, [a]rticles published in accounting journals and law reviews, conference call transcripts, ... and company web sites ... are not 'matters of public record.'" *In re Astea Int'l Inc. Sec. Litig., Civil Action No. 06-1467, 2007 U.S. Dist. LEXIS 58238, 2007 WL 2306586, at *8 (E.D. Pa. Aug. 9, 2007)* (Yohn, J.). The key question is not accessibility, but rather whether "the public had unqualified access" to the document at issue. *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1197 (3d Cir. 1993)*.

The Court declines to take judicial notice of the October 31, 2019 press release **[*21]** regarding the FDA's grant of Recro's appeal of the CRL because this document is not within the scope of the Third Circuit's narrow construction of the "public records" exception. See *Schmidt v. Skolas, 770 F.3d 241, 249 (3d Cir. 2014)* (holding that press releases not attached to the complaint could "not be considered at the motion to dismiss stage" because the complaint was not "based" on the press releases); see also *Toner v. GEICO Ins. Co., 262 F. Supp. 3d 200, 205 n.3 (E.D. Pa. 2017)* (Slomsky, J.) (construing the public records narrowly).

D. Parties' Arguments

The Motion to Dismiss articulates six independent reasons for why the Amended Complaint should be dismissed, raising arguments under the first, second, and sixth elements. Plaintiff responds in opposition to each theory set forth by Defendants.

First, Defendants assert that Plaintiff failed to plead a materially misleading misrepresentation or omission. According to Defendants, "Plaintiff's allegations based on the opinions of KOLs ... cannot form the basis of a claim against Recro because there is no legal duty for a company to disclose the opinions of third parties." (Motion to Dismiss at 2-3.) Second, Defendants argue that many of the allegedly fraudulent statements are protected by the PSLRA's safe harbor for forward looking statements, and **[*22]** therefore are not actionable as misleading misstatements. (Id. at 3.) Third, Defendants assert that the Amended Complaint does not meet the PSLRA's specificity requirement, in part because Recro fully disclosed the facts underlying the KOLs' alleged opinions regarding the efficacy of IV Meloxicam for soft tissue procedures. (Id.) Fourth, Defendants contend that Plaintiff's allegations of scienter are insufficient to satisfy the "strong inference" standard because "Plaintiff makes no allegation that could form the basis of scienter, such as allegations relating to stock sales by Defendants or any motive of Defendants to act fraudulently." (Id.) Fifth, Defendants argue that Plaintiff fails to make any allegations regarding loss causation. (Id.) Sixth, Defendants explain that because Section 20(a) liability is derivative of Section 10(b) liability, and because there is no Section 10(b) liability, Count II should be dismissed. (Id.)

Further, Defendants' chart notes specific reason(s) why each of the twenty-five alleged misstatements do not satisfy the requirements of Section 10(b). Defendants contend that: the statements in paragraphs 74, 77, 78, 81, 84, 85, 87, 88, 89, 94, 100 of the Amended Complaint are forward-looking statements and the statements **[*23]** in paragraphs 80 and 99 are corporate puffery, so these statements are protected by the PSLRA's safe harbors; the statements in paragraphs 75, 82, 91, 97 of the Amended Complaint are disclaimers or legal conclusions; and the statements in paragraphs 76, 83, 90, 92, 93, 95, 98, 101 of the Amended Complaint do not contain an allegation of falsity (i.e., there was no misrepresentation or omission).

E. Analysis

The Court will address Defendants' arguments that (1) the opinions of the third-party KOLs were not material; (2) the Amended Complaint is devoid of scienter allegations; (3) the loss causation allegations are lacking.

Initially, the Court notes that the various statements differ in the degree to which they are misleading and/or covered by Section 10(b)—for some statements, there is no clear theory of falsity, and for others, the applicability of the PSLRA's safe harbors raise legitimate questions about actionability. This Memorandum will not engage in statement-by-statement analysis because the insufficiency of the scienter allegations applies to all of the alleged misrepresentations. Plaintiff's failure to adequately plead scienter obviates the need to assess the statements individually, because **[*24]** regardless of the Court's conclusion on falsity and the PSLRA's safe harbors, the lack of scienter is fatal.

Before reaching the scienter question, however, the Court will analyze Defendants' arguments on materiality and loss causation. Like scienter, the arguments on both of these elements apply to all of the misrepresentations.

1. Materiality of Opinions of Third-Party KOLs

Defendants argue that "[t]here is no legal duty for a company to disclose the opinions of third parties. Rather, the duty to disclose is for facts and not opinions." (Motion to Dismiss at 11.) Plaintiff responds that because Recro chose to speak on the efficacy of IV Meloxicam in soft tissue procedures and the sufficiency of Recro's oversight controls, "Defendants were bound to discuss these issues in a manner that would not mislead investors as to potentially negative information within their possession." (Plaintiff's Opposition at 20.)

Defendants contend that even if the KOLs' opinions were material, Recro's public disclosure of all of its clinical data for both hard tissue and soft tissue procedures rendered the omissions not misleading. (Defendants' Supplemental Submission at 6.) Plaintiff responds that the disclosure **[*25]** of the clinical trial data is inadequate because "[n]o matter how many times investors review the clinical trial data, they are not able to discern from such disclosures that the Company's trusted KOLs, on whom [Recro] relied, had specifically told [Recro] that IV Meloxicam should not be used in soft tissue procedures." (Plaintiff's Supplemental Submission at 9.)

The questions of whether the KOLs' opinions were material, and relatedly, whether disclosure of the data underlying the KOLs' opinions rendered the statements regarding the efficacy of IV Meloxicam for use in soft-tissue procedures not misleading, are foundational to this case. If the KOLs' opinions were not material, or if the disclosure of the clinical data rendered the alleged omissions related to soft tissue efficacy not misleading, then there is no liability under Section 10(b). The Court concludes that, in the context of the statements made by Recro regarding the potential for IV Meloxicam to be used in soft tissue procedures, the KOLs' statements would have been considered significant by the reasonable investor, and that the statements still could have been misleading despite Recro's disclosure of the clinical data.

a. The KOLs' Opinions [*26] Were Material In the Context of Recro'sStatements

There is no requirement or general duty under the Exchange Act "to provide the public with all material information." *Burlington, 114 F.3d at 1432*; see also *Matrixx, 563 U.S. 27, 45, 131 S. Ct. 1309, 179 L. Ed. 2d 398 (2011)* ("Even with respect to information that a reasonable investor might consider material, companies can control what they have to disclose ... by controlling what they say to the market."); *Basic Inc. v. Levinson, 485 U.S. 224, 239 n.17, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988)* ("Silence, absent a duty to disclose, is not misleading under *Rule 10b-5*."). However, a duty to disclose "may arise when there is insider trading, a statute requiring disclosure, or an inaccurate, incomplete or misleading prior disclosure." *Oran v. Stafford, 226 F.3d 275, 285-86 (3d Cir. 2000)*. Plaintiff does not allege that there was insider trading or required disclosure here; Plaintiff's theory is that because Recro chose to speak on IV Meloxicam's efficacy and manufacturing, it was duty-bound to do so in a way that was not misleading. Because Recro chose to make representations regarding its manufacturing process and focus on the soft tissue market, it had an obligation to ensure that those representations were not materially misleading. *17 C.F.R. § 240.10b-5(b)*; see also *Williams v. Globus Med., Inc., 869 F.3d 235, 241 (3d Cir. 2017)* ("Once a company has chosen to speak on an issue—even an issue it had no independent obligation to address—it cannot omit material facts **[*27]** related to that issue so as to make its disclosure misleading."); *In re Urban Outfitters, Inc. Sec. Litig., 103 F. Supp. 3d 635, 652 (E.D. Pa. 2015)* (Restrepo, J.) ("By specifically pointing out ... areas of [the defendant's] business activities, [the] defendants put these topics 'in play' and triggered a duty to disclose and correct" prior disclosures).

The test for securities fraud materiality is whether there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Matrixx, 563 U.S. at 38* (quoting *TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976))*. "An omitted fact is material if there is a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder." *Shapiro v. UJB Fin. Corp., 964 F.2d 272, 280 n.11 (3d Cir. 1992)* (quoting *TSC Industries, 426 U.S. at 449*).

Matrixx, the most recent Supreme Court decision to analyze Section 10(b)'s materiality requirement, is factually similar and procedurally on point. The question in Matrixx was whether the plaintiff sufficiently alleged the materiality of adverse event reports associated with the defendant's pharmaceutical product to survive the defendant's *Rule 12(b)(6)* challenge. *563 U.S. at 30*. Matrixx refused to endorse a bright line rule, concluding instead that "assessing the materiality **[*28]** of adverse event reports is a 'fact-specific' inquiry ... that requires consideration of the source, content, and context of the reports." *Id. at 43*. Applying this standard, the Supreme Court found that the plaintiff adequately pleaded materiality because the defendant represented that the product would multiply revenues, but it had received information that plausibly connected the same product to a negative effect. Id. at 47. The negative information that the company received included the reports of three medical experts summarizing cases of ten patients who experienced the side effect after using the product, and the fact that two professionals presented their findings of a causal link at a medical conference. Id. at 45.

Applying the rationale and holding of Matrixx indicates that materiality is sufficiently established for purposes of Defendants' Motion. Plaintiff pleaded that Recro spoke optimistically and positively about the use of IV Meloxicam for soft tissue uses—Recro spoke of intra-abdominal procedures (a soft tissue procedure) as a "target opportunity," (Am. Compl. ¶¶ 74, 77, 78, 81, 84, 85, 87, 88), and identified "GI/Colorectal" procedures (a soft tissue procedure) as a "core target." (Am. Compl. **[*29]** ¶¶ 81, 84, 85, 87, 88, 90, 94, 100.) Yet, according to the Amended Complaint, thirty percent of the KOLs expressed concern to Recro about the oversight of manufacturing of IV Meloxicam, and an undisclosed number of KOLs advised the company that in their view the clinical data showed that IV Meloxicam was not suited for use in soft tissue patients.

The FDA presumably used the same clinical data that the KOLs analyzed in considering Recro's NDA. Therefore, the fact that at least some of these esteemed medical professionals thought IV Meloxicam was not efficacious for soft tissue uses makes it plausible that the FDA would be concerned about efficacy as well—a fact that is highly relevant to investors, especially because IV Meloxicam is Recro's lead product. See id. at 47 (concluding materiality requirement was satisfied in large part because the defendant "had information indicating a significant risk to its leading revenue-generating product" but represented that the concerns were "completely unfounded"). Moreover, Recro did not conduct any further studies to explore the KOLs' concerns about IV Meloxicam efficacy. See id. (noting that despite evidence of a "biological link" between the product **[*30]** and a bad side effect, the company did not "conduct[] any studies of its own to disprove that link"). The parallels are clear and, as the Supreme Court did in Matrixx, this Court finds the allegations sufficient to establish materiality.

b. The Statements Could Be Misleading Despite Recro'sDisclosure of the Clinical Data Regarding IV Meloxicam

Since materiality is concerned with the "total mix" of information available to the investor, a statement or omission cannot be materially misleading "if the allegedly undisclosed facts have ... already entered the market." Anderson v. Stonemor Partners, L.P., 296 F. Supp. 3d 693, 702 (E.D. Pa. 2017) (Robreno, J.). Therefore, dismissal of a securities fraud complaint may be proper if the company adequately disclosed the information that allegedly made the statements misleading. See Winer Family Tr. v. Queen, No. Civ.A. 03-4318, 2004 U.S. Dist. LEXIS 19244, 2004 WL 2203709, at *4 (E.D. Pa. Sept. 27, 2004) (Padova, J.) ("A motion to dismiss may be granted if the company's SEC filings or other documents disclose the very information necessary to make their public statements not misleading.") (internal quotation marks and citations omitted). Two precedential Third Circuit opinions illustrate this proposition.

First, in Ieradi v. Mylan Laboratories, Inc., the Third Circuit affirmed dismissal of a securities fraud complaint where the defendant company **[*31]** disclosed the possibility of adverse agency action but did not disclose the underlying contractual documents related to the agency's investigation. 230 F.3d 594, 596 (3d Cir. 2000). In Ieradi, the defendant was under investigation by the Federal Trade Commission ("FTC") for suspected antitrust violations related to the existence of exclusive supply contracts and disclosed this fact in various SEC filings. Id. at 597. The FTC investigation resulted in the filing of civil charges, which led to a drop in the company's stock price. Id. at 597-98. A shareholder who purchased prior to the filing of the FTC's action sued alleging that "in commenting on the FTC investigation [the company] had a duty to disclose the existence and substance of its exclusive supply contracts ... so that ... reasonable investors could intelligently assess the risk that the FTC investigation would result in a civil antitrust action ...." Id. at 598-99. The Third Circuit affirmed the district court's conclusion that the failure to specifically disclose the exclusive supply contracts was not material, because the company unambiguously disclosed the fact of the FTC investigation. Id. at 599. On the question of whether disclosure of the exclusive supply contracts would have given a reasonable **[*32]** investor the ability to evaluate the risk of an FTC enforcement action, Ieradi "seriously doubt[ed] that 'the reasonable investor' possesse[d] the depth of ***antitrust law*** expertise that would allow him or her to conclude that the contracts were susceptible to successful attack under the antitrust laws." *Id. at 600*.

More recently, in Fan v. StoneMor Partners LP, the Third Circuit addressed the materiality of an alleged misrepresentation in light of the company's disclosure of "facts and information that would render the alleged misrepresentations not misleading." *927 F.3d 710, 716 (3d Cir. 2019)*. The issue in Fan was whether certain disclosures regarding the defendant's accounting practices were sufficient to render immaterial statements touting its financial health and ability to pay down a credit facility. *Id. at 715*. The defendant, which provided funeral services, was required by state law to hold a certain percentage of sales proceeds in trust until the death of the customer ("pre-need sales"). *Id. at 713*. This requirement resulted in a disparity between the defendant's overall sales and its accessible cash, because Generally Accepted Accounting Principles ("GAAP") do not permit pre-need sales to be reported as current revenue. Id. To compensate, **[*33]** the defendant issued standard GAAP financials and non-GAAP financials (which included the pre-need sales in the revenue calculation); and borrowed cash to distribute the pre-need sales to investors in the same quarter in which the sale occurred, using equity sales to pay down the borrowed cash. *Id. at 713, 714*. Fan held that the issuance of both GAAP and non-GAAP financials "render[ed] any ... perceived misstatement [regarding the fact that the defendant's distributions were not funded from operating revenue] immaterial" because they "demonstrated the mathematical reality" of the defendant's accounting practices. *Id. at 717*.

Ieradi and Fan reveal that disclosure of information that is typical to a public filing (e.g., knowledge of possible adverse agency action in Ieradi or the accounting statements in Fan) may render a company's failure to provide further disclosures immaterial. However, Ieradi's conclusion that "[k]nowledge that the FTC was engaging in an investigation ... was much more informative to the 'reasonable investor' than information pertaining to [the source of the FTC's concerns]" indicates there is a nuance to the analysis: the information that is disclosed must be accessible to the reasonable **[*34]** investor. *Ieradi, 230 F.3d at 600*.

Because of this nuance, the Court rejects Defendants' analogy to Fan. In Fan, the information that was disclosed (accounting statements) was presumably accessible to the reasonable investor who is fluent in financial metrics. By contrast, here the data that was disclosed was clinical data for the pain relief provided by IV Meloxicam in both soft tissue and hard tissue patients, which would be foreign to the average investor or anyone without a medical degree. Reviewing the clinical data "from the objective perspective of a reasonable investor," the Court is not convinced that the disclosure rendered the misrepresentations not misleading. *Fan, 927 F.3d at 716*; see also *In re Celgene Corp. Secs. Litig., Civil Action No. 18-4772, 2019 U.S. Dist. LEXIS 218141, 2019 WL 6909463, at *17 (D.N.J. Dec. 19, 2019)* (finding that defendant's failure to disclose discovery of an effect that would require further safety testing was materially misleading in light of existing disclosure of timeline for submitting NDA).

In summary, Defendants' materiality arguments do not persuade the Court. Assuming the allegations in the Amended Complaint to be true, it is "substantially likely that a reasonable investor would have viewed [the KOLs' opinions] as having significantly altered the 'total mix' of information made available." *Matrixx, 563 U.S. at 47* (internal quotation **[*35]** marks and citations omitted). The KOLs raised concerns about IV Meloxicam that could have significantly affected the likelihood of FDA approval, and because IV Meloxicam is Recro's lead product, investors would have considered the KOLs' feedback highly relevant. Recro's disclosure of the clinical data does not undermine this conclusion, because a reasonable investor cannot be expected to understand complex medical data. Plaintiff has pleaded materiality under Section 10(b).

2. Loss Causation

Defendants argue that Plaintiff has failed to adequately plead loss causation because "Plaintiff does not allege that any fraudulent statement or omission was the cause of the actual loss suffered." (Motion to Dismiss at 30.) Plaintiff responds that the drop in the price of Recro's stock following the May 24, 2018 press release establishes loss causation. (Plaintiff's Opposition at 27.) The Court concludes that because Plaintiff has adequately alleged a causal nexus between the misrepresentative omissions and the stock drop, loss causation has been pleaded.

Under the PSLRA, a securities fraud plaintiff bears "the burden of proving that the act or omission of the defendant ... caused the loss for which the plaintiff **[*36]** seeks to recover damages." *15 U.S.C. § 78u-4(b)(4)*. The PSLRA "makes clear Congress' intent to permit private securities fraud actions for recovery where, but only where, plaintiffs adequately allege and prove the traditional elements of causation and loss." *Dura, 544 U.S. at 346*. The loss causation inquiry is focused on "how directly the subject of the fraudulent statement caused the loss, and whether the resulting loss was a foreseeable outcome of the fraudulent statement." *Berckeley Inv. Grp., Ltd. v. Colkitt, 455 F.3d 195, 222 (3d Cir. 2006)*. Establishing loss causation requires that the plaintiff "demonstrate[] that the fraudulent misrepresentation actually caused the loss suffered." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 173 (3d Cir. 2001)*.

The briefing on loss causation focuses on the fact that Plaintiff's loss resulted from Recro's May 24, 2018 press release announcing the CRL denying Recro's NDA for IV Meloxicam.[7] Although Defendants may be correct that this theory would not be enough, paragraph 124 of the Amended Complaint adequately alleges loss causation.

Paragraph 124 of the Amended Complaint alleges that

> Had Plaintiff and the other members of the Class known the truth, they would not have purchased or otherwise acquired [Recro's] securities, or would not have purchased or otherwise acquired them at the inflated prices that were paid. **[*37]** At the time of the purchases ..., the true value of Recro securities was substantially lower than the prices paid by Plaintiff and the other members of the Class. The market price of Recro securities declined sharply upon public disclosure of the facts alleged ... to the injury of Plaintiff and Class members.

Thus, prior to May 24, 2018, Recro's stock price was inflated because of the company's omissions and the injury to Plaintiff was realized when the facts that were allegedly fraudulently omitted were made known. Said differently, the market price for Recro's stock reflected the information that was publicly available at the time. Before May 24, 2018, Recro's stock price was artificially high because the market did not know of the concerns that had been raised by the KOLs. If Recro had not omitted the questions raised by the KOLs regarding IV Meloxicam's manufacturing and efficacy, the market price for Recro's securities would have reflected the extent to which these concerns affected the likelihood of FDA approval. On May 24, 2018, Recro announced the FDA's denial of the NDA, and explained that the CRL was concerned that "data from ad hoc analyses and selective secondary endpoints **[*38]** suggest that the analgesic effect does not meet the expectations of the FDA." (Am. Compl. ¶ 53.) The stock price dropped upon this disclosure, causing the injury that Plaintiff complains of.

This is sufficient to establish loss causation at the motion to dismiss stage. The Third Circuit has squarely held that "where the claimed loss involves the purchase of a security at a price that is inflated due to an alleged misrepresentation, there is a sufficient causal nexus between the loss and the alleged misrepresentation to satisfy the loss causation requirement." *Semerenko v. Cendant Corp., 223 F.3d 165, 184 (3d Cir. 2000)*. Paragraph 124 fits within the scope of this holding, because it alleges that Plaintiff purchased Recro's stock at a price that was artificially inflated due to the omissions, and that Plaintiff was injured by the stock price decline when the omitted information was subsequently disclosed. In other words, because Plaintiff alleges that "the price of [Recro's] security was inflated due to [the] fraudulent [omissions]," its burden on loss causation is met. *Berckeley, 455 F.3d at 222*.

Defendants argue that Plaintiff cannot plead loss causation because "the FDA denied Recro's NDA for IV [M]eloxicam for both soft tissue and hard tissue procedures, which demonstrates **[*39]** that there was no nexus between any opinions from the alleged KOLs about clinical data relating to soft tissue procedures and the FDA's

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[7] The Court notes that there is an unsupported inferential leap in this theory of loss causation. As Plaintiff acknowledges, the stock drop occurred as a result of the FDA's denial of the NDA—not as a result of Recro's failure to publicly disclose the opinions of the KOLs. See Am. Compl. ¶ 55 ("Recro's share price was decimated as a result [of] the news [that the FDA decided to deny Recro's NDA for IV Meloxicam]."). Said differently, to make the loss causation theory that is briefed work, Plaintiff would need to connect Recro's allegedly misleading omissions to the stock drop. However, analyzing this theory in depth is unnecessary because, as discussed, Plaintiff alleges that the market price incorporated the omissions at the time of purchase.

denial of Recro's NDA relating to both soft tissue and hard tissue procedures." (Motion to Dismiss at 30.) However, because the Amended Complaint alleges that the market price for Recro stock was higher than it would have been absent the omission, the FDA's subsequent denial of approval for both uses does not defeat loss causation. The share price reflected the market's assessment of the value of Recro, which reflected the market's estimated likelihood of FDA approval for either use. Accepting all of Plaintiff's allegations as true, the omission increased the market's estimation of the likelihood of FDA approval for soft-tissue uses, and therefore the stock price. If the information had been disclosed, Plaintiff either would not have purchased or would have purchased at a lower price. In either scenario, the omission's effect on the stock price is independent of any effect that the likelihood of FDA approval for hard tissue procedure uses had on the stock price.

The Amended Complaint adequately pleads loss causation for purposes of Defendants' *Rule 12* challenge. **[*40]** However, Plaintiff will bear a heavy burden in proving this element—whether Plaintiff can ultimately establish loss causation is an entirely different question.

3. Scienter

Defendants argue that Plaintiff has not satisfied the PSLRA's "strong inference" standard for scienter allegations. (Motion to Dismiss at 25.) Plaintiff responds that the scienter requirement is satisfied because CW1 had firsthand knowledge of the views of the majority of the KOLs and provided those opinions to Recro and its management. (Plaintiff's Opposition at 24-25.)

The PSLRA requires that a securities fraud complaint plead facts that lead to a "strong inference" of scienter, *15 U.S.C. § 78u-4(b)(2)(A)*; that is, an intent "to deceive, manipulate, or defraud." *Tellabs, 551 U.S. at 313*. Scienter may include "either reckless or conscious behavior." *Avaya, 564 F.3d at 276* (quoting *In re Advanta, 180 F.3d 525, 534-35 (3d Cir. 1999))*. "A reckless statement is one involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Id. at 276 n.42* (quoting *Advanta, 180 F.3d at 535*).

In Tellabs, the Supreme Court prescribed three rules for assessing scienter on a motion **[*41]** to dismiss. "First, faced with a *Rule 12(b)(6)* motion to dismiss a § 10(b) action, courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true." *Id. at 252*. "Second, courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on *Rule 12(b)(6)* motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Id. This includes documents that are "integral to or explicitly replied upon" in the complaint. *Burlington, 114 F.3d at 1426* (quoting *Shaw v. Dig. Equip. Corp., 82 F.3d 1194, 1220 (1st Cir. 1996)* (emphasis omitted)). "Third, in determining whether the pleaded facts give rise to a 'strong' inference of scienter, the court must take into account plausible opposing inferences." Id.

The pertinent inquiry is "whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Id. at 267-268*. In assessing scienter, courts must "consider plausible, nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff." *Id. at 323, 324*. To survive dismissal, the inference **[*42]** of scienter "must be cogent and compelling, thus strong in light of other explanations." *Id. at 324*. A showing of motive and opportunity, though not an independent route to scienter, may be relevant when considered along with the other allegations in the complaint. *Avaya, 564 F.3d at 277*; see also *Frater v. Hemispherx Biopharma, Inc., 996 F. Supp. 2d 335, 349 (E.D. Pa. 2014)* (Yohn, J.) ("While allegations relating to motive and opportunity may not independently support a finding of scienter, such considerations may amplify an inference of scienter as part of the holistic information available to the court.").

Plaintiff's allegations of scienter include the following:

- Defendants "knowingly or recklessly engaged in acts, transactions, practices and courses of business which operated as a fraud and deceit," (Am. Compl. ¶ 119);

• "By virtue of their positions at Recro, Defendants had actual knowledge of the materially false and misleading statements ... or, in the alternative, Defendants acted with reckless disregard for the truth in that they failed or refused to ascertain and disclose such facts as would reveal the materially false and misleading nature of the statements made, although such facts were readily available to Defendants," (Am. Compl. ¶ 121); and

• "[E]ach Defendant knew or recklessly **[*43]** disregarded that material facts were being misrepresented or omitted," (Am. Compl. ¶ 121.)

Plaintiff points to two facts that circumstantially demonstrate Defendants acted consciously or recklessly with respect to the misleading omissions: first, that the information concerning the KOLs' concerns was exposed to Defendants by someone who later became Plaintiff's confidential source (described in the Amended Complaint as "CW1"); and second, that the alleged misstatements involved Recro's lead product. (Plaintiff's Opposition at 25.)

The Court is unpersuaded by Plaintiff's theory that CW1's disclosures to Defendants of the KOLs' concerns are sufficient to establish scienter. The Third Circuit has explained that, where the defendants' purported knowledge comes from the disclosures of a confidential source, applying the PSLRA's particularity standard to the scienter element requires the court to "evaluat[e] the 'detail provided by the confidential sources, the sources' basis of knowledge, the reliability of the sources, the corroborative nature of other facts alleged, including from other sources, the coherence and plausibility of the allegations, and similar indicia.'" *Avaya, 564 F.3d at 263* (quoting *Cal. Pub. Emps.' Ret. Sys. v. Chubb Corp., 394 F.3d 126, 147 (3d Cir. 2004))*; see also **[*44]** *In re Cigna Corp. Sec. Litig., No. Civ. A. 02-8088, 2006 U.S. Dist. LEXIS 3864, 2006 WL 263631, at *2 (E.D. Pa. Jan. 31, 2006)* (Baylson, J.) ("[E]ven if personal sources must be identified in a complaint, there is no requirement that they be explicitly named, provided they are described with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged."). The weight that confidential source allegations are given depends on the degree to which they are particularized: if the allegations are inadequate with respect to these criteria, then they may be discounted "steeply," but if they are sufficiently specific, they should not be dismissed simply because they are anonymous. *Avaya, 564 F.3d at 263*.

Here, Plaintiff's description of CW1 permits the inference that CW1 had an adequate basis for his knowledge. Plaintiff explains that "CW1 was employed at [Recro] as the Regional Medical Affairs Director from June 2017 through September 2017, and the National Director of Medical Affairs from October 2017 through May 2018. CW1 was a member of Recro's Leadership Team. He led and coordinated medical conferences attended by KOLS ... During such conferences, CW1 frequently spoke with Recro's KOLs. CW1 also travelled to KOL facilities where he personally spoke with **[*45]** Recro's KOLs." (Am. Compl. ¶ 39.) Thus, Plaintiff has "adequately described the duration of ... [CW1's] employment, the time period during which [CW1] acquired the relevant information, and how [CW1] had access to [the] information." *Avaya, 564 F.3d at 263*.

However, the allegations related to CW1's communication of that information to Defendants are insufficient to create a "strong inference" that Defendants acted with scienter.

Plaintiff alleges that CW1 reported to Defendant McCallum (Recro's CMO), and that CW1 attended Recro's Leadership Team meetings "every few weeks." (Am. Compl. ¶ 40.) These meetings were attended by, among others, Defendant McCallum and Defendant Harlow. (Am. Compl. ¶ 40). Although Defendant Henwood did not generally attend, she received reports from McCallum and Harlow. (Am. Compl. ¶ 40.) It was presumably at the Leadership Team meetings that CW1 expressed the concerns he and the Medical Affairs Team had about the manufacturing of IV Meloxicam and the efficacy of the drug in soft tissue procedures.[8] Plaintiff alleges that "CW1 ... and his Medical Affairs Team reported at meetings to [Recro's] leadership that the KOLs had concerns about ...

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[8] The Amended Complaint states that CW1 brought forth his concerns "at meetings to the Company's leadership." (Am. Compl. ¶ 42.) The Amended Complaint never explicitly states that these meetings were the same Leadership Team meetings described in paragraph 40 of the Amended Complaint. However, based on Plaintiff's representation in the opposition memorandum that CW1 "conveyed [his knowledge of the KOLs' concerns] to Defendants and other top executives at Leadership Team meetings," the Court assumes that the ambiguous "meetings" Plaintiff refers to were the Leadership Team meetings described elsewhere in the Amended Complaint. (Plaintiff's Opposition at 24 25.)

Sharr and his oversight of manufacturing in **[*46]** Ireland ... and the lack of robust data concerning IV [M]eloxicam's analgesic efficacy to convince soft tissue surgeons to use IV [M]eloxicam in soft tissue procedures." (Am. Compl. ¶ 42.) Plaintiff notes that "CW1 confirmed that [the KOLs'] concerns [regarding manufacturing] were provided to Henwood, McCallum, [and] Harlow." (Am. Compl. ¶ 67.)

The paragraphs cited above relating to CW1 do not meet the requirements of a "strong inference" of scienter because they lack many of the key requirements of particularized pleading. For example, Plaintiff merely alleges that these concerns were communicated at "Leadership Team meetings [that occurred] every few weeks"—Plaintiff does not specify when these meetings occurred, where they were held, or how often the concerns were communicated.[9] (Am. Compl. ¶ 40.)

Moreover, the Amended Complaint is deficient in describing what was conveyed to Recro and its management regarding the KOLs' concerns about IV Meloxicam's efficacy in soft tissue procedures.[10] There are two allegations that relate to the information CW1 provided to Defendants regarding the KOLs' efficacy concerns:

- "CW1 stated that he and his Medical Affairs Team reported at meetings to [Recro's] **[*47]** leadership that the KOLs had concerns about ... the lack of robust data concerning IV [M]eloxicam's analgesic efficacy to convince soft tissue surgeons to use IV [M]eloxicam in soft tissue procedures," (Am. Compl. ¶ 42); and

- "CW1 ... stated that Defendants knew that while 99.9% of KOLs were convinced that IV [M]eloxicam should be used in [hard tissue] procedures, Defendants also knew that KOLs stated that IV [M]eloxicam should not be used in soft tissue procedures because the clinical trial data for the efficacy of IV [M]eloxicam in hard tissue procedures ... was far more compelling than the clinical trial data for the drug's efficacy in soft tissue procedures," (Am. Compl. ¶ 69.)

These allegations are insufficient to establish exactly what was conveyed by CW1 to Recro and Defendants regarding the substance of the efficacy-related concerns raised by the KOLs. The extent to which the KOLs were concerned about the clinical data is unclear from the Amended Complaint. While Plaintiff alleges that "99.9% of KOLs" were convinced that IV Meloxicam was efficacious in hard tissue procedures, the Amended Complaint is silent on the percentage of Recro's 200-300 KOLs who expressed concerns **[*48]** about soft tissue efficacy. (Am. Compl. ¶ 69.) This is relevant because the more KOLs who raised questions, the more reckless a course of action that seemingly ignores these concerns; conversely, if only a small percentage of KOLs raised concerns, then Recro's representations regarding IV Meloxicam's efficacy may not have been reckless. The Court is unable to evaluate the strength of any competing inferences without understanding the specific substance of the concerns that CW1 conveyed to Recro and its leadership.

Additionally, the Amended Complaint is devoid of allegations that CW1 communicated to Recro that the KOLs' concerns about soft tissue efficacy were correlated with the likelihood of FDA approval. For example, while paragraph 61 of the Amended Complaint directly relates the KOLs' concerns regarding overseas manufacturing of

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[9] The lack of information regarding the meetings at which CW1 communicated with the KOLs is important because the statements were made over a roughly one year period starting in July 2017 and ending in May 2018. Depending on when CW1 communicated the KOLs' concerns, the confidential source information may not bear on scienter at all for statements that were made prior to CW1's disclosures.

[10] Paragraphs 61 to 64 of the Amended Complaint lay out, in detail, the concerns that the KOLs brought to CW1 regarding foreign manufacturing. For example, Plaintiff alleges "CW1 stated that approximately 30% of KOLs expressed their concern to CW1 about IV [M]eloxicam being manufactured overseas" that was based, partially, on "their experience with foreign manufacturing of drugs." (Am. Compl. ¶¶ 61, 62.) The KOLs also conveyed to CW1 concerns regarding "Recro's level and quality of oversight of the manufacturing process." (Am. Compl. ¶ 63.) The Amended Complaint then alleges that "CW1 and CW1's Medical Affairs Team reported the KOLs' concerns regarding Sharr and foreign manufacturing of IV [M]eloxicam to Recro's top leadership," (Am. Compl. ¶ 67.) This level of detail is likely sufficient to establish the "what" for purposes of scienter. However, as discussed, the allegations regarding the concerns communicated to Recro about IV Meloxicam's efficacy in soft tissue procedures were far sparser, and because efficacy is the primary theory of omission, scienter is not adequately pleaded.

IV Meloxicam to the prospect of receiving FDA approval, see Am. Compl. ¶ 61 ("When CW1 spoke to KOLs about FDA approval 'the thing that kept coming back up over and over again ... the thing they were concerned about was a potential packaging issue or manufacturing issue because the manufacturer was in Ireland'"), there is no analogous paragraph relating **[*49]** the KOLs' concerns about soft tissue efficacy to the KOLs' concerns about the likelihood of FDA approval. The fact that an undisclosed number of KOLs expressed concerns about efficacy is not enough to establish that Defendants were "either reckless or conscious" as to the alleged omissions. *Avaya, 564 F.3d at 276*.

Finally, Plaintiff's allegations related to "the who" of the scienter analysis are lacking. Plaintiff alleges that CW1 communicated the KOLs' concerns to Defendant Henwood, Defendant McCallum, and Defendant Harlow. Significantly, there is no allegation that either Defendant Celano or Defendant Lake attended the meetings at which CW1 purportedly articulated the KOLs' efficacy concerns. Therefore, since Plaintiff's primary theory of scienter appears to be CW1's disclosures, there is no basis from which to conclude that either Celano or Lake acted consciously or recklessly with respect to the omissions. To the extent that Plaintiff relies on Celano and Lake's status as high level company executives to establish their scienter, that theory is unpersuasive. Although IV Meloxicam was Recro's key product and Celano and Lake held high level positions, Plaintiff suggests no reason why these executives—who **[*50]** served in financial roles—would have been aware of the KOLs' opinions regarding clinical data. See also *Egalet, 340 F. Supp. 3d at 512* ("[K]knowledge of [drug's] prospects for FDA approval in general is different from knowledge that [the drug] would or would not receive approval ....").

The two cases cited by Plaintiff to support the theory that the confidential witness information establishes scienter are distinguishable. In Aviva Partners LLC v. Exide Technologies, the plaintiffs successfully established scienter by reference to "information obtained from and corroborated by the confidential informants." *Civil Action No. 05-3098 (MLC), 2007 U.S. Dist. LEXIS 17347, 2007 WL 789083, at *18 (D.N.J. Mar. 13, 2007)*. Because the Aviva plaintiffs alleged thirteen very specific facts that the company "encountered during the class period, which were either brought to the individual defendants' attention or such that persons in their positions would have been aware of them," a strong inference of scienter was pleaded. *Id. 2007 U.S. Dist. LEXIS 17347, [WL] at *19*. As an initial matter, Aviva is distinguishable on the basis of the amount of the defendants' knowledge—there, the plaintiffs had pleaded very specific "detail[ed]" facts that the individual defendants knew, while here, the allegations are far vaguer. *Id. 2007 U.S. Dist. LEXIS 17347, [WL] at *18*. This case is also unlike Aviva because the only source of **[*51]** Defendants' alleged knowledge of potential inefficacy in IV Meloxicam is CW1's communication of the KOLs' concern. There is no independent corroboration, and the only allegation regarding a red flag is the information conveyed by CW1.

Similarly, in the second case cited by Plaintiff, In re Viropharma Inc. Securities Litigation, the "strong inference of scienter [was] supported by [the] [p]laintiff's several confidential witnesses, and the allegations [were] supported by documentation in the [c]omplaint." *21 F. Supp. 3d 458, 473 (E.D. Pa. 2014)* (Jones II, J.) (emphasis added). There were other facts alleged in the complaint that suggested scienter (including contradiction between the defendants' private information and public statements, allegations of stock sales, and facts establishing both motive and opportunity), and the confidential witness information simply provided corroboration. *Id. at 473-74*. By contrast, here the primary theory of scienter is the information provided by CW1; it is not corroborative of an allegation of independent knowledge.

Recro's disclosure of the clinical data is also relevant to scienter because it undermines Plaintiff's position that Defendants were acting with the intent to defraud investors about the **[*52]** likelihood of IV Meloxicam receiving FDA approval, at least as to the alleged omissions regarding IV Meloxicam's efficacy. Plaintiff alleges that the concerns of Recro's KOLs regarding IV Meloxicam's efficacy in soft tissue procedures came from the clinical data. (Am. Compl. ¶ 69.) However, this very same data was disclosed in Recro's public filings. (Motion to Dismiss at 20.)

The fact that the clinical data was available and could have been analyzed by a set of KOLs or other medical professionals hired by Plaintiff suggests that Recro did not mislead the market about IV Meloxicam's efficacy. The Court is not suggesting that there was an affirmative obligation on Plaintiff to independently analyze the clinical data. Rather, the fact that Plaintiff, or any other shareholder, could have conducted their own verification process is suggestive of a lack of opportunity and possibly lack of scienter. Cf. *Rahman v. Kid Brands, Inc., 736 F.3d 237, 245 (3d Cir. 2013)* ("It also is significant that [the plaintiff] did not demonstrate that the individual defendants had a motive for their wrongful conduct ... [because the] presence [of motive] can be persuasive when conducting a holistic review of the evidence."). Without a contrary explanation, the Court **[*53]** cannot ignore the inference that the disclosure of the clinical data points to—that Defendants did not have the intent to defraud the market regarding soft tissue efficacy, because if they had, they would not have disclosed the data.

Viewed "holistically," these allegations do not suggest a strong inference of scienter. *Tellabs, 551 U.S. at 326*. Without further detail as to exactly what CW1 communicated regarding the KOLs' efficacy concerns, and to whom, and when/how often, it is impossible to evaluate the plausibility of competing inferences, such as the possibility that the percentage of KOLs who expressed concerns was insignificant, or that further clinical study would alleviate the concerns, or that reasonable KOLs differed on the efficacy question. Said differently, the Court is unable to conclude that the scienter inference is at least as compelling as any competing inference from the "whole factual picture painted by the [Amended Complaint]." *Avaya, 564 F.3d at 269*. As a result, Plaintiff has not pleaded scienter with the particularity that is required by the PSLRA.[11]

F. Section 20(a) Claims

Because Plaintiff's Section 20(a) claims depend on the existence of an underlying violation of Section 10(b), and because the Court concludes that Plaintiff has not stated a **[*54]** claim under Section 10(b), it follows that the Section 20(a) claims necessarily fail. See, e.g., *City of Edinburgh Council v. Pfizer, Inc., 754 F.3d 159, 177 (3d Cir. 2014)* ("Because the [plaintiffs] have failed to adequately plead a predicate section 10(b) violation, their section 20(a) claim must be dismissed."). Therefore, Plaintiff's Section 20(a) claims, which are asserted against all five Individual Defendants in Count II, are dismissed without prejudice.

VII. Leave to Amend

Plaintiff requests that the Court grant leave to amend if the Motion to Dismiss is granted. (Plaintiff's Opposition at 28 n.22.) The Court will grant Plaintiff leave to amend to address the deficiencies identified in this Memorandum.

Rule 15 requires that a court "freely give leave when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. The Third Circuit has made clear that leave to amend should be refused "only on the grounds of bad faith, undue delay, prejudice, or futility." *Alston v. Parker, 363 F.3d 229, 236 (3d Cir. 2004)*. Granting leave would be futile when "the complaint, as amended, would fail to state a claim upon which relief could be granted." *Burlington, 114 F.3d at 1434*. The court must apply *Rule 12(b)(6)*'s standard of legal sufficiency when analyzing futility. Id.

The Amended Complaint does not contain factual allegations that support a "strong inference" of scienter, which is why Defendants' Motion to Dismiss is granted. However, if Plaintiff can supplement **[*55]** the complaint with additional factual allegations related to scienter, it may survive another *Rule 12(b)(6)* challenge. Therefore, the Court is not convinced that amendment would be futile. Defendants contend that any amendment of the complaint would be futile because it would not "change the contents of Defendants' statements on which Plaintiff has based its claims, that all of the information purportedly omitted by Defendants was already public, or the forward-looking nature of many of the statements ...." (ECF 33, Defendants' Reply at 10.)

However, as discussed, the Amended Complaint is dismissed due to the insufficiency of the scienter allegations, and because Plaintiff may be able to adequately replead that element, it is not certain that amendment would be

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[11] The allegations related to individual scienter are insufficient, and even assuming that the Third Circuit accepted the doctrine of corporate scienter, Plaintiff has not alleged facts that fit within the scope of that doctrine. Therefore, the Court will not analyze the scienter of Recro, a corporation.

futile. See, e.g., *Utesch v. Lannett Co., Inc., 316 F. Supp. 3d 895, 907 (E.D. Pa. 2018)* (Beetlestone, J.) ("Plaintiff will be given leave to amend to address the scienter pleading deficiency.").

VIII. Conclusion

Defendants' Motion to Dismiss the Amended Complaint is granted without prejudice because the Amended Complaint does not plead a "strong inference" of scienter as required by the PSLRA. Plaintiff may file a second amended complaint within fourteen days of this Memorandum.

An appropriate order follows. **[*56]**

ORDER RE MOTION TO DISMISS AMENDED COMPLAINT

AND NOW, this 14th day of February 2020, upon consideration of Defendants' Motion to Dismiss the Amended Complaint, (ECF 31), Plaintiff's Response in Opposition, (ECF 32), Defendants' Reply, (ECF 33), and the supplemental briefing, (ECF 41 (Plaintiff's Supplemental Memorandum); ECF 43 (Defendants' Supplemental Memorandum)), and for the reasons stated in the foregoing Memorandum, it is hereby **ORDERED** that Defendants' Motion is **GRANTED** and Plaintiff's Amended Complaint is **DISMISSED** without prejudice. Plaintiff may file a second amended complaint within fourteen days of this Order.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON

United States District Judge

APPENDIX

Statements Alleged to be False And/Or Misleading			
Am. Compl. ¶	**Source of Statement**	**Date**	**Statement**
Statements Issued During Third Quarter of 2017 (July 1, 2017–September 30, 2017)			
74	Investor presentation attached to Form 8-K	July 17, 2017	*IV Meloxicam Target Opportunity* *Intra-abdominal Procedures* • Surgeons have keen interest in: Avoidance of opioids Avoidance of troughs in existing non-opioid pain med options • *If approved, could answer needs through:* *Relief of moderate to severe pain over 24 hours* Hospital Outpatient & Ambulatory Surgical Settings *Target Strategy – GI* and Orthopedic *Surgeons* Hospital Outpatient Facilities Top 426 facilities equal 50% • *4,100 facilities with targeted GI &* Ortho (CPTs) *procedures* Ambulatory Surgical Centers Top 300 • *2,000 facilities with targeted GI &* Ortho *procedures*
75	Form 10-Q	Aug. 11, 2017	Certification that the Q2 2017 10-Q *"does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report."*
76	Form 10-Q	Aug. 11, 2017	Our Acute Care segment is primarily focused on developing innovative products for commercialization in hospital and other acute care settings. Our lead product candidate, IV meloxicam, has successfully completed two pivotal Phase III clinical trials, a large Phase III safety trial and other safety studies for the management of moderate to severe pain. Overall, we enrolled a total of approximately 1,100 patients in our Phase III program. At the end of July 2017, we submitted an NDA to the FDA for IV meloxicam 30mg for the management of moderate to severe pain. The FDA has a 60-day filing review period to determine whether the NDA is complete and acceptable for filing. *Our Acute Care segment*

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			has no revenue and our costs consist primarily of expenses incurred in conducting our clinical trials and preclinical studies, manufacturing scale-up, regulatory activities, initial pre-commercialization of meloxicam and personnel costs.
77	Investor presentation attached to Form 8-K	Aug. 17, 2017	*IV Meloxicam Target Opportunity* *Intra-abdominal Procedures* • Surgeons have keen interest in: Avoidance of opioids Avoidance of troughs in existing non-opioid pain med options • *If approved, could answer needs through:* *Relief of moderate to severe pain over 24 hours* *Reducing LOS* [length of stay]
78	Investor presentation attached to Form 8-K	Sept. 19, 2017	*IV Meloxicam Target Opportunity* *Intra-abdominal Procedures* • Surgeons have keen interest in: Avoidance of opioids Avoidance of troughs in existing non-opioid pain med options • *If approved, could answer needs through:* *Relief of moderate to severe pain over 24 hours* *Reducing LOS* [length of stay]
Statements Issued During Fourth Quarter of 2017 (October 1, 2017–December 31, 2017)			
80	Press Release	Oct. 10, 2017	MALVERN, Pa., Oct. 10, 2017 (GLOBE NEWSWIRE) -- Recro Pharma, Inc. (Nasdaq:REPH), a revenue generating specialty pharmaceutical company focused on therapeutics for hospital and other acute care settings, today announced an oral presentation highlighting clinical efficacy data from its Phase III study evaluating intravenous (IV) meloxicam 30mg for the treatment of acute postoperative pain in patients following abdominoplasty surgery. The poster was presented at Plastic Surgery The Meeting 2017, hosted by the American Society of Plastic Surgeons (ASPS), taking place October 6-10, 2017, in Orlando, FL. The poster, which was selected as a "Top 6" of the meeting, describes the clinical performance of IV meloxicam 30mg, including achievement of the study's primary endpoint, a statistically significant difference in Summed Pain Intensity Difference (SPID) over the first 24 hours (SPID24) compared to placebo, along with detailed secondary endpoints. "The Phase III results presented this year at Plastic Surgery The Meeting demonstrate the efficacy of IV meloxicam 30mg, including significant reductions in pain, as evidenced by SPID24, meaningful reductions in opioid rescue use and improvements across numerous other pain relief metrics," said Stewart McCallum, M.D., F.A.C.S., Chief Medical Officer of Recro Pharma and co-author of the poster. "On the safety front, IV meloxicam 30mg continues to demonstrate a favorable safety and tolerability profile with a low incidence of adverse events (AEs), serious AEs and infusion events. ***We believe these results demonstrate IV meloxicam 30mg's ability to provide rapid and durable pain relief following abdominoplasty surgery and support its potential to be an attractive non-opioid alternative for physicians and patients for the treatment of acute, postoperative pain.***"
81	Investor presentation attached to Form 8-K	Oct. 11, 2017	*IV Meloxicam Target Opportunity* *Intra-abdominal Procedures* • Surgeons have keen interest in: Avoidance of opioids Avoidance of troughs in existing non-opioid pain med options • *If approved, could answer needs through:* *Relief of moderate to severe pain over 24 hours* *Reducing LOS* [length of stay] *** *Targeted Accounts Cover ~12.6M Patients Across All Settings Of Care* *Core Target Procedures* Orthopedic (Hip/Knee, Spine other) General Surgery *GI/Colorectal*
82	Form 10-Q	Nov. 9, 2017	Certification that the Q3 2017 10-Q ***"does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report."***
83	Form 10-Q	Nov. 9, 2017	Our Acute Care Segment is primarily focused on developing innovative products for commercialization in hospital and other acute care settings. Our lead product candidate, IV meloxicam, has successfully completed two pivotal Phase III clinical trials, a large Phase III safety trial and other safety studies for the management of moderate to severe pain. Overall, we enrolled a total of approximately 1,100 patients in our Phase III program. At the end of July 2017, we submitted an NDA to the FDA for IV meloxicam 30mg for the management of moderate to severe pain. The FDA has accepted the NDA for review and set a PDUFA date of May 26, 2018. ***Our Acute Care segment has no revenue and our costs consist primarily of expenses incurred in conducting our clinical trials and preclinical studies, manufacturing scale-up, regulatory activities, initial pre-commercialization of meloxicam and personnel costs.***
84	Investor presentation attached to	Nov. 14, 2017	*IV Meloxicam Target Opportunity* *Intra-abdominal Procedures* • Surgeons have keen interest in:

	Form 8-K		Avoidance of opioids Avoidance of troughs in existing non-opioid pain med options • *If approved, could answer needs through:* *Relief of moderate to severe pain over 24 hours* ***Reducing LOS* [length of stay]** *** *Targeted Accounts Cover ~12.6M Patients Across All Settings Of Care* *Core Target Procedures* Orthopedic (Hip/Knee, Spine other) General Surgery *GI/Colorectal*
85	Investor presentation attached to Form 8-K	Nov. 28, 2017	*IV Meloxicam Target Opportunity* *Intra-abdominal Procedures* • Surgeons have keen interest in: Avoidance of opioids Avoidance of troughs in existing non-opioid pain med options • *If approved, could answer needs through:* *Relief of moderate to severe pain over 24 hours* ***Reducing LOS* [length of stay]** *** *Targeted Accounts Cover ~12.6M Patients Across All Settings Of Care* *Core Target Procedures* Orthopedic (Hip/Knee, Spine other) General Surgery *GI/Colorectal*
Statements Issued During First Quarter of 2018 (January 1, 2018–March 31, 2018)			
87	Investor presentation attached to Form 8-K	Jan. 8, 2018	*IV Meloxicam Target Opportunity* *Intra-abdominal Procedures* • Surgeons have keen interest in: Avoidance of opioids Avoidance of troughs in existing non-opioid pain med options • *If approved, could answer needs through:* *Relief of moderate to severe pain over 24 hours* ***Reducing LOS* [length of stay]**
			*** *Targeted Accounts Cover ~12.6M Patients Across All Settings Of Care* *Core Target Procedures* Orthopedic (Hip/Knee, Spine other) General Surgery *GI/Colorectal*
88	Investor presentation attached to Form 8-K	Feb. 7, 2018	*IV Meloxicam Target Opportunity* *Intra-abdominal Procedures* • Surgeons have keen interest in: Avoidance of opioids Avoidance of troughs in existing non-opioid pain med options • *If approved, could answer needs through:* *Relief of moderate to severe pain over 24 hours* ***Reducing LOS* [length of stay]** *** *Targeted Accounts Cover ~12.6M Patients Across All Settings Of Care* *Core Target Procedures* Orthopedic (Hip/Knee, Spine other) General Surgery *GI/Colorectal*
89	Investor presentation attached to Form 8-K	Feb. 7, 2018	Statement in regard to "*Defining Our Market*" that there is a "*Large Addressable Patient Opportunity*" *of "29 Million Patients" for "addressable procedures where [the] greatest IV meloxicam use is anticipated.*" It is anticipated that *"17%"* of these 29 million patients will have *"core procedures"* by *"gastrointestinal/colorectal surgeons"* involving the *"belly [and] bowel"*.
90	Investor presentation attached to Form 8-K	Feb. 7, 2018	Statement in sections titled "What We Have Learned: Market Research Feedback on Clinical Profile" and "IV Meloxicam Receptivity: Anticipated Usage" that *"In multiple market research surveys, the majority of HCP [health care professionals] surveyed said they would accept IV Meloxicam as a valuable addition upon approval to multimodal pain-management protocols. They estimated they would use the product in ~30% of their surgical cases."* The presentation also stated that *"core target procedures"* include *"GI/Colorectal"*.
91	Form 10-K	Mar. 2, 2018	Certification that the 2017 10-K *"does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report."*
92	Form 10-K	Mar. 2, 2018	Manufacturing and Supply of our Acute Care Product Candidates *We currently rely on contract manufacturers to produce drug product for our clinical studies under cGMPs [Current Good Manufacturing Practice regulations enforced by the FDA], with oversight by*

			our internal managers. We plan to continue to rely on contract manufacturers to manufacture development quantities of our product candidates, as well as commercial quantities of our product candidates, if and when approved for marketing by the FDA. We currently rely on a single manufacturer for the clinical supplies of our drug product for each of our product candidates and do not currently have agreements in place for redundant supply or a second source for any of our product candidates ….
93	Form 10-K	Mar. 2, 2018	Our Acute Care segment is primarily focused on developing innovative products for commercialization in hospital and other acute care settings. Our lead product candidate, IV meloxicam, has successfully completed three Phase III clinical trials, two pivotal efficacy trials, large double-blind Phase III safety trial and other safety studies for the management of moderate to severe pain. Overall, the total NDA program included over 1,400 patients. At the end of July 2017, we submitted an NDA to the FDA for IV meloxicam 30mg for the management of moderate to severe pain. The FDA has accepted the NDA for review and set a PDUFA date of May 26, 2018. ***Our Acute Care segment has no revenue and our costs consist primarily of expenses incurred in conducting our clinical trials and preclinical studies, manufacturing scale-up, regulatory activities, pre-commercialization of meloxicam and personnel costs.***
94	Investor presentation attached to Form 8-K	Mar. 9, 2018	Statement in regard to "***Defining Our Market***" that there is a "***Large Addressable Patient Opportunity***" of "***29 Million Patients***" for "***addressable procedures where [the] greatest IV meloxicam use is anticipated.***" It is anticipated that "***17%***" of these 29 million patients will have "***core procedures***" by "***gastrointestinal/colorectal surgeons***" involving the "***belly [and] bowel***". The presentation also stated that "***core target procedures***" include "***GI/Colorectal***".
95	Investor presentation attached to Form 8-K	Mar. 9, 2018	Statement with respect to "IV Meloxicam Receptivity: Anticipated Usage" that "***In multiple market research surveys, the majority of HCP [health care professionals] surveyed said they would accept IV Meloxicam as a valuable addition upon approval to multimodal pain-management protocols. They estimated they would use the product in ~30% of their surgical cases.***"
Statements During Second Quarter of 2018 (April 1, 2018–June 30, 2018)			
97	Form 10-Q	May 9, 2018	Certification that the Q1 2018 10-Q "***does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report.***"
98	Form 10-Q	May 9, 2018	Our Acute Care segment is primarily focused on developing and commercializing innovative products for hospital and related acute care settings. Our lead product candidate is a proprietary injectable form of meloxicam, a long-acting preferential COX-2 inhibitor. IV meloxicam has successfully completed three Phase III clinical trials for the management of moderate to severe pain, consisting of two pivotal efficacy trials and a large double-blind Phase III safety trial, as well as other safety studies. Overall, the total new drug application, or NDA, program included over 1,400 patients. In late July 2017, we submitted a NDA to the U.S. Food and Drug Administration, or FDA, for IV meloxicam 30mg for the management of moderate to severe pain. The FDA has accepted the NDA for review and set a date for decision on the NDA under the Prescription Drug User Fee Act, or PDUFA, of May 26, 2018. ***Our Acute Care segment has no revenue and our costs consist primarily of expenses incurred in conducting our clinical trials and preclinical studies, manufacturing scale-up, regulatory activities, pre-commercialization of meloxicam and personnel costs.***
99	Statement during earnings call	May 9, 2018	Given the increasing urgency of the national opioid crisis, we believe IV meloxicam has to potential to serve as a valuable analgesic alternative for healthcare institutions, physicians and patients. ***We believe, we've identified clear addressable segments of the market, that will benefit from IV meloxicam's profile. Segments in which we believe, IV meloxicam's profile provides both clinical and economic value.*** From a clinical standpoint, we believe IV meloxicam can effectively treat pain, while reducing opioid consumption, which reduced opioid related adverse events. From an economic standpoint, we believe IV meloxicam's durable 24-hour dosing profile will allow ambulatory surgical centers to perform more complex procedures with same date discharge, while managing pain. And hospitals to accelerate patients discharge and reduce length of stay through reduction of opioids. ***A pillar of our strategy is identifying the key surgeons specifically*** orthopedic surgeons, general surgeons and ***GI colorectal surgeons. The procedures conducted by these surgeons represent a primary opportunity both in ambulatory surgical centers and in hospitals.***
100	Investor presentation attached to Form 8-K	May 10, 2018	Statement in regard to "***Defining Our Market***" that there is a "***Large Addressable Patient Opportunity***" of "***29 Million Patients***" for "***addressable procedures where [the] greatest IV meloxicam use is anticipated.***" It is anticipated that "***17%***" of these 29 million patients will have "***core procedures***" by "***gastrointestinal/colorectal surgeons***" involving the "***belly [and] bowel***". The presentation also stated that "***core target procedures***" include "***GI/Colorectal***".
101	Investor presentation attached to Form 8-K	May 10, 2018	Statement with respect to "IV Meloxicam Receptivity: Anticipated Usage" that "***In multiple market research surveys, the majority of HCP [health care professionals] surveyed said they would accept IV Meloxicam as a valuable addition upon approval to multimodal pain-management protocols. They estimated they would use the product in ~30% of their surgical cases.***"

Atakapa Indian De Creole Nation v. Louisiana

United States District Court for the Middle District of Louisiana

February 14, 2020, Decided; February 14, 2020, Filed

CIVIL ACTION NO. 19-28-SDD-EWD

Reporter
2020 U.S. Dist. LEXIS 57497 *; 2020 WL 1539856

ATAKAPA INDIAN DE CREOLE NATION VERSUS LOUISIANA, THROUGH THE GOVERNOR'S OFFICE OF INDIAN AFFAIRS, ET AL.

Subsequent History: Adopted by, Motion denied by, Dismissed by *Atakapa Indian De Creole Nation v. Trump, 2020 U.S. Dist. LEXIS 56081 (M.D. La., Mar. 31, 2020)*

Prior History: *Atakapa Indian De Creole Nation v. Edwards, 2019 U.S. Dist. LEXIS 8485 (M.D. La., Jan. 17, 2019)*

Core Terms

plaintiff's claim, motion for leave, frivolous claim, frivolous, proposed amended complaint, amended complaint, sanctions

Counsel: **[*1]** For Atakapa Indian de Creole Nation, Plaintiff: Edward Moses, Jr., LEAD ATTORNEY, Moses Law Firm, Baton Rouge, LA.

Judges: ERIN WILDER-DOOMES, UNITED STATES MAGISTRATE JUDGE.

Opinion by: ERIN WILDER-DOOMES

Opinion

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Before the Court is the Original Complaint[1] and Second Motion for Leave to File Supplemental and Amended Complaint,[2] filed by Edward Moses[3] ("Plaintiff"), individually and on behalf of the Atakapa Indian de Creole Nation ("Atakapa"). Following a hearing held pursuant to *Spears v. McCotter*,[4] and for the reasons set forth herein, the

[1] R. Doc. 1-2.

[2] R. Doc. 12.

[3] Throughout the pleadings, Plaintiff refers to himself as: "the CHRISTIAN EMPEROR D'ORLEANS," "his Majesty," and "the Trust Protector of the American-l'iberian Indian Tribe of Moses." *See, e.g.*, R. Doc. 1-2, pp. 1, 4, 46, 56-57.

[4] *766 F.2d 179 (5th Cir. 1985)*.

undersigned RECOMMENDS that Plaintiff's suit be dismissed with prejudice. Plaintiff's Motion for Leave to File Supplemental and Amended Complaint is denied.[5]

I. Background

On January 15, 2019, Plaintiff filed an Application for Emergency Temporary Restraining Order ("TRO") and Injunction[6] and Application for Writ of Habeas Corpus with Verified Complaint ("Complaint"), which allege violations of federal law, purportedly giving rise to federal question jurisdiction under *28 U.S.C. § 1331*.[7] Plaintiff's request for TRO and injunction were denied (the "January 17 Ruling).[8] On referral,[9] the undersigned held a hearing on January 29, 2019 to determine **[*2]** if this proceeding established grounds for habeas relief. Plaintiff appeared at the hearing and presented argument. Since Plaintiff failed to show that the Complaint established grounds for habeas relief, the matter was reclassified as seeking declaratory and injunctive relief. As a result, Plaintiff was ordered to either pay the required civil filing fee or seek leave to proceed *in forma pauperis.*[10]

Just prior to the January 29, 2019 hearing, Plaintiff filed his First Motion for Leave of Court to File Amended and Supplemental Complaint.[11] The proposed amended complaint was not comprehensive, and the undersigned explained to Plaintiff at the hearing that the First Motion for Leave was denied on that basis. Plaintiff was also advised that his allegations in the proposed amended complaint, which were intended to address the deficiencies noted in the January 17 Ruling with respect to the Court's exercise of personal jurisdiction over many of the defendants and subject matter jurisdiction, were still inadequate. Plaintiff was instructed to file a concise, comprehensive proposed amended complaint in compliance with *Fed. R. Civ. P. 8(a)*.[12]

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[5] A motion for leave to amend is not among the motions expressly excluded from direct ruling by a magistrate judge under *28 U.S.C. § 636(b)(1)(A)*. Further, although the Fifth Circuit has not ruled on the issue, the weight of authority appears to be that motions for leave to amend are generally considered nondispositive in nature. *See, e.g., Bona Fide Demolition and Recovery, LLC v. Crosby Construction Co. of La., Inc., 07-3115, 2010 U.S. Dist. LEXIS 111782, 2010 WL 4176858, *1 (E.D. La. Oct. 20, 2010)*(collecting cases). Accordingly, the undersigned issues a Ruling on the Motion for Leave.

[6] R. Doc. 1.

[7] Although the Complaint purports to be verified by an affidavit wherein a "Notary Public" avers that Plaintiff personally appeared before the Notary, and after being duly sworn, stated: "That he is petitioner in the above and foregoing petition and that all of the allegations of fact contained therein are verified, true, and correct to the best of his information, knowledge and belief," the affidavit appears invalid because the Notary's signature is illegible, there is no notary stamp or seal, no notary number, and no identification of the state and parish/county under which the Notary is commissioned. *See* R. Doc. 1-2, p. 1. To the extent the affidavit does not attest that it is based on Plaintiff's personal knowledge, it also appears substantively deficient. *Charbonnet v. Malveaux, No. 15-799, 2017 U.S. Dist. LEXIS 25863, 2017 WL 740337 (M.D. La. Feb. 24, 2017) at *1* (to meet the *Fed. R. Civ. P. 56* standards for affidavits, verification must be based on an affiant's personal knowledge, and verification based on "knowledge, information and belief" is insufficient) (*quoting* ***Fowler v. S. Bell Tel. & Tel. Co., 343 F.2d 150, 154 (5th Cir. 1965))***.

[8] R. Doc. 1. As more fully set forth in the January 17, 2019 Ruling at R. Doc. 4, the Court denied Plaintiff's application for a TRO and injunction because Plaintiff failed to satisfy the four factors set forth in *Planned Parenthood Ass'n of Hidalgo Cnty. Tex., Inc. v. Suehs, 692 F.3d 343, 348 (5th Cir. 2012)* (citations omitted) and the two requirements of *Fed. R. Civ. P. 65(b)(1)*.

[9] R. Doc. 4.

[10] R. Doc. 8.

[11] R. Doc. 7.

[12] R. Doc. 8.

On March 1, 2019, Plaintiff filed a motion to proceed *in forma pauperis* ***[*3]*** , which was granted and a hearing set pursuant to *Spears v. McCotter*[13] ("*Spears* hearing") to determine if any or all of Plaintiff's claims were frivolous and subject to dismissal.[14] Just prior to the scheduled *Spears* hearing, Plaintiff filed his Second Motion for Leave of Court to File Amended and Supplemental Complaint ("Motion for Leave"), which included a 138-page proposed Amended Complaint ("Amended Complaint"), that reiterated many of the same claims asserted in the original Complaint.[15] The Amended Complaint also added claims for declaratory judgment and quiet title, among others, and again attempted to address the jurisdictional deficiencies. At the *Spears* hearing, Plaintiff presented argument regarding the basis for his claims. At the conclusion of the hearing, Plaintiff was advised that a report would be issued with the undersigned's recommendation as to whether Plaintiff's claims should be allowed to proceed.

II. Law and Analysis

Plaintiff, a Louisiana-licensed attorney, who (as the Fifth Circuit also found) styles himself as both a monarch and a deity, brings claims on his own behalf and on behalf of the Atakapa tribe. Plaintiff's original Complaint named approximately 180 local, **[*4]** national, and international individual and corporate defendants, including, for example: Mayor of Baton Rouge Sharon Weston Broome, Governor of Louisiana John Bel Edwards,[16] President of the United States Donald Trump, then Prime Minister of the United Kingdom Theresa May, the Crown Prince of Saudi Arabia, and Pope Francis, as well as Microsoft Corporation, Burger King, the Bank of China, and Facebook Inc.[17] (all collectively referred to herein as "Defendants"). Against these numerous Defendants, Plaintiff makes various, and often incomprehensible, allegations in his Complaint and proposed Amended Complaint on behalf of the Atakapa as its "Trust Protector"[18] including, without limitation, claims for tribal recognition[19] and a *Fed. R. Civ. P. 23* class action based upon Defendants' alleged global and "intergalactic" conspiracy to restrain trade in order to manipulate foreign currency rates on the foreign exchange market in violation of *Section 1 of the Sherman Act*, *15 U.S.C. § 1 et seq.*[20][21] Louisiana's ***antitrust law***, *La. R.S. 51:122 et seq.*, [22] and the *Civil Rights Act of 1871, 42 U.S.C. § 1983*.[23]

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[13] *766 F.2d 179 (5th Cir. 1985)*.

[14] R. Doc. 11.

[15] R. Docs. 12 and 12-2. The Motion for Leave was referred to the undersigned.

[16] The defendants domiciled in Louisiana defeat diversity jurisdiction under *28 U.S.C. § 1332*.

[17] R. Doc. 1-2, pp. 4-26.

[18] *Id.* at pp. 4, 56.

[19] R. Doc. 1-2, pp. 56, 59, 61, 63-71.

[20] R. Doc. 1-2, pp. 3, 27-30, 47-48, *citing 15 U.S.C. § 1*. *See also* Plaintiff's discussion of "spot FX trade[s]," and "State Street Rules for WM/Reuters Rates" at R. Doc. 1-2, pp. 36-45, which purports to set forth the basis for Plaintiff's conspiracy claim alleging the manipulation of foreign exchange rates and governmental investigations thereof.

[21] Plaintiff sets forth a lengthy recitation of the alleged historical treatment of the Atakapa, the Freedman's Bank, the Compromise of 1877, the production of currency by the U.S. Dept. of the Treasury's Bureau of Engraving and Printing, and other matters. *See* R. Doc. 1-2, pp. 30-36. In connection with these statements, Plaintiff references the "Violation of Human Rights of [unspecified] American Aboriginals," the "Violation of *Civil Rights Act of 1871*..." and an "Essential Facilities" claim, but Plaintiff does not assert specific factual allegations alleging particularized harm in support of these claims. Rather, Plaintiff refers to these matters in order to explain the "urgency" for judicial action.

[22] R. Doc. 1-2, pp. 49-50, *citing La. R.S. 51:122*. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in this state is illegal."

A. The Fifth Circuit Previously Dismissed Plaintiff's Claims As Frivolous

In the January 17, 2019 Ruling, this Court specifically noted that Plaintiff previously **[*5]** asserted similar claims in the United States District Court for the Western District of Louisiana ("Western District").[24] The Western District ultimately disposed of all of Plaintiff's claims as precluded on sovereign immunity grounds.[25] Plaintiff appealed the various rulings in the Western District case disposing of his claims and motions, including motions for leave to file amended complaints and an application for a temporary restraining order,[26] to the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit").[27]

On December 10, 2019, the Fifth Circuit affirmed the Western District's rulings on the alternate basis that "plaintiff's claims are frivolous and the district court lacked jurisdiction to entertain them."[28] Noting that Plaintiff's claims are "based on a gumbo of federal and state laws, including eighteenth-century federal treaties with France and Spain, as well as sources such as the 'Pactum De Singularis Caelum, [or] the Covenant of One Heaven,'" the Fifth Circuit held that, while the Western District dismissed on sovereign immunity grounds, "it need not go that far" to resolve **[*6]** the appeal because Plaintiff's claims were "entirely frivolous" such that the lower court lacked power to entertain them. According to the Fifth Circuit:

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[23] *Id., citing* *42 U.S.C. § 1983*. Plaintiff's Complaint vaguely references additional claims. For example, Plaintiff also refers to "Trademark Infringement—Temporary Restraining Order" and "Fraud." R. Doc. 1-2, p. 51. However, Plaintiff has not asserted a claim for relief for any particular or actual trademark infringement or fraud in his Complaint, and the Court has already denied Plaintiff's application for a TRO. R. Doc. 4. Rather, Plaintiff only vaguely alleges that he owns the mark "and that he may be entitled to a TRO and injunction if anyone commences use of such mark in the future. Plaintiff also vaguely claims that the federal and state governments know that the Atakapa are indigenous peoples, and that the "transfer" of the Atakapa "into United States Citizenship, Louisiana Residency, or ward and under false names such as African-American, Colored, Black or negroes" was necessarily a fraud. R. Doc. 1-2, pp. 51-52.

[24] R. Doc. 4, p. 9, *citing Atakapa Indian de Creole Nation v. State of Louisiana et al*, No. 18-0190 (W.D. La. Feb. 14, 2018) and specifically, Judge Patrick Hanna's Report and Recommendation at *No. 18-0190, 2018 U.S. Dist. LEXIS 149544, 2018 WL 4222830 at *1 (W.D. La. July 23, 2019)*, *adopted* at *2018 U.S. Dist. LEXIS 149299, 2018 WL 4089385 (W.D. La. Aug. 27, 2018)*. Like this case, Plaintiff initiated proceedings in the Western District by filing a Petition for Writ of Habeas Corpus.

[25] *See* *No. 18-0190, 2018 U.S. Dist. LEXIS 149299, 2018 WL 4089385 (W.D. La. Aug. 27, 2018)* (adopting Report and Recommendation recommending dismissal of all of Plaintiff's claims for lack of subject matter jurisdiction due to the application of sovereign immunity); *No. 18-0190, 2019 U.S. Dist. LEXIS 5789, 2019 WL 660558, at *1 (W.D. La. Jan. 11, 2019)* (denying subsequently-filed application for TRO at R. Doc. 52 because Plaintiff "clearly failed to satisfy the first factor" for temporary injunctive relief, *i.e.*, a substantial likelihood of success on the merits); No. 18-0190, at R. Doc. 58, denying Plaintiff's Motion for Reconsideration/Motion for New Trial of the August 27, 2018 Ruling dismissing Plaintiff's claims with prejudice and also denying two motions for leave to amend complaint. Then, on March 5, 2019, monetary sanctions were imposed on Plaintiff for violating *Fed. R. Civ. P. 11* when Plaintiff based his application for a TRO on the same frivolous claims that had already rejected in the August 27, 2018 Ruling. *No. 18-0190, 2019 U.S. Dist. LEXIS 35596, 2019 WL 1050405, at **1-2 (W.D. La. Mar. 5, 2019)*.

[26] *Compare* R. Doc. 1 herein *with* R. Doc. 52 in No. 18-0190 (W.D. La.), which were filed 7 days apart on January 15, 2019 and January 8, 2019, respectively.

[27] *No. 18-0190, R. Doc. 57, 2019 U.S. Dist. LEXIS 5789 (W.D. La. Jan. 11, 2019)* (Notice of Appeal of Order denying TRO and injunctions) and R. Docs. 61-62 (W.D. La. Jan. 30, 2019) (Notice of Appeal and Amended Notice of Appeal on Judgment on Report and Recommendations, Order on Motion to Dismiss, and Orders on Motions to Amend and for New Trial).

[28] *Atakapa Indian de Creole Nation v. Louisiana, 943 F.3d 1004, 1005 (5th Cir. 2019)* *citing* *Southpark Square Ltd. v. City of Jackson, Miss., 565 F.2d 338, 344 (5th Cir. 1977)* ("We hold that the district court was without power to entertain this federal question case otherwise within its jurisdiction because the claim asserted is 'so attenuated and unsubstantial as to be absolutely devoid of merit'. *Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579, 24 S.Ct. 553, 557, 48 L.Ed. 795 (1904)*. Lacking jurisdiction, the district court should have dismissed the action. *Fed.R.Civ.P. 12(h)(3)*.")

> Some claims are "so insubstantial, implausible, ... or otherwise completely devoid of merit as not to involve a federal controversy." *See* Oneida Indian Nation of N.Y. v. Oneida Cty., 414 U.S. 661, 666, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). Federal courts lack power to entertain these "wholly insubstantial and frivolous" claims. Southpark Square, 565 F.2d at 343-44. Determining whether a claim is "wholly insubstantial and frivolous" requires asking whether it is "obviously without merit" or whether the claim's "unsoundness so clearly results from the previous decisions of (the Supreme Court) as to foreclose the subject." Id. at 342.
>
> Unsurprisingly, we can find no Supreme Court precedent controlling or even addressing the plaintiff's exotic claims. We must therefore ask: are the claims "obviously without merit"? We say yes.
>
> The pleadings speak for themselves....[29]

In finding that Plaintiff's claims were frivolous, the Fifth Circuit considered the following: Plaintiff's references to himself as "his Majesty," "[T]he Christian King de Orleans," "[T]he God of the Earth Realm," the "Trust Protector of the American Indian Tribe of Moses," and by using the following Hebrew script "משה," all **[*7]** of which Plaintiff has used in this case.[30] The Fifth Circuit also considered Plaintiff's "bizarre" claims, including, for example, Plaintiff's allegations that the Atakapa are being held in "pupilage" by the United States and as "wards" of Louisiana, and that the United States and Louisiana seek to monopolize "intergalactic foreign trade," which Plaintiff has likewise asserted herein.[31] Next, the Fifth Circuit considered the relief sought, including for example, a "declaration of rights guaranteed ... by the 1795 Spanish Treaty with the Catholic Majesty of Spain and the 1800 French Treaty with the former Christian Majesty of France," which Plaintiff also references herein, [32] as well as the defendants Plaintiff named, *e.g.*, Secretary of the Interior Ryan Zinke, then Attorney General Jeff Sessions, King Felipe VI of Spain, Prime Minister Justin Trudeau of Canada, President Emmanuel Macron of France, Chancellor Angela Merkel of Germany, then Prime Minister Theresa May of the United Kingdom and Pope Francis, also named as defendants in this case.[33] The Fifth Circuit declined "to decipher what any of this means" because to do so "might suggest that these arguments have some colorable merit."[34] **[*8]** Instead, that Court held that federal question jurisdiction did not exist because Plaintiff did not present any non- frivolous claims based on the violation of federal law and, to the extent Plaintiff tried to assert various antitrust violations, such as the ones cited in this proceeding, Plaintiff so completely failed to allege any colorable basis for such violations that the courts should not have to adjudicate the claims.[35]

For the same reasons all of Plaintiff's claims asserted in this case, individually and on behalf of the Atakapa, are completely devoid of merit and should be dismissed. Likewise, the Motion for Leave,[36] which seeks to add additional frivolous claims similar to the ones already asserted, is denied.[37]

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[29] 943 F.3d 1004 at 1006.

[30] 943 F.3d 1004 at 1006 *and see* R. Doc. 1-2, pp. 1, 4, 52, and R. Doc. 12-4, pp. 23-24.

[31] Id. at 1006-07 *and see* R. Doc. 1, pp. 7-8, R. Doc. 1-2, pp. 28, 30-33, 56, and R. Doc. 12-2, p. 16.

[32] Id. at 1006 *and see* R. Doc. 1, p. 6-7, 31 and R. Doc. 12-4, pp. 14, 126.

[33] Id. at 1007 *and see* R. Doc. 1-2, pp. 5-6 and R. Doc. 12-4, p. 25.

[34] Id. at 1007.

[35] *Id.*

[36] R. Doc. 12. Plaintiff's Motion for Leave also failed to comply with the Court's Order for Plaintiff to file a concise and focused proposed Amended Complaint that complies with Fed. R. Civ. P. 8. *See* R. Doc. 8.

[37] *And see, e.g.,* Kjellvander v. Citicorp, No. 93-2665, 156 F.R.D. 138, 141 (S.D. Tex. June 30, 1994) ("Leave to amend should be denied if the proposed claims are subject to dismissal or an amendment would be futile.").

B. Plaintiff Should Be Ordered to Show Cause If He Continues to Assert Frivolous Claims

Plaintiff is a Louisiana-licensed attorney who is admitted to practice in this Court and is thus required, by the Federal Rules of Civil Procedure, the Local Rules of this Court, and the Louisiana Rules of Professional Conduct, to refrain from asserting frivolous claims.[38] Plaintiff's conduct in asserting frivolous claims in this Court **[*9]** is in violation of *Fed. R. Civ. P. 11*, which provides, in pertinent part, that by presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it, an attorney certifies that to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; and (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery. "[W]here a reasonable amount of research would have revealed to the attorney that there was no legal foundation for the position taken, *Rule 11* sanctions will be imposed."[39] Courts apply an objective (rather than subjective) standard of reasonableness in determining whether a party has violated *Rule 11*.[40]

On January 29, 2019, the Western District issued a Memorandum Order, admonishing Plaintiff for asserting the frivolous claims set forth in his application for a TRO,[41] which was filed after the case was closed and which re-alleged many of the same claims that the Western District had already dismissed. After a show cause hearing, sanctions of $ 2,500 were imposed against Plaintiff.[42] This information is pertinent because Plaintiff's Motion for Leave was filed in this Court *one week after the Western District imposed sanctions*[43] yet asserts some of the same frivolous claims upon which those sanctions were based.[44] Plaintiff is aware that his claims have been determined frivolous yet he continues to needlessly waste judicial resources by reurging them. As such, if Plaintiff continues to assert frivolous claims in this Court, Plaintiff should be ordered to show cause why *Fed. R. Civ. P. 11* sanctions should not issue.

III. Conclusion

Accordingly, for the reasons set forth herein, Plaintiff's Second Motion for Leave to File Amended and Supplemental Pleading is **DENIED.**[45]

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[38] *Thibeaux v. Psychiatrist, No. 18-314, 2018 U.S. Dist. LEXIS 61497, 2018 WL 1734632, at *3 (M.D. La. March 29, 2018)* (holding that *pro se* litigants are held to less stringent standards than formal pleadings drafted by lawyers) (*citing Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d. 652 (1972)) and see Fed. R. Civ. P. 11* and Local Rule 83.

[39] *Jordaan v. Hall, No. 03-706, 275 F.Supp.2d 778, 787 (N.D. Tex. Aug. 7, 2003)* (citation omitted).

[40] *See, e.g., Delor v. Intercosmos Media Group, Inc., No. 04-3262, 2006 U.S. Dist. LEXIS 2458, 2006 WL 435997, at *1 (E.D. La. Jan. 13, 2006)* (***[*10]*** *citing Childs v. State Farm Mut. Auto. Ins. Co., 29 F.3d 1018, 1024 (5th Cir. 1994))*.

[41] R. Docs. 54 and 54-2, No. 18-0190 (W.D. La. Jan. 9, 2019). Plaintiff's application for TRO and complaint in the Western District are very similar to the ones Plaintiff filed in this case on January 15, 2019, *see* R. Docs. 1 and 1-2.

[42] R. Doc. 60, No. 18-0190 (W.D. La. Jan. 29, 2019).

[43] R. Doc. 64, Memorandum Order, No. 18-190 (W.D. La. March 5, 2019).

[44] R. Doc. 12-2.

[45] R. Doc. 12.

IT IS RECOMMENDED that this case be **DISMISSED WITH PREJUDICE** for lack of jurisdiction pursuant to *Atakapa Indian de Creole Nation v. Louisiana, 943 F.3d 1004, 1005 (5th Cir. 2019)*.

Signed in Baton Rouge, Louisiana, on February **[*11]** 14, 2020.

/s/ Erin Wilder-Doomes

ERIN WILDER-DOOMES

UNITED STATES MAGISTRATE JUDGE

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InfoDeli, LLC v. Western Robidoux, Inc.

United States District Court for the Western District of Missouri, Western Division

February 20, 2020, Decided; February 20, 2020, Filed

Case No. 4:15-CV-00364-BCW

Reporter
2020 U.S. Dist. LEXIS 68111 *; 2020 WL 1865978

INFODELI, LLC, et al., Plaintiffs, v. WESTERN ROBIDOUX, INC., et al., Defendants.

Core Terms

Terms, platform, vectrarebate, authorization, software, entitled to summary judgment, summary judgment motion, joint venture, argues, posted, civil conspiracy, damages, tortious interference, expectancy, breached, user, genuine issue of material fact, uncontroverted facts, summary judgment, circumstances, induced

Counsel: **[*1]** For Infodeli, Llc., a Missouri LLC., Plaintiff: Jeffrey J. Lowe, LEAD ATTORNEY, Jeffrey J. Lowe, P.C., Clayton, MO USA; Joseph K Eischens, LEAD ATTORNEY, Law Office of Joseph K Eischens LLC, Parkville, MO USA; Michael M. Tamburini, LEAD ATTORNEY, Levy Craig Law Firm, PC - MainSt, Kansas City, MO USA; Paul A. Maddock, LEAD ATTORNEY, James J Rosemergy, Carey & Danis Law Firm, PC, St. Louis, MO USA; Eric L. Dirks, Williams Dirks Dameron LLC, Kansas City, MO USA; Kenneth N Caldwell, Caldwell Law Firm, Kansas City, MO USA.

For Breht C. Burri, Plaintiff: Jeffrey J. Lowe, LEAD ATTORNEY, Jeffrey J. Lowe, P.C., Clayton, MO USA; Joseph K Eischens, LEAD ATTORNEY, Law Office of Joseph K Eischens LLC, Parkville, MO USA; Paul A. Maddock, LEAD ATTORNEY, James J Rosemergy, Carey & Danis Law Firm, PC, St. Louis, MO USA; Eric L. Dirks, Williams Dirks Dameron LLC, Kansas City, MO USA; Kenneth N Caldwell, Caldwell Law Firm, Kansas City, MO USA.

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For Engage Mobile **[*2]** Solutions, Llc., Matthew Barksdale, Elizabeth Corbin, Sai Chow, Antonio Love, Darrin Clawson, Nathan Haley, James Robertson, Defendants: Peter Knops, LEAD ATTORNEY, Knops LLC, Kansas City, MO USA.

For Ceva Animal Health, Llc., Shane Fairchild, Defendants: Bryce Langford, Sean William Colligan, LEAD ATTORNEYS, Stinson Llp - Kc 2900, Kansas City, MO USA.

For Boehringer Ingelheim Vetmedica, Inc., Defendant: Kelly A Meredith, Nicholas B Clifford, Jr, LEAD ATTORNEYS, PRO HAC VICE, Tucker Ellis LLP - StL, St. Louis, MO USA.

For Brian P. Burri, Defendant: Daniel Eric Blegen, LEAD ATTORNEY, Breanna Spackler, Catherine Diane Singer, Kendra Frazier, German May, PC - KCMO, Kansas City, MO USA; Nicholas B Clifford, Jr, LEAD ATTORNEY, Tucker Ellis LLP - StL, St. Louis, MO USA.

For Ceva Animal Health, Llc., Counter Claimant: Bryce Langford, LEAD ATTORNEY, Sean William Colligan, Stinson Llp - Kc 2900, Kansas City, MO USA.

For Cindy Burri, Western Robidoux, Inc., a Missouri corporation, Peter E. Burri, Connie S. Burri, Brian P. Burri, Counter Claimants: Daniel Eric Blegen, LEAD ATTORNEY, German May, PC - KCMO, Kansas City, MO USA.

For Breht C. Burri, Infodeli, Llc., a Missouri LLC., Counter Defendants: **[*3]** Jeffrey J. Lowe, LEAD ATTORNEY, Jeffrey J. Lowe, P.C., Clayton, MO USA; Joseph K Eischens, LEAD ATTORNEY, Law Office of Joseph K Eischens LLC, Parkville, MO USA; Paul A. Maddock, LEAD ATTORNEY, James J Rosemergy, Carey & Danis Law Firm, PC, St. Louis, MO USA; Kenneth N Caldwell, Caldwell Law Firm, Kansas City, MO USA.

For Ceva Animal Health, Llc., Counter Claimant: Bryce Langford, LEAD ATTORNEY, Stinson Llp - Kc 2900, Kansas City, MO USA.

For Brian P. Burri, Cindy Burri, Western Robidoux, Inc., a Missouri corporation, Peter E. Burri, Connie S. Burri, Counter Claimants: Daniel Eric Blegen, LEAD ATTORNEY, Breanna Spackler, Catherine Diane Singer, German May, PC - KCMO, Kansas City, MO USA.

Judges: BRIAN C. WIMES, UNITED STATES DISTRICT JUDGE.

Opinion by: BRIAN C. WIMES

Opinion

ORDER

Before the Court is Defendant Shane Fairchild's separate motion for summary judgment (Doc. #638). The Court, being duly advised of the premises, grants the motion on Plaintiffs' claim for tortious interference, but otherwise denies the motion.

Plaintiffs InfoDeli, LLC, and Breht Burri as InfoDeli's sole shareholder, allege claims against Defendant Shane Fairchild, product manager for Defendant Ceva. Plaintiffs' claims stem from allegations **[*4]** that Fairchild, with knowledge that the working relationship between Plaintiffs and WRI was breaking down, feigned interest in negotiating with Plaintiffs a direct licensing agreement for the use of the InfoDeli software platform, for the improper purpose of providing compiled data to Defendant WRI and its contractor Defendant Engage Mobile Solutions, LLC. Plaintiffs assert that without Fairchild's provision of the data compilation from vectrarebate.com, WRI and Engage would not have been able to replicate the functionality of the software platform in the Ceva Webstore and Ceva Vectra Rebate website.

Fairchild's motion for summary judgment argues there is no genuine issue of material fact and he is entitled to judgment as a matter of law with respect to each of Plaintiffs' remaining claims against him.

LEGAL STANDARD

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (citing *Fed. R. Civ. P. 56(c)*).

A party who moves for summary judgment bears the burden to establish that **[*5]** there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. When considering a motion for summary judgment, the court must evaluate the evidence in the light must favorable to the nonmoving party and the nonmoving party is entitled to "the benefit of all reasonable inferences." *Mirax Chem. Prods. Corp. v. First Interstate Commercial Corp., 950 F.2d 566, 569 (8th Cir. 1991)*.

UNCONTROVERTED FACTS

On September 9, 2019, an "Amended Final Judgment On All Claims" was entered in the Circuit Court of Jackson County, Missouri in the case captioned InfoDeli, LLC, et al. v. Western Robidoux, Inc., et al., Case No. 1616-CV09518. This final judgment states:

> [i]n accordance with the jury verdicts in this matter, judgment is entered on Plaintiff TooBaRoo LLC's claim of breach of joint venture in favor of Plaintiff TooBaRoo, LLC against Defendant Western Robidoux, Inc. for breach of joint venture agreement in the amount of $1,134,372.00.
>
> [. . .]
>
> [i]n accordance with the bench trial [that was] held in this matter, judgment is separately entered on Plaintiff Breht Burri's claim of minority shareholder oppression in favor of Defendants Brian Burri and Peter Burri and against Plaintiff Breht Burri.
>
> [. . . .]

Plaintiffs InfoDeli, LLC and Breht C. Burri had a working relationship with Defendant Western Robidoux, Inc. **[*6]** ("WRI") beginning in 2011 and continuing until March 11, 2014. Breht Burri opines the joint venture between Plaintiffs and WRI was breached in 2013 when Defendants Brian Burri and Peter Burri began receiving weekly salaries that were higher than Breht Burri's compensation.

On March 11, 2014, WRI's attorney emailed Breht Burri to say WRI had stopped using the InfoDeli software platform in connection with their fulfillment service contracts. The email also discussed the Terms of Use that Breht Burri had posted to the Ceva Lit Store.

On March 12, 2014, during a meeting among Defendants Brian Burri, Cindy Burri, and Fairchild, Cindy Burri indicated WRI was experiencing a "family issue" with Breht Burri. At the time of the meeting, Brian Burri and Cindy Burri were looking for a new resource to replace Breht Burri. Plaintiffs believe Fairchild was in on, and knew about, the plan to stop relying on Plaintiffs for web-based fulfillment services for WRI's customers at the time of this March 12, 2014 meeting, and as early as February 28, 2014.

On March 12, 2014, Plaintiffs and Fairchild began discussing the possibility and/or the option of a direct license for Ceva's use of the InfoDeli software **[*7]** platform.

On March 18, 2014, Fairchild requested from Plaintiffs the data compilation used with vectrarebate.com. The data requested included information about Ceva customers who had redeemed a rebate offer on vectrarebate.com, which operated in reliance on the InfoDeli software platform. Fairchild requested this data as a backup. Vectrarebate.com never had the InfoDeli Terms of Use posted to it. Instead, vectrarebate.com had a "Legal Notice and Terms of Use" page posted, which provided that all elements of vectrarebate.com are the exclusive property of Ceva. Plaintiffs inadvertently posted this notice, instead of the Terms of Use, to vectrarebate.com.

Plaintiffs posted the Terms of Use to the Ceva Lit Store on March 11, 2014. These terms required users to acknowledge Plaintiffs' rights in the website and software. Fairchild, on at least three occasions, acknowledged the Terms of Use in connection with use of the Ceva Lit Store. Fairchild was thus aware of the Terms of Use and knew vectrarebate.com relied on the InfoDeli software platform because he had requested vectrarebate.com be designed that way.

On March 19, 2014, Cindy Burri sent an email discussing the working relationship between **[*8]** Cindy Burri on behalf of WRI, and Fairchild on behalf of Ceva. The email mentioned Ceva's continuing fulfillment contract with WRI.

On March 20, 2014, Plaintiffs provided the data to Fairchild on a thumb drive; however, Defendants believe that data provided is not the entirety of that which Fairchild requested.

Breht Burri stated he gave the data to Fairchild because he believed Fairchild was bound by the Terms of Use. Fairchild requested the data as a backup for vectrarebate.com on the basis that the data was Ceva's property.

Plaintiffs did not tell Fairchild at the time that the data was provided in reliance on the Terms of Use.

Defendants used the data requested by Fairchild and provided by Plaintiffs on a thumb drive to make the new vectrarebate website. Fairchild did not get the data on which the new vectrarebate website is based from logging into the Ceva Lit Store or vectrarebate.com.

Plaintiffs asserts its software platform was damaged through the entry of "dummy" orders, that were subsequently deleted. There is no evidence Fairchild entered or deleted any of these dummy orders.

ANALYSIS

Consistent with the Court's previous rulings, the following claims remain against Fairchild: (1) **[*9]** tortious interference with a contract or business expectancy; (2) breach of the InfoDeli Terms of Use; (3) violation of the Computer Fraud and Abuse Act; and (4) civil conspiracy. Fairchild argues there is no genuine issue of material fact and he is entitled to judgment as a matter of law with respect to each of these claims as set forth in Counts IV, VIII, X, and XII of the second amended complaint. (Doc. #287).

A. Fairchild's motion for summary judgment on Plaintiffs' Count IV for tortiousinterference with a contract or business expectancy is granted.

Fairchild argues he is entitled to summary judgment because Plaintiffs' claim for tortious interference is preempted, Plaintiffs cannot demonstrate Fairchild induced a breach, and Plaintiffs are judicially estopped from asserting they are the party in interest in the joint venture, as opposed to Toobaroo.

To demonstrate a claim of tortious interference, a plaintiff must demonstrate (i) the existence of a contract or business expectancy; (ii) the defendant's knowledge of the contract or expectancy; (iii) breach of the contract or business expectancy that was induced by the defendant's intentional interference; (iv) the absence of justification; **[*10]** and (v) damages. *Fabricor, Inc. v. E.I. DuPont Denemours & Co., 24 S.W.3d 82, 93 (Mo. Ct. App. 2000)*.

In this case, the business expectancy at issue is the "joint venture," which a jury in state court found to exist between Plaintiffs' predecessor company Toobaroo and WRI. Further, based on the record, Fairchild was aware of the relationship. However, with respect to the third element of a claim for tortious interference, Plaintiffs cannot show that breach of the joint venture was induced by Fairchild's intentional interference. To the contrary, the uncontroverted facts establish Plaintiffs' position that the joint venture was breached in 2013 when Breht Burri began receiving less money than his brothers.

Regarding the third element, Plaintiffs must demonstrate that Fairchild took affirmative steps to induce a breach, and that without Fairchild's interference, the joint venture would not have ended. *Hensen v. Truman Med. Ctr., 62 S.W.3d 549, 555 (Mo. Ct. App. 2001)*.

With all reasonable inferences drawn in Plaintiffs' favor, the joint venture was already breached in 2013 when Brian Burri received more money than Breht Burri. Further, under the uncontroverted facts, Plaintiffs posted the Terms of Use on March 11, 2014, thus demonstrating Plaintiffs' belief that the joint venture was over. Fairchild heard that WRI was dealing with a **[*11]** family issue on March 12, 2014. Therefore, Plaintiffs cannot demonstrate that but for Fairchild's conduct, the joint venture would not have been breached. Fairchild is entitled to summary judgment on this claim.

B. Fairchild's motion for summary judgment on Plaintiffs' Count VIII forbreach of the Terms of Use is denied.

Fairchild argues he is entitled to summary judgment on Plaintiffs' claim for violation of the Terms of Use ("the Terms") posted on March 11, 2014 for the same reasons that Ceva asserts it is entitled to summary judgment on this claim. (Doc. #637). Fairchild asserts the Terms are an unlawful restraint of trade because they improperly limit competition by preventing anyone besides Plaintiffs from duplicating the Platforms' functionality.

InfoDeli alleges (1) Fairchild was an active user of the Platforms and accepted the terms of use in the course of his employment; (2) the Terms to which Fairchild agreed to the following

> [n]ot to reverse engineer, copy, download, reproduce, distribute, duplicate functionality, create derivative works or adaptations of, publicly display or in any way exploit any part of the [Platforms], or content in whole or in part except as expressly authorized **[*12]** in writing by InfoDeli. Users further waive any right of 'fair use' as that phrase is interpreted and denied under U.S. Copyright law and agree to limit their use of the site to the purposes intended. InfoDeli does not grant any express or implied rights in [the Platforms] to Users, and all rights in and to the Site and to [the Platform], software, or Content are retained and reserved by InfoDeli;

(3) Fairchild materially breached the Terms by assisting WRI in copying protectable aspects of the Platform; (4) InfoDeli incurred damage as a proximate result of Fairchild's conduct for which they are entitled to compensatory and economic damages. (Doc. #287). Fairchild argues he is entitled to summary judgment because InfoDeli cannot show that the Terms are an enforceable contract.

A claim for breach of contract requires the plaintiff to establish the following: (1) an enforceable contract exists; (2) mutual obligations under the contract; (3) failure to perform a specified obligation; and (4) damages. *Superior Ins. Co. v. Univ. Underwriters Ins. Co., 62 S.W.3d 110, 118 (Mo. Ct. App. 2001)* (citing *Trimble v. Pracna, 51 S.W.3d 481, 506 (Mo. Ct. App. 2001))*.

Electronic agreements are subject to "traditional principles of contract law and focus on whether the plaintiff had reasonable notice of and manifested assent to the online agreement." **[*13]** *Ramsey v. H&R Block Inc., Case No. 18-00933-CV-W-ODS, 2019 U.S. Dist. LEXIS 79876, 2019 WL 2090691, at *3 (W.D. Mo. May 13, 2019)* (citing *Major v. McCallister, 302 S.W.3d 227, 229 (Mo. Ct. App. 2009))*.

The relevant inquiry is whether the user had reasonable notice of the terms and "manifested assent" by clicking a box or button. Id. The type of electronic agreement that includes an affirmative step, like clicking "I agree," is referred to as a "clickwrap agreement" and is generally enforceable. Id. (collecting cases).

"[E]very contract, combination or conspiracy in restraint of trade or commerce in [Missouri] is unlawful." *Mo. Rev. Stat. § 416.031.1*. "*Sections 416.011 to 416.161* shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." *Mo. Rev. Stat. § 416.141*.

Under federal ***antitrust law***, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. "To demonstrate a violation of *section 1* of the Sherman Act, a plaintiff must provide proof of an illegal contract, combination, or conspiracy which results in an unreasonable restraint of trade." *Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 558 (8th Cir. 1998)* (citing *State Oil Co. v. Khan, 522 U.S. 3, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997))*.

Certain practices, like "price-fixing, division of markets, group boycotts, and tying arrangements" are illegal per se. *Double D Spotting Serv., 136 F.3d at 558* (citing *Arizona v. Maricopa Cnty. Med. Soc., 457 U.S. 332, 344 n.15, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)* (*N. Pac. Ry. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958))*. In the absence of such circumstances, courts apply **[*14]** a "rule of reason" analysis, "according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition." *Double D Spotting Serv., 136 F.3d at 558*. This "analysis involves an inquiry into the market power and the defendant's market structure in order to assess the actual effect of the restraint," which necessarily requires the plaintiff to identify "a valid relevant market." *Double D Spotting Serv., 136 F.3d at 560* (citing *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*; *Flegel v. Christian Hosp., Ne.-Nw., 4 F.3d 682, 688 (8th Cir. 1993))*.

In the antitrust context, the relevant market consists of (1) the product market; and (2) the geographical market. *Bathke v. Casey's Gen. Stores, Inc., 64 F.3d 340, 345 (8th Cir. 1995)* (citing Flegel, 4 F.3d at 345. The product market covers "all reasonably interchangeable products." *Double D Spotting Serv., 136 F.3d at 560* (citing *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)*, cert. denied, *523 U.S. 1059, 118 S. Ct. 1385, 140 L. Ed. 2d 645 (1998))*. The geographic market is "the market area in which the seller operates." Id. (citing *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*; *Bathke, 64 F.3d at 345*).

In this case, the Terms are properly categorized as a clickwrap agreement, in that in order to use the platforms, the user had to agree to the Terms that are "reasonably communicated." *TradeComet.com LLC v. Google, Inc., 693 F. Supp. 2d 370, 377 (S.D.N.Y. Mar. 5, 2010)* (citing *Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 429 (2d Cir. 2004))*.

Fairchild argues he is entitled to summary judgment on this claim for breach of the Terms because the provision against duplicating the Platform's functionality is an unlawful restraint of trade. InfoDeli counters the Terms do not contain an unlawful restraint on trade and are enforceable **[*15]** in reliance on *Davidson & Associates v. Jung, 422 F.3d 630 (8th Cir. 2005)*.

In Davidson & Associates, the Eighth Circuit held, in affirming summary judgment for the plaintiffs in that case that "private parties are free to contractually forego the limited ability to reverse engineer a software product under the exemptions of the Copyright Act, and a state can permit parties to contract away a fair use defense or to agree not to engage in uses of copyrighted material that are permitted by the copyright law if the contract is freely negotiated." Id. (citing *Bowers v. Baystate Techs, Inc., 320 F.3d 1317, 1325-26 (Fed. Cir. 2003)*; *Nat'l Car Rental Sys., Inc. v. Computer Assocs. Intern, Inc., 991 F.2d 426, 434 (8th Cir. 1993))*. The Eighth Circuit thus concluded, in the context of the facts of that case, that in accepting the terms of use for the relevant software, the defendants had expressly agreed not to reverse engineer. *Davidson & Assocs., 422 F.3d at 639*.

Under the circumstances of this case, the Court finds Davidson persuasive. Although undisputed that Plaintiffs posted the Terms without notifying Fairchild or any other defendant of their intent to do so, Fairchild accepted the Terms of Use by accessing the Platforms after March 11, 2014 on at least a handful of occasions. Whether Fairchild breached the Terms depends on the factual circumstances surrounding Ceva's arrangement with WRI, and in turn, WRI's arrangement with Plaintiffs as agreed. **[*16]** In light of the remaining factual disputes presented by the record, the Court declines to find the Terms an unreasonable restraint of trade. Fairchild's motion for summary judgment on Plaintiffs' claim for breach of Terms of Use is denied.

C. Fairchild's motion for summary judgment on Plaintiffs' Count X for violationof the CFAA is denied.

Fairchild argues he is entitled to summary judgment for violation of the CFAA because Plaintiffs cannot establish cognizable damages or any access in excess of authorization. Fairchild further argues the record does not demonstrate that he accessed the InfoDeli software platforms in violation of the CFAA.

The Computer Fraud and Abuse Act provides a private cause of action to individuals damaged by computer fraud. *Lasco Foods, Inc. v. Hall & Shaw Sales, Mtkg. & Consulting, LLC, 600 F. Supp. 2d 1045, 1050 (E.D. Mo. 2009)* (citing *18 U.S.C. § 1030(g)*).

> Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in subclauses (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(i). [. . . .]

18 U.S.C. § 1030(g).

"[T]he factors set forth in subclauses . . . of **[*17]** subsection (c)(4)(A)(i)" are as follows:

> (I) loss to 1 or more persons during any 1-year period . . . aggregating at least $ 5,000 in value;

(II) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals;
(III) physical injury to any person;
(IV) a threat to public health or safety;
(V) damage affecting a computer used by or for an entity of the United States Government . . . .

18 U.S.C. § 1030(c)(4)(A)(i)(I)-(V). Under the circumstances presented in this case, Plaintiffs' claim under the CFAA must arise under subsection (I) because the predicate facts do not establish any of the other possible factors set forth in subsections (II)-(V). Thus, the issue is whether, with all reasonable factual inferences drawn in Plaintiffs' favor, Fairchild is entitled to summary judgment on Plaintiffs' claim that Fairchild's conduct in violation of the CFAA resulted in loss, totaling at least $ 5,000 in value, to at least one person during any one-year period.

A claim under this section of the CFAA requires a plaintiff to demonstrate that the defendant (1) accessed a protected computer, (2) without authorization or exceeding authorized access; and (3) caused a loss in excess of $ 5,000. 18 U.S.C. §§ 1030(a)(4), 1030(c)(4)(A)(i)(I). With respect **[*18]** to the element of authorization, the CFAA defines "exceeds authorized access" as "access to a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled to obtain or alter." 18 U.S.C. § 1030(e)(6). Otherwise, the CFAA, does not define "access" or "without authorization," and the Eighth Circuit has not definitely stated whether "without authorization" under the CFAA includes authorized access for an improper purpose. Porters Bldg. Ctrs., Inc. v. Sprint Lumber, Case No. 16-06055-CV-SJ-ODS, 2017 U.S. Dist. LEXIS 162139, 2017 WL 44113288, at *2 (W.D. Mo. Oct. 2, 2017) (collecting cases).

Persuasive authority on the confines of acting "without authorization" under the CFAA is also unsettled. Some courts have found that an employee who is authorized to access certain information or data acts "without authorization" under the CFAA when he or she "acquires adverse interest or if he is otherwise guilty of a serious breach of loyalty" relative to the authorizing party. Id. (citing Int'l Airport Ctrs., LLC v. Citrin, 440 F.3d 418, 421 (7th Cir. 2006); (United States v. Rodriguez, 628 F.3d 1258, 1263-64 (11th Cir. 2010; P.C. Yonkers, Inc. v. Celebrations the Party & Seasonal Superstore LLC, 428 F.3d 504, 510-11 (3d Cir. 2005). According to the narrower view, however, a CFAA violation based on access "without authorization" cannot apply to anyone to whom authorization has been previously given for a specific purpose; rather, this "without authorization" **[*19]** applies to the conduct of outsiders, like hackers. WEC Carolina Energy Sols, LLC v. Miller, 687 F.3d 199, 203-07 (4th Cir. 2012); LVRC Holdings LLC v. Brekka, 581 F.3d 1127, 1132-35 (9th Cir. 2009).

In the context of Fairchild's motion for summary judgment, the Court concludes the best course is to adopt the broader view that the CFAA might impose liability under circumstances where access to a protected computer is authorized for one purpose, but the defendant uses that access for an unauthorized purpose. Under the uncontroverted facts, Fairchild accessed the platforms after Plaintiffs posted the Terms and also used the thumb drive data in a manner inconsistent with that contemplated by Plaintiffs. Under the applicable standard for summary judgment, genuine issues of material fact relating to the issue of authorization remain in dispute. With respect to the issue of loss, the Court finds this issue is best resolved by the jury after presentation of expert witness testimony. Fairchild's motion for summary judgment under the CFAA is denied.

D. Fairchild's motion for summary judgment on Plaintiffs' Count XII for civilconspiracy is denied.

Fairchild argues he is entitled to summary judgment on Plaintiffs' Count XII for civil conspiracy because the claim is not an independent tort, and the uncontroverted facts do not demonstrate **[*20]** a meeting of the minds among any of the defendants.

A claim of civil conspiracy in Missouri requires the plaintiff to prove: (1) two or more persons; (2) acting with an unlawful objective; (3) after a meeting of the minds; (4) committed an act in furtherance of a conspiracy; and (5) resulting damages. W. Blue Print Co. LLC v. Roberts, 367 S.W.3d 7, 22 (Mo. 2012).

While a claim for civil conspiracy requires an underlying tortious act, as set forth above, Fairchild is not entitled to summary judgment on each of the remaining claims against him. Id. Because genuine issues of material fact preclude summary judgment for Fairchild on all of Plaintiffs' remaining claims, the record presents at least one underlying tortious act to which a claim for civil conspiracy might attach. The motion for summary judgment is thus denied on this point.

Fairchild next argues the record does not establish a meeting of the minds. However, the record presents sufficient evidence of association among the defendants in this case that, with all reasonable factual inferences drawn in Plaintiffs' favor, Fairchild is not entitled to judgment as a matter of law on the civil conspiracy claim. *Lyn-Flex W., Inc. v. Dieckhaus, 24 S.W.3d 693, 700 01 (Mo. Ct. App. 1999)* (the underlying tort "may include individuals associating for the purpose of causing **[*21]** or inducing a breach or business expectancy"); *Envirotech, Inc. v. Thomas, 259 S.W.3d 577, 586 (Mo. Ct. App. 2008)*. Accordingly, it is hereby

ORDERED Fairchild's motion for summary judgment (Doc. #638) is GRANTED IN PART and DENIED IN PART. The motion is granted on Plaintiffs' Count IV for tortious interference. The motion is denied on Plaintiffs' Count VIII for breach of contract, Count X for violation of the CFAA, and Count XII for civil conspiracy.

IT IS SO ORDERED.

DATE: February 20, 2020

/s/ Brian C. Wimes

JUDGE BRIAN C. WIMES

UNITED STATES DISTRICT COURT

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[Giant Eagle, Inc. v. Eastern Mushroom Mktg. Coop.](#)

United States District Court for the Eastern District of Pennsylvania

February 21, 2020, Decided; February 21, 2020, Filed

CIVIL ACTION No. 06-3523; CIVIL ACTION No. 06-932

Reporter

2020 U.S. Dist. LEXIS 30603 *; 2020-1 Trade Cas. (CCH) P81,104; 2020 WL 887933

GIANT EAGLE, INC., Plaintiff, v. EASTERN MUSHROOM MARKETING COOPERATIVE, et al., Defendants.PUBLIX SUPER MARKETS, INC., Plaintiff, v. EASTERN MUSHROOM MARKETING COOPERATIVE, et al., Defendants.

Prior History: *In re Mushroom Direct Purchaser Antitrust Litig., 514 F. Supp. 2d 683, 2007 U.S. Dist. LEXIS 30427 (E.D. Pa., Apr. 25, 2007)*

Core Terms

Defendants', mushroom, antitrust, probative value, outweighed, overcharge, policies

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Judges: Berle M. Schiller, J.

Opinion by: Berle M. Schiller

Opinion

MEMORANDUM

Schiller, J.

On February 14, 2020, this Court denied Certain Defendants' motion in limine to preclude testimony and other evidence regarding Defendants' Supply Control Plan at trial. This memorandum explains the Court's reasoning.

I. BACKGROUND

Plaintiffs have accused certain players in the market for fresh agaricus mushrooms of violating ***antitrust law***. Plaintiffs claim that Defendants incurred antitrust liability in three ways. First, Plaintiffs accuse Defendants of conspiring to set the price at which mushroom distributors would sell to buyers. Second, Plaintiffs accuse

Defendants of bid rigging reverse internet auctions in which supermarkets select mushroom **[*8]** providers to supply them with mushrooms. Finally, and most importantly here, Plaintiffs accuse Defendants of engaging in a "Supply Control Plan" whereby Defendants conspired to buy mushroom farms and place deed restrictions on them to prevent future mushroom growing, thus reducing the overall mushroom supply. According to Plaintiffs, the combined effect of this conduct inflated the price of fresh agaricus mushrooms above competitive levels, leading Plaintiffs to pay inflated prices.

Plaintiffs support the claim that Defendants' actions resulted in overcharge with a report by Dr. Keith Leffler. The Court has previously outlined Dr. Leffler's qualifications and the particulars of his analysis, which "are based on two multi-variable regression analyses, one for each opt-out plaintiff, which attempt to isolate and quantify the impact caused by and damages resulting from defendants' policies on mushroom prices." *In re Mushroom Direct Purchaser Antitrust Litig., Civ. A. No. 06-0620, 2015 U.S. Dist. LEXIS 119446, 2015 WL 5775600, at *1 (E.D. Pa. Aug. 5, 2015)*. What is important for the purpose of the instant motion is this: Dr. Leffler did not analyze the effect of Defendants' alleged Supply Control Plan on the price Plaintiffs paid for mushrooms.

In his analysis, Dr. Leffler did not include a variable to account for farm closure, a choice **[*9]** he justified by claiming that the mushroom farm closures occurring during the relevant time period were endogenous to other control variables. (Mot. to Preclude, Ex. C. 78:24-80:3 and Ex. D. 44:25-45:6.) As a result, Dr. Leffler's calculations do not show how much, if at all, Defendants' Supply Control Plan impacted the price of fresh agaricus mushrooms. (Rebuttal Expert Report of Keith B. Leffler, Ph.D. on Behalf of Public Supermarkets, Inc. and Giant Eagle Inc. [Rebuttal Report] at ¶ 6 n.6) ("[I] did not specifically estimate any overcharge from EMMC's purchase-deed restriction actions."); (*id.*) ("[I] have estimated no separate impact of the purchase-deed restriction conduct.") Because Plaintiffs have not made the Court aware of any other evidence tending to prove, through any sort of analysis, the effect of the Supply Control Plan on the price of fresh agaricus mushrooms, for the purpose of this motion, the Court finds that Plaintiffs have not shown that the Supply Control Plan resulted in overcharge.

Here, Defendants ask the Court to conclude that, because Plaintiffs cannot show that the Supply Control Plan resulted in overcharge, Plaintiffs should be precluded from putting on any **[*10]** evidence regarding the Supply Control Plan. For the reasons that follow, the Court rejects this request.

II. DISCUSSION

Defendants put forth two arguments for why evidence of the Supply Control Plan should be excluded: it is irrelevant and, in the alternative, its probative value is substantially outweighed by the risk of prejudice.[1] Neither argument is persuasive.

A. Relevance

Defendants argue that evidence of the Supply Control Plan is irrelevant. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without evidence" and "the fact is of consequence in determining the action." *Fed. R. Evid. 401*. "[T]he threshold for relevance is low." *Thomas v. Dragovich, 142 F.*

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[1] Defendants' brief also contains sections arguing (A) Plaintiffs are estopped from offering evidence that the Supply Control Plan "affected mushroom supply, otherwise had an anticompetitive effect, or caused plaintiffs any alleged damages", and (B) "expert testimony would be required to support any claim that the Supply Control Campaign caused plaintiffs any damages, and Plaintiffs have offered no such testimony with respect to the supply control campaign." However, neither serves as an independent basis to exclude evidence of the Supply Control Program — rather they are reasons that (according to Defendants) evidence of the Supply Control Plan should be excluded pursuant to *Rules 402* and *403 of the Federal Rules of Evidence.* As such, the Court evaluates the central claim of these sections — that Plaintiffs cannot show the Supply Control Plan affected the price of fresh agarics mushrooms — in the context of determining whether evidence relating to the Supply Control Plan is admissible under *Rules 402* and *403*.

App'x 33, 37 (3d Cir.2005). Here, evidence of the Supply Control Plan is relevant to Defendants' antitrust liability in two ways.

First, evidence of the Supply Control Plan is relevant to whether Defendants incur liability for their price control and reverse internet auction policies under the rule of reason. Whether or not an antitrust defendants' conduct was undertaken for the purpose of constraining trade is relevant to whether that conduct is unreasonable under a rule of reason analysis. As the Supreme Court observed in *Chicago Board of Trade v. United* ***[*11]*** *States*:

> The true test of [challenged conduct's] legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, *the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts*. This is not because a good intention will save an otherwise objectionable regulation or the reverse; *but because knowledge of intent may help the court to interpret facts and to predict consequences*.

246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918) (emphasis added). In this case, if it is true that Defendants undertook a plan to reduce the supply of mushrooms, and did so with the intent of maintaining artificially high prices, those facts would have a tendency to make it more probable that the price control and reverse internet auction policies were also undertaken with the intent of restraining **[*12]** competition, which is relevant to whether such policies constitute unreasonable restraints of trade. This is true even if Plaintiffs cannot show that Defendants Supply Control Plan was successful. Thus, evidence of the Supply Control Plan is relevant because it is probative of whether the price control and reverse internet auction policies violated ***antitrust law***.

Second, evidence of the Supply Control Plan is relevant to whether Defendants are *per se* liable for violations of the *Sherman Act*. Defendants who engage in conduct that *per se* violates the Sherman Act are liable regardless of the actual effects of their conduct. *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)* ("It is the 'contract, combination or conspiracy, in restraint of trade or commerce' which *§ 1* of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other."); *In re Flat Glass Antitrust Litig., 385 F.3d 350, 363 (3d Cir. 2004)* ("But a horizontal agreement to fix prices need not succeed for sellers to be liable under the Sherman Act; it is the attempt that the Sherman Act proscribes."); *see* Christopher R. Leslie, *Hindsight Bias in* ***Antitrust Law***, *71 Vand. L. Rev. 1527, 1579-82 (2018)*. In this case, "plaintiffs' claim that the supply control program violated *Section 1* of the Sherman Act is . . . subject to *per se* ***[*13]*** antitrust liability" *In re Mushroom Direct Purchaser Antitrust Litig., Civ. A. No. 06-0620, 2015 U.S. Dist. LEXIS 143331, 2015 WL 6322383, at *16 (E.D. Pa. May 26, 2015)*. As such, evidence regarding the Supply Control Plan is relevant to their liability even if Plaintiffs cannot show the Plan resulted in overcharge. Thus, evidence regarding Defendants' Supply Control Plan is relevant.

B. *Rule 403*

Defendants argue in the alternative that, even if evidence of the Supply Control Plan is relevant, it should nonetheless be excluded because its probative value is substantially outweighed by the risk of undue prejudice. Their argument is unavailing.

Under *Rule 403*, courts have discretion to exclude relevant evidence if the evidence's probative value is substantially outweighed by the danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, waste of time, or needlessly presenting cumulative evidence." *Fed. R. Evid. 403*. When weighing the *Rule 403* factors, courts "must appraise the genuine need for the challenged evidence and balance that necessity against the risk of prejudice to the defendant." *United States v. Bailey, 840 F.3d 99, 118-19 (3d Cir. 2016)*. Evidence can be kept out only if its unfairly prejudicial effect *substantially* outweighs its probative value. *Id. at 119*.

Here, it is not clear how introduction of evidence regarding the Supply Control Plan would result in any of the harms *Rule 403* seeks to avoid, and, to the **[*14]** extent that any such harms would occur, there is no basis to conclude that they would substantially outweigh the evidence's probative value. As such the Court declines to find evidence of Defendants' Supply Control Plan inadmissible under *Rule 403*.

III. CONCLUSION

For the foregoing reasons, this Court denied Certain Defendants' motion to categorically exclude all evidence of Defendants' alleged Supply Control Plan at trial.

ORDER

AND NOW, this **21st** day of **February 2020**, it is **ORDERED** that the attached Memorandum supplements this Court's Order of February 14, 2020 denying Certain Defendants' Motion in Limine to Preclude Testimony and Evidence Regarding Defendants' Supply Control Campaign.

BY THE COURT:

/s/ Berle M. Schiller

Berle M. Schiller, J.

Infodeli v. W. Robidoux

United States District Court for the Western District of Missouri, Western Division

February 21, 2020, Decided; February 21, 2020, Filed

Case No. 4:15-CV-00364-BCW

Reporter

2020 U.S. Dist. LEXIS 66542 *; 2020 WL 1855289

INFODELI, LLC, et al., Plaintiffs, v. WESTERN ROBIDOUX, INC., et al., Defendants.

Core Terms

Terms, users, platforms, Subscribing, civil conspiracy, summary judgment motion, conspiracy, entitled to summary judgment, software, posted, license agreement, employees, license, argues, claim for breach, summary judgment, website, notice

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Judges: BRIAN C. WIMES, UNITED STATES DISTRICT JUDGE.

Opinion by: BRIAN C. WIMES

Opinion

ORDER

Before the Court is Defendant Ceva Animal Heath, LLC's motion for summary judgment. (Doc. #636). The Court, being duly advised of the premises, denies said motion.

LEGAL STANDARD

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (citing *Fed. R. Civ. P. 56(c)*).

A party who moves for **[*4]** summary judgment bears the burden to establish that there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. When considering a motion for summary judgment, the court must evaluate the evidence in the light must favorable to the nonmoving party and the nonmoving party is entitled to "the benefit of all reasonable inferences." *Mirax Chem. Prods. Corp. v. First Interstate Commercial Corp., 950 F.2d 566, 569 (8th Cir. 1991)*.

UNCONTROVERTED FACTS

Breht Burri created the first version of its software platform in 2002 based on an existing e-commerce store. This platform is the basis for what became the Ceva Literature Store in 2011. In 2012, Breht Burri modified the platforms for Ceva's use with vectrarebate.com.

In 2013, Plaintiffs provided "ghost" codes for Ceva to use before the Plaintiffs posted the Terms of Use ("the Terms").

On March 11, 2014, Breht Burri posted the Terms for the InfoDeli software platforms underlying the Lit Store. When the Terms were posted, Ceva did not have a license to use the InfoDeli software.

The Terms provide that users would not "reverse engineer, copy, download, reproduce, distribute, duplicate functionality, create a derivative works or adaptations of . . . or in any way exploit" the software platform. The Terms do not contain a representation from users that they **[*5]** have the authority to bind their employer to the Terms.

The Terms state:

> [y]ou may access the Site or Service as an authorized user ("User") provided (a) Subscribing Organization is in possession of a current written license agreement with [InfoDeli] for the Service; (b) Subscribing Organization's licensing payments are paid in full and current as invoiced; (c) Subscribing Organization is not in default under the terms of that Licensing Agreement; (d) User is an employee or approved user of Subscribing Organization; and (3) you agree to the terms set forth herein.
> [. . . .]
> For purposes of this Agreement, the business or person that obtains a written license, 'Service License' from Company for use of the Service shall be referred to as the 'Subscribing Organization' or 'Subscriber.'

The Terms do not include any payment provision. The Terms require all users be "human" and at least 13 years old, while subscribers must be 18 years old. Ceva was not a "Subscriber" or "Subscribing Organization" under the Terms because it was not "in possession of a current written license agreement with [InfoDeli] for the service and never obtained a written license from InfoDeli."

Breht Burri posits that these **[*6]** Terms obligate the user on a continuing basis for a "reasonable period of time" after a user's last log in the Lit Store. Plaintiffs did not notify Ceva that the Terms were being posted. At least 58 Ceva employees, including Shane Fairchild, agreed to the Terms in order to access the Lit Store after March 11, 2014.

The Lit Store's functionality includes the ability to search for products. A Lit Store user would log in, search for and/or select a product to add to the electronic shopping cart, and check out, after which WRI would fulfill the order. The Lit Store also included a reporting feature that allowed users to request and determine what products were shipped where, and when they were shipped.

Plaintiffs gave Shane Fairchild the data that Engage used to create a new web store. Fairchild did not obtain the data provided to Engage through logging into the Lit Store, though he had otherwise accepted the Terms. When Plaintiffs gave Fairchild the data, Plaintiffs expected Fairchild to treat the data as subject to the website's Terms. Fairchild knew that the data compilation from vectrarebate.com was tied to Plaintiffs' software platforms because Fairchild had requested Plaintiffs design **[*7]** the rebate website in that manner. In the course of providing the data to Fairchild, Plaintiffs intended to negotiate a license with Ceva for the use of the software platforms in conformity with the Terms. The data Plaintiffs provided included information submitted by consumers who redeemed Ceva's Vectra rebate offer.

The vectrarebate.com website never had the Terms posted to it; rather, vectrarebate.com showed a "Legal Notice and Terms of Use," which provided that all elements of the redemption website were Ceva's property. The notice said the collection of personal information on the redemption website was for use by Ceva. Plaintiffs assert this notice was posted in error.

Before March 2014 and Plaintiffs' dispute with WRI, Plaintiffs had provided data requested by Ceva without restriction and/or without any claim of ownership to the data by Plaintiffs.

In mid-March 2014, Plaintiffs presented a proposed written license agreement to Ceva, but the licensing agreement was never executed.

ANALYSIS

Ceva seeks summary judgment on each of Plaintiffs' remaining claims against it for breach of the Terms (Count VIII) and for civil conspiracy (Count XII).

A. Ceva's motion for summary judgment on [*8] Plaintiff' claim for breach of the Terms is denied.

Ceva argues it is entitled to summary judgment on Plaintiffs' claim for breach of the Terms for two reasons: (1) the Terms are an unlawful restraint of trade; and (2) the Terms do not apply to Ceva.

The Court first considers whether Ceva is entitled to summary judgment on the basis that the Terms impose an unlawful restraint of trade, such that the Terms are unenforceable, and Plaintiffs cannot establish a breach of contract claim as a matter of law. *Superior Ins. Co. v. Univ. Underwriters Ins. Co., 62 S.W.3d 110, 118 (Mo. Ct. App. 2001)* (A claim for breach of contract requires the plaintiff to establish the following: (1) an enforceable contract exists; (2) mutual obligations under the contract; (3) failure to perform a specified obligation; and (4) damages).

Electronic agreements are subject to "traditional principles of contract law and focus on whether the plaintiff had reasonable notice of a manifested assent to the online agreement." *Ramsey v. H&R Block Inc., Case No. 18-00933-CV-W-ODS, 2019 U.S. Dist. LEXIS 79876, 2019 WL 2090691, at *3 (W.D. Mo. May 13, 2019)* (citing *Major v. McCallister, 302 S.W.3d 227, 229 (Mo. Ct. App. 2009))*. The relevant inquiry is whether the user had reasonable notice of the terms and "manifested assent" by clicking a box or button. Id. The type of electronic agreement that includes an affirmative step, like clicking "I agree," is referred **[*9]** to as a "clickwrap agreement" and is generally enforceable. Id. (collecting cases).

"[E]very contract, combination or conspiracy in restraint of trade or commerce in [Missouri] is unlawful." *Mo. Rev. Stat. § 416.031.1*. "*Sections 416.011 to 416.161* shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." *Mo. Rev. Stat. § 416.141*.

Under federal ***antitrust law***, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. "To demonstrate a violation of *section 1* of the Sherman Act, a plaintiff must provide proof of an illegal contract, combination, or conspiracy which results in an unreasonable restraint of trade." *Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 558 (8th Cir. 1998)* (citing *State Oil Co. v. Khan, 522 U.S. 3, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997))*.

Certain practices, like "price-fixing, division of markets, group boycotts, and tying arrangements" are illegal per se. *Double D Spotting Serv., 136 F.3d at 558* (citing *Arizona v. Maricopa Cnty. Med. Soc., 457 U.S. 332, 344 n.15, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*; (*N. Pac. Ry. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958))*. In the absence of such circumstances, courts apply a "rule of reason" analysis, "according to which the finder of fact must decide whether the questioned practice puts an unreasonable restraint on competition." *Double D Spotting Serv., 136 F.3d at 558*.

In this case, the Terms are properly categorized as a clickwrap agreement, in that in order to use the Platforms, the user had **[*10]** to agree to the Terms that are "reasonably communicated." *TradeComet.com LLC v. Google, Inc., 693 F. Supp. 2d 370, 377 (S.D.N.Y. Mar. 5, 2010)* (citing *Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 429 (2d Cir. 2004))*. Ceva argues it is entitled to summary judgment because the provision of the Terms against duplicating the functionality of the platforms is an unlawful restraint of trade. Plaintiffs counter that the Terms are enforceable in reliance on *Davidson & Associates v. Jung, 422 F.3d 630 (8th Cir. 2005)*.

In Davidson & Associates, the Eighth Circuit held, in affirming summary judgment for the plaintiffs in that case, that "private parties are free to contractually forego the limited ability to reverse engineer a software product under the exemptions of the Copyright Act, and a state can permit parties to contract away a fair use defense or to agree not to engage in uses of copyrighted material that are permitted by the copyright law if the contract is freely negotiated." Davidson & Assocs., 422 F.3d at 639 (citing *Bowers v. Baystate Techs, Inc., 320 F.3d 1317, 1325-26 (Fed. Cir. 2003)*; *Nat'l Car Rental Sys., Inc. v. Computer Assocs. Intern, Inc., 991 F.2d 426, 434 (8th Cir. 1993))*. The Eighth Circuit thus concluded, in the context of the facts of that case, that in accepting the terms of use for the relevant software, the defendants had expressly agreed not to reverse engineer.

Under the circumstances of this case, the Court finds *Davidson & Associates* instructive. To access the platforms, Ceva's employees undertook the affirmative step to acknowledge the Terms. Though Ceva asserts **[*11]** that Plaintiffs have not demonstrated that the Ceva employees who accepted the Terms had authority to bind Ceva to the Terms, the record demonstrates that Ceva employees accessed the platforms after March 11, 2014 in connection with their work for Ceva. Implied authority "encompasses the power to act in ways reasonably necessary to accomplish the purpose for which express authority was granted" and "evidence that an agent historically engaged in related conduct, without limitation, would be enough to support a jury question on the issue of actual authority." *Essco Geometric v. Harvard Indus., 46 F.3d 718, 723-24 (8th Cir. 1995)*. With all reasonable inferences drawn in Plaintiffs' favor, the Ceva employees that accessed the platforms after Plaintiffs posted the Terms likely performed the same tasks on behalf of Ceva relative to the platforms that they performed before the Terms were posted. Based on the current record, the Court declines to find the Terms unenforceable as an unlawful restraint on trade. Ceva's motion for summary judgment on this point is denied.

The Court next considers whether, by their stated provisions, the Terms can bind Ceva. Ceva argues that the Terms state they apply to "users," who must be human, or "subscribing organizations," **[*12]** which have a written licensing agreement with Plaintiffs. The Terms state that "the Service is available only to Users who are human (not bots, except for certain authorized API users) and 13 years of age or older, and Users who are also Subscribers must be 18 years old." With respect to Ceva's argument that the Terms are inapplicable because Ceva is an entity, as oppose to a "human" as required under the explicit terms of the Terms, Ceva may only act through its agents. *Sutherland v. Sutherland, 348 S.W.3d 84, 92 (Mo. Ct. App. 2011)*. Under the uncontroverted facts, Plaintiffs provided Ceva's employees credentials to access the platforms on the basis that those accessing the platforms in the course of Ceva's business would comply with the Terms. Ceva's motion for summary judgment on the basis that it is not a human under the Terms is denied.

Ceva also argues it is entitled to summary judgment because it is not, under the Terms, a "Subscriber" as explicitly defined. Because the Terms apply to users or to subscribing organizations, the Court's conclusion above precludes summary judgment for Ceva on Plaintiffs' claim for breach of the Terms. Stated differently, since Plaintiffs' claim for breach of the Terms survives because Ceva may be properly considered **[*13]** a "User," Ceva's motion for summary judgment on this claim is denied.

B. Ceva's motion for summary judgment on Plaintiff' claim for civil conspiracy is denied.

Ceva argues it is entitled to summary judgment on Plaintiffs' claim for civil conspiracy because (1) it is entitled to summary judgment on Plaintiffs' other tort claims and (2) Plaintiffs cannot demonstrate a meeting of the minds.

A claim of civil conspiracy in Missouri requires the plaintiff to prove: (1) two or more persons; (2) acting with an unlawful objective; (3) after a meeting of the minds; (4) committed an act in furtherance of a conspiracy; and (5) resulting damages. *W. Blue Print Co. LLC v. Roberts, 367 S.W.3d 7, 22 (Mo. 2012)*. "Civil conspiracy is not a stand-alone claim and requires the underlying existence of a wrongful act or intentional tort to survive." Falco v. Farmers Ins. Grps., No. 4:12-CV-00134-BCW, 2014 WL 11394453, at *6 (W.D. Mo. June 19, 2014) (citing *Williams v. Mercantile Bank of St. Louis N.A., 845 S.W. 2d 78, 86 (Mo. Ct. App. 1993))*.

"Conspiracy to breach a contract has been long recognized as a plausible civil conspiracy claim in Missouri. Similarly, a conspiracy to injure or destroy the trade, business or occupation of another is an unlawful conspiracy." *Envirotech, Inc. v. Thomas, 259 S.W.3d 577, 587 (Mo. Ct. App. 2008)* (citations omitted). Further, "proof of civil conspiracy allows a plaintiff to hold a defendant liable for the wrongful act of another, if that **[*14]** wrongful act was committed in furtherance of an illegal conspiracy." *Id. at 594 n.11*.

In the context of Ceva's motion for summary judgment, because Ceva is not entitled to summary judgment on Plaintiffs' claim for breach of the Terms, there exists an underlying basis upon which Plaintiffs' claim for civil conspiracy might attach against Ceva. In addition, there exist multiple factual disputes relating to Plaintiffs' claims for intentional tortious acts alleged against other defendants. Plaintiffs' civil conspiracy claim against Ceva may also "attach" to any of the remaining wrongful acts alleged against any of the other remaining defendants. Ceva's motion is denied on this point.

Ceva also argues there is no genuine issue of material fact with respect to the element of a "meeting of the minds." To demonstrate this element, a plaintiff must present facts suggesting a concerted action and agreement to "carry out the unlawful purposes of the conspiracy" by clear and convincing evidence. *The Olivier Family Interests Ltd. v.*

*Wright, No. 08-3075-CV-S-DW, 2012 U.S. Dist. LEXIS 194962, 2012 WL 12893873, at *5 (W.D. Mo. Jan. 24, 2012)*, aff'd, *527 F. App'x 596 (8th Cir. 2013)*; *Aguilar v. PNC Bank N.A., 853 F.3d 390, 403 (8th Cir. 2017)*; *Chmielski v. City Prods. Corp., 660 S.W.2d 275, 290 (Mo. Ct. App. 1983)*. Based on the record overall, genuine issues of material fact preclude summary judgment for Ceva on Plaintiffs' claim for civil conspiracy. Ceva's **[*15]** motion is thus denied. Accordingly, it is hereby

ORDERED Defendant Ceva Animal Heath, LLC's motion for summary judgment. (Doc. #636) is DENIED.

IT IS SO ORDERED.

DATE: February 21, 2020

/s/ Brian C. Wimes

JUDGE BRIAN C. WIMES

UNITED STATES DISTRICT COURT

Sharif Pharm., Inc. v. Prime Therapeutics, LLC

United States Court of Appeals for the Seventh Circuit

October 7, 2019, Submitted; February 24, 2020*, Decided

No. 18-2725, No. 18-3003

Reporter
950 F.3d 911 *; 2020 U.S. App. LEXIS 5549 **; 2020-1 Trade Cas. (CCH) P81,095; 2020 WL 881267

SHARIF PHARMACY, INC., Plaintiff-Appellant, v. PRIME THERAPEUTICS, LLC, Defendant-Appellee.HELEN J. SCALE, et al., Plaintiffs-Appellants, v. PRIME THERAPEUTICS, LLC, et al., Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:17-cv-03464 — Jorge L. Alonso, Judge. Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:17-cv-06837 — Robert W. Gettleman, Judge.

Core Terms

pharmacy, antitrust, customers, network, prescription drug, geographic, Sherman Act, retail, district court, cluster, cases, monopoly power, alleges, markets, plaintiffs', terminated, relevant market, competitors, damages

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction

HN1[] **Appeals, Appellate Jurisdiction**

The appellate court may not pass on the merits of moot questions or abstract propositions.

Antitrust & Trade Law > Sherman Act > Scope

HN2[] **Antitrust & Trade Law, Sherman Act**

It has long been recognized that the primary purpose of the federal anti-trust laws is to protect the welfare of customers. Perhaps ironically, however, it is well established under federal ***antitrust law***'s Illinois Brick doctrine that customers of parties more directly injured by an alleged antitrust violation do not have standing to assert their own claims for damages. *section 2*.

* These cases were scheduled for oral argument on September 18, 2019. On September 12, 2019, new counsel for plaintiffs in both cases moved to vacate oral argument and to have the cases submitted on the briefs. Two defendants opposed the motion; two others took no position. The panel vacated the oral argument and has concluded that the briefs presented the cases adequately under these circumstances. See Fed. R. App. P. 34(a)(2)(C).

Antitrust & Trade Law > Sherman Act > Scope

HN3[] Antitrust & Trade Law, Sherman Act

Antitrust defendants are not permitted to argue that their direct victims were not injured because they were able to pass along price increases to their customers. Illinois Brick extended the same principle to bar claims by indirect purchasers (such as customers) even if they were the ultimate victims of the violations.

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

HN4[] Per Se Rule & Rule of Reason, Sherman Act

Under the rule of reason for *Section 1* cases, exclusive dealing or refusals to deal could violate *Section 1* only if a defendant has monopoly or market power in a relevant market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN5[] Attempts to Monopolize, Sherman Act

Section 2 of the Sherman Act prohibits monopolization and attempts to monopolize, but with narrow exceptions it allows even firms with monopoly power to choose with whom they deal and on what terms and conditions. Even monopolists are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing. There are limited circumstances under which a monopolist's refusal to deal with a competitor will be illegal anticompetitive conduct.

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

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

HN6[] Relevant Market, Geographic Market Definition

A relevant market under the Sherman Act is comprised of the commodities reasonably interchangeable by consumers for the same purposes. A properly defined market excludes other potential suppliers (1) whose product is too different (product dimension) or too far away (geographic dimension) and (2) who are not likely to shift promptly to offer defendant's customers a suitably proximate (in both product and geographic terms) alternative.

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

HN7[] Relevant Market, Geographic Market Definition

The antitrust statutes require a pragmatic and factual approach to defining the geographic market. The market must correspond to the commercial realities of the industry. Where geographic convenience is important to consumers, retail markets can be small, but not this small. It defies belief to suggest that a hypothetical monopolist retail pharmacy could raise its drug prices substantially without losing customers to competitors outside that tiny area.

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

HN8[] **Relevant Market, Geographic Market Definition**

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.

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

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

A cluster of products can comprise a relevant product market if the cluster is itself an object of consumer demand. The Supreme Court has recognized such cluster markets in banking, and central-station home security products, no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities. Health care services can be suitable subjects for such cluster product markets.

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

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

HN10[] **Motions to Dismiss, Failure to State Claim**

Since federal civil pleading standards changed so dramatically, and it has been especially important for district courts to give leave freely to amend pleadings. Uncertainty about application of the Twombly-Iqbal standard means that a plaintiff whose original complaint has been dismissed under *Fed. R. Civ. P. 12(b)(6)* should ordinarily be given at least one opportunity to try to amend its complaint before the action itself is dismissed with prejudice.

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For HELEN J. SCALE, DENISE THOMAS, VIRGIL BROWN, individually, Plaintiffs - Appellants (18-3003): Lawrence M. Karlin, Attorney, KARLIN EIDE, Chicago, IL; Ariel Weissberg, Attorney, WEISSBERG & ASSOCIATES, LTD., Chicago, IL.

For PRIME THERAPEUTICS LLC, a Delaware Limited Liability Company, Defendant - Appellee (18-3003): Mark W. Bina, Attorney, QUARLES & BRADY LLP, Chicago, IL; Edward King Poor, Attorney, QUARLES & BRADY LLP, Chicago, IL.

For WALGREEN COMPANY, Defendant - Appellee (18-3003): Robert Andalman, A&G LAW LLC, Chicago, IL.

For HEALTHCARE **[**2]** SERVICES CORPORATION, BLUE CROSS AND BLUE SHIELD OF ILLINOIS, an Illinois corporation, Defendants - Appellees (18-3003): Martin J. Bishop, Attorney, REED SMITH LLP, Chicago, IL; William Sheridan, Attorney, REED SMITH LLP, Pittsburgh, PA.

Judges: Before KANNE, HAMILTON, and BARRETT, Circuit Judges.

Opinion by: HAMILTON

Opinion

[*914] HAMILTON, *Circuit Judge*. The issue in these consolidated appeals is whether plaintiffs in two similar cases have stated viable claims under *Sections 1* or *2* of the *Sherman Act*, *15 U.S.C. §§ 1* and *2*. They have not. We affirm the judgments of both district courts dismissing the cases on the plaintiffs' pleadings, though in one case with slight modifications.

I. *The Prime Network and the Plaintiffs*

Defendant Prime Therapeutics LLC is a pharmacy benefits manager. Plaintiffs Sharif Pharmacy, Inc. and J&S Community Pharmacy, Inc. were both members of the Prime pharmacy network. Under Medicare, Medicaid, and private health insurance plans, many patients had significant financial incentives to buy their prescription drugs from pharmacies within the network. Prime terminated both Sharif and J&S from the network after audits uncovered, in Prime's view, irregularities in invoicing for prescription drugs. Prime is owned in part by **[**3]** the insurer Blue Cross Blue Shield, and plaintiffs suggest that membership in the network is required in order for pharmacies in certain states to accept Blue Cross Blue Shield, Medicare, and Medicaid prescription drug insurance plans. We assume, therefore, that termination from the Prime network hurt Sharif's and J&S's businesses.[1]

Sharif and J&S filed these suits alleging that their terminations from the Prime network violated the federal Sherman Act. Three customers joined the J&S action as plaintiffs who had to switch to different, less convenient pharmacies, at least for a time. In both cases, the plaintiffs alleged that the audits were pretextual and that Prime really terminated both pharmacies' participation in its network in an attempt to get rid of competition with Walgreens, with whom it had entered a joint venture in August 2016. Prime sent letters to both pharmacies' customers saying that Sharif and J&S would no longer accept their insurance and recommending that customers have their prescriptions filled at a nearby Walgreens. Prime also retained funds from both pharmacies as a result of the audits.

II. *The J&S Suit*

The two cases took different paths through the district court **[**4]** and on appeal, presenting different issues. We begin with the J&S suit, which has been affected by events while the appeal has been pending. First, J&S itself obtained reinstatement in the Prime network. J&S then moved to dismiss its appeal voluntarily under *Federal Rule of Appellate Procedure 42(b)*. We granted that motion, so J&S itself is no longer asserting any claims in the lawsuit. The reinstatement has also rendered moot the customer-plaintiffs' request for injunctive relief restoring J&S to the Prime network. See, e.g., *E.E.O.C. v. Flambeau, Inc., 846 F.3d 941, 949-50 (7th Cir. 2017)*. ***HN1***[] We may not pass on the merits of "moot questions or abstract propositions." *Dorel Juvenile Group, Inc. v. DiMartinis, 495 F.3d 500, 503 (7th Cir. 2007)*, citing *Calderon v. Moore, 518 U.S. 149, 150, 116 S. Ct. 2066, 135 L. Ed. 2d 453 (1996)*.

That leaves only the customers' claims for damages in the J&S lawsuit. Those claims are not moot, but they cannot be remedied directly in federal antitrust litigation. ***HN2***[] It has long been recognized that the primary purpose of the federal anti-trust laws is to protect the welfare of customers. E.g., *NCAA v. Board of Regents, 468 U.S. 85, 107, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*, citing *Reiter v. Sonotone* ***[*915]*** *Corp., 442 U.S. 330, 343, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)*, quoting in turn Robert H. Bork, *The Antitrust Paradox: A Policy at War With Itself* 66 (1978); *Fishman v. Estate of Wirtz, 807 F.2d 520, 535-36 (7th Cir. 1986)*; *id. at 585* (Easterbrook, J., dissenting). Perhaps ironically, however, it is well established under federal ***antitrust law***'s *Illinois Brick* doctrine that customers of parties more directly injured by an alleged antitrust violation **[**5]** do not have standing to assert their own claims for damages. See *Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520-21, 203 L. Ed. 2d 802 (2019)* (applying *Illinois Brick* rules to *section 2* claims for monopolization); *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*; see also *Loeb Industries, Inc. v. Sumitomo Corp., 306 F.3d 469, 481-82 (7th Cir. 2002)* (explaining *Illinois Brick* and its limits).

[1] For example, J&S alleged that more than 80 percent of its prescription-drug customers are insured by Medicare, Medicaid, or Blue Cross Blue Shield.

HN3[] The Court explained in *Illinois Brick* that antitrust defendants are not permitted to argue that their direct victims were not injured because they were able to pass along price increases to their customers. *431 U.S. at 724-26*, discussing *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. *Illinois Brick* extended the same principle to bar claims by indirect purchasers (such as customers) even if they were the ultimate victims of the violations. Because J&S Pharmacy would have been most directly affected by any alleged anti-trust violation, its own customers may not bring their own claims for damages under the Sherman Act.

The customer plaintiffs alleged that they depended on J&S Community Pharmacy because it was the only pharmacy within walking distance that had accepted their insurance. During the time when J&S was excluded from the Prime pharmacy network, the customers were injured because they could no longer use it to fill their prescriptions and were "too poor or physically or mentally weak to regularly travel to a distant pharmacy for their medicine," "particularly **[**6]** during inclement weather."

We take these plaintiffs at their word, of course. We do not doubt that the exclusion of their familiar and most convenient pharmacy from their insurance coverage caused significant inconvenience and even hardship to them. Such harms, however, have not been treated as injury to "business or property" as required to recover damages under the Sherman Act, *15 U.S.C. § 15(a)*. Even if we assumed for the sake of argument that the exclusion of J&S Pharmacy from the Prime network might have violated the Sherman Act (though we reject Sharif's similar claims on the merits, below), its customers would not be entitled to sue for damages under that Act.

Courts and commentators have long been concerned with calibrating antitrust standing doctrine in order both to capture "the full cost of an antitrust violation ... by looking to the injuries to all victims," and to ensure that "the defendant should not be made to pay twice for the very same injury." Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* ¶ 339a (4th ed. 2019). Here, the relief sought by the customer-plaintiffs would duplicate any relief that J&S could have sought on **[**7]** its own behalf. Their claims are barred because they would "substantially increase[] the possibility of inconsistent adjudications [ ]and therefore of unwarranted multiple liability for the defendant[.]" *Illinois Brick, 431 U.S. at 730*. **[*916]** [2]

III*. The Sharif Pharmacy Suit*

Although we affirm the dismissal of the J&S suit for reasons unrelated to the merit or lack of merit of the allegations of Sherman Act violations, the Sharif Pharmacy appeal presents the merits squarely. Sharif alleges in essence that Prime Therapeutics and Walgreens have created a joint venture that encourages patients insured through Prime to buy their prescription drugs at Walgreens and not at other competing retail pharmacies like Sharif. The allegations fail to state a viable claim under either *Section 1* or *Section 2* of the Sherman Act, so we affirm.

In antitrust parlance, Sharif alleges a variant on a claim for exclusive dealing and/or a refusal to deal. Sharif alleges in effect that Prime prefers to deal with Walgreens rather than Sharif. **HN4**[] Sharif has not alleged a horizontal agreement (i.e., among competitors) to fix prices or divide markets, so the case is not subject to the rule of per se illegality under *Section 1* of the Sherman Act. Under the rule of reason for *Section 1* cases, **[**8]** exclusive dealing or refusals to deal could violate *Section 1* only if a defendant has monopoly or market power in a relevant market. See generally, e.g., *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 885-87, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (summarizing per se illegality and rule of reason).

HN5[] *Section 2* of the Sherman Act prohibits monopolization and attempts to monopolize, but with narrow exceptions it allows even firms with monopoly power to choose with whom they deal and on what terms and conditions. Even monopolists "are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Pacific Bell Telephone Co. v. Linkline Communications, Inc., 555 U.S. 438, 448, 129*

[2] Given our holdings here as to mootness and antitrust standing, we have considered but see no need to reach the arguments raised by the State of Illinois under the *Eleventh Amendment* and the Sherman Act state action immunity doctrine.

S. Ct. 1109, 172 L. Ed. 2d 836 (2009), citing United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919).

There are "limited circumstances" under which a monopolist's refusal to deal *with a competitor* will be illegal anticompetitive conduct. *Id.*; see generally Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985); Areeda & Hovenkamp, ***Antitrust Law*** ¶ 1800c5 ("Section 2 of the Sherman Act reaches unilateral refusals to deal when the refusals constitute monopolization ... ."). To begin even to try to fit this case into these relatively narrow exceptions, Sharif would need to allege that Prime and/or Walgreens either have or are dangerously likely to obtain monopoly power in a relevant market.

So, in the absence of an alleged per se violation of Section 1, Sharif's federal claims require it to identify a relevant product **[**9]** and geographic market in which Prime and/or Walgreens have or were dangerously likely to obtain monopoly power. Even at the pleading stage, it is sufficiently clear that Sharif cannot identify an appropriate geographic market where a defendant had or threatened to have monopoly power.

HN6[] A "relevant market" under the Sherman Act is comprised of the "commodities reasonably interchangeable by consumers for the same purposes." United States v. E.I. Du Pont de Nemours & Co., ***[*917]*** 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956). "A properly defined market excludes other potential suppliers (1) whose product is too different (product dimension) or too far away (geographic dimension) and (2) who are not likely to shift promptly to offer defendant's customers a suitably proximate (in both product and geographic terms) alternative." Areeda & Hovenkamp, ***Antitrust Law*** ¶ 530a.

Geographic Market: Sharif has not plausibly alleged that either Prime or Walgreens has or threatens to gain monopoly power in a relevant geographic market. In its proposed second amended complaint, Sharif identified three areas that might serve as relevant geographic markets. In the section entitled "The Geographic Market," Sharif alleges that the relevant market in this case is "nation-wide for Prime and Walgreens." Sharif **[**10]** argues, quoting a Dow Jones wire article, that Prime and Walgreens were joining forces to give Walgreens "more muscle to compete against CVS Health's integrated model that combines a retail pharmacy chain with a large PBM [pharmacy benefits manager]." The proposed complaint construes this news coverage as "a public admission by Defendants that through their partnership, and the scheme Plaintiff alleges above where Prime terminates pharmacies' ability to sell prescription drugs, they will violate antitrust laws nation-wide to increase their market share of prescription drugs." Elsewhere in the proposed complaint, Sharif asserts that "the five-block area" surrounding its pharmacy and "the Chicago market area" are geographic regions in which Prime is seeking to terminate the network participation of possible Walgreens competitors.

The United States as a whole and the Chicago metropolitan area are plausible geographic markets for retail prescription drug sales, but we see no plausible allegation that Prime and/or Walgreens have or threaten to gain monopoly power in a nationwide or metropolitan Chicago market for retail prescription drug sales. Plaintiff's assertion that the defendants merely **[**11]** sought to increase their market shares does not come close to satisfying the requirement of actual or threatened monopoly power. ***Antitrust law*** assumes that all competitors seek to increase their respective market shares, especially by business arrangements that will offer more attractive products and services to their customers.

Sharif's assertion that the five-block radius around its location is a relevant market is not plausible. ***HN7***[] The antitrust statutes require a "pragmatic" and "factual" approach to defining the geographic market. Brown Shoe Co. v. United States, 370 U.S. 294, 336, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962). The market must "correspond to the commercial realities of the industry." *Id.*, quoted in Federal Trade Comm'n v. Advocate Health Care Network, 841 F.3d 460, 468 (7th Cir. 2016) (quotations omitted). Where geographic convenience is important to consumers, retail markets can be small, see United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 358, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963), but not this small. It defies belief to suggest that a hypothetical monopolist retail pharmacy could raise its drug prices substantially without losing customers to competitors outside that tiny area. See also 42nd Parallel North v. E Street Denim Co., 286 F.3d 401, 406 (7th Cir. 2002) (rejecting as "absurdly small" a proposed market for retail designer jeans and tee-shirts comprising only the "central business district" of Highland Park, Illinois).

Product Market: Though we could affirm the judgment of the district court solely **[**12]** on the basis of our geographic market analysis, for two reasons, we also address **[*918]** plaintiffs' failure to plead a proper product market. First, though its discussion was brief, the district court did address the issue, and its analysis would have been sufficient to support its decision. Second, Prime Therapeutics has taken an aggressive position on appeal: that "claiming a market of all 'prescription drugs' is meaningless" and that "attempting to measure the interchangeability of countless unnamed 'prescription drugs' is an impossible task." Sharif has not pleaded facts sufficient to support an inference that defendants have the requisite market power within a viable product market for retail prescription drugs. Sharif's failure, however, does not mean that no future antitrust plaintiff may be able to do so.

HN8[] "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe, 370 U.S. at 325*. Sharif asserts that the relevant product market is retail prescription drugs. Defendants contend that this product market is not plausible because more than 39,000 prescription drugs are sold in **[**13]** the United States, and of course one prescription drug may be interchangeable with only a few or perhaps no others. Contrary to the defense arguments, however, and subject to appropriate proof, we see no necessarily fatal flaw in treating that bundle or cluster of prescription drugs that are typically sold in brick-and-mortar retail pharmacies as a relevant product market.

HN9[] A cluster of products can comprise a relevant product market "if the cluster is itself an object of consumer demand." *Advocate Health Care Network, 841 F.3d at 467* (quotations omitted). As the Tenth Circuit noted in *Green Country Food Market, Inc. v. Bottling Group, LLC, 371 F.3d 1275, 1283-85 (10th Cir. 2004)*, the Supreme Court has recognized such "cluster" markets in banking, see *United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 360-61, 90 S. Ct. 2035, 26 L. Ed. 2d 658 (1970)*; *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 356-57, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*, and central-station home security products, see *United States v. Grinnell Corp., 384 U.S. 563, 572-73, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. The Court said in *Grinnell Corp.* that "We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities."

Health care services can be suitable subjects for such "cluster" product markets. In *Advocate Health Care Network*, we recognized "inpatient general acute care services—specifically, those services sold to commercial health plans and their members" as a product market, including those "medical services and procedures that require admission **[**14]** to a hospital, such as abdominal surgeries, childbirth, treatment of serious infections, and some emergency care." *841 F.3d at 468*. See also, e.g., *Messner v. Northshore University HealthSystem, 669 F.3d 802 (7th Cir. 2012)* (recognizing bundled hospital services as product market); *Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1412 n.2 (7th Cir. 1989)* (retail supermarkets defined relevant product market); see generally *Grinnell Corp., 384 U.S. at 572-73 & n.6* (commercial realities showed that central-station alarm companies needed to offer all or nearly all types of property-protection services, making cluster of services a relevant product market); Areeda & Hovenkamp, ¶ 565c (recognizing that surgical services might be appropriate "cluster" product market, but criticizing other attempts to establish cluster product markets).

[*919] We close with a note about resolving these appeals on the pleadings, with the federal claims dismissed with prejudice. ***HN10***[] Since federal civil pleading standards changed so dramatically in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, and *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, it has been especially important for district courts to give leave freely to amend pleadings. E.g., *Runnion v. Girl Scouts of Greater Chicago and Northwest Indiana, 786 F.3d 510, 519-20 (7th Cir. 2015)* (collecting cases). Uncertainty about application of the *Twombly-Iqbal* standard means that a plaintiff whose original complaint has been dismissed under *Rule 12(b)(6)* should ordinarily be given at least one opportunity to try to amend its complaint before the action itself is **[**15]** dismissed with prejudice. *Id.* In these cases, however, it is apparent that the federal antitrust claims are based on misunderstandings about foundational principles of ***antitrust law***. It is evident from the proceedings in the district courts and the arguments in plaintiffs' appellate briefs that the defects in these cases cannot be corrected, so that further amendment would be futile. E.g., *Runnion, 786 F.3d at 520*; *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC, 499 F.3d 663, 666-67 (7th Cir. 2007)*. The district courts thus did not err in dismissing these federal antitrust claims with prejudice.

* * * *

The judgment of the district court in the J&S Pharmacy case dismissing the Sherman Act claims of J&S customers Scale, Thomas, and Brown with prejudice is AFFIRMED as to plaintiffs' damage claims; dismissal of those plaintiffs' claims for injunctive relief is AFFIRMED AS MODIFIED to dismiss those claims as moot; and dismissal of those plaintiffs' state-law claims without prejudice is also AFFIRMED. In the Sharif Pharmacy case, the dismissal of the Sherman Act claims with prejudice and dismissal of the state-law claims without prejudice are AFFIRMED.

Viamedia, Inc. v. Comcast Corp.

United States Court of Appeals for the Seventh Circuit

February 7, 2019, Argued; February 24, 2020, Decided

No. 18-2852

Reporter

951 F.3d 429 *; 2020 U.S. App. LEXIS 5469 **; 2020-1 Trade Cas. (CCH) P81,098; 111 Fed. R. Evid. Serv. (Callaghan) 811; 2020 WL 879396

VIAMEDIA, INC., Plaintiff-Appellant, v. COMCAST CORPORATION and COMCAST CABLE COMMUNICATIONS MANAGEMENT, LLC, Defendants-Appellees.

Subsequent History: As Corrected March 6, 2020.

Rehearing denied by, En banc *Viamedia, Inc. v. Comcast Corp., 2020 U.S. App. LEXIS 10992 (7th Cir. Ill., Apr. 7, 2020)*

Later proceeding at *Comcast Corp. v. Viamedia, Inc., 141 S. Ct. 892, 208 L. Ed. 2d 450, 2020 U.S. LEXIS 5950, 2020 WL 7132183 (U.S., Dec. 7, 2020)*

US Supreme Court certiorari denied by *Comcast Corp. v. Viamedia, Inc., 2021 U.S. LEXIS 3548 (U.S., June 28, 2021)*

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:16-cv-05486 — Amy J. St. Eve, Judge.

Viamedia, Inc. v. Comcast Corp., 2017 U.S. Dist. LEXIS 24213, 2017 WL 698681 (N.D. Ill., Feb. 22, 2017)
Viamedia, Inc. v. Comcast Corp., 335 F. Supp. 3d 1036, 2018 U.S. Dist. LEXIS 138661, 2018 WL 3921741 (N.D. Ill., Aug. 16, 2018)

Core Terms

Interconnect, competitors, advertising, antitrust, Skiing, rival, cable, customers, procompetitive, spot, markets, avails, anticompetitive, district court, monopolist, subscribers, cooperative, summary judgment, anti trust law, refusal-to-deal, monopoly, consumers, compete, exclusionary, providers, monopoly power, monopolization, conditioned, sales, buy

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Scope

HN1[] **Antitrust & Trade Law, Sherman Act**

The purpose of the antitrust laws is to protect competition, not competitors.

Communications Law > ... > Rules & Regulations > Regulated Practices > Introducing Competition

Communications Law > ... > Regulated Entities > Telephone Services > Mobile Communications Services

HN2[] **Regulated Practices, Introducing Competition**

An Interconnect is what economists call a "two-sided platform." It serves as a clearinghouse, offering different products or services to two different groups who both depend on the platform to intermediate between them. Such connectivity gives an Interconnect its value but can also be misused to harm competition.

Communications Law > ... > Regulated Entities > Telephone Services > Mobile Communications Services

HN3[] **Telephone Services, Mobile Communications Services**

The value of the services that an Interconnect provides increases as the number of participants on both sides of the Interconnect increases.

Antitrust & Trade Law > Regulated Industries > Communications

HN4[] **Regulated Industries, Communications**

An Interconnect is not necessarily a one-way ratchet to increased demand. Decreased participation on either side of the Interconnect can also reduce its value. Thus, an Interconnect losing participation on the cable provider side decreases the value of the advertiser side, and if advertisers leave due to this loss in value, then the Interconnect has even less value to the cable providers, risking a feedback loop of declining demand. Whether the Interconnects are procompetitive or not depends on the competitive dynamics among its participants. In a competitive market, for example, the risk of negative feedback may serve as a check on the ability of any one participant to raise prices or otherwise exert market power. Conversely, in a less competitive market, access to the crucial Interconnects can be used to exclude competitors and harm competition. The Interconnects are so important that exclusionary conduct can become a weapon to injure competitors.

Antitrust & Trade Law > Sherman Act > Claims

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

HN5[] **Sherman Act, Claims**

Section 2 of the Sherman Act imposes liability on every person who shall monopolize any part of the trade or commerce among the several States. *15 U.S.C.S. § 2*. A private plaintiff may bring a civil claim as a person who was injured in his business or property by reason of anything forbidden in the antitrust laws. *15 U.S.C.S. § 15(a)*.

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

HN6[] **Scope, Monopolization Offenses**

Judicial decisions interpreting *§ 2* of the Sherman Antitrust Act, *15 U.S.C.S. § 2*, have long held that simple possession of monopoly power, or the pursuit of it, is not in itself illegal. The law does not make mere size an offence, or the existence of unexerted power an offense. It requires overt acts. Size does not determine guilt as the monopolist may have gained market power by force of accident, or by virtue of his superior skill, foresight and industry. Therefore, there must be some exclusion of competitors. Thus, a firm violates the monopoly provision in *Section 2* only when it both (1) possesses monopoly power in the relevant market and (2) engages in the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

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

HN7[] **Relevant Market, Geographic Market Definition**

A relevant antitrust geographic market is the area in which sellers operate and where purchasers can predictably turn for supplies.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN8[] **Actual Monopolization, Monopoly Power**

Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. When assessing exclusionary conduct, it is necessary to examine market power or share at both of the two market levels involved.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN9[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

A firm's market power is important because, without it, a firm will have little to no ability to distort or harm competition, no matter how great its desire to do so, even when engaging in conduct that in different circumstances might be perceived as anticompetitive. Not infrequently, the initial question of market power proves decisive. Even mildly reprehensible behavior might be enough to challenge a firm whose power is significant.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN10[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Courts recognize various types of conduct that have the potential to harm competition. The types of conduct that are "exclusionary" in nature impair rivals' opportunity to compete in a way that is inconsistent with "competition on the merits. In the vernacular of ***antitrust law***, a "predatory" practice is one in which a firm sacrifices short-term profits in order to drive out of the market or otherwise discipline a competitor.

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

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

HN11[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Conduct that can harm competition may fit into more than one of the court-devised categories. After all, the means of illicit exclusion, like the means of legitimate competition, are myriad. Although the standard for a *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, violation is significantly stricter in its power assessment than for a *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, claim, it is broader and less categorical in its definition of proscribed conduct. This means that a dominant firm's conduct may be susceptible to more than one court-defined category of anticompetitive conduct. A simple refusal to deal is conduct where one firm refuses to deal no matter what, whereas tying and exclusive dealing are two common examples of conditional refusals to deal, i.e., one firm will refuse to deal with another firm unless some condition is met. Similarly, many of the practices that have been characterized as exclusive dealing could also be described as tying because the economic distinction between the two is most often slight or nil.

Antitrust & Trade Law > Sherman Act > Claims

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

HN12[] **Sherman Act, Claims**

Plaintiffs must allege and prove harm, not just to a single competitor, but to the competitive process, i.e., to competition itself. At bottom, the purpose of identifying the categories of conduct is to help determine the presence or absence of harmful effects, which are both the reason for any antitrust concern and often the simplest element to disprove.

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

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

HN13[] **Standards of Review, De Novo Review**

The court of appeals reviews de novo a grant of a motion to dismiss, construing the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in its favor. In reviewing dismissal for failure to state a claim, the court of appeals accepts the facts alleged by the plaintiff without vouching for their objective truth.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

HN14[] **Actual Monopolization, Monopoly Power**

Monopolists are both expected and permitted to compete like any other firm. A monopolist is not obliged to watch the quality of its products deteriorate and its customers become disaffected and lie down and play dead because even a monopolist is entitled to compete. Part of competing like everyone else is the ability to make decisions about with whom and on what terms one will deal. And just because a firm has monopoly power doesn't mean that the law should prevent it from competing, as it would be absurd to require the monopolist to hold a price umbrella over less efficient entrants. Thus, the general rule is that even monopolists are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing. Yet there are limited circumstances under which a monopolist's refusal to deal with another party will be illegal anticompetitive conduct. *Section 2* of the Sherman Act, *15 U.S.C.S. § 15*, reaches unilateral refusals to deal when the refusals constitute monopolization.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

HN15[] **Horizontal Refusals to Deal, Sherman Act**

In the absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his or her own independent discretion as to parties with whom he or she will deal.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

HN16[] **Horizontal Refusals to Deal, Sherman Act**

Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate *Section 2* of the Sherman Act, *15 U.S.C.S. § 15*. There are limited circumstances in which a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal

HN17[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A pre-existing relationship supports a presumption that the joint arrangement was efficient and profitable. In any business, patterns of distribution develop over time. These may reasonably be thought to be more efficient than alternative patterns of distribution that do not develop. The patterns that do develop and persist the court may call the optimal patterns. By disturbing optimal distribution patterns, one rival can impose costs upon another, that is, force the other to accept higher costs.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

HN18[] **Horizontal Refusals to Deal, Sherman Act**

The factors help case-by-case assessments of whether a challenged refusal to deal is indeed anticompetitive, even though no factor is always decisive by itself. Even a monopolist might wish to withdraw from a prior course of dealing and suffer a short-term profit loss in order to pursue perfectly procompetitive ends, say, to pursue an innovative replacement product of its own. Similarly, forgoing short-run profits may sometimes reflect desirable, procompetitive behavior, such as efforts to offer promotional discounts. And a defendant may have procompetitive rationales for treating a rival differently, such as if it's more costly to deal with distant rivals than other nearby customers. But because the factors as a whole provide a window into likely harm to competition, a court should start with the factors in determining whether a refusal to deal is unlawful.

Antitrust & Trade Law > Sherman Act > Defenses

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

HN19[] **Sherman Act, Defenses**

Valid business justifications are relevant only to the rebuttal of a prima facie case of monopolization.

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

Antitrust & Trade Law > Sherman Act > Defenses

HN20[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Balancing anticompetitive effects against hypothesized justifications depends on evidence and is not amenable to resolution on the pleadings. Whether valid business reasons motivated a monopolist's conduct is a question of fact.

Antitrust & Trade Law > Sherman Act > Defenses

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

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

HN21[] **Sherman Act, Defenses**

A district court cannot choose between competing explanations without first resolving questions of fact not before it upon a motion to dismiss.

Antitrust & Trade Law > Sherman Act > Defenses

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

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

HN22[] **Sherman Act, Defenses**

Consideration of procompetitive justifications must wait for a comprehensive rule of reason analysis.

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

HN23[] **Actual Monopolization, Anticompetitive & Predatory Practices**

A gross benefit or gain for the defendant is not enough. Conduct fails the "no economic sense" test if it is expected to yield a negative payoff, net of the costs of undertaking the conduct, and not including any payoff from eliminating competition.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

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

Antitrust & Trade Law > Sherman Act > Defenses

HN24[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Although the "no economic sense test" offers good insights into when aggressive actions by a single firm go too far, it can lead to erroneous results unless one also seeks to "balance" gains to the monopolist against losses to consumers, rivals, or others. Otherwise the courts could arrive at absurd outcomes. Theoretically, an act might benefit the defendant very slightly while doing considerable harm to the rest of the economy, and it would be lawful. It is possible the test could be adapted to meet these criticisms, given that a court should not consider any gain from eliminating competition, but, in any event, the no economic sense test was not intended to displace all other approaches. Rather, it is likely to be most useful as one part of a sufficient condition: If challenged conduct has a tendency to eliminate competition and would make no economic sense but for that tendency, the conduct is exclusionary. Under a broader approach, harm "wholly disproportionate" to the valid business justification can also support a refusal-to-deal-claim. Condemnation would be appropriate only for conduct that (1) clearly injures an actual or prospective rival either (2a) with no good business justification at all, or (2b) with a business justification that is poorly fitted to the result or wholly disproportionate to the harm that is inflicted.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

HN25[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The monopolist's conduct must be irrational but for its anticompetitive effect. The factor of a defendant forsaking short-term profits is relevant but should not always be dispositive because a short-term profit sacrifice is neither necessary nor sufficient for conduct to be exclusionary. A short-run profit sacrifice also is not necessary for conduct to be exclusionary because the anticompetitive gains from exclusionary conduct sometimes can be reaped immediately. Monopolizing conduct is not necessarily costly to the defendant. This more nuanced approach considering both pro-competitive benefits and anticompetitive harms is necessary to answer the ultimate question of whether competition was harmed. The plaintiff ultimately needs to prove that the monopolist's refusal to deal was part of a larger anticompetitive enterprise, such as (again) seeking to drive a rival from the market or discipline it for daring to compete on price. The result of such conduct is to harm competition by entrenching a dominant firm and enabling it to extract monopoly rents once the competitor is killed off or beaten down.

Antitrust & Trade Law > Sherman Act > Claims

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

HN26[] **Sherman Act, Claims**

The calculation of procompetitive benefits net of anticompetitive harms does not easily lend itself to a pleading standard. Rule of reason cases place a premium on objective tests based on evidence that is typically not in the defendant's exclusive control. This is why it is typically considered an adequate pleading in a rule of reason antitrust case for a plaintiff to allege (1) evidence of market structure (i.e., market power and relevant markets) and (2) "exclusionary effect" (i.e., foreclosure of a competitor from a market), both of which can ordinarily be obtained without access to the defendant's own records and indicate that an antitrust violation is plausible. To the extent that refusal-to-deal claims require more at the pleading stage, it is enough to allege plausibly that the refusal to deal has some of key anticompetitive characteristics.

Antitrust & Trade Law > Sherman Act > Claims

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

HN27[] **Sherman Act, Claims**

A plaintiff must eventually show a sacrifice of short-term profits to prevail on a refusal-to-deal claim, and alleging that a refusal to deal was predatory is sufficient at the pleadings stage.

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

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Defenses

HN28[] **Actual Monopolization, Claims**

Under the burden-shifting framework, once a plaintiff has successfully established a prima facie case under *§ 2* of the Sherman Act, *15 U.S.C.S. § 15*, by demonstrating anticompetitive effect, then the defendant may proffer a "procompetitive justification," a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal. If such a justification is offered, the burden shifts back to the plaintiff to rebut that claim. If the plaintiff cannot rebut the evidence of the defendant's procompetitive justifications, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit. This burden-shifting has evolved based on which party has access to the various categories of evidence and information, with any evidence of pro-competitive justifications likely to be under the defendant's control.

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

HN29[] **Per Se Rule & Rule of Reason, Sherman Act**

Courts apply a balancing approach in rule of reason cases, whether alleged under *§ 1* or *§ 2* of the Sherman Act, *15 U.S.C.S. §§ 1*, *2*. For a rule of reason *§ 1* case, to determine whether a restraint violates the rule of reason a three-step, burden-shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a pro-competitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. Courts require stronger proof of offsetting efficiencies when defendants possess greater ability to foreclose rivals from the market.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Vertical Restraints

HN30[] **Price Fixing & Restraints of Trade, Vertical Restraints**

Even a monopolist is free to integrate, especially when integration creates no new monopoly in any second area. Such an integration allows the defendant to achieve cost-savings by elimination of double marginalization. In other words, prior to vertical integration, the firms providing complementary products would earn margins over cost before their products reached consumers. After integration, goes the theory, there is no need for two entities to earn margins over cost, and the merged entity would eliminate that cost and pass on some of those cost savings to consumers in order to attract additional customers. Thus, it would rarely be an antitrust violation for a firm to supply itself through vertical integration, and a plaintiff would not generally have a right under ***antitrust law*** to demand that a defendant forgo supplying itself from an in-house source.

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Vertical Restraints

HN31[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Vertical expansion by a monopolist, without more, does not violate *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, unless there is an allegation of an anticompetitive incentive to create a downstream monopoly, or other special circumstances in which a monopolist's vertical expansion could be anticompetitive.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Vertical Restraints

HN32[] **Price Fixing & Restraints of Trade, Vertical Restraints**

Taking control of and exploiting control of a previously cooperative mechanism is not vertical integration.

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

HN33[] **Tying Arrangements, Sherman Act Violations**

The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.

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

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

HN34[] **Summary Judgment, Entitlement as Matter of Law**

The court of appeals reviews a decision to grant summary judgment de novo. Summary judgment is appropriate only if there are no disputed questions of material fact and the moving party is entitled to judgment as a matter of law, so the court examine the record in the light most favorable to the non-movant, granting it the benefit of all reasonable inferences that may be drawn from the evidence and reversing if the court find a genuine issue concerning any fact that might affect the outcome of the case.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN35[] **Summary Judgment, Evidentiary Considerations**

On summary judgment, courts must refrain from making credibility determinations or weighing evidence.

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

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

HN36[] **Private Actions, Sherman Act**

When determining whether there is a genuine issue of material fact the substantive law will identify which facts are material. The requirement in that the plaintiffs' claims make economic sense do not introduce a special burden on plaintiffs facing summary judgment in antitrust cases.

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

HN37[] **Tying Arrangements, Sherman Act Violations**

A competitor's claim that a rival used monopoly power in a tying product market to gain a monopoly in a tied product market is facially anticompetitive and exactly the harm that antitrust laws aim to prevent.

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

HN38[] **Tying Arrangements, Sherman Act Violations**

Tying is conduct in which a firm will sell one product, the tying product, but only on the condition that the buyer also purchases a different (or tied) product. The seller will purchase the tied product not because the party imposing the tying requirement has a better product or a lower price but because the seller has power or leverage in the market for the tying product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

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

HN39[] **Tying Arrangements, Per Se Rule**

Tying is still nominally subject to a per se rule of illegality, but it is a most peculiar per se rule. The factual elements that must be proven for a tying claim capture much of what must be demonstrated in a rule of reason case.

Showing that the purchase of the tied product was forced uses many of the same concepts used to analyze refusals to deal: some assessment of market power, rough predictions of anticompetitive harm, and consideration of procompetitive justifications. While some tying arrangements are still unlawful, such as those that are the product of a true monopoly, that conclusion must be supported by proof of power in the relevant market. Even when treated as per se illegal, the Supreme Court has almost always been willing to consider a defendant's offered justifications.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

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

HN40[] Tying Arrangements, Per Se Rule

When the defendant is a dominant firm and meets a much stricter power requirement, the "special screening function" of the tying factors is largely unnecessary, and the more general standards of *§ 2* of the Sherman Act, *15 U.S.C.S. § 15*, become relevant because the technical requirements attach only to per se ties. Thus, when the defendant is a monopolist in the "tying product," it may be superfluous to go through a detailed inquiry into whether there are "separate products." Similarly, when a defendant's market share and the underlying market structure make monopolization or attempt plausible, then a tie that contributes significantly to the maintenance or creation of monopoly power violates *§ 2* even though it is unilaterally imposed.

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

HN41[] Tying Arrangements, Sherman Act Violations

Whether one or two products are involved turns on the character of the demand for the two items. For service and parts to be considered two distinct products, there must be sufficient demand so that it is efficient for a firm to provide service separately from parts.

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

HN42[] Tying Arrangements, Sherman Act Violations

The fact that buyers may wish to purchase and use two complementary products together does not, in and of itself, convert the two separate products into a single product. Rather, the market must be assessed at the pre-contract rather than post-contract stage. A grouping of sales covered by a single contract does not become a relevant market for that reason.

Communications Law > ... > Rules & Regulations > Regulated Practices > Introducing Competition

HN43[] Regulated Practices, Introducing Competition

A provider of Interconnect services bundles and re-sells ads from multiple "multichannel video programming distributors" (MVPDs) in a regional market. An ad rep has a more direct relationship with an MVPD, directly representing it in regional and/or local ad sales, and potentially acting as its representative with an Interconnect. The "character of the demand" for the two services also differs, as demonstrated by how the market participants have sold and purchased the services.

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

HN44[ ] Scope, Monopolization Offenses

In applying the antitrust laws, the courts care more about economic substance than about form.

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

HN45[ ] Tying Arrangements, Sherman Act Violations

When a defendant adopts a policy that makes it unreasonably difficult or costly to buy the tying product (over which the defendant has market power) without buying the tied product from the defendant, it forces' buyers to buy the tied product from the defendant and not from competitors. Liability is appropriate where the monopolist bars a rival from cost-efficient means of distribution even if some means of distribution remain open.

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

HN46[ ] Tying Arrangements, Sherman Act Violations

Bundling in non-competitive markets does not necessarily provide insight into whether a tie is efficient rather than reflective of increased market power exploitation, while unbundling in competitive markets likely reflects efficiencies.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN47[ ] Price Fixing & Restraints of Trade, Horizontal Market Allocation

Antitrust law is rightly skeptical of mechanisms that permit competitors jointly to set prices and other terms of dealing. Collaboration between actual or potential competitors can be rife with opportunities for anticompetitive activity.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN48[ ] Price Fixing & Restraints of Trade, Horizontal Market Allocation

The government antitrust enforcement agencies provide guidance on competitor collaborations. Factors that show anticompetitive effect include whether the collaboration may: (1) Limit independent decision making or combine the control of or financial interests in production, key assets, or decisions regarding price, output, or other competitively sensitive variables, otherwise reduce the participants' ability or incentive to compete independently, potentially facilitate explicit or tacit collusion through facilitating practices such as the exchange or disclosure of competitively sensitive information or through increased market concentration, successfully eliminate procompetitive pre-collaboration conduct, such as withholding services that were desired by consumers when offered in a competitive market.

Antitrust & Trade Law > Sherman Act > Defenses

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

HN49[] **Sherman Act, Defenses**

The procompetitive benefits typically recognized in ***antitrust law*** include evidence of higher output, improved product quality, energetic market penetration, successful research and development, cost-reducing innovations, and the like.

Antitrust & Trade Law > Sherman Act > Defenses

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

HN50[] **Sherman Act, Defenses**

As a general matter, the evidence supporting a prima facie case need not be as specific as the evidence supporting a procompetitive justification because if the defendants have a procompetitive justification, it must have been a motivating factor for the restraint, and the defendants should be able to establish it rather easily. To the extent that the defendants' expectation of profit came from something other than a restriction of competition, they should have evidence and are in the best position to provide it.

Mergers & Acquisitions Law > Merger Guidelines

HN51[] **Mergers & Acquisitions Law, Merger Guidelines**

The United States Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, identify as their unifying theme the proposition that mergers should not be permitted to create, enhance, or entrench market power or facilitate its exercise by enhancing a firm's market power. One example of an anticompetitive merger is: Firms A and B operate in a market in which network effects are significant, implying that any firm's product is significantly more valuable if it commands a large market share or if it is interconnected with others that in aggregate command such a share. Prior to the merger, they and their rivals voluntarily interconnect with one another. The merger would create an entity with a large enough share that a strategy of ending voluntary interconnection would have a dangerous probability of creating monopoly power in this market. The interests of rivals and consumers would be broadly aligned in preventing such a merger.

Antitrust & Trade Law > Sherman Act > Defenses

HN52[] **Sherman Act, Defenses**

Any defense premised upon the proposition that competition itself is inefficient, unreasonable, or confusing is not cognizable.

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

HN53[] **Per Se Rule & Rule of Reason, Sherman Act**

And while protection against free-riding is generally recognized as a procompetitive goal, when payment is possible, free-riding is not a problem because the "ride" is not free. Often instances of claimed free riding are really complaints about competition, particularly when there are joint costs, and complete market exclusion is a suspiciously excessive remedy for claimed free riding, even where a certain amount of free riding actually occurs.

Antitrust & Trade Law > Sherman Act > Remedies

HN54[] **Sherman Act, Remedies**

Courts are ill suited to act as central planners, identifying the proper price, quantity, and other terms of dealing.

Antitrust & Trade Law > Sherman Act > Remedies

HN55[] **Sherman Act, Remedies**

A court should not impose a duty to deal that it cannot explain or adequately and reasonably supervise. Yet courts are often called upon to undertake complicated, long-term supervision of complex cases and remedies. The judiciary need not and should not adopt a posture of learned helplessness in the face of proven antitrust violations.

Antitrust & Trade Law > Sherman Act > Remedies

HN56[] **Sherman Act, Remedies**

Evidence of an earlier course of dealing helps address, at least to some degree, administrability concerns, presumably profitable terms already agreed to by the parties may suggest terms a court can use to fashion a remedial order without having to cook them up on its own.

Antitrust & Trade Law > Sherman Act > Remedies

HN57[] **Sherman Act, Remedies**

Antitrust courts normally avoid direct price administration, relying on rules and remedies that are easier to administer. If a pricing remedy proves too complicated, then structural remedies may be preferable. Even mildly reprehensible behavior might be enough to challenge a firm whose power is significant and could justify imposing a more substantial remedy (e.g., divestiture or dissolution versus an injunction.)

Antitrust & Trade Law > Sherman Act > Remedies

HN58[] **Sherman Act, Remedies**

Court-imposed and court-supervised remedies can be imposed without a defendant's consent after a finding of liability.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

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

HN59[] **Standing, Requirements**

A private civil plaintiff in an antitrust case must establish antitrust injury, which requires proof that its claimed injuries are of the type the antitrust laws were intended to prevent and reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

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

HN60[] **Standing, Requirements**

When a monopolist creates a monopoly in the tied market, rivals are often excluded from the market, thereby losing market share or sales. In such cases courts ordinarily grant standing to the excluded or impeded rival. Competitors may be able to prove injury before they actually are driven from the market and competition is thereby lessened. The case for relief will be strongest where competition has been diminished. Competitors suffer antitrust injury when they are forced from the market by exclusionary conduct. When the plaintiff's injury is linked to the injury inflicted upon the market, such as when consumers pay higher prices because of a market monopoly or when a competitor is forced out of the market, the compensation of the injured party promotes the designated purpose of the ***antitrust law***, the preservation of competition. This rule is integral to an effective antitrust regime because the foreclosed rival's injury is entirely independent of the amount or existence of any injury to buyers.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN61[] **Standing, Requirements**

The general rule is that customers and competitors in the affected market have antitrust standing. Competitors and consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury. Competitors and consumers are favored plaintiffs in antitrust cases. Competitors and consumers are favored plaintiffs in antitrust cases.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN62[] **Standing, Requirements**

Rivals in the tied market may be "foreclosed" when their entry or expansion is impeded or they lose existing market share or sales. Consumers lose the benefits of any entry, expansion, competition, or innovation that independent rivals might have injected into the tied market. In such cases courts ordinarily grant standing to the excluded or impeded rival.

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

HN63[] **Standards of Review, Abuse of Discretion**

The court of appeals reviews the district court's exclusion of evidence for an abuse of discretion. If a discretionary ruling is based on an error of law, though, it can often be deemed an abuse of discretion.

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

HN64[] **Expert Witnesses, Qualifications**

Expert opinion testimony is admissible if (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods, and (d) the expert has reliably applied the principles and methods to the facts of the case. *Fed. R. Evid. 702*. An expert's opinion may overlap with the jurors' own experiences or cover matters that are within the average juror's comprehension, so long as the expert uses some kind of "specialized knowledge" to place the litigated events into context. All you need to be an expert witness is a body of specialized knowledge that can be helpful to the jury.

Antitrust & Trade Law > Sherman Act > Claims

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

HN65[] **Sherman Act, Claims**

Hiring another expert on causation is not a legal requirement for successfully bringing an antitrust case. Rather than requiring *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, liability to turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct, which would only encourage monopolists to take more and earlier competitive action, courts have inferred causation when a defendant's conduct reasonably appears capable of making a significant contribution to maintaining monopoly power. To the extent there may be an underlying problem of proof, the defendant is made to suffer the uncertain consequences of its own undesirable conduct, and causation queries go to questions of remedy, not liability.

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Judges: Before BAUER, HAMILTON, and BRENNAN, Circuit Judges. BRENNAN, Circuit Judge, concurring in part and dissenting in part.

Opinion by: HAMILTON

Opinion

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[*434]

HAMILTON, *Circuit Judge*. Plaintiff Viamedia, Inc. has sued defendant Comcast Corporation for violating *Section 2 of the Sherman Act*, *15 U.S.C. § 2*. Viamedia accuses Comcast of using its monopoly power in one service market to exclude competition and gain monopoly power in another service market. The district court dismissed Viamedia's case, in part on the pleadings and in part on summary judgment. We reverse. Viamedia's allegations and evidence are sufficient to state and support claims that should be presented to a jury.

Because the district court dismissed part of the case on the pleadings and the rest on summary judgment, we must **[**4]** treat as true Viamedia's factual allegations and give it the benefit of factual disputes and favorable inferences from the evidence. To make sense of this case, we explain some basic business arrangements in the markets that put television programming in American homes, as well as market definitions necessary in evaluating the antitrust claims.

The parties agree on the definitions of the relevant geographic and service markets. Viamedia asserts claims against Comcast for monopolization in three geographic markets: the Chicago, Detroit, and Hartford metropolitan areas. In each of those three geographic markets Comcast now has monopoly power over two separate service markets: Interconnect services and advertising representation services. Interconnect services are cooperative selling arrangements for advertising through an "Interconnect" that enables providers of retail cable television services to sell advertising targeted efficiently at regional audiences. Advertising representation services for retail cable television providers assist those providers with the sale and delivery of national, regional, and local advertising slots. This market in advertising representation services is the **[**5]** one in which Viamedia competed with Comcast. In each geographic market, according to Viamedia's evidence, Comcast used its monopoly power over the cooperative Interconnects to force its smaller retail cable television competitors to stop doing business with Viamedia, thereby gaining monopoly power over the market for advertising representation services.

Viamedia has presented evidence that Comcast's elimination of its only competitor **[*435]** in the advertising representation services market has harmed competition in violation of *Section 2*. According to Viamedia's evidence, its customers for advertising representation services (i.e., Comcast's retail cable competitors) did not switch to Comcast because it offered a better-quality or lower-priced service. They switched because Comcast used its monopoly power over the Interconnects to present its cable competitors with a Hobson's choice: either start buying advertising representation services from us and regain access to the Interconnects, or keep buying those services from Viamedia and stay cut off from the Interconnects they needed to compete effectively. According to Viamedia's evidence, Comcast deliberately adopted a strategy it knew would cost Comcast **[**6]** itself millions of dollars in the short run, but the strategy eventually gave it monopoly power in these local markets for advertising representation services. ***HN1***[] Giving Viamedia the benefit of its allegations and evidence, this is not a case in which *Section 2* is being misused to protect weaker competitors rather than competition more generally. See *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 906, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*, quoting *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (purpose of the antitrust laws is to protect "*competition*, not *competitors*").

As now the sole provider of advertising representation services to its cable competitors, Comcast can also damage competition beyond the relatively narrow markets for advertising representation services in Chicago, Detroit, and Hartford. This control allows it to undercut competition in two more markets: cable television services to retail customers, and the sale of advertising spots to local retailers. By establishing itself as the gatekeeper for its cable competitors' advertising, Comcast has gained access to their sensitive marketing and promotional pricing information. And because Comcast took control of its rival cable companies' inventory of local ads, local retailers no longer have a choice of cable companies from whom they buy ad time.[1]

Viamedia has thus **[**7]** offered evidence to defeat summary judgment on its claim that Comcast unlawfully used its monopoly power over the Interconnects to tie those services to its advertising representation services. Viamedia has also adequately stated a claim that Comcast has unlawfully refused to deal with Viamedia and any cable competitor that bought advertising representation services from Viamedia. On the pleadings and the summary judgment record, Viamedia's *prima facie* claims of monopolization are similar to but stronger than the successful plaintiff's *Section 2* claim in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. We remand this case for any further necessary discovery and for trial.

In Part I, we lay out the key facts: in Part I-A, the structure of the cable television markets; in Part I-B, the specifics of Comcast's and Viamedia's businesses, including the advertising representation services they both offer and the critical role that Interconnects play for providers of cable television programming; and in Part I-C, Comcast's refusal to continue providing Interconnect access to Viamedia or **[*436]** any of its customers in Chicago, Detroit, and Hartford. In Part II, we review the district court proceedings. Then, in Part III-A, we lay out the legal standards **[**8]** under *Section 2* that apply to Viamedia's claims. In Part III-B-1, we apply that law to Comcast's decision to refuse to allow Viamedia or its customers access to the Interconnects. In Part III-B-2, we apply that law to Viamedia's claim that Comcast illegally tied Interconnect services to advertising representation services. In Part III-C, we evaluate in greater detail the harm to competition alleged by Viamedia and the procompetitive justifications offered by Comcast, highlighting considerations that will be relevant on remand. Finally, in Parts III-D and III-E, we address issues of antitrust injury and the district court's exclusion of expert witnesses.

I. *The Markets and the Competitors*

Because the district court dismissed one claim on the pleadings and the other on summary judgment, we present the relevant allegations and evidence in the light reasonably most favorable to plaintiff Viamedia, the non-moving party. The parties agree on the definition of the relevant geographic markets, and the relevant service-product markets are not disputed on appeal. The relevant geographic markets are the Chicago, Detroit, and Hartford metropolitan areas, called Direct Marketing Areas or DMAs. The monopolized **[**9]** service market in each metropolitan area is that for the sale of advertising representation services ("ad rep services" in industry terms) related to so-called spot advertising on cable systems. To assess the harm to competition that can result from monopolization of the market for ad rep services, we must explain the related markets for retail cable television services to consumers, as well as access to the cable companies' cooperative advertising distribution platforms called Interconnects.

A. *Cable Television: History, Revenue Sources, and Competition*

Understanding these markets' competitive dynamics requires a bit of history about the evolution of television in the United States, including the challenges that cable companies have faced in competing with over-the-air broadcast programming.

1. *Television Programming and Advertising*

An awkward acronym, MVPDs, stands for "multichannel video programming distributors." That umbrella term includes cable companies like Comcast and Cox, as well as "overbuilders" like RCN and Wide Open West, known as WOW!. Beyond cable companies, MVPDs also include direct-broadcast satellite companies (AT&T's DirecTV and Dish Network), as well as companies formerly **[**10]** associated only with telephone service (e.g., Verizon's

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[1] Comcast sells advertising representation services through an entity called Comcast Cable Communications Management, LLC, which was formerly called Comcast Spotlight. The district court and the parties have referred to Comcast's ad-related services division as both Comcast and Comcast Spotlight. We use "Comcast" to refer to both together but make clear when we refer to Comcast Spotlight in particular.

FiOS and AT&T's U-verse). The two largest MVPDs are Comcast and AT&T-DirecTV, which together have more than 20 million television subscribers.[2]

Focusing on the advertising-supported network programming carried by these MVPDs, we explain the special obstacles cable companies face in taking advantage of advertising revenue. The cable companies' solution—jointly developing the Interconnects—created a later opening for a dominant cable company like Comcast to use its power over several Interconnects to gain a monopoly in a related market and to **[*437]** gain some measure of oversight and control of its smaller cable competitors.

For decades, television programming was dominated by three broadcast networks and was funded largely by the advertisements that ran in the programming. To help advertisers know how many and which viewers they were reaching, the industry adopted various audience measurement metrics, most importantly "Designated Market Areas" or "DMAs." DMAs are meant to capture regional audiences that are likely to view the same programming. They often encompass more than a single county and can also cross state lines.

As cable television **[**11]** companies got started, they typically won exclusive franchise areas granted by local governments. Their further expansion was then "subsidized by monopoly profits" from these exclusive territories. U.S. Dep't of Justice, *Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers* 71 (Nov. 2008) (DOJ Report). Cable companies then grew and consolidated by sewing together such local franchises. Critically for this case, the patchwork combinations of local franchise areas did not align with DMAs.

2. *Revenue Sources: Competition and Cooperation*

Most revenue for MVPDs comes from (1) the sale of advertising and (2) customer subscription fees. In geographic areas where MVPDs overlap, they compete on both fronts. The conduct at issue in this litigation affects both fronts and millions of households in the key metropolitan areas, and it potentially affects tens of millions more in other metropolitan areas.

a. *Competition for Advertising Dollars and Cooperation Through Interconnects*

The mechanics of advertising are central to this lawsuit, accounting for the existence of the market in which Comcast and Viamedia competed. For every hour of programming, networks allot **[**12]** a certain number of minutes for advertisements. Contracts between an MVPD and a network (e.g., CNN or ESPN) typically make two or three of those minutes per hour available for the MVPDs to sell themselves, with the networks selling the remainder. MVPDs can sell these time slots to advertisers in various increments of time, such as 15, 30, or 60 seconds. Each increment is typically referred to as a "spot cable availability," or "spot avail." Approximately 75% of the spot avails are sold to advertisers. The MVPDs use the remaining 25% to advertise their own products and services.

This brings us to the source of the problem here. In the early days of cable, advertisers who wanted to reach an entire DMA such as Chicago faced an obstacle. Cable systems had grown organically, with each cable service obtaining franchises "through the simple addition of new systems as opportunities arose," leaving cable "company holdings ... typically scattered across the country." Patrick R. Parsons, *Horizontal Integration in the Cable Television Industry: History and Context*, 16 The Journal of Media Economics, no. 1 (2003) at 23, 37. Most important, the DMAs that helped broadcast television advertising reach **[**13]** entire marketing areas did not align with cable companies' franchise areas. And yet, for a substantial percentage of spot avails, it would be most profitable to sell them on a regional, DMA-wide level.

As a result, cable companies had a weaker competitive position for advertising dollars vis-à-vis the broadcast networks and satellite providers, who could easily deliver advertising to an entire DMA. Cable companies could not

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[2] For statutory definitions of "multichannel video programming distributor" (MVPD), "cable service," and "video programming," see *47 U.S.C. § 522(13)*, *(6)*, and *(20)*.

offer DMA-wide coverage, so advertisers would pay less for spot **[*438]** avails. To ensure DMA-wide coverage, an advertiser had to contract separately with each cable provider whose footprint included any part of that DMA. This was inefficient.

The cable companies came up with a solution. They banded together to create a platform called an Interconnect that could bring together all cable providers within a given DMA. The cable companies could contribute their DMA-wide spot avails to the Interconnect, which would provide a single point of contact for advertisers. An advertiser could then purchase a particular time slot and be assured that its advertisement would appear in cable subscribers' programming throughout the DMA. Thus, Interconnect services are provided DMA by DMA. **[**14]** As described by Comcast, "interconnects were formed voluntarily by MVPDs in markets to pool their resources and offer DMA-wide selling of cable/MVPD advertising inventory[.] ... Otherwise, advertisers trying to cobble together a wide-footprint, MVPD-based advertising campaign would have to go MVPD-by-MVPD."

To cable subscribers, the national, regional, and local advertisements appear seamlessly within television shows and live sports events. But the hidden seam of the Interconnects—and the ways its spot avails are paid for and delivered—is the locus of Comcast's allegedly anticompetitive conduct.

For purposes of this suit, the services provided by the Interconnects must be distinguished from advertising representation services. An Interconnect operator will:

- Pool inventory of spot avails from multiple MVPDs on a DMA-wide basis;
- Employ sales personnel to sell and/or coordinate sales of DMA-wide spot avails;
- Distribute schedules of participating MVPDs' spot avails to facilitate coordinated merging of local advertising schedules;
- Coordinate insertion of ads (although MVPDs themselves generally provide the technical equipment for ad insertion into programming); and
- Collect money from **[**15]** Interconnect advertisers and coordinate payment to participating MVPDs or their ad representatives.

Thus, the Interconnects allow the participating MVPDs to sell their DMA-wide advertising in a way that mimics the broadcast networks' and satellite providers' comprehensive coverage of a DMA.[3]

All participating MVPDs were intended to benefit from the Interconnects, and all were encouraged to participate to maximize the value of the DMA-wide spot avails. To quote Comcast again: "The value of an interconnect increases as more MVPDs in an area participate, so our incentive is to have as many MVPDs participate as possible." First Am. Cplt. ¶ 39. Because MVPDs will contribute only about one-third of their spot avails to the Interconnects, and compete with one another for local ad sales, Interconnect participants took steps to avoid giving preferential treatment to any single MVPD participant. To ensure fair administration of the Interconnects, they were initially conceived as being operated by non-MVPD, neutral third parties. At the time of their formation, **[*439]** Interconnects were overseen by boards of directors elected by all MVPD members.

Interconnects thus became valuable bridges to advertisers, **[**16]** translating into millions of dollars of advertising revenue each year in each market. Interconnects are especially valuable to smaller MVPDs. Once an Interconnect gains a critical mass of subscribers, regional or national advertisers are less likely to bother dealing with standalone MVPDs, especially those with small shares of DMA subscribers. And selling spot avails only to local (as opposed to DMA-wide or national) advertisers will not compensate for the lost revenue if an MVPD is shut out of the Interconnect. Purely local spot avails are sources of revenue and local business relationships, but they have lower profit margins.

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[3] This type of cooperative arrangement is also available at the national level, with National Cable Communications (NCC) able to place ads across multiple DMAs or nationwide, replicating broadcast networks' and satellite providers' nationwide coverage. As the country's largest cable provider, Comcast now controls 60% of the NCC.

HN2[] An Interconnect is what economists call a "two-sided platform." It serves as a clearinghouse, offering "different products or services to two different groups who both depend on the platform to intermediate between them." *Ohio v. American Express Co., 138 S. Ct. 2274, 2280, 201 L. Ed. 2d 678 (2018)*. Such connectivity gives an Interconnect its value but can also be misused to harm competition.

On one side of the Interconnect are the advertisers, who are interested in reaching the greatest number of viewers, especially within a targeted DMA. The more subscribers an MVPD can bring to the table, the more advertisers will pay to reach that **[**17]** expanded audience. On the other side of the Interconnect are the MVPDs and their retail customers. The more advertisers that participate, the more valuable the Interconnect is to the MVPDs and their customers. Cable customers watching a ballgame or their favorite comedy may not think about the value of the advertisements they see, but MVPDs can use advertising revenue to keep monthly subscription prices lower and to run promotional discounts to bring in even more subscribers. Those new subscribers will in turn make the MVPD a more valuable and attractive advertising venue. The Interconnect can thus produce a competitively virtuous feedback loop. HN3[] "[T]he value of the services that [an Interconnect] provides increases as the number of participants on both sides of the [Interconnect] increases." See *American Express, 138 S. Ct. at 2280-81*. Or, as Comcast puts it: "The value of an interconnect increases as more MVPDs in an area participate, so our incentive is to have as many MVPDs participate as possible."

HN4[] An Interconnect is not necessarily, however, a one-way ratchet to increased demand. Decreased participation on either side of the Interconnect can also reduce its value. Thus, adapting language from *American Express*, an Interconnect **[**18]** "losing participation on [the cable provider side] decreases the value" of the advertiser side, and if advertisers "leave due to this loss in value, then the [Interconnect] has even less value to [the cable providers]—risking a feedback loop of declining demand." *138 S. Ct. at 2281*.

Whether the Interconnects are procompetitive or not depends on the competitive dynamics among its participants. In a competitive market, for example, the risk of negative feedback may serve as a check on the ability of any one participant to raise prices or otherwise exert market power. See *138 S. Ct. at 2281 n.1*. Conversely, in a less competitive market, access to the crucial Interconnects can be used to exclude competitors and harm competition. The Interconnects are so important that exclusionary conduct can become a weapon to **[*440]** injure competitors.[4]

b. *Competition for Subscribers*

We have just outlined the ways in which MVPDs compete and cooperate in the pursuit of advertising revenue, which is the focus of Viamedia's claims. Yet to see the full potential harm to competition caused by Comcast's alleged conduct, we must also describe the MVPDs' competition for subscribers. Comcast's alleged conduct is all the more dangerous to competition because it **[**19]** was made possible by accelerating industry consolidation and has the potential to interfere with MVPDs' competition with one another. The industry dynamics provide important context to understand the exclusion of Viamedia from a handful of DMA Interconnects, at least initially, and the broader potential impact on MVPD markets in general.

i. *Growing MVPD Competition*

Until the mid-1990s, cable companies typically operated as monopolists with exclusive local cable franchises in their respective areas. They showed little interest in building into one another's franchise areas and forcing competition. A combination of legal, regulatory, and practical barriers limited competitive entry by new MVPDs, and those limits were often supported by incumbent cable providers. DOJ Report at 32. Thus, only satellite companies DirecTV and Dish Network, with their nationwide coverage, could compete with cable companies for subscribers. Satellite companies were able to take some market share, particularly in rural areas, but their competitive threat to cable companies proved to be limited. DOJ Report at 5, 10, 22 & n.88, 59.

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[4] There is no challenge here to the legality of the Interconnects themselves, at least as originally conceived, which seem to fit the model of certain procompetitive cooperative arrangements among competitors. See generally *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*. Whether that remains the case when one MVPD controls an Interconnect is a question not presented here.

The 1990s saw major changes in the MVPD landscape. The cable industry shifted "toward **[**20]** regional consolidation, with specific companies carving out large parts of the country within which to group their systems." Patrick R. Parsons, *Horizontal Integration in the Cable Television Industry: History and Context*, 16 Journal of Media Economics, no. 1 (2003) at 23, 37. The larger companies "bought and traded individual systems," with "the various systems in a given city" increasingly "fall[ing] into the hands of a single cable company." *Id.*

With changes in technology and the regulatory environment, however, cable companies were about to face new competitors. The *Telecommunications Act of 1996* was intended to break down barriers among cable, telephone, satellite, and internet businesses to galvanize competition—and it did. Larry Satkowiak, *The Cable Industry: A Short History Through Three Generations* 47-48 (The Cable Center 2015). The lines between MVPDs, traditional telephone companies, and new broadband internet service providers became increasingly blurred as these companies started offering multiple services to consumers. DOJ Report at 1, 17, 19. Cable companies introduced telephone voice services, which had previously been a legal monopoly in many states, and started selling **[**21]** bundles of telephone, video, and broadband Internet access. *Id.* at 9, 11. Meanwhile, broadband internet service providers like RCN and WOW!, known as "overbuilders," built their own infrastructure in areas already served by incumbent cable companies and rolled out multiple services. *Id.* at 8 & **[*441]** n.33, 21 & n.78, 47.[5] And traditional telephone service providers responded in kind. Verizon introduced its FiOS service in 2005, and AT&T followed with its MVPD service dubbed "U-Verse." *Id.* at 6-7.

Thus, cable providers—formerly the beneficiaries of cable franchise monopolies—suddenly faced a new array of competitors. Today, many DMAs are served by an incumbent cable provider (e.g., Comcast), one or more overbuilder cable providers (e.g., RCN and WOW!), one or more telephone companies offering video services (e.g., Verizon FIOS), and two satellite dish providers (DISH and AT&T-DirecTV).

ii. *Incumbent Cable Companies' Efforts to Stymie Competition for Subscribers*

This new competition led to credible reports of lower prices and falling cable subscription rates in **[**22]** areas with new MVPD entrants—exactly what one would hope to see in competitive markets. DOJ Report at 38-39 & nn.180-83. Incumbent cable companies were forced to "respond[] to new entry by improving customer service, increasing bandwidth speeds ..., adding more programming channels and services, and rolling out enhanced products (such as HD)." *Id.* at 48; see also *id.* at 45-46. But new MVPD competitors continued to encounter obstacles, including some put in place by the incumbent cable providers. The incumbents had strong incentives to try to stymie these new competitors. As the FCC noted, competition from new cable companies reduces rates far more than competition from satellite companies. *FCC 2007 Report and Order, 22 FCC Rcd 5101 [slip op] at 26 ¶ 50*.

Among the obstacles for new competitors relevant to this case, incumbent cable providers entered into exclusive contracts with apartment buildings dense with potential subscribers, which new entrants could not reach, and exclusive and discriminatory contracts with programmers, whose content new entrants could not carry. *FCC 2007 Report and Order, 22 FCC Rcd 5101 [slip op] at 18 ¶ 35*. Overbuilders and the FCC reported in 2008 that "[e]xclusivity and discrimination in access to programming are the most powerful **[**23]** tactics that incumbent operators use in an effort to block or otherwise constrain [new] competition." DOJ Report at 74; see also *id.* at 73, 75, 89; Petition of RCN Telecom Services, Inc., to Deny Applications or Condition Consent at 24, 27, *In the Matter of Applications for Consent to the Transfer of Control of Licenses of Comcast Corporation and AT&T Corporation to AT&T Comcast Corp.*, FCC MB Docket 02-70 (Apr. 29, 2002) (RCN 2002 FCC Petition) (RCN recounting "the difficulties it has encountered in gaining, and keeping, access to critical, non-substitutable local programming

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[5] "The term 'overbuild' describes the situation in which a second cable operator enters a local market in direct competition with an incumbent cable operator. In these markets, the second operator, or 'overbuilder,' lays wires in the same area as the incumbent, 'overbuilding' the incumbent's plant, thereby giving consumers a choice between cable service providers." Report and Order and Further Notice of Proposed Rulemaking at 15 n.97, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, FCC MB Docket 05-311, 22 FCC Rcd 5101, 2007 FCC LEXIS 1867 (Mar. 5, 2007)* (FCC 2007 Report and Order).

controlled by Comcast" and the "numerous instances in which the incumbents (Comcast and its predecessors) have received exclusive building rights covering a period of years").

Incumbent providers also created barriers to signing up individual customers by locking existing subscribers into long-term contracts. Because of these long-term contracts "there is only a small window when **[*442]** a customer is able to move." DOJ Report at 52. "The incumbent [cable provider] knows when that window is, but the new entrant does not." *Id.* "The new entrant must spend resources marketing to customers during periods when they cannot switch or will have **[**24]** disincentives to doing so," while "an incumbent can target discounts and other incentives to subscribers immediately prior to the expiration of their contracts." *Id.* at 52-53. This competitive dynamic helps explain why smaller cable companies would hesitate to turn over their promotional advertising plans to their dominant cable competitor in advance of the actual promotions—which is the likely result of Comcast's actions challenged in this case.

B. *The Ad Rep Services Market*

1. *The Role of Viamedia*

As MVPDs were trying to establish themselves in new markets, the sale of spot avails provided a key source of revenue that helped subsidize offers to attract subscribers. Incumbent cable companies had been selling their spot avails to advertisers for decades, with the scale, internal structures, and sales and operational personnel to support those activities. The new overbuilders and telephone service providers had no such experience or infrastructure.

Enter Viamedia. The new MVPD competitors could have all spent money to hire their own advertising sales staffs, to buy and implement billing systems, to set up monitoring protocols, and to deal with the necessary equipment to insert those ads seamlessly **[**25]** and accurately into programming. Many, including MVPDs in Chicago, Detroit, and Hartford, chose instead to contract for these spot advertising services with Viamedia. RCN, for example, could focus on competing with incumbent MVPDs through attracting subscribers and building out its footprint, with an assured ad revenue stream managed by Viamedia. With an Interconnect already in place, the new MVPDs (or Viamedia on their behalf) could sign an agreement with that Interconnect so that advertisers could place DMA-wide ads that reached the new entrants' subscribers along with the those of the incumbents.

These ad rep services are at the core of this lawsuit. The ad rep services that Viamedia provides its customer MVPDs include:

- Allocating the MVPD's inventory of spot avails among different sales channels—i.e., local ads, sold in competition with other MVPDs; DMA-wide ads; or multi-DMA/national ads;
- Researching, marketing, pricing, and selling an MVPD's inventory of spot avails to advertisers, including the approximately one-third of spot avails sold to local retailers in competition with other MVPDs;
- Interfacing with the relevant Interconnect for spot avails allocated to regional, DMA-wide **[**26]** ads;
- Providing technical services such as encoding video files and operating and maintaining the software needed to run, insert, traffic, monitor, and archive ads;
- Organizing the MVPD's inventory of spot avails into schedules and ensuring that each ad runs correctly during those schedules; and
- Performing financial services, such as accounting, billing, and collection.

Viamedia employs the personnel needed for these functions, spreading these costs among all of its MVPD customers. If an MVPD retained Viamedia to provide this full range of services for all of its inventory of spot avails, including the competitive selling of local spot avails, it was said that **[*443]** the MVPD had secured "full turnkey" representation. As overbuilders and telephone companies continued their build out, Viamedia was able to expand the areas and MVPD customers to which it could supply services.

2. *Vertically Integrated MVPDs*

By contrast, Comcast does not need an independent ad rep services provider like Viamedia. Instead, Comcast is vertically integrated and has its own wholly-owned subsidiary that provides ad rep services both in-house and to other competing MVPDs. In markets where Comcast does not operate the **[**27]** Interconnects, its in-house ad rep services arm secures Interconnect access for its own MVPD service and its customer/competitors' MVPD services, just as Viamedia used to do in Chicago, Detroit, and Hartford. Several other MVPDs have similar internal divisions that provide spot cable ad rep services.[6] In fact, Viamedia is unique in that it is the only ad rep services firm of any size that is independent—i.e., not owned by an MVPD.

MVPDs that have their own ad rep services divisions or subsidiaries, such as Comcast, compete with Viamedia to provide these services to other MVPDs. And just as MVPDs compete for subscribers wherever their service footprints overlap, the providers of ad rep services compete DMA by DMA. The ad rep services providers organize their sales forces around the boundaries of DMAs and provide services only to the MVPDs who have subscribers within those DMAs. Hybrid arrangements also exist. Some MVPDs do not contract for "full turnkey services," but instead seek ad rep services for only a portion of their spot avails and sell the remaining spot avails themselves.

This unusual market structure thus involves three levels of competition: (1) MVPDs compete against one another **[**28]** for subscribers; (2) some vertically integrated MVPDs' ad rep services arms compete against Viamedia (and potentially against each other) for clients; and (3) MVPDs compete with one another for some sales of their spot avails to advertisers. We need to keep all three levels in mind.

3. *Back to the Interconnects*

As part of the continuing industry consolidation in the 2000s, Comcast moved into many new DMAs. It also expanded from being one of several cable companies that participated in some DMA Interconnects to being the largest participant. For example, Comcast was able to acquire over 3,300 local cable franchising areas through its purchase of AT&T Broadband's and Adelphia's cable properties. *FCC 2007 Report and Order, 22 FCC Rcd 5101, [slip op] at 15 & n.95*. As Comcast repeatedly acquired other cable systems, it grew to be the largest participant in dozens of DMAs and became the sole "operator" or "manager" of those DMAs' Interconnects, including in Chicago, Detroit, and Hartford.

Yet the Interconnects continued to function as they had before industry consolidation. They provided a single point of contact for distributing DMA-wide ads, as well as access to and collecting fees from all MVPDs (or their ad rep service **[**29]** providers) that participated in the Interconnects. If an MVPD did not participate in an Interconnect, an advertiser could not reach its subscribers, making an ad buy within the DMA less valuable for any remaining MVPD Interconnect participants.

During this period, in 2003, Viamedia entered into agreements with Comcast for Interconnect access in the Chicago and **[*444]** Detroit DMAs, which ran until May 2012. Viamedia sought this access because it provided ad rep services to cable overbuilders RCN (in Chicago) and WOW! (in Chicago and Detroit) under contracts that ran until 2014. As noted above, typical industry practice is for approximately one-third of an MVPD's spot avail inventory to be sold on a DMA-wide basis. In line with that practice, Viamedia agreed to sell a portion of RCN's and WOW!'s spot avail inventory on a DMA-wide basis through the Comcast-controlled Interconnects. Viamedia sold the remaining portion of RCN's and WOW!'s spot avails both nationally and—in competition with Comcast—locally. Comcast also agreed not to solicit Viamedia's MVPD clients until four months before the Viamedia/MVPD contracts expired, although the MVPDs remained free to contact Comcast.

C. *Comcast Refuses **[**30]** Interconnect Access to Viamedia*

This was the competitive landscape for Comcast's conduct challenged in this lawsuit. Internal Comcast PowerPoint presentations explained that Comcast viewed its "Next phase" as "consolidat[ing the] core business" of ad rep services, and then "look[ing] at other businesses we can leverage (our technologies or platforms)." A212 n.68. There is evidence that Comcast saw the Interconnects as one such point of "leverage."

As noted, Viamedia's Interconnect access agreements with Comcast for the Chicago and Detroit DMAs were due to expire in 2012. Viamedia's contracts for ad rep services with RCN and WOW! were extended until 2015 (RCN) and

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[6] These include Charter's Spectrum Reach, Cox's Cox Media, Altice's Suddenlink Media and Altice Media Solutions, and Mediacom's OnMedia.

2014 (WOW!). As 2012 neared, Comcast faced a choice. It could compete for RCN's and WOW!'s ad rep services business the following year, as it already competed for RCN's, WOW!'s, and other MVPDs' business in many other DMAs. Or it could try to use its control over the Interconnects to shut out the competition for ad rep services. At first, it appeared that Comcast would take the route of competition, contacting RCN and WOW! to express interest in selling them ad rep services. But Comcast then changed its strategy. It tried instead **[**31]** to take advantage of its control over the Interconnects. Comcast notified Viamedia in December 2011 that it would refuse to permit Viamedia any further access to the Interconnects. In June 2012 Comcast executed on that notice. For the first time in any DMA since the Interconnects had been created, an Interconnect operator—Comcast—had cut off Interconnect access to an MVPD or an MVPD representative.

Comcast executed this strategy in other DMAs, as well, similarly denying Viamedia access to Interconnects on behalf of Viamedia's customer MVPDs (Comcast's competitor MVPDs). For example, in the Hartford DMA, Comcast had previously provided full-turnkey service to AT&T's MVPD. When Frontier acquired AT&T's Hartford network in 2014, it had the option of assuming the Comcast contract. Frontier, however, had been unhappy with Comcast's customer service when it used Comcast in other DMAs, so it switched from Comcast to Viamedia. Comcast then excluded Frontier's spot avails from the Hartford Interconnect, resulting in millions of dollars in lost ad revenues for Frontier and Viamedia, as well as Comcast itself, and degrading the value of the Hartford Interconnect.[7] By contrast, in DMAs **[*445]** where the **[**32]** Interconnects were controlled not by Comcast but by other large, incumbent cable companies such as TimeWarner Cable, access to the Interconnects had not yet been pulled.

Comcast then returned to Viamedia with a series of offers that would have required Viamedia to "assign" 100% of its customers' spot avails to Comcast in exchange for a one-time "finder's fee." That was essentially an offer to pay Viamedia to exit the marketplace. At the end of July 2014, Comcast provided a more detailed offer. It would have had the same effect as the first offer—a payment to Viamedia to stop providing spot cable ad rep services. In August 2014, Viamedia received the third iteration of Comcast's offer, which at first appeared promising. When Viamedia received a detailed offer in writing, however, it discovered that Comcast had added a provision that would permit Comcast unilaterally, and on just four hours' notice, to take any ad inventory from Viamedia and contribute it to the Interconnect. That uncertainty would have rendered those spot avails virtually worthless to advertisers.

Along with these onerous terms, the revenue-share proposals appeared to be below market rate for Interconnect-only access, **[**33]** compared to both Viamedia's prior agreement with Comcast and other Interconnect-only access agreements in any other comparable DMAs. In short, the agreements did not offer access to the Interconnect in a way that would allow Viamedia to provide ad rep services to its MVPD customers. Nor were these terms to be found in any other Interconnect only agreement employed by any Interconnect operator in any DMA.

Moreover, during these "negotiations" in July 2014, the head of Comcast's cable spot ad rep services division and his colleague, Hank Oster, expressed concern that Comcast COO Dave Watson was "wavering on why we won't let Viamedia in the Interconnects." Whatever second thoughts some within Comcast might have had, however, Comcast's approach did not change. As Oster later candidly explained, by July 2014 Comcast already "had made the decision" to exclude Viamedia from the Interconnects. Comcast was also telling WOW! that it would not allow it to return to the Interconnect with Viamedia as its ad rep, and that Comcast was taking that position as part of its "strategic plan." A230.

Comcast urges us to infer—as a matter of law—that it was acting for procompetitive reasons. The evidence, **[**34]** though, can easily support the inference that Comcast was instead choosing to inflict financial pain on both its competitors *and itself* to gain monopoly power in the ad rep services market, which would also produce a new

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[7] On these points, the record contains more precise numbers in documents that have been under seal. Here and elsewhere in this opinion, we have used verbal descriptions rather than specific numbers for important information that has been submitted under seal. We are skeptical, however, about the grounds for sealing much, if not all, of the evidence under seal. Simultaneously with this decision, we are issuing an order that unseals evidence we identified in an earlier order to show cause, and we are ordering the parties to show cause why any of the remaining sealed evidence, including that obtained from non-parties, should remain under seal at this time.

advantage over its retail cable competitors. By cutting Viamedia off from the Chicago and Detroit Interconnects in 2012, Comcast ensured that its competitor MVPDs' spot avails could not be distributed through the Interconnects while they were represented by Viamedia under their existing contracts.

This was an expensive decision for Comcast. As operator of the Interconnect, Comcast's internal analysis of the "Revenue Impact" of its decision predicted that Comcast itself would lose $10.6 million in just the first six months after cutting off Viamedia's (and thus RCN's and WOW!'s) **[*446]** access, including $2.3 million in lost cash flow. A838, A787-88. The evidence of actual effects is consistent with that prediction. In the years that RCN and WOW! were unable to access the Interconnects (June 2012 through December 2015), they lost approximately $27 million in ad revenue. Comcast itself lost $7 million in commissions. A248, A637, A648 (figs. 35, 46). Moreover, Comcast's own spot **[**35]** avails would have decreased in value because an advertiser could no longer reach all cable subscribers within the DMA through the Interconnect.

But as an amicus supporting Comcast points out, Comcast could easily afford to sacrifice millions in Interconnect fees and lower ad revenue in order to inflict this harm on its MVPD competitors, advertisers, and Viamedia. As the dominant MVPD provider in markets across the country, this "temporary and localized lost revenue is small potatoes," a mere "rounding error." Brief for Washington Legal Foundation's as Amicus Curiae Supporting Appellees at 22. Just so.

With Comcast and Viamedia as the only two providers of ad rep services in the Chicago and Detroit DMAs, Comcast's denial of Interconnect access to Viamedia left Comcast with an effective monopoly over both Interconnect services *and* ad rep services. The window of time between Viamedia's foreclosure from Interconnect access and Comcast's competitor MVPDs' return to the market to seek bids for their ad rep services would be the time for Comcast "to overpower ViaMedia," as a Comcast employee in the Detroit DMA explained. A217 (budget presentation). So the evidence supports an inference that Comcast willingly chose to inflict short-term financial losses on itself. Why? A reasonable **[**36]** explanation is that it did so because it could survive those losses (the "small potatoes" and "rounding error") to obtain and use monopoly power in the ad rep services market.

In this lawsuit Comcast has argued that RCN and WOW! chose it over Viamedia on the merits of its offered services. Comcast highlights, for example, testimony from an RCN representative that—after comparing Comcast's offer with Interconnect access to Viamedia's offer without—"It was not in the end a very difficult decision to make." DA688. But this answer presupposes that Comcast shutting its competitors out of the Interconnects could be a reasonable basis to treat RCN's decision as uncoerced. There is evidence that Comcast did just that. Contrary to the assertions of the district court and our colleague who dissents in part, for example, a Comcast employee working in the Chicago and Detroit DMAs explained that Comcast had adopted "a business practice" that "if an MVPD wants to get access to a Comcast controlled Interconnect, it has to hire Comcast as its sale representative." A215.

Viamedia's evidence also supports a finding that WOW! and RCN did not go willingly into Comcast's arms. Both pushed back against Comcast's **[**37]** demands (or threats) that they either use it for their advertising services or face exclusion from the Interconnects if they stayed with Viamedia. A WOW! employee communicating with Comcast reported back to WOW! colleagues that Comcast was "maintaining their position that [WOW!] can be in the IC [Interconnect] but only if they [Comcast] rep us directly." A215 n.81, A230 n.129. It is a factual question whether it was reasonable at the time for the smaller MVPDs to "understand [that] to be part of the interconnect [they] would need to be with Comcast Spotlight," Comcast's ad rep services arm. DA687.

Comcast's competitor MVPDs immediately began losing money after Comcast excluded them from the Interconnects. **[*447]** They lamented that their reductions in cash flow were "primarily due to the loss of the Comcast Interconnect revenues in Chicago and Detroit." A233. Despite that pressure, though, the MVPDs continued to resist Comcast's demands. As discussed above, at the time, Comcast was trying to buy TimeWarner Cable, a proposed deal that was under review by federal agencies. With a forum to share their ongoing experiences with Comcast, RCN (futilely) filed comments with the FCC, alerting regulators **[**38]** that "Comcast was not being truthful" when it said "RCN is free to join the Comcast-managed interconnects at any time," because "Comcast will only allow RCN to join the interconnects if RCN employs Comcast Spotlight instead of Viamedia." A215 n.81, A886-87.

Viamedia also was not going quietly. Even though Comcast had barred it from Interconnect access, Viamedia continued to compete for RCN's and WOW!'s business. Without Interconnect access, their MVPD customers' spot avails would not bring in nearly as much revenue, which left Viamedia's bids' proposed revenue shares at a substantial disadvantage compared to Comcast's bids. A231-32. Nonetheless, Viamedia's bids caused consternation for Comcast. Internal Comcast emails reflect executives' disbelief. They called it "absolutely unbelievable" that Viamedia could make a remotely competitive bid without Interconnect access. A232. In contrast to Viamedia's bids, Comcast bids touted the "exclusive" benefit of Interconnect access that WOW! would receive if it selected Comcast for ad rep services. Comcast said that the "generous" financial terms it offered included the "sizable annual guarantee" that would be attributable to "the opportunity **[**39]** to add WOW! subscribers [back] to the important Detroit and Chicago Interconnects." In other words, sign up with Comcast for ad rep services, and we will stop your bleeding—the bleeding that we have inflicted by barring you from the DMA Interconnects.

Substantial evidence thus shows that Comcast's MVPD competitors did not want to buy ad rep services from Comcast. Their reluctance was not based on a short-sighted inability to see the procompetitive benefits of Comcast's vertical integration or what Comcast touts as "one-stop shopping." Rather, these MVPDs had economically rational reasons for seeking to avoid this entanglement with their dominant competitor, which would naturally have divided loyalties. In addition, WOW! considered Viamedia to be "by far the best ad partner from a technical team to work with." A560, DA 685. RCN testified that it would prefer to obtain ad rep services from an independent company like Viamedia rather than Comcast because, "all things being equal, even close to being equal," it "had concerns about being a partner with a company associated with our competitor." A236 n.150.

Thus, as Comcast's MVPD competitors assessed the situation, the possible outcomes all **[**40]** amounted to unfair wins for Comcast. Its actions could have resulted in three different outcomes, each of which would work to its benefit and harm its competitors. First, if Comcast succeeded in having its competitor MVPDs buy Comcast ad rep services, Comcast would gain the following benefits:

- Comcast's smaller MVPD rivals would now be contributing additional revenue toward their dominant competitor, Comcast;
- The majority of spot avails that MVPDs had formerly kept out of the Interconnects to allocate to, among other outlets, local ads (for which the MVPDs compete against each other for sales) would now come under the control of their competitor Comcast **[*448]** —whose contracts required that Comcast have "sole and exclusive control" over all spot avails;
- Comcast's competitor MVPDs would just have to trust that Comcast would make the best business decisions on behalf of its competitors when allocating adds to the national, regional, and local sales markets. For example, the smaller MVPDs prefer to weight some of their ad sales to non-Interconnect local sales, which help the MVPDs with local business relationships that can lead to additional sales of services, such as providing business internet **[**41]** connectivity (sales for which they compete against Comcast); the Interconnect operator, on the other hand, prefers DMA-wide Interconnect ad sales for which it gets higher margins—an ad mix choice that Comcast would be free to make for its smaller MVPD competitors;
- Comcast would be a single seller of advertisements in the local market, eliminating competition;
- Comcast would not only have access to its competitor MVPDs' ad sales information, but the MVPDs would have to provide Comcast with all of their own promotional ad materials to current and potential subscribers that they are attempting to retain or win away from Comcast, giving Comcast a chance to undercut them. That would be in addition to other competitively sensitive information (e.g., number and location of its subscribers) that would need to be disclosed.

Viamedia has offered evidence that what drove Comcast's actions was this close relationship with competing MVPDs—not hypothesized economic efficiencies from ordinary vertical integration. For example, there are some DMAs where Comcast controls the Interconnects, but the participating MVPDs do not have overlapping footprints with Comcast's service areas. In those DMAs, Comcast **[**42]** still offers Interconnect-only agreements on terms similar to the terms of the former Comcast-Viamedia agreements for the Chicago and Detroit DMAs.

Viamedia offered evidence on summary judgment (described above) of a second outcome in which Comcast's MVPD competitors would forgo Interconnect access entirely and renew with Viamedia rather than switch to Comcast. If its MVPD competitors made that choice, those MVPDs would be cut off from a large percentage of ad revenue, which in turn would hinder them from funding promotional offers to their subscribers, potentially leading their subscribers to switch to Comcast. In the meantime, Comcast's lost millions from Interconnect fees and reduced advertising revenue within the DMA would continue to be a mere "rounding error."

In the third potential outcome—which only Comcast contends was actually a possibility—Comcast would not bar competing MVPDs completely from Interconnect access but instead would permit them to have Interconnect-only access if they took care of their own ad services, without using either Viamedia's or Comcast's ad rep services. In this scenario, Comcast would lose the revenue it would have gained from providing full-turnkey **[**43]** service to the MVPDs, but it would still earn Interconnect access fees and the Interconnect's value would not be degraded. The result would also raise rivals' costs by forcing them to provide internally the staff, technology, and services that Viamedia had previously provided at lower cost. Those fixed costs would be difficult for those MVPDs to afford and would shift revenue away from subscriber promotions and further infrastructure build-out. See *FCC **[*449]** 2007 Report and Order, 22 FCC Rcd 5101, at 5108* ("Revenues from cable services are, in fact, a driver for broadband deployment," i.e., the build-out of additional cable infrastructure).[8]

Faced with this Hobson's choice, Comcast's competitor MVPDs chose to sign with Comcast in 2015. WOW! noted that "a key decision point" in this "choice" was its understanding that "in order to remain competitive, we need to be in the Interconnect." A233. WOW! signed with Comcast for ad rep services in Chicago and Detroit in 2015. WOW! continued, however, to use Viamedia as its ad rep in some non-Comcast DMAs. Similarly, although RCN had planned to renew its contract with Viamedia, it too ultimately decided to sign with Comcast for Chicago and Detroit. By 2016, a Comcast **[**44]** employee congratulated a colleague regarding its new monopoly in ad rep services in the Chicago DMA: "THE WOW AND RCN DEALS PROVIDE [COMCAST] WITH COMPLETE REPRESENTATION OF THE CHICAGO MARKET." A214 n.77.

II. *District Court Proceedings*

In 2016, Viamedia sued Comcast for violating *Section 2 of the Sherman Antitrust Act*, as well as various state antitrust statutes, and for tortious interference. The parties agree that analysis under the state antitrust statutes tracks federal ***antitrust law***, so the federal antitrust analysis controls whether the state antitrust claims survive. Viamedia is no longer pressing its tortious interference claim, so our only focus is *Section 2 of the Sherman Act*.

Comcast moved to dismiss the complaint for failing to state a claim. The district court construed Viamedia's complaint as alleging that Comcast engaged in three types of monopolistic conduct recognized by the antitrust laws: (1) Comcast's refusal to deal with Viamedia by cutting off access to the Interconnects, (2) Comcast's exclusive dealing, and (3) Comcast's tying of Interconnect access to the purchase of Comcast's ad rep services.

The district court granted the motion to dismiss with respect to Viamedia's refusal-to-deal **[**45]** claim, faulting Viamedia for failing to demonstrate through its allegations that Comcast's conduct was "irrational but for its anticompetitive effects." *Viamedia, Inc. v. Comcast Corp., 218 F. Supp. 3d 674, 698 (N.D. Ill. 2016)*. The court hypothesized that Comcast's complete foreclosure of Viamedia from the market potentially serves a procompetitive purpose and "offers potentially improved efficiency." *218 F. Supp. 3d at 699*. And because "vertical integration is usually procompetitive," Comcast likely had "a rational procompetitive purpose: it has become 'a one-stop shop' in

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[8] Viamedia has presented evidence that RCN and WOW! did not view bringing ad rep services in-house as a viable option. When confronted with Comcast's refusal to deal with Viamedia, both said they had no choice but to enter into ad rep agreements with Comcast. A215, A887. The in-house option was always available in theory. But RCN and WOW! are presumed to be economically rational actors. They had always chosen to buy these services from outside companies, suggesting that in-house was not an economically viable option.

certain DMAs for MVPDs wishing to sell advertisements on a regional basis." Id. at 698-99. Comcast's "short-term losses" in excluding Viamedia and Comcast's competitor MVPDs from the Interconnects were not "necessarily indicative of anticompetitive conduct," the court reasoned in dismissing a later version of the complaint on identical grounds, because a "monopolist might wish to withdraw from a prior course of dealing ... in order to pursue perfectly competitive ends." Viamedia, Inc. v. Comcast Corp., No. 16-CV-5486, 2017 U.S. Dist. LEXIS 24213, 2017 WL 698681, at *4 (N.D. Ill. **[*450]** Feb. 22, 2017), quoting Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1075 (10th Cir. 2013).

After discovery on Viamedia's exclusive dealing and tying claims, the district court granted Comcast's motion for summary judgment because Viamedia had failed to "present evidence that tends to exclude the possibility that [defendant's] conduct **[**46]** was as consistent with competition as with illegal conduct." Viamedia, Inc. v. Comcast Corp., 335 F. Supp. 3d 1036, 1054 (N.D. Ill. 2018). In the district court's view, there was no evidence that Comcast conditioned its sale of Interconnect services to MVPDs on their purchase of ad rep services because in DMAs outside the relevant geographic markets, Comcast *did* offer Interconnect-only access to other MVPDs. Id. at 1058-59. Further, because "both RCN and WOW! *wanted* full-turnkey representation," the purchase of the two products together could not be considered tying. Id. at 1059. In fact, the district court concluded (in tension with the observation that Comcast offered Interconnect-only access in other DMAs), Comcast had "no reason to offer" Interconnect-only access to RCN and WOW! because, the district court again hypothesized, an Interconnect-only deal would be less substantial, less profitable, and less efficient for Comcast than a full-turnkey deal. Id. at 1059.

In any event, even if Comcast had refused to deal with its competitor MVPDs unless they met Comcast's condition of purchasing ad rep services, the court viewed this as simply a reformulation of Viamedia's already-dismissed refusal-to-deal claim. 335 F. Supp. 3d at 1062, 1070, 1072. To support this conclusion, the district court noted that Viamedia sought injunctive **[**47]** relief that would restore its access to the Interconnects and give RCN and WOW! the option to decline purchase of Comcast's ad rep services. Id. at 1074.

In addition, the district court found that Viamedia's two experts' testimony was based upon an incorrect understanding of the law—i.e., that Comcast had engaged in anticompetitive conduct for which it could be held responsible under the antitrust laws. Id. at 1064-74. The district court concluded that this justified excluding the damages expert's testimony in its entirety, as well as a portion of the economic expert's testimony. Viamedia has appealed the final judgment dismissing its claims.

III. *Legal Standards and Analysis*

With the facts and competitive dynamics set out, we turn to the legal standards and analysis. In Part III-A, we describe the standards for an antitrust violation under Section 2, the monopolization provision of the Sherman Act. Undisputed by the parties, we explain that Comcast is a monopolist in the relevant geographic markets (here: Chicago, Detroit, and Hartford) for both Interconnect and ad rep services, and that it is the dominant MVPD retail cable provider.

In Part III-B, we address Viamedia's two claims. In Part IIIB-1, we set out the legal **[**48]** test for refusals to deal and assess Comcast's conduct, explaining why this claim should not have been dismissed on the pleadings. In Part III-B-2, we turn to Viamedia's tying claim. These related claims are both based on the same course of conduct, resulted in the same anticompetitive harms, and would be subject to the same procompetitive justifications or defenses. The decision to dismiss one claim on the pleadings while allowing the other, closely related claim to go as far as summary judgment offered potential for confusion, but in the end, both claims need to be tried.

In Part III-C, we evaluate in greater detail the harm to competition alleged by Viamedia and the procompetitive justifications **[*451]** offered by Comcast, highlighting considerations that will be relevant on remand. In Part III-D, we explain that Viamedia has presented evidence of a cognizable antitrust injury as a rival driven from the market by a tying arrangement.

Finally, in Part III-E, we address the district court's rulings excluding expert witness evidence. Our resolution of Viamedia's refusal-to-deal and tying claims largely resolves its challenge to the testimony's exclusion. The district court's decision on this **[**49]** score was based almost entirely upon its erroneous legal analysis. On remand, the district court will need to take a fresh look at the expert reports in light of this opinion.

A. *Sherman Act Section 2—Illegal Monopolization*

HN5[] Section 2 of the Sherman Antitrust Act imposes liability on "Every person who shall monopolize ... any part of the trade or commerce among the several States." 15 U.S.C. § 2. A private plaintiff like Viamedia may bring a civil claim as a person who was "injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a).

HN6[] Judicial decisions interpreting Section 2 have long held that simple possession of monopoly power, or the pursuit of it, is not in itself illegal. United States v. U.S. Steel Corp., 251 U.S. 417, 451, 40 S. Ct. 293, 64 L. Ed. 343 (1920) ("[T]he law does not make mere size an offence, or the existence of unexerted power an offense. It ... requires overt acts."); United States v. Aluminum Co. of America, 148 F.2d 416, 429-30 (2d Cir. 1945) ("size does not determine guilt" as the monopolist may have gained market power "by force of accident," or "by virtue of his superior skill, foresight and industry"; therefore, "there must be some 'exclusion' of competitors"). Thus, a firm violates the monopoly provision in Section 2 only when it both (1) possesses "monopoly power in the relevant market" *and* (2) engages in "the willful acquisition or **[**50]** maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004), quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966); see also Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* ¶ 600a, at 3, ¶ 650a, at 91 (4th ed. 2015) (Areeda & Hovenkamp).[9]

On appeal, the parties do not dispute several often-contentious issues in antitrust cases: the relevant geographic and product markets, and market power. See Goldwasser v. Ameritech Corp., 222 F.3d 390, 397 (7th Cir. 2000) ("Few would say that the first element is easily proved: it is exceedingly difficult to prove market power, or monopoly power ... ."). The relevant geographic markets are the specific DMAs in which Viamedia asserts Comcast's conduct harmed competition: Chicago, Detroit, and Hartford. See Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 332-33, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961) (***HN7***[] a relevant antitrust geographic market is the area in which sellers operate and where purchasers can predictably turn for supplies). Comcast's conduct in other DMAs may be relevant for comparison purposes.

[*452] The relevant product market allegedly monopolized is ad rep services for MVPDs. The immediate effect of Comcast's conduct was to force out its only competitor in that market to gain monopoly power in **[**51]** the relevant geographic markets for those services. This market is inextricably connected to access to the cooperative mechanism of the Interconnects, as well as to the related markets for MVPD retail cable services and the sale of MVPD spot avails. Understanding the harm to competition in these related markets helps in assessing Comcast's alleged conduct. ***HN8***[] "Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue." Trinko, 540 U.S. at 411; see also Areeda & Hovenkamp ¶ 1802d, at 79-80 (When assessing exclusionary conduct, it is "necessary to examine market power or share at *both* of the two market levels involved.").

As for market power, in the Chicago, Detroit, and Hartford markets, Comcast started with monopoly control over Interconnect access and services. Comcast has acquired a pure monopoly in the market for ad rep services in these metropolitan areas, where it is also by far the dominant MVPD retail cable provider.[10]

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[9] This appeal does not present any issues under the Section 2 language barring attempts and conspiracies to monopolize.

[10] For antitrust purposes "monopoly power and market power typically are used interchangeably" and simply mean that "a firm can influence the price it receives for its product." Dennis W. Carlton and Jeffery M. Perloff, *Modern Industrial Organization* 137 (2d ed. 1994).

HN9[] A firm's market power is important because, without it, a firm will have little to no ability to distort or harm competition, no matter how great its desire to do so, even when engaging in conduct that in **[**52]** different circumstances might be perceived as anticompetitive. See *Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1071 (10th Cir. 2013)* (Gorsuch, J.) ("Not infrequently, the initial question of market power proves decisive."). Even "[m]ildly reprehensible behavior might be enough to challenge a firm whose power is significant." Areeda & Hovenkamp ¶ 600b, at 4.

B. *Claims of Anticompetitive Conduct: Refusals to Deal and Tying*

The dispute here focuses on the second prong of the *Section 2* test: did Comcast "willfully acquire" or "maintain" its new monopoly power in the ad rep services market, or is its new market dominance "a consequence of a superior product or business acumen" or the result of an "historic accident"?

Baked into this inquiry is an assessment of what types of anticompetitive conduct are prohibited as illegally acquiring or maintaining monopoly power, rather than the kind of pro-competitive conduct the antitrust laws do not impede. The latter includes innovation resulting in superior products, the introduction of efficiencies reflecting superior business acumen, or even the luck of a firm that unwittingly stumbles into a monopoly position. See Areeda & Hovenkamp ¶ 600a, at 3 (setting out first two prongs identified above and articulating the two "subsidiary **[**53]** questions": (3) "given that *§ 2* requires some element of conduct in addition to substantial market power, what kinds of conduct or intent transform power into unlawful monopolization; and (4) what defenses, if any, save monopoly power from condemnation?").

HN10[] The statutory text does not provide the answers, but case law over more than a century provides extensive guidance. Courts recognize various types of conduct that have the potential to harm competition. The types of conduct alleged in this case are "exclusionary" in nature, impairing rivals' opportunity to compete in a way **[*453]** that is inconsistent with "competition on the merits." Areeda & Hovenkamp ¶ 650a, at 92; see also *id.* ¶ 651b, at 99-100; *Covad Communications Co. v. Bell Atlantic Corp., 398 F.3d 666, 675-76, 365 U.S. App. D.C. 78 (D.C. Cir. 2005)* (agreeing with plaintiff's description of defendant's refusal to deal as "'predatory' ... because, in the vernacular of ***antitrust law***, a 'predatory' practice is one in which a firm sacrifices short-term profits in order to drive out of the market or otherwise discipline a competitor").

In the present case, Viamedia alleges and has offered evidence that Comcast: (1) refused to deal with Viamedia by denying it Interconnect access, and (2) engaged in tying by denying MVPDs Interconnect access unless **[**54]** they purchased Comcast's ad rep services.[11] We set out below the legal tests for refusals to deal and tying, which help in assessing whether such conduct is anticompetitive and illegal, or instead harmless or even procompetitive.

HN11[] Conduct that can harm competition may fit into more than one of these court-devised categories. After all, the "means of illicit exclusion, like the means of legitimate competition, are myriad." *Trinko, 540 U.S. at 398*, quoting *United States v. Microsoft Corp., 253 F.3d 34, 58, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (en banc). Although "the standard for a *§ 2* violation is significantly stricter in its power assessment [than for a *§ 1* claim], it is broader and less categorical in its definition of proscribed conduct." Areeda & Hovenkamp ¶ 777a, at 324. This means that a dominant firm's conduct may be susceptible to more than one court-defined category of anticompetitive conduct. A "simple refusal to deal" is conduct where one firm "refuses to deal no matter what," whereas "[t]ying and exclusive dealing are two common examples" of "conditional refusals to deal"—i.e., one firm will refuse to deal with another firm unless "some condition is met." Herbert Hovenkamp, *FRAND and Antitrust*, Cornell L. Rev. (forthcoming 2020) (manuscript at 11), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420925 **[**55]** . Similarly, "[m]any of the practices that have been characterized as exclusive dealing could also be described as tying" because "[t]he economic distinction between the two is most often slight or nil." Areeda & Hovenkamp ¶ 1800b, at 7-8, ¶ 1800a, at 4.

HN12[] The fact that the categories of conduct here are conceptually related and may overlap should not cause confusion if we stay focused on the underlying inquiry: the conduct "must harm the competitive *process* and thereby

[11] To "simplify the issues" on appeal, Viamedia elected not to pursue exclusive dealing as a distinct theory of liability.

harm consumers." *Microsoft, 253 F.3d at 58*; see also *Nynex Corp. v. Discon, Inc., 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)* (plaintiffs "must allege and prove harm, not just to a single competitor, but to the competitive process, i.e., to competition itself"). At bottom, the purpose of identifying these categories of conduct is to help determine "the presence or absence of harmful effects, which are both the reason for any antitrust concern and often the simplest element to disprove." Areeda & Hovenkamp ¶ 1701d, at 33. We therefore start by assessing how Comcast's conduct fits into these categories under *Section 2*, mindful that we should stay focused on the effect Comcast's conduct has on competition.

1. *Refusals to Deal*

The district court dismissed on the pleadings the portion of Viamedia's complaint focused on a refusal-to-deal **[**56]** theory. **[*454]** ***HN13***[] We review *de novo* a grant of a motion to dismiss, "constru[ing] the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in [its] favor." *Tamayo v. Blagojevich, 526 F.3d 1074, 1081 (7th Cir. 2008)*; see also *Goldberg v. United States, 881 F.3d 529, 531 (7th Cir. 2018)* (in reviewing dismissal for failure to state a claim, we accept facts alleged by plaintiff without vouching for their objective truth). We next set out the general principles underlying a refusal-to-deal claim and then explain how the leading case—*Aspen Skiing*—maps onto Comcast's conduct. We then reject Comcast's argument that Viamedia's claim could properly be dismissed on the pleadings.

a. *Monopolists and Refusals to Deal*

HN14[] Monopolists are both expected and permitted to compete like any other firm. *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 116, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. A monopolist is not obliged to "watch[] the quality of its products deteriorate and its customers become disaffected" and "lie down and play dead" because "even a monopolist is entitled to compete." *Goldwasser v. Ameritech Corp., 222 F.3d 390, 397 (7th Cir. 2000)*. "Part of competing like everyone else is the ability to make decisions about with whom and on what terms one will deal." *Id.*; see also *Authenticom, Inc. v. CDK Global, LLC, 874 F.3d 1019, 1025 (7th Cir. 2017)*. And just because "a firm has monopoly power doesn't mean that the law should prevent it from competing," as "[i]t **[**57]** would be absurd to require the [monopolist] to hold a price umbrella over less efficient entrants." Richard A. Posner, ***Antitrust Law*** 196 (2d ed. 2001). Thus, the general rule is that even monopolists "are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Pacific Bell Telephone Co. v. Linkline Communications, Inc., 555 U.S. 438, 448, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*, citing *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*.

Yet there are "limited circumstances" under which a monopolist's refusal to deal with another party will be illegal anticompetitive conduct. *Id.*; see also Areeda & Hovenkamp ¶ 1800c5, at 21 ("*Section 2* of the Sherman Act reaches unilateral refusals to deal when the refusals constitute monopolization ... ."). For example, in *Lorain Journal Co. v. United States, 342 U.S. 143, 72 S. Ct. 181, 96 L. Ed. 162 (1951)*, a monopolist newspaper was "an indispensable medium of advertising for many" local businesses but refused to deal with any advertiser who placed any ad with a new radio competitor in an effort "to destroy and eliminate" the new competitor. *Id. at 152, 150*. The Court was not persuaded by the newspaper's argument that it had "a right as a private business concern to select its customers and to refuse to accept advertisements from whomever it pleases." *Id. at 155*.

HN15[] In a holding that resonates in this case, *Lorain Journal* explained: "*In the absence of any purpose to create or* ***[**58]*** *maintain a monopoly*, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Id.*, quoting *Colgate, 250 U.S. at 307*; see also *Goldwasser, 222 F.3d at 397* (acknowledging circularity of *Colgate* test). With the newspaper's clear expectation that it would "outlast" the new competition and regain its complete monopoly, and with "no apparent efficiency justification for its conduct," *Lorain Journal* has been described as "entirely correct." Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* **[*455]** 344-45 (2d ed. 1993). This theory of liability was endorsed again in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*, the leading case on this issue.

b. *Aspen Skiing and Comcast*

Comcast takes the position that after the Supreme Court's 2003 *Trinko* decision, any "antitrust claims based on a duty to deal with rivals 'bit the dust.'" ***HN16***[] In the face of both *Aspen Skiing* and the actual language of *Trinko*, we must reject that argument about what the law should be. *Trinko* itself said just the opposite: "Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate *Section 2*," and the "leading case for *§ 2* **[**59]** liability based on refusal to cooperate with a rival ... is *Aspen Skiing*." *540 U.S. at 408*; see also *Linkline, 555 U.S. at 448* ("There are also limited circumstances in which a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability."), citing *Aspen Skiing, 472 U.S. at 608-11*.

What do those limited circumstances look like? In addition to reiterating *Aspen Skiing*'s continued, albeit narrow, validity, the Court has also provided useful guidance on primary factors to consider when determining whether potentially anticompetitive conduct falls within *Aspen Skiing's* bounds. To provide background on what role those factors play in a court's analysis, we summarize the facts of *Aspen Skiing*, focusing on the primary factors the Supreme Court has continued to highlight.

The case involved four ski mountains that were initially developed and operated under separate ownership. *472 U.S. at 587*. For over a decade, the four mountains offered a variety of ski-lift tickets and packages, including a joint ticket that allowed skiers to gain convenient access to all four mountains. *Id. at 588-89*. Even as defendant Aspen Skiing Company (Ski Co.) came to control three of the four mountains, thus gaining market power over the Aspen ski area, the joint "interchangeable ticket" program continued to include the fourth mountain, which was independently owned by plaintiff Aspen Highlands Skiing Corporation (Highlands). *Id. at 590-92*. Revenues from this **[**60]** cooperative arrangement were distributed according to mountain usage. The joint ticket was a popular and profitable package for both parties. The four-mountain package outsold by a two-to-one margin the Ski. Co. packages that offered access to only its three mountains. *Id. at 592*.

Ski Co. management concluded, however, that if the four-mountain ticket were not available at all, customers would default to buying just Ski Co.'s three-mountain pass. Ski Co.'s president explained that "the 4-area ticket was siphoning off revenues that could be recaptured by Ski Co. if the ticket was discontinued." *Id.* In the following year's negotiations, Ski Co. made a revenue share offer to Highlands on such unfavorable terms that Ski Co. correctly expected Highlands "could not accept" it. *Id.* The joint ticket was no longer offered. *Id.* In an attempt to stanch the flow of lost business, Highlands "tried a variety of increasingly desperate measures to re-create the [four-mountain] joint ticket," including "offering to buy the defendant's tickets at retail price." *Trinko, 540 U.S. at 408-09*, citing *Aspen Skiing, 472 U.S. at 593-94*. Ski Co. refused to permit Highlands even to "pay full retail value for the daily lift tickets," with a Ski Co. official explaining, "we will **[**61]** not support our competition." *Aspen Skiing, 472 U.S. at 593-94 n.14*. Highlands filed suit.

[*456] At trial, defendant Ski Co. primarily relied on the testimony of its economic expert, which included the theory that Ski Co.'s conduct had such procompetitive justifications as eliminating "free-riding by Highlands."[12] Ski Co. offered evidence that its own product was being devalued by being associated with "the inferior skiing services offered at Highlands." *Aspen Skiing, 472 U.S. at 609-10*. Ski Co. also argued that it could save administrative expenses and other costs by eliminating the joint ticket, which Ski Co. found "administratively cumbersome." *Id. at 592*. In short, defendant Ski Co. argued that "the conduct at issue was pro-competitive conduct that a monopolist could lawfully engage in." *Id. at 599*.

Procompetitive justifications were also highlighted in the jury instructions. The jury was instructed that a monopolist "is not barred from taking advantage of scale economies by constructing a large and efficient factory," nor is it "under a duty to cooperate with its business rivals ... if valid business reasons exist for that refusal." *Id. at 597*. Ski Co. could be found liable only if it "gained, **[**62]** maintained, or used monopoly power in a relevant market by arrangements and policies which rather than being a consequence of a superior product, superior business sense, or historic element, were designed primarily to further any domination of the relevant market." *Id.* Therefore, "if there

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[12] See George L. Priest & Jonathan Lewinsohn, *Aspen Skiing: Product Differentiation and Thwarting Free Riding as Monopolization*, in *Antitrust Stories* 248 (Eleanor M. Fox and Daniel A. Crane, eds., 2007).

were legitimate business reasons for the refusal [to deal], then the defendant, even if he is found to possess monopoly power in a relevant market, has not violated the law," because the law is not concerned with conduct which may "benefit consumers by making a better product or service available"—only conduct that "has the effect of impairing competition." *Id. at 597*. The jury "resolved all contested questions of fact in Highlands' favor," *id. at 599*, including a finding "that there were no valid business reasons for the refusal." *Id. at 605*.

The Supreme Court upheld the jury verdict for the plaintiff. The Court reiterated *Lorain Journal's* rejection of the argument that "the right to refuse to deal with other firms ... is unqualified." *Id. at 601-02 & n.27*, citing *Lorain Journal, 342 U.S. at 155*, and *Colgate, 250 U.S. at 307*. This conclusion was supported by three key factors.

HN17[] First, Ski Co. "elected to make an important change in a pattern of distribution that had originated in a competitive **[**63]** market and had persisted for several years," including after "the character of the market was changed by Ski Co.'s acquisition of monopoly power." *Id. at 603*. Such a pre-existing relationship supports a presumption that the joint arrangement was efficient and profitable. *Trinko, 540 U.S. at 408-09* (distinguishing *Aspen Skiing* from situation where that presumption would not apply—e.g., a defendant who would never have "voluntarily engaged in a course of dealing with its rivals ... absent statutory compulsion"); see also *Linkline, 555 U.S. at 450* (refusing to impose a duty to deal on a defendant when "such duty arises only from FCC regulations, not from the *Sherman Act*"). The Court explained in *Aspen Skiing:*

> In any business, patterns of distribution develop over time; these may reasonably be thought to be more efficient than **[*457]** alternative patterns of distribution that do not develop. The patterns that do develop and persist we may call the optimal patterns. By disturbing optimal distribution patterns, one rival can impose costs upon another, that is, force the other to accept higher costs.

472 U.S. at 604 n.31, quoting Robert H. Bork, *The Antitrust Paradox* 156 (1978).

Second, the Court compared Ski Co.'s conduct in the Aspen market with Ski Co.'s arrangements in comparable **[**64]** markets where it lacked such dominance, noting that cooperative joint tickets were "used in other multimountain areas which apparently are competitive." *Aspen Skiing, 472 U.S. at 603-04 & n.30*. The Court could thus "infer that such tickets satisfy consumer demand in free competitive markets." *Id.*

Third, defendant Ski Co. decided to forgo profitable transactions by refusing to permit Highlands to purchase ski tickets at the retail price for the sake of harming Highlands. *472 U.S. at 608* ("The jury may well have concluded that Ski Co. elected to forgo these short-run benefits because it was more interested in reducing competition ... over the long run by harming its smaller competitor."). Ski Co. made this "decision to avoid providing any benefit to Highlands even though accepting the coupons would have entailed no cost to Ski Co. itself, would have provided it with immediate benefits, and would have satisfied its potential customers." *Id. at 610*.

These factors all pointed to Ski Co.'s conduct causing anticompetitive harm. But whether its conduct "may properly be characterized as exclusionary" also required consideration of possible procompetitive justifications, including any beneficial or harmful impacts on consumers or competition itself. *Id. at 605*, citing Bork, **[**65]** *Antitrust Paradox* at 138. Critical to this case, the Court treated procompetitive justification as a factual issue properly resolved by the jury. The Court focused on "the evidence relating to Ski Co. itself, for Ski Co. *did not persuade the jury* that its conduct was justified by any normal business purpose." *Id. at 608* (emphasis added). Conflicting evidence presented at trial undermined Ski Co.'s arguments that the joint ticket was "administratively cumbersome" (no more so than the joint tickets Ski Co. used in other, competitive markets) and that Highlands' "inferior skiing services" were free-riding on Ski Co.'s services (a joint ticket "allowed consumers to make their own choice on these matters of quality"). *Id. at 608-10*.

Highlands refuted Ski Co.'s procompetitive justifications with exactly the kind of evidence that is helpful to prove exclusionary conduct or "predation," including "statements made by the officers or agents of the company, evidence that the conduct was used threateningly and did not continue when a rival capitulated, or *evidence that the conduct was not related to any apparent efficiency." Id. at 608-09 n.39*, quoting Bork, *Antitrust Paradox* at 157 (emphasis in *Aspen Skiing)*. The Court concluded that "the evidence supports an inference that Ski Co. **[**66]** was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id. at 611*.

HN18[] The *Aspen Skiing* factors help case-by-case assessments of whether a challenged refusal to deal is indeed anticompetitive, even though no factor is always decisive by itself. For example, even "a monopolist might wish to withdraw from a prior course of dealing and suffer a short-term **[*458]** profit loss in order to pursue perfectly procompetitive ends—say, to pursue an innovative replacement product of its own." *Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1075 (10th Cir. 2013)* (Gorsuch, J.). Similarly, forgoing short-run profits may sometimes reflect desirable, procompetitive behavior, such as efforts to offer "promotional discounts." *Id.* And a defendant may have "procompetitive rationales for treating a rival differently," such as if "it's more costly to deal with distant rivals than other nearby customers." *Id. at 1078 n.4*. But because the factors as a whole provide a window into likely harm to competition, a court should start with the *Aspen Skiing* factors in determining whether a refusal to deal is unlawful.

The Supreme Court has described *Aspen Skiing* as "at or near the outer boundary **[**67]** of *§ 2* liability." *Trinko, 540 U.S. at 409*. Given the facts we must assume here, Viamedia has presented a case that is well within those bounds and appears stronger than *Aspen Skiing*. A comparison of Viamedia's allegations to the facts found by the jury in *Aspen Skiing* (and which the Supreme Court considered significant to its analysis) is instructive:

[*459]

ASPEN SKIING	**VIAMEDIA ALLEGATIONS**
Long-term business relationship that created joint offering	Same
Relationship existed absent any statutory obligation/duty (*Trinko*)	Same
Can presume prior relationship was thus mutually advantageous	Same
Sudden course reversal	Same
Course reversal came at a monetary loss for defendant	Same
Refused to sell service/product at retail price	Same
Sold product at retail price to others in the relevant market	Same
Unhappy customers	Same
Discouraged customers from doing business with its smaller rival	Same
Defendant continued to deal with competitors in other competitive markets	Same
Procompetitive justifications are a question for the factfinder	Same
Exclusionary conduct aimed	Same

ASPEN SKIING	VIAMEDIA ALLEGATIONS
at the only other competitor in the market	
Ski Mountain Passes	Different: Ad Rep Services

In light of the similarities, unless the Court meant to limit *Aspen Skiing* to ski resorts, we see no sound basis **[**68]** to distinguish Viamedia's case as a matter of law. Comcast's alleged conduct, absent compelling evidence to the contrary, indicates its "calculation that its future monopoly retail price would be higher" by foreclosing its ad rep services competitor. *Trinko, 540 U.S. at 409*. In addition, **[*460]** unlike in *Aspen Skiing,* where the ultimate customers were skiers who did not compete against the defendant ski resort, Comcast's refusal to deal with Viamedia has left its MVPD customers in these markets no practical choice but to turn over their ad sales business, along with their sensitive business information and a large percentage of their ad revenue, to their dominant MVPD competitor.

c. *Refusals to Deal and Motions to Dismiss*

Comcast nonetheless contends this case can be decided on the pleadings because "there is no liability under *Aspen Skiing* where, as here, the defendant's alleged termination of a preexisting course of dealing was not 'irrational but for its anticompetitive effect.'" Comcast relies on the district court's acceptance of Comcast's thinly supported assertion that it had a "valid business purpose" in refusing to deal with Viamedia because Comcast's replacement of Viamedia as WOW!'s and RCN's ad representative **[**69]** is a course of conduct that "offers *potentially* improved efficiency." See *218 F. Supp. 3d at 698-99* (emphasis added). Comcast contends this "valid business objective" is what "distinguishes this case from *Aspen Skiing*, where the defendant 'fail[ed] to offer any efficiency justification whatever for its pattern of conduct.'" Appellees' Br at 27, quoting *Aspen Skiing, 472 U.S. at 608*.

Comcast's argument has the facts wrong. Its reading fails to comport with the actual language of the opinion, the jury instructions, and the evidence presented by both parties. In *Aspen Skiing* the Court was reviewing a jury verdict. Only after a month-long trial had the jury "resolved all contested questions of fact in Highlands' favor" and "concluded that there were no valid business reasons for the refusal." *Aspen Skiing, 472 U.S. at 599, 605*. The Court concluded that "the evidence *supports an inference* that Ski. Co. was not motivated by efficiency concerns." *Id. at 610* (emphasis added).

Comcast next cites *Novell* in support of its argument that a factual dispute regarding the existence of procompetitive justifications is appropriate for resolution on the pleadings. Yet *Novell* was a decision based on an eight-week trial. *731 F.3d at 1066*. And what about *Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370 (7th Cir. 1986)*? That decision followed a "trial [that] lasted more than six weeks **[**70]** and produced the usual mountain of testimony and exhibits." *Id. at 372*. ***HN19***[] Valid business justifications are relevant only to the rebuttal of a *prima facie* case of monopolization.

HN20[] Thus, balancing anticompetitive effects against hypothesized justifications depends on evidence and is not amenable to resolution on the pleadings, at least where the plaintiff has alleged conduct similar to that in *Aspen Skiing*. See also, e.g., *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469, 1482 (7th Cir. 1991)* ("Whether valid business reasons motivated a monopolist's conduct is a question of fact."). Adapting language from our colleagues in the D.C. Circuit, the correct approach in this situation requires a district court to acknowledge that:

> [Comcast's] defense—that its refusal to deal was economically justified—depends upon a question of fact and therefore is not cognizable in support of a motion to dismiss. It is, of course, entirely possible [Comcast] will be able to prove ... [that] its refusal to deal was a reasonable business decision. On the other hand, it is also possible [Comcast's] refusal to deal reflected its willingness to sacrifice immediate profits **[*461]** from the sale of [Interconnect access] in the hope of driving [Viamedia] out of the market and recovering monopoly

> profits **[**71]** in the long-run. ... ***HN21***[] The district court cannot choose between these competing explanations without first resolving questions of fact not before it upon a motion to dismiss.

Covad Communications Co. v. Bell Atlantic Corp., 398 F.3d 666, 676, 365 U.S. App. D.C. 78 (D.C. Cir. 2005) (reversing dismissal of refusal-to-deal claim on pleadings). This analysis must also include the harm from Comcast's alleged tying conduct, which we turn to below. Viamedia has alleged—and offered evidence of—enough harm to competition from Comcast's refusal-to-deal and tying conduct for its claim to go forward. ***HN22***[] Consideration of procompetitive justifications must wait for a comprehensive rule of reason analysis.

i. *Comcast's Proposed Legal Standard*

Comcast both misunderstands the law and relies on inapposite cases by conflating the vertical integration of its MVPD and ad rep services functions with its control over the cooperative Interconnects and alleged misuse of that power. Comcast proposes that if a defendant merely postulates "a valid business purpose"—apparently including any business purpose a defendant could dream up, regardless of feasibility or value—that "ends the inquiry." "[T]here is no 'balancing' of benefits and harms," Comcast declares. In support of that proposition, Comcast points to the United **[**72]** States' Amicus Brief (in support of neither party) filed in this case, which offers a test dubbed the "no economic sense test." Appellee Br at 27-28; see also United States Brief at 11-12 (relying on the formulation articulated in the United States' amicus brief in *Trinko*, available at 2003 WL 21269559, and elaborated upon in Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 Antitrust L.J. 413, 422-25 (2006)).

The proposed "no economic sense" test would condemn conduct as "exclusionary or predatory" only if it "would make no economic sense for the defendant but for its tendency to eliminate or lessen competition." United States Brief at 11. ***HN23***[] A "gross benefit [or gain] for the defendant" is not enough, however: "Conduct fails the no economic sense test if it is expected to yield a negative payoff, *net of the costs of undertaking the conduct, and not including any payoff from eliminating competition."* Werden at 416 (emphasis added). Or—as explained by the government at oral argument here— it is an objective "balancing" test that requires more than just "a slight procompetitive benefit or efficiency gain."[13]

[*462] ***HN25***[] This test is essentially the same one employed by the Tenth Circuit in *Novell*, which noted that "the **[**73]** monopolist's conduct must be irrational but for its anticompetitive effect." *731 F.3d at 1075*, citing *Aspen Skiing, 472 U.S. at 597*, *Trinko, 540 U.S. at 407*, and Werden at 422-25. However formulated, this test is aimed in part at the potential overweighting of the *Aspen Skiing* factor of a defendant forsaking short-term profits. *Id.* As noted, this factor is relevant but should not always be dispositive because "a short-term profit sacrifice is neither necessary nor sufficient for conduct to be exclusionary." Werden at 424; see also *id.* ("short-run profit sacrifice also

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[13] ***HN24***[] Comcast's confusion may stem from the terse proposed name of "no economic sense," which does not appear to invite balancing. The test is actually more nuanced than the name suggests, and it is not meant to resolve every *Section 2* challenge. As Werden sensibly notes, its "utility ... ultimately is apt to vary," and we "should not presume that a single test must resolve every exclusionary conduct case." Werden at 421 & n.31.

Furthermore, it has been observed that although the "no economic sense" test "offers good insights into when aggressive actions by a single firm go too far," it "can lead to erroneous results unless" one also "seek[s] to 'balance' gains to the monopolist against losses to consumers, rivals, or others." Areeda & Hovenkamp ¶ 651b3, at 106-07. Otherwise we could arrive at absurd outcomes: "Theoretically, an act might benefit the defendant very slightly while doing considerable harm to the rest of the economy, and it would be lawful." *Id.* It is possible the test could be adapted to meet these criticisms, given that a court should not consider any gain from eliminating competition, but—in any event—the "no economic sense test" was not intended to displace all other approaches. Rather, it "is likely to be most useful as one part of a sufficient condition: If challenged conduct has a tendency to eliminate competition and would make no economic sense but for that tendency, the conduct is exclusionary." Werden at 418. Areeda and Hovenkamp also suggest a broader approach, in which harm "wholly disproportionate" to the valid business justification can also support a refusal-to-deal-claim. ¶ 772c2, at 223 ("Condemnation would be appropriate only for conduct that (1) clearly injures an actual or prospective rival either (2a) with no good business justification at all, or (2b) with a business justification that is poorly fitted to the result or wholly disproportionate to the harm that is inflicted.").

is not necessary for conduct to be exclusionary because the anticompetitive gains from exclusionary conduct sometimes can be reaped immediately"); Areeda & Honvenkamp ¶ 651b3, at 107 ("monopolizing conduct is not necessarily costly to the defendant").

Because the *Aspen Skiing* factors are helpful but not dispositive, this more nuanced approach considering both pro-competitive benefits and anticompetitive harms is necessary to answer the ultimate question of whether competition was harmed. The plaintiff ultimately needs to prove "that the monopolist's refusal to deal was part of a larger anticompetitive enterprise, such as (again) seeking to drive a rival from the market or discipline it for daring to compete on price." **[**74]** *Novell, 731 F.3d at 1075*. The result of such conduct is to harm competition by "entrench[ing] a dominant firm and enab[ling] it to extract monopoly rents once the competitor is killed off or beaten down." *Id.*

As the above paragraphs suggest, and without our endorsing any particular catchy title for this analytical approach, the calculation of procompetitive benefits net of anticompetitive harms does not easily lend itself to a *pleading* standard. ***HN26***[] Rule of reason cases "place[] a premium on objective tests based on evidence that is typically not in the defendant's exclusive control"—for example, Comcast's cost savings and other efficiencies it may have obtained due to its conduct. See Herbert Hovenkamp, *The Rule of Reason*, *70 Fla. L. Rev. 81, 86 (2018)*. This is why it is typically considered an "adequate pleading in a rule of reason antitrust case" for a plaintiff to allege (1) "evidence of market structure" (i.e., market power and relevant markets, which are not in dispute in this case) and (2) "exclusionary effect" (i.e., foreclosure of a competitor from a market, which is also not in dispute in this case)—"both of which can ordinarily be obtained without access to the defendant's own records—[and] indicate that an antitrust violation **[**75]** is plausible." *Id at 90*.

To the extent that refusal-to-deal claims require more at the pleading stage, it is enough to allege plausibly that the refusal to deal has some of the key anticompetitive characteristics identified in *Aspen Skiing*. The Supreme Court said as much in *Trinko*, in which it affirmed dismissal of a complaint, distinguished *Aspen Skiing*, and emphasized that "the defendant's prior conduct sheds no light upon the motivation of its refusal to deal—upon whether its **[*463]** regulatory lapses were prompted not by competitive zeal but competitive malice." *540 U.S. at 409*. *Trinko* specifically identified the absence of two factors—a prior and voluntary course of dealing, and refusal to sell at retail price—in distinguishing *Aspen Skiing*. ***HN27***[] The former factor was important, because it "suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Id.*, citing *Aspen Skiing, 472 U.S. at 608, 610-611*. In *Covad*, the D.C. Circuit adopted a similar, if slightly more explicit, holding that a plaintiff must eventually show a sacrifice of short-term profits to prevail on a refusal-to-deal claim and that alleging that a refusal to deal was "predatory" was sufficient at the pleadings stage. *398 F.3d at 675-76*.

Viamedia's pleading adequately alleges **[**76]** an anticompetitive refusal to deal. As described above, Viamedia's claim closely tracks *Aspen Skiing* and contains the key elements that were missing in *Trinko:* a prior course of voluntary conduct, sacrifice of short-term profits, and refusal to sell to rivals on the same terms as other potential buyers. Certainly, no more is required. We leave open the question whether allegations of short-term losses are necessary to state a refusal-to-deal claim. A case might present itself in which other factors—such as a prior course of conduct, exploitation of power over a cooperative network, refusal to sell at retail price, and discriminatory treatment of rivals—could plausibly support the inference that a refusal to deal is "prompted ... by anticompetitive malice." *Trinko, 124 S. Ct. at 880*. But this case is easier and does not require precise delineation of the requirements of a refusal-to-deal pleading.

Even if an allegation that a defendant's conduct was irrational but for its anticompetitive effect were necessary, Viamedia has plausibly alleged just that. In a section of the First Amended Complaint entitled "Comcast's Refusal to Deal with Viamedia is Irrational But for its Anticompetitive Effects," Viamedia walked **[**77]** through the long-term course of dealing prior to Comcast's conduct; the subsequent degradation of the value of the cooperative Interconnects; the financial losses suffered by Comcast itself, as well as by Viamedia and Comcast's competitor MVPDs; Comcast's willingness to offer Interconnect-only access in other markets where it did face competition; and the fact that "[t]here are no procompetitive justifications" to be achieved by the conduct given that there were "no material administrability problems in allowing Viamedia to participate in Interconnects" on behalf of its MVPD customers. First Am. Cplt. ¶¶ 154-68. Viamedia's allegations—regardless of the standard applied—are more than sufficient to pass muster under *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, and *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

HN28[] With Viamedia meeting the appropriate pleading standard and presenting evidence of harm to competition, the remainder of the case should settle into the traditional analysis followed in rule of reason cases, with the burden shifting to Comcast, which "may, of course, introduce its own proof of inevitability, superior skill, or business justification." Areeda & Hovenkamp ¶ 650c, at 94. To be more specific, under this burden-shifting framework, once Viamedia has "successfully **[**78]** establish[ed] a *prima facie* case under *§ 2* by demonstrating anticompetitive effect, then [Comcast] may proffer a 'procompetitive justification' ... a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal." *Microsoft, 253 F.3d at* ***[*464]*** *59*. If such a justification is offered, "the burden shifts back to [Viamedia] to rebut that claim." *Id.* If Viamedia cannot rebut the evidence of Comcast's procompetitive justifications, "then [Viamedia] must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Id.* This burden-shifting has evolved based on which party has access to the various categories of evidence and information, with any evidence of pro-competitive justifications likely to be under the defendant's control. Cf. United States Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 10, at 30 (Aug. 19, 2010) (Merger Guidelines) ("much of the information relating to efficiencies is uniquely in the possession" of the firms seeking to justify a transaction).[14]

ii. *Inapposite Vertical Integration Cases*

Comcast also relies on cases involving vertically integrated **[**79]** defendants with facts that, in crucial ways, do not map onto this case. In seeking to shoehorn this case into this category, Comcast caused confusion in the district court—and continues in this effort on appeal—by glossing over the unusual market structures in this case and portraying itself as just a "prototypical" vertically integrated firm. This misconception is accomplished by conflating (1) Comcast's actual vertical integration of its MVPD cable services with its ad rep services functions with (2) its control over the cooperative Interconnects in the relevant geographic markets. Comcast's argument for dismissal on the pleadings depends upon this confusion.

HN30[] To start, "[e]ven a monopolist ... is free to integrate, especially when integration creates no new monopoly in any second area." Areeda & Hovenkamp ¶ 1700j1, at 14-15. Such an integration allows the defendant to achieve cost-savings by "elimination of double marginalization." *United States v. AT&T, Inc., 916 F.3d 1029, 1036, 439 U.S. App. D.C. 388 (D.C. Cir. 2019)*. In other words, prior to vertical integration, the firms providing complementary products would "earn[] margins over cost before their products reached consumers." *Id. at 1044*. After integration, goes the theory, there is no need for two entities to earn margins **[**80]** over cost, and "the merged entity would eliminate that cost and ... pass on some of those cost savings to consumers in order to attract additional" customers. *Id.* Thus, it would rarely be an antitrust violation for a firm to supply itself through vertical integration, and a plaintiff would not generally have a right under ***antitrust law*** to demand that a defendant forgo supplying itself from an in-house source. Areeda & Hovenkamp ¶ 1700j1, at 14-16 & n.35.

[*465] This principle has been illustrated in some *Section 2* cases, in which a company claimed antitrust injury when a larger company vertically integrated and provided in-house what it formerly purchased from the smaller

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[14] ***HN29***[] Courts apply a "similar balancing approach" in rule of reason cases, whether alleged under *§ 1* or *§ 2*. *Microsoft, 253 F.3d at 59*, citing *Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*. The Supreme Court has recently reiterated this balancing test for a rule of reason *§ 1* case: "To determine whether a restraint violates the rule of reason ... a three-step, burden-shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a pro-competitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Ohio v. American Express Co., 138 S. Ct. 2274, 2284, 201 L. Ed. 2d 678 (2018)* (omitting internal citations); see also Areeda & Hovenkamp ¶ 1820a, at 188, ¶ 1821, at 207 (observing that courts require "stronger proof of offsetting efficiencies" when defendants possess greater ability to foreclose rivals from the market).

company. For example, in *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc., 507 F.3d 117 (2d Cir. 2007)*, a company with a local monopoly in crushed stone (aggregate) sold the aggregate through two distributors. The aggregate monopolist decided to vertically integrate by purchasing one of the distributors and bringing all of its distribution in-house. *Id. at 119*. The remaining distributor alleged a Section 2 violation, claiming that "its injury resulted from [defendant's] vertical integration into the distribution market." *Id. at 120*. The facts of *Port Dock* do not map onto the conduct of Comcast, which was already vertically integrated **[**81]** and was instead exploiting its control over the cooperative Interconnects.

Similarly, the defendant in *Christy Sports, LLC v. Deer Valley Resort Co., 555 F.3d 1188 (10th Cir. 2009)*, owned the mountain on which it leased property to plaintiff, and "the creator of a resort has no obligation under the antitrust laws to allow competitive suppliers of ancillary services on its property." *Id. at 1193*. Notably, the mountain was not a cooperative enterprise, and the customers (skiers) did not compete against the defendant mountain resort. And in *Novell* (which, recall, was a case that went to trial), defendant Microsoft was the sole owner of the intellectual property it had made available to independent software vendors. *731 F.3d at 1067*. And again, the customers (computer users) did not compete against Microsoft.

HN31[] These opinions about "prototypical" vertically integrated firms recognize, nevertheless, that different circumstances could support a cognizable antitrust claim in cases like this one. See *Port Dock, 507 F.3d at 124-25* ("Vertical expansion by a monopolist, without more, does not violate *section 2*," unless there is an allegation of an "anticompetitive incentive to create a downstream monopoly," or other "special circumstances in which a monopolist's vertical expansion could be anticompetitive."); *Christy Sports, 555 F.3d at 1196* ("We would not even preclude **[**82]** the theoretical possibility that such a change [by refusing to deal] could give rise to an antitrust claim, for example, if by first inviting an investment and then disallowing the use of the investment the [defendant] imposed costs on a competitor that had the effect of injuring competition in a relevant market."); *Novell, 731 F.3d at 1076* (plaintiff could have proven refusal-to-deal case against Microsoft, but at trial "presented no evidence from which a reasonable jury could infer that Microsoft's discontinuation of this arrangement suggested a willingness to sacrifice short-term profits, let alone in a manner that was irrational but for its tendency to harm competition").

Even if this were a vertical integration case, Viamedia adequately alleged that Comcast presented just such a "special circumstance." Its conduct eliminated its only competitor in the ad rep services market and increased control over its MVPD competitors in the retail cable market. But again, this is not a case of simple vertical integration. Comcast *is* vertically integrated and has been at all relevant times. No one objects to a vertically integrated Comcast offering both Interconnect services and ad rep services. Viamedia does not seek **[**83]** to force Comcast to buy ad rep services from Viamedia; nor does Viamedia seek to force Comcast to allow Viamedia to re-sell or distribute Comcast's ad rep services. Viamedia simply wants to ensure that MVPDs can freely choose Viamedia as their supplier of ad rep services if that is their preferred choice.

[*466] Another distinguishing fact is that the Interconnects are joint, cooperative efforts among competing MVPDs. That distinguishes this case from cases involving vertically integrated defendants, as in *Port Dock*. Viamedia seeks to regain access to the Interconnects to operate on behalf of its MVPD customers. It is true that by virtue of acquiring numerous other cable companies, Comcast now controls the Interconnects at issue. But they are cooperative ventures that jointly set prices for competitor MVPDs' spot avails. Comcast itself has described the Interconnects as a "collection of two or more cable TV systems that work together to distribute commercials to a wider geographic area than a single system would otherwise reach, giving advertisers the option to reach all cable households within a market with one buy." First Am. Cplt. ¶ 156.

The Interconnects' cooperative structure explains **[**84]** why Comcast describes itself not as an Interconnect "owner" but as an Interconnect "operator" and describes its function as a firm that "operates interconnects in DMAs including Chicago and Detroit." See, e.g., Appellees' Br. at 7. It also explains why Comcast describes Viamedia as having "participated in interconnects," and after being denied access, Comcast says, Viamedia sought "readmission." *Id.* Typical vertically integrated firms do not refer to themselves as the "operators" of their assets, and they do not describe their buyers as "participating" in the vertically integrated firms' services, let alone say that buyers might seek "readmission" to those services. **HN32**[] Taking control of and exploiting control of a previously cooperative mechanism is *not* vertical integration.[15]

Accordingly, we reverse the Rule 12(b)(6) dismissal of Viamedia's claim for monopolization through an unlawful refusal to deal.

2. *Tying*

HN33[] The "essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." **[**85]** Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984). Viamedia contends that Comcast conditioned the sale of Interconnect services (the tying product) on the purchase of ad rep services (the tied product). Viamedia alleges that Comcast engaged in anticompetitive conduct on two fronts. Comcast inserted itself between Viamedia and its competitor MVPDs by: (1) denying Viamedia access to the Comcast-controlled Interconnects, and (2) then using its control over the Interconnects to demand that its smaller MVPD competitors turn over to Comcast 100% of their spot avails, including the sale of local spots, an area in which Comcast and the MVPDs had formerly competed. Viamedia has offered evidence that this two-front strategy was successful. Comcast excluded its only competitor in the ad rep services market—gaining a pure monopoly. It also gained new control over and insight into its MVPD competitors that it could not have achieved otherwise.

HN34[] The district court, however, granted summary judgment on Viamedia's tying claim, a decision we also review *de novo.* Schlaf v. Safeguard Prop., LLC, 899 F.3d 459, 465 **[*467]** (7th Cir. 2018). "Summary judgment is appropriate only if there are no disputed questions of material fact and the moving party is entitled to judgment as a matter of law," so we "examine the record in the **[**86]** light most favorable to the [non-movant], granting [it] the benefit of all reasonable inferences that may be drawn from the evidence and reversing if we find a genuine issue concerning any fact that might affect the outcome of the case." *Id.* (citations omitted); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (**HN35**[] on summary judgment, courts must refrain from making credibility determinations or weighing evidence).

a. *Summary Judgment Standard*

HN36[] The district court applied, and Comcast argues for, a summary judgment standard that requires plaintiffs in Section 2 monopolization cases to present evidence that "tends to exclude the possibility" that a monopolist's conduct is just "as consistent with competition as with illegal conduct." 335 F. Supp. 3d at 1061, quoting Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The proper question on summary judgment is whether Viamedia has presented evidence to establish a genuine dispute of material fact as to whether Comcast engaged in exclusionary conduct forbidden by Section 2. See Matsushita, 475 U.S. at 585; Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451, 483, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992); see also, generally, In re Text Messaging Antitrust Litig., 782 F.3d 867 (7th Cir. 2015). **HN37**[] When determining whether there is a "genuine issue of material fact ... the substantive law will identify which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. at 247-48 (emphasis omitted). "The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden **[**87]** on plaintiffs facing summary judgment in antitrust cases." Eastman Kodak, 504 U.S. at 467-68.

Viamedia's tying theory is not economically implausible, unlike the alleged twenty-year-long conspiracy to charge predatorily low prices in Matsushita itself. A competitor's claim that a rival used monopoly power in a tying product market to gain a monopoly in a tied product market is "facially anticompetitive and exactly the harm that antitrust laws aim to prevent." Eastman Kodak, 504 U.S. at 479. The sufficiency of the tying claim depends on whether Comcast forced RCN and WOW! to buy its ad rep services. Our summary judgment inquiry can be framed in the

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[15] Viamedia disputes the accuracy of describing Comcast as an Interconnect "owner." Deposition testimony characterizes an Interconnect simply as "an agreement between two or more MVPDs in a DMA to distribute commercials ... across all partners in the interconnect."

language of *Matsushita—are* the facts "as consistent with" forcing as with noncoerced action?—but this formulation does not get us anywhere beyond the general summary judgment standard. In the following analysis, we ask whether Viamedia has presented evidence of forcing sufficient to create a genuine dispute for trial.

b. *Tying and Comcast's Conduct*

In granting summary judgment, the district court concluded that no reasonable jury could find as a matter of fact that Comcast tied Interconnect services to the purchase of its ad rep services. We respectfully disagree. Viewing the evidence in the light most **[**88]** favorable to Viamedia, and without making credibility determinations or weighing the parties' competing evidence, we conclude that Viamedia has offered sufficient evidence that Comcast illegally tied purchase of its ad rep services to the Interconnect access it already controlled.

[*468] First, it is undisputed that Comcast (a) has market power in the tying market for Interconnect services and (b) has now foreclosed all competition in the tied market for ad rep services. Second, there is substantial evidence that the cooperative Interconnects are a separate service from Comcast's ad rep services. Third, Viamedia offered evidence that Comcast forced its competitor MVPDs to become its customers for ad rep services if they also wanted to keep their access to the Interconnects.

i. *Definition*

HN38[] Tying is conduct in which a firm will "sell one product [the tying product] but only on the condition that the buyer also purchases a different (or tied) product." *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*; see also *Sheridan v. Marathon Petroleum Co., 530 F.3d 590, 592 (7th Cir. 2008)*; Areeda & Hovenkamp ¶ 1700a, at 4. The seller will purchase the tied product "not because the party imposing the tying requirement has a better product or a lower price" but because the seller has "power or leverage" in the market for **[**89]** the tying product. *Northern Pacific Railway, 356 U.S. at 6*.

HN39[] Tying is still nominally subject to a per se rule of illegality, but it is "a most peculiar per se rule." Areeda & Hovenkamp ¶ 1701c, at 31; see *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. at 26-29*; *Eastman Kodak, 504 U.S. at 462*.[16] The factual elements that must be proven for a tying claim capture much of what must be demonstrated in a rule of reason case. Showing that the purchase of the tied product was forced uses many of the same concepts used to analyze refusals to deal: some assessment of market power, rough predictions of anticompetitive harm, and consideration of procompetitive justifications. See, e.g., *Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 44, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)* ("While some such [tying] arrangements are still unlawful, such as those that are the product of a true monopoly ... that conclusion must be supported by proof of power in the relevant market.") (citation omitted); *Sheridan v. Marathon Petroleum Co., 530 F.3d 590, 593-94 (7th Cir. 2008)* (describing the tying rule and its market-power requirement); Areeda & Hovenkamp ¶ 1760(b), at 379 (noting that, even when treated as per se illegal, "the Supreme Court has almost always been willing to consider a defendant's offered justifications").

HN40[] "When the defendant is a dominant firm" and meets "a much stricter power requirement," however, the "special screening function" of the tying factors **[**90]** is "largely unnecessary, and the more general standards of *§ 2* become relevant" because "the technical requirements ... attach only to per se ties." Areeda & Hovenkamp ¶ *777*, at 324. Thus, "when the defendant is a monopolist in the 'tying **[*469]** product,'" it may be superfluous to go through a detailed inquiry into whether there are "separate products." *Id.* ¶ 617b2, at 52-53; see also *id.* ¶ *777*, at

[16] We stay "still" because in recent years the Supreme Court has held that some categories of conduct that were formerly treated as per se illegal are now subject to a rule of reason analysis. See *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 907, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (resale price maintenance no longer per se illegal, overruling *Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911))*; *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 57, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)* (non-price vertical restraints no longer per se illegal, overruling *United States v. Arnold, Schwinn, & Co., 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967))*; *State Oil Co. v. Khan, 522 U.S. 3, 22, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)* (vertical maximum price restraints no longer per se illegal, overruling *Albrecht v. Herald Co., 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968))*.

324-25 & n.9 (noting that in *Eastman Kodak*, the Supreme Court treated a conditional refusal to sell parts without service as a tying arrangement, although on remand the tying claim was dropped and a *Section 2* violation was found without any "separate products" requirement); *United States v. Microsoft Corp., 253 F.3d 34, 96-97, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (en banc). Similarly, "[w]hen a defendant's market share and the underlying market structure make monopolization or attempt plausible, then a tie that contributes significantly to the maintenance or creation of monopoly power violates *§ 2* even though it is unilaterally imposed." Areeda & Hovenkamp ¶ *777*, at 325.

Here, Comcast's monopoly power in the tying market of Interconnect services in the three metropolitan areas and its successful capture of a monopoly position in the tied market of ad rep services in the same areas are undisputed. And **[**91]** yet great effort has been made to parse whether Comcast's conduct satisfies some platonic ideal of tying conduct. We, too, walk through the tying factors at issue (separate product and forced purchase) and determine, taking the record as a whole, that Viamedia has provided sufficient evidence to create a question of fact as to each factor. Ultimately, the focus in this *Section 2* case must remain on "whether, viewing the monopolist's conduct as a whole, it has unreasonably maintained or enhanced its monopoly position." *Id.* ¶ 777, at 324.

ii. *Separate Products or Services*

HN41[] "[W]hether one or two products are involved turns ... on the character of the demand for the two items." *Jefferson Parish, 466 U.S. at 19*; see also *Eastman Kodak, 504 U.S. at 462* ("For service and parts to be considered two distinct products, there must be sufficient demand so that it is efficient for a firm to provide service separately from parts."); *Northern Pacific Railway, 356 U.S. at 5-6*. Comcast disputes whether Interconnect access and ad rep services are separate services. The district court assumed they are. On this record, that was correct.

HN42[] The fact that buyers may wish to purchase and use two complementary products together does not, in and of itself, convert the two separate products into a single product. Rather, the **[**92]** market must "be assessed at the pre-contract rather than post-contract stage." Areeda & Hovenkamp ¶ 1802d6, at 89, citing *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*; see also *id.* ¶ 1802d6, at 88 (noting that a "grouping of sales covered by [a single] contract does not become a relevant market for that reason"). In this case, RCN and WOW! viewed the services as separate prior to entering into their present contracts with Comcast.

Interconnect services and ad rep services are different functionally, as already described at length. See above at pages 10-24. To summarize, ***HN43***[] a provider of Interconnect services bundles and re-sells ads from multiple MVPDs in a regional market. An ad rep has a more direct relationship with an MVPD, directly representing it in regional and/or local ad sales, and potentially acting as its representative with an Interconnect. The "character of the demand" for the two services also differs, as demonstrated by how the market participants have sold and purchased the services. See *Jefferson Parish, 466 U.S. at 19-21*. Viamedia has offered only ad rep services for almost two decades. Comcast formerly offered the two **[*470]** services separately in the relevant DMA geographic markets. It continues to offer them separately in other DMAs. MVPDs like Comcast **[**93]** that also operate Interconnects "often have separate salespeople selling local advertising and selling Interconnect advertising." DA650. And the other alleged victims of Comcast's tying conduct—its smaller MVPD competitors—previously purchased these services separately and, as shown above, expressed strong interest in continuing to do so when Comcast was forcing them to buy the two together in Chicago, Detroit, and Hartford.

Comcast's claim that the two services are not distinct is also flatly inconsistent with one of Comcast's primary arguments on the next factor. In arguing that it did not force the MVPDs to buy its ad rep services, Comcast points to other DMAs where it sells Interconnect services separately. Even if there might be a viable factual dispute on whether it is possible to consider these two services a single "unified market," which we doubt, that would be at minimum a question to "be resolved by the trier of fact." *Eastman Kodak, 504 U.S. at 463*. Comcast is not entitled to summary judgment on this ground.

iii. *Forced Purchase*

Ample evidence shows that Comcast conditioned MVPDs' access to the Interconnects on hiring Comcast as their ad rep. Internal Comcast documents indicate that it ended its relationship **[**94]** with Viamedia specifically to obtain full-turnkey deals with the MVPDs. A216 n.84. Internal WOW! emails show that its executives understood that WOW! would have to hire Comcast for ad rep services if it wanted to regain access to the Interconnects. A215 n.81. RCN testified to the FCC that "Comcast will only allow RCN to join the interconnects if RCN employs Comcast spotlight instead of Viamedia." *Id. A* Comcast employee working in the Chicago and Detroit markets testified to the Department of Justice that Comcast had a business practice that "if an MVPD wants to get access to a Comcast [Spotlight] controlled Interconnect, it has to hire Comcast [Spotlight] as its ad sales representative." *Id.*, A835. And a Comcast employee responded to the question "were you also clear ... that Comcast Spotlight was interested only in a turnkey deal?" with "Direct relationship, full turnkey, yes, we made that clear to [WOW!]." A811. Both Comcast and the partial dissent offer explanations and rationales to try to defang these unusually explicit pieces of evidence. See Post at 136-37. On review of summary judgment, of course, Viamedia is entitled to the benefit of reasonable inferences and interpretations in its favor. **[**95]** The opposing arguments are suitable for a trial but are not grounds for affirmance.

A jury could easily find that Comcast improperly forced the smaller MVPDs to buy its ad rep services using its monopoly in the Interconnect services market. The entire purpose of its refusal to deal with Viamedia—conceded repeatedly by Comcast—was to force RCN and WOW! to become full-turnkey clients for ad rep services. A789. Every party involved understood that this was the practical effect of banning from the Interconnects MVPDs that received ad rep services from Viamedia.

The fact that the arrangements were structured so that ownership of the slot avails passed from the MVPDs to Viamedia does not affect this analysis. ***HN44***[] In applying the antitrust laws, we care more about economic substance than about form. See *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 760, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. Smaller MVPDs do **[*471]** not have their own ad rep services divisions. As a practical matter, they cannot self-provide ad rep services and must work with an ad rep to interface with the Interconnects. ***HN45***[] Given these dynamics, Viamedia offered sufficient evidence that Comcast explicitly used its control over the Interconnects to deny access to its competitor MVPDs or their agent to force RCN and WOW! to use **[**96]** Comcast's ad rep services for *all* spot avails, including the two-thirds of spot avails sold outside of the Interconnects, many of which used to be sold locally in competition with Comcast. See *Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 272 (6th Cir. 2015)* ("When a defendant adopts a policy that makes it unreasonably difficult or costly to buy the tying product (over which the defendant has market power) without buying the tied product from the defendant, it 'forces' buyers to buy the tied product from the defendant and not from competitors."); *Microsoft, 253 F.3d at 64* (liability appropriate where monopolist bars rival from "cost-efficient" means of distribution even if some means of distribution remain open).[17]

Because this is not a typical bundling case, Comcast's and the partial dissent's reliance on *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171 (9th Cir. 2016)*, is misplaced. In that case, the plaintiff purchased Honeywell's replacement parts and then "bundle[d] parts and repairs in an effort to woo" the ultimate airline customers, in part reselling defendant's products. *Id. at 1176*. Moreover, Aerotec presented no evidence that Honeywell "explicitly or implicitly" tied or conditioned the sale of the tying product of parts to the ultimate airline customers' purchase of the tied product of maintenance. *Id. at 1179*. The court found compelling that "Honeywell **[**97]** allows airlines to purchase parts and services in separate transactions from whichever supplier they please." *Id.* But Viamedia is not

[17] The partial dissent insists that that there was no conditioning and that "RCN and WOW! maintained the ability to deal directly with Comcast and access the Interconnect without any ad representative should they choose not to employ Comcast." Post at 118-19 This is wrong as a matter of fact. As described above, every party involved—Comcast, RCN, and WOW!—understood that RCN and WOW! would be unable to access the Interconnects unless they hired Comcast to provide ad rep services. Even though its reasoning relies on the possibility that RCN and WOW! could access the Interconnects without Viamedia or Comcast, the partial dissent points to no evidence supporting that possibility. The record contains evidence of the opposite: RCN and WOW! needed to employ an ad rep services provider, and once Comcast refused to deal through their chosen intermediary, they had no practical choice but to obtain ad rep services from Comcast. As described above, substantial evidence shows that both RCN and WOW! understood themselves to be forced by Comcast into purchasing its ad rep services. A215 n.81. We cannot affirm summary judgment by overlooking that evidence about the realities of the parties' dealings and the economic realities of the market.

a bundler. It has presented substantial evidence of an explicit tie, and its former customers could not separately obtain Interconnect access.

There are other fundamental differences between the product offered in *Aerotec* and the one offered here. Honeywell sold airplane parts and repair services. Comcast, by contrast, operates a platform that is necessarily cooperative. RCN and WOW! are not just potential customers of Comcast as the airlines were potential customers of Honeywell. They are also Comcast's rivals in the retail cable market. Because self-providing ad rep services was not a viable option for RCN and WOW!, refusing to deal with their chosen intermediary had the effect of forcing them into much less desirable direct relationships with Comcast, their monopolist-competitor. Viamedia has presented evidence that the **[*472]** MVPDs were reluctant to be forced into their more powerful rivals' arms. A886-87. There was no evidence in *Aerotec* that the airlines felt similarly threatened, that providing repairs in-house was economically infeasible, or that the **[**98]** airlines viewed Honeywell as a necessary intermediary.

Comcast's reliance on *It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676 (4th Cir. 2016)*, is even further off-base. That case involved "a world of robust market competition where [the ultimate customers] were free to take a package deal of promotion and venues, free to purchase those products separately, free to turn down both, and where they in fact exercised all those options to their advantage." *Id. at 687*. That does not bear even a passing resemblance to the markets here.

The district court's holding that Viamedia failed to offer evidence of forcing was premised on three assumptions: first, that the refusal-to-deal claim was correctly dismissed; second, that Viamedia acted as a reseller of Interconnect services rather than as the MVPD's agent for Interconnect access; and third, that RCN and WOW! could have purchased Interconnect-only access separately. Viewing the record as a whole, as we must, we disagree. We address each assumption in turn.

First, the district court acknowledged Viamedia's evidence that Interconnect access was conditioned on the purchase of Comcast's ad rep services. Yet the court discounted this evidence because such a condition could be explained by Comcast's "legal refusal to deal" **[**99]** rather than "an illegal tying." *335 F. Supp. 3d at 1061*. This analysis fails on its own terms. As described above, Viamedia alleged a *prima facie* refusal-to-deal claim. Such potentially illegal conduct cannot justify Comcast's related tying of Interconnect services to ad rep services, and more fundamentally, a tying claim does not fail as a matter of law simply because it was implemented by refusing to deal with an intermediary.

Second, the district court conflated access to the cooperative Interconnects, formerly granted uniformly to competing MVPDs or their ad rep services agents, with the Interconnect services themselves. The district court's conclusion that the MVPDs wanted a single entity to "make available to them both Interconnect Services and Ad Rep Services" is simply wrong as a matter of fact. Before Comcast excluded Viamedia, RCN and WOW! received Interconnect services from Comcast and ad rep services *separately* from Viamedia. The district court misunderstood Viamedia to be a reseller of Interconnect services as part of a bundle that included ad rep services, and concluded there was no impermissible tying simply because Viamedia "could not offer that bundle" any longer due to Comcast's (supposedly) **[**100]** legal refusal to deal with Viamedia. *335 F. Supp. 3d at 1058 n.12*. That characterization does not have a factual basis in the record, and it is certainly not beyond reasonable factual dispute. Even Comcast characterized Viamedia not as a reseller of Interconnect services but as a reseller of MVPD spot avails to the Interconnect operator. DA638. Comcast's characterization of ad rep services—including its own ad rep services provided to customer/competitor MVPDs—as reselling spot avails and disconnected from its MVPDs customers' best interests is troubling in its own right, but we return to that below. Neither the district court's nor Comcast's characterization of Viamedia's role was accurate.

As an ad rep services provider, Viamedia acted in the best interests of its MVPD customers and served as their agent or interface with the Comcast-controlled Interconnects for the one-third of MVPD spot avails that they sold cooperatively— **[*473]** not competitively—on a regional, DMA-wide basis. The district court acknowledged as much elsewhere in its opinion, explaining that MVPDs view "themselves as receiving Interconnect Services from interconnect operators (like Comcast) even when they have hired an unaffiliated Ad Rep (like Viamedia) on **[**101]** a full-turnkey basis." *335 F. Supp. 3d at 1058 n.10*. We agree with the district court's latter characterization.

Third, in considering the summary judgment evidence, the district court drew inferences in favor of Comcast in concluding that RCN's and WOW!'s purchases of Interconnect services and ad rep services from Comcast were not forced. It did not credit RCN's and WOW!'s reasonable understanding that Comcast was tying Interconnect services to ad rep services. The court (1) read Comcast's statements as more ambiguous than they actually were; (2) concluded that, because the MVPDs ultimately purchased Comcast's ad rep services, they must have wanted both services to be provided by Comcast; and (3) pointed to out-of-market evidence to infer that Comcast would have offered an Interconnect-only deal if only RCN and WOW! had asked for one. This analysis departed from summary judgment standards in several respects.

Even if Comcast's statements had been ambiguous, a plaintiff does not need an express, written declaration of a proposed tying arrangement. A sale on the announced or implied condition that the buyer purchase the tied goods from the seller ordinarily satisfies the tying-agreement requirement. Areeda & Hovenkamp ¶ 1754b-c, at 315-20 **[**102]** . Although it is not enough for the services to be merely complementary, a seller is not immunized from a tying claim if there is a factual dispute as to whether the buyer wished to purchase the tied service (here ad rep services) from the defendant with market power in the tying service market (here Interconnect services). The MVPDs' ultimate decisions, after much financial pain, to sign with Comcast for ad rep services do not disprove an illegal tie. (And notably, in Hartford, Frontier has continued to resist signing with Comcast for ad rep services and remains cut off from the Interconnects.) After all, "the great majority of tying and exclusive-dealing provisions that exclude rivals are engaged in by one market-dominating party and one party that is 'innocent' in the sense that it cannot profit from monopoly in the market, but is agreeing to the exclusivity only at the behest of the other party." Areeda & Hovenkamp ¶ 1803a, at 107 n.5.

Finally, the district court incorrectly inferred from the fact that Comcast offers Interconnect-only access in other local markets that RCN and WOW! could have obtained Interconnect-only access if only they had asked. That reasoning **[**103]** denies the non-moving party the benefit of reasonable inferences from the evidence. It also overlooks the evidence showing that in-house provision of ad rep services simply was not a practical option for RCN or WOW! in these markets.

More specifically, the evidence from other markets actually supports Viamedia's case, not Comcast's defense. It is undisputed that competition takes place within metropolitan (DMA) markets. If an advertiser wishes to purchase advertising time in the Chicago DMA, buying a spot avail in New Orleans is not an adequate substitute. Similarly, if Comcast was not permitting RCN an Interconnect-only deal in Chicago, an Interconnect-only deal in Denver was not an adequate substitute. And we summarized above at pages 24-35 the evidence indicating that RCN and WOW! did *not* willingly agree to Comcast's terms.

[*474] The Interconnect-only arrangements that Comcast offered in other DMAs, where it did not have (or exercise) so much market power, help Viamedia. Those arrangements show that Interconnect and ad rep services are indeed separate products. They need not be sold together. At the same time, Comcast's willingness to offer Interconnect-only access in other DMAs may reflect **[**104]** that Comcast does not have an overlapping footprint—i.e., does not compete—in those markets. In contrast, the evidence could support a finding that in Chicago, Detroit, and Hartford, Comcast tied Interconnect services to ad rep services to exclude its competitor in ad rep services and thereby force its MVPD competitors into its not-so-tender arms. ***HN46***[] See Areeda & Hovenkamp ¶ 1744g, at 198-99 (explaining that bundling in non-competitive markets does not necessarily provide insight into whether a tie is efficient rather than reflective of increased market power exploitation, while unbundling in competitive markets likely reflects efficiencies). In drawing inferences in favor of the non-moving party, we must also recognize the possibility that Comcast was testing the waters in Chicago, Detroit, and Hartford with an eye toward expanding its tying demands to other markets if it is not held accountable.[18]

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[18] The partial dissent incorrectly looks to arrangements in other geographic markets to draw conclusions about forcing in the relevant markets. Post at 132-33. The ad rep services and Interconnect markets are distinct for each DMA. Viamedia's tying

Outside of the district court's inconclusive comparison of other, more competitive markets, there was no basis in the record to support Comcast's speculation that if RCN and WOW! had just asked once more, Comcast would have abandoned its strategic plan and agreed to standalone Chicago and Detroit **[**105]** Interconnect access. To make such an inference, we would have to assume that the MVPDs went several years without access to the Interconnects, lost millions of dollars in advertising revenue, complained to Comcast and federal regulators, and then chose the ad rep services provider that they least preferred, all because of a mere misunderstanding. Comcast is free to offer this misunderstanding theory at trial, but the theory cannot support summary judgment. We reverse summary judgment for Comcast on Viamedia's tying claim.

C. *Section 2 Monopolization: Harms, Efficiencies, & Remedies*

Undisputed geographic markets, service markets, and market power make this case unusual. In addition, Viamedia has offered sufficient evidence to demonstrate *prima facie* claims for monopolization of the ad rep service markets in three DMAs through refusal to deal and tying. Comcast's actions also forced a new, intimate, and unwelcome relationship upon its smaller MVPD competitors. If credited, that evidence will shift to Comcast the burden to prove what would need to be some dazzling procompetitive benefits to justify its conduct. We set out below considerations for the district court to consider in the rule of reason **[**106]** analysis it will have to conduct on remand.

1. *Harm to Competition*

The potential harm in this case from Comcast's refusal to deal and tying **[*475]** ripples outward. Prior to Comcast's conduct, there was competition in three related markets: (1) between Comcast and other MVPDs for subscribers; (2) between Viamedia and Comcast in ad rep services; and (3) between Comcast and other MVPDs for the sale of spot avails in the local DMA market. By forcing out its only competitor in the market for ad rep services and forcing its MVPD competitors to turn over 100% of their spot avails, Comcast eliminated competition in the market for ad rep services and the market for the sale of local spot avails. At the same time, it gained the ability to impair competition in the market for MVPD subscribers. These harms to competition are prototypical antitrust harms.

a. *Ad Rep Services*

The ad rep services market went from two service providers to a single, monopolist provider. With no other ad rep services providers, the elimination of Viamedia unquestionably harmed competition. The harms that typically flow from a competitive market shifting to total control by a monopolist include potentially higher prices, lower output, **[**107]** and reduced innovation. The market at issue here may not have had time to show ultimate effects from total foreclosure. But Comcast is forthright about the fact that it has refused to allow Viamedia entry into other DMAs. Appellees' Br. at 35-36. The DMAs that have never had a competitive ad rep services market may provide useful comparison points to the relevant DMAs here, which are still governed by contracts that were signed while Viamedia was still trying to compete with Comcast.

b. *The MVPD Market: MVPDs, Advertisers, Cable Subscribers*

Recall that the MVPDs faced three possible scenarios when Comcast refused to deal with Viamedia and then conditioned the MVPDs' access to the Interconnects on the MVPDs turning over all of their spot avails to Comcast's ad rep services arm. Above at pages 31-35. Each scenario entailed its own potential harm to competition.

The MVPDs elected the first scenario, giving in to Comcast and signing up for its ad rep services. To summarize, this arrangement has resulted in:

- Comcast's smaller MVPD rivals contributing additional revenue toward their dominant competitor;

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allegations and evidence focused on Comcast's conduct in Chicago, Detroit, and Hartford. The fact that Comcast did not simultaneously monopolize or attempt to monopolize ad rep services in other geographic markets is not a defense to its monopolization of Chicago, Detroit, and Hartford. The dissent's only support for its novel market-aggregating approach comes from a calculation of profit sacrifice in *Novell, 731 F.3d at 1077*, which has nothing to do with market definition or tying. See post at 133.

• MVPDs turning over to Comcast the majority of spot avails they had formerly kept out of the Interconnects, **[**108]** a large portion of which are allocated to local ads (for which the MVPDs formerly competed against each other);
• RCN and WOW! being forced to trust that their dominant, incumbent cable rival Comcast will make ad sales decisions in the smaller competitors' best interests, despite Comcast's divided loyalties—as it is more profitable for Comcast to place ads in ways that are different from how RCN and WOW! might allocate them;
• Comcast gaining access to its competitor MVPDs' competitively sensitive information, including number and location of subscribers, ad sales, promotional ad materials to current and potential subscribers (including promotions trying to get customers to switch away from Comcast);

• And it is not just the MVPDs that have been harmed. Comcast is now the only seller of spot avails in the local market. As Viamedia's counsel noted at oral argument, local advertisers used to have several outlets to **[*476]** choose among at various price points when buying spot avails. Comcast is now their only-stop-shop, as well.

And recall that this was the MVPDs' *least-bad* choice—the one they chose when Comcast denied them their best option. Comcast and the district court hypothesized that Comcast **[**109]** was not actually barring competing MVPDs completely from Interconnect access. The hypothesis was instead that Comcast would have permitted the MVPDs to have Interconnect-only access without using either Viamedia's or Comcast's ad rep services. In this scenario, Comcast would lose ad rep services revenue, but would not lose millions from forgoing Interconnect access fees and from its own spot avails being less valuable when placed through a degraded Interconnect.

But contrary to what the district court seemed to assume, this result still would have been harmful. Forcing RCN and WOW! to forsake the benefits they had gained by outsourcing ad sales to an independent Viamedia would have dramatically raised their costs. RCN and WOW! would have needed to hire staff, purchase technology, and pay for services that Viamedia had previously provided at lower cost. Those fixed costs would have been difficult for those MVPDs to afford, as shown by the fact that the option was always available in theory, and they never took it, and as shown by RCN's filing with the FCC and WOW!'s internal emails. A215 n.81.

In the other possible scenario, RCN and WOW! could continue working with Viamedia for ad rep **[**110]** services, but Comcast would continue barring them from the cooperative Interconnects. If the MVPD competitors had made that choice, they would have remained cut off from a large percentage of their advertising revenue.

Any loss of revenue or higher costs from these scenarios is not just a loss for competitors. It leads to a negative feedback loop in the market in which the MVPDs compete for cable subscribers, further harming competition. Higher costs and less advertising revenue lead to fewer promotional offers to subscribers and reduced expansion. See *FCC 2007 Report and Order, 22 FCC Rcd 5101 at 5108* ("Revenues from cable services are, in fact, a driver for broadband deployment," i.e., the build-out of additional cable infrastructure). This in turn hampers RCN and WOW! from obtaining new cable subscribers or retaining the subscribers they already have (who may switch to Comcast). With a weakened RCN and WOW!, Comcast benefits further by not needing to offer the promotions it otherwise would have if it faced a more vibrant RCN or WOW!

To the extent that cable subscribers are left with higher priced and lower quality services and competition has been eliminated in the market for the sale of local spot **[**111]** avails, a trier of fact would have to account for that additional anticompetitive harm.

c. *Back to the Interconnects*

Comcast's conduct also turned a previously procompetitive platform into a weapon to decrease competition in related markets. As originally conceived and implemented, the Interconnects appear to have been comfortably on the "reasonable" side of a rule of reason analysis for such cooperative ventures among competitors. See generally *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*. Comcast has described the Interconnects in these procompetitive terms, as a "collection of two or more cable TV systems that work together to distribute commercials to a wider geographic area than a single system would otherwise reach, giving advertisers the option to **[*477]** reach all cable households within a market with one buy." First Am. Cplt. ¶ 156. Consistent with that description, Comcast itself has told the FCC that "the revenue share in an interconnect is often the same for all participants, and fairly standardized across interconnects." Opposition to Petitions to Deny and Response to Comments at 279 n.883, *In the Matter of Applications of Comcast Corp., Time Warner Cable Inc., et al. for Consent to Assign or Transfer Control of Licenses and Authorizations*, FCC MB Docket 14-57 (Sept. 23, 2014) (Comcast 2014 FCC Response) **[**112]** . Which is as it should be if this cooperative mechanism is procompetitive rather than a weapon to inflict anticompetitive harm.

In congressional hearings on its proposed merger with TimeWarner Cable, Comcast highlighted the non-exclusionary nature of the Interconnects. A Comcast executive was sent to testify to a congressional committee about the proposed purchase. Much of the concern focused on the potential power of a combined Comcast/TimeWarner Cable to harm other content providers who relied on access to cable companies' "pipes" into the home (e.g., Netflix, YouTube). One Representative, however, asked about Comcast's actions with the Interconnects it controlled.

Comcast executive vice president David Cohen was asked to "provide assurances that Comcast will not exclude competitors or advertising firms from the advertising interconnects that Comcast operates." Cohen replied, "We are not in the business of excluding businesses who want to buy advertising from us." Cohen was again pressed: "So your short answer is that you are not going to exclude competitors or advertising ... [f]rom the interconnects." **[**113]** "Correct." According to Viamedia's evidence, however, Comcast was in the midst of doing just what Cohen was denying.[19]

In this lawsuit, moreover, Comcast now argues that its control over the cooperative Interconnects is the *source* of its competitive advantage. If that were correct, it would call into question the legality of the Interconnects themselves. ***HN47***[] ***Antitrust law*** is rightly skeptical of mechanisms that permit competitors jointly to set prices and other terms of dealing. Collaboration between actual or potential competitors "can be rife with opportunities for anticompetitive activity." *American Society of Mech. Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 571, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982)*.

Based on Comcast's portrayal and use of the Interconnects in this suit, such skepticism is now warranted. The government antitrust enforcement agencies provide guidance on competitor collaborations. A number of the factors that show anticompetitive effect appear to be met by the Interconnects *as now portrayed by Comcast*. ***HN48***[] The factors include whether the collaboration may:

- "[L]imit independent decision making or combine the control of or financial **[**114]** interests in production, key assets, or decisions regarding price, **[*478]** output, or other competitively sensitive variables;"
- "[O]therwise reduce the participants' ability or incentive to compete independently;"
- Potentially "facilitate[] explicit or tacit collusion through facilitating practices such as the exchange or disclosure of competitively sensitive information or through increased market concentration;"
- "Successfully eliminate[] procompetitive pre-col-laboration conduct, such as withholding services that were desired by consumers when offered in a competitive market."

Federal Trade Commission and United States Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* § 2.2, at 6, § 3.31, at 12 (April 2000) (Collaboration Guidelines). Check, check, check, and check.

These red flags were not raised by the truly cooperative original concept of the Interconnects. Having taken control of at least some Interconnects, though, Comcast now has the ability—and now even claims the *right*—to use the mechanism as a *source of its competitive advantage over rivals*, distorting competition in related markets. The use

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[19] Comcast abandoned the Time/Warner transaction after investigations by federal enforcement and regulatory agencies. The government's "significant concerns" about the merger were focused on the likelihood that it "would make Comcast an unavoidable gatekeeper for Internet-based services that rely on a broadband connection to reach consumers." DOJ Press Release, *Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Department and Federal Communications Commission Informed Parties of Concerns* (Apr. 24, 2015), at http://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department (last visited on Feb. 21, 2020).

of the Interconnects to take control of and set prices for competitors' **[**115]** local ads does not appear related to accomplishing the Interconnects' procompetitive goals. These facts weigh against Comcast, not for it.

2. *Procompetitive Justifications*?

HN49[] The potential harms stemming from Comcast's conduct will not lead to *Section 2* liability if Comcast proves that its monopoly in ad rep services "is a consequence of a superior product, business acumen, or historic accident," or if its conduct was the result of, or necessary to achieve, much greater procompetitive benefits. *United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; see also Areeda & Hovenkamp ¶ 650c, at 94-95. The procompetitive benefits typically recognized in ***antitrust law*** include evidence of "higher output, improved product quality, energetic market penetration, successful research and development, cost-reducing innovations, and the like." Areeda & Hovenkamp ¶ 651d, at 119.[20] As this issue must also be decided by a trier of fact on remand, we offer some observations.

a. *The Interconnects*

We start with Comcast's monopoly control over the Interconnects in Chicago, Detroit, and Hartford, which Comcast has identified as the source of its competitive advantage that permitted it, in turn, to gain monopoly control over ad rep services. It appears that the **[**116]** only skill and foresight demonstrated by Comcast in obtaining monopoly control over the Interconnects was its ability to acquire a multitude of other cable MVPD providers without facing a challenge from government antitrust enforcers. Comcast's acquisitions are not in and of themselves **[*479]** evidence of superior skills, services, or accident.

What Comcast now identifies as a source of competitive advantage was produced by the kind of mergers that the agency Merger Guidelines describe as anticompetitive. ***HN51***[] The Guidelines identify as their "unifying theme" the proposition that "mergers should not be permitted to create, enhance, or entrench market power or facilitate its exercise" by "enhancing [a firm's] market power." § 1, at 2. One example of an anticompetitive merger is directly on point:

> Merging Firms A and B operate in a market in which network effects are significant, implying that any firm's product is significantly more valuable if it commands a large market share or if it is interconnected with others that in aggregate command such a share. Prior to the merger, they and their rivals voluntarily interconnect with one another. The merger would create an entity with a large enough share that **[**117]** *a strategy of ending voluntary interconnection would have a dangerous probability of creating monopoly power in this market*. The interests of rivals and consumers would be broadly aligned in preventing such a merger.

Merger Guidelines § 2, at 6 (emphasis added). Comcast cannot now justify exclusionary conduct by pointing to control over the Interconnects, which was acquired through mergers that themselves may have been anticompetitive *precisely because of the risk that they could enable Comcast's exclusionary conduct*.

b. *The Ad Rep Services Market*

Comcast's new monopoly position in the ad rep services markets in Chicago, Detroit, and Hartford, if we draw reasonable inferences in favor of Viamedia, is a result not of its superior services but of its exclusionary conduct. Any claimed benefits from that conduct must be procompetitive and not simply the result of eliminating competition. For example, if Comcast has reduced advertising, promotions, or other incentives that it previously offered to customers or local retailers when competing with Viamedia, those savings would represent harm to competition. See *Covad Communications Co. v. Bell Atlantic Corp., 398 F.3d 666, 674, 365 U.S. App. D.C. 78 (D.C. Cir. 2005)*, citing Bork, *Antitrust Paradox* at 314. Similarly, any savings gained by forgoing investments in research and **[**118]**

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[20] ***HN50***[] "As a general matter, the evidence supporting a prima facie case need not be as specific as the evidence supporting a procompetitive justification" because "[i]f the defendants have a procompetitive justification, it must have been a motivating factor for the restraint, and the defendants should be able to establish it rather easily." Herbert J. Hovenkamp, *The Rule of Reason*, *70 Fla. L. Rev. 81, 107 (2018)*; see also *id. at 110* ("To the extent that the defendants' expectation of profit came from something other than a restriction of competition, they should have evidence and are in the best position to provide it.").

development, infrastructure, or sales personnel, that otherwise would have been made under competitive conditions are properly categorized as harm to competition, not benefits. HN52[] Finally, any defense premised upon the proposition that competition itself is inefficient, unreasonable, or confusing is not cognizable. See *National Society of Professional of Engineers v. United States, 435 U.S. 679, 696, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*.

Viewing the facts in the light most reasonably favorable to Viamedia, Comcast's procompetitive justifications seem to fall into this latter category. If Comcast could offer improved efficiencies by offering ad rep services and Interconnect services together to MVPDs, it was always free to do so. If this were the case, it could have passed on some of those savings to MVPD customers and possibly outcompeted Viamedia. Refusing to deal with the MVPD's representative of choice appears to be an attempt to avoid competition on the merits in the markets for ad rep services.

On the procompetitive side of the ledger, evidence of reduced pricing could offset harm—although current contracts may not yet reflect ultimate post-competition pricing. They were signed when Comcast was still bidding against Viamedia. HN53[] And while **[*480]** protection against free-riding is generally recognized as a procompetitive **[**119]** goal, "[w]hen payment is possible, free-riding is not a problem because the 'ride' is not free." *Chicago Prof'l Sports Ltd. Partnership v. NBA, 961 F.2d 667, 675 (7th Cir. 1992)*; see also Hovenkamp, *The Rule of Reason*, *70 Fla. L. Rev. at 111, 113* ("Often instances of claimed free riding are really complaints about competition, particularly when there are joint costs," and "complete market exclusion is a suspiciously excessive remedy for claimed free riding, even where a certain amount of free riding actually occurs."). If Comcast has evidence of truly procompetitive benefits, it should submit that evidence to the trier of fact. But the hypotheses it has offered thus far do not entitle it to summary judgment.

3. *Remedies*

Comcast's final defense focuses on the challenge of remedying its conduct. HN54[] After all, Comcast points out, "Courts are ill suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing.'" *Pacific Bell Telephone Co. v. Linkline Communications, Inc., 555 U.S. 438, 452, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*, quoting *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. Call this the "So what?" defense.

HN55[] We agree that a court should not "impose a duty to deal that it cannot explain or adequately and reasonably supervise." *Linkline, 555 U.S. at 452-53*, quoting *Trinko, 540 U.S. at 415*. Yet courts are often called upon to undertake complicated, long-term supervision of complex cases and remedies. The judiciary need not and should not adopt a posture of learned **[**120]** helplessness in the face of proven antitrust violations. For example, courts regularly preside over dozens, if not hundreds or even thousands, of related cases in multidistrict litigation that present complicated questions of liability, not to mention supervising and implementing remedies over years if not decades. See, e.g., *MDL 875 In re: Asbestos Products Liability Litigation* (No. VI) (overseeing thousands of asbestos cases, including class actions, since 1991). Courts oversee the bankruptcy process for companies with complicated corporate structures and far-flung assets, supervising sales of those assets worth hundreds of billions of dollars. See, e.g., *In re Lehman Brothers Holdings, Inc.*, Case No. 08-13555 (Bankr. S.D.N.Y.). And of course federal courts currently supervise at least 115,000 individuals on supervised release, implementing difficult-to-monitor and intrusive conditions limiting those individuals' jobs, the family and friends they can see, their drug and alcohol consumption, and locations to which they can travel, among others—all enforced through routine interviews of family and associates, electronic monitoring, drug tests, and random searches. Administrative Office **[**121]** of the United States Courts, *Overview of Probation and Supervised Release Conditions* 42-93 (Nov. 2016). In this antitrust case, we are not yet ready to cry "uncle" by affirming dismissal based on the unsubstantiated claim that this case poses "insoluble administrability problems."

In any event, this defense puts the cart before the horse. The trier of fact must first evaluate the evidence and determine whether Comcast's procompetitive justifications outweigh the anticompetitive harms from its conduct. If Comcast is found liable, the district court will then face a decision about appropriate remedies. That will be the time to face the practical problems Comcast hypothesizes.

The record thus far offers reasons to think the problems would be manageable. **[*481]** Comcast and Viamedia did business voluntarily, presumably on profitable terms for both. That history may well simplify the problems. ***HN56***[] As then-Judge Gorsuch wrote for the Tenth Circuit in *Novell*, evidence of that earlier course of dealing "helps address, at least to some degree, administrability concerns—presumably profitable terms already agreed to by the parties may suggest terms a court can use to fashion a remedial order without having **[**122]** to cook them up on its own." *731 F.3d at 1075*.

Moreover, Comcast itself told the FCC that this should not be an insoluble problem. It told the FCC that "the revenue share in an interconnect is often the same for all participants, and fairly standardized across interconnects." Comcast 2014 FCC Response at 279 n.883. Such comparison points (both within a given Interconnect and against other Interconnects in which Comcast sells or buys Interconnect-only access) may be used to establish a remedy that addresses pricing.

HN57[] That being said, "Antitrust courts normally avoid direct price administration, relying on rules and remedies ... that are easier to administer." *Linkline, 555 U.S. at 453*, quoting *Concord v. Boston Edison Co., 915 F.2d 17, 25 (1st Cir. 1990)* (Breyer, C.J.). If a pricing remedy proves too complicated, then structural remedies may be preferable. See, e.g., Areeda & Hovenkamp ¶ 600b, at 4 (even "[m]ildly reprehensible behavior might be enough to challenge a firm whose power is significant" and could justify imposing a more substantial remedy (e.g., "divestiture or dissolution" versus "an injunction")).

Comcast knows that courts are capable of overseeing structural and behavioral remedies (including ones that govern pricing disputes) that ameliorate competitive concerns. It agreed **[**123]** to such an arrangement as a condition for court approval of its challenged 2009 merger with NBC Universal. *United States v. Comcast Corp., 808 F. Supp. 2d 145, 147-48 (D.D.C. 2011)* (Comcast agreeing to certain remedies to prevent anticompetitive conduct post-merger). ***HN58***[] Such court-imposed and court-supervised remedies can also be imposed without a defendant's consent after a finding of liability. One obvious possibility would be to prohibit Comcast's control over Interconnects, which, in light of the evidence of misuse of that power to harm competition, raises serious problems under *Section 1* of the Sherman Act.[21]

D. *Antitrust Injury*

HN59[] A private civil plaintiff in an antitrust case must also establish "antitrust injury," which requires proof that its "claimed injuries are of the type the antitrust laws were intended to prevent and reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation." *Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 716 (7th Cir. 2006)* (internal quotation marks and citations omitted). Viamedia has offered evidence of antitrust injury.

HN60[] When a monopolist creates a monopoly in the tied market, rivals are often excluded from the market, thereby losing market share or sales. "In such cases courts ordinarily grant standing to the excluded **[*482]** or impeded rival." Areeda & Hovenkamp ¶ 1767a, at 449 **[**124]** ; see also *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 490 n.14, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* ("[C]ompetitors may be able to prove injury before they actually are driven from the market and competition is thereby lessened. Of course, the case for relief will be strongest where competition has been diminished."). We have also often recognized that competitors suffer antitrust injury when they are forced from the market by exclusionary conduct. See, e.g., *Tri-Gen Inc. v. Int'l Union of Operating Engineers, Local 150, AFL-CIO, 433 F.3d 1024, 1032 (7th Cir. 2006)* ("[T]his Court has recognized that competitors can bring an antitrust claim when they are excluded from the market and injured by defendants' actions."); *Serfecz v. Jewel Food Stores, 67 F.3d 591, 597 (7th Cir. 1995)* ("When the plaintiff's injury is linked to the injury inflicted upon the market, such as when consumers pay higher prices because of a market monopoly *or*

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[21] An amicus brief filed in support of Comcast argued that any "relief for arbitrary refusals to deal should be left to the legislature." Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Appellees at 25 (internal quotation marks omitted). The Chamber's argument that courts should not enforce *Section 2* in refusal-to-deal claims is a policy position—and not one with which we are free to agree.

when a competitor is forced out of the market, the compensation of the injured party promotes the designated purpose of the ***antitrust law***—the preservation of competition.") (emphasis added). This rule is integral to an effective antitrust regime because "the foreclosed rival's injury is entirely independent of the amount or existence of any injury to buyers." Areeda & Hovenkamp ¶ 1767a, at 449.

HN61[] The general rule is that customers and competitors in the affected market have antitrust standing. **[**125]** See *Associated General Contractors, 459 U.S. at 539*; *McGarry & McGarry, LLC v. Bankruptcy Mgmt. Solutions, Inc., 937 F.3d 1056, 1065-66 (7th Cir. 2019)*, citing *In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 158 (2d Cir. 2016)*, citing in turn *Serpa Corp. v. McWane, Inc., 199 F.3d 6, 10 (1st Cir. 1999)* ("Competitors and consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury."), and *SAS of P.R., Inc., v. P.R. Tel. Co., 48 F.3d 39, 45 (1st Cir. 1995)* ("competitors and consumers are favored plaintiffs in antitrust cases"). Viamedia is not seeking relief based on a theory that competition should have been *reduced*. Cf. *Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. at 488* (rejecting claim for loss of income that would have been earned if other competitors had been forced out of the market and competition had thus been reduced). Instead, Viamedia seeks only an opportunity for fair competition in the ad rep services markets, based on the quality and prices of its services. It is an appropriate plaintiff to seek damages based on exclusionary conduct that forced it out of that market.

Viamedia claims that Comcast's exclusionary conduct drove it from the ad rep services markets in Chicago, Detroit, and Hartford, thus reducing competition. Viamedia has presented evidence indicating that if Comcast not tied its sale of Interconnect services to ad rep services, RCN and WOW! likely would have continued to obtain ad rep services from Viamedia. The harm to competition is particularly pronounced since Viamedia was **[**126]** Comcast's only competitor in in the relevant markets. To the extent that Comcast engaged in exclusionary conduct, the evidence indicates that the exclusionary conduct caused Viamedia's injuries by forcing it from the ad rep services markets.

The partial dissent expresses great skepticism toward rivals' antitrust suits and argues that Viamedia cannot show antitrust injury on its tying claim. As a general matter, caution is appropriate. The partial dissent goes astray, however, by contending it is "uncommon" for a "single **[*483]** foreclosed rival" to have standing in a tying case. Post at 122-23. The leading tying cases and the leading treatise's specific, on-point discussion of antitrust standing in tying cases teach otherwise.

The foundational tying cases of the past 40 years were brought by tied-market rivals. *Eastman Kodak, 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265*; *Jefferson Parish, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2*. The partial dissent cites no case law for its assertion that such cases are "uncommon." It also does not cite any case in which an excluded rival in the tied market was found to lack antitrust injury. In the single tying case cited in the partial dissent's discussion of antitrust injury, the plaintiff lacked antitrust injury precisely because she was *not* participating in the tied market when the **[**127]** tie was allegedly implemented. See *Kochert, 463 F.3d at 716*.

And where Areeda and Hovencamp address antitrust standing in tying cases, they recognize that standing is appropriate in cases like this. Viamedia was competing with Comcast in the tied market for ad rep services. It was forced out of that market in Chicago, Detroit, and Hartford. ***HN62***[] Areeda and Hovencamp explain:

> Rivals in that market [the tied market] may be "foreclosed" when their entry or expansion is impeded or they lose existing market share or sales. Consumers lose the benefits of any entry, expansion, competition, or innovation that independent rivals might have injected into the tied market. *In such cases courts ordinarily grant standing to the excluded or impeded rival*.

¶1767a, at 449-50 (emphasis added); accord, *Eastman Kodak, 504 U.S. at 479* (reversing summary judgment for defendant: market foreclosure in tied market resulting from illegal tying "is facially anticompetitive and exactly the harm that antitrust laws aim to prevent"). To the extent that the partial dissent suggests that the tying conduct at issue is not illegal or exclusionary, that goes to the merits, not to antitrust injury.

The partial dissent also suggests that Viamedia's injuries cannot establish antitrust **[**128]** injury because they are the same as those alleged from the refusal to deal. Post at 125. This point also reflects only disagreement on the merits of the tying claim and the confusion that has stemmed from the different treatment of the two claims in the district court. Because the same general course of conduct supports both the refusal-to-deal and tying claims, the two theories necessarily allege similar injuries and damages.

E. *Role of Expert Witnesses*

HN63[] The final issue is the admissibility of expert testimony. We review the district court's exclusion for an abuse of discretion. *Salgado v. General Motors Corp., 150 F.3d 735, 739 (7th Cir. 1998)*. If a discretionary ruling is based on an error of law, though, it can often be deemed an abuse of discretion. E.g., *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* (*Rule 11* sanctions); *Ervin v. OS Restaurant Services, Inc., 632 F.3d 971, 976 (7th Cir. 2011)* (class certification).

The district court struck Viamedia's expert testimony largely based on the view that Viamedia's claims should fail as a matter of law. We disagree with the district court's view of the law, so we reverse the court's rulings regarding Viamedia's expert witnesses.[22] We address separately **[*484]** the district court's ruling regarding a portion of Viamedia's expert economic witness, whom the court perceived as merely offering "lay" testimony, as well as an objection Comcast has raised **[**129]** on appeal that Viamedia failed to offer a causation expert, which Comcast believes should be fatal.

1. *Standard*

HN64[] Expert opinion testimony is admissible if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." *Fed. R. Evid. 702*. An expert's opinion may "overlap[] with the jurors' own experiences" or "cover matters that are within the average juror's comprehension," so long as the expert uses some kind of "specialized knowledge" to place the litigated events "into context." *Lawson v. Trowbridge, 153 F.3d 368, 376 (7th Cir. 1998)* (citations omitted); see also *United States v. Williams, 81 F.3d 1434, 1441 (7th Cir. 1996)* ("All you need to be an expert witness is a body of specialized knowledge that can be helpful to the jury.").

2. *Economic Expert Witness*

Viamedia offered Dr. Furchtgott-Roth as an expert witness on the economic rationales of Comcast's conduct and the competitive ramifications from such conduct. Setting aside the district court's ruling regarding Dr. Furchtgott-Roth's report based on the **[**130]** court's legal holdings, the court also excluded a portion of his testimony as offering only a lay impression of the market and Comcast's conduct.

Viamedia argues that Dr. Furchtgott-Roth's undisputed "specialized knowledge" would be helpful to a jury to place Comcast's conduct into context, and that there are some complex facts in this case, "including the economic incentives faced by a set of interrelated firms in the two-sided market for spot cable advertising," which are not "obvious to the layperson."

Dr. Furchtgott-Roth clearly drew conclusions through "expert assessment," not merely a lay interpretation of the evidence. While he did summarize and repeat some relevant facts, he drew significantly on expertise to "add something"—context and supporting information—to the record. Viamedia contends that its exclusion from the Interconnects furthered Comcast's tying policy. Dr Furchtgott-Roth's opinion that self-provision is not a viable business option for smaller MVPDs is an expert interpretation of evidence on a highly relevant factual point. So too

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[22] Viamedia offered Dr. Lys as an expert on damages issues. The only basis for excluding his opinion was that he assumed that Comcast's conduct had violated the antitrust laws and thus caused Viamedia cognizable harm, and the court had concluded that Viamedia could not legally prevail on its antitrust claims. As we are reversing the district court's legal rulings, the court's exclusion of Dr. Lys' expert opinion must also be reversed.

is his opinion that Viamedia cannot make a competitive offer for ad rep services if Comcast conditions its competitor MVPDs' Interconnect **[**131]** access on forgoing Viamedia's services. He drew on his expertise to make these two determinations, both of which required analysis of market conditions. These opinions informed his broader opinion that Comcast's exclusion of Viamedia from the Interconnects was integral to its tying conduct. The district court therefore abused its discretion in concluding that Dr. Furchtgott-Roth's testimony was not significantly informed by his expertise. It was, and it therefore meets the requirement of *Federal Rule of Evidence 702(a)*.

3. *Lack of Expert Witness on Causation*

Comcast also argues that Viamedia's case must fail because it has not **[*485]** offered an expert on causation. ***HN65***[] Hiring another expert on causation is not a legal requirement for successfully bringing an antitrust case. Rather than requiring "*§ 2* liability [to] turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct," which "would only encourage monopolists to take more and earlier competitive action," courts have inferred causation when a defendant's conduct "reasonably appear[s] capable of making a significant contribution to ... maintaining monopoly power." *United States v. Microsoft Corp., 253 F.3d 34, 78-79, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (en banc) (citation omitted). To the extent **[**132]** there may be an underlying problem of proof, "the defendant is made to suffer the uncertain consequences of its own undesirable conduct," and causation "queries go to questions of remedy, not liability." *Id. at 79-80* (citation omitted).

Conclusion

Viamedia alleged sufficiently, and at summary judgment offered sufficient evidence, that Comcast violated *Section 2* of the Sherman Act. Viewing the allegations and evidence in the light most favorable to Viamedia, Comcast abruptly terminated decade-long, profitable agreements and sacrificed short-term profits to obtain and entrench long-term market power, and used its monopoly power in Interconnect services market to force its MVPD competitors into a relationship that makes Comcast a gatekeeper of its competitors' advertising revenue. This conduct "reveal[s] a distinctly anticompetitive bent." *Trinko, 540 U.S. at 409*, discussing *Aspen Skiing, 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467*. Comcast is free to contest these issues at trial, as well as to try to prove and quantify any procompetitive justifications. The factual disputes in this case are numerous, genuine, and material. The judgment of the district court is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

Concur by: BRENNAN (In Part)

Dissent by: BRENNAN (In Part)

Dissent

BRENNAN **[**133]** , *Circuit Judge*, concurring in part and dissenting in part. The majority opinion is synoptic in its coverage, deeply researched, and meticulous in its consideration of the antitrust issues this case presents. It deserves much respect. While I agree Viamedia has plausibly alleged an antitrust violation and is entitled to reversal and remand on its refusal-to-deal claim, I would affirm summary judgment on its tying claim because the undisputed facts do not present evidence of an illegal tie. I also respectfully part company with my colleagues on some other issues the majority opinion tackles.

The last several decades have brought a new regime to ***antitrust law*** in the world of exclusionary conduct. Outdated monopolization doctrines have given way to a sharper and narrower understanding of what constitutes exclusionary behavior under *§ 2* of the Sherman Act, *15 U.S.C. § 2*. *See* *Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072 (10th Cir. 2013)*; *United States v. Microsoft Corp., 253 F.3d 34, 49, 346 U.S. App. D.C. 330 (D.C. Cir.*

2001). History teaches this new regime promotes competition and innovation in the marketplace, and it informs the resolution of the claims and defenses before us now.

I. Refusal to Deal

A 2003 agreement between Viamedia and Comcast granted Comcast the exclusive right to sell on its Chicago, Detroit, and Hartford Interconnects advertising **[**134]** availabilities that Viamedia purchased from multichannel video programming distributors ("MVPD") WOW! and RCN. Viamedia understood that, upon the agreement's **[*486]** expiration, Comcast had the right to solicit RCN's and WOW!'s advertising business directly. The agreement between Viamedia and Comcast expired May 31, 2012. The next day Comcast informed Viamedia of its intent not to renew their agreement and to seek RCN's and WOW!'s business directly.

Comcast "prefers to deal directly with MVPDs, rather than with intermediaries such as Viamedia, and has found substantial benefits from direct dealings." Appellee's Br. 11. When their contracts with Viamedia expired in 2015, RCN and WOW! contracted with Comcast to be their ad representative in Chicago and Detroit and sell their availabilities on its Interconnects. Up to that point, Viamedia's agreements with RCN and WOW! prevented them from dealing directly with Comcast.

Cut out of the deal, Viamedia sued Comcast for allegedly violating § 2 of the Sherman Act, claiming Comcast's decision to end Viamedia's access to the Interconnects lacked a valid business reason under *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. Specifically, Viamedia alleged Comcast's decision caused Comcast to forfeit fees **[**135]** upfront and reduced the economic value of the Interconnects. The allegations do not claim that Comcast's sacrificed profits later led to monopoly recoupment.

The district court dismissed Viamedia's refusal-to-deal claim. *Viamedia, Inc. v. Comcast Corp., 218 F. Supp. 3d 674 (N.D. Ill. 2016)*. The court found that Viamedia's own allegations admitted a valid business purpose for Comcast's refusal: removing an intermediary, Viamedia, to deal directly with MVPD customers.[1] *Id. at 698*. The court further found that Viamedia failed to allege or explain how Comcast's refusal to deal with it had "no rational procompetitive purpose." *Id.*

A. *The Refusal-to-Deal Claim Survives a Motion to Dismiss*.

We review the grant of a *Federal Rule of Civil Procedure 12(b)(6)* motion to dismiss de novo and ask whether there is "plausibility in the complaint." *Christy Sports, LLC v. Deer Valley Resort Co., 555 F.3d 1188, 1191 (10th Cir. 2009)* (citing *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 564, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*) (internal citations omitted); *see also* *Deppe v. NCAA, 893 F.3d 498, 500 (7th Cir. 2018)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Plausibility does not ask whether the allegations are likely true; the court must assume they are. Instead, the inquiry is "whether, if the allegations are true, it is plausible and not merely possible that the plaintiff is entitled to **[**136]** relief." *Christy Sports, 555 F.3d at 1191-92*. The plaintiff must plausibly allege more than "wholly conclusory statements" that a defendant violated § 2 of the Sherman Act to advance past the pleadings stage. *Id.*

In considering the alleged violation at the root of Viamedia's refusal-to-deal claim, we must be cognizant that "the antitrust laws rarely impose on firms—even dominant firms—a duty to deal with rivals." *Novell, 731 F.3d at 1066*; *see also* **[*487]** *Verizon Commc'ns v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 411, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (holding even a monopolist has no duty to cooperate with rivals). "As a general rule purely

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[1] This court has characterized this common business practice of vertical integration or disintermediation as pro-competitive and efficient. *See* *Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 710 (7th Cir. 1984)* (holding "vertical integration usually is procompetitive").

unilateral conduct does not run afoul of section 2—businesses are free to choose whether or not to do business with others and free to assign what prices they hope to secure for their own products." 731 F.3d at 1072. In the past, "some courts suggested that a monopolist must lend smaller rivals a helping hand," but today it is understood that forcing rivals to cooperate "usually leaves consumers paying more for less." *Id.; see also* Frank H. Easterbrook, *The Chicago School & Exclusionary Conduct*, 31 Harv. J.L. & Pub. Pol'y 439, 441-42 (2008) (antitrust themes incentivizing cooperation among firms largely "bit the dust in *Verizon v. Trinko*" and now "the main goal of antitrust is to compel firms to be rivals"); Olympia Equip. Leasing v. Western Union Telegraph, 797 F.2d 370, 375 (7th Cir. 1986) ("Today it is clear that a firm with lawful monopoly power has no general **[**137]** duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches.").

Despite this hesitancy to condemn refusals to deal, a monopolist's behavior violates § 2 if it is "irrational but for its anticompetitive effect." Novell, 731 F.3d at 1075; *see also* 3 Phillip E. Areeda & Herbert Hovenkamp, ***ANTITRUST LAW***: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 651b3, p. 107 (4th ed. 2015) (monopolizing conduct is "irrational" if "only explanation that makes it seem profitable is destruction or discipline of rivals") (hereinafter Areeda & Hovenkamp, ***ANTITRUST LAW***); Trinko, 540 U.S. at 407 (defendant must be seeking "an anticompetitive end"); Aspen Skiing, 472 U.S. at 605 ("If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory.") (internal citations omitted); Christy Sports, 555 F.3d at 1194 ("in rare circumstances a refusal to cooperate with competitors might constitute a § 2 violation").

It is unclear—particularly on a motion to dismiss when a plausibly alleged violation is all that is required—whether conduct "irrational but for its anticompetitive effect" is to be treated the same as conduct with "no rational procompetitive purpose." *See* 218 F. Supp. 3d at 698. Although **[**138]** slight, there is a difference: the former provides an antitrust plaintiff the opportunity to argue that, despite some efficiency justification proffered by an antitrust defendant, the rational or intended goal of the conduct was its anticompetitive impact. The latter, in contrast, requires the antitrust defendant to put forward any evidence of some business reason for its conduct, regardless of potential anticompetitive effect. The district court applied the latter and found there was a rational procompetitive purpose because Comcast offered evidence of vertical integration and disintermediation—motives that I agree reflect lawful and procompetitive marketplace conduct.[2] But it did so by disregarding the plausibility of Viamedia's allegations of anticompetitive conduct and weighing the evidence in Comcast's favor. This is not the court's role on a Rule 12(b)(6) motion.

Any confusion here may stem from a misunderstanding of how to handle conflicting **[*488]** evidence of conduct in the allegations. If only one party advances evidence showing procompetitive or anticompetitive conduct, the court may find the lack of any opposing evidence shows either rationality or irrationality for § 2 purposes. *See* Novell, 731 F.3d at 1076 (on review **[**139]** of judgment as a matter of law, finding no evidence from which a reasonable jury could conclude monopolist's conduct was irrational); *see also* Aspen Skiing, 472 U.S. at 610 (on review of summary judgment, finding no evidence of efficiency justification for the refusal to deal). But even these instances are post-pleading. What of the parties who, at the pleading stage, proffer allegations of competing economic justifications for behavior? Are we to accept the defendant's proffered justification as conclusive of procompetitive rationality without considering the plaintiff's allegations of anticompetitive conduct? If so, can an antitrust plaintiff ever advance past the pleadings stage when a defendant asserts a procompetitive justification? The district court effectively held the plaintiff cannot, 218 F. Supp. 3d at 698, but this is up for debate. *See* 3 Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 651b3, pp. 106-07 (criticizing approach that relies on facts which "benefit the defendant very slightly while doing considerable harm to the rest of the economy;" "[n]ot all monopolizing conduct that we might wish to condemn is 'irrational'"); Microsoft Corp., 253 F.3d at 59 (defendant bears the burden of presenting a "nonpretextual claim" and proving procompetitive justification **[**140]** on the facts); Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469, 1481-82 (7th Cir. 1991) (finding "the presence of a legitimate business justification *reduces the likelihood* that the conduct will produce undesirable effects on the competitive process"; "[w]hether valid business

[2] The majority opinion reviews vertical integration and disintermediation cases cited by Comcast and concludes they are inapposite here on the question of procompetitive conduct. *See* Majority op. at pp. 63-67. While it does not change my agreement with the majority to remand the refusal-to-deal claim, I do not reach this same conclusion.

reasons motivated a monopolist's conduct is a question of fact" for a fact-finder); Olympia, 797 F.2d at 378 (reasoning the lack of "a clear business justification" among conflicting evidence "*may indicate* probable anticompetitive effect" but is not conclusive). We need not settle this debate, though, as it does not impact the decision to remand.

As the majority opinion recognizes, "the calculation of procompetitive benefits net of anticompetitive harms does not easily lend itself to a *pleading* standard." Majority op. at p. 59. Viamedia alleged Comcast's conduct could achieve "no procompetitive justifications" because there were no "problems in allowing Viamedia to participate in Interconnects" on behalf of its MVPD customers. Viamedia's allegations show more than market power; they allege Comcast's exclusionary conduct was anticompetitive and harmful to the economic purpose of the Interconnects, *see* Christy Sports, 555 F.3d at 1192 (anticompetitive allegation must appear in the pleadings), specifically by denying Viamedia access to the **[**141]** Interconnects. Giving Viamedia the benefit of its allegations, its refusal-to-deal claim clears the Rule 12(b)(6) pleading bar because it plausibly alleges it was "excluded from the market and injured by defendant['s] actions," Tri-Gen Inc. v. Int'l Un. of Op. Eng's Local 150, 433 F.3d 1024, 1032 (7th Cir. 2006)—an alleged injury that "harms both competitors *and* competition," Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 118, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986). Down the road, the facts Viamedia has pleaded or other facts discovered may render its refusal-to-deal claim a candidate for summary disposition. *See* Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 475 (7th Cir. 1988) (considering various antitrust claims: "the very nature of antitrust litigation encourages summary disposition of such cases when permissible"). But viewing the facts **[*489]** in a light favorable to Viamedia, its refusal-to-deal claim has not reached that point.

On a motion to dismiss, an antitrust plaintiff seeking § 2 damages must point to plausible allegations showing its rival's refusal to deal was irrational but for its anticompetitive effect. Regardless of how this court in the future resolves competing justifications at the dismissal stage, Viamedia has plausibly alleged refusal to deal in violation of § 2 and was entitled to advance that claim beyond the pleadings.

B. *The Refusal-to-Deal Claim Is Different than the Claim in* Aspen Skiing.

The majority opinion concludes **[**142]** this case is indistinguishable from Aspen Skiing, 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467. Majority op. at p. 54. I respectfully do not join the majority's conclusion that *Aspen Skiing* "maps onto Comcast's conduct," *id. at 44*, or that on a refusal-to-deal theory this case "appears stronger than *Aspen Skiing*." *Id. at 52*.

The familiar holding of *Aspen Skiing* is that the defendant's "failure to offer any efficiency justification whatever for its pattern of conduct" resulted in a § 2 violation. 472 U.S. at 608; *see also* Christy Sports, 555 F.3d at 1197 (finding the "critical fact in *Aspen Skiing* was that there were no valid business reasons for the refusal" to deal). Its holding is specific: the defendant could not justify either its insistence on breaking up the joint lift pass or its refusal to sell the other owner its passes for the same value just to keep the pass together. 472 U.S. at 603. There was no efficiency reason offered for the defendant's conduct; the only apparent purpose was to eliminate competition. *Id. at 608*. The Supreme Court later explained that this conduct constituted a violation because the "unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." Trinko, 540 U.S. at 409. The defendant's "unwillingness to renew **[**143]** the ticket even if compensated at retail price revealed a distinctly anticompetitive bent." *Id; see also* Goldwasser v. Ameritech Corp., 222 F.3d 390, 398 (7th Cir. 2000) (explaining the decision "to forgo cash revenues and efficient methods of doing business for the sole purpose of driving its rival out of the market" is a § 2 violation).

The application of *Aspen Skiing*'s holding has been the subject of substantial debate. Albeit a seminal antitrust opinion, *Aspen Skiing* is recognized as a factual and legal exception under current ***antitrust law***. *See* Trinko, 540 U.S. at 409 ("*Aspen Skiing* is at or near the outer boundary of § 2 liability."). Today, it fits within the "narrow world of refusal to deal cases."[3] *Novell, 731 F.3d at 1079*; *see* Easterbrook, *The Chicago School & Exclusionary Conduct, at 441-42* (describing the Court's holding in *Aspen Skiing* as "the last gasp of the old school of antitrust").

Not all refusal-to-deal challenges fall within the "limited exception" of *Aspen Skiing*. *Novell, 731 F.3d at 1074-75*. To invoke that exception, there must be a preexisting, voluntary, and presumably profitable course of dealing between a monopolist **[*490]** and a rival, and the discontinuation of that dealing must reveal irrational willingness to forsake short-term profits to achieve an anti-competitive end. *Id.* Evidence of forsaking short-term profits may "isolate conduct that has *no* possible efficiency **[**144]** justification." *Id. at 1077*. When considering sacrificed profits, though, courts should not "disaggregate profits from different lines of business" as "[p]arsing profits" would defeat the purpose of "holding firms liable for making moves that enhance their overall efficiency." *Id.* (disaggregating profits would make it difficult to assess firm's goal of "maximizing overall profits" and is inconsistent with the Court's reasoning in *Aspen Skiing* and *Trinko*); *see also* *Christy Sports, 555 F.3d at 1194* (businesses have ability "to recoup [their] investment[s]" in any number of ways). In finding the *Aspen Skiing* exception applies here, the majority opinion points to three key factors underlying the Supreme Court's decision in that case: (1) an important change in a pattern of distribution that had persisted for years; (2) conduct in the market with arrangements in comparable markets; and (3) forgoing profitable transactions. Majority op. at pp. 49-51. On these factors, I see *Aspen Skiing* and this case as different.

First, in *Aspen Skiing* there was more than an "important change" in the distribution pattern, as in that case the joint pass was terminated altogether. *472 U.S. at 603*. Here, no termination of the Interconnect occurred; instead, Comcast **[**145]** encouraged additional MVPD participation and sought to secure their access to the Interconnects by contracting with them directly. Second, in *Aspen Skiing*, the monopolist's conduct in comparable markets where it lacked dominance included the use of cooperative tickets in areas that apparently were competitive. *Id. at 603-04*. But Comcast participates in Interconnects across other DMAs, and, where it is the largest MVPD in a market, it operates the Interconnect there, too. *335 F. Supp. 3d at 1046*. Third, in *Aspen Skiing* the forgoing of profitable transactions was not alone, but "in exchange for perceived long-run impact on its smaller rival," and referenced in *Aspen Skiing* only in the context of finding no efficiency justification for the refusal to deal. *472 U.S. at 608, 610*. That is not the case here, as Comcast was able to proffer an efficiency justification (disintermediation and vertical integration) for its conduct. *See* Appellee's Br. 3.

Aspen Skiing would be more analogous to this case if a third-party vendor had managed the sales and advertising of the joint pass directly to skiers, and then Aspen Skiing Company (the monopolist) took over that role for vertical integration or other efficiency reasons. Instead, Aspen Skiing Company **[**146]** terminated the joint pass altogether; that would be like Comcast terminating the Interconnects to create a sub-optimal new platform to sell advertising, which of course did not happen here. Rather than terminate the Interconnects, Comcast encouraged MVPD participation and sought to secure MVPDs' access to the Interconnects by contracting directly with them. The record also contains evidence that Comcast acted pursuant to a rational business purpose: Comcast claimed it sought vertical integration and disintermediation, and Viamedia admitted such an efficiency justification in its allegations. *See id.* at 3.

Still, the reinstatement of Viamedia's refusal-to-deal claim does not depend on *Aspen Skiing*. Because that claim survives the plausibility requirement we apply under *Rule 12(b)(6)*, that portion of the judgment should be reversed and remanded.

[*491] C. *Opinion Testimony on the Refusal-to-Deal Claim May Be Allowed*.

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[3] *See* Gov't's Br. in Supp. of Neither Party at 6, 8-11, ECF No. 33 (arguing only limited circumstances have been recognized in which a monopolist violates *§ 2* by refusing to deal with a rival, and those circumstances are tightly circumscribed due to the negatives of coerced dealing; recommending this court follow *Novell* and its test that a refusal to deal does not violate *§ 2* "unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition").

Lastly on the refusal-to-deal claim, the district court's order regarding expert witnesses, which we review for abuse of discretion, is properly vacated. *See* Salgado ex rel. Salgado v. Gen. Motors Corp., 150 F.3d 735, 739 (7th Cir. 1998). On remand, the landscape of this case will have sufficiently changed to allow for this method of proof on the refusal-to-deal claim. This reversal **[**147]** allows for Viamedia to name expert witnesses on this claim, subject to the usual later motion practice to exclude or limit their testimony on this cause of action.

II. Tying

After their agreements with Viamedia expired, RCN and WOW! sought exclusive, full-turnkey relationships with Comcast. Neither RCN nor WOW! ever sought Interconnect-only services. The record contains no evidence that Comcast has ever declined an MVPD's request for Interconnect-only services; in fact, 14 percent of Comcast's agreements with MVPDs across all DMAs since December 2011 were Interconnect-only agreements. Viamedia, Inc. v. Comcast Corp., 335 F. Supp. 3d 1036, 1058 (N.D. Ill. 2018). None of those Interconnect-only agreements prevent an MVPD from hiring another ad representative for local sales or conducting their own ad representation.

Under its tying theory, Viamedia claimed Comcast conditioned access to the Interconnect (the "tying" product) on the purchase of Comcast's ad representation services (the "tied" product). But for whom? Viamedia conceded that both RCN and WOW! maintained the ability to deal directly with Com cast and access the Interconnect without any ad representative should they choose not to employ Comcast at the termination of their agreements with Viamedia.

The **[**148]** district court granted summary judgment on Viamedia's tying claim. 335 F. Supp. 3d at 1074. In so doing the court found there was no evidence that Comcast conditioned access to the Interconnect on the purchase of ad representation services. Id. at 1058 (finding the fact that RCN and WOW! both requested full-turnkey representation and that 14 percent of Comcast's agreements with MVPDs are Interconnect-only "belies any inference that Comcast tied its services."). The court further found there was no triable issue as to antitrust injury or damages, both necessary elements of an actionable claim. Notably, Viamedia admitted its injuries were "fully attributable to Comcast's decision to deny Viamedia Interconnect access," id. at 1070, thereby failing to establish a cognizable antitrust injury separate from the refusal to deal. Viamedia likewise failed to separately prove damages caused by the alleged tying conduct, again collapsing that showing into the refusal-to-deal claim. Id. at 1072-73.

To the district court, the crux of Viamedia's tying claim was that Comcast withheld the alleged tying product from its *rival*, Viamedia, not from its *customers*, WOW! and RCN. As the court found, Viamedia aimed to sell MVPDs a bundle of Comcast's Interconnect services **[**149]** with Viamedia's ad representation services, but "Viamedia has no antitrust right to force Comcast to help it sell such a bundle to their mutual customers." Id. at 1064. Finding the undisputed evidence did not show tying conduct, the district court granted summary judgment. Id. at 1074.

A. *Antitrust Injury and Standing are Lacking on the Tying Claim*.

As a threshold matter, a plaintiff must have antitrust standing to bring an antitrust **[*492]** claim. *See* McGarry & McGarry v. Bankr. Man. Solut., 937 F.3d 1056, 1063 (7th Cir. 2019) (antitrust standing required to identify "which plaintiffs may bring the cause of action"); *see also* Novell, 731 F.3d at 1080 ("[A] private party must establish some link between the defendant's alleged anticompetitive conduct, on the one hand, and its injuries and the consumer's, on the other."). A showing of antitrust standing requires more than the standing inquiry under Article III. *See* McGarry, 937 F.3d at 1063 ("[T]he Sherman Act has additional rules for determining whether the plaintiff is the proper party to bring a private antitrust action.") (citing Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 n.31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)); *see also* Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 716 (7th Cir. 2006) ("Antitrust standing requires more than the 'injury in fact' and the 'case or controversy' required by Article III of the Constitution.").

To establish antitrust standing, a plaintiff must first show it was injured by anticompetitive conduct. *See* McGarry, 937 F.3d at 1063-64. Antitrust standing is limited **[**150]** to "(1) those who have suffered the type of injury that the antitrust laws were intended to prevent and (2) those whose injuries are a result of the defendant's unlawful conduct." *Id.* (quoting *Serfecz v. Jewel Food Stores, 67 F.3d 591, 595 (7th Cir. 1995))*; *see also* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (antitrust plaintiff must be able to show that its injury is "of the type the antitrust laws were intended to prevent").

Even if a plaintiff can show its injuries are the result of unlawful anticompetitive conduct, it must be able to "efficiently vindicate the purposes of the antitrust laws" to gain antitrust standing. *Kochert, 463 F.3d at 716*; *see also* *Associated Gen. Contractors, 459 U.S. at 537-44* (plaintiff's ability to efficiently vindicate the law's purpose confers antitrust standing if shown antitrust injury); *In re Industrial Gas Antitrust Litigation, 681 F.2d 514, 516 (7th Cir. 1982)* ("not all persons who have suffered an injury flowing from [an] antitrust violation have standing to sue"). Simply, the successful antitrust plaintiff must prove both antitrust injury and antitrust standing. *See* *Kochert, 463 F.3d at 716*.

"We usually presume that competitors and consumers in the relevant market are the only parties who suffer antitrust injuries and are in a position to efficiently vindicate the antitrust laws." *McGarry, 937 F.3d at 1065* (citing *Associated Gen. Contractors, 459 U.S. at 538*; *In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 158 (2d Cir. 2016))*. "But 'presumptively' does not mean always," *SAS of Puerto Rico v. Puerto Rico Telephone Co., 48 F.3d 39, 45 (1st Cir. 1995)* (finding third-party suppliers are not "automatically improper antitrust plaintiffs"), **[**151]** and often consumers or competitors are denied antitrust standing.

The majority opinion proffers a bright-line rule "that customers and competitors in the affected market have antitrust standing," Majority op. at p. 99. But in each case cited in the majority opinion the court denied antitrust standing, including to competitors. *See* *Kochert, 463 F.3d at 718*; *Tri-Gen Inc. v. Int'l Union of Operating Engineers, Local 150, AFL-CIO, 433 F.3d 1024, 1031-32 (7th Cir. 2006)*; *Brunswick, 429 U.S. at 477-78, 484, 488* (collectively, competitors); *see also* *McGarry, 937 F.3d at 1063-66*; *In re Aluminum, 833 F.3d at 158*; *Serfecz, 67 F.3d at 597-98*; *Serpa Corp. v. McWane, Inc., 199 F.3d 6, 10 (1st Cir. 1999)*; *SAS of P.R., Inc., 48 F.3d at 44*; *Associated Gen. Contractors,* ***[*493]*** *459 U.S. at 540* (collectively, neither consumers nor competitors).

Instead, on this prerequisite the relevant case law prioritizes the type, directness, and cause of an antitrust injury, rather than applying a bright-line rule for antitrust standing based on the plaintiff's status. *See* *McGarry, 937 F.3d at 1064-65* (examining the "type of injury" alleged, the "remote[ness]" or "direct link" between the alleged antitrust violation and the claimed antitrust injury, and the "causal connection") (citing *Associated Gen. Contractors, 459 U.S. at 537-40* (explaining these factors)); *see, e.g.,* *Blue Shield of Va. v. McCready, 457 U.S. 465, 476-77, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)* (plaintiff's status was neither consumer nor competitor, but granted antitrust standing based on type, directness, and cause of antitrust injury suffered).

Even with the presumption favoring consumers and competitors, standing is granted to rivals only when it "serves antitrust policy." 2A Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 348a, p. 232 (4th ed. 2014) **[**152]** (examples include when a rival is in a position to detect a violation earlier than consumers, or the rival's injury is large while consumers' injuries are small or their suits less likely). "[T]he elimination of a single competitor, standing alone, does not prove anticompetitive effect." *Austin v. McNamara, 979 F.2d 728, 739 (9th Cir. 1992)* (quoting *Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979))*. Thus, it is uncommon that a suit by a single foreclosed rival disputing a tying arrangement will have antitrust standing.[4] *See* 2A Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 348a, p. 232 ("courts are properly skeptical of many rivals' suits, particularly when the practices are not obviously 'exclusionary'"). First, the rival must show it suffered the type of injury the antitrust laws intend to prevent. This is consistent with antitrust jurisprudence that looks to market injury, like raised prices and decreased output or quality, to determine a competitor's antitrust injury. *See* *Tri-Gen, 433 F.3d at 1031* ("To have standing as a competitor,

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[4] The leading treatise acknowledges the possibility that a rival could have standing if an illegal tying arrangement creates, enlarges, or perpetuates a monopoly for a tied product, and that rival may be foreclosed if it loses existing market share or sales. But "[i]njury to the foreclosed rival occurs, of course, only because a tie has forced buyers to purchase the defendant's tied product rather than the rival's." 10 Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 1767a, p. 449. This is a high bar: the rival must show (a) a monopoly in the tied-market, (b) the loss of its existing market share or sales (not limited to certain customers), and (c) an injury based only on buyers being forced to purchase defendant's product over their own.

[plaintiff] needed to show that 'its loss comes from acts that reduce output or raise prices to consumers.'") (quoting Stamatakis Industries, Inc. v. King, 965 F.2d 469, 471 (7th Cir. 1992)); *see also* Serfecz, 67 F.3d at 597 (plaintiff's injury was "linked to the injury inflicted upon the market," including consumers paying higher prices); Associated Gen. Contractors, 459 U.S. at 539 n.40 (finding **[**153]** no antitrust injury from alleged predatory behavior because competitor failed to show "that output has been curtailed or prices enhanced throughout an entire competitive market").

Next, the rival must show it is the party "who can most efficiently vindicate the purposes of the antitrust laws" against unlawful ties. Kochert, 463 F.3d at 718 (quoting Serfecz, 67 F.3d at 598). But, having been forced to purchase a product it did not want, the tied consumer is almost always in the superior position to sue the violator. McGarry, 937 F.3d at 1066 (concluding **[*494]** "[t]here is, after all, a more appropriate person to pursue [a] claim" when that person's "self-interest would normally motivate them to vindicate the public interest in antitrust enforcement"); *see also* Kochert, 463 F.3d at 718; 2A Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 348a, p. 232 (recognizing that "consumers almost always have the correct incentives for suit, [but] rivals do not"). The presence of a more appropriate person to bring a claim "diminishes the justification for allowing a more remote party" to step in. McGarry, 937 F.3d at 1066 (quoting Associated Gen. Contractors, 459 U.S. at 542). Whether or not there is a more appropriate plaintiff, a rival may not pursue an antitrust injury that is "entirely derivative" of other injuries. *Id.* And even when standing is recognized, a foreclosed **[**154]** rival cannot oppose efficient, legitimate, or even aggressive lawful competition by its rivals. 2A Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 348a, p. at 231 ("[A] rival may allege an antitrust violation by its rivals not to protect competition but to protect itself from competition. ... Such losses are not antitrust injury, so the rival is [] denied standing.").

Here, Viamedia claims it is a foreclosed rival harmed by Comcast's alleged tying conduct. First, Viamedia must show it suffered an injury the antitrust laws intend to prevent that is directly linked to or caused by Comcast's alleged tying conduct. But Viamedia relies on the injuries and damages it claims from Comcast's refusal to deal rather than any distinct tying injury. *See* 335 F. Supp. 3d at 1069-73 (Viamedia's expert testified that foreclosure from the market and resulting injury or damages "flows directly from Viamedia's inability to access" the Interconnects, not tying); *see also* Novell, 731 F.3d at 1080 (declining to recognize separate, cognizable antitrust injury for other exclusionary conduct that relied on alleged refusal-to-deal injury). Viamedia has conceded that any injury it suffered is derivative of Comcast's refusal to deal, not the alleged tie. So Viamedia lacks **[**155]** an independent basis for advancing a tying claim, and recognizing it as a foreclosed rival with standing to sue under the narrow exception described above would not "serve[] antitrust policy." 2A Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 348a, p. 232. While Comcast offered its customers, RCN and WOW!, access to the Interconnect and exclusive ad representation services, it was not required to make such an offer to its rival, Viamedia. This reveals the fatal flaw in Viamedia's tying theory: even if Comcast acted precisely as Viamedia claims by tying Interconnect access and ad representation services, Viamedia would suffer no separate, cognizable antitrust injury. 335 F. Supp. 3d at 1071; *see* Novell, 731 F.3d at 1080 ("Even if Microsoft had behaved just as Novell says it should have, it would have helped Novell not at all.").

Next, Viamedia must show it is the party "who can most efficiently vindicate the antitrust laws" regarding tying. Kochert, 463 F.3d at 718 (quoting Serfecz, 67 F.3d at 598). While Viamedia enjoys the general presumption of antitrust standing as a competitor, this presumption is limited by the court's determination of whether an antitrust injury occurred. *See* 2A Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 348a, p. 232. Here, RCN and WOW! would have been directly impacted **[**156]** by Comcast's alleged tying conduct and would be in the superior position to pursue a claim against Comcast. Viamedia could not participate directly in this alleged tying arrangement, and it now seems motivated to protect itself from competition rather than enforce the antitrust laws. *See* Majority op. at p. 66 ("Viamedia simply wants to ensure that MVPDs can freely choose Viamedia as **[*495]** their supplier of ad rep services if that is their preferred choice.").[5]

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[5] Even if somehow Viamedia could be considered a foreclosed rival with antitrust injury and standing, the leading treatise notes the possibility of injunctive relief—which the district court correctly concluded was misplaced on these facts, 335 F. Supp. 3d at 1074—and that treatise observes how difficult it is in such a circumstance to prove damages without speculation. 10 Areeda &

Because Viamedia has not shown a cognizable injury that the antitrust laws intend to prevent or that was directly linked to an antitrust violation caused by Comcast's conduct, it has no antitrust injury. Without an antitrust injury, and not able to efficiently enforce the law against illegal tying, Viamedia lacks antitrust standing to bring this claim.

B. *Summary Judgment Was Properly Granted on the Tying Claim*.

The district court's grant of summary judgment on Viamedia's tying claim, which we review de novo, was proper. We construe all facts and reasonable inferences in favor of the nonmoving party, and we refrain from weighing any evidence. *See* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *see also* *In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 655 (7th Cir. 2002)* (describing the weighing of evidence as a "trap" to avoid). But the **[**157]** nonmoving party must "go beyond the pleadings" at summary judgment. *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. It must affirmatively demonstrate through evidence that there is a genuine issue for trial. *Anderson, 477 U.S. at 249*.

Liability under *§ 2* requires anticompetitive conduct. *Mercatus Grp., 641 F.3d at 854*; *Endsley v. City of Chicago, 230 F.3d 276, 282 (7th Cir. 2000)*. On summary judgment, the *§ 2* plaintiff must present evidence tending to exclude the possibility that the monopolist's conduct is as likely to be procompetitive as anticompetitive. *Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* ("conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy"); *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* ("[T]here must be evidence that tends to exclude the possibility of independent [pro-competitive] action by the manufacturer and distributor.").

As noted previously, firms—even monopolies—generally have the right to decide with whom they will do business. In this vein, "***antitrust law*** does not require monopolists to cooperate with rivals by selling them products that would help the rivals to compete." *Schor v. Abbott Labs., 457 F.3d 608, 610 (7th Cir. 2006)*; *see* *Pac. Bell Tel. Co. v. Linkline Commc'ns, 555 U.S. 438, 450, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)* (monopolist may wield "upstream" power "to prevent rival firms from competing effectively" in a downstream market); *see also* *Trinko, 540 U.S. at 409-10* (a monopolist has no duty to deal with a rival, let alone a duty to deal on favorable terms). In presenting its tying **[**158]** claim, though, Viamedia argued that Comcast's conduct constituted more than a "mere" refusal to deal. *335 F. Supp. 3d at 1057*. Viamedia claimed that when Comcast excluded Viamedia from the Interconnects, **[*496]** Comcast engaged in the "distinct" practice of tying, pressing forward with this claim as an "alternative theor[y]" of relief. *Id.* After discovery on Viamedia's tying theory, the district court ruled that "the record leaves no genuine issue of material fact." *Id.* The district court correctly evaluated Viamedia's tying claim and rightly concluded that Viamedia's proffered evidence did not tend to exclude the possibility that Comcast's alleged tying conduct was as likely procompetitive as anticompetitive. *Id. at 1055-64*.

Under the new antitrust regime, "[o]utright condemnation of product tying has been reversed." Hon. Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, *95 Minn. L. Rev. 59, 76 (2010)*; *see* *Microsoft Corp., 253 F.3d at 49* ("[N]ot all ties are bad."). The "essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*. An illegal tie, whether **[**159]** express or as applied, exists only when "the defendant improperly imposes *conditions* that explicitly or practically require buyers to take the second product if they want the first one." 10 Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 1752b, p. 291 (4th ed. 2018). The fundamental feature of a tying claim is the conditioned sale, including by force. *See* *Sheridan v. Marathon Petrol. Co. LLC, 530 F.3d 590, 592 (7th Cir. 2008)*. No conditioning occurs if a buyer wants to purchase a

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Hovenkamp, ***ANTITRUST LAW*** ¶ 1767a, p. 450 ("Even for those established in the market, estimating the number of sales lost as a result of the tying arrangement is elusive at best.").

Viamedia's status as a foreclosed rival, though, would depend on the existence of a tie. I conclude below the undisputed facts show no evidence of tying conduct because there was no conditioned sale of services.

bundle of the tied and tying products from the same seller. *See* *Will v. Comprehensive Acct. Corp., 776 F.2d 665, 669 (7th Cir. 1985)* ("A tie within the meaning of antitrust depends on showing that the buyer did *not* want to take both products from the same vendor."). Without the actual, conditioned sale of the tied product, there is no tie. *See* *It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676, 684 (4th Cir. 2016)* ("If ... the buyer is free to decline the tied product ..., then by definition there is no unlawful tying.").

Other circuits have acknowledged the essential and indispensable role conditioning plays in a tying claim. In *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171 (9th Cir. 2016)*,[6] the Ninth Circuit concluded **[*497]** there was no evidence that Honeywell, a monopolist manufacturer of replacement airplane parts, "explicitly or implicitly tie[d] or condition[ed] the sale" of replacement parts on a requirement that its customers use its in-house repair services. *Id. at 1179*. When Honeywell ceased **[**160]** supplying parts to Aerotec—a third-party repair service provider—for repairs, Aerotec sued Honeywell for alleged unlawful tying. *Id. at 1177*. Honeywell explained it had long preferred the benefits it achieved from internalizing its repair services and working with its affiliated servicers, rather than with independent ones like Aerotec. *Id. at 1176-77*. The court found it did not matter whether Honeywell had refused to deal with Aerotec, even if that made it more difficult for Aerotec to compete. *Id. at 1179-80*. The Ninth Circuit "decline[d] to stretch the tying construct to accommodate the claim that ... conduct toward third party servicers ... acts as an effective, or 'de facto,'" tying condition. *Id. at 1178*.

In *Serv. & Training, Inc. v. Data Gen. Corp., 963 F.2d 680 (4th Cir. 1992)*, the Fourth Circuit reached the same conclusion, finding there was no conditioned sale of a licensed product when customers demanded access to it, even though this hindered the ability of third-party servicers to compete with the company. *Id. at 687-88*. The same is true with the D.C. Circuit, *see* *Microsoft Corp., 253 F.3d at 85* (tying requires consumer to have "no choice but to purchase the tied product"), and this court, *see* *Reifert v. South Cent. Wisconsin MLS Corp., 450 F.3d 312, 318 (7th Cir. 2006)* ("conditioning access" to a service based on the forced purchase of a membership was essential element of **[**161]** tying).

Like these other third-party rivals, Viamedia has offered no evidence of conditioning. Such evidence is simply absent from the undisputed facts on which Viamedia attempted to build its tying claim:

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[6] The majority opinion relies on certain factual assumptions to attempt to distinguish *Aerotec*.

First, the majority assumes "this is not a typical bundling case," Majority op. at 77, so *Aerotec* should not control. But *Aerotec* provides an instructive framework for determining whether a tie has occurred and illustrates the important role that conditioning plays in an unlawful tying arrangement, *see* *836 F.3d at 1179*.

Second, the majority assumes "self-providing ad rep services was not a viable option for RCN and WOW!," Majority op. at 78, and so they "needed to employ [a third-party] ad rep services provider." *Id.* at 77 n.17. As discussed elsewhere in this opinion, infra at 134, this assumption relies on the majority opinion's conclusion that it must not have been economically feasible for RCN and WOW! to internalize ad representation, either regionally or locally. This is not supported by the record, which contains undisputed evidence of various economically feasible options MVPDs choose in structuring their advertising sales. *See* infra at 25-26. Regardless, this assumption does not prevent Aerotec's application here.

Third, the majority assumes RCN and WOW! had "no choice but to obtain ad rep services from Comcast," Majority op. at 34 n.8, and were "forced by Comcast" to do so. *Id.* at 77 n.17. This in turn assumes that RCN and WOW! did not want ad representation services from Comcast. But the evidence shows the opposite: neither RCN nor WOW! ever requested Interconnect-only services from Comcast, and both sought full-turnkey relationships with Comcast to receive ad representation and Interconnect services together. Ultimately, Comcast's and Viamedia's offers to solicit RCN's and WOW!'s business were "nowhere near equal," and it was "not a very difficult decision" for the MVPDs to make. *335 F. Supp. 3d at 1048*. Comcast was able to offer superior terms and better prices with full Interconnect access and ad representation services. The assumption that any MVPD was forced or threatened to purchase ad representation services to gain access to the Interconnects does not follow from the evidence and is not a distinguishing factor from *Aerotec*.

- An ad representative is responsible for managing and selling an MVPD's avails to advertisers and can represent their MVPD customers: (1) locally, selling only a part of an MVPD's avails in a DMA to local advertisers; (2) regionally, selling all of the MVPD's avails in a DMA; or (3) nationally. *Id. at 1044*.

- The industry standard relationship between an ad representative and an MVPD is exclusive, region-wide, full-turnkey representation. *Id. at 1045*.

- MVPDs in a full-turnkey relationship with an ad representative have an exclusive agreement with that ad representative, which makes Interconnect services available to them without requiring a direct relationship with the Interconnect operator. *Id. at 1063-64*.

- Interconnect operators may pursue a direct relationship with MVPDs to sell a portion of their avails regionally without a third-party ad representative. *Id. at 1046*. This is called an "Interconnect-only" agreement. *Id.*

- Some MVPDs retain a portion of their avails for local advertising and hire an ad representative to represent **[**162]** them locally. *Id. at 1045*.

[*498] • Some MVPDs choose to conduct their own ad representation—regionally, locally, or both. *Id.*

- RCN and WOW! are MVPD customers of Comcast and Viamedia, which compete for MVPDs' business on the relevant Interconnects. *Id. at 1046*.

- Comcast refused to deal with Viamedia by disallowing it access to the relevant Interconnects. *Id. at 1057*.[7]

- No evidence shows that Comcast told MVPDs across all DMAs, expressly or impliedly, that they could only access the Interconnects on the condition that they also purchase ad representative services. *Id. at 1058*.

- Fourteen percent of Comcast's agreements with MVPDs across all DMAs are Interconnect-only. *Id.*

- RCN and WOW! never requested Interconnect-only services from Comcast, and both pursued full-turnkey relationships with Comcast. *Id. at 1059*.

These facts do not show illegal tying conduct. Both parties stipulate that Comcast never denied an MVPD's request to access the Interconnect on a standalone basis. In fact, 14 percent of Comcast's agreements with MVPDs across all DMAs are Interconnect-only. *Id. at 1058*; *see, e.g., It's My Party, 811 F.3d at 685* (14 percent of standalone, non-tied sales "exceed [] sufficiently" the minimum threshold required "to cast doubt on any allegation of tying"); *see also* 10 Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 1756b2, p. 334 **[**163]** ("10 percent unbundle[ed]" sales rebuts any "established or presumed inference of a tying condition"); *see also* *Novell, 731 F.3d at 1077* (aggregating sales and profits across entire market to assess firm's "overall efficiency" and not singling out smaller market or product line). And there is no evidence Comcast withheld Interconnect access from MVPDs unless they also purchased ad representative services from Comcast. Instead, the evidence shows that RCN and WOW! sought a full-turnkey relationship with Comcast to receive access to the Interconnects and ad representation services as a bundle. They were neither forced to purchase ad representation services from Comcast nor denied access to the Interconnects unless they purchased ad representation from Comcast. Further, if they wished, they were free to contract with a third-party ad representative for local sales. Even while under exclusive contract with Viamedia, RCN and WOW! were not forced to purchase ad representation services from Comcast. Comcast never poached RCN or WOW!

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[7] The majority opinion casts Comcast's refusal to deal as a negative fact, noting that Comcast "conceded repeatedly" that it had done so. Majority op. at p. 76. It is undisputed that Comcast refused to deal with Viamedia; the question on remand is whether that refusal was anticompetitive, which Viamedia will have to prove. As discussed, refusals to deal are now not disfavored, and in fact the opposite—cooperation among rivals—is a red flag under ***antitrust law***. *See* Easterbrook, *The Chicago School & Exclusionary Conduct, at 442* ("cooperation is to be feared rather than welcomed").

during that time to capture their business in the ad market, and RCN and WOW! could have chosen to forgo ad representation altogether at the conclusion **[**164]** of those exclusive contracts.

That Comcast did not affirmatively offer RCN or WOW! Interconnect-only access does not alter these facts. Courts need not assume antitrust laws require a business to offer its customer a less profitable or less efficient option than the one the customer seeks. Here, it is undisputed that RCN and WOW! sought Interconnect access and ad representation services as a bundle in a full-turnkey relationship with **[*499]** Comcast. *See* 9 Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 1700i, p. 12 (4th ed. 2018) ("[F]inding two products does not mean that they are tied together. The franchisee may have preferred a 'turnkey' franchise and never asked for the" tying product "separately"); *see also* *Will, 776 F.2d at 670* (the "voluntary purchase of two products together" is "not a tie at all"). The district court recognized, and correctly rejected, how broad a view of tying Viamedia attempts to advance. *335 F. Supp. 3d at 1059* ("the constraining of consumer choice is of course a feature of a tying arrangement ... but there must still be an actual 'tie' of products or services").[8] Viewing the record in the light most favorable to Viamedia, the evidence reflects that WOW! and RCN wanted full-turnkey representation, and they were prepared **[**165]** to hire the company with the ability to deliver both Interconnect access and ad representation services. Here, that company was Comcast.

My colleagues in the majority conclude, at various points, that it was not economically feasible for RCN or WOW! to conduct their own ad representation. *See* Majority op. at p. 34 n.8 (finding RCN and WOW! "had always chosen to buy [ad representation] services from outside companies, suggesting that in-house was not an economically viable option"); *id.* at 77 n.17 (concluding sufficient evidence existed of a "forced" sale because "RCN and WOW! needed to employ [a third-party] ad rep services provider"); *id.* at 78 (deciding "self-providing ad rep services was not a viable option for RCN and WOW!"); *id.* at 82 (finding evidence "showing that inhouse provision of ad rep services simply was not a practical option for RCN or WOW! in these markets"). This conclusion assumes that if RCN and WOW! chose to outsource ad representation to a third-party, either locally or regionally, then it must have been economically feasible to do so. It also assumes the inverse: that internalizing these services must be economically *in*feasible. Such assumptions go beyond the court's role and presume underlying **[**166]** facts about the parties' business practices and strategies that we simply do not know and cannot accurately predict. These assumptions are not supported by the record, which instead contains evidence of various economically feasible options MVPDs choose in structuring their advertising sales, including internalizing part of or all ad representation services. *335 F. Supp. 3d at 1044*. I respectfully do not share this economic feasibility conclusion and rely only on the evidence presented.

The majority opinion also references "[a]mple evidence" the jury could have relied upon to "easily find that Comcast improperly forced the smaller MVPDs to buy its ad rep services" through a tying arrangement. Majority op. at pp. 75-76. In particular, the majority points to internal Comcast and WOW! documents, deposition responses, and testimonies before the Federal Communications Commission and the Department of Justice. But the relevant evidence shows Comcast's desire to solicit RCN's and WOW!'s business directly, *not* the forced purchase of a service that neither RCN nor WOW! wanted. For example, the majority references an email from a WOW! employee to his colleagues explaining his understanding that "[WOW!] can be in the **[**167]** [Interconnect] but only if [Comcast] rep[s] us directly." *See* Majority op. at p. 75. The majority opinion reads this as revealing Comcast's "demands" and "threats" with which RCN **[*500]** and WOW! did not "willingly" comply. *Id.* But in context, the email reflects only ongoing business negotiations between WOW! and Comcast, in which Comcast expressed its desire to no longer accommodate third-party ad representatives (its competitors) on the Interconnects it operates. This is consistent with Comcast's position all along—that it wishes to increase efficiency by internalizing services—and does not constitute tying as defined.

Some other examples: in a different email, a Comcast employee expressed to a WOW! employee Comcast's "desire to have a direct relationship" with MVPDs on the Interconnects and noted that "Comcast would be thrilled to do business directly with WOW," reiterating the "tremendous value and benefits [Comcast] can deliver for WOW" in

[8] Further, if tying occurred, one would expect to see higher prices or lower output. *See* Washington Legal Foundation's Br. in Supp. of Def. at 12, ECF No. 45. There is no such evidence here.

a direct relationship. Another Comcast employee noted in a deposition that working "through a middleman" like Viamedia "really brought no value to the table" and the decision not to renew its contract with Viamedia was primarily to "have a direct relationship **[**168]** with WOW and RCN." Explaining RCN's decision to contract directly with Comcast, an RCN executive testified to the superior terms Comcast could provide, noting that Comcast's and Viamedia's offers were "nowhere near equal" and that it was "not a very difficult decision" for RCN to make. *335 F. Supp. 3d at 1048*. WOW!, too, selected Comcast's direct representation based on "better financial terms." *Id.*

These statements are consistent with Comcast's position to directly solicit the business of MVPDs. When questioned by the Department of Justice, a Comcast executive acknowledged it was Comcast's "business practice" to inform MVPDs that want "to get access to a Comcast controlled Interconnect, it has to hire Comcast as its ad sales representative" instead of a third-party rival. *Id. at 1061*. This does not reveal a forced purchase that neither RCN nor WOW! wanted. If anything, such evidence depicts "hard-nosed" business practices like those the Tenth Circuit noted but did not find anticompetitive in *Novell, 731 F.3d at 1078* (finding email evidence may suggest "an uncharitable intent toward rivals" or even an "intent to undo a competitor," but did not show that conduct was "irrational but for its exclusionary tendencies"). None of this evidence "tends **[**169]** to exclude the possibility" that Comcast's conduct "was as consistent" with lawful conduct as with illegal tying conduct. *Mercatus Grp., 641 F.3d at 856*.

Importantly, the internal documents the majority opinion references are dated 2014, when WOW! and RCN were still under exclusive contract with Viamedia but soliciting bids from other representatives to sell advertising avails on the Interconnects. While soliciting bids, RCN and WOW! engaged in back-and-forth negotiations with Comcast and Viamedia, leading ultimately to new contracts with Comcast. The timing of these discussions, as preserved in the record, is key. When reviewing the evidence here, this court is limited by the prospective nature of these then-ongoing negotiations. Our perspective is necessarily predictive not retrospective. These internal documents do not contain evidence of the economic impact *after* the negotiated deals were made, but only *before* when offers were being made, accepted, and rejected. They do not describe the economic results of these then-prospective relationships. Because of their prospective nature, they are not a reliable metric for understanding what has transpired since, but merely what the parties had hoped to achieve. Under **[**170]** our antitrust regime, "[w]hat distinguishes exclusion from efficiency is what happens in the future," Easterbrook, *The Chicago School & Exclusionary Conduct, at 443*, not what the parties want to happen.

[*501] None of this evidence measures whether Comcast's conduct has resulted in a market injury, such as raised prices or decreased output. It does not show that RCN or WOW! understand their contracts with Comcast to be coercive or conditioned, and there is no evidence indicating RCN and WOW! are unhappy with their current relationship with Comcast. While viewing this evidence in Viamedia's favor, it is crucial to acknowledge its limitations in this case.

As the district court noted, the real "gravamen of Viamedia's tying claim [is] that Comcast's refusal to provide [Viamedia] Interconnect access prevents [Viamedia] from selling the kind of full-turnkey Ad Rep Services that WOW! and RCN desire." *Id. at 1063* (internal quotations omitted). That differs from the paradigmatic tying claim, which requires conditioning and a forced sale to a *customer* rather than a withheld advantage from a *rival. See* 9 Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 1700a, p. 4. ***Antitrust law*** does not require Comcast to help Viamedia sell the same bundle it offers to their mutual customers. **[**171]** *See* 10 Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 1748b, pp. 251-53 (no tied product "when the plaintiff's theory of injury is not that customers of the defendant's [tied] bundle would buy the items unbundled if they could, but rather that a rival could sell the *same bundle* if only the defendant would sell it a particular input").

Finally, even if Viamedia's refusal-to-deal claim had survived a motion to dismiss, summary judgment was appropriate on the tying claim because the undisputed facts do not show Comcast conditioned access to the Interconnects on the purchase of ad representation services. Although acknowledging that "[t]hese related claims are both based on the same course of conduct, resulted in the same anticompetitive harms, and would be subject to the same procompetitive justifications or defenses," Majority op. at p. 38, the majority opinion does not explain how Viamedia has established a distinct tying claim that should have advanced beyond summary judgment on its own merits. In framing its tying analysis, the majority opinion focuses on whether, when viewing Comcast's conduct as a whole, "[Comcast] has unreasonably maintained or enhanced its monopoly position." *Id.* at 73. While this **[**172]** framework would not necessarily reveal anticompetitive conduct in violation of *§ 2*, I hesitate to apply it here for the simpler reason that our antitrust jurisprudence does not instruct us to do so. Instead, looking to the undisputed facts, Viamedia has failed to prove the elements of a tying claim.

To the extent the majority opinion also concludes that the existence of a viable refusal-to-deal claim saves Viamedia's tying claim, I am not convinced of that connection. In comparison to refusal to deal, tying is a form of exclusionary conduct with more specific requirements, which the district court noted. *218 F. Supp. 3d at 698* (a refusal-to-deal claim is different than a tying claim); *accord* *Novell, 731 F.3d at 1072* (distinguishing unilateral refusals to deal from other recognized forms of anticompetitive conduct like tying). Viamedia, seeking an "escape route" and "trying to recast" Comcast's refusal to deal as unlawful tying conduct, *see* *Novell, 731 F.3d at 1078*, has treated these two claims interchangeably. But parties' claims stand and fall on their own merits, so the district court was correct to consider them separately.

Conditioning, an essential element of tying, requires the forced sale of a product the buyer did not want. Based on the record before **[**173]** us, to which we are limited, there was no conditioning. Because the undisputed facts show no evidence of tying conduct separate from Viamedia's refusal-to-deal **[*502]** claim, I would affirm that portion of the district court's judgment.

III.***Section 2*** **Monopolization Analysis**

The majority opinion acknowledges Viamedia raised only two claims on appeal: refusal-to-deal and tying. Majority op. at p. 42 n.11. It also suggests an alternative means of *§ 2* recovery should Viamedia fail on either of its alleged claims. Per the majority opinion, Viamedia has sufficiently pleaded and presented evidence for the court to find an alternative *§ 2* monopolization claim. Such an open-ended approach may place courts in the role of the decision-maker on dense and complex economic issues better left to the free market. *See* Easterbrook, *The Chicago School & Exclusionary Conduct, at 442* ("Markets are much better than judges at sifting efficient from anticompetitive practices."). We are no more skilled at predicting market shifts than anyone else, and courts are very rarely the best forum for discerning between exclusionary and efficient conduct. *See* *id. at 442-45*.

The district court hewed to the particular types of exclusionary conduct Viamedia alleged (tying and refusal to deal; its exclusive dealing **[**174]** claim was abandoned on appeal). The court found Viamedia had "affirmatively disavowed" any "free-standing" *§ 2* monopolization claim. *335 F. Supp. 3d at 1068*. Having failed to plead or preserve an alternative claim before the district court, Viamedia should not be entitled to pursue a vague *§ 2* monopolization theory on appeal. *King v. Kramer, 763 F.3d 635, 641 (7th Cir. 2014)* (this court not in a position to advance claims that party abandons or fails to preserve below); *Geva v. Leo Burnett Co., 931 F.2d 1220, 1225 (7th Cir. 1991)* (an issue not "properly preserved below" in the district court is generally waived). Nor should the court be required to consider the restraint on trade or the impact on monopoly powers generally that may arise from Viamedia's allegations.

This rule is particularly relevant in ***antitrust law***, which is susceptible to high rates of "false positives" that occur when the court confuses real competition with exclusion. *See* Easter-brook, *The Chicago School & Exclusionary Conduct, at 445*; *see also* *Microsoft Corp., 253 F.3d at 87* (discussing false positives). The new antitrust regime identifies problems like false positives, unpredictability, and past court confusion, and it seeks to protect consumers and promote competition in a technologically advancing marketplace. Many cases and authorities point in this direction. An alternative *§ 2* monopolization theory is not consistent with **[**175]** how courts now consider potentially exclusionary conduct. Accordingly, I am unable to join this portion of the majority opinion.

IV. Conclusion

The majority opinion dives deep into this case's complicated facts and thoroughly covers swaths of ***antitrust law*** in an insightful manner. As Viamedia has plausibly alleged an anticompetitive refusal to deal, I join the majority in reversing and remanding on that claim. But the undisputed facts do not show an illegal tie, so summary judgment was proper on that allegation. For the reasons above, I respectfully concur in part and dissent in part.

Texas v. Am. Tobacco Co

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

February 25, 2020, Decided; February 25, 2020, Filed

CIVIL ACTION NO. 5:96-CV-00091-JRG

Reporter
441 F. Supp. 3d 397 *; 2020 U.S. Dist. LEXIS 36840 **; 2020 WL 991784

THE STATE OF TEXAS, Plaintiff, v. AMERICAN TOBACCO CO, PHILIP MORRIS USA, IMPERIAL TOBACCO GROUP BRANDS, LLC, R.J. REYNOLDS TOBACCO COMPANY ET AL., Defendants.

Prior History: *Texas v. American Tobacco Co., 14 F. Supp. 2d 956, 1997 U.S. Dist. LEXIS 22580 (E.D. Tex., Sept. 8, 1997)*

Core Terms

Settlement, Brands, settling, assigns, settlement agreement, cigarettes, parties, market share, obligations, manufacturers, Tobacco, successors, motion to enforce, binding, rights, reimbursement, perpetual, terms, join, private counsel, disputes, calculation, argues, settlement payment, transferred, provisions, employees, shipments, sales, audited

LexisNexis® Headnotes

Antitrust & Trade Law > Consumer Protection > Tobacco Products > Federal Cigarette Labeling & Advertising Act

Tax Law > ... > Alcohol & Tobacco Products > Tobacco Products Taxes > Imposition of Tax

Business & Corporate Compliance > ... > Alcohol & Tobacco Products > Tobacco Products Taxes > Failure to Pay

Antitrust & Trade Law > Consumer Protection > Tobacco Products > State Regulation

HN1[] **Tobacco Products, Federal Cigarette Labeling & Advertising Act**

While the Texas Settlement is designed to recover tobacco-related healthcare costs from settling manufacturer defendants, the Tobacco Equity Tax is designed to recover the State's health care costs imposed by non-settling manufacturers' products, by imposing a tax on those manufacturers. The Tobacco Equity Tax applies to all non-settling manufacturers, a class defined as manufacturers of cigarettes or cigarette tobacco products that did not sign either the Liggett Settlement or the Texas Settlement.

Tax Law > ... > Alcohol & Tobacco Products > Tobacco Products Taxes > Imposition of Tax

HN2[] Tobacco Products Taxes, Imposition of Tax

The Texas Tobacco Equity Tax authorizes the Texas Comptroller or the Texas Attorney General, in their discretion, to conduct reasonable periodic audits in order to ensure compliance with *Tex. Health & Safety Code Ann. § 161.605(g)*. §*Tex. Health & Safety Code Ann. § 161.609*.

Civil Procedure > Settlements > Settlement Agreements > Validity of Agreements

HN3[] Settlement Agreements, Validity of Agreements

A party who receives any interest in assets that are subject to a settlement agreement may be joined in settlement enforcement proceedings pursuant to *Fed. R. Civ. P. 25*.

Governments > Courts > Common Law

HN4[] Courts, Common Law

Florida law, which follows the general common law rule governing assignments related to contract obligations, provides that a party may not relieve itself of its liability under a contract via an assignment. A party is not relieved of liability based on an assignment of either a contract itself, or the assets which form the subject matter of the contract.

Torts > ... > Settlements > Settlement Agreements > Enforcement

HN5[] Settlement Agreements, Enforcement

A district court shall treat a motion to enforce a settlement agreement as it would a motion for summary judgment.

Antitrust & Trade Law > Consumer Protection > Tobacco Products > State Regulation

HN6[] Tobacco Products, State Regulation

Under the plain language of the Minnesota Settlement Agreement, a settling defendant is responsible for paying in the current year, for the damage its cigarettes caused in the past.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Creditors & Debtors

HN7[] Standards of Performance, Creditors & Debtors

An asset purchase does not extinguish liabilities associated with that asset.

Civil Procedure > Settlements > Settlement Agreements > Validity of Agreements

HN8[] Settlement Agreements, Validity of Agreements

Market share is defined in the Minnesota Settlement Agreement to include the market share of settling defendants, which includes their successors and assigns.

Contracts Law > Contract Interpretation

HN9[] **Contracts Law, Contract Interpretation**

The courts read contract terms in the context of the entire contract and will not construe the terms so as to lead to a harsh and absurd result.

Governments > Courts > Authority to Adjudicate

HN10[] **Courts, Authority to Adjudicate**

The court has an independent obligation to determine its subject-matter jurisdiction. Federal courts are under an independent obligation to examine whether subject-matter jurisdiction exists.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

Civil Procedure > Settlements > Settlement Agreements > Incorporation in Judgment

HN11[] **Types of Contracts, Settlement Agreements**

With consent of the parties, a district court may expressly retain jurisdiction over a settlement agreement in order to enforce the parties' compliance with that agreement and thereafter may assert jurisdiction over breach of settlement claims. A final judgment may make a settlement agreement part of the order of dismissal in one of two ways, either by separate provision, such as a provision retaining jurisdiction over the settlement agreement, or by incorporating the terms of the settlement agreement in the order.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

Contracts Law > Contract Interpretation

HN12[] **Types of Contracts, Settlement Agreements**

The Texas Settlement must be interpreted under Texas law. The Texas Settlement Agreement shall be governed by the laws of the State of Texas. It is a well-settled rule that the construction and enforcement of settlement agreements are governed by principles of local law applicable to contracts generally.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

Contracts Law > Contract Interpretation

HN13[] **Types of Contracts, Settlement Agreements**

Under Texas law, settlement agreements are interpreted according to the law generally governing contractual agreements. Under Texas law, the courts interpret settlement agreements like other contracts. This is because settlement agreements are contracts, which reflect agreements related to the resolution of legal disputes.

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Enforcement of Judgments

Constitutional Law > Relations Among Governments > Full Faith & Credit

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Full Faith & Credit Statutes

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN14[] **Full Faith & Credit, Enforcement of Judgments**

To determine the preclusive effect of a state court judgment, federal courts apply the preclusion rules of the state whose court issued the judgment. The U.S. Supreme Court has held that under the Full Faith and Credit Act a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN15[] **Preclusion of Judgments, Res Judicata**

When multiple courts have previously rendered a judgment addressed to the same issue, a subsequent court may give preclusive effect only to the decision of the final court to render judgment. In such a case, the governing rule to be applied is quite clear. The third court should give res judicata effect to the last previous judgment entered.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN16[] **Preclusion of Judgments, Res Judicata**

The formal rationale behind the rule of last in time is that the implicit or explicit decision of the second court, to the effect that the first court's judgment is not res judicata, is itself res judicata and therefore binding on the third court. The decision is not binding because it is correct; it is binding because it is last. The rule of last in time furthers the purposes of res judicata because it ends the chain of relitigation by stopping it where it stands after entry of the second court's judgment, and thereby discourages relitigation in a third court. If an aggrieved party believes that the second court erred in not giving res judicata effect to the first court's judgment, then the proper avenue of redress is appeal of the second court's judgment, not collateral attack in a third court.

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

Evidence > Burdens of Proof > Allocation

HN17[] **Estoppel, Collateral Estoppel**

Minnesota squarely assigns the burden to establish that collateral estoppel is applicable to the party asserting collateral estoppel.

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

HN18[] **Estoppel, Collateral Estoppel**

Florida law limits issue preclusion to circumstances where an identical issue was presented in a prior proceeding. Florida law also requires that the parties in the two proceedings must be identical.

Civil Procedure > Parties > Real Party in Interest > Assignees

HN19[] **Real Party in Interest, Assignees**

Texas law recognizes that an assignment does not relieve a party of its obligations under a contract. An assigning party remains liable unless expressly or impliedly released by the other party to a contract.

Contracts Law > Third Parties > Delegation of Performance

HN20[] **Third Parties, Delegation of Performance**

A party cannot escape its obligations under a contract merely by assigning the contract to a third party. As a general rule, a party who assigns its contractual rights and duties to a third party remains liable unless expressly or impliedly released by the other party to the contract.

Business & Corporate Compliance > ... > Negotiable Instruments > Types of Parties > Assignees & Assignors

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Releases

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Releases

HN21[] **Types of Parties, Assignees & Assignors**

Under Texas contract law, an assignor's contractual obligations generally survive assignment unless the contract expressly provides otherwise or the assignor obtains an express release.

Civil Procedure > Parties > Real Party in Interest > Assignees

HN22[] **Real Party in Interest, Assignees**

Even when a contract does not expressly provide for the consequences resulting from the assignment of one's interest, the contract's subject or other circumstances may indicate that obligations were not intended to survive assignment.

Business & Corporate Compliance > ... > Negotiable Instruments > Types of Parties > Assignees & Assignors

Civil Procedure > Settlements > Releases From Liability > General Releases

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Releases

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Releases

HN23[] **Types of Parties, Assignees & Assignors**

Absent a specific release, an assignment, of either a contract or an asset, will not obviate a party's contractual obligations. Under Texas contract law, an assignor's contractual obligations generally survive assignment unless the contract expressly provides otherwise or the assignor obtains an express release.

Contracts Law > Contract Interpretation > Intent

HN24[] **Contract Interpretation, Intent**

In all contract cases, the task of the court is to ascertain the parties' true intentions as expressed in the language they chose. Since parties may make drafting choices in light of the circumstances under which a contract is reached, Texas courts construe contracts from a utilitarian standpoint bearing in mind the particular business activity sought to be served. Texas courts examine the entire agreement and seek to harmonize and give effect to all provisions so that none will be meaningless.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

HN25[] **Types of Contracts, Settlement Agreements**

Texas law recognizes that the business purpose of a settlement agreement is to resolve disputes with finality. In Texas, a settlement agreement is meant to forever settle the dispute at hand, rather than merely deferring the dispute to a later date.

Contracts Law > Contract Interpretation

HN26[] **Contracts Law, Contract Interpretation**

Under Texas law, courts are expressly permitted to take into account the objectively determinable facts and circumstances surrounding the contract that give context to the parties' transaction.

Contracts Law > Contract Interpretation

HN27[] **Contracts Law, Contract Interpretation**

Contracts must be construed in a manner that will harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument.

Contracts Law > Contract Interpretation

HN28[] **Contracts Law, Contract Interpretation**

Courts must avoid contract constructions that are unreasonable, inequitable, and oppressive.

Contracts Law > Contract Interpretation > Intent

HN29[] **Contract Interpretation, Intent**

A successors and assigns clause reflects an effort by the parties to ensure that the obligations of the contract could not be defeated by transferring the subject matter of the contract.

Civil Procedure > Parties > Real Party in Interest > Assignees

HN30[] **Real Party in Interest, Assignees**

In the context of interpreting a contract, courts must examine whether either the contract's subject or other circumstances indicates whether or not the obligations are intended to survive assignment.

Business & Corporate Compliance > ... > Assignments > Assignment of Obligations > Consent Requirements

Contracts Law > Third Parties > Delegation of Performance

HN31[] **Assignments, Consent Requirements**

The duties under a contract are not delegable inter vivos in a true sense under any circumstances; that is, one who owes money or is bound to any performance whatsoever cannot by its own act, or by any act in agreement with anyone else, except its creditor, divest itself of the duty and substitute the duty of another. No one can assign his liabilities under a contract without the consent of the party to whom he is liable. While a party to a contract may as a general rule assign all his beneficial rights, except where a personal relation is involved, his liability under the contract is not assignable inter vivos because any one who is bound to any performance whatever or who owes money cannot by any act of his own, or by any act in agreement with any other person than his creditor or the one to whom his performance is due, cast off his own liability and substitute another's liability. The Uniform Commercial Code provides in this regard that a delegation of performance does not relieve the delegating party of the duty to perform or of any liability for breach of contract. A party cannot free itself from its obligations by the simple expedient of assigning them.

Business & Corporate Compliance > ... > Assignments > Assignment of Obligations > Consent Requirements

HN32[] **Assignments, Consent Requirements**

If a settling defendant cannot assign an obligation without the other parties' prior written consent, it follows that the same defendant cannot extinguish an obligation without the other parties' prior written consent.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

HN33[] **Contract Interpretation, Ambiguities & Contra Proferentem**

Only where a contract is ambiguous may a court consider the parties' interpretation and admit extraneous evidence to determine the true meaning of the instrument.

Governments > State & Territorial Governments > Employees & Officials

HN34[] **State & Territorial Governments, Employees & Officials**

Texas law is replete with restrictions on the ability of officers and agents to modify or limit legal rights to which the State would otherwise be entitled.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

Trademark Law > ... > Defenses > Defenses to Incontestability > Laches

Governments > Legislation > Statute of Limitations > Time Limitations

HN35[] **Affirmative Defenses, Laches**

Texas is not subject to the defenses of limitations, laches, or estoppel.

Governments > Local Governments > Claims By & Against

HN36[] **Local Governments, Claims By & Against**

It remains a fundamental principle of Texas law, intended to shield the public from the costs and consequences of improvident actions of their governments.

Contracts Law > Remedies > Ratification

HN37[] **Remedies, Ratification**

Texas' rights are held for the benefit of all the people of the state. If only a subset of employees could strip the public of its rights, such employees, whether through mistake or misconduct, might grievously injure the public. For that reason, the Texas Supreme Court uniformly rejected ratification by estoppel arguments that would limit Texas' entitlement to payments.

Governments > Police Powers

HN38[] **Governments, Police Powers**

Texas courts have also rejected limitations that would obstruct Texas' responsibility and duty to enforce health care rights that are designed to protect its citizens. Texas law is careful to limit any waiver of the State's rights, in order to avoid obstructing predictable payments that are intended for public use. The limitations remain true with respect to binding the State to contractual duties and obligations. Only persons authorized by the Constitution or a statute can make a contract binding on the State. All state officers' powers are fixed by law, and all persons dealing with them are charged with notice of the limitations on those powers. Only persons having actual authority to act on behalf of the State can bind the State in contract.

Governments > Legislation > Statute of Limitations > Time Limitations

HN39[] **Statute of Limitations, Time Limitations**

Litigants may not create a backdoor limitations argument by suggesting that inaction on Texas' part has altered its substantive rights.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Releases

HN40[] **Affirmative Defenses, Releases**

The affirmative defense of release unambiguously falls within the term defenses relating to any transferred asset or assumed liability.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN41[] **Reviewability of Lower Court Decisions, Preservation for Review**

An argument not raised before the district court cannot be asserted the first time on appeal. If a party fails to assert a legal reason why relief should be granted, that ground is waived and cannot be considered or raised on appeal. A party waives his or her constitutional challenge by failing to raise it in the district court in a manner that would allow the district court to rule on it. The raising party must present the issue so that it places the opposing party and the court on notice that a new issue is being raised.

Business & Corporate Compliance > ... > Secured Transactions > Third Party Rights > Assignments of Secured Transactions

HN42[] **Third Party Rights, Assignments of Secured Transactions**

Under Texas law, the term assignment has a comprehensive meaning and in its most general sense means the transfer or setting over of property or some right or interest from one person to another. An assignment is a manifestation by the owner of a right or property of its intention to transfer such right or property to another.

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Judges: RODNEY GILSTRAP, UNITED STATES DISTRICT JUDGE.

Opinion by: RODNEY GILSTRAP

Opinion

[*405] **MEMORANDUM OPINION AND ORDER**

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V. Conclusion

Introduction

In January of 1998, faced with potentially crippling liability and a fellow tobacco manufacturer who had decided to cooperate with the State of Texas ("Texas"), the nation's remaining major tobacco manufacturers agreed to settle all claims with Texas on the eve of a trial set to begin in the United States District Court for the Eastern District of Texas, Texarkana Division. **[**13]** [1] Over twenty years later, this Court now **[*407]** confronts disputes emanating from that settlement.

The Texas Comprehensive Settlement Agreement and Release ("Texas Settlement") provides that each settling defendant would make annual payments to Texas in perpetuity. After being amended twice, the final Texas Settlement provided that payments to Texas **[**14]** would be based on the number of cigarettes sold each year, in order to proportionately compensate Texas for the money it spends providing medical treatment to its citizens suffering from illnesses caused by the accused tobacco products. The Texas Settlement payments were perpetual by design to continually reimburse Texas for the increase in its citizens' healthcare costs. In exchange for these perpetual payments, Texas furnished each settling defendant with an equally perpetual release from liability—Texas forever waived any claims related to the use of or exposure to their tobacco products.

The Texas Settlement framework largely functioned as anticipated for seventeen years. However, in 2015, one of the settling manufacturers—R.J. Reynolds Tobacco Company ("Reynolds")—informed Texas that it no longer intended to make Texas Settlement payments regarding a sizeable number of cigarettes. Reynolds explained that it had sold four of its major brands—Winston, Salem, Kool, and Maverick ("Acquired Brands")—for approximately seven billion dollars, and that it would no longer make payments to Texas for those brands.[2] The purchaser-by-assignment of the Acquired Brands, Imperial Tobacco Group Brands, **[**15]** LLC ("Imperial"), similarly disclaimed any intent to compensate Texas under the Texas Settlement for the sale of cigarettes produced under the Acquired Brands. According to Reynolds and Imperial, liability for the annual sales of those sixteen billion cigarettes had been extinguished by virtue of the contract assigning those brands to Imperial. Reynolds disclaimed liability because it no longer owned the Acquired Brands; Imperial disclaimed liability because it is not a signatory to the Texas Settlement. Instead, Reynolds and Imperial took the position that Texas must file a new lawsuit against Imperial if it wanted to be compensated for sales under the Acquired Brands going forward.

Texas disagreed. After sending a formal demand to Imperial and Reynolds, Texas filed its Motion to Enforce the Texas Settlement ("Texas' Motion to Enforce"). Texas claims that nothing in the Texas Settlement gives settling defendants, such as Reynolds, the power to unilaterally extinguish their liability, and Texas advances theories of contract liability applicable to both Reynolds and Imperial. Texas urges that under well-settled Texas law, a contracting party cannot unilaterally eliminate its obligations **[**16]** under a contract via an assignment to a third party. Texas also emphasizes that the Texas Settlement expressly binds successors and assigns, and Imperial

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[1] Justice Don Willett, writing for the Texas Supreme Court, subsequently set out the circumstances giving rise to this case:

> This case arises in part from historic litigation that buffeted the tobacco industry in the last decade of the twentieth century. The Lone Star State was a significant player in that litigation. Just over twenty years ago, Texas sued several of the nation's leading tobacco companies, asserting violations of numerous state and federal fraud, racketeering, antitrust, conspiracy, and other laws.
>
> Texas's claims were that these companies knowingly misrepresented their products as safe and targeted minors in their advertisements. More than 40 states filed similar suits against the tobacco industry. The companies' collective defense faltered, however, when one of the companies, Liggett, settled with Texas and several other states (the Liggett Settlement), agreeing in large part to cooperate with the states in their suits against the remaining defendants.

Hegar v. Tex. Small Tobacco Coal., 496 S.W.3d 778, 781 (Tex. 2016) (Willett, J.).

[2] Approximately 16,000,000,000 cigarettes are manufactured and sold every year under these four brands.

acknowledges itself to be an "assign" of the Acquired Brands in the contract by which it purchased those brands. Finally, Texas urges that the central purposes of the Texas Settlement—finality and medical reimbursement—would be undercut if a settling defendant could eliminate its obligations under the Texas Settlement, while still profiting from the sales of those same cigarettes via a sale of the brands themselves.

Philip Morris USA ("PMUSA"), the only remaining settling defendant[3] from the **[*408]** Texas Settlement (besides Reynolds) filed a similar Motion to Enforce the Texas Settlement ("PMUSA's Motion to Enforce") (collectively, "Motions to Enforce"). PMUSA based its motion on injuries it claims arise from Reynolds' wrongful distortion of the relative payment allocation system created within the Texas Settlement. PMUSA asserts that the less Reynolds pays, the more it pays. PMUSA also represents that if this Court recognizes a route for Reynolds to escape the obligations imposed by the Texas Settlement, PMUSA will likely do the same.

The **[**17]** Texas Settlement is a contract, and the role of this Court in interpreting that contract is to ascertain the expressed intent of its parties. As such, the question presented by the Motions to Enforce is whether the signatories to the Texas Settlement expressed an intent to allow the settling tobacco manufacturers to unilaterally extinguish their payment obligations under the Texas Settlement by selling the brands which form the subject matter of the Texas Settlement. For the reasons described herein, the Court concludes they did not.

Accordingly, having considered the Motions to Enforce, and for the reasons set forth herein, Texas' Motion to Enforce (Dkt. No. 2214) is **GRANTED-IN-PART, DENIED-IN-PART**, and **CARRIED-IN-PART** to the extent and as set forth herein. For the same reasons, PMUSA's Motion to Enforce (Dkt. No. 2222) is **GRANTED-IN-PART, DENIED-IN-PART**, and **CARRIED-IN-PART** to the extent and as set forth herein.[4]

I. <u>Factual and Procedural History</u>

A. Original Litigation

Texas filed the litigation which gave rise to the Texas Settlement on March 28, 1996. Texas alleged that medical research increasingly showed that consumption of tobacco products had harmful health **[**18]** consequences and that Texas had spent significant sums of money through its delivery of Medicaid and other state-level healthcare programs to "citizens who suffer, or have suffered, from tobacco related injuries, disease or sickness" resulting from the settling defendants' tobacco sales. *Original Complaint*, Dkt. No. 1 at 5. According to the Complaint, the nation's major tobacco manufacturers had systematically targeted children and youth with cigarette advertisements, in order to produce early-in-life addiction, and had collectively conspired to produce misinformation about the medical effects of cigarette consumption, cumulatively costing Texas billions of dollars in medical expenses. On the basis of these factual allegations, Texas asserted violations of the Federal Racketeer Influenced and Corruption Act, violations of federal and state ***antitrust law***, and a panoply of state-level products liability and tort theories related to Texas' healthcare expenditures related to tobacco-related **[*409]** illnesses. *Fourth Amended Complaint*, Dkt. No. 1328.

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[3] While PMUSA is formally postured as a defendant to the underlying civil litigation, PMUSA joins Texas' effort to enforce the Texas Settlement. Accordingly, in this Order, the Court will use the designation "Defendants" to refer collectively to only Imperial and Reynolds, who jointly oppose the motions urged by Texas and PMUSA.

[4] At the joint request of the parties, the Court previously issued an order bifurcating the issue of liability under the Texas Settlement from an issue related to the relative allocation of payment obligations between the settling defendants—an issue primarily advanced by PMUSA, as the party whose relative payment obligations have been allegedly distorted as a result of the sale of the Acquired Brands. *See Bifurcation Order*, Dkt. No. 2328. Since this Order determines that Reynolds remains liable under the Texas Settlement for the payments on the Acquired Brands, the remaining issue related to profit adjustment now appears moot. The Court will invite additional briefing on the disposition of the profit adjustment issue in a separate order filed contemporaneously herewith.

Texas named every major domestic tobacco manufacturer as a defendant. The list of such defendants includes: The American Tobacco Company; R.J. Reynolds **[**19]** Tobacco Company; Brown & Williams Tobacco Corporation; B.A.T. Industries P.L.C.; Philip Morris, Inc.; Liggett Group, Inc. ("Liggett"); Lorillard Tobacco Company, Inc. ("Lorillard"); and the United States Tobacco Company.[5]

B. The Texas Settlement, the Master Settlement Agreement, and the Other Previously Settled States ("PSS") Agreements

The negotiations giving rise to the Texas Settlement began in earnest when one of the nation's largest tobacco manufacturers—Liggett—settled with the several states that had brought suit, and "agree[d] in large part to cooperate with the states in their suits against the remaining defendants." *Hegar v. Tex. Small Tobacco Coal., 496 S.W.3d 778, 781 (Tex. 2016)*. The Texas Supreme Court has succinctly summarized the events giving rise to the Texas Settlement after Liggett began cooperating with the several states:[6]

> Shortly thereafter, the states and tobacco defendants executed a Memorandum of Understanding and Proposed Resolution (Proposed Resolution). The Proposed Resolution sought "to forge an unprecedented national resolution of the principal issues and controversies associated with the manufacture, marketing and sale of tobacco products in the United States." According to the Proposed Resolution, federal legislation would **[**20]** provide the vehicle for implementing the solution and ensuring "comprehensive regulation of the tobacco industry while preserving the right of individuals to assert claims for compensation."
> The Proposed Resolution would primarily require the remaining defendants to make annual payments in perpetuity "to fund health benefits program expenditures and to establish and fund a tobacco products liability judgments and settlement fund." Those payments would total approximately $368.5 billion over the first 25 years. The payments would be adjusted for inflation and changes in the defendants' sales. The Proposed Resolution would also impose significant limitations on the defendants' marketing of their products. In return, the states would waive their claims against the defendants as well as future claims arising from the sale or use of tobacco products. The Proposed Resolution never became federal law, but it would serve as the blueprint for several settlements in the following months.
>
> The Master Settlement Agreement (MSA) was the largest of the subsequent settlements, involving 46 states plus American territories and the District of Columbia (collectively, settling states). Under the MSA, the **[**21]** settling states released past, pending, and future claims against the remaining defendants (deemed "participating manufacturers") that sought "recovery for Medicaid and other public health expenses incurred in the treatment of smoking-induced illnesses." Tracking the Proposed Resolution, the MSA required the participating manufacturers to make initial payments followed by perpetual annual payments based on their market share and product **[*410]** sales. The MSA also imposed marketing restrictions on the participating manufacturers, forbidding advertising to minors and requiring initiatives to prevent such advertising. The MSA permits other tobacco manufacturers to join the MSA, generally requiring these "subsequent participating manufacturers" to comply with the MSA's restrictions and ongoing payment scheme to receive the same release of claims that the participating manufacturers received.
>
> Texas was not a party to the MSA. Instead, Texas and three other states—Minnesota, Mississippi, and Florida—reached individual settlements with the remaining tobacco defendants. For purposes of this case, the differences between these settlements are negligible. The Texas Comprehensive Settlement Agreement **[**22]** and Release (Comprehensive Settlement) accomplished much of what the Proposed Resolution would have accomplished, exemplified by the Comprehensive Settlement's constant invocation of the Proposed Resolution and the Proposed Resolution's attachment to the Comprehensive Settlement as an appendix. It stated that

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[5] As a result of mergers and acquisitions, the majority of these manufacturers no longer exist as they did when this action was commenced. The only remaining settling defendants are PMUSA and Reynolds.

[6] Justice Don Willett, writing for a unanimous Texas Supreme Court.

> Texas and the remaining defendants (settling manufacturers)—Philip Morris, Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Co., Lorillard Tobacco Co., and United States Tobacco Co.—desired to settle on terms "comparable to those contained in the Proposed Resolution, which terms will achieve for Texas immediately and with certainty the financial benefits it would receive pursuant to the Proposed Resolution."
>
> The Comprehensive Settlement required the settling manufacturers to make initial payments to Texas of $725 million—Texas's 7.25% share of the $10 billion initial payment to the states set out in the Proposed Resolution. The Comprehensive Settlement also required the settling manufacturers to make annual payments in perpetuity. Adjusted by inflation and the settling manufacturers' market share and product sales, the payments may increase, decrease, and even end if **[**23]** a manufacturer stops selling tobacco products altogether. The Comprehensive Settlement stated that the initial payments "constitute[d] reimbursement for public health expenditures by the State of Texas." It further stated that "[a]ll other payments . . . are in satisfaction of all of the State of Texas's claims for damages incurred by the State in the year of payment or earlier years, including those for reimbursement of Medicaid expenditures and punitive damages." Pursuant to a most-favored-nation provision, the amount of the payments corresponds to the amount required under the Minnesota settlement, which costs settling manufacturers approximately $0.64 per cigarette pack. The parties to this litigation do not dispute that the settling manufacturers' payments to the State result in annual revenue of approximately $500 million.
>
> As in the MSA and Proposed Resolution, the Comprehensive Settlement prohibited the settling manufacturers from marketing to minors and required them to support programs created to reduce underage smoking. Further, the Comprehensive Settlement prevented the settling manufacturers from opposing any legislative or administrative initiatives to strengthen penalties **[**24]** for tobacco-product sales to minors and for minors in possession of those products.
>
> In return, the Settlement secured robust immunity for the settling manufacturers, though they admitted no wrongdoing and disclaimed any liability. Texas released all past claims "that were or could have been made in this action or any comparable federal or state action." And as to future claims, Texas released those claims "directly or indirectly based **[*411]** on . . . the use of or exposure to Tobacco Products manufactured in the ordinary course of business, including without any limitation any future claims for reimbursement for health care costs allegedly associated with use of or exposure to Tobacco Products."

Id. at 781-83. As noted by the Fifth Circuit, after "the parties executed the original [Texas Settlement] they have amended it twice."[7] *Texas v. Am. Tobacco Co., 463 F.3d 399, 401-02 (5th Cir. 2006)*. "On July 24, 1998, the parties entered into the Stipulation of Amendment to Settlement Agreement and for Entry of Consent Decree ('1998 Amendment'), and on June 8, 2001, the parties entered into the Agreement to Amendment to Settlement Agreement ('2001 Amendment')." *Id. at 402*.

> The 1998 Amendment reflects Texas' exercise of its rights under the Original Agreement's "Most Favored Nation" provision to adopt the more favorable terms of the settlement agreement reached between the Settling Defendants and the State of Minnesota on May **[**25]** 8, 1998. The Original Agreement tied the formula for calculating the annual payments to the "respective share of *sales* of cigarettes by unit for consumption in the United States." Apparently, some of the Settling Defendants began marketing cigarettes in "two for one" or "buy two get one free" promotions. "Free" cigarettes given as part of such promotions would likely be excluded from the annual payment calculations of the Original Agreement because they would not have been considered cigarettes "sold." Perhaps recognizing the potential decrease in the amount of the settlement payments presented by these promotions, the settlement agreement reached between the State of Minnesota and the Settling Defendants tied the Settling Defendants' annual payment obligations to *shipped* cigarettes. Texas and the Settling Defendants thereafter entered into the 1998 Amendment, which changed the annual payment

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[7] As used herein, the Court will refer to the original settlement along with the two amendments collectively as the "Texas Settlement."

> provisions by tying the annual payment calculations to the "number of cigarettes *shipped* for domestic consumption." *See 1998 Am.*, at Appx. A (emphasis added).

Id.

The 1998 Amendment also requires each settling defendant to make payments to the private lawyers hired by Texas to represent it in prosecuting the underlying **[**26]** action ("Private Counsel"). *1998 Amdt.*, Dkt. No. 2222-2 at 24 § 22. Specifically, the 1998 Amendment included a provision incorporating a document entitled the Texas Fee Payment Agreement, which provided that each settling defendant would make payments to Texas' Private Counsel based on each settling defendant's Market Share. *Id.* at 27 § 24 (integrating the Texas Fee Payment Agreement as part of the "entire, complete and integrated statement" of the terms of the Texas Settlement); *see also generally Texas Fee Payment Agreement*, Dkt. No. 2222-11.

The payment to Texas' Private Counsel was made in addition to the payment made by settling defendants to Texas itself. *See Texas Fee Payment Agreement*, Dkt. No. 2222-11 at 2 § 1. The payment to Texas' Private Counsel is calculated using the same definition of Market Share as the payment made to Texas under the Texas Settlement. *Id.* at 16 § 24 ("Terms used herein that are defined in the Settlement Agreement . . . are . . . used in this Agreement as defined in the Settlement Agreement."); *compare id.* at 13 § 15(d) (defining **[*412]** the Texas Fee Payment Agreement obligation as follows: "Each Settling Defendant shall severally pay, ***pro rata in proportion to its respective Market Share***, its share of the **[**27]** amounts" of payment due to Texas' Private Counsel), *with 1998 Amdt.*, Dkt. No. 2222-2 at 11 § 7 (defining the Texas Settlement payment obligation as follows: "Each of the Settling Defendants . . . agrees that, on December 31, 1999 and annually thereafter on December 31st of each year after 1999 . . . it shall severally cause to be paid . . . ***pro rata in proportion to its Market Share***, its share of" the amounts due to Texas under the Texas Settlement).

The 2001 Amendment was also directed towards the specifics of payment calculation and addressed the definition of the term "net operating profits" as used in the 1998 Amendment. *2001 Amdt.*, Dkt. No. 2214-4 at 4 § 5 (clarifying that profit adjustment based on a settling defendant's "net operating profits" shall exclude "investment income" in such calculation). Both amendments agreed that the original agreement remains "in full force" unless a term was expressly revised. *See id.* at 2 § 2 ("The provisions of this Agreement supplement and amend the terms of the Original Agreement and the Stipulation of Amendment, which shall remain in full force and effect except insofar as they are expressly revised by the provisions of this Agreement."); *1998 Amdt.*, Dkt. No. 2222-2 at 3 § 1 (same).

C. The 2004 Motion to Enforce

This dispute is **[**28]** not the only time this Court has addressed a motion to enforce the Texas Settlement. *Texas v. Am. Tobacco Co., 463 F.3d 399 (5th Cir. 2006)*. On May 27, 2004, Texas filed a Motion to Enforce the Texas Settlement against Brown & Williams Tobacco Co. ("B&W"), which had begun to manufacture cigarettes for Star Tobacco & Pharmaceuticals ("Star"), a non-signatory to the Texas Settlement. *Id. at 401*. Under the Texas Settlement, B&W had only reported the cigarettes it directly sold, and had not included the cigarettes which it manufactured for Star. *Id.* "Had B&W reported those cigarettes as its own, Texas claims it would have received an additional $16,420,252 in settlement payments for the years 1999 through 2002." *Id. at 405*.

B&W defended on the ground that the Texas Settlement was ambiguous on this question, and that the parties had engaged in a course of performance suggesting that B&W was not liable for the cigarettes it manufactured for Star. Specifically, the Texas Settlement requires the group of settling defendants to make payments on "the aggregate number of cigarettes shipped for domestic consumption," and calculated each individual defendant's payments based on "such Settling Defendant's audited reports of shipments of Tobacco Products provided to the **[**29]** [Securities and Exchange Commission ('SEC')] (or, in the case of any Settling Defendant that does not provide such reports to the SEC, audited reports of shipments containing the same shipment information as contained in the reports provided to the SEC)." *Id. at 404-05*. Since B&W was "a subsidiary of a British corporation, B&W does not report to the SEC." *Id. at 406*.

B&W argued that "audited reports of shipments" was a term of art given unique meaning by the course of performance of the parties. According to B&W, the reference to "audited reports" was directed to reports made to a private industry organization called Management Science Associates, Inc. ("MSA, Inc."). *Id. at 402*. "MSA, Inc. is an independent third party that has been collecting information related to tobacco companies' shipments to wholesalers for over thirty years. As part of its Cigarette Research Audit ('CRA') program, MSA, Inc. collects and reports information **[*413]** from cigarette manufacturers concerning shipments to their wholesalers and distributors." *Id. at 402-03*. Pursuant to the reporting "agreement between MSA, Inc. and B&W," "B&W only reports the cigarettes it ships through its own distribution system"—not "the contract-manufactured cigarettes" it made for **[**30]** Star. *Id. at 403*. Accordingly, B&W's argument proceeded as follows—"audited reports" is ambiguous; the parties' course of performance suggests "audited reports" was a reference to MSA, Inc. reports; and MSA, Inc. reports only include direct shipments, not the Star shipments. *Id.*

This Court agreed and found that "since its inception, all of the annual payments due under the Texas Settlement Agreement have been based on MSA, Inc.'s 'Shipments to Wholesale' reports." *Id. at 409*. This Court also found that Texas had expressly and intentionally agreed to calculate cigarette shipments by reference to MSA, Inc. reports "in 2002 when the State and the Settling Defendants entered into an engagement letter with PriceWaterhouseCoopers ('PWC')." *Id. at 404*. As the Court explained, "PWC was engaged to collect 'shipment volume data' from each Settling Defendant and, based on that data, to calculate the payments due under the Texas Settlement Agreement." *Id.* Pursuant to the terms of that engagement letter, all parties agreed that "shipment volume data" was to be calculated by reference to reports to MSA, Inc. *Id.* In view of Texas' express prior consent to the use of MSA, Inc. reports, this Court found a course of performance suggesting **[**31]** nonliability for B&W. *Id.*

Texas appealed this Court's judgment, arguing for the first time on appeal that this Court should not have considered parol evidence without expressly finding the Texas Settlement to be ambiguous. *Id. at 406 n.13*. Texas also urged that, in any case, the Texas Settlement was not ambiguous with respect to this question. *Id.*

The Fifth Circuit affirmed this Court's judgment. While noting that this Court did not expressly address whether the Texas Settlement was ambiguous, the Fifth Circuit conducted its own review and found that the Texas Settlement contained a latent ambiguity. *Id. at 409-10*. The Fifth Circuit found the term "audited reports of shipments" to be latently ambiguous since the Texas Settlement was "completely lacking in detail" about the nature of the audited reports. *Id. at 410*. The Texas Settlement does not set out implementation detail regarding "audited reports," such as *who* would implement such audits and *how* specifically such audits were to be conducted. *Id.* Since the Texas Settlement left those implementation matters unspecified, the Fifth Circuit found that the application of that term, in practice, revealed an ambiguity. *Id.* Concluding that the term was latently ambiguous, the **[**32]** Fifth Circuit found no error in this Court's review of course of performance parol evidence as a means to determine what "audited reports" meant. The Fifth Circuit also determined that this Court's "findings of fact [were] supported by the evidence and certainly are not subject to attack under the clear error standard of review." *Id.*

D. Texas Tobacco Equity Tax Statute

It is helpful to briefly describe the Texas Tobacco Equity Tax ("Tobacco Equity Tax"), enacted by the Texas Legislature in 2013. *Tex. Health & Safety Code § 161.603 et seq.* ***HN1***[] While the Texas Settlement is designed to recover tobacco-related healthcare costs from settling manufacturer defendants, the Tobacco Equity Tax is designed "to recover the State's health care costs imposed by non-settling manufacturers' products," by imposing "a tax **[*414]** on those manufacturers." *Tex. Small Tobacco Coal., 496 S.W.3d at 780*. The Tobacco Equity Tax applies to all "non-settling manufacturers," a class "defined as manufacturers of cigarettes or cigarette tobacco products that did not sign either the Liggett Settlement or the [Texas] Settlement." *Id. at 783*.

The Tobacco Equity Tax relies upon a self-reporting regime from non-settling manufacturers who convey information to the Texas Comptroller of Public Accounts ("Texas Comptroller") or **[**33]** the Texas Office of the Attorney General ("Texas Attorney General"). *See Tex. Health & Safety Code § 161.606*. Since the tax is imposed on cigarettes produced by non-settling tobacco manufacturers, but is directly paid by downstream tobacco distributors, the statute directs the Texas Comptroller to maintain a website indicating the identity of non-settling manufacturers. *Id.* *§ 161.605(g)*. ***HN2***[] The statute also authorizes the Texas Comptroller or the Texas Attorney General, in their discretion, to conduct "reasonable periodic audits" in order "to ensure compliance with this subchapter." *Id.* *§ 161.609*.

E. Asset Purchase Agreement to Present

The crux of the dispute presently before the Court is the result of an Asset Purchase Agreement ("APA") executed between Imperial and Reynolds in 2015. As part of a twenty-seven billion dollar transaction whereby Reynolds would acquire one of the only remaining major tobacco companies—Lorillard—Reynolds was compelled by the United States Department of Justice to divest and sell four of its most popular brands: Winston, Kool, Salem, and Maverick.[8] The Acquired Brands comprise approximately eight percent of the total domestic cigarette market in the United States, representing approximately sixteen billion cigarettes **[**34]** produced and sold each year.

The APA is a contract of more than two-hundred pages governed by Delaware law that memorializes the purchase and sale agreement between Imperial and Reynolds. *APA*, Dkt. No. 2222-6. "The aggregate 'Purchase Price'" for the assets being sold to Imperial—including the Acquired Brands[9]—included two elements. *Id.* § 2.04(a). First, Imperial paid Reynolds "an amount in cash equal to $7,056,202,000." *Id.* Second, the "Purchase Price" also included "the assumption of the Assumed Liabilities by [Imperial]."[10] *Id.*

In the APA, Reynolds agreed to "sell, convey, assign, transfer and deliver" to Imperial both its "right, title and interest" in the Acquired Brands and "all benefits and credits under the State Settlements in respect of the Acquired Brands that relate to the period after the Closing Date." *Id.* § 2.01(a), § 2.01(a)(vi). Reynolds also conveyed "all claims, causes of action, defenses and rights of offset or counterclaim against third parties relating to any Transferred Asset or any Assumed Liability." *Id.* § 2.01(a)(v). Imperial further agreed to "purchase, acquire and accept" the same. *Id.*

Imperial also undertook a variety of obligations related to the Acquired Brands. *Id.* § 2.01(c). For example, "[s]ubject to the **[**35]** Agreed Assumption Terms" set out in the APA, Imperial assumed from Reynolds "all Liabilities under the State Settlements **[*415]** in respect of the Acquired Tobacco Cigarette Brands." *Id.* § 2.01(c)(vii). The APA also reflects a specific mechanism for calculating the "amounts payable after the Closing Date by [Imperial] under the State Settlements," including the Texas Settlement. *Id.* at Ex. F, § 4.4. That mechanism provides that Imperial will *only* be liable under the State Settlements for the Acquired Brands, and will not include its other cigarette sales as part of the payments Imperial would make. *Id.*

One of the negotiated terms that Reynolds sought and obtained was that Imperial would undertake "reasonable best efforts" to become a party to the Texas Settlement. *Id.* at Ex. F., § 2.2. Specifically, Imperial agreed to "use its reasonable best efforts to reach agreements with each of the Previously Settled States, by which the [Imperial] will assume, as of the Closing, the obligations of a Settling Defendant under the PSS Agreement with each such State, with respect to the Acquired Tobacco Cigarette Brands, on the same basis as the Settling Defendants prior to the Closing."[11] *Id.*

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[8] Antitrust clearance from the Department of Justice was conditioned on the sale of the Acquired Brands.

[9] The assignment of the Acquired Brands included transfer of then-existing raw tobacco, tobacco farmland, brand-related intellectual property, existing fabricated cigarettes, and other related assets.

[10] The "Assumed Liabilities" are expressly set forth in the APA.

[11] Imperial failed to undertake "the obligations of a Settling Defendant" by "the Closing" of the APA in 2015. That failure is the subject of a breach of contract action between Reynolds and Imperial, and is presently pending before the Chancery Court of Delaware. See also **[**36]** *ITG Brands, LLC v. Reynolds Am.,Inc., No. CV 2017-0129-AGB, 2017 Del. Ch. LEXIS 819, 2017 WL 5903355, at *9-*12 (Del. Ch. Nov. 30, 2017)* (Bouchard, C.) (rejecting as "absurd" Imperial's contention that its obligations to use

Imperial and Reynolds reached out to Texas during 2015 in an attempt to join the Texas Settlement. Both Defendants had negotiated a joinder letter, suggesting a recalibrated set of payment obligations under the Texas Settlement in addition to the assignment of the Acquired Brands. However, Defendants neither informed PMUSA nor sought its consent to join, as required under the express terms of the Texas Settlement. The Texas Settlement provides: "None of the rights granted or obligations assumed under this Settlement Agreement by the parties hereto may be assigned or otherwise conveyed without the express prior written consent of all of the parties hereto." *Texas Settlement*, Dkt. No. 2222-1 at 4 § 2. Based on the failure to obtain PMUSA's consent, Texas rejected the offer as inconsistent with the express terms of the Texas Settlement.[12]

[*416] After Imperial "continued back and forth with [Texas] in February, March, April of 2015," it was unable to reach an agreement with Texas, because Texas refused to join Imperial to the Texas Settlement in a manner that did not comply with its terms. *Hearing Tr.*, Dkt. No. 2354 at 63:24-64:1. No agreement was reached by the date the APA closed in late 2015.[13]

Having purchased the Acquired Brands, Imperial reported to the Texas **[**38]** Comptroller that it was a non-settling manufacturer. Imperial, in effect, told the Texas Comptroller that it was subject to the Tobacco Equity Tax, but not the Texas Settlement. Without auditing Imperial's report, the Texas Comptroller updated its website to reflect Imperial's submission. This online update listed the Acquired Brands as the brands of a non-settling manufacturer. Imperial also submitted Tobacco Equity Tax payments for the Acquired Brands, which the Texas Comptroller passively accepted. *Hearing Tr.*, Dkt. No. 2354 at 13:15-20 ("[T]he equity tax payments were accepted passively by

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"reasonable best efforts" terminated as of the date when the APA closed). Reynolds is also seeking indemnity for any judgment against it levied under the PSS Agreements, including the Texas Settlement.

[12] At the hearing before this Court, Reynolds disagreed that Texas had rejected Imperial's offer to join the Texas Settlement. However, in the Chancery Court of Delaware, Imperial described the interaction with Texas as follows:

> [I]n Texas we gave them a draft joinder in January 2015. We had some conversations with it in April 2015 in which it said, you know, essentially you got to go get Philip Morris involved here because we don't think you can join without Philip Morris' consent. And we never heard another word from Texas until a demand letter in August of 2018, this year.

[**37] *Del. 6/4/19 Hearing Tr.* at 37:20-38:3, *ITG Brands, LLC v. Reynolds Am. Inc.*, C.A. No. 2017-0129-AGB (Del. Ch. June 4, 2019). Texas described the interaction similarly before this Court:

> After we met in 2014 with [Imperial] and with Reynolds, you know, the State did have concerns about the method that [Imperial] was proposing to join because it did not comport with the method that is actually contained in the contract itself, in the settlement agreement for that -- you know, to make that change, to insert a new party into the Texas Settlement Agreement.

Hearing Tr., Dkt. No. 2354 at 15:12-18. Counsel for Reynolds, by contrast, told this Court that Texas actually never responded. In the hearing before this Court, Reynolds told the Court that Texas had not responded at all. The following colloquy occurred between counsel for Reynolds and the Court:

> COUNSEL FOR REYNOLDS: The State was put on notice of the pending transaction in 2014 prior to -- put on notice by [Imperial] --
>
> THE COURT: But it's also uncontested that the State did not consent, correct?
>
> COUNSEL FOR REYNOLDS: Your Honor, the State did not consent, and to -- to Reynolds's knowledge, the State did not respond.

Id. at 43:10-17. The Court has no reason to believe counsel for Reynolds was intentionally misspeaking. However, the Court also has no basis to believe that the substantively identical descriptions from Texas and Imperial are incorrect.

[13] One primary reason that the Texas Settlement required the consent of all parties before a joinder could occur is that the payment framework of the Texas Settlement is relative. While Texas receives approximately the same amount of money each year, the distribution of payment burdens among the settling defendants can vary substantially. As detailed later in this Order, the joinder order proposed by Reynolds and Imperial could have distorted their payment obligations in a manner that would proportionately *increase* PMUSA's obligations (and concomitantly decrease Reynolds' obligations).

the comptroller's office, but there was never any agreement that those payments were somehow to be made in lieu of the payments pursuant to the Texas Settlement Agreement.").

F. The Present Motions to Enforce

Texas filed the instant Motion to Enforce the Settlement Agreement ("Texas' Motion to Enforce") on January 28, 2019. Texas primarily argues that Reynolds is liable for breach of the Texas Settlement under a variety of theories, but also argues alternatively that Imperial must make the Texas Settlement payments on the Acquired Brands. Texas also urged that it is a third-party beneficiary of **[**39]** the APA between Reynolds and Imperial, because the APA contemplates Imperial's performance of actions in satisfaction of Reynolds' legal obligations to Texas.

Shortly after Texas filed its Motion to Enforce, PMUSA followed suit and filed its Motion to Enforce the Settlement Agreement ("PMUSA's Motion to Enforce") (collectively, "Motions to Enforce") on January 31, 2019.

In addition to echoing many of Texas' arguments, PMUSA focuses significantly on Reynolds' actions under the Texas Settlement. As described above, the Texas Settlement has two annual payment provisions: a provision requiring settling defendants to pay Texas, and a parallel provision requiring settling defendants to pay Texas' Private Counsel. Both provisions calibrate payments in proportion to each settling defendant's Market Share, using the same definition of Market Share.

Even after the closing of the APA—and continuing through the present—Reynolds has included the Acquired Brands as part of its Market Share, but only when calculating payments made to Texas' Private Counsel. Reynolds does not include the **[*417]** same Acquired Brands as part of its Market Share when making payments to Texas itself. PMUSA argues that Reynolds **[**40]** cannot have it both ways. When pressed at oral argument on the Motions to Enforce, Reynolds indicated that it was willing to concede that the Acquired Brands should be included in the payments under the Texas Settlement to Texas' Private Counsel. Oddly, however, part of Reynolds' reasoning for such concession was because those payments are less expensive than the payments to Texas.[14]

1. Joining Imperial and Extensive Discovery

On May 22, 2019, pursuant to *Federal Rule of Civil Procedure 25*, Imperial was voluntarily joined to the instant litigation by order of this Court. *Joinder Order*, Dkt. No. 2276 ("***HN3***[] A party who receives any interest in assets that are subject to a settlement agreement may be joined in settlement enforcement proceedings pursuant to *Fed. R. Civ. P. 25*.") (citing *Negron-Almeda v. Santiago, 579 F.3d 45, 53 (1st Cir. 2009))*. Imperial agreed to join on the condition that it receive discovery, which the Court subsequently granted.

Though all parties apparently agreed—and still agree—that the Texas Settlement is unambiguous, Reynolds and Imperial both sought extensive discovery from Texas. Out of an abundance of caution, and in view of the truth-seeking purpose of discovery, the Court ordered substantial discovery from Texas.[15]

Over Texas' persistent objections, the Court granted nearly **[**41]** every discovery request sought by either Imperial or Reynolds. *See Discovery Order*, Dkt. No. 2278. The Court required Texas to produce responsive documents not only from the Office of the Texas Attorney General, but also required Texas to canvass "all state agencies" for responsive documents. *Id.* at 5. Though Texas asked the Court to limit discovery to "a date range spanning January 1, 2014 through January 27, 2019," the Court granted the requests for production from Reynolds

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[14] Though payments to Texas and Texas' Private Counsel are calculated by reference to the same base number of cigarettes, the payments due to Texas are calculated by reference to a higher percentage rate than the payments to Texas' Private Counsel.

[15] PMUSA neither sought nor received discovery, ostensibly because any such documents had already been exchanged twice over in PMUSA's related disputes with Imperial and Reynolds in Florida and Minnesota.

and Imperial based on "a date range spanning March 28, 1996, through June 28, 2019." *Id.* The Court granted all but one of Imperial's requests for production, and granted twelve of Reynolds' nineteen separate requests for production addressed to Texas. *Id.* Finally, the Court ordered Texas to produce a witness pursuant to *Federal Rule of Civil Procedure 30(b)(6)* for seven hours of deposition. *Id.*

In the interest of fairness, the Court also granted Texas' requests for discovery. Texas asked Reynolds and Imperial to produce the document production from the related litigation in Florida and Minnesota, *see infra* Section I.G, which was unopposed by Reynolds and Imperial, as well as all "non-privileged documents relating to the Texas Settlement Agreement, from January **[**42]** 1, 2014, to January 27, 2019" and a 30(b)(6) witness from Imperial and from Reynolds, respectively, for a cumulative total of seven hours.

This Court has gone out of its way to ensure that each party received the broadest proportional discovery which they sought, so that no one would stand before the Court at its hearing on the Motions to Enforce and complain that they had been precluded in any way from being fully knowledgeable and prepared. No such complaints were made.

[*418] *2. Imperial's Failure to Join the Texas Settlement*

The Court held a hearing on the Motions to Enforce on October 29, 2019. Given the sophisticated nature of the parties, and the discovery each had obtained, the Court asked each party: Why have the parties been unable to resolve this issue?

According to Imperial and Reynolds, Imperial stood ready to join the Texas Settlement at the closing of the APA in 2015. With cooperation, Texas could have received the remedy it now asks the Court to order—payment on the Acquired Brands—and PMUSA would not be stuck with a disproportionate part of the Texas Settlement's allocated payments.

So what remains in dispute? As is often the case, the devil is in the details—namely, the details **[**43]** concerning the relative allocation of payments between PMUSA, Imperial, and Reynolds. As noted above, Imperial and Reynolds refused to seek PMUSA's prior written consent before seeking to join the Texas Settlement, and Texas declined to consent to Imperial's joinder in a manner that would violate the consent provisions in the Texas Settlement. When the Court asked whether Imperial ever sought PMUSA's consent, Imperial indicated that it had not. *Hearing Tr.*, Dkt. No. 2354 at 133:14-18. However, Imperial did not explain *why* it had not.

Keeping in mind that these manufacturers exist in a world of constant competition with each other, the answer appears to relate to the commercial advantages and disadvantages between PMUSA and Imperial or Reynolds. Though this issue is set to be more fully explored in the latter portion of the bifurcated briefing schedule,[16] the Texas Settlement makes plain that PMUSA has legitimate interests that may be adversely affected by improper joinder of another settling party. Texas is primarily interested in receipt of the correct ***overall*** amount demanded by the Texas Settlement. The settling defendants, however, are primarily interested in the appropriate allocation **[**44]** of that overall amount among and ***between themselves***. It is reasonable that PMUSA would have legitimate concerns that modifications to the Texas Settlement, negotiated in its absence, may have serious consequences that place a disproportionate liability on PMUSA. Indeed, such a joinder without PMUSA's participation or consent appears to be the cause of significant litigation regarding the Mississippi Settlement. *See infra* Section I.G.3.

This reveals a proverbial chicken-and-egg conundrum where negotiations between the relevant parties—Texas, Imperial, Reynolds, and PMUSA—appeared to break down. Texas refused to negotiate without PMUSA; Imperial and Reynolds refused to negotiate with them.

G. Other PSS Litigation

[16] *See supra* n.4 (describing the bifurcation order and process).

Reynolds, Imperial, and PMUSA have also been embroiled in litigation in the other Previously Settled States ("PSS" and "PSS Agreements")—Mississippi, Florida, and Minnesota. Florida and Minnesota have both entered a judgment finding Reynolds liable (and leaving open the question of Imperial's liability), while the litigation in Mississippi appears to have been partly resolved by a negotiated settlement joining Imperial to the Mississippi Settlement.

While these other actions **[**45]** do not govern this Court's reasoning or result, the Court reviews the disputes in Florida, Minnesota, and Mississippi to fully explain the existing legal landscape over which these parties have traveled to get to this Court. The Court considers the decisions reached in these actions to the extent their reasoning is persuasive.

[*419] *1. Florida*

On December 27, 2017, the Circuit Court for the Fifteenth Judicial Circuit of Florida ("Florida Court") issued its Order Granting-In-Part Settlement-Agreement-Enforcement Motions ("Florida Court's Judgment") brought by Florida and PMUSA. The Florida Court began by reciting the history of Florida's August 25, 1997 settlement, which it referred to as the Florida Agreement. *Fla. Ct. Judgment*, Dkt. No. 2222-7 at 1. The Florida Agreement imposes "payments to Florida every December 31 in perpetuity" based on each settling defendant's "proportionate share" as measured by such defendant's Market Share. *Id.* at 2. In exchange, "Florida executed a release of all its claims for substantial damages, primarily in the form of health-care costs, which it alleged it had incurred and would continue to incur due to the tobacco-parties' alleged predatory and deceptive practices **[**46]** in the marketing of their cigarettes." *Id.*

The annual payments received by the State of Florida ("Florida") are adjusted in several respects, pursuant to an amendment to the Florida Agreement that was executed on September 11, 1998 ("September 1998 Amendment"). *Id.* at 2 nn. 3-4. Those adjustments include adjustments for inflation, for the relative volume sold by the settling defendants, and for the relative profitability of the settling defendants. *Id.* The September 1998 Amendment included a provision entitled the "Florida Fee Payment Agreement," which provides payment to the private counsel hired by Florida to prosecute the underlying action which gave rise to the Florida Agreement. *Id.*

The relevant dispute in the Florida Court arose in much the same manner as the present dispute. Following Reynolds' assignment of the Acquired Brands to Imperial, Reynolds "modified its payments under the Florida Agreement subsequent to the mid-2015 closing and justified the new payments exclusively on the fact that Imperial, not Reynolds, was selling the cigarettes under the four brands Reynolds transferred to Imperial." *Id.* at 2-3. As a result, "Florida filed its motion to enforce the Florida Agreement against Reynolds and Philip Morris filed a similar motion." *Id.* at 3.

On Florida's **[**47]** motion, the Florida Court joined Imperial to that litigation on March 30, 2017, and on June 8, 2017, "set the matter for hearing on 'liability only.'" *Id.* "In the context of this matter, the liability question is whether Reynolds, Imperial, either or both is-or-are obligated to make payments to Florida for cigarettes sold for consumption in the United States under the four brands transferred by Reynolds to Imperial." *Id.*

As an initial matter, the Florida Court found that Imperial had not assumed liability for any payments under the Florida Agreement. Specifically, the Florida Court recognized that Imperial's liability turned on the interpretation of its promise, in the APA, to use "reasonable best efforts" to join the Texas, Mississippi, Minnesota, and Florida Settlements. *Id.* at 7-9. Accordingly, the Florida Court concluded that the "reasonable best efforts" provision "is to be determined by the Delaware Chancery Court," where the interpretation of that provision of the APA is presently being litigated.[17] *Id.* at 9; *see also id.* at 12 **[*420]** ("Once again, it is for the Delaware Court, not this Court, to determine Reynolds' and Imperial's rights and obligations under their asset-purchase agreement.").

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[17] Indeed, the scope of obligations imposed by the term "reasonable best efforts" is an issue of construction presently pending before the Delaware Chancery Court. Depending on the Delaware Chancery Court's construction of "reasonable best efforts,"

The Florida **[**48]** Court then turned to the issue of whether Reynolds remained liable under the Florida Agreement, and concluded that it did. ***HN4***[] Florida law, which follows the general common law rule governing assignments related to contract obligations, provides that a party may not relieve itself of its liability under a contract via an assignment. *Id.* at 12. Surveying the common law, the Florida Court concluded that a party is not relieved of liability based on an assignment of *either* a contract itself, *or* the assets which form the subject matter of the contract. *Id.* at 12-13. Accordingly, the Florida Court found that Reynolds remained liable under the Florida Agreement.

As an additional basis for its holding, the Florida Court looked to Reynolds' continued payments to Florida's private counsel, pursuant to the 1998 Amendment to the Florida Agreement. Notably, and as is true in the instant case, at the time the Florida Court issued its Order, Reynolds included the Acquired Brands in calculating its payment obligations with respect to Florida's private counsel, but omitted the Acquired Brands from its calculation of the same payment obligations to the State of Florida—even though both payments are calculated based on "the **[**49]** same pro-rata share based on nationwide cigarette sales." *Id.* at 14. The Florida Court diplomatically suggested that it was "not entirely persuasive" for Reynolds to acknowledge an ongoing obligation to pay Florida's private counsel counting cigarettes produced as part of the Acquired Brands, and yet simultaneously omit the same cigarettes from payments to the State of Florida. *Id.* Accordingly, the Florida Court concluded that Reynolds remained liable under the Florida Agreement.

2. Minnesota

On September 24, 2019, the District Court for the Second Judicial District of Minnesota ("Minnesota Court") entered an Order and Memorandum ("Minnesota Court's Judgment") addressed to cross-motions for summary judgment filed by the State of Minnesota ("Minnesota"), Imperial, and PMUSA.[18] The Minnesota Court reached substantially the same result as the Florida Court. With respect to Reynolds, it granted Minnesota's motion for summary judgment and PMUSA's accompanying motion to enforce the 1998 Settlement Agreement and Stipulation for Entry of Consent Judgment ("Minnesota Settlement Agreement"). *Minn. Ct. Judgment*, Dkt. No. 2344-1 at 1-2. However, with respect to Imperial, the Minnesota Court denied both Minnesota's **[**50]** motion for summary judgment and PMUSA's motion to enforce the Minnesota Settlement Agreement, finding that a fact question had been raised as to Imperial's assumption of liability. *Id.* Imperial's cross-motion for summary judgment was denied in all respects. *Id.* It appears that Reynolds did not urge an affirmative request for relief.

The Minnesota Court began by recounting the history of the Previously Settled States, and the respective state settlement agreements. *Id.* at 2-4. In addition to recounting much of the same information addressed by the Florida Court, the Minnesota Court identified portions of the APA that impose obligations and secure **[*421]** rights in the Acquired Brands to Imperial. In quoting the language of the APA, the Minnesota Court set forth as follows:

> Under the APA, Reynolds agreed to "sell, convey, assign, transfer and deliver" to [Imperial] its "right, title and interest" in the Acquired Brands and the benefits and credits under the State Settlements, including Minnesota which relate to the period after the closing date. Specifically, [Imperial] agreed to assume:
>
>> all Liabilities under the State Settlements in respect of the Acquired Tobacco Cigarette Brands that **[**51]** relate to the period after the Closing Date, including (A) any recalculation or redetermination of amounts due in respect of the Acquired Tobacco Cigarette Brands that relate to the period after the Closing Date.
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> Under the APA, [Imperial] also agreed that with the assistance of Reynolds and Lorillard:

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such term may furnish an independent basis for Imperial to be liable for payments under the Texas Settlement. *See infra* Section III.F; Part IV.

[18] The Minnesota Court entertained motions for summary judgment under a holding of the Minnesota Supreme Court, which provides that "***HN5***[] [a] district court 'shall treat a motion to enforce a settlement agreement as it would a motion for summary judgment.'" *Minn. Ct. Judgment*, Dkt. No. 2344-1 at 11 (quoting *Voicestream Minneapolis, Inc. v. RPC Props., Inc., 743 N.W.2d 267, 273 (Minn. 2008))*.

> in communications and negotiations as required by the Agreement, shall use its reasonable best efforts to reach agreements with each of the Previously Settled States, by which [Imperial] will assume, as of the Closing, the obligations of a Settling Defendant under the PSS Agreement with each such State, with respect to the Acquired Tobacco Cigarette Brands, on the same basis as the Settling Defendants prior to the Closing.

The APA also included Agreed Assumption terms, which applied before and after the closing:

> As soon as practicable after the date of this Agreement, and both before and after the Closing, each of the Parties shall . . . make all such communications with and provide all such information to . . . the States . . . and take all such other steps . . . as are necessary and/or expedient for the purposes of . . . obtaining the agreement as necessary of the States . . . to the Agreed **[**52]** Assumption Terms.
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> * * *
>
> . . . each of the Parties undertakes that from and after the date of this Agreement and both before and after the Closing it shall . . . adhere fully to and not deviate in any respect from the Agreed Assumption Terms including in any communications with any of the States . . .
>
> Each of [Imperial] and [Reynolds] further undertakes from and after the Closing, to take . . . all such steps as are necessary or expedient . . . to cause the Agreed Assumption Terms, as applicable, to become fully effective and binding on each of the States.

Id. at 5-6 (omissions in original).

In reaching its conclusions about liability, the Minnesota Court first rejected Reynolds' argument that *no one* was liable for payments under the Minnesota Settlement Agreement. "Reynolds' contention that no one has responsibility for settlement payments for the sales of the Acquired Brands is contrary to the essential purpose of the Minnesota Settlement Agreement," which provides that compensatory payments were to be made to Minnesota in perpetuity. *Id.* at 14.

Second, the Minnesota Court examined the structure of the Minnesota Settlement Agreement, which by its terms provides that each settlement payment is designed "not **[**53]** only to compensate Minnesota for health-care costs relating to cigarettes sold in the year of the settlement payment, but also for 'damages incurred by the State in . . . earlier years related to the subject matter of this action.'" *Id.* at 14-15. ***HN6***[] Under the plain language of the Minnesota Settlement Agreement, a "Settling Defendant is therefore responsible for paying in the current year, for the damage its cigarettes **[*422]** caused in the past." *Id.* at 15. Accordingly, "[i]t would be contrary" to that express purpose "if a Settling Defendant could avoid responsibility for current and future harm to Minnesota" resulting from "the past sales of its cigarettes" by selling those brands, "unilaterally extinguish[ing] any liability for future settlement payments, and walk[ing] away." *Id.* The Minnesota Court noted that continuing liability was textually consistent with the fact that Reynolds and the other Settling Defendants "explicitly agreed to a definition which included their 'successors and assigns' in the obligation to make future settlement payments as well." *Id.*

Finally, as an independent basis for finding liability, the Minnesota Court agreed with the Florida Court's finding that "***HN7***[] an asset purchase does not extinguish **[**54]** liabilities associated with that asset." *Id.* at 16. As the Florida Court did, the Minnesota Court surveyed the common law and relevant treatises and found that such authorities uniformly supported its holding that Reynolds should remain liable for its contractual obligations. *Id.* at 16-17 (collecting cases and treatises).

In holding Reynolds liable, the Minnesota Court rejected Reynolds' contention that its liability was limited by the Market Share provision of the Minnesota Settlement Agreement. As summarized by the Minnesota Court, Reynolds contended "that it should no longer be responsible for settlement payments on cigarettes from the Acquired Brands which it no longer sells because those sales are no longer part of its market share." *Id.* at 15. "While this argument has some superficial appeal," the Minnesota Court explained, Reynolds' argument was ultimately inconsistent with the design of the Minnesota Settlement Agreement and the inclusion of a successors-and-assigns clause. *Id.* at 15-16. "'***HN8***[] Market Share' is defined in the Minnesota Settlement Agreement to include the market share of Settling Defendants, which includes their 'successors and assigns.' Accordingly, absent an agreement otherwise, the market share of its **[**55]** successors or assigns remain the obligation of Reynolds as a Settling Defendant." *Id.*

The Minnesota Court also rejected the absence of an express "brand transfer" provision as a basis for releasing Reynolds and Imperial from liability.[19] The Minnesota Court explained that the absence of an express provision boiled down to a drafting choice, because such a provision was unnecessary in light of settled common law relating to contract assignment. Even in the absence of a brand transfer provision, "Reynolds as obligor under the Minnesota Settlement Agreement, could not divest itself of liability for settlement payments on the Acquired Brands without the consent of Minnesota as the obligee." *Id.* at 17. While it could have been a belt-and-suspenders choice to include an express brand transfer provision in the PSS Agreements, the Minnesota Settlement—when read in light of the established common law governing contract assignments—was enough to create a continuing obligation with respect to Reynolds without an additional brand transfer provision. *Id.*

Further, the Minnesota Court also rejected the brand transfer argument on the **[*423]** grounds that it would produce a contractual absurdity and Minnesota **[**56]** courts attempt to avoid contract interpretations that produce such results. As the Minnesota Court explained:

> [T]he idea that the parties to the Minnesota Lawsuit negotiated a resolution which bound the Settling Defendants and their successors and assigns to making perpetual settlement payments in exchange for a permanent release of all claims, yet allowed for the opportunity for a Settling Defendant to snuff out its liabilities by simply transferring its assets, is absurd. The intent of the parties to the Minnesota Settlement Agreement was to obtain an agreement from the Settling Defendants, including Reynolds, to make payments in perpetuity to offset Minnesota's public health care expenditures associated with the use of their cigarettes. To allow Reynolds to escape its obligation by selling the Acquired Brands to another cigarette manufacturer, resulting in no one making settlement payments, would defeat the purpose of the Minnesota Settlement Agreement.

Id. at 17 (citation omitted) (citing Brookfield Trade Ctr., Inc. v. City of Ramsey, 584 N.W.2d 390, 394 (Minn. 1998) ("**HN9**[] We read contract terms in the context of the entire contract and will not construe the terms so as to lead to a harsh and absurd result.")).

The Minnesota Court then turned to Imperial's liability. Imperial **[**57]** broadly alleged "that Minnesota has no enforceable rights against it, because Minnesota was neither a party to the APA, nor was Minnesota a third-party beneficiary." *Id.* at 19. The Minnesota Court rejected that argument out of hand. First, it found that Imperial was a third-party beneficiary under the APA, because Imperial had made promises which conferred direct benefits on Minnesota. In the Minnesota Court's view, "[b]y promising in the APA to negotiate with Minnesota to assume the benefits, credits and obligations of Reynolds under the Minnesota Settlement Agreement, [Imperial] cannot credibly contend that Minnesota has no direct or third-party interest in the APA." *Id.*

Second, the Minnesota Court determined that there was a dispute of fact as to whether Imperial is liable under the "successors and assigns" clause in the Minnesota Settlement. In the Minnesota Court's view, Imperial's status as a "successor or assign" turned on the interpretation of ambiguous provisions of the APA, including the "reasonable best efforts" clause, which governed the scope of obligations assumed by Imperial. *Id.* at 22-23. Since the procedural posture before the Minnesota Court was a series of motions for summary judgment, **[**58]** the Minnesota Court indicated that it could not conclusively resolve the underlying fact questions related to the interpretation of the APA. *Id.*

3. Mississippi

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[19] As used here, a "brand transfer" provision refers to an express provision prohibiting a settling defendant from transferring cigarettes or cigarette brands. Reynolds and Imperial contended that since the Master Settlement Agreement contained an explicit "brand transfer" provision, while the Minnesota Settlement Agreement did not contain a "brand transfer" provision, the Court should infer that "the intent of the parties in the resolution of the Minnesota Lawsuit was to allow for the Settling Parties to transfer their brands and extinguish their liability for future settlement payments." *Minn. Ct. Judgment*, Dkt. No. 2344-1 at 17.

The litigation in Mississippi exists in a substantially different posture than the other settlement disputes discussed above. Presently, it remains pending before the Chancery Court of Mississippi ("Mississippi Court"). The Mississippi litigation resolved, in substantial part, when Imperial elected to voluntarily join the Mississippi Settlement.

Despite Imperial's joinder, it appears that there are ongoing disputes as to the manner in which Imperial was joined. Imperial was joined without PMUSA's consent, and in a manner that allegedly damaged PMUSA financially. Specifically, PMUSA alleged that the joinder letter submitted by Imperial and Reynolds (and the Mississippi Court order adopting the same) not only joined Imperial, but altered the relative "allocation of the profit adjustment under the [Mississippi Settlement] **[*424]** agreement, in a way . . . that directly affects [PMUSA] to the tune of many millions of dollars a year . . . without telling [PMUSA]." *Miss. Ct. Oral Arg. Tr.*, Dkt. No. 2357-61 at 8:4-23. PMUSA suggested that Reynolds **[**59]** and Imperial misled the Mississippi Court by presenting Imperial's request for joinder as "agreed," when in fact such request was made "without providing any notice, or opportunity for hearing" to PMUSA.[20] *Id.* at 8:20-23. The litigation appears to be ongoing, subject to an apparently pending motion to stay, which is the most recent docket entry on the public docket for the Mississippi litigation. *See* https://perma.cc/7M2C-AXNY .[21]

II. Threshold Issues and Procedural Approach

Before turning to the merits of the Motions to Enforce, the Court addresses four threshold issues: subject-matter jurisdiction, choice of law, issue preclusion (raised by Imperial), and an allegation that the Texas Settlement precludes review of the Motions to Enforce (raised by Reynolds).

As a matter of procedure, the Court will follow the procedure previously approved by the Fifth Circuit in evaluating motions to enforce the Texas Settlement. When this Court last construed the Texas Settlement, the Court received motions to enforce, took evidentiary submissions, heard arguments related to the same, and issued an order which made subsidiary **[**60]** findings of fact and conclusions of law related to the Texas Settlement. In affirming this Court's prior order, the Fifth Circuit agreed that this Court had appropriately made findings of fact in support of its conclusions of law. Accordingly, in disposing of the instant Motions to Enforce, the Court will follow the same procedural approach as was previously approved by the Fifth Circuit: the Court has received pertinent evidence, heard argument, and accordingly issues this Order setting forth its findings of fact and conclusions of law as a part hereof.

A. Subject-Matter Jurisdiction

HN10[] The Court has an independent obligation to determine its subject-matter jurisdiction. *Lemaire Illumination Techs., LLC v. HTC Corp., No. 2:18-cv-00021-JRG, 2019 U.S. Dist. LEXIS 58108, 2019 WL 1489065, at *2 (E.D. Tex. Apr. 4, 2019)* (citing *McCorvey v. Hill, 385 F.3d 846, 848 (5th Cir. 2004))* ("Federal courts 'are under an independent obligation to examine'" whether subject-matter jurisdiction exists).

HN11[] "With consent of the parties, a district court may expressly retain jurisdiction over a settlement agreement in order to enforce the parties' compliance with that agreement and thereafter may assert jurisdiction over breach of

[20] This issue—the distortion of profit adjustment and payment allocation—is the basis upon which Texas refused to consent to Imperial's attempt to join the Texas Settlement without first securing the consent of PMUSA. The existence of the Mississippi litigation shows that Texas' concerns were real and substantial.

[21] To avoid the issues of link rot and reference rot, the Court uses a persistent identifier link to archive the public docket for the Mississippi litigation, as available at the time this Order is issued. *See, e.g.*, Christine L. Borgman, *Open Data, Grey Data, and Stewardship: Universities at the Privacy Frontier*, *33 Berkeley Tech. L.J. 365, 378 n.34 (2018)* (highlighting the importance of "persistent identifiers" that are able to permanently "'resolve to a location' online," in order "to facilitate access in addition to identification").

settlement claims." Energy Mgmt. Servs., LLC v. City of Alexandria, 739 F.3d 255, 261 n.3 (5th Cir. 2014) (citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 380-81, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)). A final judgment may make a settlement **[*425]** agreement "part of the order of dismissal" **[**61]** in one of two ways—"either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order." Kokkonen, 511 U.S. at 381.

The Court's final judgment in this case expressly incorporates the Texas Settlement. *Final Judgment*, Dkt. No. 1866. The Court indicated that "pursuant to Fed. R. Civ. P. 58, the Court does hereby ORDER, ADJUDGE, and DECREE as follows: the Comprehensive Settlement Agreement and Release (attached as Exhibit A) is hereby adopted and incorporated herein as an enforceable order of this Court." *Id.* at 1 ¶ 1.

In addition to incorporating the Texas Settlement itself, the Court also independently ordered the parties to comply with the terms of the Texas Settlement. *Id.* at 1 ¶ 4 (ordering that "the parties shall comply with all terms and conditions contained in the Comprehensive Settlement Agreement and Release, Exhibit 1, Costs, Expenses and Fees and other attachments"). Accordingly, this Court has subject-matter jurisdiction to dispose of the present Motions to Enforce.

B. Choice of Law

By its terms, ***HN12***[] the Texas Settlement must be interpreted under Texas law. *Texas Settlement*, Dkt. No. 2222-1 at 28 § 26 ("This Settlement Agreement shall **[**62]** be governed by the laws of the State of Texas."). "It is a 'well-settled rule that the construction and enforcement of settlement agreements are governed by principles of local law applicable to contracts generally.'" In re Deepwater Horizon, 785 F.3d 986, 994 (5th Cir. 2015) (quoting Fla. Educ. Ass'n, Inc. v. Atkinson, 481 F.2d 662, 663 (5th Cir. 1973)); *accord* Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); BNSF Ry. Co. v. Panhandle N. R.R., L.L.C., 946 F.3d 705, 711 (5th Cir. 2020).

HN13[] Under Texas law, settlement agreements are interpreted according to the law generally governing contractual agreements. Sandt v. Energy Maint. Servs. Grp. I, LLC, 534 S.W.3d 626, 642 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) ("Under Texas law, we interpret settlement agreements like other contracts."). This is because settlement agreements *are* contracts, which reflect agreements related to the resolution of legal disputes. McCoy v. Rogers, 240 S.W.3d 267, 275-76 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Accordingly, the Court will apply Texas contract law to the interpretation of the Texas Settlement.

While a variety of other choice of law issues have arisen, including issues related to the law of Florida, Delaware, and Minnesota, for efficiency's sake, the Court will address each subsidiary choice of law issue in context, rather than addressing all choice-of-law issues here.

C. Issue Preclusion

As an initial matter, the Court must address Imperial's contention that this Court should apply issue preclusion to reject PMUSA's Motion to Enforce. Imperial asserts that the Florida Court's Judgment determined that Imperial was not liable **[**63]** under the Florida Agreement, and argues that PMUSA is precluded from relitigating the issue with respect to the Texas Settlement. *Imperial Resp.*, Dkt. No. 2341 at 12.

In response, PMUSA suggests that Imperial's argument is misplaced. Initially, issue preclusion "does not apply, because, as [Imperial] notes, the issues are 'nearly identical' to Minnesota and Florida, and 'nearly identical' is not identical." *PMUSA Reply*, Dkt. No. 2345 at 12. Further, to the extent the Court should find a preclusive effect, PMUSA argues that the Court should give effect to the decision of the **[*426]** ***Minnesota*** Court—not the Florida Court—because the Minnesota Court's Judgment was later in time. *Id.* And the Minnesota Court recognized that Imperial could be liable "if it is an 'assign'"—a question unresolved by the Minnesota Court. *Id.*

Though Imperial only asks the Court to apply preclusion to PMUSA, Texas argues that issue preclusion cannot apply to Texas because Texas "was not a party in Florida," which is required for any form of preclusion to attach. *Texas Reply*, Dkt. No. 2346 at 7.

HN14[] To determine the preclusive effect of a state court judgment, federal courts apply the preclusion rules of the state whose court **[**64]** issued the judgment. *Shimon v. Sewerage & Water Bd. of New Orleans, 565 F.3d 195, 199 (5th Cir. 2009)*. "The Supreme Court has held that 'under the Full Faith and Credit Act a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give.'" *Id.* (quoting *Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 523, 106 S. Ct. 768, 88 L. Ed. 2d 877 (1986))*.

HN15[] When multiple courts have previously rendered a judgment addressed to the same issue, a subsequent court may give preclusive effect *only* to the decision of the final court to render judgment. *Americana Fabrics, Inc. v. L & L Textiles, Inc., 754 F.2d 1524, 1529-30 (9th Cir. 1985)*. *Americana Fabrics* addressed a scenario where a third court was required to choose between giving a preclusive effect to the judgment of a first court, or the subsequent judgment of a second court. In such a case, "[t]he governing rule to be applied is quite clear. The third court should give res judicata effect to the last previous judgment entered." *Id.* (citing *Treinies v. Sunshine Mining Co., 308 U.S. 66, 75-78, 60 S. Ct. 44, 84 L. Ed. 85 (1939)*; 18 Charles Wright, Arthur Miller & Edward Cooper, *Federal Practice and Procedure* § 4404 (1981); Hon. Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 Harv. L. Rev. 798 (1969)).

Americana Fabrics articulates several rationales for the Supreme Court's "rule of 'last in time'":

> ***HN16***[] The formal rationale behind the rule is that the implicit or explicit decision of the second court, **[**65]** to the effect that the first court's judgment is not res judicata, is itself res judicata and therefore binding on the third court. The decision is not binding because it is correct; it is binding because it is last. The rule furthers the purposes of res judicata because it "end[s] the chain of relitigation . . . by stopping it where it [stands]" after entry of the second court's judgment, and thereby discourages relitigation in a third court. If an aggrieved party believes that the second court erred in not giving res judicata effect to the first court's judgment, then the proper avenue of redress is appeal of the second court's judgment, not collateral attack in a third court.

Id. at 1530 (citing *Treinies, 308 U.S. at 77-78*; *Porter v. Wilson, 419 F.2d 254, 258-59 (9th Cir. 1969))* (alterations in original).

Notably, the Minnesota Court expressly found that neither the Florida Court's Judgment nor any decision by the Delaware Chancery Court gave rise to preclusion. *Minn. Ct. Judgment*, Dkt. No. 2344-1 at 21 (recognizing that the Florida Court's Judgment and a decision by the Delaware Chancery court "are informative," but are not "dispositive ***or preclusive*** with regard to any obligations [Imperial] may have under the Minnesota Settlement Agreement"). Accordingly, this Court similarly **[**66]** holds that no previous judicial decision—whether rendered by Minnesota, Delaware, **[*427]** or Florida—gives rise to issue preclusion in this case.

The foregoing makes clear that the Florida Court's Judgment cannot give rise to issue preclusion in this case. As noted above, Imperial claims this litigation and the Florida litigation involve identical issues because both cases ostensibly involved "'identical' claimed breaches of contract, the same facts, the same transaction, 'substantively identical' settlement language, the same APA, the same principles of law, and the same claims." *Imperial Resp.*, Dkt. No. 2341 at 12. Yet every one of those facts applies with equal force to the Minnesota litigation, and the Minnesota Court's Judgment was issued later in time than the Florida Court's Judgment. Thus, under the "last in time" rule, if preclusion should apply at all, it should apply only to the Minnesota Court's Judgment—not the Florida Court's Judgment.[22] Accordingly, the Florida Court's Judgment does not preclude PMUSA in any respect related to this case.

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[22] Minnesota law does not suggest any preclusive effect is appropriate with respect to the issues raised by enforcement of the Texas Settlement. ***HN17***[] Minnesota squarely assigns "the burden to establish" that collateral estoppel is applicable to "[t]he party asserting collateral estoppel." *Mach v. Wells Concrete Prod. Co., 866 N.W.2d 921, 927 (Minn. 2015)* (quoting *Lange v. City*

In the alternative, even if the Florida Court's Judgment were appropriate to consider as a basis for issue preclusion, ***HN18***[] Florida law limits **[**67]** issue preclusion to circumstances where "an identical issue" was "presented in a prior proceeding." *Lucky Nation, LLC v. Al-Maghazchi, 186 So. 3d 12, 14 (Fla. 4th DCA 2016)*. Florida law also requires that "the parties in the two proceedings must be identical." *Id.* For the latter reason, issue preclusion cannot apply to Texas because Texas was undisputedly not a party to the Florida litigation. That determination appears to be conclusive of the impact of issue preclusion, because both PMUSA and Texas seek substantially and functionally identical relief. Since Texas may appropriately seek the entirety of the relief pending before the Court, it is unclear how a finding of preclusion as to PMUSA would alter the Court's approach to the merits.

Further, the issues presented in this case are different than the issues decided by the Florida Court. This Court must apply a different body of law (Texas law) to a different settlement agreement (Texas Settlement) that was reached under different circumstances to evaluate a different issue of liability (that is, liability for Texas Settlement payments). Both Texas and Florida cases rely on analogous principles of contract interpretation and both ask each respective court to interpret analogous agreements, but merely **[**68]** analogous issues are not "identical issues." *See id.*

On balance, this Court finds that issue preclusion does not apply to this case. Texas is not Florida (or Minnesota) and the Texas Settlement is not the Florida Settlement (or the Minnesota Settlement). Further, in the unlikely event that the Texas Settlement could overlap with another **[*428]** state's settlement to a sufficient degree for preclusion to attach, *only* the Minnesota Court's Judgment could receive preclusive effect in this case under the last-in-time rule. Accordingly, the Court concludes that issue preclusion does not apply to the Motions to Enforce in this case.

D. Contractual Limits on Review

In a single paragraph, Reynolds argues that the court lacks jurisdiction to entertain the Motions to Enforce because the parties have contractually limited this Court's ability to review disputes about Market Share. Reynolds claims that "under the express terms of the Agreement, [PricewaterhouseCoopers' ('PwC')] determination of the parties' Market Share dispute is final and non-appealable." *Reynolds Resp.*, Dkt. No. 2340 at 16-17 (citing *1998 Amdt.* at 12-13 § 8; *In re Deepwater Horizon, 785 F.3d at 995 n.8*). In pertinent part, § 8 of the 1998 Amendment to the Texas Settlement recites the following:

> ***In the event of a disagreement between [**69] or among any Settling Defendants as to their respective shares of any payment due to be paid on a Market Share basis pursuant to the Settlement Agreement and this Stipulation of Amendment, each Settling Defendant shall*** pay its undisputed share of such payment promptly on or before the date on which such payment is due, and shall, within 21 days of such date, ***submit its Shipment Reports for the year in question to a third party to be selected by agreement of Settling Defendants (the "Third Party"), who shall determine the Market Share of each Settling Defendant*** within three business days of receipt of such Shipment Reports. ***The decision of the Third Party shall be final and non-appealable, and shall be communicated by facsimile to each person designated to receive notice hereunder***. . . .

1998 Amdt., Dkt. No. 2222-2 at 12-13 § 8 (emphasis added). According to Reynolds, this is a dispute about Market Share, and such disputes must be submitted to a third-party neutral—in this case, PwC, who Reynolds submits has been appropriately designated under § 8.

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of Byron, 255 N.W.2d 226, 228 (Minn. 1977)). Imperial has not carried that burden, given that Imperial does not urge that the Minnesota Court's Judgment should be given preclusive effect. Further, Imperial could not carry its burden under Minnesota law for one of the same reasons its claim fails under Florida law—Minnesota limits issue preclusion to circumstances where the "issue was identical to one in a prior adjudication," and the issues before the Minnesota court are merely analogous to the issues before this Court, rather than identical to the issues presented herein. *See id.* (citing ***Nelson v. Am. Family Ins. Grp., 651 N.W.2d 499, 511 (Minn. 2002))***. At issue in the Minnesota Court was the Minnesota Settlement, read in light of Minnesota law; at issue in this Texas federal court is the Texas Settlement, read in light of Texas law. This point is sufficient to reject application of any form of preclusion.

PMUSA responds that Reynolds' argument "fails for numerous, independently sufficient reasons." *PMUSA Reply*, Dkt. No. 2345 at 8. First, by its own terms, § 8 "applies only **[**70]** to 'a disagreement between or among any Settling Defendants,' and so is irrelevant to disputes like this one as to what [Texas] is owed." *Id.* Second, "Reynolds does not point to any evidence the Settling Defendants ever 'selected' PwC to finally resolve this (or any other) dispute." *Id.* Third, § 8 "does not apply in any event, because these motions present the *legal* question whether payment obligations on transferred brands continue; per the Settlement Agreement, *this Court*—not any accountant—is the arbiter of that issue." *Id.* (citing *Texas Settlement*, Dkt. No. 2345-1 at 3-4). Fourth, "although the Florida Agreement has the same provision, Reynolds never made this argument in Florida." *Id.* (citing *Fla. Agreement*, Dkt. No. 2345-13 at 82789-90). Fifth, "following the Florida court's ruling, PwC has included the transferred brands in calculating what Reynolds owes Florida—yet Reynolds is appealing." *Id.* Indeed, PMUSA points out that Reynolds has made directly contradictory representations to other courts. Specifically, Reynolds asserted to the Mississippi Chancery Court: "'the Court decides and PwC implements. That is the way it has always been, Your Honor. The Court decides the legal issues **[**71]** and PwC implements it, not the reverse. PwC is not a lawyer.'" *Id.* (quoting *Miss. Oral Arg. Tr.*, Dkt. No. 2345-61 at 87:19-22).

Texas similarly disputes Reynolds' argument. Initially, Texas echoes PMUSA's **[*429]** textual argument that § 8 does not apply under "the plain language of the contract," because this is a dispute between Texas and Settling Defendants, which falls outside of the carveout for disagreements that are "between or among" the settling defendants. *Texas Reply*, Dkt. No. 2346 at 10. Texas further suggests that Reynolds' description of PwC is inconsistent with the structure of the Texas Settlement and the uniform course of performance of the parties. *Id.* "Reynolds attempts to inflate the role of [PwC] beyond that of an accounting firm into that of a legal tribunal empowered to dictate not only the amounts due under the [Texas Settlement] but to make legal determinations as to its enforcement." *Id.*

At the hearing on the Motions to Enforce set by the Court, the Court pressed Reynolds with respect to its position on the role of PwC in the Texas Settlement, and counsel for Reynolds substantially walked its argument back on this issue.

> COUNSEL FOR REYNOLDS: Reynolds has, from the inception **[**72]** of the Texas Settlement Agreement, paid every dime that PricewaterhouseCoopers has attributed to it. And, ***Your Honor, that's important not because Pricewaterhouse supplants the -- the authority of any Court but because it was the independent third party that all of the parties***, including the State -- the State ***agreed should determine what was owed***, based on the amount of cigarettes shipped for domestic consumption.
>
> THE COURT: ***But their role was to do a calculation based on an existing structure, not to offer legal advice or to construe legal relationships in any kind of binding way, correct***?
>
> COUNSEL FOR REYNOLDS: ***A hundred percent correct, Your Honor***.
> THE COURT: Okay.
>
> COUNSEL FOR REYNOLDS: ***Nor are we arguing that*** -- I'd like to say here we are not arguing that ***PricewaterhouseCoopers has any -- any effect -- any binding effect on this Court. We'd -- we'd be foolish to say so***.

Hearing Tr., Dkt. No. 2354 at 54:24-55:18 (emphasis added). As PMUSA notes in its briefing, Reynolds' representations to this Court were consistent with the representations it has made to other courts, including the Chancery Court of Mississippi.

The Mississippi Court held an evidentiary hearing on December 4, 2015, **[**73]** where PMUSA asked the Mississippi Court to vacate one of its previous orders joining Imperial to the Mississippi Settlement, because the joinder was done without PMUSA's consent and with alterations to the Mississippi Settlement's payment allocation scheme. *Miss. Oral Arg. Tr.*, Dkt. No. 2345-61 at 7:4-8:23. PMUSA alleged that such alterations injured PMUSA's economic interests to the benefit of Reynolds and Imperial.

To resolve the foregoing issue, PMUSA proposed that the parties voluntarily delegate the issue to PwC, which PMUSA suggested could bring its expertise to bear on determining whether Imperial had been joined in a way that would unfairly reallocate payment obligations under the Mississippi Settlement. *Id.* at 35:15-20 ("What Your Honor should do, respectfully, is, if we can't agree as to how things change and how we ought to move things around as a result of the brand transfer to [Imperial], let PwC decide, and, then, if there is a dispute, the parties can come back to Your Honor with a complete record.").

Reynolds rejected PMUSA's proposal, on the grounds it would upset the appropriate allocation of authority between the courts and the accountants set out in the PSS Agreements. **[**74]** [23] *Id.* at 87:14-24. In addressing **[*430]** "PMUSA's proposal," Reynolds argued that asking PwC to resolve the issue "puts the cart before the horse." *Id.* at 87:17-18. Reynolds explained, "the court decides and PwC implements. ***That is the way it has always been***, Your Honor. The court decides the legal issues and PwC implements it, not the reverse. PwC is not a lawyer." *Id.* at 87:19-22 (emphasis added). In Reynolds' view, any preliminary resolution by PwC "would create uncertainty without court guidance, and it would needlessly drag out the issue," because only a court has the authority to actually resolve legal questions related to liability under the state settlements at issue. *Id.* at 87:23-24.

In view of the foregoing admissions in both the Mississippi Court and this Court, it is not clear what remains of Reynolds' argument on this issue. At both colloquies, Reynolds candidly and correctly acknowledged that the PSS Agreements—including the Texas Settlement—distinguish between the legal question of liability for cigarettes that are sold (*i.e.*, the question of "who must pay?"), and the accounting question addressed to quantifying the number of cigarettes that are sold (*i.e.* **[**75]** , the question of "how much must be paid?"). In both Mississippi and this Court, Reynolds recognized that "PwC is not a lawyer" and that it would "be foolish to say" that PwC's determination has "***any*** binding effect on this Court." *Miss. Oral Arg. Tr.*, Dkt. No. 2345-61 at 7:4-8:23; *Hearing Tr.*, Dkt. No. 2354 at 54:24-55:18 (emphasis added). Since Reynolds acknowledges that PwC is tasked only with the accounting question, and Reynolds recognizes that the question of "legal relationships" is reserved for this Court by the express text of the Texas Settlement, Reynolds has substantively conceded that this Court has the authority to evaluate the legal questions presented by the Motions to Enforce. Reynolds' admissions thus constitute a standalone basis to reject this argument.

Since Reynolds has not formally withdrawn this argument, to avoid any doubt, the Court reaches and rejects Reynolds' contention that the Court's ability to evaluate the Motions to Enforce has been contractually limited by the role of PwC in addressing disputes about Market Share.

The Texas Settlement expressly reserves and recognizes this Court's authority to evaluate "any" disputes related to the enforcement or breach of the Texas Settlement. Section 1 of **[**76]** the Texas Settlement provides, in pertinent part, the following fountainhead of jurisdiction for this Court:

> Jurisdiction. Settling Defendants and the State of Texas acknowledge that this Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and that this Court shall retain jurisdiction for the purposes of implementing and enforcing this Settlement Agreement. ***The parties hereto agree to present any disputes under this Settlement Agreement, including without limitation any claims for breach or enforcement of this Settlement Agreement, exclusively to this Court***.

Texas Settlement, Dkt. No. 2222-1 at 3-4 § 1 (emphasis added). Accordingly, the plain text of § 1 broadly delegates resolution **[*431]** of "any disputes under [the Texas Settlement]" to this Court, and enumerates specifically the examples of "any claims for breach or enforcement" as being appropriate for resolution by this Court. *Id.* The Motions to Enforce are literally "claims for . . . enforcement" of the Texas Settlement, and are predicated on

[23] Reynolds' representations to the Mississippi Court about PwC's role are relevant to the Texas Settlement because PwC was engaged with a single engagement letter for all four Previously Settled States, and because each PSS Agreement reflects the same allocation of responsibility between the courts and the accountants. *PwC Engagement Letter*, Dkt. No. 2357-5. Reynolds' description of PwC's role with respect to the Mississippi Settlement is accordingly informative of PwC's role with respect to the Texas Settlement, because PwC plays the same accounting role for both Mississippi and Texas under the terms of the engagement letter and the two respective states' settlement agreements.

allegations of "breach" of the Texas Settlement. *See id.* The Motions to Enforce thus fall within the broad assignment of "any disputes" to this Court for **[**77]** exclusive resolution.

Further, § 8's finality provision does not apply to this dispute because § 8 limits its applicability to payment allocation disputes "between or among Settling Defendants." *See id.* § 8. The finality provision in § 8 arises in a specific context within the Texas Settlement, which suggests that it does not apply to motions to enforce based on allegations of breach. As noted above, the Texas Settlement provides that Texas receives approximately the same amount of money each year. The relative allocation of payments between or among settling defendants, however, is adjusted each year in view of the relative profitability of those defendants, as well as the relative volume of sales from those defendants, compared to the "base year" profitability and cigarette volume set out in the Texas Settlement.[24] Depending on how profitable (or unprofitable) a settling defendant is—or how much (or little) it sells—both its payment obligations and the payment obligations of the other settling defendants may change significantly. Accordingly, the settling defendants may dispute—between or among themselves—the relative allocation of payments, as an accounting matter. That dispute is then submitted **[**78]** to an accounting firm—PwC—whose decision is final.

This context makes clear that the finality mechanism is not applicable to enforcement actions predicated on breach of contract theories. The finality mechanism is *only* applicable to those decisions made by PwC, who in turn *only* takes up that particular class of dispute—accounting disputes over relative allocation of payment.[25] However, the finality mechanism in § 8 is not designed to divest the Court of jurisdiction over legal disputes relating to the allocation of liability under the Texas Settlement.

In sum, the Court concludes that § 8 does not bar this Court's review of the pending Motions to Enforce because § 8 is addressed to a different type of dispute (accounting disputes over relative Market Share) between a different class of parties (settling defendants). Since this dispute involves Texas, and a legal question of enforcement predicated on allegations of breach, the Court finds that the Texas Settlement expressly preserves this Court's ability to hear this dispute. Thus, the Texas Settlement does not prevent this Court from evaluating the Motions to Enforce.

III. Delegation Under Texas Common Law and Breach of Contract

Both the Minnesota **[**79]** Court and the Florida Court found that Reynolds continued to be liable under the common law doctrine **[*432]** that obligations under a contract cannot be destroyed by an assignment of that contract or its subject matter. Both courts found that because Reynolds undertook an obligation to make payments on the Acquired Brands, that obligation continued even after the sale of the Acquired Brands. As explained below, the Texas Supreme Court has announced an analogous doctrine, and that doctrine applies with equal force to Reynolds' conduct in this case. Given that this was the primary basis of decision in both the Florida Court and the Minnesota Court, the Court addresses this issue first.

A. Contentions of the Parties

Texas argues that Reynolds remains bound to the obligations it assumed under the Texas Settlement, including the obligation to make payments on sales of the Acquired Brands. ***HN19***[] Texas law recognizes that an assignment

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[24] The Texas Settlement establishes certain preset values from the year 1997 as the "base year" for reference and comparison during each year annually thereafter. The sales of the Acquired Brands remain included in the base year for Reynolds.

[25] This does not mean, however, that PwC is responsible for determining the legal issue bifurcated by the Court, which goes to whether—as a legal matter—the Acquired Brands remain proper for inclusion in the reference base year of 1997, if liability for those brands is assigned to Imperial. Though more closely related to the role PwC, that issue too is an issue for the Court, and turns on an interpretation of the Texas Settlement.

does not relieve a party of its obligations under a contract. *Texas Motion to Enforce*, Dkt. No. 2214 at 8. An assigning party "remains liable unless expressly or impliedly released by the other party to a contract." *Id.*

Texas directs the Court's attention to the Texas Supreme **[**80]** Court's decision in *Seagull Energy E&P, Inc. v. Eland Energy, Inc., 207 S.W.3d 342, 346-47 (Tex. 2006)*, and argues that Reynolds remains liable under the Texas Settlement based on a straightforward application of *Seagull*. In exchange for a release from potentially overwhelming liability, Reynolds knowingly undertook the obligation to make payments on the Acquired Brands, as well as its other cigarette brands, when it signed the Texas Settlement. To eliminate those obligations, Texas argues that it "would have to assent to Reynolds no longer being liable under the Texas Settlement." *Id.* at 9. However, Reynolds may not unilaterally "escape its obligations," under the Texas Settlement by virtue of its assignment of the Acquired Brands. *Id.* at 8 (quoting *Seagull, 207 S.W.3d at 346-47*). Further, Texas argues, the Texas Settlement evinces an intent that any potential assignments would not defeat any party's rights, by providing that it "shall be binding upon all Settling Defendants and their successors and assigns in the manner expressly provided for herein." *Id.* at 12 (citing *Texas Settlement*, Dkt. No. 2222-1 at 4 § 2).

The Court notes that the Texas Settlement also imposes a variety of non-monetary restrictions, including limiting advertising to children and certain lobbying activities, which would also be nullified under **[**81]** Reynolds' approach. *Id.* at 9. Indeed, when the Court asked if Imperial was bound by the Texas Settlement's advertising-to-children and lobbying restrictions, at least with respect to the Acquired Brands, Reynolds said ***no***. *Hearing Tr.*, Dkt. No. 2354 at 126:25-128:10.

Reynolds disagrees with Texas' contention and argues that this doctrine only applies when a party assigns the entire contract, or an obligation under the contract. In Reynolds' view, it did not assign any *obligation* to pay for the Acquired Brands—it merely sold *assets*, which Reynolds says were effectively unencumbered. According to Reynolds, it had an obligation to make Texas Settlement payments for the Acquired Brands only ***before*** they were acquired by Imperial, but such obligation as of Imperial's acquisition ceased pursuant to the Market Share provision of the Texas Settlement.[26]

[*433] In response, PMUSA supports the position taken by Texas, saying that "[i]t is hornbook law in Texas that an asset purchase does not extinguish any of the underlying obligations associated with those assets." *PMUSA Motion to Enforce*, Dkt. No. 2222 at 6 (citing *Seagull, 207 S.W.3d at 344*). PMUSA additionally cites a treatise which has been repeatedly relied upon by the **[**82]** Texas Supreme Court for the proposition that "[a]lthough a sale of assets may allow an injured plaintiff to proceed against the successor corporation, it does not vitiate the original company's liability." *Id.* at 7 (citing 15 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 7123 (perm. ed., rev. vol. 2017)).

PMUSA also argues that its position is consistent with the explicit purposes of the Texas Settlement. First, the Texas Settlement expressly provides that the obligations contained therein run "in perpetuity" and are intended to be made binding on "successors and assigns." *Id.* at 8. PMUSA contends that these terms, when read together, reveal contractual purposes that are discordant with releasing Reynolds from its obligations. *Id.*

Second, the reimbursement framework created by the Texas Settlement would be undermined if Reynolds' assignment of the Acquired Brands extinguished its obligation to make payments thereupon. Under the Texas

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[26] Reynolds has gone to great lengths to dispute this characterization, claiming that its argument is not that the obligation to pay disappears, but rather that Reynolds never had an obligation to pay on the Acquired Brands in the first place—its obligations were limited to cigarettes it sold, pursuant to the Market Share provision, and since it no longer sells the Acquired Brands, its obligation no longer extends to those cigarettes. *See Hearing Tr.*, Dkt. No. 2354 at 42:6-10 ("I'd like to frame our argument thusly, which is that Reynolds does not claim that any obligation has been extinguished but rather that liability is calculated on brands -- on cigarettes sold by Reynolds, not brands previously owned by Reynolds."). The Court recognizes why Reynolds seeks to frame its argument in that manner, but concludes that such framing obscures the crux of the issue: according to Reynolds, it was obligated to pay for the Acquired Brands before the assignment but was not obligated to pay after the assignment. In every sense of the term, Reynolds asks the Court to hold that the obligation to pay for the Acquired Brands is extinguished by means of Reynolds' assignment to Imperial. The Court declines to so hold.

Settlement, each year's payment is "in settlement of all of the State of Texas's claims for damages incurred by the State in the year of payment or earlier years." *Id.* at 9 (citing *1998 Amdt.*, Dkt. No. 2222-2 at 7 § 4).

The Texas Settlement includes **[**83]** reimbursement for "earlier years" as part of each year's payment because of the continuous and inseverable nature of the injuries that can result from use of tobacco products. *See id.* As an example: imagine a smoker that started smoking Salem cigarettes on the day after the Texas Settlement went into effect in 1998, and stopped smoking altogether on the day before the APA was consummated in 2015. Then, consider that in 2016, this particular smoker developed lung cancer that was indisputably caused by the previous years of smoking Salem cigarettes while Salem was owned by Reynolds. Under Defendants' theory of the Texas Settlement, Texas would be owed no reimbursement because the smoker's diagnosis (and medical treatment) happened ***after*** the Acquired Brands were assigned to Imperial. That result is simply irreconcilable with the text and business purposes of the Texas Settlement.

PMUSA also argues such result would be unreasonable, inequitable, and oppressive because it "would allow [Reynolds] to reap an immediate profit" of $7,000,000,000.00 "without ensuring that [Texas] receives the corresponding payments that [it] bargained for" in the Texas Settlement. *PMUSA Motion to Enforce*, Dkt. **[**84]** No. 2222 at 10. To allow such asymmetry would "nullify the parties' intent and the contract's purpose in violation of basic canons of Texas contract law." *Id.* at **[*434]** 10-11 (citing *Frost Nat'l Bank v. L & F Distribs., Ltd., 165 S.W.3d 310, 312-13 (Tex. 2005))*. Further, PMUSA argues that adopting Defendants' position "presents a road map for the complete unraveling of the [Texas Settlement]. If the brand transfer here is permitted to extinguish the obligations on the Acquired Brands, nothing prevents the remaining Settling Defendants from repeating this maneuver with their own brands — leaving Texas empty-handed." *Id.* at 9.

With respect to Reynolds' Market Share argument, PMUSA responds in two ways. First, PMUSA argues that the Market Share provision deals with the method for determining the ***number*** of cigarettes sold, rather than allocating ***liability*** for cigarettes that have been assigned. Relying on the maxim that the specific controls over the general, PMUSA notes that the Texas Settlement contains a specific clause that addresses whether liability can be eliminated by an assignment—the successors and assigns clause. As the Texas Supreme Court concluded on similar facts in *Seagull*, an interpretation such as Reynolds'"reads far too much" into the Market Share provision.

Second, PMUSA **[**85]** notes that Reynolds has taken inconsistent positions on whether the Market Share provision embraces the Acquired Brands. At present, Reynolds ***includes*** the Acquired Brands in the Market Share calculation for payments made to Texas' Private Counsel. At the same time, Reynolds ***omits*** the Acquired Brands from its Market Share for the payments it makes to Texas. As noted above, the Texas Settlement provides that both Texas ***and*** its Private Counsel would receive payments that are calculated based on the same definition of Market Share for each Settling Defendant.

The Court pressed both Imperial and Reynolds on this point at the hearing it held. For its part, Imperial's counsel offered no explanation or defense for Reynolds' conduct, and instead suggested that the Court direct the query to Reynolds.

> THE COURT: If Reynolds did not include those Acquired Brands . . . in the calculation of market share for purposes of paying under the Texas Fee Payment Agreement, would [Imperial] otherwise owe payments under the Texas Fee Payment Agreement based on those Acquired Brands?
>
> COUNSEL FOR IMPERIAL: No, Your Honor, because [Imperial] is not a party either to the Texas settlement or to the related fee payment **[**86]** agreement.
>
> THE COURT: ***So are you telling me that Reynolds is paying gratuitously*** to the lawyers?
>
> COUNSEL FOR IMPERIAL: ***I don't know why Reynolds — that's a question for Reynolds's counsel***."

Hearing Tr., Dkt. No. 2354 at 131:19-22 (emphasis added). When the Court asked Reynolds, it offered two explanations: the payments to Texas' Private Counsel were less expensive in view of their limited duration, so

Reynolds was willing to make such payments, and the rights maintained by Texas' Private Counsel had "accrued" previously. *See id.* at 123:13-124:19. Neither is persuasive.[27]

[*435] It is hard for this Court not to speculate that perhaps Reynolds was more concerned about incurring the wrath of Texas' Private Counsel than the wrath of the Texas Attorney General. In any event, and all speculation aside, Reynolds' conduct is inconsistent and at the same time, quite telling. What matters is ***what*** Reynolds has done, rather than any subjective rationale as to ***why*** Reynolds has done it.

B. Legal Standard

The Texas Supreme Court addressed the scope of assignor liability in *Seagull Energy E&P, Inc. v. Eland Energy, Inc., 207 S.W.3d 342 (Tex. 2006)*. *Seagull* involved a contract governing the development of minerals contained beneath two offshore oil and gas blocks. *Id. at 344*. The relevant contract—an **[**87]** operating agreement—provided that one of the lessees, Seagull Energy E&P ("Seagull"), would develop the minerals contained beneath the offshore blocks on behalf of all other parties who had interests in the leases covering the blocks. *Id.*

"In 1994, Eland Energy, Inc. purchased an interest in both leases, acquiring a 1.09375% interest . . . and a 9.41719% interest" respectively in the two offshore blocks. *Id.* "As the new owner, Eland expressly assumed certain rights and responsibilities under two offshore operating agreements, each applicable to its respective block." *Id.* One such obligation applicable to both blocks "provided that Eland and the other lessees were to share the cost of operations in proportion to their respective interests, and that Seagull, as operator," would develop "the minerals and collect the operating costs from the other lessees." *Id.*

Two years later, in 1996, Eland sold its interests in the leases to a third party, and assigned its rights and obligations under the operating agreements to that third party. *Id.* After the third party "failed to reimburse Seagull for its share of operating costs," Seagull brought suit against Eland. *Id.*

Both Eland and Seagull moved **[**88]** for summary judgment. *Id.* Much like Reynolds in the instant case, Eland argued that it was not obligated to pay for post-1996 operating costs because it did not own any interest in the leases during that time period. *Id. at 345*. The contract at issue defined "Participating Interest" as "the respective percentage of participation of each Party . . . based on ownership in the Lease," and required "each Party" to "reimburse [Seagull] in proportion to its Participating Interest."[28] *Id.* Since it had no ownership in the leases after 1996, Eland argued that the "Participating Interest" definition eliminated its liability. *Id.* In contrast, Seagull argued that "Texas contract law generally provides that an assignor's contractual obligations survive assignment unless the contract expressly provides otherwise or the assignor obtains an express release. Because the operating agreements here were silent on the subject and [Seagull] did not expressly release Eland," Seagull claimed that Eland remained liable. *Id.* Eland then argued that the definition of Participating Interest, combined with the provision allocating payments according to Participating Interest, made that general rule inapplicable. *Id.* The trial **[**89]** court agreed with Seagull, and granted summary judgment. *Id. at 344*.

The court of appeals reversed and "concluded that Eland had no continuing liability under the operating agreements after the assignment of its working interest because the agreements did not expressly provide for such a continuing obligation." *Id. at 344-45*. That court agreed that **[*436]** Eland's "obligation to pay expenses under the operating

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[27] With respect to the former rationale, Reynolds' willingness to meet its less expensive obligations—but not its costlier ones—is no basis to avoid liability. The latter rationale is similarly unavailing, both as a factual and legal matter. Texas' rights (and its performance under the Texas Settlement) had "accrued" with the execution of the Texas Settlement. By the covenants in the Texas Settlement, Texas then and thereby released the settling defendants from liability, in perpetuity. That release *was* Texas' performance, and its rights vested contemporaneously thereto: Texas then became entitled to payments as set out in the Texas Settlement. If the rights of Texas' Private Counsel had already accrued, then so too had the rights of Texas.

[28] Eland's argument with respect to "Participating Interest" is much like Reynolds' argument concerning the Market Share calculations called for in the Texas Settlement.

agreement terminated on the date it sold its interests because the agreement imposed liability for expenses only upon ***current*** working interest owners." *Id. at 345* (emphasis in original).

The Texas Supreme Court granted Seagull's petition for review, and concluded that Eland remained liable. In the court's view, the dispute turned "on whether the parties to the operating agreement expressly agreed upon the consequences that should follow an assignment of one's interest to a third party." *Id.* As an initial matter, the court rejected Eland's argument based on the Participating Interest term and the related payment obligation. While acknowledging both terms, the court concluded that "Eland . . . reads far too much into these provisions. Nowhere do they mention the subject of release or the consequences which are to follow **[**90]** the assignment of a working interest." *Id. at 346*. Indeed, these provisions governed the calculation of the ***amount*** of payment due under the contract—not the allocation of liability for that amount. *Id.* "Thus, we disagree with Eland that the parties expressly agreed that an assignment of a working interest was to operate as a novation, effectively ending any further obligation of the assignor under the operating agreement." *Id.* "The operating agreement simply does not explain the consequences of an assignment of a working interest to a third party." *Id.*

Given that contract's silence on the consequences of an assignment, the Texas Supreme Court looked to the common law for a rule of construction. It concluded that "[g]enerally speaking, ***HN20***[] a party cannot escape its obligations under a contract merely by assigning the contract to a third party." *Id. at 346-47*. "Thus, as a general rule, a party who assigns its contractual rights and duties to a third party remains liable unless expressly or impliedly released by the other party to the contract." *Id. at 347*. Applying this common law rule, the court concluded that Eland remained liable. *Id.* "Because the operating agreement did not expressly provide that Eland's obligations **[**91]** under the operating agreement should terminate upon assignment and Seagull did not expressly release Eland following the assignment of its working interest, we reverse the court of appeals' judgment and render judgment for Seagull as the trial court did." *Id.*

HN21[] In summary, "[u]nder Texas contract law, an assignor's contractual obligations generally 'survive assignment unless the contract expressly provides otherwise or the assignor obtains an express release.'" *Republic Petroleum LLC v. Dynamic Offshore Res. NS LLC, 474 S.W.3d 424, 430 (Tex. App.—Houston [1st Dist.] 2015, pet. denied)* (quoting *Seagull, 207 S.W.3d at 345*).[29]

[*437] C. Reynolds Improperly Narrows *Seagull*

Reynolds contends that *Seagull* only applies to transfers of contracts, and that it does not apply to transfer of the assets that form the subject matter of a contract. Reynolds argues that *Seagull* is an inadequate basis to find Reynolds liable. The Court rejects this argument.

First, Reynolds does not cite a single case or other authority that has narrowed *Seagull* in the manner it proposes. Reynolds has not identified any case distinguishing *Seagull* from applying to asset transfers rather than assignment of contract rights. Likewise, this Court has found none.

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[29] In addition to its general rule, which the Court relies upon, *Seagull* also recognizes that "[***HN22***[] e]ven when the contract does not expressly provide for the consequences resulting from the assignment of one's interest, the contract's subject or other circumstances may indicate that obligations were not intended to survive assignment." *Seagull, 207 S.W.3d at 347*. Like the defendant in *Seagull*, Reynolds does not argue here that the Texas Settlement's "subject or other circumstances" imply that it should be released of its obligations after assignment. Just as the *Seagull* defendant could have paid money to fulfill its obligations under the applicable operating agreement after it assigned its leasehold interests, Reynolds could pay money after its assignment of the Acquired Brands, in order to fulfill its obligations to Texas. There is nothing about the subject or circumstances of the Texas Settlement that implies, in any way, that Reynolds should be released from obligations upon the transfer of the Acquired Brands. In this regard, and otherwise, *Seagull* is on all fours with the instant case. Without an express release from Texas—and there is none—the assignment by Reynolds does not allow it to escape its existing obligations under the Texas Settlement.

Second, Reynolds' argument is inconsistent with the reasoning in *Seagull*. *Seagull* provides a rule **[**92]** applicable when parties do not expressly specify the consequences of an assignment. Nothing in *Seagull* turns on the nature of the assignment—either assignment of the payment obligations under the operating agreement, or assignment of the underlying working interests in the leases at issue. Instead, *Seagull* provides a framework for determining the consequences of an assignment when a contract does not otherwise expressly provide for the consequences of such assignment, and there is no release given by the obligee. Accordingly, the rule and analysis set out in *Seagull* are directly on point here.

Third, *Seagull* reflects a general rule—continuing liability—that may be informed by the relevant contract's "subject" or "other circumstances." Thus, even if the general rule announced by *Seagull* did not squarely govern this case—and the Court finds that it does—the Court would apply *Seagull* to this contract's "subject" or "other circumstances" pursuant to the ordinary rules of contractual interpretation in Texas. These rules direct that the Court be informed by the text, structure, and business purposes of the Texas Settlement, which reflect the parties' expressed intent. The text, structure, **[**93]** and business purposes support the conclusion that Reynolds' liability continues despite its assignment of the Acquired Brands. *See infra* Section III.D.2. Thus, even if the default rule announced in *Seagull* would not apply to *all* asset sales, it certainly applies to *this* asset sale, in light of the ordinary application of contract law to the Texas Settlement.

Fourth, the guidance of the Fifth Circuit's decision in *Texas Industries* is contrary to Reynolds' position. *See infra* Section III.D.2.b.iii (applying *Tex. Indus. v. Brown, 218 F.2d 510, 512 (5th Cir. 1955))*. As noted above, *Texas Industries* explained that in addition to "an assignment of the contract," "neither a sale nor lease" of the assets at issue would "effectuate a release of [the original contracting party's] obligations under the contract." *Tex. Indus., 218 F.2d at 512*. The rule set out in *Texas Industries* is closely akin to the rule set out in *Seagull*—*i.e.*, ***HN23***[] absent a specific release, an assignment (of either a contract or an asset) will not obviate a party's contractual obligations. *See also* *Republic Petroleum, 474 S.W.3d at 430* ("Under Texas contract law, an assignor's contractual obligations generally 'survive assignment unless the contract expressly provides otherwise or the assignor obtains an express release.'" (quoting *Seagull, 207 S.W.3d at 345*)).

The rule in **[**94]** *Texas Industries* is also consistent with the broader common law rule, which is relied upon in both the decisions of the Minnesota Court and the Florida Court, as well as in the cases cited by those courts. In summarizing the common law on the subject, Williston on Contracts explains that the basis for the doctrine "is sufficiently obvious when attention is called to it, for otherwise obligors would find an easy practical way of escaping their **[*438]** obligations: . . . obligors could free themselves of their obligations by the simple expedient of assigning them . . . ." 29 Samuel Williston & Richard A. Lord, *Williston on Contracts* § 74:27 (4th ed.). The Fletcher Cyclopedia, a leading treatise on the law of corporations,[30] also confirms that Reynolds remains liable under the common law rule. The treatise provides that:

> Although a sale of assets may allow an injured plaintiff to proceed against the successor corporation, it does not vitiate the original company's liability. The right of the injured party to elect to proceed against the [original] corporation, the successor corporation, or both cannot be altered per se by the corporations, although the corporations can regulate how such liability will **[**95]** be allocated among themselves.

Fletcher et al., *supra*, § 7123; *accord* *Golden State Bottling Co. v. N.L.R.B., 414 U.S. 168, 182, 94 S. Ct. 414, 38 L. Ed. 2d 388 (1973)* (citing § 7123 as setting forth "the general rule of corporate liability"). Reynolds seeks to achieve precisely the result prohibited by this doctrine: it attempts to "free [itself] of [its] obligations" under the Texas Settlement "by the simple expedient of assigning" the Acquired Brands. Williston & Lord, *supra*, § 74:27.

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[30] For over a century, the Supreme Court of Texas, the Fifth Circuit Court of Appeals, and the United States Supreme Court have all repeatedly cited Fletcher's Cyclopedia as an authoritative treatise on the law of corporations and corporate liability. The Texas Supreme Court has even disapproved of Texas intermediate appellate courts on the basis of inconsistency with Fletcher's Cyclopedia. *See* *Texam Oil Corp. v. Poynor, 436 S.W.2d 129, 130 & n.2 (Tex. 1968)* (following "[t]he rule which Fletcher says is 'the better and majority rule,'" and accordingly disapproving a decision from a Texas intermediate appellate court).

Accordingly, Reynolds may not "vitiate" its "liability" to Texas through "a sale of assets." Fletcher et al, *supra*, § 7123.

D. Text and Context Demonstrate Reynolds Remains Liable

HN24[] In all contract cases, the task of the court "is to ascertain the parties' true intentions as expressed in the language they chose." *Plains Expl. & Prod. Co. v. Torch Energy Advisors Inc., 473 S.W.3d 296, 305 (Tex. 2015)* (citing *Moayedi v. Interstate 35/Chisam Rd., L.P., 438 S.W.3d 1, 7 (Tex. 2014))*. Since parties may make drafting choices in light of the circumstances under which a contract is reached, Texas courts "'construe contracts from a utilitarian standpoint bearing in mind the particular business activity sought to be served.'" *Apache Deepwater, LLC v. McDaniel Partners, Ltd., 485 S.W.3d 900, 906-07 (Tex. 2016)* (quoting *Lenape Res. Corp. v. Tenn. Gas Pipeline Co., 925 S.W.2d 565, 574 (Tex. 1996))*. To do so, Texas courts "examine the entire agreement and seek to harmonize and give effect to all provisions so that none will be meaningless." *Nassar v. Liberty Mut. Fire Ins. Co., 508 S.W.3d 254, 258 (Tex. 2017)* (quoting *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London, 327 S.W.3d 118, 126 (Tex. 2010))*.

As noted above, *Seagull* furnishes a rule of contract construction where the contract is silent on the result of an assignment. The Court applies that rule **[**96]** to determine that Reynolds is liable. However, the Court also concludes that even if the rule announced in *Seagull* does not apply to all asset transfers, there are case-specific justifications—based on the ordinary rules of contract interpretation—for applying that rule to the Texas Settlement. Nothing in *Seagull* suggests that it intends to displace the ordinary application of contract law to determine liability based on an assignment. Applying Texas contract law, the Court finds that the text, structure, and **[*439]** "particular business activit[ies] sought to be served" by the Texas Settlement uniformly demonstrate that Reynolds remains liable for the Acquired Brands.

1. Texas Did Not Consent

All parties agree that Texas has not consented, expressly or otherwise, to release Reynolds from its liability under the Texas Settlement.[31] Accordingly, the Court next turns to whether the context or subject matter of the Texas Settlement supports a finding of continued liability for Reynolds.

2. The Text and Business Purposes of the Texas Settlement Demonstrate That Reynolds Remains Liable

Both the text and context of the Texas Settlement demonstrate that Reynolds remains liable **[**97]** for payments under the Texas Settlement. In the following Sections, the Court will first examine each business purpose that is expressly set out in the Texas Settlement, and then will examine specific textual indicators which confirm that Reynolds remains liable for the Acquired Brands.

a. Every Business Purpose of the Texas Settlement Suggests Liability Continues

Since parties negotiate specific terms in light of a specific business context, Texas courts construe contracts from "a utilitarian standpoint" while "bearing in mind the particular business activity sought to be served." *Apache Deepwater, 485 S.W.3d at 906-07*. Accordingly, in construing the Texas Settlement, the Court now turns to the business purposes which the Texas Settlement sought to serve.

[31] The Court does not interpret Reynolds' and Imperial's submission of parol evidence related to the Texas Comptroller to suggest that Texas consented to release Reynolds from its obligations under the Texas Settlement. However, to the extent Reynolds and Imperial ask the Court to draw that inference as a factual matter, the Court finds that the relevant parol evidence does not suggest that Texas consented to release Reynolds. *See infra* Section III.D.2.d. Further, the actions of the Texas Comptroller's employees cannot effectuate a release under the Texas Settlement, because the Texas Settlement provides that any waiver of rights must be made in a writing. *See Texas Settlement*, Dkt. No. 2222-1 at 24 § 23.

i. Finality

The language of the Texas Settlement reflects finality as a business purpose of the settlement agreement.[32] ***HN25***[] Texas law recognizes that the business purpose of a settlement agreement is to resolve disputes with finality. In Texas, a settlement agreement is meant to forever settle the dispute at hand, rather than merely deferring the dispute to a later date.

A recent case illustrates how the Fifth Circuit applies this principle. *In re Pirani, 824 F.3d 483 (5th Cir. 2016)*. The matter before the Fifth Circuit **[**98]** in *In re Pirani* concerned interpretation of a settlement agreement under Texas law. *Id. at 488-89*. A hotel developer, as a debtor in a bankruptcy proceeding, alleged breach of a loan agreement against a number of investors in a hotel development deal that subsequently fell apart. *Id. at 489*. In response, the investors alleged that a settlement executed by the hotel developer released them from any liability under the loan agreement. *Id. at 490*. The hotel developer disputed that the settlement agreement barred his individual claims, because the **[*440]** settlement only included a release from "the Company." *Id. at 492-93*. Accordingly, the developer argued that only his corporate entity was bound by the settlement. *Id.* Since the developer asserted that he was not personally bound to the settlement agreement, he asserted that his personal breach claims in the bankruptcy court could proceed. *Id.*

The phrase "the Company" was defined in multiple ways throughout the settlement agreement. *Id. at 494-95*. The settlement included a definition in the opening paragraph which included the hotel developer in his individual capacity, and a definition in a later provision—§ 3.1(a)—that only included the developer's corporate entity. *Id.* Since the relevant release language was **[**99]** contained in nearby § 3.2, the developer contended that specific-over-general canon of Texas contract interpretation favored using the narrow § 3.1(a) definition of "the Company" rather than the global definition in the opening paragraph. *Id.* The investors urged that the definition in § 3.1(a) applied only to the subsections ***within*** that section—that is, §§ 3.1(a)-(d)—and that the global definition applied to the remainder of the contract, including the release language in § 3.2. *Id.*

The Fifth Circuit agreed with the investors, and applied the broader definition of "the Company" to hold that the settlement agreement bound and barred the hotel developer's individual claims. *Id. at 495-96*. While both sides had advanced plausible arguments for each definition of "the Company," the *Pirani* court selected the construction that effectuated the goal of finality inherent in the settlement agreement. *Id.* Accordingly, this holding instructs courts to prefer constructions which effectuate finality interests over constructions that vitiate finality. *Id.* The Fifth Circuit explained:

> The overall context of the agreement also supports this result. ***HN26***[] Under Texas law, courts are expressly permitted to take into account the "objectively determinable" "facts **[**100]** and circumstances surrounding [the] contract" that "give context to the parties' transaction." *Kachina Pipeline, 471 S.W.3d at 450* (citation omitted). ***Here, the most critical relevant circumstance is that the contract is a settlement agreement, drafted and entered into for the purpose of settling claims between two sides to a dispute***. Those two sides are defined in the opening paragraph, with "the Company" encompassing all parties on the [hotel developer's] side of the dispute. ***In the context of a settlement agreement, section 3.2 makes the most sense if the promise to secure releases for [the investors] is binding all of the parties on the other side of the dispute***.

Id. (emphasis added).

Consistent with *Pirani*, the Texas Settlement evinces the purpose of finally settling disputes related to the sale of tobacco products, including the Acquired Brands. As with the settlement in *Pirani*, the Texas Settlement was

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[32] To avoid duplication, the Court sets out its analysis of specific textual indicators in the Texas Settlement below, in Section III.D.2.b. For the reasons set out therein, the following textual provisions specifically support the Court's conclusion that finality was an intended business purpose of the Texas Settlement: Section III.D.2.b.ii (discussing payments-in-perpetuity terms); Section III.D.2.b.iii (discussing successors-and-assigns term); Section III.D.2.b.v (discussing prior written consent term).

"drafted and entered into for the purpose of settling claims between two sides to a dispute," and "makes the most sense" if its obligations are "binding on all of the parties on the other side of the dispute," including their successors and assigns—as expressly provided for in the Texas Settlement. *See id.* Accordingly, finding **[**101]** that liability for the Acquired Brands is not extinguished by Reynolds' assignment is consistent with the finality interests manifest in the Texas Settlement.

By contrast, Defendants' position is inconsistent with finality. Both Imperial and Reynolds argue that if Texas wants to receive any payments for the harm caused by public consumption of the Acquired Brands, it must file a new suit and relitigate **[*441]** with Imperial the claims it previously settled with Reynolds.

Defendants' position would not only vitiate the finality of the Texas Settlement with respect to the Acquired Brands, but would do the same to the entire agreement. At the hearing on the instant Motions to Enforce, PMUSA all-but-admitted that it would follow Reynolds' example if the Court permitted Reynolds to escape its obligations under the Texas Settlement by transferring assets. "If the position of Reynolds and [Imperial] were adopted . . . it would be a roadmap—in fact, it would almost be ***imperative*** for the settling Defendants to escape their liability under the settlement agreement" by following the model established by Reynolds. *Hearing Tr.*, Dkt. No. 2354 at 27:3-13 (emphasis added). Accordingly, PMUSA argued that permitting **[**102]** defendants to unilaterally escape their liability would "destroy" the Texas Settlement. *Id.*

The Court does not view PMUSA's statement as a threat. Instead, the Court simply concludes that PMUSA provided a candid description of how it likely would proceed, if Reynolds' example was vindicated. That scenario is not only possible but is likely, given that PMUSA—and Reynolds for that matter—could likely retain all or virtually all of the profit from those cigarettes, while completely avoiding liability therefor.[33]

There is no textual or contextual basis to conclude that the parties to the Texas Settlement intended to permit such a result. As noted above, on the eve of a trial, **[*442]** the parties created a settlement that imposed payments in perpetuity on every major tobacco manufacturer in the nation. It would be unreasonable for a comprehensive settlement to be read as only partial, incomplete, and terminable at the obligated Defendants' unilateral option.

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[33] Reynolds' interpretation would permit settling defendants to completely avoid all existing obligations under the Texas Settlement while retaining all, or virtually all, of the profit from those cigarette sales. Consider the following scenario: if this Court adopts Reynolds' theory of the Texas Settlement, Reynolds (or PMUSA for that matter) could create a distinct corporate entity ("ReynoldsSub"). Reynolds could assign ownership of all of its cigarettes to ReynoldsSub, while maintaining its status as the sole shareholder in ReynoldsSub. As the sole shareholder, Reynolds would maintain complete control over the issuance of dividends by ReynoldsSub, permitting Reynolds to reap the profit from the sales of its cigarettes. Further, its status as sole shareholder would leave Reynolds in control of the organization and conduct of ReynoldsSub, despite the observation of corporate formalities between the two.

Under Reynolds' theory, ReynoldsSub would not be an "assign" within the meaning of the Texas Settlement, since it only possesses Reynolds' brands, cigarettes, and intellectual property—not any of Reynolds' rights or obligations under the Texas Settlement. If the Court adopted Reynolds' construction of the Texas Settlement, liability for all of those cigarettes simply goes up in smoke, since the Market Share provision applies only to direct sales by Reynolds, and the cigarettes would be sold by ReynoldsSub. If Texas (or Minnesota, Mississippi, and Florida) wished to collect repayment for the damage caused by the sale of those tobacco products sold by ReynoldsSub, the several states would have to file an entirely new lawsuit.

This scenario is neither idle nor hypothetical. As noted above, PMUSA candidly informed the Court that if the Court creates a legitimate path by which it may avoid its Texas Settlement obligations, it will do so. In light of its duties to its shareholders, why wouldn't it? The Texas Settlement imposes sizeable financial obligations on the settling defendants, and Texas would face serious practical obstacles if it was forced to file a new lawsuit and redo the work of the Texas Settlement. *See supra* Section III.D.2.b.ii (describing "problems of proof" related to causation and damages that would arise out of the existence of the Texas Settlement). Forcing Texas into a redo-scenario easily leaves the settling defendants far better off than they are under the yoke of the Texas Settlement. This scenario, or a comparable scenario organized to the same end, is a natural result of adopting the construction urged by Reynolds. To permit such a scenario is to end the Texas Settlement. The Court finds that such a result would be oppressive, inequitable, and unreasonable. According, application of that canon of construction strongly favors continuing liability under the Texas Settlement on this basis.

Defendants' construction of the Texas Settlement is incompatible with the purpose of finality. The Court concludes that the finality-related business purpose and context of the Texas Settlement support a finding that the parties intended **[**103]** liability for Reynolds to continue after assignment of the Acquired Brands.

ii. Reimbursement

a) The Texas Settlement contemplates proportional reimbursement for Texas' healthcare expenditures, including past cigarette consumption

The Texas Settlement sets forth a reimbursement framework that is consistent with Reynolds remaining liable. Specifically, the Texas Settlement includes a separate provision addressing the purpose of the "payments to be made by Settling Defendants." *1998 Amdt.*, Dkt. No. 2222-2 at 7 § 4. Section 4 of the 1998 Amendment provides:

> The payments to be made by Settling Defendants under this Stipulation of Amendment during the year 1998 are in settlement of the State's claims for reimbursement for public health expenditures of the State of Texas incurred in the year of payment or earlier years related to the subject matter of this Action, including without limitation expenditures made by the State's Employees' Health Insurance Program and Charity Care programs. ***All other payments made by Settling Defendants*** pursuant to this Stipulation of Amendment ***are in settlement of all of the State of Texas's claims for damages incurred by the State in the year of payment or earlier years related to the subject matter of this Action, including claims for reimbursement [**104] of Medicaid expenditures*** and punitive damages, except that no part of any payment under the Settlement Agreement or this Stipulation of Amendment is made in settlement of an actual or potential liability for a fine, penalty (civil or criminal) or enhanced damages or as the cost of a tangible or intangible asset or other future benefit.

Id. (emphasis added); *accord* *Texas v. Am. Tobacco Co., 463 F.3d 399, 401 (5th Cir. 2006)* ("On March 28, 1996, the State of Texas sued several major tobacco companies ***seeking reimbursement for various smoking-related health care expenditures***.") (emphasis added). This payment framework is necessary because of the various ways in which tobacco-related illnesses manifest themselves. Tobacco-related injuries frequently accrue over a period of years, only presenting after a substantial period of time. This risk remains even after the use of tobacco products stops. *See supra* Section III.A (giving the example of a Salem smoker with a time-lagged injury).

As a result, the Texas Settlement involves a methodology approximating the amount of damage caused by the tobacco products of each settling defendant for each given year. When more Texans smoke a settling defendant's cigarettes (measured by the volume of cigarettes purchased in a given year), **[**105]** the Texas Settlement assigns proportionally greater liability to that defendant for that year. This design is consistent with the perpetual nature of the payment framework set out by the Texas Settlement. Given that no reimbursement structure would guarantee all the funds needed every year to address that year's treatment demands,[34] the perpetual **[*443]** nature of the agreed-upon reimbursement framework ensures that Texas always has the resources—in any given year—to dedicate towards its citizens' medical care.

Texas argues that this reimbursement framework is only coherent if liability continues for the Acquired Brands. At the Court's hearing on the Motions to Enforce, Texas offered the following example to illustrate its point:

> So just as an example, say you have Jane Smith, she starts to smoke Winston cigarettes in 2001. She smokes for 15 years and unfortunately is diagnosed with cancer from her smoking in 2016. Reynolds stopped paying the State of Texas for the Winston brands in 2015. So when Smith gets cancer, the State has to begin making Medicaid payments for Ms. Smith's healthcare. In that situation, the State has not been paid for any of Ms. Smith's healthcare costs because none of the **[**106]** yearly payments were for future harm. And the Texas

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[34] This principle follows from the fact that tobacco-related illnesses may manifest at unpredictable times and in unpredictable ways.

> Settlement Agreement required that perpetual payment so that the State would not be in a position where it had to pay for Smith's medical care without reimbursement for those costs.
>
> . . .
>
> [T]he claim language of the agreement demonstrates that this intent was for a payment to be in perpetuity, because if we aren't paid every year, we won't catch people like Ms. Smith. And, unfortunately, the reality is that lots of people get very sick.

Hearing Tr., Dkt. No. 2354 at 17:20-19:16.

Reynolds counters that this result is acceptable under the Texas Settlement, because the same result would occur if Reynolds simply stopped selling cigarettes at all. In Reynolds' view, since Reynolds could unilaterally *stop selling* the Acquired Brands without breaching the Texas Settlement, it can also *assign* the Acquired Brands without breaching the Texas Settlement.

This argument is misplaced. A scenario where the Acquired Brands were *no longer sold at all*—and thus no longer contribute to the harm of Texas citizens—is very different than a situation where the Acquired Brands continue to be sold in Texas, but by someone other than Reynolds. The Court agrees that **[**107]** the Texas Settlement evinces a mutually-agreed business purpose of providing perpetual reimbursement. That business purpose is only consistent with continuing liability for Reynolds with respect to the Acquired Brands.

In sum, the Court finds that reimbursement is an explicit business purpose of the Texas Settlement, and that such purpose would be frustrated without continuing liability for Reynolds.

b) Texas is not judicially estopped from asserting reimbursement as a purpose of the Texas Settlement

Reynolds advances the argument that Texas is judicially estopped from asserting that the Texas Settlement includes "compensation for past acts" based on positions that Texas took in a separate action before the Texas Supreme Court.

Texas had the opportunity to discuss the Texas Settlement in a constitutional challenge brought against the Tobacco Equity Tax statute pursuant to the Equal and Uniform Clause of the Texas Constitution. *See supra* Section I.D (describing the Tobacco Equity Tax). When such challenge reached the Texas Supreme Court, Texas intervened and defended the law. *Tex. Small Tobacco Coal., 496 S.W.3d at 785*. The challengers—a coalition of smaller tobacco manufacturers—asserted that the Tobacco Equity Tax was unconstitutional because it was not "uniform" in its application. **[**108]** The coalition argued that the Texas Settlement payments were really about ***punishment***, not reimbursement, and so **[*444]** the Texas Settlement was not a valid way to distinguish between classes of manufacturer. Texas asserted that Texas Settlement payments were not ***exclusively*** punitive—even if they were designed, in part, to punish, such payments also included an ongoing reimbursement framework designed to reimburse healthcare costs to Texas. Ultimately, the Texas Supreme Court agreed with Texas and upheld the constitutionality of the Tobacco Equity Tax.

Reynolds' argument fails because the position Texas took in the *Texas Small Tobacco Coalition* case is not inconsistent with its position here. Further, there is no judicial reliance—as is required for judicial estoppel—because the Texas Supreme Court explicitly reached its conclusion without relying on a finding related to the underlying purposes of the Texas Settlement. *Cf. Gabarick v. Laurin Mar. (Am.) Inc., 753 F.3d 550, 553 (5th Cir. 2014)* (requiring judicial reliance). In fact, that Court went to great lengths to make its restraint clear. The Texas Supreme Court expressly refused to determine the purpose of the payments made under the Texas Settlement. *Tex. Small Tobacco Coal., 496 S.W.3d at 788-92* ("[A]s a matter of judicial restraint, we *must* not decide **[**109]** the meaning of those payments today.") (emphasis in original). For these reasons, Reynolds' judicial estoppel argument is of no effect.

b. Taken as a Whole, the Texas Settlement Demonstrates Continuing Liability

HN27[] Contracts must be construed in a manner that will "harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless." *J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003)* (citing *Universal C.I.T. Credit Corp. v. Daniel, 150 Tex. 513, 243 S.W.2d 154, 158 (Tex. 1951))*. "No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument." *Id.* The following provisions, when harmonized rationally, support finding Reynolds liable.

i. No Release Provision

The most directly relevant indicator is the absence of a release provision. In *Seagull*, the contract did not include a provision that expressly released the contracting party from its obligations following an assignment, neither did it include a provision that expressly extended the contracting party's obligations after an assignment. *Seagull, 207 S.W.3d at 345*. As here, the contract was "silent on the subject" of post-assignment liability for the assignor. *Id.*

The *Seagull* court concluded that the absence of an express release provision was sufficient to support continuing **[**110]** liability for the assignor. *Id. at 347*. Specifically, *Seagull* explained that the assignor's liability continued "[b]ecause the operating agreement did not expressly provide that [the assignor's] obligations under the operating agreement should terminate upon assignment and [the injured party] did not expressly release [the assignor] following the assignment of its working interest." *Id.*

Here, no one disputes that the Texas Settlement does not contain any provision that could be construed as a release to be effective upon an assignment of the type Reynolds has made. Reynolds could have negotiated for a "release upon assignment" provision. It did not. Accordingly, as in *Seagull*, the absence of an express release provision is sufficient to find that Reynolds remains liable for the Acquired Brands under the Texas Settlement.

ii. Payments in Perpetuity

The Texas Settlement provides that Settling Defendants shall make Texas **[*445]** Settlement payments in perpetuity. The Texas Settlement provides that each Defendant shall make payments "on December 31, 1999 and annually thereafter on December 31st of each year after 1999." *1998 Amdt.*, Dkt. No. 2222-2 at 11 § 7. The phrase "annually thereafter" is unambiguous.[35] It **[**111]** is unqualified, includes no termination condition, and by its plain text literally encompasses every year after the Texas Settlement is executed.[36]

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[35] As noted above, the Court finds that "annually thereafter" is unambiguous on its face. However, for the purpose of argument, to the extent "annually thereafter" might elsewhere be read as ambiguous, the Court alternatively makes the following factual findings that the phrase "annually thereafter" was understood by the parties to the Texas Settlement as imposing payment obligations in perpetuity.

First, there is a uniform course of performance from the settling defendants which shows that Texas Settlement payments are ongoing. Both Reynolds and PMUSA—the only remaining settling defendants—continue to make Texas Settlement payments for all of their brands (with the obvious exclusion that Reynolds has stopped making payments on the Acquired Brands).

Second, in documents filed with the United States Securities and Exchange Commission, Reynolds documented its understanding that the Texas Settlement "***imposed future payment obligations in perpetuity on RJR Tobacco***, B&W, Lorillard Tobacco and other major U.S. cigarette manufacturers." *Reynolds 2015 Form 10-K*, Dkt. No. 2222-8 at 111 (emphasis added). These statements were made prior to the present litigation, in a context where Reynolds had a legal obligation to make accurate statements. The Court credits them as such.

Those statements are also consistent with the position taken under oath by Reynolds' then-CEO Andrew J. Schindler that payment obligations under the Texas Settlement last "forever." *Schindler Fla. Trial Testimony*, Dkt. No. 2222-9 at 54711:25-54712:4 ("Q. Do Reynolds' obligations stop after 25 years under the MSA and the other four agreements? A. No, they don't. Q. ***How long do they go on***? A. ***Forever***.") (emphasis added). Other Reynolds executives took an identical position under oath. *See, e.g., Orlowsky Fla Trial Testimony*, Dkt. No. 2222-10 at 55899:16-55900:7 ("Q: Let's start with the MSA and other state agreements. . . . Q. Do your financial obligations under those agreements end after 25 years? A. No, they do not. ***They go on***

The interpretation of the Texas Settlement, as presented in this case by Defendants, is irreconcilable with a perpetual payment framework. Reynolds argues, in essence, that it is only liable as long as it produces and sells cigarettes branded under the Acquired Brands. Reynolds seems content to argue that if it were to sell the Acquired Brands for billions of dollars (which it did) Texas has no recourse under the Texas Settlement. This construction contradicts the perpetual payment structure of the Texas Settlement.

Imperial argues that since it disclaims any rights under the Texas Settlement, Texas can simply initiate new litigation against Imperial for the harm caused by the Acquired Brands. The Court rejects this suggestion because it would result in an unreasonable, oppressive, and inequitable construction of the Texas Settlement. *See* *Frost Nat'l Bank, 165 S.W.3d at 313* (explaining **[**112]** that ***HN28***[] courts must avoid contract constructions that are "unreasonable, inequitable, and oppressive"). Indeed, it would vitiate the very purpose of a settlement **[*446]** agreement and subject Texas to a potentially endless stream of litigation.

However, Imperial's suggestion that Texas simply file a new lawsuit reveals more fundamental problems. The compounding nature of tobacco injuries creates a material problem of proof that could bar any effective relief that Texas could seek. In any new action, Imperial would surely argue that Texas cannot prove that its citizens' medical illnesses (and resultant expenses) are caused by *Imperial's* sales of the Acquired Brands. Imperial would be able to claim that it is impossible to disaggregate the post-2015 harm caused by Imperial from the pre-2015 harm caused by Reynolds. Accordingly, absent some reliable measure of disaggregated damages, which may be foreclosed by the very nature of tobacco-related injuries, Imperial would surely assert that it cannot be held liable in any such new litigation. *See, e.g.,* *Bostic v. Ga.-Pac. Corp., 439 S.W.3d 332, 359 (Tex. 2014)* (vacating judgment in favor of asbestos plaintiff because there was no "basis for the jury to apportion liability between these two sources of asbestos"). **[**113]**

Compounding the issue, a follow-on suit would not only involve disaggregating between "two sources" of cigarettes, but would involve resolving the impact of the releases already given by Texas. Notably, Imperial has not disclaimed its right to rely on the Texas Settlement to immunize itself from liability for the cigarettes that were sold by Reynolds under the Acquired Brands. In that sense, Imperial has retained the right to benefit from the releases granted by the Texas Settlement, even if it does not identify as a beneficiary under the contract itself. The practical result of Imperial's retention of its right to rely on the releases in the Texas Settlement is that Imperial could very well receive, as a functional matter, a perpetual release of liability while avoiding making corresponding payments in perpetuity.

iii. Successors and Assigns Clause

The Texas Settlement provides, in pertinent part: "This Settlement Agreement shall be binding upon all Settling Defendants and their successors and assigns in the manner expressly provided for herein." *Texas Settlement*, Dkt. No. 2222-1 at 4 § 2.

The Fifth Circuit relied on a similar clause in *Texas Industries v. Brown* to find that an original contract signatory's liability **[**114]** continued even though the assets which formed the "subject matter" of the contract had been transferred. *218 F.2d 510 (5th Cir. 1955)*. *Texas Industries* dealt with a requirements contract addressed to three lightweight concrete manufacturing plants. *Id. at 511*. The manufacturing plants relied on a material known as "aggregate" to manufacture lightweight concrete, and the requirements contract obligated the concrete manufacturer to purchase all the aggregate that the manufacturer needed from the supplier for a period of sixty months. *Id.* The contract also purported to be binding on the manufacturer's "successors and assigns." *Id.*

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forever .") (emphasis added). In view of the foregoing, the Court factually finds that the term "annually thereafter" was understood by the parties to impose an obligation to make Texas Settlement payments in perpetuity.

[36] The inclusion of an adjustment for inflation is also additional evidence that the signatories to the Texas Settlement understood that payments would be made in perpetuity—if payments were only intended to be made for a relatively short period of time, there would be a correspondingly lessened need to include an adjustment for inflation. While the inclusion of this term is not determinative of the duration of payments, it remains additional evidence consistent with an ongoing payment arrangement.

After only sixteen of the sixty months, the manufacturer leased the concrete plants to a third party, and thereafter rejected further shipments of aggregate on the basis that ***he*** no longer required any aggregate since ***he*** did not operate the plants. *Id.* The aggregate supplier brought suit against the concrete manufacturer and his third-party lessees, alleging that the manufacturer was liable for breach of contract and the lessees were liable for inducing breach of contract. *Id. at 511-12*. The trial court granted summary judgment to the plant owners "solely upon the contention that their obligation under the contract **[**115]** was extinguished by the leasing arrangement." *Id. at 512*.

The Fifth Circuit reversed. It explained: "In our opinion, neither a sale nor lease of **[*447]** the three block plants, nor an assignment of the contract, by the [concrete manufacturer] could in law effectuate a release of their obligations under the contract without the consent" of the aggregate supplier. *Id.* The Fifth Circuit identified three independent actions—"sale . . . of the three block plants," "lease of the three block plants," and "assignment of the contract"—and held that ***none of them*** could "effectuate a release" of liability under the original contract. *Id.* Specifically, the Fifth Circuit explained to release the manufacturer from liability would defeat the express intent of the parties. "The written agreement shows on its face that the requirements of the three block plants were the subject matter of the sale, and were within the contemplation of the parties." *Id.* Given that "the plants" themselves had "never ceased to operate," it would be inconsistent with the contract to release the concrete manufacturer from its liability under the contract. *Id.*

The Fifth Circuit also directly pointed to the contract's "successors and assigns" **[**116]** clause. *Id. at 513*. The clause provided, in pertinent part, as follows: "the terms and provisions of this contract shall inure to the benefit of and ***be binding upon the parties hereto, and upon the heirs, executors, administrators, successors and assigns of each party hereto***." *Id.* (emphasis added). The court explained that inclusion of a successors and assigns clause was evidence that the parties intended liability to continue for the original contracting party. *Id.* The "provisions" of the successors and assigns clause "strengthen our conclusion that [the manufacturer was] not released from but remained obligated" under the contract, despite the transfer of the plants to the lessees. *Id.* In the Fifth Circuit's view, the successors and assigns clause "makes clear . . . that the contracting parties took pains to anticipate and provide against contingencies such as are now being put forward as reasons for terminating the contract." *Id.* ***HN29***[] In other words, a "successors and assigns" clause reflects an effort by the parties to ensure that the obligations of the contract could not be defeated by transferring the "subject matter" of the contract. *Id.*

The Fifth Circuit surveyed applicable case law reaching **[**117]** back as far as the late 1800s, and found that the authorities reached a uniform outcome: the original contracting party remained liable on a contract when the "subject matter" of the contract was sold, leased, assigned, or otherwise transferred to a third party. *See id. at 512-13*.[37] Not without significance, the language and analysis conducted by the Fifth Circuit in *Texas Industries* is almost identical to the language used by the Texas Supreme Court in *Seagull*. *See Seagull, 207 S.W.3d at 347* (instructing ***HN30***[] courts to examine whether either "the contract's subject" ***or*** "other circumstances" indicated whether or not the obligations were "intended to survive assignment"); *compare id.* (construing contract in light of "the contract's subject"), *with Tex. Indus., 218 F.3d at 512* (construing contract in light of "the subject matter of the contract"). **[*448]** The analytical similarities between the Fifth Circuit's opinion in *Texas Industries* and the Texas Supreme Court's decision in *Seagull* confirm that both decisions are connected links in the same chain of precedent.

A faithful application of *Texas Industries* in combination with *Seagull* directs the Court to conclude that Reynolds remains liable under the Texas **[**118]** Settlement for sales of the Acquired Brands. The "subject matter" rationale,

[37] *See Tex. Indus., 218 F.2d at 512-13* (citing *Kamm v. Pritchard, 296 F. 871, 872 (5th Cir. 1924)* ("[W]here the owners of timberland and lumber mills had contracted with the plaintiffs to sell to them all of their output of lumber, the Fifth Circuit held that, although the contract contained no covenant by defendants not to sell their entire lumber operation, the contract was nevertheless enforceable by the plaintiff, and damages were recoverable.")); *see also, e.g., id.* (citing *Wells v. Alexandre*, 85 Sickels 642, *130 N.Y. 642, 29 N.E. 142, 3 Silv. A. 594 (1891)* ("In *Wells v. Alexandre*, the court held that the sale of steamers after making a contract for the supply of coal to them for one year did not relieve the original owners from the obligation to take the coal that the ordinary and accustomed use of the steamers required." (internal citation omitted))).

the "successors and assigns" rationale, and the uniformity of the common law rationale all indicate that Reynolds should not avoid its liability under the Texas Settlement by means of its assignment of the Acquired Brands.

Notably, the Court is persuaded that the weight of common law authority supports the Court's finding of continuing liability for Reynolds. The purpose of the common law rule that assignments do not extinguish obligations is directly relevant here. Professor Williston's well-regarded treatise on contracts extracts the rationale for this rule from the common law, and summarizes it as follows:

> It has been stated that ***HN31***[] the duties under a contract are not delegable inter vivos in a true sense under any circumstances; that is, ***one who owes money*** or is bound to any performance whatsoever ***cannot by its own act, or by any act in agreement with anyone else, except its creditor, divest itself of the duty and substitute the duty of another***. "No one can assign his liabilities under a contract without the consent of the party to whom he is liable." ***This is sufficiently obvious when attention is called to [**119] it, for otherwise obligors would find an easy practical way of escaping their obligations***: "While a party to a contract may as a general rule assign all his beneficial rights, except where a personal relation is involved, his liability under the contract is not assignable inter vivos because any one who is bound to any performance whatever or who owes money cannot by any act of his own, or by any act in agreement with any other person than his creditor or the one to whom his performance is due, cast off his own liability and substitute another's liability. ***If this were not true, obligors could free themselves of their obligations by the simple expedient of assigning them*** . . . ." The Uniform Commercial Code provides in this regard that a delegation of performance does not relieve the delegating party of the duty to perform or of any liability for breach of contract.

Williston & Lord, *supra*, § 74:27 (emphasis added). From this straightforward rationale, it follows that a party cannot free itself from its "obligations by the simple expedient of assigning them." *Id.* Texas law follows this rule, as must this Court. *See* Capitan Enters., Inc. v. Jackson, 903 S.W.2d 772, 776 (Tex. App.—El Paso 1994, writ denied).

iv. "In the Manner Expressly Provided For Herein"

The Texas Settlement also provides that it shall **[**120]** be binding on successors and assigns "in the manner expressly provided for herein." In pertinent part, § 2 provides:

> This Settlement Agreement shall be binding upon all Settling Defendants and their successors and assigns ***in the manner expressly provided for herein*** and shall inure to their benefit and to that of their respective directors, officers, employees, attorneys, representatives, insurers, suppliers, distributors and agents, and to that of any of their present or former parents, subsidiaries, affiliates, divisions or other organizational units of any kind; and the predecessors, successors and assigns of any of the foregoing.

[*449] *Texas Settlement*, Dkt. No. 2222-1 at 4 § 2 (emphasis added). Imperial puts forward a strained argument as to this phrase. In Imperial's view, the phrase "***expressly*** provided for herein" modifies "successors and assigns" to mean that only the ***releases*** are "binding on successors and assigns," and consequently, the Texas Settlement does not impose continuing payment obligations because "the ***payment*** sections do not mention successors and assigns." *Imperial Resp.*, Dkt. No. 2341 at 16 (emphasis in original). The Court rejects Imperial's interpretation for two reasons. **[**121]**

First, Imperial's argument conflates "benefits" that "inure" with "obligations" that "bind." The releases from liability are ***benefits*** that inure to the benefit of Reynolds' successors and assigns. It is unclear how Reynolds' assigns are ***bound*** by a benefit that inures in their favor. Yet Imperial claims that the only section which "shall be binding" on successors and assigns is the beneficial "waiver and release" provisions, rather than the payment obligations.

Second, Imperial next disclaims those benefits by indicating that it is ***not bound*** to accept the waiver and release from Texas. Such may reflect an effort to avoid liability under the "prior written consent" prong of § 2, which requires such consent whenever a right under the Texas Settlement is assigned. *See Texas Settlement*, Dkt. No. 2222-1 at

4 § 2. Thus, Imperial's argument that it does not benefit from the Texas Settlement's releases is irreconcilable with Imperial's construction suggesting that the releases in the Texas Settling "shall be binding" on Imperial.

The better reading of this phrase is that "in the manner expressly provided for herein" means "on the same terms as are expressly set out herein." PMUSA argues, and the Court **[**122]** agrees, that this term is designed to ensure that any successors and assigns are bound on equal terms as an original settling defendant—that is, bound in the manner expressly provided for in the Texas Settlement. The phrase "expressly" refers to the explicit terms of the Texas Settlement ("herein"), and the obligations of the Texas Settlement constitute "the manner" in which each settling defendant is bound. This interpretation is most consistent with the antecedent phrase "shall be binding." Obligations can be binding, but benefits inure.

This construction is also the most consistent with the stated purposes of the Texas Settlement. By ensuring that the assigns of settling defendants were bound to the same extent as the original settling defendants, this provision of the "successors and assigns" clause was aimed to avoid precisely this type of scenario, where an assignment is alleged to diminish the rights of the other signatories to the Texas Settlement. Instead, this term expresses the intent that successors and assigns must be bound not in some partial or incomplete way, or in some way that lessens the rights secured by the Texas Settlement, but instead must be bound "in the manner **[**123]** expressly provided for" by the Texas Settlement. In that sense, this construction facilitates both the finality interests of the Texas Settlement, as well as the reimbursement framework.

Accordingly, this Court finds that this provision of § 2, which provides that the Texas Settlement "shall be binding upon all settling defendants and their successors and assigns ***in the manner expressly provided for herein***," reflects that successors and assigns would be bound to the same extent as an original settling defendant. This provision is designed to avoid diminishment of Texas' rights as a result of a succession or assignment. As a result, this provision supports a finding that the parties to the Texas Settlement intended that **[*450]** liability for the Acquired Brands should continue even after an assignment.

v. Prior Written Consent

The Texas Settlement includes a provision that prohibits assignment of rights or obligations without the prior written consent of all other signatories to the Texas Settlement. Specifically, the Texas Settlement provides in pertinent part: "None of the rights granted or obligations assumed under this Settlement Agreement by the parties hereto may be assigned or otherwise conveyed **[**124]** without the express prior written consent of all of the parties hereto." *Texas Settlement*, Dkt. No. 2222-1 at 4 § 2.

Since this clause its substantially similar to the "successors and assigns" clause analyzed *supra* in Section III.B.2.b.iii, the Court's analysis materially overlaps with the analysis previously set forth therein. The Court incorporates that analysis by reference. That said, the Court finds there are two additional observations worth noting.

HN32[] First, if a settling defendant cannot *assign* an obligation without the other parties' prior written consent, it follows that the same defendant cannot *extinguish* an obligation without the other parties' prior written consent.

Second, this section limits a party's ability to "assign[] ***or otherwise convey***[]" rights or obligations under the Texas Settlement. Consistent with the reasoning of *Texas Industries*, this clause confirms that the parties did not intend Reynolds to be able to escape its liabilities under the Texas Settlement through ***any*** form of conveyance.

Accordingly, the Court concludes that the "prior written consent" provision supports the conclusion that Reynolds remains liable under the Texas Settlement for the Acquired Brands. **[**125]**

c. The Market Share Provision Supports Liability Rather Than Excusing It

Reynolds argues that its liability is limited—and is now fully excused—by the Market Share provision in the Texas Settlement. Specifically, Reynolds asserts that the quantity of liability is measured by the "Market Share" definition, and that the Market Share definition only imposes liability for cigarettes which it currently sells.

The Texas Settlement defines Market Share as follows:

> (b) "Market Share" means a Settling Defendant's respective share of sales of Cigarettes, by number of individual Cigarettes shipped in the United States for domestic consumption, as measured by such Settling Defendant's audited reports of shipments of Tobacco Products provided to the U.S. Securities and Exchange Commission ("SEC") (or, in the case of any Settling Defendant that does not provide such reports to the SEC, audited reports of shipments containing the same shipment information as contained in the reports provided to the SEC) ("Shipment Reports"), during (i) with respect to payments made pursuant to paragraph 7 of this Stipulation of Amendment, the calendar year ending on the date on which the payment at issue is due (or, in the case of the payment due **[**126]** on November 1, 1998, the calendar year ending December 31, 1998), regardless of when such payment is made, and (ii) with respect to all other payments made pursuant to this Stipulation of Amendment and the Settlement Agreement, the calendar year immediately preceding the year in which the payment at issue is due, regardless of when such payment is made;

1998 Amdt., Dkt. No. 2222-2 at 5-6 § 3(b). Further, the Texas Settlement provides the following payment requirement:

> **[*451]** Each of the Settling Defendants further agrees that, on December 31, 1999 and annually thereafter on December 31st of each year after 1999 (subject to final adjustment within 30 days), it shall severally cause to be paid into the registry of the Court and in accordance with and subject to paragraph 17 of this Stipulation of Amendment, pro rata in proportion to its Market Share, its share of 7.25% of the following amounts (in billions) . . . .

Id. at 10-12 § 7. Based upon a combination of the Market Share provision and the payment provision, Reynolds asks the Court to conclude that its obligations under the Texas Settlement, at least with respect to the Acquired Brands, have now terminated. The Court declines for the following reasons.

First, the Court finds as a matter of law that the Market Share provision does not apply **[**127]** to the legal question of liability following an assignment. Second, to the extent (if any) that the Market Share provision is relevant to the issue of Reynolds' post-assignment liability, Reynolds' continued inclusion of the Acquired Brands in its Market Share payment to Texas' Private Counsel is tantamount to an admission by Reynolds that it remains liable to Texas.

i. Market Share Relates to Payment Quantification, Not the Legal Attribution of Liability for Payment

As an initial matter, the Market Share argument which Reynolds makes is very similar to the Participating Interest argument rejected by the Texas Supreme Court in *Seagull*. The contract in *Seagull* required the defendant to "reimburse [the plaintiff for operating costs] in proportion to its Participating Interest," and it defined "Participating Interest" as the defendant's ownership in the oil and gas leases. *Seagull, 207 S.W.3d at 345*. Since the defendant did not own any participating interest *after* its assignment, the defendant claimed the contract imposed no liability for that period of time. *Id. at 344-45*. Instead, the defendant contended that its "obligation to pay . . . terminated on the date it sold its interests because the agreement imposed liability for **[**128]** expenses only upon ***current*** working interest owners." *Id. at 345* (emphasis in original).

The Texas Supreme Court squarely rejected that argument, concluding instead that the defendant "reads far too much into these provisions." *Id. at 346*. The *Seagull* court found those provisions were addressed to the ***amount*** of payment, not the issue of ***responsibility*** for payment. *Id.* The provisions cited by the *Seagull* defendant simply did not "mention the subject of release or the consequences which are to follow the assignment of a working interest" in the leases. *Id.*

Following *Seagull*, the Market Share provision is inapplicable to the issue of legal liability now before the Court. The Texas Settlement distinguishes between disputes over attribution of ***liability for payments*** (which is an issue reserved for this Court, and which is determined by reference to legal principles) and disputes over ***quantity of payments*** (which is an issue delegated in part to PwC, and determined by reference to the Market Share provision). In the instant case, no party disputes how many cigarettes are being sold or how much would be due; rather, the parties dispute who must pay. Reynolds' attempt to recast the Market Share provision as a provision **[**129]** controlling the consequences of an assignment conflicts with the remaining text and context of the Texas Settlement. *See supra* Sections III.C.2.a—b. As in *Seagull*, the Texas Settlement has a definition quantifying the amount of payments which are due. As in *Seagull*, the Texas Settlement imposes a pro rata obligation to pay based on that payment quantity term. And as in *Seagull*, **[*452]** the Court concludes that the original contracting party—here, Reynolds—remains liable.

By contrast, a finding that the Market Share provision does not control post-assignment liability is consistent with the foregoing textual and contextual indicators. The canon of construction that provisions within a contract be read, wherever feasible, in harmony and not in conflict with one another supports a finding that the Market Share provision does not relieve Reynolds from liability.

Before this Court, Reynolds acknowledged that the Texas Fee Payment Agreement, which is a part of the Texas Settlement, uses the same Market Share definition for both payments to Texas and to Texas' Private Counsel.

> THE COURT: Do you agree that the market share definition in the Texas Fee --Fee Payment Agreement is the same definition of **[**130]** market share that's in the Texas Settlement Agreement?
> COUNSEL FOR REYNOLDS: I do, Your Honor.
> THE COURT: Okay. Do you acknowledge that Reynolds, by including the Acquired Brands and its definition of market share for purposes of the Texas Fee Payment Agreement -- well, first of all, do you agree that Reynolds does that, that they include the Acquired Brands in their definition of market share for purposes of the Texas Fee Payment Agreement?
> COUNSEL FOR REYNOLDS: Your Honor, under the Asset Purchase Agreement, Reynolds did elect to do so, yes.

Hearing Tr., Dkt. No. 2354 at 114:23-115:11. Given those two concessions, the Court pressed Reynolds to explain its inconsistent conduct.

> THE COURT: I don't know how you can say Reynolds continued to make the payments under the attorney's fees agreement because that's the commitment they made, and at the same time say, but notwithstanding the commitment Reynolds made to the State of Texas in the settlement agreement, it's not going to include the Acquired Brands in the market share calculation for paying the State.
> COUNSEL FOR REYNOLDS: Your Honor, one moment because I do need to read what Mr. Leibenstein handed me.
> THE COURT: That's fine.
>
> COUNSEL FOR **[**131]** REYNOLDS: But his handwriting is outside of my grasp. One moment. I apologize. May I speak with him?
> THE COURT: You may consult with co-counsel.
> COUNSEL FOR REYNOLDS: Your Honor, and I think -- I think Mr. Leibenstein and I -- I had the discussion that I attempted to make a point less artfully with the Court. Again, the attorney's fees -- and this goes to the State's shifting position. The attorney's fees were for past conduct. The attorney fees were accrued at the time the settlement agreement was signed.

Id. at 119:1-20.[38]

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[38] Reynolds also attempted to distinguish the payments to Private Counsel from the payments to Texas, on the basis that the payments to Private Counsel are less expensive because they "do not exist in perpetuity." *Hearing Tr.*, Dkt. No. 2354 at 123:8-124:19; *see also, e.g., id.* at 124:11-14 ("So I understand the inconsistency there, but when we're talking, again, about forward-

This explanation is unpersuasive. Under the Texas Settlement, each settling defendant obtained a full release from liability **[*453]** in perpetuity. At that moment, Texas immediately "accrued" its entitlement to payment (as did Texas' Private Counsel, for legal services).

Further, the ***motivation*** for providing payments—*e.g.*, whether they were "accrued"—is wholly unrelated to the calculation for such payments. The Acquired Brands either are part of Reynolds' Market Share, as that term is defined in the Texas Settlement, or they are not. Reynolds' own conduct in making payments to Texas' Private Counsel recognizes that the Acquired Brands appropriately **[**132]** remain within its Market Share. Reynolds cannot now pretend that its conduct does not exist or fails to have meaning.

ii. Texas Fee Payment Agreement

Reynolds' conduct in paying attorneys' fees to Texas' Private Counsel confirms that its liability to Texas continues, because Reynolds continues to recognize that the Acquired Brands fall within its Market Share.

As described above, the Texas Settlement obligates settling defendants to make two sets of annual payments—one annual payment to the State of Texas, and a separate annual payment to the Private Counsel Texas hired to represent it in prosecuting the 1996 litigation. Both payments are based on a single definition of Market Share. The State of Texas gets a larger percentage of each defendant's Market Share, while Texas' Private Counsel gets a smaller percentage. Since Reynolds sold the Acquired Brands as part of the APA, it has stopped making payments for the Acquired Brands to Texas—***but has continued to make payments for the Acquired Brands to Texas' Private Counsel***. Thus, to the extent that the Market Share provision is relevant, it supports ongoing liability for Reynolds.

d. <u>The Texas Comptroller's Employees</u>

Imperial and Reynolds **[**133]** rely on the conduct of several employees of the Texas Comptroller of Public Accounts to argue that Texas has acquiesced in the exclusion of the Acquired Brands from the Texas Settlement.

In 2015, Imperial submitted paperwork to the Texas Comptroller indicating that the Acquired Brands were subject to the Tobacco Equity Tax, but not the Texas Settlement. Consistent with the ministerial handling of the paperwork submitted by Imperial, the employees of the Texas Comptroller added the Acquired Brands to the Comptroller website, reflecting the information that Imperial submitted: that the Acquired Brands were ***not*** subject to the Texas Settlement. Imperial and Reynolds now argue that Texas itself has conceded that the Acquired Brands are subject only to the Tobacco Equity Tax.

The Court disagrees. As a threshold matter, this is parol evidence. Further, the conduct of employees within the Texas Comptroller's office, administratively processing a unilateral submission from Imperial, does not reflect a knowing concession by Texas. Such conduct is not effective to bind Texas to a particular course of performance.[39] Finally, as a factual matter, the Court does not find that Texas actually engaged **[**134]** in a course of performance conceding nonliability for either Reynolds or Imperial.

i. Course of Performance Evidence Is Inappropriate

As an initial matter, the Court rejects this argument because it is parol **[*454]** evidence which may only be used to shed light on an ambiguous contract. *URI, Inc. v. Kleberg Cty., 543 S.W.3d 755, 764-65 (Tex. 2018)* ("***HN33***[]

looking payments, these -- these in a few years, a relatively few years as -- as against perpetuity, then those obligations will cease."). The Court summarily rejects this argument, which is not an appropriate basis of distinction.

[39] Despite relying on the actions of the Texas Comptroller's employees, Imperial and Reynolds spend no time arguing the antecedent question of whether this evidence is cognizable under Texas law. Despite a need to do so, Imperial and Reynolds simply do not address whether several employees of the Texas Comptroller may bind Texas to a course of performance.

Only where a contract is ambiguous may a court consider the parties' interpretation and 'admit extraneous evidence to determine the true meaning of the instrument.'" (quoting *David J. Sacks, P.C. v. Haden, 266 S.W.3d 447, 450-51 (Tex. 2008))*). All parties to this case agree that the Texas Settlement is unambiguous, and the Court does not find otherwise. Therefore, the Court does not consider this course of performance evidence.

ii. The Conduct of Several of the Comptroller's Employees Is Not Competent Course of Performance Evidence That May Bind Or Limit Texas' Rights

HN34[] Texas law is replete with restrictions on the ability of "officers and agents" to modify or limit legal rights to which the State would otherwise be entitled. *Tex. Co. v. State, 154 Tex. 494, 281 S.W.2d 83, 88 (Tex. 1955)*; *see also* *State v. Durham, 860 S.W.2d 63, 67-68 (Tex. 1993)* (explaining that "[t]he acts and conduct of its officers and agents cannot estop it from recovering" payments which are otherwise due). Texas law would not support a finding of estoppel, laches, or any other limitation based on this conduct. **[**135]** *State v. Emeritus Corp., 466 S.W.3d 233, 250 (Tex. App.—Corpus Christi 2015, pet. denied)* (explaining that ***HN35***[] Texas "is not subject to the defenses of limitations, laches, or estoppel"). The question is thus whether Texas would nonetheless permit a course of performance theory to abrogate rights that Texas would otherwise have under the Texas Settlement. The Court concludes Texas would not so permit.

There are a number of rationales for restricting the ability of random state employees to limit Texas' rights. First, the well-ordered functioning of government "would be undermined if a government agent could—through mistake, neglect, or an intentional act—effectively" nullify Texas' legal rights "by ignoring, misrepresenting, or misinterpreting" its duties. *City of White Settlement v. Super Wash, Inc., 198 S.W.3d 770, 773 (Tex. 2006)*; *see also* *City of San Angelo v. Deutsch, 126 Tex. 532, 91 S.W.2d 308, 309 (Tex. 1936)* ("The decisions in this state have consistently protected the public from liability and loss on account of mistakes, negligence, and unauthorized acts of public officials in the performance of public or governmental duties. Mistakes or unauthorized acts of officials charged with the custody and disposition of public land do not estop the state or deprive it of its property."). In the best-case scenario, Texas would constantly be at the mercy of its least competent employees if such employees could limit Texas' **[**136]** rights—and in the worst case, deliberate misconduct might intentionally strip the state of its rights. *Lubbock Cty. Water Control & Imp. Dist. v. Church & Akin, L.L.C., 442 S.W.3d 297, 300-01 (Tex. 2014)* ("***HN36***[] [I]t remains a fundamental principle of Texas law, intended 'to shield the public from the costs and consequences of improvident actions of their governments.'" (quoting *Tooke v. City of Mexia, 197 S.W.3d 325, 331-32 (Tex. 2006))*).

HN37[] Second, Texas' rights are held "for the benefit of all the people of the state." *Durham, 860 S.W.2d at 68*. If only a subset of employees could strip the public of its rights, such employees—whether through mistake or misconduct—might grievously injure the public. *Id. at 67-68*. For that reason, the Texas Supreme Court has uniformly rejected "ratification by estoppel" arguments that would limit Texas' entitlement to payments. *Id.*; *see also* *Weatherly v. Jackson, 123 Tex. 213, 71 S.W.2d 259, 266 (Tex. 1934)* ("To **[*455]** the authorities ***may be added the rule that the failure of public officers to perform their duties will not work an estoppel against the state***.") (emphasis added). ***HN38***[] Texas courts have also rejected limitations that would obstruct Texas' "responsibility and duty to enforce health care" rights that are designed "to protect its citizens." *Emeritus Corp., 466 S.W.3d at 251*. Indeed, Texas law is careful to limit any waiver of the State's rights, in order to avoid obstructing predictable payments that are intended for public use. *Tex. Nat. Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 854 (Tex. 2002)*.

These limitations **[**137]** remain true with respect to binding the State to contractual duties and obligations. *State ex rel. Dep't of Criminal Justice v. VitaPro Foods, Inc., 8 S.W.3d 316, 322 (Tex. 1999)*. "[O]nly persons authorized by the Constitution or a statute can make a contract binding on the State. All state officers' powers are fixed by law, and all persons dealing with them are charged with notice of the limitations on those powers. Only persons having actual authority to act on behalf of the State can bind the State in contract." *Id.* (citing *State v. Ragland Clinic—Hosp., 159 S.W.2d 105, 106 (Tex. 1942))*.

Adopting the approach advocated by Reynolds and Imperial would circumvent the well-settled Texas principle of law that limitations do not run against the State, and that Texas' agents and officers may not deprive the State of rights. The Texas Supreme Court has long recognized that ***HN39***[] litigants may not create a backdoor limitations argument by suggesting that inaction on Texas' part had altered its substantive rights. *See Truehart & Andrews v. Babcock, 49 Tex. 249, 258-59 (1878)*.

Notably, Reynolds expressly recognized before this Court that the employees of the Texas Comptroller were not capable of binding Texas to a course of performance.

> COUNSEL FOR REYNOLDS: The State, likewise, required [Imperial] to make equity fee payments as a non-settling manufacturer, quote, because they were non-settlement **[**138]** cigarettes. And here you see a tax policy representative from the comptroller's office. This is in 2016, following the acquisition, saying: Ms. Wright is correct, Winston, Salem, Kool, and Maverick are now under SPM. Now they're subsequent participating manufacturers, and they -- so it's not as though this was not being discussed --
>
> THE COURT: ***Can the comptroller bind the State of Texas through an email like that***?
>
> COUNSEL FOR REYNOLDS: ***No, Your Honor***, the comptroller can't bind the State of Texas, ***but it does tell the State — it does tell us how the State of Texas viewed [Imperial]***, just as PM did, as an entity that had not yet joined the settlement agreement and thus was not subject.
>
> THE COURT: ***It tells us how one person in the comptroller's office viewed it***.
>
> COUNSEL FOR REYNOLDS: ***It -- it does, Your Honor. It does -- that's -- that's completely fair***.
>
> THE COURT: ***It doesn't purport to speak for the State, and it doesn't purport to speak for the comptroller of public accounts, correct***?
>
> COUNSEL FOR REYNOLDS: ***It does not, Your Honor***. Only insofar as those --those individuals are confirming the basis by which the State is collecting payments.

Hearing Tr., Dkt. No. 2354 at 57:20-58:20 (emphasis **[**139]** added).

iii. Conduct Was Passive

As noted above, the Texas Comptroller's employees are not automatically tasked **[*456]** with auditing a manufacturer's self-reporting. Imperial provided un-audited information to state employees, who then performed what is clearly a ministerial task. This cannot be recast as knowing decision-making. Nothing in the record before the Court suggests that these employees understood the relationship between the Acquired Brands and the Texas Settlement, let alone that their conduct might be imputed to Texas as a course of performance.

Indeed, Imperial recognized that the conduct of the Texas Comptroller employees was only reactive. While displaying a demonstrative image of the Texas Comptroller's website during the hearing before this Court, Imperial engaged in the following colloquy.

> COUNSEL FOR IMPERIAL: This is the version of the website they put up when they were treating us as a non-settling manufacturer, which is an SPM.
> THE COURT: In response to the form that you submitted?
> COUNSEL FOR IMPERIAL: In response to the form that we submitted.

Hearing Tr., Dkt. No. 2354 at 66:23-67:4. The Court factually concludes that the Texas Comptroller's employees were behaving in **[**140]** a reactive and passive manner, rather than affirmatively engaging in a course of performance under the Texas Settlement.

In sum, the Court concludes that the Texas Comptroller's employees could not legally create a course of conduct as described by Imperial and binding on Texas. Further, in the alternative, the Court makes the finding of fact that the conduct of such employees does not demonstrate a course of performance suggesting that the Acquired Brands fall outside the Texas Settlement.

E. Reynolds Is Liable For Breach of the Prior Written Consent Clause in Texas Settlement § 2

Reynolds breached the Texas Settlement by transferring the releases included in the Texas Settlement to Imperial without the prior written consent of the Texas Settlement signatories. As noted above, the Texas Settlement provides "[n]one of the rights granted or obligations assumed under this Settlement Agreement by the parties hereto may be assigned or otherwise conveyed without the express prior written consent of all of the parties hereto." *Texas Settlement*, Dkt. No. 2222-1 at 4 § 2. One of the rights under the Texas Settlement is the right to a release with respect to the Acquired Brands. *See, e.g., id.* at 15-16 § 13 (stipulating to dismissal of the underlying action with prejudice); § 14 (providing a perpetual release). **[**141]**

Reynolds transferred that release to Imperial as part of the APA. Article II of the APA provides that Reynolds and Lorillard shall "sell, convey, assign, transfer and deliver," a series of assets, including the Acquired Brands (which are defined as part of the "Transferred Assets"), and the following:

> (v) ***all*** claims, causes of action, ***defenses*** and rights of offset or counterclaim against third parties ***relating to any Transferred Asset or any Assumed Liability***, including unliquidated rights under manufacturers' or vendors' warranties, except for claims for refunds of any Taxes paid prior to the Closing Date;

APA, Dkt. No. 2222-6 at 5 art. II § 2.01(a)(v) (emphasis added). ***HN40***[] The affirmative defense of "release" unambiguously falls within the term "defenses . . . relating to ***any*** Transferred Asset or Assumed Liability." *Seven Invs., LLC v. AD Capital, LLC, 32 A.3d 391, 396 (Del. Ch. 2011)* (recognizing that "release" is a defense).[40] **[*457]** The Transferred Assets include the Acquired Brands, and Texas' release of liability is a complete defense to any claim of liability for the Acquired Brands. Accordingly, the APA expressly includes a transfer of a right under the Texas Settlement to Imperial.[41] Since the Texas Settlement expressly prohibits such an assignment, Reynolds

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[40] The APA is construed pursuant to Delaware law. *See infra* Part IV. Accordingly, the Court relies on a Delaware Chancery Court opinion in setting out the plain textual meaning of "defense." Further, while the Court defers to the Delaware Chancery Court for all fact-bound interpretation of any ambiguous provisions of the APA, the Court finds that § 2.01(a)(v) is unambiguous in transferring the "defense" of release for the Acquired Brands to Imperial. Accordingly, the Court reaches the meaning of § 2.01(a)(v).

[41] The APA includes a provision which states:

> "Notwithstanding any other provision of this Agreement to the contrary, this Agreement shall not constitute an agreement to assign, directly or indirectly, any Transferred Asset or any claim or right or any benefit arising thereunder or resulting therefrom if an attempted direct or indirect assignment or transfer thereof, without the consent of a third party, would constitute a breach, default, violation or other contravention thereof, would be ineffective with respect to any party to an agreement concerning such Transferred Asset, claim or right or would in any way adversely affect the rights of the Acquiror or the Sellers (as applicable) thereto or thereunder, and such consent has not been obtained on or prior to the Closing Date."

APA, Dkt. No. 2222-6 at 5 art. II § 2.02(a). While inartfully drafted, the import of this provision is to disclaim any assignment of any right or asset if such assignment would be a breach of any contract or "would in any way adversely affect the rights" of Reynolds or Imperial. While this might hypothetically have limited the transfer of any defenses, Reynolds and Imperial do not press the applicability of this provision. Indeed, given that two courts have found Reynolds liable for breach of contract based on the transfer of the Acquired Brands, a faithful application of this provision would suggest that the assignment of the Acquired Brands was itself ineffective. Since neither Reynolds nor Imperial appear to desire that result, it appears they have made the strategic choice not to assert this provision as a limitation that the Court should consider when construing the APA, despite spending considerable time discussing whether various assignments under the APA constitute a breach of contract. To the extent Reynolds and Imperial wished to press the position that § 2.02(a) limited transfers, it would necessarily require both parties to argue that the transfers of the Acquired Brands and related assets were not actually effective. Imperial and Reynolds had ample opportunity to argue that § 2.02(a) limited their liability and declined to do so. Accordingly, given the apparently breached the Texas Settlement. However, **[**142]** this assumption does not cause Imperial to be liable under the Texas Settlement, given that the releases are a right—not an obligation—which is expressly assumed. Since Texas law appears to require ***obligations*** to be expressly assumed for liability under a contract to attach, and this provision deals with rights, it does not create direct liability for Imperial.

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For all the reasons set forth above, the Court holds that Reynolds remains liable **[*458]** for the Acquired Brands under the Texas Settlement.

F. Imperial

Imperial asserts that it is not liable under the Texas Settlement, despite the existence of a clause therein which purports to bind successors and assigns. Imperial points to *Texas Business Organizations Code § 10.254*, which altered the common law rule for binding successors and assigns in the context of a sale of assets. *Section 10.254* recites in pertinent part: "Except as otherwise expressly provided by another statute, a person acquiring property described by this section may not be held responsible or liable for a liability or obligation of the transferring domestic entity that is not expressly assumed by the person." *Tex. Bus. Org. Code § 10.254(b)*. At least one Texas intermediate appellate court has held that a "successors and assigns" clause is no longer self-executing, because a contract purporting to bind successors and assigns cannot ***actually*** bind successors and assigns unless the successor or assign also expressly consents to be bound. *See C.M. Asfahl Agency v. Tensor, Inc., 135 S.W.3d 768, 775 (Tex. App.—Houston [1st Dist.] 2004, no pet.)*.

Asfahl involved an assign that had only purchased assets, and had not expressly consented **[**144]** to be bound. *Id. at 780-81*. That court held that the assign could not be liable under the original contract between the parties. *Id.* "[E]ven if the 'continuity provisions' of the . . . sales and marketing agreements . . . purported to bind their 'successors and assigns,' those agreements could not contravene the protections that *article 5.10(B)(2)* afforded [to the assign] in acquiring the assets of the [the assignor] entities unless [the assign] expressly agreed to be bound by the . . . agreements." *Id. at 791*.[42] Thus, according to *Asfahl*, a successors-and-assigns clause is not self-executing to bind an assignee without the assignee's express consent. *Id.*

The Court finds Imperial is not directly liable under the Texas Settlement pursuant to the successors and assigns clause. As noted below, Imperial may be liable pursuant to its undertakings in the APA, depending on the Delaware Court's construction of the obligations undertaken by Imperial. However, Imperial is not liable under the Texas Settlement merely by virtue of the "successors and assign" clause, in light of *§ 10.254* and *Asfahl*. The Court does not ultimately pass on whether Imperial has expressly assumed obligations under the Texas Settlement by virtue **[**145]** of its promises in the APA, in view of the Court's decision to defer construction of the APA to the Delaware Court.

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strategic choice made by Reynolds and Imperial not to discuss this issue, the Court finds any argument based on this provision waived. *See Firefighters' Ret. Sys. v. Grant Thornton, LLP, 894 F.3d 665, 670 n.18 (5th Cir. 2018)* ("[***HN41***[] A]n argument not raised before the district court cannot be asserted the first time on appeal"); *Dallas Gas Partners, L.P. v. Prospect Energy Corp., 733 F.3d 148, 156-57 (5th Cir. 2013)* ("If a party fails to assert a legal reason why [relief] should . . . be granted, that ground is waived and cannot be considered or raised on appeal."); *Maverick Recording Co. v. Harper, 598 F.3d 193, 197 (5th Cir. 2010)* (holding that a party "waived her constitutional challenge ***by failing to raise it [in the district court] in a manner that would allow the [**143] district court to rule on it***"); *Kelly v. Foti, 77 F.3d 819, 823 (5th Cir. 1996)* ("[The] raising party must present the issue ***so that it places the opposing party and the court on notice*** that a new issue is being raised").

[42] *Texas Business Corporations Act article 5.10(B)* is the predecessor statute to *Texas Business Organizations Code § 10.254*. Despite stylistic wording differences between the two statutes, Texas courts have interpreted *article 5.10(B)* and *§ 10.254* identically. *In re 1701 Commerce, LLC, 511 B.R. 812, 823 (Bankr. N.D. Tex. 2014)* (citing *E-Quest Mgmt., LLC v. Shaw, 433 S.W.3d 18, 23-24 (Tex. App.—Houston [1st Dist.] 2013, pet. denied)*); *see also Ford, Bacon & Davis, L.L.C. v. Travelers Ins. Co., 635 F.3d 734, 737 (5th Cir. 2011)*.

Though Imperial's liability is limited by Texas statutory law, Imperial is still an assign within the meaning of the Texas Settlement. ***HN42***[] Under Texas law, "[t]he term 'assignment' has a comprehensive meaning and in its most general sense means the transfer or setting over of property or some right or interest from one person to another." *Epstein v. Wendy's Int'l, Inc., No. 14-04-00704-CV, 2006 WL 535759, at *2 (Tex. App.—Houston [14th Dist.] 2006, pet. denied)* (citing *Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc., 938 S.W.2d 102, 113 (Tex. App.—Houston [14th Dist.] 1996, no writ)*; *Univ.* ***[*459]*** *of Tex. Med. Branch at Galveston v. Allan, 777 S.W.2d 450, 452 (Tex. App.—Houston [14th Dist.] 1989, no writ))*. An assignment "is a manifestation by the owner of a right or property of [its] intention to transfer such right or property to another." *Twelve Oaks, 938 S.W.2d at 113*; *Pape Equip. Co. v. I.C.S., Inc., 737 S.W.2d 397, 399 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.)*.

The APA unambiguously and expressly provides that Imperial is an assign of Reynolds. Under the APA, Reynolds promised to "sell, convey, ***assign***, transfer and deliver" a variety of assets, including the Acquired Brands which form the subject matter of the Texas Settlement. *APA*, Dkt. No. 2222-6 at 5 art. II § 2.01(a). The APA unambiguously involves "the transfer . . . of property or some right or interest" from Reynolds to Imperial. *See Epstein, 2006 Tex. App. LEXIS 1734, 2006 WL 535759, at *2*.

Despite the finding that Imperial is an assign, and considering the totality of the existing circumstances, this Court elects to defer ultimate resolution of the Motions **[**146]** to Enforce, as they relate to Imperial and the issue of its liability to Texas, to the pending litigation in the Delaware Chancery Court between Imperial and Reynolds. The Court is persuaded that judicial restraint in this regard is the better course. The legal obligations, if any, between Texas and Imperial are largely informed by the APA, which is subject to Delaware law and best determined there. For these reasons, and mindful of comity between Texas and Delaware, this Court exercises judicial restraint to leave the issues between Reynolds and Imperial within the capable hands of the Delaware Court. Such issues include the scope and nature of the obligations undertaken by Imperial pursuant to the APA, and whether Imperial expressly assumed liability under the Texas Settlement by virtue of the APA.

Both the Florida Court and Minnesota Court recognized that it was possible that the Delaware Court would construe the APA to find that Imperial expressly assumed the PSS Agreement obligations. For example, if Imperial's covenant to use "reasonable best efforts" to join the PSS Agreements requires the actual assumption of PSS obligations, then the "reasonable best efforts" term ***is*** an express **[**147]** assumption of liability. However, the parties have not asked this Court to construe "reasonable best efforts," nor have they briefed the question. Instead, the parties note that the appropriate construction of "reasonable best efforts" is presently before the Delaware Chancery Court. Based upon recognized notions of comity and judicial efficiency, this Court defers the construction of "reasonable best efforts," with full knowledge that such represents a separate theory by which Imperial might find itself liable under the Texas Settlement.

IV. Texas' Third-Party Beneficiary Status

Texas also advances the argument that it is a third-party beneficiary of the APA and urges this Court to follow the decision of the Minnesota Court, which found that Texas was unambiguously a third-party beneficiary of the APA because the APA expressly contracts for providing Texas Settlement payments to Texas. *See Texas Reply*, Dkt. No. 2346 at 7 (quoting *Minn. Ct. Judgment*, Dkt. No. 2346-6 at 19 ("[Imperial] cannot credibly contend that Minnesota has no direct or third-party interest in the APA.")).

This Court also defers this issue to be taken up as part of the Delaware action, to the extent Texas is inclined **[**148]** to intervene therein. The parties do not dispute that Delaware law generally governs the formation and interpretation of the APA. The plain text of the APA confirms that Delaware law governs its interpretation. *APA*, **[*460]** Dkt. No. 2222-6 at 82 § 12.12(a); *Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co., 98 F.R.D. 254, 264 (D. Del. 1983)*. Accordingly, the Court instead defers to the Delaware Court the issue of whether Texas is a third-party beneficiary under the APA. In this too, the Court is informed by accepted notions of comity and judicial efficiency.

V. Conclusion

The text, structure, and purpose of the Texas Settlement clearly establish that Reynolds remains liable for the Acquired Brands under the Texas Settlement, and this Court so holds.

Both *Seagull* and *Texas Industries* make clear that Reynolds cannot eliminate its obligations under the Texas Settlement by assigning the Acquired Brands. As in *Seagull*, the Texas Settlement has no express provision addressing the consequences of a subsequent assignment. As in *Texas Industries*, both the contract itself ***and*** the "subject matter" of the contract are subject to the rule regarding continuing post-assignment liability. Accordingly, as in both cases, the original contracting party—here, Reynolds—remains liable. Additionally, the consensus **[**149]** of the common law authorities, as interpreted by preeminent treatises, the other PSS courts, and the Fifth Circuit, confirms that Reynolds remains liable.

The ordinary rules of contract interpretation independently demonstrate the propriety of Reynolds' continued liability. The text, structure, and business purposes of the Texas Settlement uniformly reflect the parties' intention not to permit an assignment to extinguish liability thereunder. Accordingly, the Court finds that Reynolds remains liable under the Texas Settlement for the full amount of any and all payments due regarding the Acquired Brands.

Reynolds also remains liable under the clause requiring Texas' written consent prior to the assignment of any rights. Reynolds promised not to assign any rights under the Texas Settlement without the prior written consent of the other parties thereto. When Reynolds assigned all defenses related to the Acquired Brands to Imperial, including the defense of "release" arising from the Texas Settlement, Reynolds breached that promise.

Finally, Imperial is unambiguously an assign within the meaning of the Texas Settlement. However, a final determination of the scope of the obligations undertaken **[**150]** by Imperial under the APA is a matter more properly presented to the Delaware Court. To the extent that court determines that Imperial expressly assumed obligations which require Imperial to join the Texas Settlement, Imperial may be directly liable to Texas or it may be indirectly liable via a potential right held by Reynolds to seek reimbursement from Imperial. Those issues are left to the Delaware Court. The Court similarly defers the issue of Texas' status as a third-party beneficiary under the APA to the Delaware Court. To the extent Texas seeks to vindicate any rights under the APA, it must intervene to do so in that forum.

* * *

In writing *The Common Law*, Justice Holmes observed:

> The very office of construction is to work out, from what is expressly said and done, what would have been said with regard to events not definitely before the minds of the parties, if those events had been considered.

Hon. Oliver Wendell Holmes, *The Common Law* 303 (1881). It is unclear whether the parties in 1998 envisioned the unprecedented consolidation that would occur within the domestic tobacco industry during the intervening two decades. However, it is certainly clear that no one considered—in **[*461]** light **[**151]** of Reynolds' perpetual promise to pay Texas regarding the Acquired Brands—that Reynolds would sell those brands for seven billion dollars and at the same time maintain that its responsibility to continue its payments to address the misery and costs visited upon the people of Texas by those brands had been snuffed out. Reynolds accepted a perpetual release in return for agreeing to make perpetual payments. Nothing that has intervened since then has lessened that obligation. Reynolds remains as liable today as it was when it entered into the Texas Settlement in 1998.

So ORDERED and SIGNED this 25th day of February, 2020.

/s/ Rodney Gilstrap

RODNEY GILSTRAP

UNITED STATES DISTRICT JUDGE

ORDER

The Court issues this Order in light of the Memorandum Opinion and Order filed contemporaneously herewith, addressed to the State of Texas's Motion to Enforce Settlement Agreement (Dkt. No. 2214) and Philip Morris USA's Motion to Enforce Settlement Agreement (Dkt. No. 2222) (collectively, "the Motions to Enforce").

The Court previously bifurcated the issue of whether Reynolds or Imperial were liable under the Texas Settlement from the issue of whether Reynolds had appropriately calculated its profit adjustment, **[**152]** by including the Acquired Brands from its base year while excluding the Acquired Brands from its Texas Settlement payments. (Dkt. No. 2328). In light of the Court's order that Reynolds remains liable to the State of Texas ("Texas") for sales of the Acquired Brands, such issue now appears to be moot.

Accordingly, the Court **ORDERS** that Texas, Philip Morris USA ("PMUSA"), Imperial Tobacco Brands Group, LLC ("Imperial") and R.J. Reynolds ("Reynolds") (collectively, "the Parties") shall meet and confer to address whether any issue remains live in light of the Court's Memorandum Opinion and Order. Subsequently, the Parties shall file a joint status report, not to exceed five pages,[1] indicating each Party's position as to whether any such issue remains live before the Court, and if so, the nature of such issue. Texas and PMUSA shall also indicate whether they intend to file motions pursuant to *Texas Civil Practice and Remedies Code § 38.001*.

If any party believes any issue remains live with respect to the Motions to Enforce or *§ 38.001*, such party shall meet-and-confer with the remaining parties and jointly propose an applicable docket control order. Any such proposed docket control order shall be filed as an attachment to the joint status report **[**153]** and is not subject to the five page limit. To the extent the Parties disagree on a proposed docket control order, each Party shall include its alternative proposal within the join submission.

Finally, in view of this Order, the Joint Motion for Entry of Order Governing Schedule for Expert Discovery (Dkt. No. 2351) filed by PMUSA is **DENIED WITHOUT PREJUDICE** subject to the meet and confer efforts set forth herein.

So ORDERED and SIGNED this 25th day of February, 2020.

/s/ Rodney Gilstrap

RODNEY GILSTRAP

UNITED STATES DISTRICT JUDGE

End of Document

[1] The Parties may agree to divide the five pages in any manner they choose. Absent an agreement, the five pages shall be equally divided among the Parties.

Am. Contrs. Supply, LLC v. HD Supply Constr. Supply, Ltd.

United States District Court for the Northern District of Georgia, Atlanta Division

February 26, 2020, Decided; February 26, 2020, Filed

Case No. 1:16-cv-03595

Reporter
2020 U.S. Dist. LEXIS 257348 *; 2020 WL 10467232

American Contractors Supply, LLC, Plaintiff, v. HD Supply Construction Supply, Ltd., Defendant.

Prior History: *Am. Contrs. Supply, LLC v. HD Supply Constr. Supply, Ltd., 2018 U.S. Dist. LEXIS 121239 (N.D. Ga., May 31, 2018)*

Core Terms

summary judgment, monopolization, distributors, manufacturer, engineering department, competitor, seal, tilt, tortious interference, anti trust law, do business, genuine, grant summary judgment, business relationship, restraint of trade, Sherman Act, monopoly power, customers, backlog, lead time, antitrust, projects, partial summary judgment, anticompetitive conduct, issue of material fact, motion to exclude, concerted action, documents, nonmoving, supplies

Counsel: **[*1]** For HD Supply Construction Supply Ltd., Defendant: Milton Russell Wofford Jr., Carroll & Weiss LLP, Atlanta, GA.

For American Contractors Supply LLC, Plaintiff: Jeffrey L. Berhold, LEAD ATTORNEY, Jeffrey L. Berhold P.C., Atlanta, GA.

Judges: MICHAEL L. BROWN, UNITED STATES DISTRICT JUDGE.

Opinion by: MICHAEL L. BROWN

Opinion

ORDER

Plaintiff American Contractors Supply, LLC ("ACS") claims Defendant HD Supply Construction Supply, Ltd. ("White Cap")[1] conspired with another company to freeze it out of the Florida market for tilt construction. ACS sued White Cap for violating federal antitrust laws and tortious interference under Georgia law. White Cap moved for summary judgment on all counts.

I. Factual Background

[1] Plaintiff first named White Cap Construction Supply, Inc. as the defendant in this matter but then filed an amended complaint to correct the name to HD Supply Construction, Ltd., d/b/a HD Supply Construction & Industrial—White Cap. The Court refers to Defendant as White Cap throughout this order.

This case arises from Plaintiff ACS's contention that it was pushed out of the Florida market for tilt-up construction when manufacturer Meadow Burke refused to support it and instead chose to maintain its otherwise exclusive relationship with Defendant White Cap. Despite alleging concerted action to restrain trade, ACS sued only White Cap (its direct competitor) without including Meadow Burke (the company that decided not to do business with it).

Tilt-wall construction, allows contractors to cast wall panels at **[*2]** the jobsite, leading to the use of fewer panels, less equipment, and cheaper, larger, and more rapidly erected buildings. (Dkts. 55-2 ¶ 1; 73-1 ¶ 1.) Tilt-wall buildings insulate more easily, better resist normal wear-and-tear, and endure extreme weather. (Dkts. 55-2 ¶ 2; 73-1 ¶ 2.) The Florida geographic market, the construction market at issue, offers a healthy growth trajectory for tilt-wall construction. (Dkts. 55-2 ¶ 3; 73-1 ¶ 3.) Three manufacturers supply tilt-wall-specific equipment in Florida: Meadow Burke, Dayton Superior, and SureBuilT. (Dkts. 55-2 ¶ 4; 73-1 ¶ 4.) Each manufacturer works with specific distributors in the state. Meadow Burke, for example, distributes only through White Cap — the business relationship prompting this antitrust lawsuit; Dayton Superior distributes mainly through Construction Materials, Inc.; and SureBuilT distributes through ACS[2] and Construction Materials. (Dkts. 55-2 ¶ 5; 73-1 ¶ 5.) ACS alleges these manufacturers typically require a distributor to have a physical office in Florida before selling to customers in that state. ACS also alleges they closely control entry into the Florida market by limiting distributors to which they will sell. **[*3]** (Dkt. 73-1 ¶ 6.)

Meadow Burke and Dayton Superior are the most established manufacturers. (Dkts. 73-3 ¶ 2; 78-1 ¶ 2.) Meadow Burke is the manufacturer with a "position of power" in the tilt-up industry, because of its superior engineering department and industry veterans. (Dkts. 55-2 ¶¶ 9-10; 73-1 ¶¶ 9-10; 78-1 ¶ 23.) It controls much of the market through its partnership with White Cap, which has "invested heavily in the Meadow Burke brand" according to Meadow Burke's Vice President for Sales and Marketing. (Dkts. 55-2 ¶ 14; 73-1 ¶ 14.)

White Cap has a substantial presence in Florida. It maintains fourteen locations, operates three rental yards, employs twenty-nine tilt-specialist account managers, and employs over one hundred people with extensive experience in Meadow Burke tilt-up construction. (Dkts. 55-2 ¶ 15; 73-1 ¶ 15.) White Cap also keeps working to develop its relationship with Meadow Burke, including cosponsoring events with Meadow Burke and working with the manufacturer to identify new business opportunities. (Dkts. 55-2 ¶ 16; 73-1 ¶ 16.)

ACS, in contrast, conducts most of its business from its office in Atlanta, Georgia. (Dkts. 73-3 ¶ 1; 78-1 ¶ 1.) It has limited **[*4]** presence in Florida. (Dkts. 73-1 ¶ 17; 73-3 ¶ 10; 78-1 ¶ 10.) ACS and Meadow Burke had discussed ACS opening a location in Florida. (Dkts. 73-3 ¶ 28; 78-1 ¶ 28.) ACS claims that, during a meeting in April 2016, its main contact at Meadow Burke, Mike Wolstenholme, committed to supplying ACS with Meadow Burke-branded tilt products in Florida. (Dkts. 73-3 ¶ 27; 78-1 ¶ 27.) The record contains no definitive evidence memorializing this meeting or the agreement, however. ACS and Meadow Burke never had a written distributor agreement. (Dkts. 73-3 ¶ 5; 78-1 ¶ 5.) Meadow Burke likewise had no written agreement to distribute exclusively with White Cap in Florida. (Dkts. 73-3 ¶ 19; 78-1 ¶ 19.)

At some point after this meeting, ACS sent Meadow Burke's engineering department drawings for a Florida project. (Dkts. 55-2 ¶ 21; 73-1 ¶ 21.) White Cap claims this was a "backdoor submission" by ACS because ACS did not properly inform its contacts at Meadow Burke about the project before submitting the drawings directly to the engineering department. (Dkt. 55-2 ¶ 21.) As a result of how ACS submitted its drawings, they were given priority in Meadow Burke's engineering department over projects that White **[*5]** Cap and other distributors had already submitted. White Cap refers to this as ACS appearing to have jumped the line. (Dkts. 55-2 ¶ 23; 67-1 at 31:11-14, 33:20-24.)

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[2] In September 2018, well after the filing of this lawsuit, ACS closed its Florida location because of poor sales performance with SureBuilT. (Dkts. 73-1 ¶ 5; 78-1 ¶ 93.) Many customers chose not to use SureBuilT, a less well-established tilt construction manufacturer. (Dkts. 73-3 ¶ 86; 78-1 ¶ 86.) In its statement of facts, ACS also includes various facts about its unsuccessful performance in Florida, but those facts are immaterial to the Court's determination. (*See, e.g.*, Dkt. 73-3 ¶¶ 79-92.)

Meadow Burke's Sales Manager for Florida then inadvertently sent White Cap paperwork related to ACS project, alerting White Cap to ACS's work with Meadow Burke. (Dkts. 55-2 ¶ 22; 73-1 ¶ 22.) Doug Bartle, White Cap's Director of Tilt Sales, saw the ACS documents and called Meadow Burke. He was "very upset" and "totally disappointed" that Meadow Burke had decided to sell to ACS. (Dkt. 78-1 ¶ 52.) He placed a Meadow Burke order on hold and said he would be meeting with Dayton Superior the next day. ACS says this was a threat by White Cap to switch suppliers away from Meadow Burke. (Dkts. 55-2 ¶ 23; 73-1 ¶ 23.)

About a week later, Meadow Burke decided it would not supply ACS on future tilt projects in Florida. (Dkts. 55-2 ¶ 25; 73-1 ¶ 25.) The parties dispute who at Meadow Burke made that decision. ACS claims Mike Wolstenholme (its contact) made the decision because of pressure from White Cap. (Dkt. 73-1 ¶¶ 25-26.) But ACS cites no admissible evidence to support its contention.[3] White Cap says Doug Crawford, Meadow Burke's Vice **[*6]** President of Sales and Marketing, made the decision. (Dkt. 55-2 ¶ 25.) Crawford testified that he recalled "no pressure" from White Cap to stop dealing with ACS. (Dkts. 55-2 ¶ 26; 73-1 ¶ 26.) Crawford testified that he decided not to add ACS as another distributor in Florida because:

- White Cap had "performed well" for Meadow Burke in Florida;
- White Cap had "bought a lot of equipment" and invested in its relationship with Meadow Burke in other ways, so it would not be "fair" to allow ACS to "piggyback" on White Cap's efforts;
- Meadow Burke was "satisfied with the amount of business it was getting" in Florida; and
- Meadow Burke had a backlog in its engineering department and feared additional orders from ACS would exacerbate that backlog for current customers, like White Cap.

(Dkts. 55-2 ¶ 27; 73-1 ¶ 27; 78-1 ¶ 110.)[4]

ACS claims that there are "no internal records of why Meadow Burke cut off ACS." (Dkt. 73-1 ¶ 27.) The Court, however, has Crawford's testimony about his decision. Again, ACS does not dispute Crawford's testimony or directly refute that he was the decisionmaker.

Instead, ACS focuses on the specific timing of communications between Doug Bartle of White Cap and various Meadow **[*7]** Burke salespeople. For instance, ACS asserts that "Mr. Bartle left a voice mail with Ms. Dykes [Meadow Burke's sales manager who mistakenly sent the email] on July 13, 2016 at 9:53 a.m." (Dkts. 73-3 ¶ 48; 78-1 ¶ 48.) "Ms. Dykes called Mr. Bartle back by cell phone at 2:04 p.m." (Dkts. 73-3 ¶ 49; 78-1 ¶ 49.) "Mr. Bartle and Ms. Dykes were on the call for 13 minutes." (Dkts. 73-3 ¶ 50; 78-1 ¶ 50.) And then "[l]ess than an hour later, Ms. Dykes sent an email to Mr. Wolstenholme and Mr. Arnett reporting her telephone conversation with Mr. Bartle." (Dkts. 73-3 ¶ 51; 78-1 ¶ 51.)

In the email, Ms. Dykes explained that White Cap was very upset about Meadow Burke's decision to "let someone else into Florida," that White Cap had cancelled an order, and that she wanted Mr. Wolstenholme and Mr. Arnett to "confirm [Meadow Burke] will NO longer allow anyone other than [White Cap] to sell Tilt in Florida." (Dkts. 73-3 ¶¶ 51-55; 73-4 at 245.) Mr. Bartle admitted he was trying to get Meadow Burke to reconsider its decision to supply ACS in Florida. (Dkt. 73-3 ¶ 56.) Mr. Arnett then called Mr. Crawford after receiving the email from Ms. Dykes and "told him about 'what had taken place.' " (Dkts. 73-3 **[*8]** ¶ 58; 78-1 ¶ 58.)

As discussed below, these facts do not suggest any unlawful agreement in violation of the antitrust laws. Instead, they point to essentially a game of telephone up the chain of command that one of Meadow Burke's major customers was unhappy. They point to an unhappy customer and its attempt to pressure its supplier. But again, ACS presents nothing to dispute Mr. Crawford's testimony that he decided to stop doing business with ACS and was not influenced by improper pressure from White Cap to do so.

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[3] ACS often cites deposition testimony and declarations from two of its employees to support its statement of facts. Much of this hearsay support comes from what ACS's employees claim another person told them, however. The Court disregards these unsupported hearsay statements. In any case, "self-serving hearsay . . . has no probative value on summary judgment." *Kirkland v. Tamplin, 285 Ga. App. 241, 645 S.E.2d 653, 656 (Ga. Ct. App. 2007)*.

[4] Because ACS claims (without record evidence) Wolstenholme made the decision, it does not directly address White Cap's facts about Crawford's reasons for ending the relationship.

After Meadow Burke informed ACS of its decision not to supply further projects, Meadow Burke fulfilled its commitment on the existing project. (Dkts. 55-2 ¶ 28; 73-1 ¶ 28.) ACS then partnered with SureBuilT to sell tilt supplies for projects in Florida, which supplied ACS on at least nine tilt projects there. (Dkt. 55-2 ¶ 30.) It is undisputed that White Cap did nothing to interfere with that business relationship. (Dkts. 55-2 ¶ 31; 73-1 ¶ 31.) After these events transpired — with ACS partnering with SureBuilT — the Florida market included three tilt-wall manufacturers rather than two, and three statewide distributors rather than two.[5] (Dkts. 55-2 ¶ 33; 73-1 ¶ 33.)

In September **[*9]** 2016, however, ACS sued White Cap, alleging claims of unlawful restraint on trade and monopolization in violation of the Sherman Act and tortious interference under Georgia law. (Dkt. 7 at 14-16.) White Cap moved for summary judgment on all of ACS's claims while ACS moved for partial summary judgment as to the relevant market. (Dkts. 55; 56.) Also pending are ACS's motions to exclude and to seal. (Dkts. 57; 69; 75.)

II. Legal Standard

A. Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides that a court "shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A factual dispute is genuine if the evidence would allow a reasonable jury to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A fact is "material" if it is "a legal element of the claim under the applicable substantive law which might affect the outcome of the case." *Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997)*.

The party moving for summary judgment bears the initial burden of showing a court, by reference to materials in the record, that there is no genuine dispute as to any material fact that should be decided at trial. *Hickson Corp. v. N. Crossarm Co., 357 F.3d 1256, 1260 (11th Cir. 2004)* (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*). A moving party meets this burden merely by " 'showing'—that is, pointing out to **[*10]** the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex, 477 U.S. at 325*. The movant, however, need not negate the other party's claim. *Id. at 323*. In determining whether the moving party has met this burden, a court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. *Johnson v. Clifton, 74 F.3d 1087, 1090 (11th Cir. 1996)*.

Once the movant has adequately supported its motion, the nonmoving party then has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Ultimately, there is no "genuine [dispute] for trial" when the record as a whole could not lead a rational trier of fact to find for the nonmoving party. *Id.* But "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson, 477 U.S. at 247-48*. The court, however, resolves all reasonable doubts in favor of the non-movant. *Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993)*.

B. Motions to Seal

Federal Rule of Civil Procedure 26(c) provides that a court, for good cause, may issue an order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including requiring that **[*11]** a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way. *Fed. R. Civ. P. 26(c)(1)(H)*. Courts determine whether there is good cause to seal by balancing

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[5] Since the filing of the complaint, ACS has "quietly" shuttered its Florida office. The Florida market now includes two statewide tilt distributors, White Cap and Construction Materials. (Dkt. 73-1 ¶ 33.)

the public's "interest in obtaining access" against the "party's interest in keeping the information confidential." *Chi. Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1313 (11th Cir. 2001)*. "[D]iscovery material filed in connection with pretrial motions that require judicial resolution of the merits" is subject to the common-law right of access to judicial proceedings, which includes the right to inspect and copy public records and documents. *Id. at 1311-12*. The common-law right of access "requires the court to balance the respective interests of the parties." *Id. at 1313*.

C. Motions to Exclude under *Rule 702*

Trial courts serve a critical gate-keeping function concerning the admissibility of expert testimony. *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. Expert testimony can be particularly persuasive, and as such, the role of the trial court is to keep speculative and unreliable testimony from reaching the jury. *Id. at 595*; *see* *McCorvey v. Baxter Healthcare Corp., 298 F.3d 1253, 1256 (11th Cir. 2002)*.

Federal Rule of Evidence 702 allows a qualified expert to give opinion testimony when it is necessary to help the trier of fact understand the issues, the opinion is based on sufficient facts or data, the expert produced it using reliable **[*12]** principles and methods, and those principles and methods were reliably applied to the facts of the case. *Fed. R. Evid. 702*. The Eleventh Circuit employs a "rigorous" three-part inquiry to determine whether these admissibility criteria are met. *City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998)*. Expert testimony is admissible when

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Id. (internal footnote omitted). Thus, the admissibility of an expert's opinion turns on three things: qualifications, reliability, and helpfulness. *See* *United States v. Frazier, 387 F.3d 1244, 1260-62 (11th Cir. 2004)*.

While the trial court's role is critical, it "is not intended to supplant the adversary system or the role of the jury." *Allison v. McGhan Med. Corp., 184 F.3d 1300, 1311 (11th Cir. 1999)*. When the accuracy of evidence is the issue — as opposed to its admissibility — the trial court should allow the judicial process to resolve the matter. *Daubert, 509 U.S. at 596* ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction **[*13]** on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

III. Analysis & Discussion

A. Defendant White Cap's Motion for Summary Judgment (Dkt. 55)

ACS asserts claims for restraint of trade, monopolization, and attempted monopolization, under *Sections 1* and *2* of the Sherman Act. *15 U.S.C. §§ 1-2*. (Dkt. 7 ¶¶ 48-53.) It also asserts a claim against White Cap under Georgia law for tortious interference with its business relationship with Meadow Burke. (*Id.* ¶¶ 57-65.) White Cap moves for summary judgment on all counts.

1. Count One - Monopolization

Section 2 of the Sherman Act provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a felony." *15 U.S.C. § 2*. As an offense then, monopolization requires two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992) (internal quotation marks omitted).

The first element, **[*14]** monopoly power, is the power to control prices in or to exclude competition from the relevant market. Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1294 (11th Cir. 2004). The second element requires predatory or exclusionary acts or practices that have the effect of preventing or excluding competition. *Id.* For a practice to be unlawfully exclusionary, however, "a defendant must harm the competitive *process*, and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice" under Section 2. McWane, Inc. v. F.T.C., 783 F.3d 814, 835-36 (11th Cir. 2015) (internal quotation marks omitted). This is because the Sherman Act does not require a company with monopoly power to alter its way of doing business in order to promote competition. Section 2 of the Sherman Act merely prohibits the unlawful monopolization and the unlawful refusal to deal. *See* Morris Commc'ns, 364 F.3d at 1295 (internal quotation marks omitted). "Unlawful monopoly power requires anticompetitive conduct, which is conduct without a legitimate business purpose that makes sense only because it eliminates competition." *Id.* (internal quotation marks omitted).

ACS alleges that White Cap "acquired and maintained" its monopoly power causing Meadow Burke to stop doing business with ACS. (Dkt. 7 ¶ 49.) ACS's alleged exclusion from the market and resulting injury thus arose, if at all, **[*15]** from Meadow Burke's decision to stop doing business with it and to continue its (functionally) exclusive relationship with White Cap. But, ACS chose to sue only White Cap while leaving Meadow Burke, the company that refused to deal with it, out of the litigation. By doing so, ACS seeks to divorce the alleged anticompetitive decision from the bedrock principle that "[i]n the absence of any purpose to create or maintain a monopoly . . . a company may deal or refuse to deal with whomever it pleases." Morris Commc'ns, 364 F.3d at 1294-95 (quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601-02, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)).

ACS cannot plead around this legitimate business practice. A company's refusal to deal with another company in order to protect or further its own ***legitimate*** business purposes does not violate the antitrust laws, even if its refusal to deal injures competition or a competitor. Id. at 1295 ("Likewise, refusal to deal that is designed to protect or further the legitimate business purposes of a defendant does not violate the antitrust laws, even if that refusal injures competition."). Ordinarily, once a defendant establishes its valid business justification for its conduct, the burden shifts to the plaintiff to show that the proffered business justification is pretextual. *Id.* A defendant in **[*16]** the position of White Cap — that is, a company who receives the benefit of another company's legitimate decision not to deal with a plaintiff — should be permitted the benefit of this same principal. That company does not violate the Sherman Act simply by being the beneficiary of another company's legitimate decision to refuse to deal with a competitor.

And the undisputed evidence in the record shows that is exactly what happened here. The employees of Meadow Burke testified as to their legitimate decision to stop doing business with ACS. They said White Cap had "performed well" for Meadow Burke in Florida. (Dkts. 55-2 ¶ 27; 73-1 ¶ 27; 78-1 ¶ 110.) It had "bought a lot of equipment" and invested in its relationship with Meadow Burke in other ways, so it would not be "fair" to allow ACS to "piggyback" on White Cap's efforts. (Dkts. 55-2 ¶ 27; 73-1 ¶ 27; 78-1 ¶ 110.) Meadow Burke was thus "satisfied with the amount of business it was getting" in Florida and did not feel the need to expand. (Dkts. 55-2 ¶ 27; 73-1 ¶ 27; 78-1 ¶ 110.) Meadow Burke also had a backlog in its engineering department and feared that additional orders from ACS could further lengthen the backlog, upsetting and alienating **[*17]** current customers, like White Cap. (Dkts. 55-2 ¶ 27; 73-1 ¶ 27; 78-1 ¶ 110.) Again, White Cap presented evidence that Meadow Burke had "long lead times for engineering," was at full capacity, and "already maxed out with what [its engineers] could handle." (Dkt. 62-1 at 27:15-28:2.) It was taking Meadow Burke too long to do the work it already had. It feared that, if it added another supplier, their lead times would get even longer, causing it to lose business. (*Id.*; Dkt. 67-1 at 34:11-17.) There is evidence in the record that White Cap was also concerned about delivery times from Meadow Burke's engineering department and complained to Meadow Burke about it. For instance, Meadow Burke employees testified that they had heard "consistently throughout [the] year . . . concern over lead times" and had reached capacity in their engineering department. (Dkt. 66-1 at 19:17-19, 32:19-20 ("Typically, the lead time that we shoot for is about two weeks and at that time we were at about four weeks.").)

White Cap also presented evidence that, when ACS submitted plans directly to Meadow Burke's engineering department rather than following proper channels, ACS "jumped the line," thus getting its plans **[*18]** in front of plans that White Cap and other distributors had previously submitted. (Dkt. 67-1 at 31:5-14.) White Cap was understandably upset and concerned that the backlog in the engineering department would get worse. (*See id.* at 34:11-19.)

White Cap has met its burden of showing that Meadow Burke had a valid business justification for its decision to stop doing business with White Cap. The burden thus shifts to ACS to allege facts to support an inference that the proffered justification is merely pretextual, thereby establishing a genuine issue of material fact. *Morris Commc'ns, 364 F.3d at 1296*. ACS has not done that. Instead, ACS argues that Meadow Burke could have and should have increased its engineering capacity in order to support both ACS and White Cap. It says Meadow Burke should have added more engineers or outsourced engineering. (Dkt. 73 at 22 n.8.) That is not how the antitrust laws work. That ACS can imagine steps Meadow Burke could have taken to change its business and work with ACS does not suggest its business justification for deciding to stop doing business with ACS was pretextual. Because ACS has not raised any issue of material fact challenging Meadow Burke's valid business justification, White **[*19]** Cap is entitled to summary judgment.[6]

Implicit in Meadow Burke's "freedom to deal exclusively" with White Cap "is the freedom to refuse to deal with" ACS. *See* *Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575, 1581 (11th Cir. 1988)*. The virtually exclusive dealing between White Cap and Meadow Burke is thus "free from scrutiny in the absence of proof of competitive harm, or other underlying illegal behavior." *See* *Constr. Aggregate Transp., Inc. v. Fla. Rock Indus., Inc., 710 F.2d 752, 773 (11th Cir. 1983)*. Exclusive distributorships are common and are pro-competitive because they can foster competition, not because they guarantee the success of competitors. *See* *McWane, Inc., 783 F.3d at 827*.

Even putting aside Meadow Burke's legitimate reason for refusing to supply ACS on future projects in Florida, ACS's monopolization claim fails because it has presented no evidence from which a jury could conclude that White Cap's (or Meadow Burke's) actions had the effect of preventing or excluding competition. It might have excluded ACS from Meadow Burke products but it did not prevent, harm, or even lessen competition. Indeed, the fact that ACS introduced SureBuilT products into Florida shows the pro-competitive effect of White Cap's actions, not an anticompetitive effect. White Cap's conduct caused an *increase* in the number of tilt-equipment brands from which Florida contractors could **[*20]** choose. (*See* Dkts. 55-2 ¶ 33; 73-1 ¶ 33.)

The record contains ample evidence that interbrand competition in tilt construction increased following White Cap's conduct in May 2016. For instance, "[o]ver the last two years, Construction Materials, Dayton Superior's exclusive tilt-supplies distributor in Florida, has increased its investment in Florida in competition with White Cap and Meadow Burke" by: (a) hiring a former White Cap tilt specialist to reach new customers in Florida and elsewhere in the Southeast; (b) spending about a million dollars on tilt braces for use in Florida and the Southeast; (c) employing a full-time estimator who works out of Construction Materials' Tampa office; and (d) replacing or adding three or four trucks in Florida. (Dkt. 73-1 ¶ 34.)

That ACS could not successfully maintain its business in Florida is immaterial.[7] Likewise, the fact that SureBuilT was not ACS's first-choice partner is immaterial. The antitrust laws do not ensure that every competitor receives its first choice and gets what it wants. "The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of market." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458-59, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. The **[*21]** antitrust laws were intended to protect

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[6] A court assessing a claim under *§ 2* of the Sherman Act must first determine the relevant market and whether the defendant possessed monopoly power in that market. The Court has not done so here because, even assuming White Cap possessed that power in the relevant market, ACS cannot prevail on its claim because White Cap (and Meadow Burke) have proffered a valid business justification for their actions and ACS has not shown that reason to be a pretext for illegal activity.

[7] ACS does not blame White Cap for its decision to close its Florida office and concedes that White Cap has done nothing to prevent ACS from selling the SureBuilT brand in Florida. (Dkts. 55-2 ¶ 31; 73-1 ¶ 31.)

competition for the benefit of *consumers*, not the preferences of competitors. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*; *see* *Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245, 1249 (5th Cir. 1979)* ("Lest any other former distributors succumb to the temptation of treble damages, we reiterate that it is simply not an antitrust violation for a manufacturer to . . . terminate his relationship with a former distributor, even if the effect of the new contract is to seriously damage the former distributor's business.").[8]

Much of what the parties present as evidence of an adverse or beneficial effect on competition is pure speculation. For instance, White Cap claims that, if Meadow Burke had continued to supply ACS, Meadow Burke's share of the market would have increased even more. But ACS counters that, had Meadow Burke continued their business relationship, White Cap instead would have taken its business elsewhere and thus Meadow Burke's share would not have increased. But each of these proffered outcomes are speculative. The Court considers the facts in front of it, as the parties have presented them, and as they have actually transpired. *See* *K.M.B Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 128 (2d Cir. 1995)* (granting summary judgment because rejected distributor "continued to compete" by selling alternative brand and "offering **[*22]** superior pricing and service to counteract what it considers the higher quality" of the incumbent brand).

In antitrust cases such as this one, the chilling effect on procompetitive behavior and the extraordinary incentives to sue — automatic treble damages and "the cost of suit, including a reasonable attorney's fee" — "endorse[ ] the use of summary judgment." *15 U.S.C. § 15(a)*; *see* *Tidmore Oil Co., Inc. v. BP Oil Co., 932 F.2d 1384, 1388 (11th Cir. 1991)* (affirming award of summary judgment to the defendant). And the Court finds summary judgment warranted, concluding that ACS has failed to point to evidence creating a genuine issue of material fact about the crucial prerequisite of harm to competition in general, as opposed to harm to a particular competitor. *See* *Star Discount Pharmacy, Inc. v. MedImpact Healthcare Sys., Inc., 614 F. App'x 988, 990 (11th Cir. 2015)* (per curiam) ("[T]his indication of harm is harm only to a single competitor (i.e., plaintiffs) and not harm to competition in general.") As the Supreme Court has explained, "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." *Brooke Grp. Ltd., 509 U.S. at 225*. Because ACS has failed to show that Meadow Burke's conduct prevented or excluded competition (other than preventing it from using its preferred manufacturer), the Court grants summary judgment **[*23]** to White Cap on ACS's *Section 2* monopolization claim.

2. Count Two - Attempted Monopolization

Attempt to monopolize requires specific intent to achieve monopoly power. *See* *Spectrum Sports, Inc., 506 U.S. at 456*. "[T]o demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Id.* The attempted monopolization claim is thus harder to maintain and prove that the monopolization claim.

The Court has already determined that neither White Cap nor Meadow Burke engaged in predatory or anticompetitive conduct, "which is conduct without a legitimate business purpose that makes sense only because it eliminates competition." *See* *Morris Commc'ns, 364 F.3d at 1295*. Meadow Burke and White Cap have both presented legitimate, non-pretextual reasons for their conduct. Meadow Burke was concerned that it was "maxed out" in its engineering department and could not effectively increase its capacities without lengthening its already "backlogged" turnaround times. White Cap was concerned that its wait-times would increase even further. Without a showing of predatory or anticompetitive conduct, ACS thus cannot succeed **[*24]** on an attempted monopolization claim, which requires the same elements of a monopolization claim plus a specific intent. Further still, ACS has presented nothing — either direct evidence or circumstantial evidence — demonstrating a "specific intent to

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[8] In *Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981)* (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

monopolize" on the part of White Cap or Meadow Burke. The Court thus grants summary judgment to White Cap on ACS's attempted monopolization claim in Count Two.

3. Count Three - Restraint of Trade

Section 1 of the Sherman Act "does not prohibit *every* act that has the effect of restraining trade . . . [it] prohibits only a 'contract, combination[,] . . . or conspiracy in restraint of trade.' " *Tidmore Oil Co., 932 F.2d at 1388* (affirming grant of summary judgment to defendant because no identifiable agreement to restrain trade). Whether the challenged anticompetitive conduct "stem[s] from independent decision or from an agreement, tacit or express" forms the "critical question" in *Section 1* cases. *Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540, 74 S. Ct. 257, 98 L. Ed. 273 (1954)*; *see also* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (reversing circuit court and remanding for dismissal because pleading alleged "merely parallel conduct that could just as well be independent action"); *Tidmore Oil Co., 932 F.2d at 1388* (reversing circuit court's denial of summary judgment because "the first inquiry . . . is to locate the agreement that restrains trade"). **[*25]**

ACS thus must provide either direct or circumstantial evidence of an unlawful agreement. ACS has failed to do so. The record contains no direct evidence of an agreement. Indeed, ACS admits this. (*See* Dkt. 73-1 ¶ 27 (admitting that there are "no internal records of why Meadow Burke cut off ACS").)

ACS has also pointed to no circumstantial evidence, which "is by its nature ambiguous, and necessarily requires the drawing of one or more inferences in order to substantiate claims of illegal conspiracy." *Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1300 (11th Cir. 2003)*. To be sure, the evidence shows that White Cap complained to Meadow Burke about Meadow Burke's decision to supply ACS. And, further, the evidence shows Meadow Burke thereafter decided to stop supplying ACS. From this, a jury could infer that Meadow Burke did so in response to White Cap's complaint about ACS. But that is not enough. The Supreme Court has explained that permitting an illegal agreement to be inferred "merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct." *See* *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763-64, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. Something more is needed. "There must be evidence that tends to exclude the possibility that the **[*26]** manufacturer and nonterminated distributors were acting independently." *Id.; see also* *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 1001-02 (11th Cir. 1993)* ("Federal ***antitrust law*** requires a plaintiff to introduce evidence that tends to exclude the possibility that the defendants acted independently or legitimately.").

ACS claims it has "abundant evidence of concerted action," "overwhelming direct and circumstantial evidence," and "extensive evidence showing a genuine issue of material fact that Meadow Burke did not act independently in cutting off ACS in Florida." (Dkt. 73 at 2, 12, 15.) ACS argues in a brief: "White Cap threatened Meadow Burke. Meadow Burke acquiesced to the threats from White Cap. Furthermore, Meadow Burke and White Cap both admitted that ACS was terminated in response to the pressure from White Cap." (Dkt. 73 at 16.) These conclusory assertions are not enough to withstand summary judgment. This is precisely the evidence the Supreme Court found lacking in *Monsanto. See also* *Procaps S.A. v. Patheon, Inc., 845 F.3d 1072, 1080 (11th Cir. 2016)* (holding argument unavailing when plaintiff "wholly failed to establish concerted action"); *cf.* *City of Tuscaloosa v. Harcos Chemicals, Inc., 158 F.3d 548, 570 (11th Cir. 1998)* (finding "no shortage of evidence" of concerted action and denying summary judgment).

ACS's brief in opposition to White Cap's motion for summary judgment is untethered **[*27]** from the law. It admonishes the Court to "look beyond a bald denial of concerted action and analyze the substance of the evidence." (Dkt. 73 at 15.) The Court has done so and found ACS's evidence lacking. As explained above, the record shows that White Cap had a legitimate reason to complain to Meadow Burke about its decision to supply ACS — specifically, its frustration with already long lead times within Meadow Burke's engineering department, its fear that adding ACS would exacerbate the situation, and its further irritation that ACS jumped the line on its Florida project. (Dkts. 55-2 ¶ 21; 78-1 ¶ 52.) And the undisputed record evidence also shows that Meadow Burke had a legitimate reason for deciding not to add ACS as a competitor — specifically, its loyalty to White Cap for the investment it had made in Florida, its concern about the capacity of its engineering department, and its overall satisfaction with its level of business.

This evidence does not provide the "something more" the Supreme Court said was required in *Monsanto*. The Supreme Court recognized that manufacturers often obtain information from distributors about the market and use that information to guide their actions. **[*28]** The Supreme Court focused on information about the manufacturer's "prices and the reception of their products in the market" — often arising from a distributor's complaints about prices. *Monsanto, 465 U.S. at 726*. The Supreme Court further noted that, to prevent manufacturers from reacting to these complaints (or to attach antitrust liability from its decision to do so) would inhibit a company's ability to respond to market conditions. *See id. at 764* ("To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market.").

The same is true here. The evidence shows that Meadow Burke came to realize — from White Cap's complaint about ACS's "jumping in line" with engineering — that it did not have enough production capacity to meet those expanded needs. (Dkt. 67-1 at 34:11-19.) Crawford testified that at the time, Meadow Burke had "quite a bit of backlog" in their engineering department and "were behind where [they] wanted to be." (Dkt. 66-1 at 19:14-17.) He also testified that White Cap had "invested heavily" in the Meadow Burke brand and they had "collectively enjoyed a strong business in Florida," which was a "strong **[*29]** stable market." (*Id.* at 18:25-19:6.) Because Meadow Burke was already behind on their lead times at this point, Crawford testified that "[t]here was no compelling reason to make an adjustment to" what was otherwise a "strong stable market." (*Id.* at 19:6-8.) To prevent Meadow Burke from taking this action (or to attach antitrust liability to it) simply because the analysis arose from White Cap's complaint would upset natural market conditions and prevent Meadow Burke from independently acting in its own best interests. That is exactly why the Supreme Court held "there must be evidence that tends to exclude the possibility that the manufacturer [Meadow Burke] and nonterminated distributors [White Cap] were acting independently." *Monsanto, 465 U.S. at 764*.

There is no such evidence of "a conscious commitment to a common scheme designed to achieve an unlawful objective" here. *Id.* "[C]onclusory statement[s] by [ACS] that a conspiracy existed, without more, do[ ] not support 'even an inference of conspiracy' and cannot survive a motion for summary judgment." *Baker's Carpet Gallery, Inc. v. Mohawk Indus., Inc., 942 F. Supp. 1464, 1476 (N.D. Ga. 1996)* (quoting *Dunnivant, 851 F.2d at 1579*). The Court grants summary judgment to White Cap on ACS's *Section 1* restraint of trade claim.

4. Count Four - Claim for Tortious Interference

ACS asserts a claim **[*30]** against White Cap that it improperly interfered with ACS's business relationship with Meadow Burke. (Dkt. 7 ¶¶ 57-65.) White Cap moves for summary judgment, arguing that ACS cannot satisfy the necessary elements. Under Georgia law, to avoid summary judgment on its tortious-interference claim, ACS must provide evidence that

1) White Cap was a stranger to the business relations between Meadow Burke and ACS;
2) White Cap acted improperly or without privilege;

3) White Cap acted purposefully with malice and with the intent to injure the business relationship between ACS and Meadow Burke;

4) White Cap caused Meadow Burke to discontinue or fail to enter into an anticipated business relationship with ACS.

See Barnwell v. Barnette & Co., 476 S.E.2d 1, 2 (Ga. Ct. App. 1996) (holding defendant entitled to summary judgment on the plaintiff's claim for tortious interference); *Servicetrends, Inc. v. Siemens Med. Sys., Inc., 870 F. Supp. 1042, 1068-69 (N.D. Ga. 1994)* (granting summary judgment to defendant after plaintiff's failure to show element of tortious interference claim). ACS has failed to provide evidence every element.

First, acting "improperly or without privilege" requires behavior wrongful by itself, such as "physical violence, fraud or misrepresentation, defamation, use of confidential information, abusive civil suits, and unwarranted criminal **[*31]** prosecutions." *Kirkland, 645 S.E.2d at 656* (affirming summary judgment when plaintiff could not show defendant acted "improperly or without privilege"). There is none of that here. Competitive business practices, including advocating and persuading a supplier not to do business with a rival, cannot satisfy this requirement. *See id. at 656* (finding insufficient to show tortious interference "bare evidence" that one party persuaded another to breach a contract); *Elder v. Cardoso, 205 Ga. App. 144, 421 S.E.2d 753, 757 (Ga. Ct. App. 1992)* (reversing trial court and granting summary judgment because "dissuad[ing]" or "discourage[ing]" statements could not support tortious interference claim).

So, White Cap's complaint to Meadow Burke (based on its belief that it would be hurt by Meadow Burke's decision to supply ACS) is insufficient to state a claim.[9] Even viewing the evidence in the light most favorable to ACS, as the Court must, it can offer no evidence that White Cap acted improperly and without privilege. As stated above, there is also no evidence in the record to suggest that White Cap in fact caused Meadow Burke to stop working with ACS. The undisputed evidence shows that

- Made aware of an unauthorized future shipment of supplies by Meadow Burke to ACS, Doug Crawford, Meadow Burke's Vice President **[*32]** for Sales and Marketing, considered whether Meadow Burke would support ACS in Florida;
- Mr. Crawford decided not to supply ACS for reasons having to do with Meadow Burke's "best interests"; and
- Mr. Crawford was unaware of or uninfluenced by any "pressure" from White Cap to decide as he did.

ACS points to no evidence that White Cap's supposed "pressure" caused Mr. Crawford to act as he did, particularly when Mr. Crawford testified it did not. (Dkt. 73-1 ¶¶ 25, 27.)

To demonstrate causation, ACS must provide affirmative evidence that tends to exclude the possibility of Meadow Burke's independent action. *See Smith v. Morris, Manning & Martin, LLP, 293 Ga. App. 153, 666 S.E.2d 683, 694-95 (Ga. Ct. App. 2008)* (affirming summary judgment where decisionmaker asserted that defendant's actions did not affect his decision to terminate the contract). And ACS has not done so. The Court grants summary judgment to White Cap on Count Four of ACS's complaint for tortious interference.

B. Plaintiff ACS's Motion for Partial Summary Judgment (Dkt. 56)

Plaintiff ACS moves for partial summary judgment on the relevant market for its *Section 2* antitrust claims. Because the Court decides the monopolization claims on other grounds in White Cap's favor, the Court denies as moot Plaintiff ACS's motion for partial summary **[*33]** judgment. (Dkt. 56.)

C. Plaintiff ACS's Motion to Exclude White Cap's Experts' Regression Analysis (Dkt. 57)

ACS moves to exclude the regression analysis offered by Dr. Kristin Terris, White Cap's expert, under *Rules 702* and *403 of the Federal Rules of Evidence.* (Dkt. 57.) The Court agrees with White Cap, however, that the role of the Court is to serve as gatekeeper, not as an arbiter of probative value. (Dkt. 71 at 10.)

ACS takes issue with Dr. Terris's choice of variable in her regression analyses. (Dkt. 57 at 2.) But the Court finds that this dispute goes to the probative nature of the expert's report, not its admissibility. As a gatekeeper, the Court does not make ultimate conclusions about the persuasiveness of the proffered evidence. An expert's selection of independent variables "affect[s] the analysis' probativeness, not its admissibility." *Bazemore v. Friday, 478 U.S. 385, 400, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986)*.

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[9] The record also contains no evidence sufficient to survive summary judgment. Interestingly, the Court notes that White Cap did not file a dispositive motion to dismiss before the start of discovery.

The Court notes that ACS's reply brief highlights the correctness of this conclusion. Its reply brief essentially amasses what would be a proper cross-examination. The Court thus denies ACS's motion to exclude Dr. Terris's regressions. (Dkt. 57.)

D. Plaintiff ACS's Motions to Seal (Dkts. 69; 75)

Plaintiff ACS has moved to retain under seal certain documents marked as confidential by Defendant **[*34]** White Cap. The documents contain White Cap's proprietary and competitively sensitive pricing information and detailed customer information. (Dkt. 74-1 at 1.) Given the narrow scope of the information sought to be kept under seal, the Court finds good cause to seal the documents under *Federal Rule of Civil Procedure 26*. *FED. R. CIV. P. 26(c)*. The Court grants ACS's motions for leave to file under seal. (Dkts. 69; 75.)

IV. Conclusion

The Court **GRANTS** Defendant White Cap's Motion for Summary Judgment (Dkt. 55) on all counts of Plaintiff ACS's amended complaint and **DENIES** Plaintiff ACS's motion for partial summary judgment (Dkt. 56).

The Court **DENIES** Plaintiff ACS's Motion to Exclude (Dkt. 57).

The Court **GRANTS** Plaintiff ACS's motions for leave to file under seal (Dkts. 69; 75) and **DIRECTS** the Clerk to **SEAL** Plaintiff ACS's filings at Docket numbers 63 and 74.

SO ORDERED this 26th day of February, 2020.

/s/ Michael L. Brown

MICHAEL L. BROWN

UNITED STATES DISTRICT JUDGE

Gov't of P.R. v. Carpenter Co.

United States District Court for the District of Puerto Rico

February 27, 2020, Decided; February 27, 2020, Filed

Civil No. 18-1987 (GAG)

Reporter

442 F. Supp. 3d 464 *; 2020 U.S. Dist. LEXIS 34611 **; 2020-1 Trade Cas. (CCH) P81,120; 2020 WL 962931

THE GOVERNMENT OF PUERTO RICO, Plaintiff, v. THE CARPENTER COMPANY, et al., Defendants.

Core Terms

foam, conspiracy, polyurethane, antitrust, price-fixing, motion to dismiss, purchaser, damages, injunctive relief, allegations, Flexible, indirect, statute of limitations, laches, parens patriae, alleged conspiracy, unjust enrichment, increased price, discovery, Products, doctrine of unjust enrichment, antitrust claim, anti trust law, overt act, four-year, meetings, ongoing, courts, posits, failure to state a claim

LexisNexis® Headnotes

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

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

For purposes of the joint motion to dismiss, a court accepts as true all the factual allegations in the complaint and construes all reasonable inferences in favor of plaintiff.

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

Evidence > Judicial Notice

HN2[] **Defenses, Demurrers & Objections, Motions to Dismiss**

At the motion to dismiss stage, a court may take judicial notice of the fact that press coverage, prior lawsuits or regulatory filings contained certain information, without regard to the truth of the contents.

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

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

HN3[] **Motions to Dismiss, Failure to State Claim**

When considering a motion to dismiss for failure to state a claim upon which relief can be granted, *Fed. R. Civ. P. 12(b)(6)*, a court analyzes the complaint in a two-step process under the context-based plausibility standard established by the United States Supreme Court. First, a court must isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements. A complaint does not need detailed factual allegations, but threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Second, the court must then take the complaint's well-pleaded, i.e., non-conclusory, non-speculative, facts as true, drawing all reasonable inferences in the pleader's favor, and see if they plausibly narrate a claim for relief. Plausible, means something more than merely possible, and gauging a pleaded situation's plausibility is a context-specific job that compels the court to draw on its judicial experience and common sense. That simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element.

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

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

HN4[] **Motions to Dismiss, Failure to State Claim**

Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not shown--that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. If, however, the factual content, so taken, allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged, the claim has facial plausibility.

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

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

HN5[] **Motions to Dismiss, Failure to State Claim**

In the early stage of the proceedings, the plausibility standard requires a court to consider if the allegations set forth in the complaint are more than merely possible. As it is well-known that simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence concerning the necessary elements to prove the relief plaintiff seeks. For a plaintiff to show an entitlement to relief a complaint must contain enough factual material to raise a right to relief above the speculative level. A well-plead complaint may proceed even if a recovery is very remote and unlikely yet it may not, if the remedy sought is not available.

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

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

HN6[] **Motions to Dismiss, Failure to State Claim**

At the *Fed. R. Civ. P. 12(b)(6)* motion to dismiss stage of the proceedings, a court's task requires analyzing if the pleadings in the complaint can plausibly establish this cause of action upon which relief may be granted.

Antitrust & Trade Law > Clayton Act > Remedies

Evidence > Burdens of Proof > Allocation

Constitutional Law > The Judiciary > Case or Controversy

Antitrust & Trade Law > Clayton Act > Scope

HN7[] Clayton Act, Remedies

Section 16 of the Clayton Act which provides that any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief against threatened loss or damage by a violation of the antitrust laws. 15 U.S.C.S. § 16. To meet that burden, a plaintiff must demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur. The threatened injury must be one for which plaintiff would be entitled to compensation if the injury actually occurred. The United States Court of Appeals for the First Circuit, when analyzing the elements for an antitrust injunction and its standing requirements, have held that: Section 16's requirement of threatened injury dovetails with Article III's requirement that in order to obtain forward-looking relief, a plaintiff must face a threat of injury that is both real and immediate, not conjectural or hypothetical. Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Clayton Act > Defenses

HN8[] Remedies, Damages

When entertaining a suit under the Clayton Act's Section 4 (damages), a court shall determine if it was filed within the four-year statute of limitations. 15 U.S.C.S. § 15b. Those claims accrue when a defendant commits an act that injures a plaintiff's business. The United States Supreme Court has delineated at least two distinct exceptions to the four-year statute of limitations in antitrust actions: (1) the continuing violation and (2) the speculative damages exception.

Antitrust & Trade Law > Clayton Act

Governments > Legislation > Statute of Limitations > Extensions & Revivals

HN9[] Antitrust & Trade Law, Clayton Act

Where the Clayton Act claim is a continuing conspiracy violation, each time a plaintiff is injured by an act of the defendants, a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act. In the context of price-fixing allegations, that implies that each time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs from the date of the act. However, the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.

Antitrust & Trade Law > Clayton Act > Defenses

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

HN10[] **Clayton Act, Defenses**

In applying laches, a court looks to the same legal rules that animate the four-year statute of limitations for damages under the Clayton Act.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

HN11[] **Affirmative Defenses, Laches**

The doctrine of laches, which penalizes a litigant for negligent or wilful failure to assert his rights, requires proving (1) lack of diligence by the party against whom the defense is asserted and (2) prejudice to the party asserting the defense. Nevertheless, the laches doctrine applies only where the plaintiff knew or should have known of the infringing conduct.

Civil Procedure > Preliminary Considerations > Justiciability > Case & Controversy Requirements

Civil Procedure > Remedies > Injunctions

HN12[] **Justiciability, Case & Controversy Requirements**

As the United States Court of Appeals for the First Circuit has held, past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Statute of Limitations

HN13[] **Affirmative Defenses, Laches**

When considering statute of limitations and laches defenses, the United States Court of Appeals for the Ninth Circuit has held that to re-start a statute of limitations, there must be a new overt act which: (1) is new and independent and not merely a reaffirmation of a previous act and (2) inflicts new and accumulating injury on the plaintiff.

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

Civil Procedure > Remedies > Injunctions

HN14[] **Motions to Dismiss, Failure to State Claim**

An injunctive relief claim that relies on general and vague descriptions of an ongoing conspiracy without a new and independent act, fails to overcome the Fed. R. Civ. P. 12(b)(6) standard.

Antitrust & Trade Law > Business & Corporate Compliance > Antitrust

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

Civil Procedure > Remedies > Injunctions

HN15[] **Antitrust & Trade Law**

Although district courts are reluctant to dismiss antitrust injunction claims based on ongoing conspiracies, proceeding to antitrust discovery can be expensive and thus retains the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed. In the Twombly decision, the United States Supreme Court cautioned about the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.

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

HN16[] **Regulated Practices, Price Fixing & Restraints of Trade**

The United States Supreme Court held that indirect purchasers may not recover damages in price-fixing cases and even if direct purchasers have passed on some or all the overcharges to indirect purchasers.

Civil Procedure > Preliminary Considerations > Equity > Relief

HN17[] **Equity, Relief**

The Puerto Rico Supreme Court has recognized a cause of action under the unjust or undue enrichment doctrine. That civil law equity doctrine can be invoked when the laws have not foreseen a situation where a patrimonial shift occurs and which shift cannot be rationally explained by the prevalent body of laws. There are five elements to an unjust enrichment action: (1) existence of enrichment; (2) a correlative loss; (3) nexus between loss and enrichment; (4) lack of cause for enrichment, and (5) absence of a legal precept excluding application of enrichment without cause.

Antitrust & Trade Law > Clayton Act

Civil Procedure > Preliminary Considerations > Equity > Relief

HN18[] **Antitrust & Trade Law, Clayton Act**

Federal ***antitrust law***, specifically *Section 16* of the Clayton Act, provides statutory authorization for claims brought by a state or territory in its capacity as parens patriae. *15 U.S.C.S. §§ 15g-15h*; However, no Commonwealth statute nor Puerto Rico Supreme Court precedent explicitly provides for parens patriae standing to present unjust enrichment claims.

Antitrust & Trade Law > Business & Corporate Compliance > Antitrust

HN19[] **Antitrust & Trade Law**

The costs of complex antitrust lawsuits require diligence and timeliness.

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Judges: GUSTAVO A. GELPI, United States District Judge.

Opinion by: GUSTAVO A. GELPI

Opinion

[*466] **OPINION AND ORDER**

On December 20, 2018, the Government for the Commonwealth of Puerto Rico ("Government" or "Commonwealth"), in its *parens patriae* capacity and on behalf of the people of the Puerto Rico, filed suit against several companies and private individuals ("Defendants")[1] involved in the flexible polyurethane foam's industry[2] for allegedly conspiring to price-fix products from January 1, 1999 up to the present. (Docket No. 1). Plaintiff seeks injunctive **[*467]** relief, pursuant to the *Clayton Act*, *15 U.S.C. § 26*, requesting this Court to enjoin Defendants from continuing its ongoing price-fixing conspiracy **[**3]** and demands damages in no less than $50,000,000.00, under the unjust enrichment equity doctrine. Id.

Pending before the Court are Defendants' motions to dismiss for failure to state a claim upon which relief can be granted (Docket No. 34), for lack of standing (Docket No. 39) and for lack of personal jurisdiction (Docket Nos. 35; 37). After reviewing the parties' submissions, record and applicable law, this Court **GRANTS** the joint motion to

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[1] Not all Defendants named in the Complaint have appeared before this Court. Each defendant is specifically named in section I.A.

[2] Flexible polyurethane foam is defined in the Complaint as "a commodity widely used for cushioning and insulation in a variety of goods, including but not limited to furniture, bedding, packaging, and flooring." (Docket No. 1 ¶ 3).

dismiss for failure to state a claim at Docket No. 34 and, consequently, finds that the motions to dismiss at Docket Nos. 35, 37, 39 are **MOOT**.

I. Relevant Factual and Procedural Background

HN1[] For purposes of the joint motion to dismiss, the Court accepts as true all the factual allegations in the Complaint and construes all reasonable inferences in favor of Plaintiff. See *Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 16 (1st Cir. 1998)*.

A. Defendants

The companies, and or affiliates, that sold flexible polyurethane foam throughout the United States, including the Commonwealth of Puerto Rico, during the period of the alleged price-fixing conspiracy are: (1) The Carpenter Company (or Carpenter Co.);[3] (2) Flexible Foam Products, Inc. (Flexible Foam Products);[4] (3) FXI Holdings, Inc., Foamex Innovations, Inc., or Foamex International, **[**4]** Inc. (Foamex or FXI);[5] (4) Future Foam, Inc. (Future Foam);[6] (5) Hickory Springs Manufacturing Company (Hickory Springs);[7] (6) Leggett & Platt Inc. (Leggett);[8] (7) Mohawk Industries Inc. (Mohawk);[9] (8) Otto Bock Polyurethane Technologies, Inc. (Otto **[*468]** Bock);[10] (9) Scottdel Inc. (Scottdel);[11] (10) Woodbridge Foam Corporation, Woodbridge Sales & Engineering, Inc., (collectively "Woodbridge"),[12] and (11) Corporation ABC.[13] The claims against Defendants Vitafoam Products Canada Limited

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[3] Carpenter Co. is a company that manufacture and distribute flexible polyurethane foam for bedding, including cushioning, foam mattresses, and fibers, carpet cushion products, and flexible foam packaging. (Docket No. 1 ¶¶ 13-16). Defendant Carpenter Co. clarifies in its joint motion to dismiss that Plaintiff incorrectly identified it as "The Carpenter Company," when the corporation's name is Carpenter Co. Id. at 1.

[4] Flexible Foam Products is a company that manufactures flexible polyurethane foam and re-bond products serving customers in the bedding, flooring, furniture, packaging, and transportation industries. Id. ¶¶ 17-20. Defendant Flexible Foam Products has yet to appear in this case.

[5] FXI is a company with its principal place of business in Pennsylvania that provides flexible polyurethane foam for the home, healthcare, electronics, industrial, personal care and transportation markets. (Docket No. 1 ¶¶ 21-25). Defendant FXI clarifies that "Foamex Innovations, Inc." or "Foamex International, Inc." no longer exist and that FXI Holdings, Inc. is the entity appearing to move to dismiss the present case. (Docket No. 34 at 1).

[6] Future Foam is a company with its principal place of business in Iowa that produces flexible polyurethane foam products for the bedding, flooring, furniture, and packaging industries. (Docket No. 1 ¶¶ 26-28).

[7] Hickory Springs is one of the nation's largest integrated components manufacturers and suppliers for the furniture and bedding industries, with more than sixty operating facilities in the United States and throughout the world. Id. ¶¶ 29-33.

[8] Leggett is a company that manufactures flexible polyurethane foam and other components for the bedding and furniture industries. Id. ¶¶ 34-36.

[9] Mohawk is a company that manufactures flexible polyurethane foam and other components for the flooring industry. (Docket No. 1 ¶ 37).

[10] Otto Bock is a subsidiary of Otto Bock Holding GmbH & Co. KG, a German company. Id. ¶¶ 38-40. Defendant Otto Bock has yet to appear in this case.

[11] Scottdel is a company that manufactures bonded urethane carpet cushions since 1961 and now operates complete line of commercial and residential cushions ranging in density from 3.5 pounds to 10 pounds per cubic foot. Id. ¶¶ 41-44. Defendant Scottdel has yet to appear in this case.

[12] Woodbridge are companies whose primary focus involves supplying flexible polyurethane foam for automotive components, but it also supplies flexible polyurethane foam for commercial and recreational transportation, building products, construction, packaging, and several consumer and industrial products. Id. ¶¶ 53-59.

(Vitafoam Canada) and Vitafoam Inc. (collectively with Vitafoam Canada, "Vitafoam") were *dismissed with prejudice* pursuant to Plaintiff's notice of voluntary dismissal. (Docket Nos. 58; 59).

Similarly, according to the Complaint, the private individuals responsible for heading the alleged price-fixing conspiracy throughout the United States, including the Commonwealth of Puerto Rico, during the period in question are: (1) Louis Carson, former President of Scottdel; (2) David Carson, former Vice President, Manufacturing of Scottdel,[14] (3) John Doe, (4) Jane Doe, (5) and their conjugal partnership, whose identity is currently unknown yet may be responsible for the allegations set forth in Plaintiff's complaint. **[**5]** Id. ¶¶ 61-65. Lastly, Plaintiff mentions possible agents and co-conspirators that may have participated as co-conspirators in the violations alleged in the Complaint. (Docket No. 1 ¶¶ 66-69).

B. The flexible polyurethane foam market

In 2008, over 590,000 metric tons of slabstock flexible polyurethane foam were produced in the United States. (Docket No. 1 ¶ 74). Flexible polyurethane foam has a wide-range of uses, yet it is most used in bedding and upholstery, while the more rigid variety is used for products, thermal insulation and in automobile dashboards. Id. ¶ 77. The American Chemistry Council estimated that the domestic revenue for polyurethane foam industry for 2015 was $28.2 billion. Id. ¶ 91. The Polyurethane Foam Association, a trade association in which the non-private-individual Defendants are members, advances that, compared to polyurethane foam, other alternative materials in the areas of economics, comfort potential, ease of use, and durability, cannot be deemed as acceptable a substitute. Id. ¶ 98. Finally, according to Plaintiff, there has been a recent trend towards consolidation in this industry where major players within the industry have been active in acquiring smaller **[**6]** companies and other competitors over the course of the last ten years. Id. ¶¶ 99-100.

C. The alleged conspiracy

The unraveling of the alleged conspiracy occurred in February 2010 when Vitafoam voluntarily contacted the U.S. Department of Justice's (DOJ) Antitrust Division to self-report evidence of misconduct amongst itself, other companies and individuals in the industry. (Docket No. 1 **[*469]** ¶ 105). Vitafoam sought, and eventually received, acceptance into the DOJ's Corporate Leniency Program. Id. Since that date, Vitafoam and its employees have been cooperating with the DOJ's criminal investigation into illegal anticompetitive conduct in the flexible polyurethane foam market. (Docket No. 1 ¶ 106). While seeking the corporate leniency letter, and in connection with a Canadian government antitrust investigation, several current and former Vitafoam employees agreed to be interviewed regarding the alleged price-fixing conspiracy. (Docket No. 1 ¶ 108). These interviews revealed the mechanisms, participants, duration, and impact of the conspiracy. Id.

According to these interviews, Defendants established a practice where they would communicate and reach an agreement or understanding as to the percentage **[**7]** amount and timing of price increases and market allocation in the sale and supply of polyurethane foam. Id. at ¶ 109. The price increase discussions occurred approximately two to three times per-year and often coincided with the bi-annual meetings held by the Polyurethane Foam Association (PFA). Id. The general pretext used to explain the price increases was through an increase in raw material costs. Id. at ¶ 110. When Defendants' raw material suppliers announced price increases for chemical ingredients of foam, they contacted each other to provide an opportunity to raise prices. Id. Defendants viewed price fixing as necessary because if they did not increase their foam prices by the same percentage amount, and at around the same period, then the attempted price increase would fail. Id.

During the period of the alleged conspiracy there has been an understanding among Defendants and their co-conspirators to collectively support supra-competitive prices; specifically, the percentage of price increases, the dates of the increases and how the conspirators would announce the increases with nearly the same effective dates. Id. at ¶ 112. Subsequently, price increase announcement letters were **[**8]** then mailed to customers,

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[13] Corporation ABC is a corporate entity and who's the identity is currently unknown that may be responsible for the allegations set forth in Plaintiff's complaint. Id. ¶ 60.

[14] These individual defendants have yet to appear in this case.

reflecting the prices determined. Id. Defendants policed these increases to ensure they were implemented amongst themselves and did not permit price reductions without consent of the overall group. (Docket No. 1 ¶ 112).

In the Complaint, Plaintiff explains in great length how former Vitafoam executives, particularly its former President and Vice President, coordinated and executed this price-fixing conspiracy. (Docket No. 1 ¶¶ 113-153). The allegations described include discussions and transcripts of conversations that occurred by means of telephone, e-mails and in-person meetings. Id. at ¶ 117. These top executives, as detailed in the Complaint, participated in a conspiratorial conduct during this period alongside individuals employed by numerous competitors, including co-Defendants Carpenter, Otto Bock, Woodbridge, Flexible Foam, Hickory Springs, Scottdel, and Foamex. Id. at ¶ 120. Notably, an unnamed witness that participated in an investigation held by Canada's Commissioner of Competition confirmed the involvements of most Defendants in these price-fixing schemes. Id. at ¶¶ 130-139. It is alleged that Defendants also undertook substantial efforts to police **[**9]** the conspiracy and keep it secret. Id. at ¶¶ 154-207. In this regard, they took advantage of attending trade association meetings along with their competitors and met to discuss coordinating price increases outside of the formal meetings. Id. at ¶ 199. The Complaint also lays out various market factors that made the market for flexible polyurethane foam highly susceptible to anticompetitive practices and unlawful collusion. Id. at ¶ 208. These were: (1) limited competition; (2) inelastic demand due to lack of substitutes; **[*470]** (3) standardized commodity product with high degree of interchangeability; (4) opportunities to conspire. Id. at ¶¶ 209-221.

The Commonwealth puts forward that it did not discover nor could have discovered, through the exercise of reasonable diligence, the existence of the conspiracy alleged prior to disclosure in 2010 of federal agencies' raids of certain Defendants' facilities. Id. at ¶ 222. Plaintiff stresses that, except for Vitafoam which sought leniency from the DOJ and Scottdel that filed for bankruptcy and went into liquidation, there was no indication that any of the other Defendants has taken affirmative action to leave the conspiracy. (Docket No. 1 ¶ 207). **[**10]**

Finally, the Commonwealth pleads that the unlawful conspiracy had the effect of: (1) maintaining prices charged by Defendants at an artificially high and supra-competitive levels; (2) having them pay more for products manufactured with polyurethane foam than they would have paid in a competitive marketplace, and (3) depriving them of the benefits of free, open and unrestricted competition in the market for polyurethane foam. (Docket No. 1 ¶¶ 299-232). All of these occurred, during and throughout the period in question, as the Government indirectly purchased Defendants' polyurethane foam in Puerto Rico. Id. ¶ 230.

D. Multi-District Antitrust Litigation, Settlements and Fines

The Court takes judicial notice, pursuant to *FED. R. EVID. 201*,[15] of the following facts: After Vitafoam voluntarily approached the DOJ's antitrust division in early 2010, lawsuits were filed in several district courts seeking class action status and alleging a price-fixing conspiracy in the foam industry. See Peter Reap, Antitrust News: Companies Which Purchased Flexible Polyurethane Foam Allege Price Fixing Conspiracy, Wolters Kluwer ***Antitrust Law*** Daily, 2013 WL 5861997. Most of these actions were consolidated in the Northern District of Ohio. See *In re: Polyurethane Foam Antitrust Litig., 753 F. Supp. 2d 1376 (U.S. Jud. Pan. Mult. Lit. 2010)*. Many of these lawsuits concluded with million-dollar settlements that led to the dissolution or bankruptcy of some companies.[16]

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[15] ***HN2***[] At the motion to dismiss stage, a Court may take judicial notice of the fact that press coverage, prior lawsuits or regulatory filings contained certain information, without regard to the truth of the contents. See *Rodi v. S. New England Sch. Of Law, 389 F.3d 5, 12-19 (1st Cir. 2004)*. See also *Staehr v. Hartford Fin. Servs. Grp., Inc., 547 F.3d 406, 425 (2d Cir. 2008)*.

[16] See Polyurethane foam makers in $128.5 mln US price-fixing accords, Reuters (June 22, 2015), https://www.reuters.com/article/polyurethane-settlement/polyurethane-foam-makers-in-128-5-mln-us-price-fixing-accords-idUKL1N0Z829 M20150622; Jonathan Stempel, Polyurethane foam makers pay $275.5 million to end price-fixing cases, Reuters (May 19 2015), https://www.reuters.com/article/us-polyurethane-settlement/polyurethane-foam-makers-pay-275-5-million-to-end-price-fixing-cases-idUSKBN0O42K8201 50519. See also *In re Polyurethane Foam Antitrust Litig., 135 F. Supp. 3d 679 (N.D. Ohio 2015)*; *In re Polyurethane Foam Antitrust Litig., Civil Case No. 10-MD-2196, 2015 U.S. Dist. LEXIS 23482, 2015 WL 1639269 (N.D. Ohio 2015)*.

Similarly, **[**11]** various companies in the industry faced criminal prosecution for the price-fixing scheme and were fined by countries in North America and Europe.[17]

[*471] E. Defendants' Motions to Dismiss

Defendants Carpenter, FXI, Future Foam, Hickory Springs, Mohawk, Leggett, and Woodbridge filed a joint motion to dismiss for failure to state a claim, under *FED. R. CIV. P. 12(b)(6)*, arguing that the allegations contained in the Complaint offer no sufficient legal basis to issue an injunction that would stop the alleged anticompetitive conduct that has not occurred since 2010. (Docket No. 34). Similarly, they posit that the Commonwealth may not sue for unjust enrichment to revive a time-barred antitrust damages claim because the *Puerto Rico Antitrust Act ("PRAA"), P.R. LAWS ANN. tit. 10, §§ 257 et seq.*, provides an adequate legal remedy to their alleged injuries. Id. Finally, Defendants contend that **[**12]** Plaintiff cannot sue in *parens patriae* capacity because it lacks statutory standing to litigate the individual claims of Puerto Rico residents. Id.

Defendants Woodbridge, Hickory Springs and FXI filed additional motions to dismiss against Plaintiff on different grounds to those articulated in the joint motion. (Docket Nos. 35, 37, 39). Woodbridge mainly argues that the Government's conspiracy allegations cannot be related to its business activities in the Commonwealth; thus, under *FED. R. CIV. P. 12(b)(2)*, the Court lacks personal jurisdiction over the company. (Docket No. 35). Likewise, it also pleads that both federal and Commonwealth ***antitrust law*** claims should be dismissed for lack of proper venue, pursuant to *FED. R. CIV. P. 12(b)(3)*. (Docket No. 35). Similarly, Hickory Springs posits that the Court lacks specific jurisdiction, under *FED. R. CIV. P. 12(b)(2)*, because Plaintiff's claims are not related to any activity carried out by Hickory Springs in Puerto Rico. (Docket No. 37). Notably, Hickory Springs puts forward that the polyurethane foam products at issue were sold into the Commonwealth by third parties; hence, there is no nexus between Plaintiff and Hickory Springs. Id. Lastly, FXI argues that Plaintiff cannot identify facts that would establish **[**13]** Article III standing against it given that Plaintiff fails to sue an existing corporate entity, Foamex. (Docket No. 39). Specifically, FXI details Foamex's bankruptcy procedures that ended up in its dissolution and avers that Plaintiff never mentions FXI in the Complaint neither does it allege a real, immediate, and significant threat of injury. Id.

The Government filed responses in opposition to all motions to dismiss (Docket Nos. 60, 61) and Defendants replied thereafter. (Docket Nos. 68, 69, 70, 71).

II. Standard of Review

HN3[] When considering a motion to dismiss for failure to state a claim upon which relief can be granted, *Fed. R. Civ. P. 12(b)(6)*, the Court analyzes the complaint in a two-step process under the context-based "plausibility" standard established by the Supreme Court. See *Schatz v. Republican State Leadership Comm., 669 F.3d 50, 55 (1st Cir. 2012)*; see also *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. First, the Court must "isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements." *Schatz, 669 F.3d 50 at 55*. A complaint does not need detailed factual allegations, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal, 556 U.S. at 678-79*. Second, the court must then "take the complaint's well-[pleaded] (i.e., **[**14]** **[*472]** non-conclusory, non-speculative) facts as true, drawing all reasonable inferences in the pleader's favor, and see if they plausibly narrate a claim for relief." *Schatz, 669 F.3d at 55*. Plausible, means something more than merely possible, and gauging a pleaded situation's plausibility is a context-specific job that compels the court to draw on its judicial

[17] See Three Foam Manufacturers Plead Guilty in Price Fixing Scheme, Department of Justice (June 27, 2014), https://www.justice.gov/opa/pr/three-foam-manufacturers-plead-guilty-price-fixing-scheme; European Commission, Antitrust: Commission fines producers of foam for mattresses, sofas and car seats € 114 million in cartel settlement (Jan. 29, 2014), https://ec.europa.eu/commission/presscorner/detail/en/IP_14_88; Polyurethane foam, Government of Canada (Jan. 6, 2012), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02585.html.

experience and common sense. Id. (citing *Iqbal, 556 U.S. at 678-79*). This "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of" the necessary element. *Twombly, 550 U.S. at 556*. ***HN4***[] "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal, 556 U.S. at 679* (quoting *FED. R. CIV. P. 8(a)(2)*). If, however, the "factual content, so taken, 'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,' the claim has facial plausibility." *Ocasio-Hernández v. Fortuño-Burset, 640 F.3d 1, 12 (1st Cir. 2011)* (quoting *Iqbal, 556 U.S. at 678*).

III. Discussion

Defendants primarily argue that Plaintiff cannot show imminent harm and rely on the analysis set forth in different complex litigation antitrust cases. (Docket No. 34 at 5-6). See *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6 (1st Cir. 2008)*; *In re Relafen Antitrust Litig., 221 F.R.D. 260 (D. Mass. 2004)*; *Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404 (1st Cir. 1985)*. They assert that Plaintiff's theory of an ongoing industry-wide **[**15]** conspiracy requires an overt act sufficient to toll and restart the statute of limitations. (Docket No. 34-1 at 5-6). They argue that this has yet to occur. Id. Moreover, Defendants contend that the doctrine of laches bars the Government's claims because it had knowledge about the alleged conspiracy as early as 2010 meaning that the Clayton Act *Section 4* (Damages)'s four-year statute of limitations, *15 U.S.C. § 15b*, expired prior to filing this lawsuit on December 20, 2018. Id. at 7.

Plaintiff holds, in opposition, that in the context of antitrust litigation the requirements for standing to pursue an injunctive relief are "less stringent" than those for standing to claim damages. (Docket No. 61 at 4). At this early litigation stage, the Government avers that it describes a plausible set of facts about the conspiracy: how it worked and the active policing that each Defendant engaged in to ensure everybody involved complied with the agreement. Id. Plaintiff also puts forward that not issuing an injunction may result in a recurring incident that could evade judicial review. Id. at 5. Lastly, the Government holds that it plausibly suffers an imminent threat of injury. Id.

In their reply, Defendants posit that the Government offers **[**16]** a legal conclusion about a continuing conspiracy without supporting factual allegations from the past nine years. (Docket No. 69). They insist that the Court should not enjoin all potential and future ***antitrust law*** violations. Id. As to the evading judicial review argument, Defendants assert that the mootness doctrine exception explained in the opposition is irrelevant to the case at hand. Id. Finally, Defendants aver that Plaintiff failed to oppose their laches argument, and have thus, waived its right to contest it. Id.

HN5[] Given the early stage of the proceedings, the plausibility standard requires the Court to consider if the allegations set forth in the Complaint are "more than merely possible." *Schatz, 669 F.3d at 55*. As it is well-known this "simply calls for enough facts to raise a reasonable expectation **[*473]** that discovery will reveal evidence" concerning the necessary elements to prove the relief plaintiff seeks. *Twombly, 550 U.S. at 556*. For a plaintiff to show an entitlement to relief "a complaint must contain enough factual material to raise a right to relief above the speculative level." *Ocasio-Hernández, 640 F.3d at 12* (citation omitted); see also *Twombly, 550 U.S. at 555*. A well-plead complaint "may proceed even if . . . a recovery is very remote and unlikely" yet it may not, **[**17]** *if the remedy sought is not available*. *Ocasio-Hernández, 640 F.3d at 12-13*. Bearing this in mind, in this case, Plaintiff seeks an injunctive relief in the context of an antitrust case. ***HN6***[] The Court's task requires analyzing if the pleadings in the Complaint can plausibly establish this cause of action upon which relief may be granted.

A. Injunctive Relief

Plaintiff invokes ***HN7***[] *Section 16* of the Clayton Act which provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26*. To meet this burden Plaintiff must "demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)* (citations omitted). The threatened injury must be one for which plaintiff would be entitled to compensation if the injury actually occurred. *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 111-13, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. The First Circuit, when analyzing the elements for an antitrust injunction and its standing requirements, held that:

> *Section 16*'s requirement of "threatened injury" dovetails with Article III's requirement that in order to obtain forward-looking relief, a plaintiff must face a threat of injury that is both real **[**18]** and immediate, not conjectural or hypothetical. Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.

In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 14 (1st Cir. 2008) (citations and internal quotation marks omitted); see also *In re Nexium (Esomeprazole) Antitrust Litig., 845 F.3d 470, 474-75 (1st Cir. 2017)*; *O'Shea v. Littleton, 414 U.S. 488, 494-95, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)*.

Plaintiff avers that it meets these requirements as it detailed Defendants' alleged conspiracy scheme and its ongoing presence in the Commonwealth. (Docket No. 61 at 4). Defendants, on the other hand, argue that the Government fails to plead the necessary element of imminent harm and that this claim is time-barred, or alternatively, the laches doctrine should be applied because there is no allegation in the Complaint dating subsequent to 2010, when Plaintiff learned about the alleged conspiracy. (Docket No. 69 at 2).

HN8[] When entertaining a suit under the Clayton Act's *Section 4* (damages), a Court shall determine if it was filed within the four-year statute of limitations. *15 U.S.C. § 15b*. These claims accrue "when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp., 401 U.S. at 338*. The Supreme Court has delineated at least two distinct exceptions to the four-year statute of limitations in antitrust actions: (1) the continuing **[**19]** violation and (2) the speculative damages exception. *Id. at 338-342*. **[*474]** While Plaintiff fails to invoke either exception, the Court will consider whether the continuing conspiracy violation exception applies.

HN9[] Where the claim is a continuing conspiracy violation, "each time a plaintiff is injured by an act of the defendants [,] a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." Id. In the context of price-fixing allegations, this implies that each time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs from the date of the act. However, "the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period." See *Klehr v. A.O. Smith Corp., 521 U.S. 179, 188, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)*. See also Pan-Am. Tel. Co. v. Municipality of San Juan, Civil Case No. 09-1256 (ADC/BJM), 2012 WL 13027982 at *4 (D.P.R. 2012).

Notwithstanding this analysis, several District and other Circuit courts have held that there is no statute of limitations for injunctive relief claims under *Section 16* of the Clayton Act and that rather, the equitable defense of laches applies. See e.g. *Midwestern Machinery Co., Inc. v. Northwest Airlines, Inc., 392 F.3d 265 (8th Cir. 2004)*; *Duty Free Americas, Inc. v. Estee Lauder Companies, Inc., 2014-1 Trade Cas. (CCH) ¶ 78771, 2014 WL 1329359 (S.D. Fla. 2014)* aff'd, *797 F.3d 1248 (11th Cir. 2015)*; *Oliver v. SD-3C LLC, 751 F.3d 1081 (9th Cir. 2014)*. **[**20]** When computing the laches period, the four-year statute of limitation is used as a "guideline." *Oliver 751 F.3d at 1086*. Therefore, ***HN10***[] in applying laches, the Court looks to the same legal rules that animate the four-year statute of limitations. Id.

HN11[] The doctrine of laches, "which penalizes a litigant for negligent or wilful failure to assert his rights," *Valmor Prods. Co. v. Standard Prods. Corp., 464 F.2d 200, 204 (1st Cir. 1972)*, requires proving "(1) lack of diligence by the party against whom the defense is asserted and (2) prejudice to the party asserting the defense." *Museum of Fine Arts, Bos. v. Seger-Thomschitz, 623 F.3d 1, 10 n. 9 (1st Cir. 2010)*. Nevertheless, the laches doctrine applies only where the plaintiff knew or should have known of the infringing conduct. *Valmor Prods., 464 F.2d at 204*.

In light of the above, the Court agrees with Defendants' position that Plaintiff has failed to present a cogent argument for establishing an impeding, contemporary and threatened harm. Although an alleged price-fixing conspiracy could have possibly occurred throughout the Nation, as the multi-district antitrust lawsuits, settlement agreements and monetary fines reveal, it is apparent from the face of the Complaint that the last injurious act in this entire scheme befell *almost* ten years ago; specifically, in the Summer of 2010 (Docket No. 1 at 136-188). Not a single pleading references a recent **[**21]** act (from 2011 to 2018), nor does it relate to the Defendants' businesses in the Commonwealth of Puerto Rico. Simply adding the phrase, "including Puerto Rico" at the end of every other allegation in the Complaint is not specific enough to survive the burden at this stage. (Docket No. 1). ***HN12***[] As the First Circuit has held, in similar antitrust cases, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d at 14*. Consequently, Plaintiff has **[*475]** failed to plausibly establish that injunctive relief should be granted. The Court will not proceed with almost decade-old allegations, as Defendants correctly point out. (Docket No. 34 at 5-8).

Plaintiff's request for injunctive relief is time-barred and the laches doctrines applies. There is *no doubt* that more than four years have elapsed since the factual allegations detailed in the Complaint. Under the conspiracy exception, there has not been an overt act since the Summer of 2010 that would have tolled this cause of action. ***HN13***[] When considering theses defenses, the Ninth Circuit has held that to re-start a statute of limitations, **[**22]** there must be a new overt act which: (1) is "new and independent . . . [and] not merely a reaffirmation of a previous act and (2) inflict[s] new and accumulating injury on the plaintiff." *Oliver, 751 F.3d at 1086*. None of these has occurred in the present case.

Additionally, under the First Circuit's laches analysis, the Commonwealth must or should have known of the infringing conduct, given the allegations in the Complaint date back to at least four years prior to its filling. In the Complaint, Plaintiff contradicts itself when it alleges that: "Plaintiff did not discover and could not have discovered through the exercise of reasonable diligence the existence of the conspiracy alleged herein *prior to disclosure in 2010 of the raids by government agencies of certain Defendants' facilities*." (Docket No. 1 ¶ 222) (emphasis added). It admits that it learned about the alleged conspiracy in 2010 yet did not file suit until December 20, 2018. Once again, ***HN14***[] an injunctive relief claim that relies on general and vague descriptions of an "ongoing conspiracy" without a new and independent act, fails to overcome the *Rule 12(b)(6)* standard.

HN15[] Although district courts are reluctant to dismiss antitrust injunction claims based on ongoing **[**23]** conspiracies, this Court is mindful "that proceeding to antitrust discovery can be expensive" and thus "retain[s] the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Twombly, 550 U.S. at 558* (citations and internal quotations marks omitted); see also *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528, n. 17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. In Twombly, the Supreme Court cautioned about "the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Twombly, 550 U.S. at 558* (citing *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (C.A.7 1984))*. The present case would likely involve a lengthy and costly discovery as in the consolidated cases on the same alleged price-fixing conspiracy held before the Northern District of Ohio. After four years of litigation, the District Court for the Northern District of Ohio highlighted the fact that "[m]illions of pages of discovery, hundreds of fact and expert witness depositions, and extensive motion practice [had] ensued." *In re Polyurethane Foam Antitrust Litig., 152 F. Supp. 3d 968, 974 (N.D. Ohio 2015)*. The same would occur here.

Finally, the Court is concerned that the present case could be a needless fishing expedition. See *In re Carbon Black Antitrust Litig., Case No. 03-10191 (DPW), 2005 U.S. Dist. LEXIS 660, 2005 WL 102966 at *5 (D. Mass. 2005)*; see also *Eastern Food Services, Inc. v. Pontifical Catholic Univ. Services Assoc., Inc., 357 F.3d 1, 9 (1st Cir. 2004)* ("[T]he **[**24]** cases . . . say that it is not enough merely **[*476]** to allege a violation in conclusory terms, that the complaint must make out the rudiments of a valid claim, and that discovery is not for fishing expeditions."). In fact, how does Plaintiff plan to carry-out an effective and complete discovery if it voluntarily dismissed all claims against Vitafoam, the alleged mastermind in this ongoing price-fixing conspiracy and the Defendant most mentioned in the Complaint? (Docket No. 58; 59). It simply would not be able.

For the all foregoing reasons, this Court **GRANTS** Defendants joint motion to dismiss at Docket No. 34 as to Plaintiff's request for injunctive relief.

B. Unjust or Undue Enrichment Doctrine and Indirect Purchaser Claims

Given the subsidiary nature of the unjust enrichment doctrine, Defendants aver that the Government may not pursue this claim because the Puerto Rico Antitrust Act ("PRAA"), *P.R. LAWS ANN. tit. 10, § 268*, provides a legal remedy. It further puts forward that the Court has previously dismissed an antitrust claim "cloaked as unjust enrichment" in *Rivera-Muñiz v. Horizon Lines Inc., 737 F. Supp. 2d 57 (D.P.R. 2010)*. (Docket No. 34-1 at 9).

Plaintiff opposed this argument asserting that an indirect purchaser antitrust claim is not available under Puerto Rico law and hence **[**25]** it can only sue pursuant to the unjust enrichment doctrine. (Docket No. 61 at 6-7). The Government posits that Defendants rely on Rivera-Muñiz's analysis on this issue, while other federal courts have held that Puerto Rico has not rejected *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*.[18] (Docket No. 61 at 6-9). Plaintiff posits that without an express repeal of Illinois Brick, indirect purchaser antitrust claims are not available in this jurisdiction. Id. Defendants stress in their reply that Plaintiff offers no analysis grounded on Commonwealth law that departs from the Court's prior decision in Rivera-Muñiz, which held that liberally construing antitrust claims is inconsistent with limiting indirect purchaser standing. (Docket No. 69 at 5).

HN17[] The Puerto Rico Supreme Court recognized a cause of action under the unjust or undue enrichment doctrine in *Ortiz-Andújar v. Commonwealth of Puerto Rico, 22 P.R. Offic. Trans. 774, 122 D.P.R. 817, 1988 Juris P.R. 147 (P.R. 1988)*. This civil law equity doctrine can be invoked "when the laws have not foreseen a situation where a patrimonial shift occurs [and] which shift cannot be rationally explained by the prevalent body of laws." Id. (internal **[**26]** quotation marks omitted). There are five elements to an unjust enrichment action: "(1) existence of enrichment; (2) a correlative loss; (3) nexus between loss and enrichment; (4) lack of cause for enrichment, and (5) absence of a **[*477]** legal precept excluding application of enrichment without cause." See *Hatton v. Mun. de Ponce, 1994 P.R.-Eng. 909, 605, 134 P.R. Dec. 1001, 1010, 1994 Juris P.R. 2 (P.R. 1994)*; see also *Puerto Rico Tel. Co. v. SprintCom, Inc., 662 F.3d 74, 97 (1st Cir. 2011)*.

Defendants focus primarily on the doctrine's fifth element, or the absence of thereof, arguing that the Government had a legal remedy under PRAA's *Section 268*. Specifically, this section provides that "[a]ny person who shall be injured in his business or property by any other person, by reason of acts or intended acts, forbidden or declared to be unlawful by the provisions of this chapter . . . may sue therefor . . . and shall recover threefold the damages by him sustained." *P.R. LAWS ANN. tit. 10, § 268(a)*.[19] Furthermore, it provides that "[t]he judicial action to recover damages . . . [the action] shall be commenced within four (4) years after the cause of action accrued." Id. Under Defendants' theory, Plaintiff had a remedy under PRAA yet failed to file suit within the four-year statute of limitations and cannot now disguise its time-barred action using the unjust enrichment **[**27]** doctrine. (Docket No. 34-1 at 9-10). The Government opposes this argument and posits that an indirect purchaser antitrust claim is not available under Puerto Rico law and thus the only remedy available is unjust enrichment. (Docket No. 61 at 6-9).

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[18] In Illinois Brick, several brick companies allegedly conspired to raise prices to masons who in turn passed the inflated prices along to the subcontractors on public works projects; ultimately harming the indirect purchasers: the state and its taxpayers. *Illinois Brick Co., 431 U.S. at 726-27*. ***HN16***[] The Supreme Court held that indirect purchasers may not recover damages in price-fixing cases and even if direct purchasers have "passed on" some or all the overcharges to indirect purchasers. *Id. at 744-46*. As a policy matter, the Court found it necessary to restrict the remedy to direct purchasers. Id. In response to the Court's decision, several states enacted laws permitting indirect purchasers to sue under state antitrust laws. See Daniel R. Karon, "Your Honor, Tear Down That Illinois Brick Wall!" the National Movement Toward Indirect Purchaser Antitrust Standing and Consumer Justice, *30 Wm. Mitchell L. Rev. 1351, 1360-63 (2004)* (explaining different states Illinois Brick "repealer statutes"); *California v. ARC Am. Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*.

[19] It is worth noting that this statute's language is practically identical to the Clayton Act's *Section 4* (damages), *15 U.S.C. § 15*.

The Court disagrees with Plaintiff's arguments on indirect purchaser standing. As a threshold matter, in Rivera-Muñiz the undersigned explicitly addressed the issue of direct and indirect purchaser antitrust standing under Commonwealth law and held that "although federal jurisprudence has implied special standing requirements into private antitrust actions, Puerto Rico explicitly rejects any such limitations." *Rivera-Muñiz, 737 F. Supp. 2d at 61 (D.P.R. 2010)* (citations and internal quotation marks omitted). Relying on *Pressure Vessels of P.R., Inc. v. Empire Gas de P.R., 1994 P.R.-Eng. 909, 547, 137 P.R. Dec. 497, 1994 Juris P.R. 144 (P.R. 1994)*, the Court held that "because Puerto Rico liberally construes its standing requirements in private antitrust cases, it is immaterial whether Plaintiffs are direct or indirect purchasers." Id. After the Court's ruling in Rivera-Muñiz, Defendants in that case moved to certify a question to the Puerto Rico Supreme Court as to whether indirect purchasers have standing to sue under PRAA. This Court **[**28]** denied that request:

> The Puerto Rico legislature enacted PRAA in 1964. *Pressure Vessels of P.R., Inc. v. Empire Gas de P.R., 137 P.R. Dec. 497, 519, 1994 Juris P.R. 144 (1994)*. Since then, federal precedents have limited standing in private antitrust actions under federal law to direct purchasers. See *Ill. Brick Co. v. Illinois, 431 U.S. 720, 746, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. Without citing Illinois Brick explicitly, the Puerto Rico Supreme Court rejected such limitations on standing for the purpose of private antitrust actions under PRAA. See *Pressure Vessels, 137 P.R. Dec. at 519* (citing federal precedents limiting antitrust standing that postdate enactment of PRAA in 1964). According to the Commonwealth court, the legislative intent under PRAA must be inferred from the state of federal case law in 1964 - when federal precedents tended to favor liberal standing requirements in private antitrust actions. Id. Because the Puerto Rico Supreme Court has unequivocally rejected limitations to private antitrust standing under PRAA, this court must **[*478]** deny Defendants' motion for certification. See *Romero, 204 F.3d at 305-06*.

*Rivera-Muñiz v. Horizon Lines Inc., Civil No. Case 09-2081 (GAG), 2010 U.S. Dist. LEXIS 95495, 2010 WL 3703737 at *1 (D.P.R. 2010)* (footnotes omitted). Additionally, the Court advanced that if defendants "wish[ed] to amend the standing requirements under PRAA, they must appeal to the Puerto Rico legislature or present their arguments in a proper judicial venue in the Commonwealth." *2010 U.S. Dist. LEXIS 95495, [WL] at 1, n. 2*.

Following this decision, as Plaintiff points out, several **[**29]** district courts have rejected the Court's Pressure Vessels of P.R., Inc. reading. See e.g. *In re Opana Er Antritrust Litig., 162 F. Supp. 3d 704 (N.D. Ill. 2016)*; *United Food & Commercial Workers Local 1776 & Participating Employers Health & Welfare Fund v. Teikoku Pharma USA, Inc., 74 F. Supp. 3d 1052 (N.D. Cal. 2014)*; *In re TFT-LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d 1179 (N.D. Cal. 2009)*. While other jurisdictions, and rather *recently*, have agreed with it. See e.g. *In re Zetia (Ezetimibe) Antitrust Litig., Civil Case No. 18-MD-2836, 2019 U.S. Dist. LEXIS 59469, 2019 WL 1397228 (E.D. Va. 2019)*, report and recommendation adopted as modified, *400 F. Supp. 3d 418 (E.D. Va. 2019)*; *Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, plc, Civil Case No. 15-6549 (CM), 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233 (S.D.N.Y. 2018)*. Nevertheless, these decisions are not binding, nor do they persuade the undersigned to reconsider its holding in *Rivera-Muñiz*. More so, following the decision in Rivera-Muñiz, the Puerto Rico Supreme Court has not ruled upon a similar issue, nor has the Commonwealth's Legislature amended the PRAA to restrict indirect purchaser standing.

Accordingly, under the current state of Commonwealth law, there exists a liberal construction of who and whom possess standing to bring to court an antitrust case. If there is no distinction between direct or indirect purchaser, then the Government should have sought damages pursuant to PRAA for the alleged price-fixing conspiracy and not under the unjust enrichment doctrine. In Rivera-Muñiz, the Court also decided that the unjust enrichment **[**30]** doctrine is "subsidiary to other remedies provided by law and is unavailable if the plaintiff may seek other forms of relief. Because PRAA affords a remedy to private litigants who are injured by antitrust violations, Plaintiff[] may not simultaneously seek relief under the theory of unjust enrichment." *Rivera-Muñiz, 737 F. Supp. 2d 57, 65-66*. The Court stands by this reasoning.

Consequently, the Court **GRANTS** Defendants motion to dismiss as to their request for damages under the unjust enrichment doctrine.

C. *Parens patriae* standing

Finally, Defendants argue that the Government lacks *parens patriae* standing to sue because there is no express statute granting it and neither can it satisfy the Supreme Court's test set forth in *Alfred L. Snapp & Son, Inc. v. P.R., ex rel., Barez, 458 U.S. 592, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982)*. (Docket No. 34 at 10-12). Plaintiff opposes contending that it has a legitimate state interest in recovering for the economic harm that Defendants have caused through their price-fixing conspiracy and that it meets all requirements set under Snapp. (Docket No. 61 at 9-11). In its reply, Defendants advances that Plaintiff lacks a quasi-sovereign interest. (Docket No. 69 at 8-10).

HN18[] Federal ***antitrust law***, specifically *Section 16* of the Clayton Act, provides statutory authorization for claims brought **[*479]** by a state or territory **[**31]** in its capacity as *parens patriae*. *15 U.S.C. §§ 15g-15h*; *Georgia v. Pennsylvania R.R., 324 U.S. 439, 447, 65 S. Ct. 716, 89 L. Ed. 1051 (1945)*; see also *California v. American Stores Co., 495 U.S. 271, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)*; *Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 258-66, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)*. However, no Commonwealth statute nor Puerto Rico Supreme Court precedent explicitly provides for *parens patriae* standing to present unjust enrichment claims. Had the Government timely filed this suit and would have sought damages under PRAA, then it may have had *parens patriae* standing. However, like an unjust enrichment claim, the Puerto Rico Supreme Court has not addressed this issue and no Commonwealth statues directly allows *parens patriae* standing for antitrust claims, as it does for other civil claims. See e.g. *Class Suit for Consumers of Goods and Services Act, P.R. LAWS ANN. tit., 32 § 3341* ("There is recognized the right to consumers of goods and services and/[or] [] the Commonwealth of Puerto Rico, through their agencies, dependencies and instrumentalities in their capacity of '*parens patriae*' to file a class suit on behalf of said consumers by reason of damages.").

D. Motions to Dismiss for Lack of Personal Jurisdiction and Proper Venue (Docket Nos. 35 and 37) and Motion to Dismiss for Lack of Standing (Docket No. 39)

The Court need not address these motions as Plaintiff's claims have been dismissed on other grounds. For the foregoing reasons, the Court **[**32]** finds the motions to dismiss at Docket Nos. 35, 37, 39 are **MOOT**.

IV. Conclusion

As explained above, ***HN19***[] the costs of complex antitrust lawsuits require diligence and timeliness. Plaintiff lacked both and, thus, failed to plausibly state a claim upon which relief may be granted. Consequently, the Court **GRANTS** the joint motion to dismiss for failure to state a claim at Docket No. 34.

According to the case' record, remaining Defendants Flexible Foam Products, Otto Bock, Scottdel, Louis Carson and David Carson have not been served with process. Plaintiff shall inform the Court, **on or before March 5, 2020**, any action it has taken to pursue its claims against them. Otherwise, the Court will proceed to enter judgment accordingly.

SO ORDERED.

In San Juan, Puerto Rico this 27th of February, 2020.

/s/ Gustavo A. Gelpí

GUSTAVO A. GELPI

United States District Judge

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In re Epipen Epinephrine Injection

United States District Court for the District of Kansas

February 27, 2020, Decided; March 10, 2020, Filed

MDL No: 2785; Case No. 17-md-2785-DDC-TJJ

Reporter

2020 U.S. Dist. LEXIS 40788 *; 2020 WL 1809664

IN RE: EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation. (This Document Applies to Consumer Class Cases)

Prior History: In re EpiPen Mktg., 268 F. Supp. 3d 1356, 2017 U.S. Dist. LEXIS 121974, 2017 WL 3297989 (J.P.M.L., Aug. 3, 2017)

Core Terms

patent, expert report, defendants', methodology, class certification, regression, consumers, reliable, ascertainability, unreliable, generic, putative class, settlement, expert testimony, plaintiffs', expert opinion, opines, motion to exclude, probability, damages, class member, antitrust, correlation, explains, offers, rebuttal testimony, classwide, reasons, courts, econometric

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For Consumer Class Cases Plaintiffs, (For Filings as to All Consumer Class Cases Plaintiffs), In Re: Alison Elizabeth Chase, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLP - Santa Barbara, Santa Barbara, CA; Amanda Klevorn, LEAD ATTORNEY, Burns Charest, LLP - New Orleans, New Orleans, LA; Arthur L. Shingler, III, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Brian O. O'Mara, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Daniel E. **[*2]** Gustafson, LEAD ATTORNEY, PRO HAC VICE, Minneapolis, MN; Daniel C. Hedlund, LEAD ATTORNEY, PRO HAC VICE, Minneapolis, MN; Devon Paul Allard, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Eric Fierro, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLP - Phoenix, Phoenix, AZ; Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Mahde Youssef Abdallah, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Maxwell Goins, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Ryan C. Hudson, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS; Ryan McDevitt, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Spencer Cox, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX; Stuart A. Davidson, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Tanya Korkhov, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLP - New York, New York, NY; Warren T. Burns, LEAD ATTORNEY, Burns Charest, LLP - Dallas, Dallas, TX; William L. Kalas, **[*3]** LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI.

For All Defendants (for Lead/Liaison Counsel ONLY), In Re: Philip A. Sechler, LEAD ATTORNEY, PRO HAC VICE, Robbins, Russell, Englert, Orseck, Untereiner & Sauber, LLP, Washington, DC; Special Master, Honorable Margaret R. Hinkle (Ret.), Rosetta Serrano -- Consumer Class -- (KS #16-2711) on behalf of themselves, Plaintiff: Amanda Klevorn, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - New Orleans, New Orleans, LA; Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Charles Jacob Gower, LEAD ATTORNEY, PRO HAC VICE, CAD Law, LC, Salina, KS; Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Greenwood Village, Greenwood Village, CO; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Derek William Loeser, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, **[*4]** Oakland, CA; Gretchen Freeman Cappio, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Korey Nelson, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - New Orleans, New Orleans, LA; Lydia Wright, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - New Orleans, New Orleans, LA; Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Ryan C. Hudson, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Spencer Cox, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX; Stephen J. Fearon, Jr., LEAD ATTORNEY, **[*5]** PRO HAC VICE, Squitieri & Fearon, LLP, New York, NY; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX; Warren T. Burns, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX.

For Shannon Clements -- Consumer Class -- (KS #16-2711) on behalf of themselves and all other similiarly situated, Annette Sutorik -- Consumer Class -- (KS #16-2711) on behalf of themselves and all other similiarly situated formerly known as Annette P. Wilcome Sutorik, Lesley Huston -- Consumer Class -- (KS #16-2711), Plaintiffs: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Charles T. Schimmel, LEAD ATTORNEY, Wright Schimmel, LLC, Overland Park, KS; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Ian S. Millican, LEAD ATTORNEY, **[*6]** PRO HAC VICE, Robins Kaplan LLP, New York, NY; Isaac L. Diel, LEAD ATTORNEY, Sharp McQueen, PA - OP, Overland Park, KS; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Ryan C. Hudson, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX; W. Greg Wright, LEAD ATTORNEY, Wright Schimmel LLC, Overland Park, KS.

For Chris Rippy -- Consumer Class -- (KS #16-2711), Lee Seltzer -- Consumer Class -- (KS #16-2711), Joy Shepard -- Consumer Class -- (KS #16-2711), Lorraine Wight -- Consumer Class -- (KS #16-2711), Teia Amell -- Consumer Class **[*7]** -- (KS #16-2711), Todd Beaulieu -- Consumer Class -- (KS #16-2711), Heather DeStefano -- Consumer Class -- (KS #16-2711), Sonya North -- Consumer Class -- (KS #16-2711), Elizabeth Huelsman -- Consumer Class -- (KS #16-2711) formerly known as Liz Huelzman, Nikitia Marshall -- Consumer Class -- (KS #16-2711), Stacee Svites -- Consumer Class -- (KS #16-2711), Linda Wagner -- Consumer Class -- (KS #16-2711), Mark Kovarik -- Consumer Class -- (KS #16-2711), Suzanne Harwood -- Consumer Class -- (KS #16-2711), Donna Wemple -- Consumer Class -- (KS #16-2711), Meredith Krimmel -- Consumer Class -- (KS #16-2711), Meredith Krimmel -- Consumer Class -- (KS #16-2711), Plaintiffs: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan **[*8]** K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Ryan C. Hudson, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Raymond C. Buchta, III -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; **[*9]** Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jason Scott Goldstein, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Ryan C. Hudson, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Laura Chapin -- Consumer Class -- (KS #16-2711), Anastasia Johnston -- Consumer Class -- (KS #16-2711), Elizabeth Williamson -- Consumer Class -- (KS #16-2711), **[*10]** Jennifer Walton -- Consumer Class -- (KS #16-2711), Plaintiffs: Arthur R. Miller, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Emily Hughes, LEAD ATTORNEY, PRO HAC VICE, Miller Law Firm, PC, Rochester, MI; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Ryan C. Hudson, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS; Sharon S. Almonrode, LEAD **[*11]** ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Vishal Aggarwal -- Consumer Class -- (ILN #17-2189 / KS #17-2450) individually and on behalf of all other similarly situated, Plaintiff: Ben Barnow, LEAD ATTORNEY, PRO HAC VICE, Barnow and Associates, PC, Chicago, IL; Erich Paul Schork, LEAD ATTORNEY, PRO HAC VICE, Barnow and Associates, PC, Chicago, IL; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Paul J. Geller, LEAD

ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Ryan C. Hudson, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS; Rosemary Medellin Rivas, LEAD ATTORNEY, PRO HAC VICE, Levi & Korsinsky, LLP, San Francisco, CA; Timothy Gordon Blood, LEAD ATTORNEY, PRO HAC VICE, Blood Hurst & O'Reardon, LLP, San Diego, CA.

For Angie Nordstrum -- Consumer Class -- (NJ #17-2401 / KS #17-2451) Individually and on Behalf of All Others Similarly Situated, Carly Bowersock -- Consumer Class -- (NJ #17-2401 / KS #17-2451) Individually **[*12]** and on Behalf of All Others Similarly Situated, Plaintiffs: Arthur L. Shingler, III, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Bradley Beall, LEAD ATTORNEY, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Brian O. O'Mara, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Brian D. Penny, LEAD ATTORNEY, PRO HAC VICE, Goldman Scarlato & Penny, PC, Conshohocken, PA; Damien J. Marshall, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner, LLP - NY, New York, NY; Donald A. Ecklund, LEAD ATTORNEY, PRO HAC VICE, Carella, Byrne, Cecchi, Olstein, Brody & Agnello, PC, Roseland, NJ; Duane L. Loft, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner, LLP - NY, New York, NY; Eugene Mikolajczyk, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; James E. Cecchi, LEAD ATTORNEY, PRO HAC VICE, Carella, Byrne, Cecchi, Olstein, Brody & Agnello, PC, Roseland, NJ; Jennifer Kan, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner, LLP - Armonk, Armonk, NY; Joseph Alm, LEAD ATTORNEY, **[*13]** PRO HAC VICE, Boies, Schiller & Flexner, LLP - DC, Washington, DC; Lea Bays, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Matthew S. Tripolitsiotis, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner, LLP - Armonk, Armonk, NY; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Ryan C. Hudson, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS; Stuart A. Davidson, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL.

For Sanofi-Aventis US, LLC -- Sanofi -- (NJ #17-2763 / KS #17-2452), Plaintiff: Adam Scott Tolin, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - NJ, Princeton, NJ; Diane P. Sullivan, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - NJ, Princeton, NJ; Eric Shaun Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - New York, New York, NY; Eric Andrew Rivas, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP- CA, Redwood Shores, CA; Erin Marie James, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - New York, New York, NY; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New **[*14]** York, NY; Jacob Benjamin Ebin, LEAD ATTORNEY, PRO HAC VICE, Mayer Brown LLP, New York, NY; John A. Stratford, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP-CA, Redwood Shores, CA; Joseph Adamson, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - New York, New York, NY; Lauren Jacobson, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - New York, New York, NY; Lisa Marie Madalone, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - New York, New York, NY; Luna Ngan Barrington, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - New York, New York, NY; Melissa Rutman, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP - New York, New York, NY; Nathaniel David White, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - Dallas, Dallas, TX; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Randi Singer, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP - New York, New York, NY; Robert William Taylor, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - New York, New York, NY; Sarah L. Segal, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - New York, New York, NY; Yehudah L. Buchweitz, **[*15]** LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP - New York, New York, NY.

For Kenneth Evans -- Consumer Class -- (ALS #17-336 / KS #17-2485) as an individual and as representative of the class, Plaintiff: Archie Grubb, II, LEAD ATTORNEY, PRO HAC VICE, Beasley Allen Crow Methvin Portis & Miles, PC, Montgomery, AL; Brian Murphy, LEAD ATTORNEY, PRO HAC VICE, Braswell Murphy, LLC, Mobile, AL; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Kasie M. Braswell, LEAD ATTORNEY, PRO HAC VICE, Braswell Murphy, LLC, Mobile, AL; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Ryan C. Hudson, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS; W. Daniel Miles, III, LEAD ATTORNEY, PRO HAC VICE, Beasley Allen Crow Methvin Portis & Miles, PC, Montgomery, AL.

For Local 282 Welfare Trust Fund -- Consumer Class -- (NJ #17-6110 / KS #17-2498) Individually and on Behalf of All Others Similarly Situated, Plaintiff: Arthur L. Shingler, III, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Bradley Beall, LEAD ATTORNEY, Robbins Geller Rudman & Dowd, LLP - Boca Raton, **[*16]** Boca Raton, FL; Brian O. O'Mara, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Eugene Mikolajczyk, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; James E. Cecchi, LEAD ATTORNEY, PRO HAC VICE, Carella, Byrne, Cecchi, Olstein, Brody & Agnello, PC, Roseland, NJ; Lea Bays, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Ryan C. Hudson, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS.

For Donna Anne Dvorak -- Consumer Class -- (KS#17-2785), Michael Gill -- Consumer Class -- (KS#17-2785), April Sumner -- Consumer Class -- (KS#17-2785), Landon Ipson -- Consumer Class -- (KS#17-2785), Kenneth Steinhauser -- Consumer Class -- (KS #16-2711), Plaintiffs: Cristina R. Delise, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, LEAD ATTORNEY, PRO HAC VICE, **[*17]** The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Ryan C. Hudson, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS; Scott B. Goodger, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Mylan N.V., Defendant: Adam K. Levin, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Benjamin Frederick Holt, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Brian C. Fries, LEAD ATTORNEY, Lathrop Gage LLP - KC, Kansas City, MO; Carolyn Anne DeLone, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Chad E. Blomberg, LEAD ATTORNEY, **[*18]** Lathrop Gage, LLP - Kansas City, Kansas City, MO; Christopher D. Edelman, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Daniel Thomas Graham, LEAD ATTORNEY, PRO HAC VICE, Clark Hill, PLC - IL, Chicago, IL; David M. Foster, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; James Moloney, LEAD ATTORNEY, Lathrop Gage, LLP - Kansas City, Kansas City, MO; Jon Myer Talotta, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US LLP, Tysons, VA; Justin Bernick, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Katherine Booth Wellington, LEAD ATTORNEY, Hogan Lovells US, LLP - DC, Washington, DC; Kathryn M. Ali, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US LLP - DC, Washington, DC; Keith O'Doherty, LEAD ATTORNEY, Hogan Lovells US, LLP - DC, Washington, DC; Michael David Gendall, LEAD ATTORNEY, Hogan Lovells US LLP, Washington, DC; Sue Lin, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Timothy Robert Herman, LEAD ATTORNEY, PRO HAC VICE, Clark Hill, PLC - IL, Chicago, IL; Yuri Fuchs, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC, Washington, DC.

For Mylan Specialty, LP a Delaware **[*19]** limited partnership, Defendant: Adam K. Levin, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Arnold B. Calmann, LEAD ATTORNEY, PRO HAC VICE, Saiber, LLC, Newark, NJ; Benjamin Frederick Holt, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Brian C. Fries, LEAD ATTORNEY, Lathrop Gage LLP - KC, Kansas City, MO; Carolyn Anne DeLone, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Chad E. Blomberg, LEAD ATTORNEY, Lathrop Gage, LLP - Kansas City, Kansas City, MO; Christopher D. Edelman, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells US, LLP - DC555, Washington, DC; Daniel Thomas Graham, LEAD ATTORNEY, PRO HAC VICE, Clark Hill, PLC - IL, Chicago, IL; David M. Foster, LEAD

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For Elan Klein, (Plaintiff in MN#17-1884 Klein, et al. v. Prime Therapeutics, LLC, et al.), Adam Klein, (Plaintiff in MN#17-1884 Klein, et al. v. Prime Therapeutics, LLC, et al.), Leah Weaver, (Plaintiff in MN#17-1884 Klein, et al. v. Prime Therapeutics, LLC, et al.), Miscellaneous: Patrick Thomas Egan, LEAD ATTORNEY, PRO HAC VICE, Berman Tabacco, Boston, MA.

For Arissa Paschalidis, (Plaintiff in MN#17-1884 Klein, et al. v. Prime Therapeutics, LLC, et al.), Miscellaneous: Patrick Thomas Egan, LEAD ATTORNEY, PRO HAC VICE, Berman Tabacco, Boston, MA; Miscellaneous, Plaintiffs' Steering Committee, Elizabeth Pritzker (Chair); Sharon Almonrode; Eric Hochstadt; W. Mark Lanier; Damien Marshall; Rosemary Rivas; and Steven Williams, Humana, Inc., Miscellaneous: Ursula A. Taylor, LEAD ATTORNEY, PRO HAC VICE, Strategic Health Law, Chicago, IL.

For Kaiser Foundation Hospitals, Oakland, CA; Mark Palley, LEAD ATTORNEY, Marion's Inn, LLP, Oakland, CA.

For Kaiser Foundation Health Plan, Inc., **[*30]** Oakland, CA; Mark Palley, LEAD ATTORNEY, Marion's Inn, LLP, Oakland, CA; Miscellaneous, Humana Pharmacy Solutions, Inc., Aetna Inc., Horizon Blue Cross and Blue Shield of New Jersey, Coventry Health Care, Blue Cross Blue Shield Massachusetts, Thomas Hadley, Miscellaneous: Robert E. Boston, LEAD ATTORNEY, PRO HAC VICE, Waller, Lansden, Dortch & Davis, LLC, Nashville, TN.

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For Change Healthcare, Inc., Interested Party: Mary Mifflin Drake, LEAD ATTORNEY, PRO HAC VICE, Lightfoot Franklin White, Birmingham, AL; Robert Ashby Pate, PRO HAC VICE, Lightfoot Franklin White, Birmingham, AL.

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Judges: Daniel D. Crabtree, United States District Judge.

Opinion by: Daniel D. Crabtree

Opinion

MEMORANDUM AND ORDER

This multi-district litigation ("MDL") involves antitrust, civil RICO, consumer protection, and unjust **[*34]** enrichment claims asserted by a putative class of plaintiffs. The putative class members assert these claims against suppliers and manufacturers of the EpiPen ("the Mylan and Pfizer defendants"). The EpiPen is an epinephrine auto-injector ("EAI") that delivers epinephrine to treat severe allergic reactions known as anaphylaxis. The putative class members—*i.e.*, end-payors who purchased the EpiPen—have filed a motion seeking class certification under Fed.

R. Civ. P. 23. Doc. 1353. Contemporaneously, the parties have filed motions seeking to exclude certain expert testimony offered either to support or oppose the putative class members' Motion for Class Certification. This Order rules those *Daubert* motions.

As explained more fully below, the court rules the parties' motions as follows:

The putative class plaintiffs' motions:

- Motion to Strike the Partial Testimony of Dr. Michael Blaiss (Doc. 1584) is denied.
- Motion to Strike the Testimony of Professor James Hughes (Doc. 1852) is denied.

The Mylan and Pfizer defendants' motions:

- Motion to Exclude Expert Opinions of Professor Meredith Rosenthal (Doc. 1602) is denied.
- Motion to Exclude Expert Opinions of Professor Einer Elhauge (Doc. 1604) is granted in part **[*35]** and denied in part. The court grants the motion to exclude Professor Elhauge's opinions about Auvi-Q market foreclosure based on Mylan's EpiPens4Schools program because plaintiffs since have abandoned this theory. The court denies the motion in all other respects.
- Motion to Exclude Opinions and Proposed Testimony of Andrew K. Torrance (Doc. 1847) is denied.

I. Legal Standard

The court has a "gatekeeping obligation" to determine whether expert testimony is admissible. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (citing Daubert v. Merrell Dow Pharm., Inc., 1993 U.S. LEXIS 4408, 509 U.S. 579, 589 (1993)). When performing this gatekeeping role, the court has broad discretion. Kieffer v. Weston Land, Inc., 90 F.3d 1496, 1499 (10th Cir. 1996) (citing Orth v. Emerson Elec. Co., 980 F.2d 632, 637 (10th Cir. 1992)). Courts exercise this discretion under Federal Rule of Evidence 702. It provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

The Tenth Circuit has not yet ruled whether a court must conduct **[*36]** a full *Daubert* analysis at the class certification stage. One federal court has noted that "[t]he issue of how to evaluate expert testimony at the class-certification stage 'ha[s] beguiled the federal courts.'" Campbell v. Nat'l R.R. Passenger Corp., 311 F. Supp. 3d 281, 294 (D.D.C. 2018) (quoting 3 William B. Rubenstein, *Newberg on Class Actions* § 7:24 (5th ed. 2014)). In dictum, the Supreme Court has expressed "doubt" about the notion that "*Daubert* [does] not apply to expert testimony at the certification stage of class-action proceedings." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 354, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). But the Court has not yet ruled the question definitively.

Previously, this court recognized that "the case law contains some dissonance about the proper breadth of *Daubert*-style challenges at the class certification stage." Doc. 1532 at 4. As one leading treatise has explained, "two approaches . . . have emerged in the case law." 3 William B. Rubenstein, *Newberg on Class Actions* § 7:24 (5th ed. 2013). Some Circuits have held that a court must perform a "full *Daubert* analysis" before certifying a class. *See* Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815-16 (7th Cir. 2010) (per curiam) ("We hold that when an expert's report or testimony is critical to class certification, . . . the district court must perform a full *Daubert* analysis before certifying the class . . . ."); *see also* In re Carpenter Co., No. 14-0302, 2014 U.S. App. LEXIS 24707, 2014 WL 12809636, at *3 (6th Cir. Sept. 29, 2014) (holding district **[*37]** court did not abuse its discretion by applying *Daubert* to determine admissibility of expert testimony offered to support class certification); Sher v. Raytheon Co., 419 F. App'x 887, 890-91 (11th Cir. 2011) ("Here the district court refused to conduct a *Daubert*-like critique of the proffered experts' qualifications. This was error.").[1] The Eighth Circuit has adopted a different approach. It directs trial courts to apply a "focused *Daubert* analysis" instead of a "full and conclusive *Daubert* inquiry before certification." *In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 610-11 (8th Cir. 2011)*. The Third Circuit has considered both approaches and recognized that some differences might exist between these two approaches. Nonetheless, the Third Circuit has declined "to examine whether there might be some variation between the Seventh and Eighth Circuit formulations" because "both courts limit the *Daubert* inquiry to expert testimony offered to prove satisfaction of *Rule 23*'s requirements." *In re Blood Reagents Antitrust Litig., 783 F.3d 183, 187, 188 n.8 (3d Cir. 2015)* (joining with "sister courts to hold that a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with *Rule 23* unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*").

Here, the court likewise declines to decide whether the two approaches differ in a material fashion. Instead, because the parties' motions seek to exclude expert opinions used to support or oppose *Rule 23*'s class certification requirements, the court applies the *Daubert* standard to those proffered opinions to determine whether the court should consider them at the class certification stage.

Outside the class certification phase, our Circuit has directed trial judges to apply a two-part test when determining the admissibility of expert testimony under *Daubert* and *Rule 702*. *Conroy v. Vilsack, 707 F.3d 1163, 1168 (10th Cir. 2013)*. First, the court must determine "whether the expert is qualified 'by knowledge, skill, experience, training, or education' to render an opinion." *United States v. Nacchio, 555 F.3d 1234, 1241 (10th Cir. 2009)* (quoting *Fed. R. Evid. 702*). Second, the court "'must satisfy itself that the proposed expert testimony is both reliable and relevant, in that it will assist the trier of fact, before permitting a jury to assess such testimony.'" *Id.* (quoting *United States v. Rodriguez-Felix, 450 F.3d 1117, 1122 (10th Cir. 2006)* (further citations omitted)).

To qualify as an expert witness, the witness must possess "such skill, experience or knowledge in that particular field as to make it appear that his opinion would rest on substantial foundation and would tend to aid the trier of fact **[*39]** in his search for truth." *LifeWise Master Funding v. Telebank, 374 F.3d 917, 928 (10th Cir. 2004)* (citation and internal quotation marks omitted). To determine whether the expert's testimony is reliable, the court must assess "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert, 509 U.S. at 592-93*.

In *Daubert*, the Supreme Court identified four factors that—though not exhaustive—trial courts should consider when determining the reliability of proffered expert testimony under *Fed. R. Evid. 702*. They are: (1) whether the theory used can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) general acceptance in the scientific community. *Id. at 593-94*. The Supreme Court has emphasized, however, that these four factors are not a "definitive checklist or test," and that a court's gatekeeping inquiry about reliability "must be tied to the facts of a particular case." *Kumho Tire, 526 U.S. at 150* (citations and internal quotation marks omitted).

But in some cases, "the relevant reliability concerns may focus upon personal knowledge or experience," rather than the *Daubert* factors and scientific foundation. *Id.* For such testimony **[*40]** to satisfy the reliability standard, it

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[1] Several district court decisions from the District of Columbia have adopted the view that a court must perform a full *Daubert* analysis before certifying a class. *See, e.g., Campbell v. Nat'l R.R. Passenger Corp., 2018 U.S. Dist. LEXIS 70667, 311 F. Supp. 3d 281, 296 (D.D.C. 2018)* (agreeing "with the heavy weight of authority that, when a party moves to exclude expert testimony proffered in support of a motion for class certification, the district court must perform a full *Daubert* analysis before certifying a class); *In re Rail Freight Fuel Surcharge Antitrust Litig., No. 07-0489(PLF), 2016 U.S. Dist. LEXIS 66526, 2016 WL 2962186, at *2 (D.D.C. May 20, 2016)* (holding that the court "will first address the relevance of all expert opinions and the reliability of the experts' methodology under *Daubert* and *Rule 702*, and then conduct the 'rigorous analysis' of all of the relevant evidence—including expert testimony that meets the *Daubert* ***[*38]*** and *Rule 702* standards—that is critical to proving the class certification requirements" under *Rule 23*); *Kottaras v. Whole Foods Mkt., Inc., 281 F.R.D. 16, 26 (D.D.C. 2012)* (agreeing "with other courts that the Rule calls for careful and searching analysis of all evidence with respect to whether *Rule 23*'s certification requirements have been met, including expert opinions").

"must be 'based on actual knowledge, and not mere "subjective belief or unsupported speculation."'" Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A., 858 F.3d 1324, 1341-42 (10th Cir. 2017) (quoting Mitchell v. Gencorp, Inc., 165 F.3d 778, 780 (10th Cir. 1999) (quoting Daubert, 509 U.S. at 590)). "When expert opinion 'is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict' and will be excluded." Id. at 1342 (quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)).

"The proponent of expert testimony bears the burden of showing that the testimony is admissible." Conroy, 707 F.3d at 1168 (citing Nacchio, 555 F.3d at 1241). "[R]ejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702 advisory committee's notes to 2000 amendments. While *Daubert* makes the court the gatekeeper for expert testimony, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" remain "the traditional and appropriate means of attacking shaky but admissible evidence." Daubert, 509 U.S. at 596 (citation omitted).

The court has discretion to determine how to perform its gatekeeping function under *Daubert*. Bill Barrett Corp. v. YMC Royalty Co., LP, 918 F.3d 760, 770 (10th Cir. 2019). "The most common method for fulfilling this function is a *Daubert* hearing, although such a process is not specifically mandated." Goebel v. Denver & Rio Grande W. R.R., 215 F.3d 1083, 1087 (10th Cir. 2000) (citations omitted); *see also* United States v. Charley, 189 F.3d 1251, 1266 (10th Cir. 1999) ("The **[*41]** trial judge is granted great latitude . . . in deciding whether to hold a formal [*Daubert*] hearing."). Alternatively, the district court may satisfy its gatekeeping role without a formal *Daubert* hearing "so long as the court has sufficient evidence to perform 'the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.'" Goebel, 215 F.3d at 1087 (quoting Daubert, 509 U.S. at 597). Here, exercising its discretion, the court concludes that it need not conduct a separate *Daubert* hearing to rule the parties' motions to exclude. The court has reviewed the parties' filings and attached exhibits carefully. And the court finds that the parties have provided a sufficient record to render a decision without a hearing.

II. Discussion

A. The Putative Class Plaintiffs' Motions to Exclude

The putative class plaintiffs have filed two motions seeking to exclude expert testimony: (1) Motion to Strike the Partial Testimony of Dr. Michael Blaiss (Doc. 1584); and (2) Motion to Strike the Testimony of Professor James Hughes (Doc. 1852). The court addresses each motion, in turn, below.

1. Motion to Strike the Partial Testimony of Dr. Michael Blaiss

The putative class plaintiffs seek to exclude just **[*42]** one aspect of Dr. Michael Blaiss's testimony. Their motion asks the court to strike Dr. Blaiss's proffered opinions expressed in Section 6.0 of his expert report. Dr. Blaiss is a medical doctor with training in allergy and immunology. Section 6.0 of Dr. Blaiss's expert report opines about the likelihood that existing EpiPen users would have switched to the generic EAI product of Teva Parenteral Medicines Inc. ("Teva") had the Teva generic launched in the market at an earlier date. Dr. Blaiss concludes EpiPen users may not readily have switched to the Teva generic because: (1) EAI products are unique, (2) the Teva product is not identical to the EpiPen EAI, and (3) the Teva generic is not widely available. Doc. 1585-1 at 18-19 (Blaiss Expert Report ¶ 6.0).

Plaintiffs assert that the court should exclude Dr. Blaiss's opinions because his conclusions in Section 6.0 are unsupported by data or analysis. Thus, plaintiffs argue, Dr. Blaiss's opinions are: (1) unreliable, and (2) not relevant because they do not fit with the facts of the case.[2] The court rejects both of plaintiffs' arguments.

First, the court finds Dr. Blaiss's opinions sufficiently reliable. Dr. Blaiss explains that he bases his opinions about patients' **[*43]** reluctance to switch from the EpiPen to the Teva generic on more than 30 years of clinical experience treating patients who present a risk of anaphylaxis and prescribing EAI products to those patients. Also, Dr. Blaiss has reviewed the Teva generic product information and determined that it is "not identical to the EpiPen Auto-Injector." *Id.* at 19 (Blaiss Expert Report ¶ 6.0); *see also id.* at 12-13 (Blaiss Expert Report ¶ 5.1.6). Thus, Dr. Blaiss concludes, patients are likely to stick with EpiPen products instead of having to learn how to use another product with different instructions. *Id.* at 19 (Blaiss Expert Report ¶ 6.0).

Plaintiffs characterize Dr. Blaiss's opinions as ones based on anecdotal evidence drawn from his clinical experience. Plaintiffs assert that opinions about patient conversion present economic questions, but, plaintiffs argue, Dr. Blaiss has no training or education in the law, finance, business, marketing, consumer behavior, pharmacy, or economics. Also, plaintiffs criticize Dr. Blaiss's opinions because he never used any economic methodologies to reach his conclusions about the likelihood that patients would switch products. Thus, plaintiffs argue, Dr. Blaiss's opinions are not reliable because **[*44]** he can't ground them in the study of economics. The court disagrees.

Dr. Blaiss has grounded his opinions using his observations and experiences as a medical doctor. Plaintiffs' criticisms about the absence of economic methodologies used to support Dr. Blaiss's opinions go to their weight. But, the court declines to find Dr. Blaiss's opinions inadmissible under *Daubert* at the class certification stage. *See In re Syngenta AG MIR 162 Corn Litig., No. 14-md-2591-JWL, 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *10 (D. Kan. Sept. 26, 2016)* (holding criticisms about reliability of plaintiffs' experts' opinions "go to the weight of those opinions and not . . . their admissibility" and concluding "the experts' methodologies [weren't] so unreliable as to preclude certification"); *see also Bell v. 3M Co., No. 16-cv-02351-RBJ, 2018 U.S. Dist. LEXIS 163610, 2018 WL 4599689, at *3 (D. Colo. Sept. 25, 2018)* (concluding "defendant's challenges go to the weight of the evidence, not whether the Court can consider the opinions in its analysis of the class certification issues"); *Campbell v. Nat'l R.R. Passenger Corp., 311 F. Supp. 3d 281, 304 (D.D.C. 2018)* (holding expert's opinions were sufficiently reliable for court to consider at class certification and challenges to the opinions went to "what weight to afford [the] opinions as part of [the court's] class-certification analysis").

Second, Dr. Blaiss's opinions are relevant to the **[*45]** class certification issues. Specifically, plaintiffs allege that defendants engaged in unlawful conduct that delayed Teva's entry of a generic product into the EAI market. Plaintiffs assert that the delay prevented generic competition, protected the EpiPen monopoly, and allowed defendants to continue raising the EpiPen's prices. Plaintiffs rely on their own expert testimony to demonstrate the classwide impact of the delay. Prof. Meredith Rosenthal opines that almost 95% of EpiPen users would have switched to a Teva generic within one year of its launch. And, using that figure, she provides an opinion about the damages sustained classwide from the delayed entry of a generic competitor. Dr. Blaiss's opinions—based on his own observations and experience—are relevant to the generic-delay theory and, specifically, the question whether

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[2] Plaintiffs don't challenge Dr. Blaiss's qualifications to provide expert testimony. Dr. Blaiss serves as the Executive Medical Director of the American College of Allergy, Asthma, and Immunology, and he is a Clinical Professor of Pediatrics at the Medical College of Georgia at Augusta University in Augusta, Georgia. Doc. 1585-1 at 2 (Blaiss Expert Report ¶ 1.1). Dr. Blaiss currently practices as an allergist at Good Samaritan Health Center of Gwinnett in Norcross, Georgia. *Id.* He is the former President of the American College of Allergy, Asthma and Immunology, and he has served as an officer or board member of several other allergy-related organizations. *Id.* He is certified in Allergy & Immunology by the American Board of Allergy and Immunology and certified in Pediatrics by the American Board of Pediatrics. *Id.* at 3 (Blaiss Expert Report ¶ 1.2). He has published more than 120 scientific peer-reviewed articles and presented at more than 500 meetings and seminars throughout the world, including presentations about anaphylaxis. *Id.* (Blaiss Expert Report ¶ 1.3). The court finds that Dr. Blaiss is sufficiently qualified to render the opinions he offers in his Expert Report.

plaintiffs sustained damages classwide from that delay. Thus, the court rejects plaintiffs' argument that Dr. Blaiss's opinions don't fit within the facts of the case.

For the above reasons, the court denies the putative class plaintiffs' Motion to Strike the Partial Testimony of Dr. Michael Blaiss.

2. Motion to Strike the Testimony of Professor James Hughes [*46]

The putative class plaintiffs also move to strike the testimony of Prof. James Hughes. Prof. Hughes is a college professor who specializes in "the fields of health economics, industrial organization, law and economics, and labor economics." Doc. 1852-4 at 3 (Hughes Expert Report ¶ 1). In this MDL, Prof. Hughes generally provides expert testimony on two subjects.

First, Prof. Hughes provides an overview of "the economic and commercial context surrounding the distribution of and payment for prescription drugs in the United States." *Id.* at 8 (Hughes Expert Report ¶ 12). More specifically, he explains "the flow of products and payments in the prescription drug space and the roles that various actors, including third-party payors, pharmacy benefit managers ("PBMs"), and consumers, play in the pharmaceutical supply and payment chain." *Id.* at 5 (Hughes Expert Report ¶ 7).

Second, Prof. Hughes opines about the ascertainability of the putative class in this lawsuit. *Id.* (Hughes Expert Report ¶ 8). He concludes that the putative class plaintiffs cannot ascertain with sufficient certainty who qualifies as a member of the putative class. This is so, Prof. Hughes asserts, because plaintiffs rely on data that is insufficient **[*47]** to: (1) identify and include the individuals who fit within the class definition, and (2) identify and exclude individuals who never actually paid for an EpiPen device. *Id.* at 8-9 (Hughes Expert Report ¶¶ 13-14).

The putative class plaintiffs argue that the court should strike Prof. Hughes's testimony on both subjects because, they contend, it is neither relevant nor reliable.[3]

a. Testimony about the Pharmaceutical Industry

The putative class plaintiffs contend that Prof. Hughes's testimony about the pharmaceutical industry is not reliable because it consists of generalized opinions about the industry as a whole—and not a particular drug. Plaintiffs' attack disregards the advisory committee's note to *Rule 702*. It recognizes that:

> [I]t might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. . . . For this kind of generalized testimony, *Rule 702* simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

Fed. R. Evid. 702 advisory committee's **[*48]** note to 2000 amendments; *see also* *United States v. Brinson, 772 F.3d 1314, 1320 (10th Cir. 2014)* (holding that district court did not abuse its discretion by allowing a detective to testify as an expert about the general characteristics of the prostitution trade).

[3] The putative class plaintiffs assert that Prof. Hughes is not a health economist. Doc. 1852 at 6. They contend that his current teaching and recent publications involve subjects other than the pharmaceutical industry. And, they allege, other courts have rejected some of Prof. Hughes's opinions. *Id.* at 8. But plaintiffs never argue that Prof. Hughes isn't qualified to provide expert testimony. Defendants respond that plaintiffs have mischaracterized Prof. Hughes's resume and the way courts have considered his expert opinions in other cases. The court finds that plaintiffs' criticisms of Prof. Hughes's academic work and other expert testimony go to the weight his opinions should receive, and not their admissibility. The court finds that Prof. Hughes, who is a Professor of Economics at Bates College specializing in the fields of health economics, industrial organization, law and economics, and labor economics, is qualified to render the expert opinions he provides.

Consistent with the guidance from the advisory committee's note, defendants assert that they offer Prof. Hughes's expert testimony to provide important and relevant background information to help the court understand the highly technical operation of a complex industry. And, they contend, the court can consider Prof. Hughes's opinion about the industry because *Rule 702* allows the "venerable practice of using expert testimony to educate the factfinder on general principles." *Fed. R. Evid. 702* advisory committee's note to 2000 amendments.

In response, plaintiffs assert that Prof. Hughes's generalized testimony here just doesn't apply to the facts of the EpiPen market. Thus, plaintiffs contend, the court should exclude the testimony because it is unhelpful and irrelevant. For support, plaintiffs cite a portion of Prof. Hughes's deposition transcript where he opines he wouldn't expect to see a positive correlation between the drug price set by the manufacturer (the Wholesale Acquisition Cost, "WAC") and the pharmacy's **[*49]** price for cash paying customers (the Usual and Customary Price, "U&C price") for a given drug. The putative class plaintiffs argue that Prof. Hughes performed no analysis to reach this conclusion. And, they contend, his testimony directly conflicts with the analysis that plaintiffs' expert performed on EpiPen price trends. According to plaintiffs, their expert—Prof. Meredith Rosenthal—analyzed the actual correlation between EpiPen WAC and U&C price and concluded it is "near-perfect." Doc. 1852 at 16-17.

Defendants respond that Prof. Hughes never opines about the relationship between WAC and U&C price in the pharmaceutical industry. Also, he offers no opinions about the correlation between these prices specifically for EpiPen products. Instead, he just offers generalized background information about the industry. The court agrees with defendants. Plaintiffs rely on just this one example—Prof. Hughes's response to a deposition question—to argue that his opinions don't fit the facts of the case. But Prof. Hughes never opines specifically about price correlation. Instead, his expert opinions consist of general background information about the pharmaceutical industry. And *Rule 702* allows this kind **[*50]** of generalized expert testimony.

Next, the putative class plaintiffs argue, Prof. Hughes's opinion that one of the members of the putative class—*i.e.*, Local 282 Welfare Trust Fund ("Local 282")—bears no financial responsibility for drugs dispensed to its insured members is unreliable because the evidence in the case contradicts his conclusion. Prof. Hughes opines that it's the employers paying into Local 282—not Local 282 itself—who pay the costs in full for drugs dispensed to Local 282's insured members. Doc. 1852-4 at 24 (Hughes Expert Report ¶ 48). Plaintiffs argue that Local 282's *Fed. R. Civ. P. 30(b)(6)* witness's testimony establishes that Prof. Hughes is incorrect. This 30(b)(6) witness testified that Local 282 "pays for every prescription drug covered under its plans," and does not "see[k] reimbursement for any part of that cost from any other entity." Doc. 1852-9 at 4 (Bulding Dep. 198:14-22). But the 30(b)(6) witness also testified that when Local 282's costs increase, it "potentially [has] to go back . . . and negotiate higher contribution rates to the welfare trust fund." Doc. 1873-4 at 3 (Bulding Dep. 59:3-25). So, Prof. Hughes opines, it's the employer-sponsors who ultimately bear the financial **[*51]** responsibility for drug costs. But, plaintiffs argue, Prof. Hughes conceded in his deposition that the 30(b)(6) witness's testimony "says nothing about the employer sponsor being obligated to make up a shortfall when it occurs," and he doesn't know whether Local 282's employer sponsors actually are obligated to make up a shortfall if one occurs. Doc. 1852-2 at 104-05 (Hughes Dep. 102:19-103:2).

Based on this competing testimony, plaintiffs argue that the evidence in the case contradicts Prof. Hughes's opinion that Local 282 bears no financial responsibility for drugs dispensed to its insured members. Also, plaintiffs challenge the methodology Prof. Hughes used to reach his conclusions because he supposedly relied on testimony that—plaintiffs contend—doesn't support his conclusions. But, as summarized above, the parties offer competing evidence that either supports or refutes Prof. Hughes's opinion about Local 282's financial responsibility. These arguments go to the weight that the court should give his opinion, not its admissibility.

Also, plaintiffs argue that Prof. Hughes's opinions aren't supported by the evidence because he conceded that asking an employer sponsor to make more contributions **[*52]** to the fund is "similar" to "a commercial insurer who has to go back and increase premiums" when faced with cost increases. *Id. at 102-03* (Hughes Dep. 100:20-101:11). And, plaintiffs argue, courts are clear that antitrust defendants may not avoid liability for overcharges simply because the plaintiff was able to pass any additional costs on to someone else. Doc. 1852 at 17 (citing *In re Lidoderm Antitrust Litig., No. 14-md-02521-WHO, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *22 (N.D. Cal. Feb. 21, 2017)*); *see also* *In re Nexium Antitrust Litig., 777 F.3d 9, 27 (1st Cir. 2015)* ("[D]efendants incorrectly assume that if a class member offsets an overcharge through later savings attributable to the same or related transaction, there is no injury. But antitrust injury occurs the moment the purchaser incurs an overcharge, whether that injury is later offset or not. Here, if a class member is overcharged, there is an injury, even if that class member suffers no damages." (internal citations omitted)).

This argument challenges Prof. Hughes's opinion using a legal argument—that is, plaintiffs contend that Prof. Hughes's opinion does not preclude defendants' liability for antitrust claims under well-settled law. But plaintiffs' legal argument provides no reason to exclude his testimony. This legal argument does not challenge the reliability **[*53]** of Prof. Hughes's reasoning or the methodology used to form his opinions. Thus, the court denies the putative class plaintiffs' motion to exclude Prof. Hughes's opinions on this basis.

Finally, the putative class plaintiffs assert that the court should exclude Prof. Hughes's expert testimony about the pharmaceutical industry because, they contend, he reached his conclusions before he reviewed the relevant literature and without reviewing the entire contents of the sources he relies on to support his opinions. Thus, plaintiffs argue, Prof. Hughes's opinions are the product of an unreliable and unscientific methodology. The court disagrees.

Plaintiffs take issue with part of Prof. Hughes's deposition testimony where he described the information he reviewed to prepare his expert report. Prof. Hughes testified that he "looked at fact depositions from PBM people, from Local 2[8]2" and he wrote part of his report "based largely on [his] 20 years of experience in examining the pharmaceutical market." Doc. 1852-2 at 48 (Hughes Dep. 46:7-21). Then, Prof. Hughes described that "afterwards [he] went back to look for secondary sources that were consistent with what [he] knew about the industry so **[*54]** that [he] could [c]ite an outside source for [his] outside authority for the fact that [he] was presenting in the report." *Id.* Plaintiffs contend that this testimony shows that Prof. Hughes "cherry-picked" evidence to support his opinions—something an expert may not do. Doc. 1852 at 18 n.79 (citing *Fish v. Kobach, 309 F. Supp. 3d 1048, 1102 (D. Kan. 2018))*.

The court doesn't read Prof. Hughes's testimony the way plaintiffs describe it. Instead, Prof. Hughes testified that he drafted the report based on his 20 years of experience in the field, and then he found secondary sources to support his knowledge. *Daubert* requires an expert to base his testimony either "upon professional studies or personal experience." *Kumho Tire, 526 U.S. at 152*. As defendants assert, Prof. Hughes did both here. He relied on his personal knowledge—drawn, he says, from his 20 years of experience studying the pharmaceutical industry—to draft the portions of his report describing that industry. And he verified that knowledge by finding and citing secondary sources that substantiated his assertions. In short, Prof. Hughes didn't "cherry pick evidence in support of his opinion" like the expert did in *Fish v. Kobach. 309 F. Supp. 3d at 1102*. Instead, Prof. Hughes backed up his knowledge by citing other authorities to support it. The court **[*55]** finds no reason to exclude Prof. Hughes's opinions under *Daubert* based on the methodology he used to cite secondary sources when preparing his expert report.

Also, the court doesn't agree with plaintiffs' assertions that Prof. Hughes's opinions are unreliable because he performed an incomplete or cursory review of the materials. Plaintiffs contend that Prof. Hughes testified that he relied on deposition testimony to form his opinions. But Prof. Hughes also conceded that he didn't read the full deposition transcript of any of the named plaintiffs or Local 282's 30(b)(6) witness. Doc. 1852-2 at 48, 104 (Hughes Dep. 46:7-16, 102:9-10). Plaintiffs argue that Prof. Hughes's limited review has caused him to mischaracterize deposition testimony, thus making his opinions unreliable.

Defendants respond that *Daubert* does not require an expert to review every line of every deposition where the case involves hundreds of pages of deposition testimony. Instead, an expert need only review the relevant parts of the record to form a reliable opinion. *See, e.g., Milam v. Ranger Ins. Co., No. CIV-04-1749-HE, 2006 U.S. Dist. LEXIS 97320, 2006 WL 5347771, at *3 n.9 (W.D. Okla. June 13, 2006)* ("Contrary to defendants' suggestion, it is not necessary that an expert witness 'read all the depositions' **[*56]** and turn himself into some sort of 'super juror' in order to offer expert testimony on an issue, assuming other prerequisites to admissibility are met."). And, defendants contend, Prof. Hughes has characterized the deposition testimony properly based on its context.

The court finds that the parties' dispute about Prof. Hughes's characterization of the evidence goes to the weight his opinions deserve, but does not undermine their admissibility. Plaintiffs properly have challenged the way Prof. Hughes interpreted the evidence to argue that his opinions don't preclude the court from certifying a class action in this MDL. *See* Doc. 1837 at 47, 49 (Pls.' Reply Mem. in Further Supp. of Mot. for Class Certification). The court will consider these arguments on class certification, but the court refuses to exclude Prof. Hughes's opinions under *Daubert*.[4]

b. Opinions about Ascertainability

Next, the putative class plaintiffs argue that the court should exclude Prof. Hughes's opinions about ascertainability of the putative class because, plaintiffs contend, they are unreliable. Plaintiffs advance three arguments to support this request.

First, plaintiffs assert, Prof. Hughes's ascertainability opinion **[*57]** is an impermissible legal conclusion. Our Circuit recognizes that "testimony on *ultimate facts* is authorized under [*Federal Rule of Evidence] 704*," but an expert "may not give an opinion on *ultimate issues of law*." *Specht v. Jensen, 853 F.2d 805, 808 (10th Cir. 1988)* (emphasis added). But here, the court concludes that Prof. Hughes is not offering opinions about ultimate issues of law.

As Prof. Hughes explained in both his expert report and his deposition, he provides an expert opinion about whether plaintiffs have proposed a methodology for analyzing data so that one can identify which consumers qualify as members of the class under the class definition. Doc. 1852-4 at 5 (Hughes Expert Report ¶ 8); Doc. 1852-2 at 111 (Hughes Dep. 109:3-14 ("[M]y assignment is very narrow, is that can you tell who is in—is there a methodology to tell who is in the class and who is not in the class.")). Prof. Hughes concludes that "based on the data and other materials [he has] reviewed, the Plaintiffs do not provide data or a methodology for identifying which individuals should be excluded and included in the class." Doc. 1852-4 at 9 (Hughes Expert Report ¶ 16). Prof. Hughes thus bases his opinion on facts he has reviewed in this case. He never opines that plaintiffs fail to satisfy **[*58]** a legal burden to establish ascertainability. To the contrary, Prof. Hughes testified he was not "applying any court's test because it's a legal standard" and "[t]hat would be outside [his] expertise." Doc. 1852-2 at 111 (Hughes Dep. 109:3-14). The court thus concludes that Prof. Hughes isn't offering an impermissible legal opinion.

Second, plaintiffs argue that Prof. Hughes bases his ascertainability opinions on a legal standard that simply doesn't apply in our Circuit. Thus, plaintiffs contend, his opinions aren't relevant to this case. To support this argument, plaintiffs cite Prof. Hughes's deposition transcript. Prof. Hughes testified that ascertainability requires "a methodology upfront that can be used to identify who is in the class and who is not in the class." Doc. 1852-2 at 111-12 (Hughes Dep. 109:14-110:4). And, according to Prof. Hughes, one performs that methodology by "using data that is produced in discovery . . . ." *Id.* at 117-18 (Hughes Dep. 115:22-116:6). So, as Prof. Hughes testified, he reached his conclusions about ascertainability by reviewing the data that insurers and PBMs had produced in discovery. Doc. 1852-2 at 118 (Hughes Dep. 116:11-22).

Plaintiffs assert that Prof. **[*59]** Hughes's testimony shows that he bases his opinions on the Third Circuit's standard used to determine ascertainability, as defined in *Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013)*. *See id. at 307* (holding the "method of determining whether someone is in the class must be 'administratively feasible'" and a plaintiff cannot "satisfy the ascertainability requirement if individualized fact-finding or mini-trials will be required to prove class membership"). Indeed, defendants argue that plaintiffs bear the burden to demonstrate ascertainability before the court can certify a class. Doc. 1873 at 18. But, plaintiffs respond that defendants are citing a legal standard that doesn't apply in our Circuit.

The Tenth Circuit hasn't imposed a requirement that a putative class must demonstrative an "administratively feasible method" for determining whether putative class members fall within the class definition. And this court has

[4] The court addresses Prof. Hughes's opinions in its Order on the class certification motion at Parts IV.C.1. & IV.D.3.a.

refused to apply "the Third Circuit's stricter standard from *Carrera* that requires an administratively feasible mechanism for identifying class members . . . ." *In re Syngenta AG MIR 162 Corn Litig., No. 14-md-2591, 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *2-3 (D. Kan. Sept. 26, 2016)* (declining "invitation to apply a standard—one not adopted by the Tenth Circuit—that would preclude certification **[*60]** without a showing that class members may be determined in an administratively feasible manner"). For this reason, plaintiffs ask the court to exclude Prof. Hughes's opinions as irrelevant.

Daubert does not require the court to exclude Prof. Hughes's testimony for this reason. As already discussed, Prof. Hughes isn't offering a legal conclusion. Instead, Prof. Hughes bases his ascertainability opinions on data produced in the case that he used to determine whether one can identify who qualifies as a class member (and who doesn't) under the proposed class definition.[5] Whether the law requires this kind of methodology to prove ascertainability at the class certification stage is a question of law for the court to decide. And the court can determine whether Prof. Hughes's ascertainability opinions are relevant under the applicable legal standard when it decides the class certification motion.[6] The court thus declines to exclude Prof. Hughes's opinions under *Daubert* because it relies on a legal standard from another Circuit.

Finally, plaintiffs contend that Prof. Hughes did not perform an appropriate analysis before reaching his ascertainability opinions. Thus, plaintiffs argue, Prof. Hughes's **[*61]** opinions are unreliable because he bases them on speculation. Plaintiffs criticize Prof. Hughes for failing to review plaintiffs' expert reports. Doc. 1852-2 at 51 (Hughes Dep. 49:11-15). But, Prof. Hughes explained, he didn't read those reports because plaintiffs' experts had not included any opinions about ascertainability in their reports. *Id.* (explaining that he reviewed none of plaintiffs' expert reports because "they were not on the topic [he] was opining on"). Plaintiffs don't refute the proposition that their expert reports had not proposed a methodology for identifying class members when Prof. Hughes submitted his expert report. But, they contend, Prof. Hughes's methodology is flawed because he relied on a consultant to provide the information about plaintiffs' expert reports but he never verified independently that the expert reports included no opinions about ascertainability. Plaintiffs' argument here asks too much. The court declines to find Prof. Hughes's opinions unreliable simply because he relied on information from a consultant—information that indeed was accurate—when he formed his opinions.

Also, plaintiffs argue that Prof. Hughes's opinions are flawed because he **[*62]** didn't use the data produced in the case to determine whether a consumer paid with a fully-funded HSA, a Mylan coupon, or a flat co-pay. But, Prof. Hughes testified that he doesn't believe it's possible to determine whether a consumer paid for the EpiPen in one of those three ways based on the data produced in the case. Doc. 1852-2 at 113-14, 145-46, 150 (Hughes Dep. 111:16-112:15, 143:25-144:6, 148:15-20). Prof. Hughes's report identifies the data he reviewed and analyzed when forming his opinions. Doc. 1852-4 at 8, 30-40 (Hughes Expert Report ¶¶ 13, 63-84). And, the court finds, Prof. Hughes's methodology for using that data is sufficiently reliable for the court to consider his ascertainability opinions on class certification. Plaintiffs' criticisms about how Prof. Hughes interpreted the data—and what he concluded the data shows and does not show—go to the weight of his opinions, not their admissibility. The court declines to exclude Prof. Hughes's opinions from the court's consideration of the class certification motion.

For all these reasons, the court denies the putative class plaintiffs' Motion to Strike the Testimony of Prof. James Hughes.

B. Defendants' Motions to Exclude

The **[*63]** Mylan and Pfizer defendants have filed three motions seeking to exclude expert testimony: (1) Motion to Exclude Expert Opinions of Professor Meredith Rosenthal (Doc. 1602); (2) Motion to Exclude Expert Opinions of

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[5] Plaintiffs also argue that Prof. Hughes's opinions are not reliable because he limited his analysis just to the data produced in the case but did not consider other data from PBMs that they could provide and Prof. Hughes could use to determine ascertainability. These arguments go to the weight the court should give Prof. Hughes's opinions but not their admissibility.

[6] The court addresses this question in its Order on the class certification motion at Part IV.C.1.

Professor Einer Elhauge (Doc. 1604); and (3) Motion to Exclude Opinions and Proposed Testimony of Andrew K. Torrance (Doc. 1847). The court addresses each motion, in turn, below.

1. Motion to Exclude Expert Opinions of Professor Meredith Rosenthal

Defendants move the court to exclude the expert opinions expressed by the putative class plaintiffs' expert, Prof. Meredith Rosenthal. Prof. Rosenthal opines about the damages purportedly sustained by the putative class plaintiffs. *See generally* Doc. 1500-3 (Rosenthal Expert Report). She has identified certain categories of damages that, she contends, the putative class plaintiffs have sustained on a classwide basis. *Id.* And, she has applied certain methodologies to calculate those purported damages. *Id.*

Defendants argue that the court should exclude some of Prof. Rosenthal's opinions because, they contend, her opinions are unreliable and thus inadmissible under *Daubert*.[7] Defendants assert four arguments supporting this request. *First* ***[*64]*** , defendants contend that Prof. Rosenthal's damages methodology for the 2-Pak theory is an unreliable model for measuring classwide injury. *Second*, defendants contend that Prof. Rosenthal's ascertainability opinion is flawed and improper rebuttal testimony. *Third*, defendants argue that Prof. Rosenthal's probability analysis cannot estimate or identify uninjured class members in a reliable fashion. Defendants also assert that her probability analysis constitutes improper rebuttal testimony. *Finally*, defendants argue that the methodologies Prof. Rosenthal used to determine generic delay and Auvi-Q foreclosure damages rely on Prof. Einer Elhauge's unreliable opinions. So, defendants contend, if the court excludes Prof. Elhauge's opinions under *Daubert*, it also must exclude Prof. Rosenthal's opinions that rely on Prof. Elhauge's opinions. The court addresses all four arguments, below.

a. Methodology for 2-Pak Damages

First, defendants seek a *Daubert* ruling excluding Prof. Rosenthal's opinion about the damages allegedly sustained by the putative class members from purchasing the EpiPen in the 2-Pak. In August 2011, Mylan stopped selling EpiPen products in single packages. **[*65]** And instead, it began offering the EpiPen exclusively in the 2-Pak (*i.e.*, two EpiPen devices in one package). Mylan asserts that it switched to the 2-Pak in response to medical guidance recommending that patients always carry two EAI devices in case the patient requires more than one dose of epinephrine to treat an anaphylactic reaction. The putative class plaintiffs allege that Mylan's switch to the 2-Pak was not clinically necessary, but instead, Mylan implemented the change to force consumers to purchase two EpiPens instead of one. And they have retained Prof. Rosenthal to provide a methodology for calculating the classwide damages sustained because Mylan allegedly forced EpiPen customers to buy at least two EpiPens at a time.

Prof. Rosenthal's report explains that she calculated the "overcharge damages" allegedly sustained from Mylan's switch to the 2-Pak using "the difference between expenditures resulting from the average number of pens per prescription before vs. after the withdrawal." Doc. 1500-3 at 24 (Rosenthal Expert Report ¶ 54). Specifically, Prof.

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[7] Defendants don't challenge Prof. Rosenthal's qualifications. *See* Doc. 1850 at 10 (explaining that the "focus" of defendants' motion is challenging the methodologies that Prof. Rosenthal used to form her opinions but not her knowledge, training, experience, and qualifications). But, as *Fed. R. Evid. 702* and *Daubert* require, the court finds that Prof. Rosenthal is qualified to render the opinions she has offered at this stage. Prof. Rosenthal is the C. Boyden Gray Professor of Health Economics and Policy at the Harvard T.H. Chan School of Public Health. Doc. 1500-3 at 4 (Rosenthal Expert Report ¶ 3). Her field of research is the economics of the health care industry. *Id.* And, at Harvard, she has taught undergraduate, Masters-level, and Ph.D.-level health economics and health policy courses. *Id.* (Rosenthal Expert Report ¶ 4). Prof. Rosenthal earned an A.B. in International Relations from Brown University and a Ph.D. in Health Policy (Economics Track) from Harvard University. *Id.* (Rosenthal Expert Report ¶ 6). Prof. Rosenthal has testified as an expert witness in several cases involving alleged anticompetitive conduct in the pharmaceutical industry. *Id.* at 4, 52-53 (Rosenthal Expert Report ¶ 4, Attach. A). And, she has published more than 100 peer-reviewed journal articles, essays, and book chapters. *Id.* (Rosenthal Expert Report ¶ 5). Her experience and credentials qualify Prof. Rosenthal to provide expert testimony.

Rosenthal compared "the average pen per prescription from the first two quarters of 2011 with the average pen per prescription **[*66]** in the years following that point in time." *Id.* at 30 (Rosenthal Expert Report ¶ 69). Prof. Rosenthal asserts that—in a but-for world—consumers would have continued to purchase single pens at the same rate they had manifested in the first two quarters of 2011 for the next seven years, but-for Mylan's switch to selling the EpiPen exclusively in the 2-Pak. *Id.* at 30-31, 33 (Rosenthal Expert Report ¶¶ 69-73, 77-78); *see also* Doc. 1497-3 at 84-90, 101-104 (Sealed Rosenthal Expert Report Attach. D.1—D.4, Attach. E.3.a—E.3.c). But, Prof. Rosenthal opines that, in the actual world, Mylan forced an increase in EpiPen consumption by requiring consumers to buy EpiPens in the 2-Pak. *Id.* Thus, Prof. Rosenthal concludes, consumers overpaid for the EpiPen after August 2011 because EpiPen purchasers had to buy two EpiPens instead of just one. *Id.* And then, Prof. Rosenthal calculates the alleged overcharge damages sustained by EpiPen consumers from the forced increase in their consumption of EpiPens after the switch to the 2-Pak. *Id.*

In her Reply Report, Prof. Rosenthal explains that her 2-Pak damages methodology "uses an event study approach." Doc. 1711-1 at 12-13 (Rosenthal Reply Report ¶ 15). Prof. Rosenthal explains how **[*67]** event studies are "widely employed in economic analysis." *Id.* And, she describes how, "[i]n each case, the event study relies on the timing of an event of interest to identify its effects." *Id.* According to Professor Rosenthal, "[t]he power of the event study is the ability to abstract from complex phenomena that are not changing over the short time window of the study—in this case, factors such as patient and physician preferences, comorbidities, and product attributes." *Id.*

Defendants argue that Prof. Rosenthal's analysis here isn't an event study at all. Instead, they say, Prof. Rosenthal has used an unreliable methodology that she invented just to support the putative class plaintiffs' class certification motion. Defendants contend that real event studies are used in securities and finance litigation—not consumer class actions like this one—to show how stock prices have reacted to announcements about economic events. Prof. Rosenthal responds, explaining, "[e]vent studies have also been used in health policy and pharmaceutical economics." Doc. 1711-1 at 13 (Rosenthal Reply Report ¶ 15). And, to support this rebuttal, she cites several peer-reviewed articles from economic publications **[*68]** where, she asserts, event studies were used in pharmaceutical economic analysis. *Id.* (Rosenthal Reply Report ¶ 15 n.18). Defendants respond that each of Prof. Rosenthal's cited articles aren't helpful to her point because each one used event studies to examine the effect on stock prices. Doc. 1884 at 7 n.2.

The court finds that defendants' distinction doesn't preclude the court from considering Prof. Rosenthal's opinion at the class certification stage. The fact that event studies typically are used in securities and finance litigation doesn't undermine the reliability Prof. Rosenthal's methodology. And defendants don't explain why it is improper to use an event study in a consumer class action case like this one. To satisfy *Daubert*'s reliability requirement, the party offering the expert opinion "'need not prove that the expert is undisputably correct or that the expert's theory is "generally accepted" in the scientific community.'" *Bitler v. A.O Smith Corp., 400 F.3d 1227, 1233 (10th Cir. 2005)* (quoting *Mitchell v. Gencorp Inc., 165 F.3d 778, 781 (10th Cir. 1999))*. Instead, the expert testimony's proponent "'must show that the method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts which sufficiently satisfy *Rule 702*'s reliability requirements.'" **[*69]** *Id.* (quoting *Mitchell, 165 F.3d at 781*). Here, plaintiffs sufficiently have established that Prof. Rosenthal used a reliable method to reach her conclusions about the 2-Pak. At best, defendants' attacks on the appropriateness of an event study in a consumer class action go to the weight of her opinion, not its admissibility.

Defendants also contend that a valid event study must consider the potential effect of competing factors that may influence the outcome. Defendants argue that Prof. Rosenthal failed to consider such other factors here. Specifically, defendants assert that Prof. Rosenthal's model studies the potential effect of just one factor—the switch to the 2-Pak. But, defendants contend, Prof. Rosenthal failed to consider other factors that could influence consumers' purchases, such as widespread medical guidance issued after 2011 recommending that patients purchase two EAI devices. Defendants argue that the medical guidance could have caused consumers to purchase the 2-Pak after August 2011. And thus, consumers would have based their decisions to purchase in packs of two on a reason entirely independent of Mylan's decision to withdraw the single-pack from the market. But, they assert, Prof. Rosenthal **[*70]** didn't account for other factors like this one. As a result, defendants contend, her study fails to demonstrate that the switch to the 2-Pak was the sole reason why the putative class members bought more EpiPens than they otherwise would have. According to defendants, this omission makes her analysis unreliable. *See* *Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse Sec. (USA) LLC, 752 F.3d 82, 95-97 (1st Cir. 2014)* (affirming district court's decision to exclude expert opinion in form of event study that didn't appropriately account for other confounding factors that may have affected company's stock price); *see also* *Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP, 806 F.3d 71, 95 (2d Cir. 2015)* (affirming district court's denial of a class certification motion and holding Dr. Rosenthal's regression analysis didn't support plaintiffs' RICO causation theory because she "conceded that she had not been asked by Plaintiffs' counsel to perform the kind of regression analysis that might have isolated the relative causal effect of the numerous variables [other than defendant's alleged withholding of safety information] bearing on the decline in [an antibiotic drug's] sales").

But, Prof. Rosenthal explains why she didn't need to consider whether medical guidance recommending patients carry two EAI devices would have influenced the outcome of her study. She opines that **[*71]** the medical guidance "did not change coincident with the removal of the single injector packaging." Doc. 1711-1 at 13 (Rosenthal Reply Report ¶ 16). Instead, she explains, "[t]he effects of clinical recommendations are constant before and after the event [she] stud[ies] and so do not need to be separately accounted for." *Id.* As support, she cites deposition testimony by the putative class plaintiffs' medical expert, Dr. Jay Portney, who testified that the medical guidance recommending two EAI devices wasn't a landmark document because it only published what allergists already knew. *Id.* (Rosenthal Reply Report ¶ 16 n.20). Also, Prof. Rosenthal explains, her event study "assess[es] the impact of the withdrawal of the single injector EpiPen using a narrow time window (two quarters pre-withdrawal) to avoid picking up the effects of other influences," and it "strongly support[s] the casual inference" that withdrawing "the single injector EpiPen forced the Class to purchase more pens than it would have [purchased] otherwise." *Id.* at 13-14 (Rosenthal Reply Report ¶ 17).

Plaintiffs argue that the cases defendants cite to support excluding Prof. Rosenthal's opinion involve a failure to consider competing **[*72]** factors that could have influenced the study's outcome. In contrast, here, plaintiffs contend, Prof. Rosenthal didn't have to consider other factors because any such factors—like the prevalence of medical guidance—remained constant before, during, and after Mylan switched to selling the EpiPen exclusively in the 2-Pak.

Defendants argue that the only support for Prof. Rosenthal's conclusion that the other factors remained constant is her own subjective analysis. Defendants criticize Prof. Rosenthal's reliance on plaintiffs' medical expert's testimony. Instead, defendants argue, Prof. Rosenthal should have performed an empirical analysis to determine whether the medical guidance, in fact, influenced customers' purchasing decisions. These arguments go to the weight of Prof. Rosenthal's opinion, but they don't preclude its admissibility. Certainly, "[v]igorous cross-examination" and "presentation of contrary evidence" are "the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert, 509 U.S. at 596* (citation omitted). And defendants appropriately can challenge (and have challenged) Prof. Rosenthal's opinions on class certification in this fashion. *See* Doc. 1636 at 41-45 (Mylan Defs.' **[*73]** Opp'n to Class Pls.' Mot. for Class Certification).[8] But, exercising its discretion, the court concludes that defendants' arguments don't warrant a *Daubert* order excluding Prof. Rosenthal's opinions about the alleged damages the putative class members sustained from Mylan's switch to the 2-Pak.

b. Ascertainability Opinion

Second, defendants ask the court to exclude Prof. Rosenthal's opinion about ascertainability of the class for two reasons: (1) her ascertainability opinion is unreliable because she can't identify the customers who actually qualify as class members under the class definition, and (2) her ascertainability opinion is improper rebuttal testimony.

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[8] The court addresses defendants' challenges to Professor Rosenthal's damages opinion in its Order on the class certification motion at Part IV.E.2.a.

The court addresses the second argument first. This argument contends that the putative class plaintiffs bear the burden to prove that their proposed class is ascertainable. Thus, defendants contend, plaintiffs should have offered any expert opinion about ascertainability in their experts' opening reports. Prof. Rosenthal didn't do so. Instead, Prof. Rosenthal first offered her ascertainability opinion in her Reply Report. Thus, defendants argue, the court should exclude this opinion as improper rebuttal testimony.

Plaintiffs respond **[*74]** that Prof. Rosenthal's Reply provides proper rebuttal testimony in response to criticisms levied by expert opinions that defendants presented in their Opposition to the class certification motion. Specifically, defendants' experts opine that large numbers of proposed class members are uninjured because they never paid for their EpiPens. And, defendants argue, plaintiffs cannot ascertain from the data produced during discovery who actually paid for their EpiPens, and thus who qualifies as a member of the proposed class. Defendants' expert, Prof. James Hughes, asserts that he has reviewed the data and documents produced in discovery and he has concluded they are "insufficient to . . . exclude individuals from the class who did not actually pay for an EpiPen device." Doc. 1852-4 at 9 (Hughes Expert Report ¶ 14). Plaintiffs argue that Prof. Rosenthal's Reply Report merely responds to Prof. Hughes's criticisms about her analysis. *See* Doc. 1711-1 at 3 (Rosenthal Reply Report) (explaining that she is "respond[ing] to the expert report[ ] of . . . Dr. Hughes as [it] pertain[s] to [her] affirmative report on class certification submitted in this matter," and specifically, she "disagree[s] with **[*75]** Dr. Hughes and provide[s] documentation that contradicts his conclusions regarding the so-called 'ascertainability' of Class members"). And thus, plaintiffs contend, Prof. Rosenthal's ascertainability opinion is proper rebuttal testimony.

Our Circuit has explained that "[r]ebuttal evidence is evidence which attempts to 'disprove or contradict' the evidence to which it is contrasted." *Tanberg v. Sholtis, 401 F.3d 1151, 1166 (10th Cir. 2005)* (quoting *Black's Law Dictionary* 579 (7th ed. 1999)). The Federal Rules specifically limit rebuttal expert testimony to evidence that is "intended solely to contradict or rebut evidence *on the same subject matter* identified by another party" in its expert disclosures. *Fed. R. Civ. P. 26(a)(2)(D)(ii)* (emphasis added). A court properly may admit rebuttal evidence on a topic when "a party opens the door to [that] topic." *Tanberg, 401 F.3d at 1166*. But generally, courts will exclude "use of a rebuttal expert to introduce evidence more properly a part of a party's case-in-chief, especially if the alleged rebuttal expert is used to introduce new legal theories." *Foster v. USIC Locating Servs., LLC, No. 16-2174-CM, 2018 U.S. Dist. LEXIS 139648, 2018 WL 4003354, at *2 (D. Kan. Aug. 17, 2018)* (citations and internal quotation marks omitted); *see also* *Koch v. Koch Indus., 203 F.3d 1202, 1224 (10th Cir. 2000)* ("When plaintiffs, however, seek to rebut defense theories which they knew about or reasonably could have anticipated, the district court is within **[*76]** its discretion in disallowing rebuttal testimony."). In short, the decision to admit or exclude rebuttal testimony is within the trial court's discretion. *Tanberg, 401 F.3d at 1166*.

Here, plaintiffs assert that they couldn't have anticipated Prof. Hughes's criticisms about identifying the individuals who qualify as class members because, they contend, Prof. Hughes relies on an "administrative feasibility" standard for identifying class members and that standard doesn't apply in our Circuit. As with the discussion about the putative class plaintiffs' motion to exclude the opinions of Prof. James Hughes, the parties sharply disagree about the legal requirements for showing ascertainability at class certification. With this motion, seeking to exclude Prof. Rosenthal's opinions, defendants cite a Pennsylvania case where the court defined the "ascertainability requirement" as "show[ing] that there is a reliable, administratively feasible mechanism that can identify which potential class members fall within the class definition." *In re Wellbutrin XL Antitrust Litig., 308 F.R.D. 134, 137 (E.D. Pa. 2015)* (citing *Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015))*. In contrast, plaintiffs argue the Tenth Circuit has no "administrative feasibility" requirement to prove ascertainability on class certification. And, they argue, our court explicitly **[*77]** has rejected such a requirement. *See* *In re Syngenta AG MIR 162 Corn Litig., No. 14-md-2591, 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *2-3 (D. Kan. Sept. 26, 2016)* (declining an "invitation to apply a standard—one not adopted by the Tenth Circuit—that would preclude certification without a showing that class members may be determined in an administratively feasible manner"). Instead, plaintiffs assert, this court has adopted an ascertainability standard that requires that "the class definition must not be too vague, the class must not be defined by subjective criteria, and the class must not be defined in terms of success on the merits." *Id. 2016 U.S. Dist. LEXIS 132549, [WL] at *2* (citing *Mullins v. Direct Digital, LLC, 795 F.3d 654, 659-60 (7th Cir. 2015))*.

On this *Daubert* motion, the court declines to decide what standard to apply when determining whether the putative class presently is ascertainable. That is a question the court will decide in its class certification analysis.[9] Here, the court exercises its discretion and refuses to exclude Prof. Rosenthal's opinion as improper rebuttal testimony on this *Daubert* motion. Prof. Rosenthal's Reply Report explicitly recites that she offers her rebuttal opinions in response to Prof. Hughes's criticisms about her analysis. *See* Doc. 1711-1 at 3. The Reply Report cites specific portions of Prof. Hughes's report and explains **[*78]** why Prof. Rosenthal disagrees with his analysis of the ascertainability question. *See id.* at 27-28 (Rosenthal Reply Report ¶¶ 44, 46-49). The court finds that Prof. Rosenthal's ascertainability opinion is proper rebuttal testimony.

Now, the court turns back to defendants' first argument supporting their request that the court exclude Prof. Rosenthal's opinion about the ascertainability of the class. Defendants contend that Prof. Rosenthal doesn't have a reliable methodology for ascertaining three types of EpiPen consumers to determine whether these consumers qualify as members of the class under the class definition. The three types of consumers are: (1) consumers who paid nothing, (2) consumers who had flat co-pays for the EpiPen, and (3) consumers who paid cash for their EpiPen products.[10]

Defendants assert that the law in our Circuit requires the putative class plaintiffs to define the class using a definition that is ""precise, objective, and presently ascertainable."" *See* *In re Syngenta AG MIR 162 Corn Litig., 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *1* (quoting *In re Urethane Antitrust Litig., 237 F.R.D. 440, 444 (D. Kan. 2006)* (quoting *Manual for Complex Litig*. § 221.222, at 270 (4th ed. 2005))); *see also* *Shook v. El Paso Cty., 386 F.3d 963, 972 (10th Cir. 2004)* (recognizing that "the lack of identifiability is a factor that may defeat *Rule 23(b)(3)* class **[*79]** certification"). And, defendants contend, Prof. Rosenthal hasn't used a reliable methodology to ascertain who qualifies (and does not qualify) as a member of the class under the Tenth Circuit's standard for any of the three categories of consumers. The court addresses each argument for each type of consumer, below.

i. Consumers Who Paid Nothing

In the first category of consumers, defendants explain that Mylan issued coupons to consumers who, in many instances, used the coupons to pay nothing for their EpiPens. And, if the consumer paid nothing to purchase an EpiPen, that consumer doesn't qualify as a member of the class under the class definition.

Prof. Rosenthal offers a methodology for identifying this first category of consumers so that they aren't included in the class. Doc. 1711-1 at 21-22 (Rosenthal Reply Report ¶ 33). She asserts, "[t]here are individual identifiers, provider identifiers, and dates in the Mylan coupon data that will permit matching with paid pharmacy claims." *Id.* To illustrate, Prof. Rosenthal used CVS/Caremark pharmacy claims data to "cross reference with the Mylan coupon data and identify the prescriptions where copay coupons were used." *Id.* By "[m]atching on **[*80]** exact combinations of fill date, physician identification number, [National Drug Code] and/or Rx number," Prof. Rosenthal was able to "link the copay coupon information with the CVS/Caremark pharmacy claims . . . ." *Id.* Prof. Rosenthal opines that "[m]any examples like this can be observed in the merged data," and thus, "data exists such that—at the appropriate time—we can link coupons with pharmacy records and determine their effect on whether an individual Class member was injured." *Id.*

Defendants say Prof. Rosenthal's methodology is wrong. For support, they rely on their own expert's analysis. Defendants' expert, Prof. Hughes, asserts that he tried to match all the transactions listed in the produced PBM claims data with Mylan's coupon data using Prof. Rosenthal's proposed methodology. Doc. 1850-1 at 10-11 (Hughes Decl. ¶ 20). And, according to Prof. Hughes, he was able to match fewer than 16% of the transactions

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[9] The court addresses this question in its Order on the class certification motion at Part IV.C.1.

[10] As discussed below, only the third category of consumers qualify for class membership. Consumers in the first and second categories would not qualify if they never paid for their EpiPens.

listed in the Mylan coupon data with the PBM claims data. *Id.* Thus, defendants assert, Prof. Rosenthal's methodology fails to account for a large number of consumers who paid nothing for the EpiPen using a coupon.

Defendants' criticisms about Prof. Rosenthal's methodology **[*81]** go to the weight of her opinion but not its admissibility. With his analysis, Prof. Hughes recognizes that the methodology allows for some identification of coupon users—even if less than 16%. And, plaintiffs assert, discovery is continuing. So, to the extent discovery produces additional identifying information, Prof. Rosenthal may be able to use her methodology to identify more coupon users. As our Circuit has recognized, *Daubert* doesn't require the court to decide whether Prof. Rosenthal's opinions are "undisputably correct." *Etherton v. Owners Ins. Co., 829 F.3d 1209, 1217 (10th Cir. 2016)* (citation and internal quotation marks omitted). Instead, the court must determine whether "the method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts which sufficiently satisfy *Rule 702*'s reliability requirements." *Id. at 1217-18* (citations and internal quotation marks omitted). So, the court's *Daubert* inquiry should "'focus . . . solely on [the expert's] principles and methodology, not on the conclusions that they generate.'" *Id. at 1217* (quoting *Daubert, 509 U.S. at 595*). On that issue, the court finds that Prof. Rosenthal's methodology for identifying EpiPen coupon users sufficiently is reliable that the court properly may consider her opinions **[*82]** on class certification.

ii. Consumers Who Had Flat Co-Pays

For the second type of consumers—*i.e.*, ones who had flat co-pays—defendants assert that Prof. Rosenthal's methodology cannot determine reliably who falls into this category. Consumers who paid a single, flat co-pay for their EpiPens fall outside the class definition because they would have made the same copayment whether they purchased a branded EpiPen or a generic product. Thus, defendants contend, plaintiffs must show a reliable method for identifying these consumers and excluding them from the class.

Prof. Rosenthal opines that she can identify co-pay consumers reliably using data maintained by PBMs. She explains that, in two other pharmaceutical cases, "[d]eclarations submitted by PBMs . . . specifically identified and confirmed that data are available through the PBMs sufficient not only to identify class members but also to determine whether or not they had a fixed copay or other coinsurance arrangements." Doc. 1711-1 at 15-16 (Rosenthal Reply Report ¶ 20). Prof. Rosenthal suggests that "[t]hese data must be available in order to allow insurers and their PBMs the ability to process prescription claims at the retail level." **[*83]** *Id.* And, "[t]hese PBM declarations confirm the obvious that these data can be provided if requested." *Id.* Specifically, Prof. Rosenthal cites one PBM declaration that identifies the types of data "generally maintained in an industry standard format created by the National Council for Prescription Drug Programs [("NCPDP")] . . . ." *Id.* Prof. Rosenthal also opines that the PBM declarations from these other cases "are entirely consistent with the data produced by multiple PBMs in this matter." *Id.* at 16 (Rosenthal Reply Report ¶ 21).

Defendants contend, in response, that the *Wellbutrin* court rejected a similar opinion by Prof. Rosenthal. *In re Wellbutrin XL Antitrust Litig., 308 F.R.D. 134, 150-51 (E.D. Pa. 2015)*. In that case, the court found that the class "ha[d] not carried its burden of affirmatively demonstrating by a preponderance of the evidence that there is a reliable, administratively feasible method of ascertaining the class" because its "evidence in support of ascertainability consist[ed] mainly of conclusory statements by its experts that records exist that could be used to ascertain the class and the existence of NCPDP standards." *Id. at 151* (citations and internal quotation marks omitted). *Wellbutrin* held that "[t]his evidence is not enough to show by a preponderance **[*84]** of the evidence that the class is ascertainable." *Id.* Importantly, the court reached this decision when it decided whether the *Wellbutrin* plaintiffs had shouldered their burden to establish that class certification was warranted under *Fed. R. Civ. P. 23(b)(3)*.[11] *Id.* But the court didn't exclude Prof. Rosenthal's opinions as unreliable under *Daubert*.[12]

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[11] The court recognizes that the *Wellbutrin* court also applied the Third Circuit's "administrative feasibility" standard for determining the class's ascertainability. *308 F.R.D. at 151*. Plaintiffs assert that this is not the appropriate standard for determining ascertainability under our court's governing law. As already discussed, this Order doesn't decide that issue.

In short, *Wellbutrin's* conclusion doesn't apply here because plaintiffs have made a stronger showing than plaintiffs did there. Prof. Rosenthal's report provides a direct, specific, and principled explanation how she can avoid the *Wellbutrin* problem. Prof. Rosenthal's opinion here doesn't rely on conclusory statements. Instead, she has offered a reliable method for identifying these consumers using PBM data. Defendants' challenges about whether the PBM data actually is available in this case—as opposed to other cases—go to the weight of her opinions. The court declines to exclude her opinions for this reason.

iii. Consumers Who Paid Cash

Finally, defendants assert that Prof. Rosenthal offers no reliable methodology for identifying the EpiPen consumers who paid cash for their EpiPen purchases. In her Reply Report, Prof. Rosenthal responds **[*85]** to the concerns described in Prof. Hughes's Expert Report about the availability of data for cash payers. Doc. 1711-1 at 29 (Rosenthal Reply Report ¶ 48). Prof. Rosenthal identifies two means to gather information about cash-paying EpiPen consumers. "First, the individuals will have records on the transactions." *Id.* "Second, pharmacy records will contain information on these transactions . . . ." *Id.* She points out that "Plaintiffs have in fact produced a large sample of pharmacy records for cash payers in the form of the IQVIA Xponent data." *Id.* But, she concedes that the IQVIA Xponent data "used in [her] report do not have patient identifiers (IQVIA protects these for good reason)." *Id.* Nevertheless, Prof. Rosenthal opines that "such identifiers do in fact exist at the dispensing pharmacies and presumably the Court could compel their production if it were deemed necessary." *Id.*

Again, defendants cite the *Wellbutrin* case as support for excluding Prof. Rosenthal's methodology for identifying consumers who paid cash for EpiPens. Defendants assert that the *Wellbutrin* court was "not persuaded by [Prof. Rosenthal's] conclusory statements" that "records at the retail pharmacy and PBM level **[*86]** . . . can be used to identify class members" when she had not "examined or analyzed these pharmaceutical records." *In re Wellbutrin XL Antitrust Litig., 308 F.R.D. at 150*. But, as already discussed, the *Wellbutrin* court considered Prof. Rosenthal's opinions in the context of determining whether class certification was appropriate. *Id. at 150-51*. It didn't exclude her opinion about identifying consumers with pharmaceutical records under *Daubert* as unreliable. Instead, it found that her opinions didn't support class certification under *Rule 23(b)(3)*.

The court is persuaded that defendants have come forward with legitimate and even substantiated questions about Prof. Rosenthal's opinions for cash payers. But the governing law doesn't use that threshold as the standard for excluding an expert's opinion. Instead, the standard inquires whether Prof. Rosenthal has marshaled "sufficient facts to validate [her opinions] in the eyes of the law . . . ." *Pioneer Ctrs., 858 F.3d at 1342* (citation and internal quotation marks omitted). Mindful that "rejection of expert testimony is the exception rather than the rule," *Fed. R. Evid. 702* advisory committee's notes to 2000 amendments, the court exercises its discretion and declines to exclude Prof. Rosenthal's methodology for identifying consumers who paid cash for EpiPens. On **[*87]** balance, Prof. Rosenthal offers a reasonably reliable method for identifying these consumers using either their own or pharmacy records. In the end, merits discovery may substantiate Prof. Hughes's view. The task of gathering pharmacy records may prove overwhelming because it requires collecting data from about 65,000 pharmacies, more than 23,000 of which are independent. Doc. 1850 at 16. Also, defendants question whether class members will have records showing both that they purchased an EpiPen and that they paid more than nothing for their purchase (meaning that insurance, coupons, or patient assistance didn't cover the entire price of the products). Doc. 1884 at 11. These arguments test the weight of Prof. Rosenthal's opinion, but they don't preclude its admission from the court's consideration of the class certification motion.[13]

The court declines to exclude Prof. Rosenthal's ascertainability opinion under *Daubert*.[14]

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[12] The *Wellbutrin* court did exclude another of Prof. Rosenthal's opinions under *Daubert*—but the excluded opinion is not relevant here. *308 F.R.D. at 146-47*.

[13] The court addresses the weight to give Prof. Rosenthal's opinion about the ascertainability of the putative class members in the Order on the class certification motion at Part IV.C.1.

c. Probability Opinion

Next, defendants argue that the court should exclude Prof. Rosenthal's probability opinion. This opinion "estimate[s] the percentage" of putative class members "who might not have suffered an overcharge from the particular misconduct alleged **[*88]** by Plaintiffs." Doc. 1711-1 at 29-30 (Rosenthal Reply Report ¶ 50). Defendants give four reasons for excluding Prof. Rosenthal's probability opinion: (1) the opinion depends on unreasonable assumptions that the record doesn't support; (2) the opinion lacks support in the relevant field and case law; (3) the opinion is incapable of measuring classwide injury; and (4) it is improper rebuttal testimony. The court addresses each of defendants' arguments, in turn, below.

i. Unsupported Assumptions

Defendants argue the court must exclude Prof. Rosenthal's probability opinion as unreliable because it is not "based upon conclusions from established evidentiary facts." *United States v. Rice, 52 F.3d 843, 847 (10th Cir. 1995)*; *see also* *Cochrane v. Schneider Nat'l Carriers, Inc., 980 F. Supp. 374, 378 (D. Kan. 1997)* (excluding expert opinion that was "based on unjustified assumptions" and "therefore will not assist the trier of fact"). To support this argument, defendants direct the court to three assumptions that Prof. Rosenthal makes in her analysis.

First, defendants assert that Prof. Rosenthal wrongly assumes the same probability for the rate that each third party payor ("TPP") will reimburse the purchase of a branded EpiPen or 2-Pak. *See* Doc. 1711-1 at 31-33 (Rosenthal Reply Report ¶¶ 54, 56). Defendants contend her assumption **[*89]** is not supported by the record. For support, they cite portions of Mylan's expert's report that identify differences among TPPs that, the competing expert contends, Prof. Rosenthal failed to consider when forming her opinions. Doc. 1850 at 19. These differences include variations in formularies, benefit design, negotiating power, and rebate payment. *Id.*

Second, defendants contend that Prof. Rosenthal uses an arbitrary and unfounded estimate of 95% to calculate the rate consumers would have switched from the EpiPen to a generic EAI device. Doc. 1850 at 20; *see also* Doc. 1711-1 at 30-31 (Rosenthal Reply Report ¶ 53, n.59). Again relying on Mylan's expert's opinion, defendants argue Prof. Rosenthal's generic conversion assumption is just wrong. Doc. 1850 at 20. They assert her assumption is flawed because she didn't consider other evidence of lower generic switching rates, including evidence of the Teva generic's performance and forecasts. *Id.* Defendants also refute Prof. Rosenthal's assertion that her methodology "can accommodate a range of yardsticks." Doc. 1711-1 at 19 (Rosenthal Reply Report ¶ 27). They contend that any reduction in her generic conversion assumption still doesn't account **[*90]** for the probability that the consumers are brand loyalists who would have continued purchasing the EpiPen even if a generic EAI was available. Doc. 1850 at 21.

Third, defendants assert that Prof. Rosenthal's 2-Pak probability calculations are unreliable. Using a Mylan slide deck from May 2010, Prof. Rosenthal estimates that 65% of patients would have preferred to purchase a 2-Pak instead of a single EpiPen. Doc. 1711-1 at 32-33 (Rosenthal Reply Report ¶ 55, n.61). Defendants argue that her assumption is flawed because it ignores evidence showing that, after May 2010, doctors were recommending and patients were preferring to purchase EpiPens in packages of two.

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[14] Defendants ask that, if the court declines to exclude Prof. Rosenthal's ascertainability opinion as unreliable under *Rule 702* or improper rebuttal testimony, the court give defendants an opportunity to depose Prof. Rosenthal about the ascertainability opinion in her Reply Report, introduce additional expert rebuttal testimony, and submit supplemental briefing in opposition to plaintiffs' Motion for Class Certification. The court denies this request. Prof. Rosenthal submitted her Reply Report on April 26, 2019. Defendants had plenty of time to review and respond to this Reply Report before the court held its June 11-12, 2019 hearing on the Motion for Class Certification. Also, Prof. Hughes has had the chance to review and comment on Prof. Rosenthal's Reply Report. *See, e.g.*, Doc. 1850-1 (May 21, 2019 Decl. of Dr. James W. Hughes in Supp. of Defs.' Mot. to Exclude Expert Opinions of Professor Meredith Rosenthal). For all these reasons, the court denies defendants' request.

All of defendants' criticisms about the assumptions Prof. Rosenthal uses to support her probability opinion go to the weight of her opinion testimony, but not its admissibility. Prof. Rosenthal's Reply Report adequately explains why she made the assumptions her probability analysis made and why, she contends, those assumptions are proper under the facts of the case. Doc. 1711-1 at 30-33 (Rosenthal Reply Report ¶¶ 53-56). And, her Reply Report rebuts the criticisms that Mylan's expert makes about those assumptions. *Id.* at 19-20, 24-25 (Rosenthal Reply **[*91]** Report ¶¶ 27-29, 37-39). Defendants' challenges to those assumptions don't show that Prof. Rosenthal's probability opinion is so unreliable that the court must exclude it. *See, e.g., In re Lidoderm Antitrust Litig., No. 14-md-02521-WHO, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *28 (N.D. Cal. Feb. 21, 2017)* (denying motion to exclude expert opinion because it was based on "reasonable assumptions and evidence, and supported by reasoned principles as well as academic scholarship" and while "some of those assumptions [were] disputed," those disputes did not "make [the expert's] reliance on them improper").

Instead, defendants' challenges more properly are presented through the "presentation of contrary evidence" on class certification because these are "the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert, 509 U.S. at 596* (citation omitted). And, indeed, defendants have asserted these challenges in their Opposition to the class certification motion. *See, e.g.*, Doc. 1636 at 41-43 (criticizing Prof. Rosenthal's failure to account for consumers who would have purchased a 2-Pak even if a single pack was available), 53-55 (challenging Prof. Rosenthal's assumption that 95% of consumers would have switched to a generic), 60-61 (explaining how brand loyalty **[*92]** and rebates may result in no injury to a consumer).[15] The court declines to exclude Prof. Rosenthal's probability opinion based on the assumptions she made to support it.

ii. Unsupported in the Field or Case Law

Next, defendants assert that Prof. Rosenthal's probability opinion is unreliable because her methodology has no support in the field or the case law. Defendants concede that Prof. Rosenthal's Reply Report opines that "health economists routinely use probabilities to estimate the distribution of harms and benefits to populations from a range of policy and clinical interventions." Doc. 1711-1 at 30 (Rosenthal Reply Report ¶ 51). And she cites two articles as support for this assertion. *Id.* (Rosenthal Reply Report ¶ 51, n.57). Relying on an opinion from Mylan's expert, defendants argue that these two articles don't use the same methodology that Prof. Rosenthal has used. Doc. 1850 at 22. And thus, they contend, plaintiffs can't show that her methodology has support in the field. Plaintiffs respond that Mylan's expert merely tries to distinguish Prof. Rosenthal's methodology from the ones discussed in the two cited articles. But, they contend, Mylan's expert doesn't refute Prof. Rosenthal's **[*93]** basic premise that health economists routinely use probabilities to analyze the distribution of harms and benefits to a population.

Also, defendants assert that no court ever has accepted Prof. Rosenthal's probability analysis. For support, defendants assert that "plaintiffs in one recent case submitted Prof. Rosenthal's probability analysis as the leading piece of evidence that they argued warranted consideration of the First Circuit's denial of class certification. But the district court rejected the analysis and plaintiffs' motion." Doc. 1850 at 23 n.8 (citing Electronic Order, *In re Asacol Antitrust Litig.*, No. 15-cv-12730-DJC (D. Mass. Apr. 11, 2019), ECF No. 772). As plaintiffs correctly point out, the Massachusetts order defendants cite is a three-paragraph text order denying a motion for leave to file a renewed motion for class certification because it "would be futile" and "would involve re-litigation of matters previously decided." Electronic Order, *In re Asacol Antitrust Litig.*, No. 15-cv-12730-DJC (D. Mass. Apr. 11, 2019), ECF No. 772. The text order says nothing about Prof. Rosenthal or that the court is rejecting her analysis. *Id.*

In contrast, plaintiffs assert that the **[*94]** First Circuit considered a probability analysis "similar" to the one offered here by Prof. Rosenthal, along with other summary judgment evidence, and concluded that a TPP plaintiff had submitted sufficient causation proof to survive summary judgment. Doc. 1860 at 23 (citing *In re Celexa & Lexapro Mktg. & Sales Practices Litig., 915 F.3d 1, 13-14 (1st Cir. 2019)* (holding district court erred by granting defendant's summary judgment motion)). Specifically, Prof. Rosenthal had opined in *Celexa & Lexapro* that a defendant pharmaceutical company's "spending on promotions in general correlated positively with sales." *In re Celexa &*

[15] The court addresses Prof. Rosenthal's probability opinions in its Order on the class certification motion at Part IV.E.2.b.ii.

Lexapro Mktg. & Sales Practices Litig., 915 F.3d at 12. She concluded that the defendant's off-label promotions had produced 76% of Celexa prescriptions and 54% of Lexapro prescriptions. *Id. at 13*. And "Dr. Rosenthal estimated that if [the TPP plaintiff] paid for as few as five independent prescriptions, there would be a 98% chance that at least one was the result of off-label marketing." *Id.* The First Circuit noted that the record showed the TPP plaintiff likely paid for more than five prescriptions, and "[s]o the odds that [the TPP plaintiff] was not harmed if the drugs were, indeed, ineffective was likely infinitesimal (assuming the prescriptions were independent of one another)." *Id.* Thus, the First Circuit concluded, the **[*95]** TPP plaintiff "could establish causation and injury at least for any TPP who paid for more than a handful of different patients' prescriptions." *Id. at 14*.

The First Circuit also recognized that "there is room for reasonable disagreement on the merits of Dr. Rosenthal['s]" assumptions, but it recognized that a jury could accept them "as reasonable." *Id. at 13*. And while the court noted that the district court had not yet conducted a *Daubert* analysis of the experts' opinions, *id.*, the Circuit nevertheless didn't find any flaws with Dr. Rosenthal's analysis. To the contrary, the court considered her opinion when reversing the summary judgment order. *Id. at 13-14*.

After examining the parties' competing arguments, the court is unpersuaded by defendants' argument that Prof. Rosenthal's methodology lacks sufficient support in the field to require excluding her opinions on class certification. Defendants' disagreements about her methodology go to the weight of her opinion, which the court can consider when deciding the class certification motion.[16]

iii. Incapable of Measuring Classwide Injury

Defendants next argue that Prof. Rosenthal's probability opinion is unreliable because it is not capable of measuring classwide injury. **[*96]** Defendants assert that plaintiffs have the burden to establish classwide injury which, they contend, requires a showing of actual injury to all or substantially all class members. Instead, defendants assert, Prof. Rosenthal's probability opinion simply estimates the percentage of putative class members "who *might not* have suffered an overcharge from the particular misconduct alleged by Plaintiffs." Doc. 1711-1 at 29-30 (Rosenthal Reply Report ¶ 50) (emphasis added). Thus, defendants contend, Prof. Rosenthal's opinion is not reliable because it doesn't establish the actual percentage of consumers who, in fact, sustained an injury.

Plaintiffs respond that they aren't required to establish the percentage of consumers who actually sustained injuries to prevail on class certification. Instead, they contend, class certification just requires that plaintiffs show "there is no basis to conclude that a 'great number' of members could not have been harmed as alleged by plaintiffs." *In re Syngenta AG MIR 162 Corn Litig., 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *4* (quoting *Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 824 (7th Cir. 2012))*. And, plaintiffs argue, Prof. Rosenthal's analysis sufficiently demonstrates that few consumers could not have sustained harm from defendants' **[*97]** alleged misconduct. Doc. 1711-1 at 29-33 (Rosenthal Reply Report ¶¶ 50-56). In their Reply, defendants argue that this isn't the correct standard for determining predominance on a *Rule 23* motion. And, even if it were, Prof. Rosenthal's opinion doesn't satisfy that standard.

These arguments go to the merits of the class certification motion. The court will decide when ruling the class certification motion whether plaintiffs have shouldered their burden to establish classwide injury sufficient to certify a class under *Rule 23*. And it will consider whether Prof. Rosenthal's expert opinions constitute sufficient evidence to support class certification under the governing case law.[17] But defendants' arguments here don't establish that Prof. Rosenthal's opinion about the percentage of uninjured class members is so unreliable that the court must exclude it under *Daubert*.

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[16] The court addresses Prof. Rosenthal's probability opinions in its Order on the class certification motion at Part IV.E.2.b.ii.

[17] As previously mentioned, the court addresses Prof. Rosenthal's probability opinions in its Order on the class certification motion at Part IV.E.2.b.ii.

Also, defendants argue, Prof. Rosenthal's model cannot assess which class members, if any, were harmed by each individual theory of liability. Defendants assert that plaintiffs are required to "tie each theory of antitrust impact to an exact calculation of damages." *Comcast Corp. v. Behrend, 569 U.S. 27, 37, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*. Defendants assert that Prof. Rosenthal's analysis flunks this test because **[*98]** she shows "how combining multiple sources of impact reduces the probability of a class member remaining uninjured." Doc. 1711-1 at 34 (Rosenthal Reply Report ¶ 58). Plaintiffs respond that Prof. Rosenthal properly considered multiple theories of harm in her analysis because class plaintiffs have proposed certifying a class that includes multiple theories of liability, including the alleged generic delay and improper switch to the 2-Pak.

The court recognizes that *Comcast* differs from this case. In *Comcast*, plaintiffs alleged four different theories of antitrust impact, but the district court "accepted [just one of the theories] of antitrust impact as capable of classwide proof and rejected the rest." *569 U.S. at 31*. The Supreme Court held that the district court erred by certifying a class based on an expert's regression model that "assumed the validity of all four theories of antitrust impact initially advanced" by plaintiffs, even though the district court had rejected three of those theories. *Id. at 36*. Thus, the Court found that the model "falls far short of establishing that damages are capable of measurement on a classwide basis," and "[w]ithout presenting another methodology," plaintiffs could not prove **[*99]** "*Rule 23(b)(3)* predominance." *Id. at 34*. Instead, the Court reasoned that "[q]uestions of individual damage calculations will inevitability overwhelm questions common to the class." *Id.*

That's not the posture of this case. Plaintiffs have asserted several theories of liability. And, at this stage, the court hasn't excluded any of the theories that Prof. Rosenthal uses in her analysis. Plaintiffs assert that Prof. Rosenthal's theory is consistent with *Comcast* because, in that case, the Supreme Court explained that "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory." *Id. at 35*. And, because plaintiffs have identified several theories that purportedly injured the putative class members—thus producing damages—it was proper for Prof. Rosenthal to combine the theories in her analysis. *See* *Butler v. Sears, Roebuck & Co., 727 F.3d 796, 800 (7th Cir. 2013)* (recognizing that "it was not the existence of multiple theories in [*Comcast*] that precluded class certification; it was the plaintiffs' failure to base all the damages they sought on the antitrust impact—the injury—of which the plaintiffs were complaining"). Also, plaintiffs distinguish Prof. Rosenthal's probability opinion from the model excluded in ***[*100]*** *Comcast* because her probability opinion isn't a damages measurement. Prof. Rosenthal provided her damages opinions elsewhere in her expert report, and there, she separated her damage opinions among the various theories.

The court agrees that defendants' arguments about *Comcast* don't preclude the court from considering Prof. Rosenthal's probability opinion on class certification.

iv. Improper Rebuttal Testimony

Last, defendants assert that Prof. Rosenthal's probability methodology is improper rebuttal testimony. Similar to their arguments directed at the ascertainability opinion, above, defendants argue that Prof. Rosenthal should have offered a model to assess the possibility of uninjured class members in her opening report. Thus, defendants contend, the probability opinion she offers in her Reply Report constitutes improper rebuttal testimony.

Plaintiffs respond that, after Prof. Rosenthal submitted her initial report, defendants filed their Opposition to the class certification motion. It argued that plaintiffs' proposed class definitions contain too many uninjured class members. And one of Mylan's experts (Dr. John H. Johnson, IV) issued a report criticizing the conclusions announced **[*101]** in Prof. Rosenthal's initial report. Plaintiffs assert that Prof. Rosenthal's Reply Report properly responds to the arguments raised by defendants' Opposition and Mylan's expert. The court agrees with them.

Prof. Rosenthal's Reply Report explicitly recites that she offers her rebuttal opinions in response to Dr. Johnson's criticisms about her analysis, including his assertions that Prof. Rosenthal's analysis fails to account for uninjured class members. *See* Doc. 1711-1 at 3; *see also id.* at 29-37 (Rosenthal Reply Report ¶¶ 50-60). Also, the Reply Report cites specific portions of Dr. Johnson's report and gives Prof. Rosenthal's reasons for disagreeing with his conclusions. *See id.* at 20-24 (Rosenthal Reply Report ¶¶ 30-36). Exercising its discretion, the court declines to exclude Prof. Rosenthal's probability opinion as improper rebuttal testimony.

For all these reasons, the court rejects defendants' request that the court exclude Prof. Rosenthal's probability opinion under *Daubert*.[18]

d. Professor Rosenthal's Opinions that Rely On Professor Elhauge's Opinions

Finally, defendants assert that the court should exclude Prof. Rosenthal's opinions that rely on the opinions of another one of the putative **[*102]** class plaintiffs' experts. Prof. Rosenthal reaches some of her conclusions by relying on opinions offered by Professor Einer Elhauge. *See, e.g.*, Doc. 1500-3 at 33 (Rosenthal Expert Report ¶ 79), Doc. 1711-1 at 18-19, 37 (Rosenthal Reply Report ¶¶ 26, 61). Defendants contend that Prof. Elhauge's opinions are unreliable and inadmissible under *Daubert*. And, by separate motion, they ask the court to exclude his opinions from the court's consideration of the class certification motion. *See* Doc. 1604.

The court addresses defendants' motion to exclude Prof. Elhauge's opinions in the next section of this Order. As discussed below, the court rejects defendants' premise—that the court should exclude any of Prof. Elhauge's opinions that Prof. Rosenthal has relied on when forming her opinions. Consequently, the court rejects defendants' final argument for excluding Prof. Rosenthal's opinions.

For the reasons explained, the court denies defendants' motion to exclude Prof. Rosenthal's expert opinions.

2. Motion to Exclude Expert Opinions of Professor Einer Elhauge

Defendants next ask the court to exclude the expert opinions of Prof. Einer Elhauge. Prof. Elhauge opines that Mylan entered into exclusionary **[*103]** contracts with PBMs and its EpiPens4Schools program which harmed the entire putative class by foreclosing a part of the market to Auvi-Q (a rival EAI device manufactured and sold by Sanofi-Aventis U.S. LLC ("Sanofi")). Doc. 1500-2 at 6 (Elhauge Expert Report ¶ 3). According to Prof. Elhauge, Mylan's market foreclosure, in turn, decreased Auvi-Q sales and prevented Auvi-Q from competing with Mylan, thereby reducing Mylan's incentives to lower its prices across the market and across the putative class.[19] *Id.*

Defendants assert three arguments to support their request that the court exclude Prof. Elhauge's opinions. First, defendants contend that Prof. Elhauge is not qualified to render opinions based on econometric models. Second, defendants argue that Prof. Elhauge's econometric analyses are either unreliable or no longer relevant to the case. And finally, defendants assert that Prof. Elhauge's opinions rely on improper and unreliable rebuttal testimony that doesn't suffice to cure the defects in his initial analysis. The court addresses each argument, below.

a. Professor Elhauge's Qualifications

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[18] Similar to the request above about Prof. Rosenthal's ascertainability opinion, defendants ask that, if the court declines to exclude Prof. Rosenthal's probability opinion, the court allow defendants to depose Prof. Rosenthal about the probability opinion in her Reply Report, introduce additional expert rebuttal testimony, and submit supplemental briefing opposing plaintiffs' Motion for Class Certification. The court denies this request for the same reasons discussed above. *See supra* note 14. Also, the court recognizes that Mylan's expert, Dr. Johnson, has had the chance to review and comment on Prof. Rosenthal's Reply Report. *See, e.g.*, Doc. 1850-2 (May 21, 2019 Decl. of Dr. John H. Johnson, IV in Supp. of Defs.' Mot. to Exclude Expert Opinions of Professor Meredith Rosenthal).

[19] Prof. Elhauge also offers opinions about market definition and market power. Doc. 1500-2 at 1 (Elhauge Expert Report ¶ 1). Defendants don't challenge the admissibility of these opinions on class certification. But defendants reserve their right to challenge these opinions at a later stage. Doc. 1886 at 9 n.1.

Defendants assert that Prof. Elhauge is not qualified to render his opinions because he is neither **[*104]** an economist nor an econometrician (an economist with highly specialized training in mathematics and statistics who builds economic models). Plaintiffs recognize that Prof. Elhauge is not an economist or an econometrician, but, they argue, Prof. Elhauge is well-qualified to testify as an expert in antitrust economics. Also, plaintiffs assert, Prof. Elhauge has extensive expertise applying economics and econometrics to antitrust issues. Thus, they argue, he is qualified to render the opinions he offers in this case. The court agrees with plaintiffs. Prof. Elhauge is qualified to opine on the topics that he offers here.

Prof. Elhauge is the Petrie Professor of Law at Harvard Law School, where he teaches ***antitrust law***, health policy, and other subjects. Doc. 1500-2 at 6-7 (Elhauge Expert Report ¶ 4). Prof. Elhauge has authored or coauthored several books about ***antitrust law*** and economics. *Id.* Also, he has authored many articles involving economic analysis of antitrust and other legal issues, including articles on monopolization, bundled discounts, loyalty discounts, and reverse payment settlements. *Id.* Since 1991, Prof. Elhauge has written more than 40 legal articles that leading law reviews **[*105]** and bar journals have published. *Id.* at 81-85. Also, Prof. Elhauge has testified as an expert witness on antitrust economics in dozens of federal cases, as well as before Congress, arbitration panels, and international competition agencies. *Id.* at 7 (Elhauge Expert Report ¶ 5). His expert testimony has included testimony about reverse payment settlements, other horizontal agreements, vertical agreements, mergers, monopolization and exclusionary conduct, price discrimination, health economics, patent economics, and contract economics. *Id.* Courts have referred to Prof. Elhauge as a ""highly qualified antitrust titan."" *See, e.g., Castro v. Sanofi Pasteur Inc., 134 F. Supp. 3d 820, 830 (D.N.J. 2015)* (quoting *In re Mushroom Direct Purchaser Antitrust Litig., No. 06-0620, 2015 U.S. Dist. LEXIS 120892, 2015 WL 5767415, at *4 (E.D. Pa. July 29, 2015)* (quoting *Natchitoches Par. Hosp. Serv. Dist. v. Tyco Int'l, Ltd., 247 F.R.D. 253, 273 (D. Mass. 2008)))*.

In his deposition testimony, Prof. Elhauge conceded that he is "not an expert in econometrics . . . ." Doc. 1861-2 at 12 (Elhauge Dep. 29:8-23). Also, he testified that he doesn't come up with "new, novel econometric methods." *Id.* But, Prof. Elhauge testified that he has "expertise . . . applying econometrics to antitrust issues." *Id.* And he considers himself an expert in "the application of econometrics to antitrust issues." *Id.* at 11-12 (Elhauge Dep. 28:25-29:3). That's what Prof. Elhauge says he did in this case—*i.e.*, apply econometric methods to antitrust issues **[*106]** by performing regression analyses to estimate the effects of Mylan's exclusionary contracts with PBMs.[20]

At least two courts have found that Prof. Elhauge is qualified to perform this type of expert analysis, even though he is not an econometrician. *See, e.g., In re Mushroom Direct Purchaser Antitrust Litig., No. 06-0620, 2015 U.S. Dist. LEXIS 120892, 2015 WL 5767415, at *5 (E.D. Pa. July 29, 2015)* (rejecting argument that Prof. Elhauge was not qualified to provide expert testimony, recognizing that "[t]here is no serious question that Prof. Elhauge possess[es] skill or knowledge in conducting regression analysis in antitrust cases that is greater than the average layman even if it were conceded that his expertise with multiple regression analysis as an econometric tool in general is not as deep as that of an econometrician," and concluding that his "lack of econometric/economic credentials" affected the weight but not the admissibility of his testimony (citations and internal quotation marks omitted)); *see also Natchitoches Par. Hosp. Serv. Dist. v. Tyco Int'l, Ltd., No. 05-12024 PBS, 2009 U.S. Dist. LEXIS 86435, 2009 WL 3053855, at *3 (D. Mass. Sept. 21, 2009)* (finding that Prof. Elhauge was qualified to provide expert testimony because the court-appointed expert in econometrics "pinpointed no methodological flaws or technical errors in the econometric analysis that Professor Elhauge presented" and concluding **[*107]** that his "lack of econometric/economic credentials affects the weight, not the admissibility, of Professor Elhauge's testimony").

And, in a third case, the court found Prof. Elhauge's econometric analysis sufficiently reliable to deny the defendant's motion to exclude under *Daubert*. *Castro v. Sanofi Pasteur Inc., 134 F. Supp. 3d 820, 831-42 (D.N.J.*

[20] Defendants argue that Prof. Elhauge isn't just applying econometrics to antitrust issues here. Instead, they contend, he's "attempted" to "com[e] up with a new econometric method"—something he's not qualified to do. Doc. 1886 at 8. But defendants don't explain how Prof. Elhauge's analysis invokes an entirely new econometric method. Instead, as Prof. Elhauge testified, he applies *proven* econometric methods in his analysis to determine the effects of Mylan's exclusionary contracts with PBMs. Doc. 1861-2 at 13 (Elhauge Dep. 31:5-8).

2015). Although the defendant there never challenged Prof. Elhauge's qualifications, the court summarized Prof. Elhauge's educational background, professional experience, publications, and expert testimony; and the court concluded that he is "eminently qualified" to provide expert opinions in the form of econometric analysis. *Id. at 830*.

For the same reasons, the court finds that Prof. Elhauge is qualified to render his expert opinions in this case.

b. The Reliability and Relevancy of Professor Elhauge's Econometric Analyses

Next, defendants argue that the court should exclude Prof. Elhauge's opinions about Auvi-Q market foreclosure and delayed generic entry because, defendants contend, Prof. Elhauge used flawed econometric analyses to support his opinions.

i. Auvi-Q Foreclosure Analysis

Prof. Elhauge opines that "Mylan's exclusionary contracts with PBMs . . . foreclose[ed] a part of the market to Auvi-Q . . . ." Doc. 1500-2 at 6 (Elhauge **[*108]** Expert Report ¶ 3). Defendants assert that this opinion is unreliable because Prof. Elhauge bases his conclusion on a flawed regression analysis that failed to account for "serial correlation." Doc. 1854 at 8, 14-16.

"Multiple-regression analysis is a statistical tool used to determine the relationship between an unknown variable (the 'dependent' variable) and one or more 'independent' variables that are thought to impact the dependent variable." *In re Urethane Antitrust Litig., 768 F.3d 1245, 1260 (10th Cir. 2014)* (citing Saks, Michael J., et al., *Reference Manual on Scientific Evidence* 179, 181 (2d ed. 2000)); *see also* Daniel L. Rubinfeld, "Reference Guide on Multiple Regression," in *Reference Manual on Scientific Evidence* 303, 305 (3d ed. 2011), https://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf (hereinafter "Reference Guide on Multiple Regression") (explaining that regression analysis "involves a variable to be explained—called the dependent variable—and additional explanatory variables that are thought to produce or be associated with changes in the dependent variable").

In Prof. Elhauge's regression model, the dependent variable is Auvi-Q's market share, and the two independent variables are: (1) the percentage of lives subject to PBM coverage **[*109]** restrictions on Auvi-Q, and (2) the price ratio of Auvi-Q and EpiPen. Doc. 1500-2 at 57-58 (Elhauge Expert Report ¶ 112). Thus, Prof. Elhauge's model tests whether either of the two independent variables affects the size of Auvi-Q's market share (the dependent variable).

Defendants contend, however, Prof. Elhauge's model is unreliable because it relies on underlying data that is "serially correlated." Specifically, Prof. Elhauge relied on Auvi-Q market share data for six PBMs over a 34-month period, thus producing 204 data points for Prof. Elhauge's regression analysis. Doc. 1500-2 at 56-57 (Elhauge Expert Report ¶ 110). But, defendants contend, these data points are not independent sample results. Instead, defendants argue, the data points are "serially correlated" because PBMs generally decide formulary placement on an annual basis. So, if a PBM had chosen to restrict Auvi-Q in January, it generally would restrict Auvi-Q in every month for the rest of the year. Defendants argue that Prof. Elhauge's regression model fails to control for the fact that PBMs generally don't adjust their formularies one month at time. Thus, defendants contend, his data points are "serially correlated," **[*110]** meaning that they aren't independent and thus make the variables appear far more correlated than they actually are. *See* Reference Guide on Multiple Regression, at 355 (defining "serial correlation" as "[t]he correlation of the values of regression errors of time"). And, according to Mylan's expert, when one controls for this serial correlation embedded in Prof. Elhauge's model, the model isn't capable of generating a statistically significant result. Thus, defendants contend, Prof. Elhauge's model is unreliable.

Plaintiffs respond by citing Prof. Elhauge's Expert Reply Report. In that Report, Prof. Elhauge recognizes that serial correlation is present in his foreclosure regression but, he explains, serial correlation "does not make the regression biased in favor of finding a significant foreclosing effect." Doc. 1711-2 at 40 (Elhauge Expert Reply Report ¶ 81). Instead, Prof. Elhauge asserts, the presence of serial correlation only affects the statistical significance of the results. *Id.* And, Prof. Elhauge explains his regression model does produce statistically significant results when one uses "clustered standard errors" to control for serial correlation. *Id.*; *see also id.* at 40-42 (Elhauge Expert Reply Report ¶¶ 80-84). Although "using clustered **[*111]** standard errors reduces the statistical power of the regression by effectively grouping all observations at the same PBM," one can "obtain statistical significance" by "includ[ing] more PBMs." *Id.* at 40 (Elhauge Expert Reply Report ¶ 81). Also, one can reduce serial correlation significantly by "adding PBM fixed effects to the regression." *Id.* at 40-41 (Elhauge Expert Reply Report ¶ 82).

The court finds that Prof. Elhauge's Reply Report sufficiently explains how to account for serial correlation in his model. Defendants' criticisms about his regression analysis—particularly the criticism asserted by Mylan's expert—go to the weight of Prof. Elhauge's opinions, but not their admissibility. *See, e.g., Southwire Co. v. J.P. Morgan Chase & Co., 528 F. Supp. 2d 908, 929 (W.D. Wis. 2007)* (refusing to exclude expert opinion based on an econometric model because the expert "accounted for the existence of serial correlation and the need to correct for it" and thus "his method is not so inherently flawed as to preclude him from establishing whether defendants' alleged wrongdoing had any effect on the price of copper" and whether the expert "erred in applying his model and whether he failed to properly correct for serial correlation are jury questions not amenable to resolution on summary judgment"). **[*112]** Defendants can challenge—and have challenged—Prof. Elhauge's opinions about class certification by offering competing expert opinions.[21] *See* Doc. 1636 at 49, 49 n.43 (Mylan Defs.' Opp'n to Class Pls.' Mot. for Class Certification). But the court declines to find that Prof. Elhauge's analysis is inherently unreliable such that the court should exclude it. The court thus denies defendants' Motion to Exclude Prof. Elhauge's opinions about Auvi-Q market foreclosure based on PBM exclusionary contracts.

ii. EpiPens4Schools Program Analysis

Prof. Elhauge also opines that "Mylan's exclusionary contracts with . . . its EpiPens4Schools program . . . foreclose[ed] a part of the market to Auvi-Q . . . ." Doc. 1500-2 at 6 (Elhauge Expert Report ¶ 3). Defendants assert that the court should exclude Prof. Elhauge's opinions for two reasons. *First*, defendants argue that Prof. Elhauge bases his opinion on an inaccurate assumption—*i.e.*, that Mylan imposed exclusivity requirements in exchange for free EpiPens for schools through its EpiPens4Schools program. Defendants assert that the factual record doesn't support this assumption because, from 2013 to 2015, 96% of schools participating in the EpiPens4Schools **[*113]** Program were not subject to any exclusivity requirements. Defendants contend that plaintiffs' discovery of these facts has compelled them to abandon "any independent causally related damages based on the EpiPen4Schools program." Doc. 1590-3 at 2 (May 14, 2019 email from plaintiffs' liaison counsel).

Second, defendants contend, the court should exclude Prof. Elhauge's opinions because they are no longer relevant now that plaintiffs have abandoned this theory in their case. Plaintiffs concede that Prof. Elhauge's opinions about the EpiPens4Schools program no longer matter because plaintiffs aren't pursuing this theory. Doc. 1861 at 26. And, they explain, Prof. Elhauge's Expert Reply Report makes clear that he already has withdrawn his opinion about the EpiPens4Schools program. Doc. 1711-2 at 46 (Elhauge Expert Reply Report ¶ 90) (assuming "no foreclosing impact from the EpiPens4Schools program because [Prof. Elhauge] understand[s] that plaintiffs have abandoned that claim"). Thus, plaintiffs assert, the court shouldn't exclude an already-withdrawn opinion, but instead, the court should find that defendants' arguments are moot.

Defendants disagree that the issue is moot. Prof. Elhauge offered **[*114]** an opinion about the EpiPens4Schools program in his initial report. And, defendants contend, the correct procedural device is for the court to grant defendants' motion to exclude the opinion as uncontested so that no question exists about the status of this theory in further proceedings before this court or on appeal. The court agrees with defendants. Because plaintiffs concede that they have abandoned an independent claim for damages based on the EpiPen4Schools program, the court excludes Prof. Elhauge's opinions on this subject from its consideration at the certification stage because they no

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21 The court addresses defendants' challenges to Professor Elhauge's opinion in its Order on the class certification motion at Parts IV.E.2.a. & IV.E.2.d.

longer are relevant to this case. *See* *Fertik v. Stevenson, No. 12-10795-PBS, 2016 U.S. Dist. LEXIS 102543, 2016 WL 4148193, at *3 (D. Mass. Aug. 4, 2016)* (prohibiting an expert from testifying about a "now-abandoned theory").

iii. Delayed Generic Entry Analysis

Finally, defendants seek to exclude Prof. Elhauge's opinions about delayed generic entry because, they contend, his opinions aren't reliable and have no probative value. Prof. Elhauge opines that "reverse payments in patent settlements . . . injure competition across the market (and thus across the class) when they result in generic entry dates that are later than the entry date that would have occurred without that **[*115]** payment in a no-payment settlement." Doc. 1500-2 at 5 (Elhauge Expert Report ¶ 2). Using various data points, Prof. Elhauge has developed a model that, he opines, can "determine the generic entry date in a no-payment settlement that would have been economically rational given [the parties'] actual bargaining power." *Id.* Specifically, Prof. Elhauge "illustrate[s] this classwide methodology, showing that with a $100 million reverse payment amount, the no-payment settlement entry date that would have been economically rational given their actual bargaining power would have been March 13, 2014, some 15.3 months earlier than the entry date in the actual settlement." *Id.* Defendants contend that Prof. Elhauge's opinions about delayed generic entry are unreliable for several reasons.

First, defendants argue, Prof. Elhauge's opinions are flawed because he predicts an entry date for a Teva generic EAI occurring before Teva even had secured FDA approval for its generic product. The FDA didn't approve the Teva generic until August 16, 2018. Doc. 1854 at 18 n.11 (citing FDA, *FDA Approves First Generic Version of EpiPen* (Aug. 16, 2018), https://www.fda.gov/news-events/press-announcements/fda-approves-first-generic-version-epipen). **[*116]** Defendants thus contend that no settlement could have prevented Teva from entering the market before the date when the FDA approved Teva's introduction of its EAI device.

The putative class plaintiffs respond that Teva's actual market entry date is irrelevant to Prof. Elhauge's analysis. Prof. Elhauge explained how he used factual data from the record to determine Teva's expectations for a generic entry date. Doc. 1500-2 at 39-40, 43 (Elhauge Expert Report ¶¶ 71, 78). And, Prof. Elhauge described how his analysis "addressed only the economically rational ***entry date in a but-for settlement agreement***" and "expressly disclaimed offering any opinion on whether Teva would have ***actually*** been able to enter on that settlement entry date given any obstacles, such as the need for FDA approval." Doc. 1711-2 at 23 (Elhauge Reply Report ¶ 45) (emphasis in original). Prof. Elhauge further explained "the fact that after the settlement Teva may have actually struggled to obtain FDA approval does not bear on what the entry date would have been in the but-for settlement, which can only be affected by expectations at the time of settlement." *Id. at 24* (Elhauge Reply Report ¶ 47). Prof. Elhauge recognized that **[*117]** FDA approval may affect plaintiffs' ability to prove "actual causation" if Teva struggled to secure FDA approval for reasons not caused by anticompetitive conduct. *Id.* But, Prof. Elhauge "simply stayed within [his] assignment of analyzing the entry date in a but-for settlement that the parties would have rationally agreed to," and he "[left] it to plaintiffs to establish through other evidence whether in the but-for world Teva would have actually obtained FDA approval and been able to enter by that but-for settlement date." *Id.* Prof. Elhauge asserts that "[s]taying within [his] assignment does nothing to undermine the reliability or classwide nature of the methodology [he] used to determine the economically rational entry date in the but-for settlement." *Id.* The court agrees.

Defendants also contend that Prof. Elhauge's model is flawed because he testified that the actual entry day and actual alleged payment don't matter, but instead, they are "illustrative" placeholders to show that one can apply this model to any set of facts. Doc. 1605-1 at 10 (Elhauge Dep. 64:16-25). But, defendants argue, the model can't demonstrate classwide harm unless it calculates an entry date before June **[*118]** 22, 2015—the date of the Teva settlement agreement. Defendants contend that, if Teva wasn't entering the market until after June 22, 2015 anyway, then defendants couldn't have caused any delay in Teva's generic entry because it entered the settlement before then. For this reason, defendants contend that Prof. Elhauge's model is flawed.

The putative class plaintiffs expose the weakness of this argument. As plaintiffs explain, to prove causation—*i.e.*, that defendants' conduct delayed the entry of a Teva generic—plaintiffs just need to show that Teva would have entered the market sooner than it did but for the reverse payment settlement. For example, if plaintiffs prove that, but for a reverse payment settlement, Teva would have entered the market on June 23, 2015—the day after the settlement—plaintiffs still will have shown that the reverse payment settlement delayed generic entry by more than three years. Thus, defendants' argument on this front doesn't persuade the court that Prof. Elhauge's model is unreliable simply because it may calculate an entry date following the date of the settlement agreement.

Second, defendants assert that Prof. Elhauge's opinions are unreliable because his **[*119]** analysis simply assumes that defendants made a $100 million reverse payment settlement to Teva, but he has no factual basis for this assumption. The court disagrees. Prof. Elhauge has explained why he used the $100 million reverse payment settlement in his calculation. Prof. Elhauge says that he used a 15% patent strength estimate and the parties' profit projections to calculate "that reverse payment must have been at least $47.8 million to get Teva to agree to the actual settlement." Doc. 1711-2 at 19 (Elhauge Reply Report ¶ 37); *see also* Doc. 1500-2 at 43-44 (Elhauge Expert Report ¶ 80); Doc. 1497-2 at 43-44 (Sealed Elhauge Expert Report ¶ 80). Prof. Elhauge then "used a hypothetical reverse payment amount of $100 million to illustrate how [his] methodology would apply and produce a predicted but-for settlement entry date using classwide evidence and a classwide method." Doc. 1711-2 at 19 (Elhauge Reply Report ¶ 37). Prof. Elhauge explained that he did so "because there is still a significant amount of non-coordinated discovery remaining and because the point at this stage was simply to show a reliable classwide methodology, which can be illustrated by a reverse payment amount of **[*120]** $100 million as well as any other." *Id.* And, he explained, his model can estimate the but-for entry date for any given settlement amount ranging from $47.8 to $446 million. Doc. 1500-2 at 45-46 (Elhauge Expert Report ¶ 85, fig.12). Prof. Elhauge sufficiently has explained why he used the $100 million reverse payment settlement in his model. Defendants' argument on this point doesn't show that Prof. Elhauge's use of this data point at this stage for illustrative purposes renders his opinions unreliable.

Third, defendants argue Prof. Elhauge's analysis is flawed because he assumed a patent strength of 15% (meaning that Teva had a 85% chance of prevailing in its lawsuit challenging the EpiPen patent). Defendants assert that this assumption conflicts with the opinion of plaintiffs' patent litigation expert (Prof. Andrew Torrance) who opines that the EpiPen patent strength was as high as 30%. But, Prof. Elhauge explains why he chose 15% patent strength for his model. Prof. Elhauge recognized that "any patent strength from 0-30% was equally possible given Professor Torrance's opinion." Doc. 1711-2 at 19 (Elhauge Reply Report ¶ 36). "But if any patent strength from 0-30% is equally possible," **[*121]** Prof. Elhauge concluded "that means that the ***expected*** patent strength was 15%, and it is the overall expectation that drives the settlement analysis." *Id.* (emphasis in original). Thus, Prof. Elhauge asserts "15% is the appropriate estimate to use for an expected patent strength." *Id.* Prof. Elhauge also explains that his model can estimate delay across a range of assumed patent strengths. Doc. 1500-2 at 46-47 (Elhauge Expert Report ¶ 86). And, his Report includes a Figure showing "the effect of varying the patent strength up to as high as it could possibly have been while still being consistent with Mylan having rationally accepted the actual settlement and paid the illustrative $100 million reverse payment amount." *Id.*; *see also id.* (Elhauge Expert Report fig.13). Defendants criticize this model because, they contend, it ignores "the other equally likely values—including values that result in no generic delay." Doc. 1886 at 11 (citation and internal quotation marks omitted). But the court finds that this argument goes to the weight of Prof. Elhauge's opinion, not its admissibility.

Finally, defendants assert that Prof. Elhauge's analysis is based on an unproven model, never accepted **[*122]** by any court as reliable. But, as plaintiffs point out, at least three courts have approved Prof. Elhauge's methodology in pay-for-delay cases. *See, e.g.,* *In re Namenda Direct Purchaser Antitrust Litig., 331 F. Supp. 3d 152, 174 (S.D.N.Y. 2018)* (denying motion to exclude Prof. Elhauge's opinion that "it would have been economically rational for both parties to enter into a no-payment settlement in a but-for world by specific dates" and rejecting defendants' arguments that his opinions "are speculative, internally inconsistent, and contradicted by the evidence" because "Defendants' disagreements with Plaintiffs' expert are appropriate subjects for cross-examination"); *In re Androgel Antitrust Litig. (No. II), No. 1:09-MD-2084-TWT, 2018 U.S. Dist. LEXIS 99716, 2018 WL 2984873, at *17 (N.D. Ga. June 14, 2018)* (concluding that Prof. Elhauge's reverse payment settlement opinion, as well as other evidence, sufficiently supported plaintiffs' alternative settlement theory to survive defendants' summary judgment motion and noting that "[a]ny criticism the Defendants have of the experts' methodologies or conclusions are best handled through cross-examination and the production of contrary evidence"); *United Food & Commercial Workers Local 1776 &* *Participating Emp'rs Health & Welfare Fund v. Teikoku Pharma USA, 296 F. Supp. 3d 1142, 1186-88 (N.D. Cal. 2017)* (denying motion to exclude Prof. Elhauge's opinions in an antitrust lawsuit involving Lidoderm patches because, though **[*123]** "defendants [were] correct that Elhauge could point to no other case where an expert has employed the exact model he employs here, both the components of his model (estimating parties' bargaining strengths and expectations of patent strength) and the assumptions that go with it (the parties' own pre-settlement forecasts) are consistent with accepted economic theory and well-established principles"). *See also* Doc. 1648-1 at 8 (Elhauge Dep. 167:4 - 19) (explaining that Prof. Elhauge has used the same methodology in other cases to evaluate a but-for settlement date, including the *Namenda, Lidoderm*, and *Androgel* cases).

Defendants also contend that Prof. Elhauge's model is unreliable because it "would render class certification essentially 'automatic' in every 'pay for delay' case, regardless of the actual facts." Doc. 1854 at 9. At least two courts have rejected this very argument. *See, e.g., In re Namenda Direct Purchaser Antitrust Litig., 331 F. Supp. 3d at 173* (rejecting defendants' argument that "Professor Elhauge presumes that *any* payment from a patentee to a prospective generic, regardless of its size or the reasons for making it, causes anticompetitive delay" because it was "a mischaracterization of [his] analysis"); *In re Androgel Antitrust Litig., 2018 U.S. Dist. LEXIS 99716, 2018 WL 2984873, at *17* (rejecting defendants' argument **[*124]** that Prof. Elhauge's "model[ ] assume[s] that a reverse payment always causes delay" and concluding that his "model[ ] assume[s] nothing of the sort" but, instead, Prof. Elhauge "use[d] [his] experience and knowledge in the field to conclude that reverse payments cause delay, and [he] confirm[ed] that conclusion in [his] model[ ] addressing the specific settlement at issue in this case").

Similarly here, Prof. Elhauge has used his experience and knowledge in the field to conclude that reverse payments cause generic delay. Doc. 1500-2 at 5 (Elhauge Expert Report ¶ 2). Then, using "the parties' actual settlement, profit projections, and estimates about the patent litigation and reverse payment value," Prof. Elhauge "calculate[d] their actual bargaining strength and then use[d] that information to determine the generic entry date in a no-payment settlement that would have been economically rational given their actual bargaining power." *Id.* Defendants' criticisms of his methodology go to the weight the court should give his opinions, but they don't undermine the reliability of his opinions sufficient to exclude them. The court thus declines to exclude Prof. Elhauge's opinions about delayed **[*125]** generic entry as unreliable.

c. The Reliability of Professor Elhauge's Rebuttal Testimony

Last, defendants' motion argues that the court should exclude analyses that Prof. Elhauge presented in his Reply Report for two reasons. *First*, defendants argue, Prof. Elhauge's Reply Report contains improper rebuttal testimony. *And second*, defendants assert that the analyses in the Reply Report are unreliable.

i. Rebuttal Testimony

Defendants assert that Prof. Elhauge's Reply Report contains two "new" analyses that he should have disclosed in his initial report. Doc. 1854 at 20. According to defendants, these analyses are improper rebuttal testimony. Plaintiffs respond that Prof. Elhauge doesn't offer any new analyses in his Reply Report. Instead, plaintiffs contend, his Reply Report properly responds to the criticisms that Mylan's expert made about Prof. Elhauge's regression analyses. Thus, plaintiffs argue, the analyses in his Reply Report are proper rebuttal testimony.

As already discussed, "[r]ebuttal evidence is evidence which attempts to 'disprove or contradict' the evidence to which it is contrasted." *Tanberg v. Sholtis, 401 F.3d 1151, 1166 (10th Cir. 2005)* (quoting *Black's Law Dictionary* 579 (7th ed. 1999)). "When a party opens the door to a topic, **[*126]** the admission of rebuttal evidence on that topic becomes permissible." *Id.* (citation omitted). "Permissible does not mean mandatory, however; the decision to admit or exclude rebuttal testimony remains within the trial court's sound discretion." *Id.* (citation omitted).

Defendants take issue with various modifications that Prof. Elhauge made to his regression analysis. Doc. 1711-2 at 36 (Elhauge Reply Report ¶ 70). Defendants assert that these modifications are substantive changes that produce entirely new damage figures, as depicted in a series of 24 new tables. *Id. at 45-64*. But, as Prof. Elhauge's Reply Report makes clear, he made the modifications to his regression analysis specifically in response to Mylan's expert's critiques. *See id. at 36* (Elhauge Reply Report ¶ 70) (summarizing the criticisms made by Mylan's expert about Prof. Elhauge's model and explaining that "[n]one of these critiques are valid, but the results of the regression are similar even if one modifies the regression to address his critiques."). Prof. Elhauge's modifications thus rebut Mylan's expert's testimony on the same subject matter. So, the court finds, this modified regression is proper rebuttal testimony.

Also, defendants object **[*127]** to the analysis in Prof. Elhauge's Reply Report that purports to separate damages calculations for third party payors ("TPPs") and cash end-payors. Again, Prof. Elhauge offers this opinion in his Reply Report to rebut Mylan's expert's opinion that his method "cannot determine how overcharges differ between third party payors (TPPs) and cash end-payors." Doc. 1711-2 at 69 (Elhauge Reply Report ¶ 103). And, Prof. Elhauge explains, he calculated separate damages using Mylan's rebate data. *Id.* (Elhauge Reply Report ¶ 105). Plaintiffs assert that defendants did not produce this rebate data until after Prof. Elhauge completed his initial Report and his deposition. Defendants concede that "Plaintiffs used data that Mylan produced after Prof. Elhauge's initial Report was submitted" but, defendants contend, "those data were not required to perform Prof. Elhauge's analyses." Doc. 1886 at 12 n.11. Defendants assert that "Mylan had already produced the bulk of its data well in advance of Prof. Elhauge's initial Report, and those data were equally amenable to use in his analysis." *Id.* The court declines to accept defendants' conclusory assertion that Prof. Elhauge could have performed his regression **[*128]** with data Mylan already had produced. Because the parties agree that Prof. Elhauge relied on data that Mylan produced after he completed his initial Report and sat for his deposition,[22] the court refuses to find that Prof. Elhauge's analysis is improper rebuttal testimony.

In sum, the court rejects defendants' arguments that Prof. Elhauge's Reply Report offers improper rebuttal testimony.[23]

ii. Reliability of Reply Report's Analyses

Next, defendants assert, the analyses in Prof. Elhauge's Reply Report are unreliable. They assert three reasons why the court should exclude them.

First, defendants assert that the Reply Report's analysis is unreliable because Prof. Elhauge omits the relative price of EpiPen and Auvi-Q from his regression model. Defendants assert that price is a "major factor" that influences Auvi-Q sales—the dependent variable in the regression analysis. Doc. 1854 at 22. And, "to be admissible, a regression analysis must control for the 'major factors' that might influence the dependent variable." *Reed Constr. Data Inc. v. McGraw-Hill Cos., 49 F. Supp. 3d 385, 400 (S.D.N.Y. 2014)* (citation omitted). By excluding price from his regression model, defendants argue, Prof. Elhauge has no way to determine whether the effect he observes in his regression **[*129]** results from Mylan's PBM contracts or, instead, the higher price of Auvi-Q.

Plaintiffs respond that one of Prof. Elhauge's rebuttal analyses simply added PBM fixed effects to the regression analysis in response to criticism by Mylan's expert. *See* Doc. 1711-2 at 40-41 (Elhauge Reply Report ¶ 82). But the

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[22] Defendants assert that Prof. Elhauge described "some version" of this analysis at his deposition but plaintiffs refused to produce the analysis when defendant requested it. Doc. 1854 at 21. Plaintiffs assert that defendants wrongly equate the "rough estimate" that Prof. Elhauge testified about at his deposition with the analysis he provided in his Reply Report. Doc. 1861 at 24. As discussed, Prof. Elhauge performed the analysis using Mylan rebate data produced *after* his deposition. So the court agrees with plaintiffs that the analysis described in his deposition differs from the analysis found in the Reply Report.

[23] Defendants ask that, if the court declines to exclude Prof. Elhauge's testimony, the court give defendants an opportunity to depose Prof. Elhauge about the analysis in his Reply Report, introduce additional expert rebuttal testimony, and submit supplemental briefing in opposition to plaintiffs' Motion for Class Certification. The court denies this request. As plaintiffs correctly explain, defendants had ample opportunity to review and respond to Prof. Elhauge's Report (issued on April 29, 2019) before the court held its June 11-12, 2019 hearing on the Motion for Class Certification. Also, this case is a long way from trial, and Mylan's expert has had the chance to review and comment on Prof. Elhauge's rebuttal opinions. *See, e.g.*, Doc. 1605-7 (May 21, 2019 Decl. of Dr. John H. Johnson, IV in Supp. of Defs.' Mot. to Exclude Expert Opinions of Professor Einer Elhauge). The court thus denies defendants' request.

regression never eliminated the price variable, and thus, the analysis still controlled for price. *Id.* Plaintiffs concede that another one of Prof. Elhauge's rebuttal analyses did drop the price variable, but, plaintiffs explain, the analysis continues to use time and PBM fixed effects to control for any differences in price across time or between PBMs. *Id.* at 35 (Elhauge Reply Report ¶ 68). Also, Prof. Elhauge specifically excluded the price variable in response to the criticisms lodged by Mylan's expert. *Id.* at 36 (Elhauge Reply Report ¶ 70).

The parties' competing arguments about Prof. Elhauge's exclusion of the price variable and whether he properly controlled for this factor in his regression go to the probative value of his analysis. *See, e.g., Bazemore v. Friday, 478 U.S. 385, 400, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986)* ("Normally, failure to include variables will affect the analysis' probativeness, not its admissibility."); *In re Urethane Antitrust Litig., 768 F.3d 1245, 1260-61 (10th Cir. 2014)* ("Consequently, the exclusion of major variables **[*130]** or the inclusion of improper variables may diminish the probative value of a regression model. But such defects do not generally preclude admissibility, and courts allow use of a regression model as long as it includes the variables accounting for the major factors." (citing *Bazemore, 478 U.S. at 400*)). But defendants' attacks don't establish that Prof. Elhauge's analysis is inadmissible under *Daubert.*

Second, defendants argue that Prof. Elhauge's rebuttal analysis employs the wrong standard for statistical significance. More specifically, Prof. Elhauge uses a 0.10 threshold for statistical significance. But, defendants contend, the conventional level of statistical significance used by both the scientific community and the courts is 0.05. *See Apsley v. Boeing Co., 691 F.3d 1184, 1198 (10th Cir. 2012)* ("The significance level is typically placed at 5%."); *see also* Reference Guide on Multiple Regression, at 320 ("In most scientific work, the level of statistical significance required to reject the null hypothesis (i.e., to obtain a statistically significant result) is set conventionally at 0.05, or 5%.").

Plaintiffs respond that Prof. Elhauge used the 0.10 threshold in just one of his regressions—one that he offered to respond to Mylan's expert's criticisms about his failure to account for serial correlation. ***[*131]*** *See* Doc. 1711-2 at 40-41 (Elhauge Reply Report ¶ 82). And, while defendants assert that 0.05 is the accepted threshold, they don't cite any authority *requiring* an expert to use this standard. Indeed, the Reference Guide on Multiple Regression—the authority defendants cite in their motion—recognizes that:

> The use of 1%, 5%, and, sometimes, 10% levels for determining statistical significance remains a subject of debate. One might argue, for example, that when regression analysis is used in a price-fixing antitrust case to test a relatively specific alternative to the null hypothesis (e.g., price fixing), a somewhat lower level of confidence (a higher level of significance, such as 10%) might be appropriate.

Reference Guide on Multiple Regression, at 321 n.48.

Also, courts generally have found that challenges to statistical significance go to the weight, but not the admissibility, of a regression model. *See, e.g., Kadas v. MCI Systemhouse Corp., 255 F.3d 359, 362-63 (7th Cir. 2001)* (explaining that "[t]he 5 percent test is arbitrary" and "[t]he question whether a study is responsible and therefore admissible under the *Daubert* standard is different from the weight to be accorded to the significance of a particular correlation found by the study. It is for the judge to say, on the basis of the evidence of **[*132]** a trained statistician, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury."); *Kurtz v. Kimberly-Clark Corp., 414 F. Supp. 3d 317, 331 (E.D.N.Y. 2019)* ("Regressions should not be excluded on the ground that they fail to meet arbitrary thresholds of statistical significance."); *In re High-Tech Emp. Antitrust Litig., No. 11-CV-02509-LHK, 2014 U.S. Dist. LEXIS 47181, 2014 WL 1351040, at *15 (N.D. Cal. Apr. 4, 2014)* ("The Court finds that the fact that these two variables are not statistically significant at the 1%, 5%, and 10% levels goes to the weight, not the admissibility of [the] model."). Similarly, here, the court finds that defendants' arguments about the statistical significance of Prof. Elhauge's analysis go to the weight the court should give his opinions when deciding the class certification motion. But, they do not preclude the court from considering it on class certification.

Finally, defendants assert that one of Prof. Elhauge's rebuttal analyses uses the wrong test for statistical significance. Defendants explain that there are two tests for statistical significance: a two tailed test and a one-tailed test. A two-tailed test allows for "the effect [on the dependent variable] to be either positive or negative." **[*133]** Reference Guide on Multiple Regression, at 321. And a one-tailed test is used "when the expert believes, perhaps on the basis of other direct evidence presented at trial, that the alternative hypothesis is either positive or negative, but not both." *Id.*

Prof. Elhauge's Reply Report explains that he used a one-tailed test in his regression. He also explains why. Doc. 1711-2 at 41 (Elhauge Reply Report ¶ 82 n.146) ("A one-sided test is appropriate here because we are only interested in whether the regression shows a significant negative (foreclosing) effect of the formulary restrictions, and because there is no plausible theory under which the formulary restrictions would increase Auvi-Q's share."). Stated another way, Prof. Elhauge assumed that the formulary restrictions only could produce a negative effect on Auvi-Q's market share (*i.e.*, the dependent variable). And thus, he used a one-tailed test for this regression.

Defendants assert that Prof. Elhauge's use of the one-tailed test makes his analysis unreliable because both the scientific community and the courts prefer the two-tailed test. *See, e.g., Palmer v. Shultz, 815 F.2d 84, 95-96, 259 U.S. App. D.C. 246 (D.C. Cir. 1987)* (concluding that "generally two-tailed tests are more appropriate in Title VII cases"); *Smith v. City of Bos., 144 F. Supp. 3d 177, 196 (D. Mass. 2015)* (observing in a Title VII case, "[t]he **[*134]** weight of the case law appears to favor two-tailed tests."). *See also* Reference Guide on Multiple Regression, at 321 (explaining that use of the two-tailed test "is usually appropriate"). But, as plaintiffs note, defendants cite no authority that requires an expert to use a two-tailed test as a condition for finding the expert's opinions admissible under *Daubert*. And, plaintiffs contend, the expert should have discretion to decide whether to use a one-tailed or two-tailed test based on the regression that he is testing. Indeed, the Reference Guide on Multiple Regression explains:

> [A]n expert might use a one-tailed test in a patent infringement case if he or she strongly believes that the effect of the alleged infringement on the price of the infringed product was either zero or negative. (The sales of the infringing product competed with the sales of the infringed product, thereby lowering the price.) By using a one-tailed test, the expert is in effect stating that prior to looking at the data it would be very surprising if the data pointed in the direct opposite to the one posited by the expert.

Reference Guide on Multiple Regression, at 321. And the Guide cautions: "Because there is some arbitrariness involved in the choice of an alternative hypothesis, courts should avoid **[*135]** relying solely on sharply defined statistical tests." *Id.*

Plaintiffs assert that it was proper for Prof. Elhauge to use a one-tailed test in this particular regression because, he determined, it's not realistic to expect that defendants' exclusionary contracts ever would cause Auvi-Q's market share to increase. Defendants respond with the conclusion of Mylan's expert. He opines that—for at least two major PBMs—Prof. Elhauge's regression actually shows that formulary restrictions caused Auvi-Q's market share to increase. Thus, defendants assert, the data is capable of producing either a positive or negative effect. And, they contend, Prof. Elhauge should have used a two-tailed test in his regression.

The court refuses to exclude Prof. Elhauge's opinion simply because Mylan's expert disagrees with it. Prof. Elhauge has explained his reasons for using the one-tailed test. And even if a factfinder ultimately would reject his reasoning, his reasoning is, at worst, plausible. Defendants' attacks against Prof. Elhauge's decision don't show that his opinions are unreliable or preclude their admissibility. The court thus declines to exclude Prof. Elhauge's opinions based on his use of the one-tailed **[*136]** test for one of his regressions.

In sum, the court grants defendants' Motion to Exclude Prof. Elhauge's opinions in part and denies it in part. The court grants the motion to exclude his opinions about Auvi-Q market foreclosure based on Mylan's EpiPens4Schools program because plaintiffs since have abandoned this theory. And, the court denies defendants' motion in all other respects.

3. Motion to Exclude Opinions and Proposed Testimony of Professor Andrew K. Torrance

Finally, defendants ask the court to exclude opinions and proposed testimony of Prof. Andrew K. Torrance. Prof. Torrance offers opinions about the patent lawsuit that King Pharmaceuticals (a Pfizer subsidiary) filed against Teva alleging that Teva's generic version of the EpiPen infringed two of King's EpiPen patents ("Teva patent litigation").

Prof. Torrance opines about Teva's likelihood of success in the Teva patent litigation had the parties not settled the lawsuit. Also, Prof. Torrance opines about the costs and duration of the Teva patent litigation had the parties not settled.

Defendants base their motion to exclude on three arguments. *First*, defendants contend that Prof. Torrance fails to explain how he reached his **[*137]** conclusion that Teva had a greater than 70% chance of prevailing in the Teva patent litigation. *Second*, defendants assert that Prof. Torrance's opinions don't fit with the factual record. *Third*, defendants argue that Prof. Torrance didn't apply accepted methods and principles for analyzing patent invalidity. All these reasons, defendants assert, render Prof. Torrance's opinions unreliable. And thus, defendants assert, the court should exclude them. The court addresses each of the three arguments, separately, below.

a. Professor Torrance Adequately Explained How He Reached His Conclusions.

First, defendants argue that Prof. Torrance doesn't explain how he determined Teva's likelihood of success in the Teva patent litigation. Defendants assert that Prof. Torrance offers nothing but baseless speculation to support his conclusions. Thus, defendants contend, Prof. Torrance's opinions will not help decide whether it was reasonable for Teva to settle the Teva patent litigation.

Plaintiffs respond that Prof. Torrance bases his opinions on both: (1) his experience as a patent attorney, legal scholar, and law professor,[24] and (2) his review of materials that he considered when forming his opinions. **[*138]** Doc. 1849-1 at 19, 21 (Torrance Dep. 240:8-16, 257:8-258:18). As plaintiffs explain in response, other courts have found similar expert testimony admissible under *Daubert* when the expert bases his opinions about the likelihood of success in litigation on his experience and his review of the relevant litigation materials. *See, e.g., In re Namenda Direct Purchaser Antitrust Litig., 331 F. Supp. 3d 152, 187-88 (S.D.N.Y. 2018)* (denying motion to exclude opinions of a "patent attorney with extensive experience in the area of patent law" about "the likelihood [of success] in [a patent] lawsuit" because the expert "unquestionably has the expertise to evaluate the things he assessed—from expert reports to patent file folders—and to draw conclusions about who is more likely to win a patent lawsuit"); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-md-02503, 2018 U.S. Dist. LEXIS 11921, 2018 WL 563144, at *16 (D. Mass. Jan. 25, 2018)* (refusing to exclude opinion of patent law expert who opined about the likelihood of success in patent litigation "based upon his own expertise and experience in the field of patent law"); *United Food & Commercial Workers Local 1776 & Participating Emp'rs Health & Welfare Fund v. Teikoku Pharma USA, 2017 U.S. Dist. LEXIS 182940, 296 F. Supp. 3d 1142, 1186-87 (N.D. Cal. 2017)* (denying motion seeking to exclude expert testimony about likely outcome of patent litigation when the expert had reached his conclusions by "applying his scientific background **[*139]** and knowledge to his review of the trial record"); *In re Wellbutrin XL Antitrust Litig., 133 F. Supp. 3d 734, 765-67 (E.D. Pa. 2015)* (denying motion to exclude expert's opinion about the chances of prevailing in underlying patent litigation because the expert—a patent law professor—was "a qualified expert offering appropriate expert testimony" and had reached his conclusions after "review of the briefs, pleadings, [Abbreviated New Drug Application], and underlying patent at issue in the . . . litigation").

For the same reasons, the court refuses to exclude Prof. Torrance's opinions here. Prof. Torrance sufficiently explained how he reached his conclusions—using his experience in the field of patent law and his review of the relevant materials. *See, e.g., F & H Coatings, LLC v. Acosta, 900 F.3d 1214, 1224 (10th Cir. 2018)* (finding no error

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[24] Defendants' motion never asserts directly that Prof. Torrance's opinions are inadmissible under *Daubert* because he isn't qualified to provide expert testimony. But, in a footnote, defendants suggest that Prof. Torrance doesn't have sufficient patent litigation experience "that would qualify him to opine on the likely outcome of the underlying patent litigation." Doc. 1848 at 8 n.10. Plaintiffs respond that Prof. Torrance is well-qualified to provide expert testimony based on his experience as a patent attorney, his education, his extensive scholarship and publication in the patent field, and his teaching experience. Doc. 1862 at 8-11. The court agrees. Prof. Torrance's experience and education qualify him to opine about Teva's likelihood of success in the Teva patent litigation. Defendants' criticisms about Prof. Torrance's experience in patent litigation trials, and the role he played in those trials, go to the weight of his opinions, not their admissibility.

in admission of expert testimony because the expert's "experience and industry knowledge were sufficient . . . to find that his expert conclusions . . . were reliable").

Defendants also attack Prof. Torrance's conclusions by citing their own expert's critique of Prof. Torrance's report. Doc. 1848 at 9-10. Defendants' expert believes that Prof. Torrance's opinions are flawed because he failed to consider the trial court's decision denying Teva's pretrial motion for judgment as a matter of **[*140]** law. *Id.* Also, defendants' expert asserts that Prof. Torrance's conclusion that Teva had a relatively large probability of infringing one of the EpiPen patents doesn't comport with his opinion that Teva also had an above 70% chance of success in the Teva patent litigation. *Id. at 10*. These arguments go to the weight the court should give Prof. Torrance's opinion on class certification—not whether the court should exclude them altogether as unreliable.

The court rejects defendants' first argument supporting their motion to exclude Prof. Torrance's opinions under *Daubert*.

b. Professor Torrance's Opinions Sufficiently Fit with the Facts of the Case to Allow their Admission.

Second, defendants argue that Prof. Torrance's opinions about Teva's likelihood of success in the Teva patent litigation are untethered to the factual record because he relies on arguments that the parties never raised at trial in the Teva patent litigation, or ones that the parties waived during the course of the litigation. More specifically, defendants assert that Prof. Torrance's opinions are unreliable because he bases them on: (1) the patent prosecution history, even though the parties never raised this subject at trial **[*141]** in the Teva patent litigation; (2) an "unenforceability" defense based on inequitable conduct, even though Teva never raised this defense in the Teva patent litigation; and (3) an "obviousness" defense to patent infringement, even though Teva never asserted this defense in the Teva patent litigation.

Plaintiffs respond that Prof. Torrance doesn't offer opinions about Teva's likelihood of success *at trial*. Instead, Prof. Torrance opines about Teva's likelihood of prevailing "in any final adjudication by the Court of Appeals for the Federal Circuit." Doc. 1500-4 at 4-5 (Torrance Expert Report ¶ 3.a.). Thus, plaintiffs contend, defendants' criticisms that Prof. Torrance's opinions aren't tethered to the *trial* record don't matter for purposes of determining their reliability. And, even so, plaintiffs assert that the trial record supports Prof. Torrance's opinions.

The parties to the Teva patent litigation settled their dispute after they had tried their case to a district judge in a bench trial—but before the district judge had issued a decision. So, defendants argue, the trial record that the Federal Circuit would consider on appeal was complete. And, according to defendants, Prof. Torrance's **[*142]** opinions rely on arguments that Teva never asserted at trial or ones that it had waived at trial. Plaintiffs disagree.

First, plaintiffs explain that the patent's prosecution history is relevant because the Federal Circuit applies a two-step process when deciding patent infringement claims. *Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1581 (Fed. Cir. 1996)* (citing *Markman v. Westview Instruments, Inc., 52 F.3d 967, 976 (Fed. Cir. 1995))*. In the first step, the court determines "the proper construction of the asserted claim." *Id. at 1581-82* (citing *Markman, 52 F.3d at 976*). In the second step, the court determines "whether the accused method or product infringes the asserted claim as properly construed." *Id.*

The Federal Circuit has explained that "[t]he first step, claim construction, is a matter of law, which [the Federal Circuit] review[s] de novo." *Id. at 1582* (citing *Markman, 52 F.3d at 979*). And, when conducting this de novo review, the Federal Circuit looks "first to the intrinsic evidence of record, *i.e.*, the patent itself, including the claims, the specification and, if in evidence, *the prosecution history*." *Id.* (emphasis added). So, plaintiffs assert, Prof. Torrance properly relied on the prosecution history when forming his opinions about Teva's likelihood of success in the Teva patent litigation because, even though the parties may not have cited the prosecution history during trial, **[*143]** the Federal Circuit still could rely on the prosecution history during its de novo review of claim construction on appeal. The court agrees with plaintiffs. Prof. Torrance's reliance on the prosecution history does not render his opinions unreliable.

Next, plaintiffs argue that the unenforceability defense based on inequitable conduct could apply in the Teva patent litigation because the parties had identified it as a contested issue of fact and law in the Intelliject litigation (a lawsuit related to the Teva patent litigation). Doc. 1837-8 at 3 (Pls.' Statement of Contested Issues of Fact and Law ¶ 13 ("Whether Intelliject has proven by clear and convincing evidence that the '432 Patent is unenforceable due to patent misuse?")). Plaintiffs explain that a finding of unenforceability for the '432 Patent in the related Intelliject litigation would operate as *res judicata* in the Teva patent litigation, if the cases hadn't ended with the parties' settlements—ones that plaintiffs describe as "anticompetitive pay-for-delay settlement[s]." Doc. 1862 at 18.

Defendants counter that the defense asserted in the Intelliject litigation (and cited by plaintiffs) was unenforceability based on *patent misuse*—not unenforceability **[*144]** based on inequitable conduct. Indeed, the issue recited in the Statement of Contested Issues of Fact and Law reads: "Whether Intelliject has proven by clear and convincing evidence that the '432 Patent is unenforceable *due to patent misuse*?" Doc. 1837-8 at 3 (Pls.' Statement of Contested Issues of Fact and Law ¶ 13) (emphasis added). And, the court agrees with defendants that an inequitable conduct defense differs from a patent misuse defense. *See Resqnet.Com, Inc. v. Lansa, Inc., No. 01 Civ.3578(RWS), 2004 U.S. Dist. LEXIS 13579, 2004 WL 1627170, at *4 (S.D.N.Y. July 21, 2004)* ("Patent misuse and inequitable conduct are different defenses. Misuse is a defense based upon the idea that a patent properly procured has been broadened in scope impermissibly so as to be used to impose an unreasonable restraint in competition . . . [i]nequitable conduct, on the other hand, renders the patent unenforceable permanently, and involves concealing facts or being dishonest in the procurement of the patent"); *see also Electro Source, LLC v. Nyko Techs., Inc., Nos. CV 01-10825 DT (BQRx), CV 02-520 DT (BQRx), 2002 U.S. Dist. LEXIS 28436, 2002 WL 34536682, at *12 (C.D. Cal. Apr. 15, 2002)* (explaining that "patent misuse [claims] differ from . . . inequitable conduct claims" because "[i]nequitable conduct relates to the *means of obtaining* a patent, and deems any patent obtained by such means unenforceable" while "[p]atent misuse relates **[*145]** to the enforcement of a patent after it has been obtained").

Prof. Torrance's report suggests that certain actions taken by the patent inventors before the United States Patent and Trademark Office ("USPTO") could amount to inequitable conduct. *See* Doc. 1500-4 at 21 (Torrance Expert Report ¶ 49 (opining that the inventor's failure to file timely an Information Disclosure Statement "[a]t best . . . suggests carelessness, and, at worst, a desire to postpone consideration by the examiner of potentially damaging prior art")); *see also* Doc. 1497-4 at 30 (Sealed Torrance Expert Report ¶ 72 (explaining that, based on Prof. Torrance's review of the patent application history, it suggests that the inventors did not submit some potentially relevant prior art to the USPTO during prosecution)). But neither Teva nor Intelliject raised inequitable conduct as an affirmative defense in the underlying patent litigation. Thus, defendants argue, the inequitable conduct defense was waived. So, according to defendants, the trial court never would have considered the inequitable conduct defense in rendering its decision in the Teva patent litigation. And, Teva never could assert this defense in an appeal **[*146]** to the Federal Circuit because it had waived the defense.

The court agrees with defendants that it is unlikely that the Federal Circuit would consider an inequitable conduct defense based on the Teva patent litigation record. But it's not impossible. Generally, "'a federal appellate court does not consider an issue not passed upon below.'" *Golden Bridge Tech., Inc. v. Nokia, Inc., 527 F.3d 1318, 1322 (Fed. Cir. 2008)* (quoting *Singleton v. Wulff, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976))*. However, appellate courts also have "the discretion to decide when to deviate from this general rule of waiver . . . ." *Id.* (citing *Singleton, 428 U.S. at 121*); *see also Celgene Corp. v. Peter, 931 F.3d 1342, 1356 (Fed. Cir. 2019)* (recognizing that the Federal Circuit has "discretion to reach issues raised for the first time on appeal"). Although "[d]eparting from the general rule of waiver is appropriate only in limited circumstances," the Federal Circuit may consider an issue not presented to the lower tribunal when there is "an intervening change in the law" or when "the 'interest of justice' guides [the Federal Circuit] to consider the issue despite the fact that it was not raised below." *Celegene, 931 F.3d at 1356* (citations omitted).

When considering whether to exclude Prof. Torrance's opinion, the court is guided by *Rule 702*'s advisory committee's notes. They recognize that "rejection of expert testimony is the exception rather than the rule." *Fed. R. Evid. 702* advisory **[*147]** committee's notes to 2000 amendments; *see also In re Syngenta AG MIR 162 Corn Litig., No. 14-md-2591-JWL, 2017 U.S. Dist. LEXIS 68501, 2017 WL 1738014, at *2 (D. Kan. May 4, 2017)*. While

Daubert requires the court to serve as a gatekeeper for expert testimony, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" remain "the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert, 509 U.S. at 596* (citation omitted). Ultimately, the "district court has 'considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.'" *In re Syngenta AG MIR 162 Corn Litig., 2017 U.S. Dist. LEXIS 68501, 2017 WL 1738014, at *2* (quoting *Kumho Tire, 526 U.S. at 152*); *see also Vining v. Enter. Fin. Grp., 148 F.3d 1206, 1218 (10th Cir. 1998)* ("The admission of expert testimony is left to the sound discretion of the trial court.").

Also, *Daubert* doesn't require the court to decide whether Prof. Torrance's opinions are "undisputably correct." *Etherton v. Owners Ins. Co., 829 F.3d 1209, 1217 (10th Cir. 2016)* (citation and internal quotation marks omitted). Instead, the court must determine whether "the method employed by the expert to reach his conclusion is scientifically sound and that the opinion is based on facts which sufficiently satisfy *Rule 702*'s reliability requirements." *Id. at 1217-18* (citations and internal quotation marks omitted). Thus, when performing **[*148]** the *Daubert* inquiry, the court should "'focus . . . solely on [the expert's] principles and methodology, not on the conclusions that they generate.'" *Id. at 1217* (quoting *Daubert, 509 U.S. at 595*).

The court is satisfied here that Prof. Torrance has used a reliable methodology to reach his opinions about Teva's likely success in the Teva patent litigation. Defendants' criticisms about his opinions—*i.e.*, that Prof. Torrance relied on defenses that Teva never asserted in the Teva patent litigation—go to the weight the court should give them on class certification. But, the court refuses to exclude his opinions from consideration.

Finally, plaintiffs assert that the "obviousness" defense to the validity of the '432 patent was at issue in both the Teva patent litigation and the Intelliject litigation. *See* Doc. 1837-8 at 2-3 (Pls.' Statement of Contested Issues of Fact and Law ¶¶ 7-9, 11, 12); *see also* Doc. 1837-9 at 2-3 (Teva's Statement of Contested Issues of Fact and Law ¶¶ C.—E.). Defendants concede that Teva asserted the obviousness defense in the Statement of Contested Issues of Fact and Law. Doc. 1888 at 12. But, they argue, Teva did not pursue this defense at trial. Defendants contend that Teva based its invalidity defense at **[*149]** trial on "the legal doctrine of anticipation"—and not that "the '432 patent was invalid for obviousness." *Id.* For support, defendants cite a single passage from the trial transcript where counsel clarified that Teva was "asserting an anticipation defense based on the *'429 patent*," but "not asserting derivation" or "prior invention." Doc. 1888-5 at 4 (Tr. 403:6-13) (emphasis added). With this statement, counsel may have limited Teva's use of the invalidity defense to anticipation based on the '429 patent, but it didn't waive the other obviousness defenses that Teva asserted based on the '316 and '686 patents. *Compare* Doc. 1837-9 at 2 (Teva's Statement of Contested Issues of Fact and Law ¶ C. ("Whether one or more of the asserted claims . . . of the '432 patent, are invalid as anticipated or obvious . . . by . . . the '429 patent")) *with id. at 2-3* (Teva's Statement of Contested Issues of Fact and Law ¶¶ D.—E. (asserting an invalid as obvious defense based on the '316 and '686 patents)). Based on this record, the court can't conclude that Teva waived its obviousness defense at trial such that the Federal Circuit would refuse to consider this defense on appeal. And, the court declines to find Prof. Torrance's opinions unreliable because he considered an obviousness defense **[*150]** when forming his conclusions about Teva's likelihood of success in a final adjudication before the Federal Circuit.

In sum, the court agrees with plaintiffs that the way in which Prof. Torrance considered the trial record and what the Federal Circuit could consider on appeal does not render his opinions unreliable or require their exclusion under *Daubert*. The court thus denies this aspect of defendants' Motion to Exclude Prof. Torrance's opinions.

c. Professor Torrance Adequately Applied Accepted Methods and Principles for Analyzing Patent Invalidity.

Last, defendants argue that Prof. Torrance's opinions are inadmissible because he did not analyze the validity of the '432 patent consistent with the governing law. Prof. Torrance opines that the '432 patent claims are "quite weak, and likely invalid" due to obviousness. Doc. 1500-4 at 31 (Torrance Expert Report ¶ 74); *see also 35 U.S.C. § 103* ("A patent for a claimed invention may not be obtained . . . if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains."). **[*151]** The Supreme Court has established a framework for analyzing whether a patent is invalid for obviousness under *35 U.S.C. § 103*. *KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 406, 127 S. Ct. 1727, 167 L. Ed. 2d 705 (2007)*. Under that framework, "'the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved.'" *Id.* (quoting *Graham v. John Deere Co., 383 U.S. 1, 17, 86 S. Ct. 684, 15 L. Ed. 2d 545 (1966))*.

Defendants assert that Prof. Torrance failed to apply this legal framework because his report neither (1) explains how he construed the claims of the '432 patent, nor (2) analyzes the prior art. Defendants thus contend that Prof. Torrance's opinions are unreliable because the expert never applied the accepted standard for analyzing patent invalidity due to obviousness.

Plaintiffs respond that Prof. Torrance's report both construes the claims and analyzes the prior art. Also, plaintiffs assert that Prof. Torrance confirmed that he performed this work in his deposition. For support, plaintiffs cite Prof. Torrance's report where he recited: "To form my opinion, I analyzed a variety of information, materials, and documents, the most relevant of which are the litigated patents themselves, the prosecution histories of those patents, and the materials **[*152]** and records related to the litigations." Doc. 1500-4 at 13 (Torrance Expert Report ¶ 27).

With respect to the patent itself, Prof. Torrance described how he reviewed the patent and explained how one must interpret the claims of the patent to understand the invention it protects. *Id. at 14* (Torrance Expert Report ¶¶ 29-30). Prof. Torrance also reviewed the patent's litigation history, including the trial court's *Markman* rulings. *Id. at 16, 29* (Torrance Expert Report ¶¶ 37, 71). And, he concluded that "the claim constructions adopted by the judge would have disadvantaged King and Meridian more than [Teva and Intelliject]." *Id. at 30* (Torrance Expert Report ¶ 71). Defendants respond that none of these passages explain *how* Prof. Torrance construed the claims. In his deposition, Prof. Torrance conceded that he included no "particular section on claim construction" in his report. Doc. 1849-1 at 17 (Torrance Dep. 231:24-232:16). But, Prof. Torrance explained, claim construction was something that he considered when forming his opinions and is found "throughout the report." *Id.* Plaintiffs don't provide any specific citations showing where Prof. Torrance construed the claims in the report.

With respect to the prior art, Prof. **[*153]** Torrance explains that he "reviewed the available prosecution histories of each of the patents at issue," taking a "particular interest [in] the variety of prior art references and legal grounds for rejection the examiners identified . . . ." Doc. 1500-4 at 15 (Torrance Expert Report ¶ 34); *see also id.* at 18 (Torrance Expert Report ¶ 42 (explaining that Prof. Torrance considered a number of factors when forming his conclusions including "the number and complexity of asserted patent claims in each patent" and "the volume of relevant prior art")). Based on his review, Prof. Torrance concluded the '432 patent's claimed invention included "key elements" such as "a lack of kickback and a second locked extended position of the needle cover" that make it "highly likely that there exists prior art relevant to auto-injectors that discloses these simple elements." *Id.* at 30-31 (Torrance Expert Report ¶ 74). Plaintiffs don't provide any specific citations showing exactly which prior art Prof. Torrance considered when forming his opinions. As Prof. Torrance testified, he "refer[s] to the prior art usually as a group" in his report. Doc. 1849-1 at 27 (Torrance Dep. 346:9-25). But also, Prof. Torrance testified about specific **[*154]** prior art that he considered in his report. *Id.* (Torrance Dep. 347:5-348:22 (referring to his discussion of the '686, '458, and '336 patents in ¶¶ 48.a., 51, 60, and 62 of his expert report)).

The court agrees with defendants. Prof. Torrance's report never explains how he construed the claims or how he compared those construed claims to the prior art before reaching his conclusion that the '432 patent is likely invalid due to obviousness. Instead, the report contains general references about his analysis of the claims and prior art. *See, e.g.*, 1500-4 at 27, 29, 30-31, 36 (Torrance Expert Report ¶¶ 65, 66, 70, 74-76, 92). And, plaintiffs' only response to defendants' argument on this point is Prof. Torrance's vague explanation that the claim construction analysis is found "throughout the report." Doc. 1862 at 15 (citing Doc. 1849-1 at 27 (Torrance Dep. 232:15)).

Nevertheless, the court declines to exclude Prof. Torrance's opinion on this basis. Prof. Torrance correctly cites the law governing patent validity. *See, e.g.*, Doc. 1500-4 at 12-13 (Torrance Expert Report ¶ 26 (citing *KSR Int'l Co., 550 U.S. 398, 127 S. Ct. 1727, 167 L. Ed. 2d 705*)). And, Prof. Torrance says he applied this law to reach his conclusions. *See id.* at 23-24, 27, 30-31, 36 (Torrance Expert Report ¶¶ 56, 57, 65, 74, 92). Defendants **[*155]** have the better end of the criticisms that the report lacks an explanation *how* Prof. Torrance reached his conclusions after applying the appropriate governing standard. But that doesn't mean the court should exclude his opinions. While closer than other decisions, these criticisms, the court finds, go to the weight of his opinions, not their admissibility. The court thus denies defendant's Motion to Exclude Prof. Torrance's opinions on this ground.

For all these reasons, the court denies defendants' Motion to Exclude Opinions and Proposed Testimony of Andrew K. Torrance.

III. Conclusion

This Order has ruled the five pending motions seeking to exclude certain experts' opinions from the court's consideration of the putative class members' Motion for Class Certification.

For reasons explained above, the court denies the two motions filed by the putative class plaintiffs—*i.e.*, their (1) Motion to Strike the Partial Testimony of Dr. Michael Blaiss (Doc. 1584), and (2) Motion to Strike the Testimony of Prof. James Hughes (Doc. 1852).

The court grants in part and denies in part defendants' Motion to Exclude Expert Opinions of Professor Einer Elhauge (Doc. 1604). The court grants the motion to **[*156]** exclude his opinions about Auvi-Q market foreclosure based on Mylan's EpiPens4Schools program because plaintiffs since have abandoned this theory. In all other respects, the court denies defendants' Motion to Exclude Expert Opinions of Professor Einer Elhauge.

And, the court denies the other two motions filed by defendants—*i.e.*, their (1) Motion to Exclude Opinions and Proposed Testimony of Andrew K. Torrance (Doc. 1847), and (2) Motion to Exclude Expert Opinions of Professor Meredith Rosenthal (Doc. 1602).

IT IS THEREFORE ORDERED BY THE COURT THAT the putative class plaintiffs' Motion to Strike the Partial Testimony of Dr. Michael Blaiss (Doc. 1584) is denied.

IT IS FURTHER ORDERED THAT defendants' Motion to Exclude Expert Opinions of Professor Meredith Rosenthal (Doc. 1602) is denied.

IT IS FURTHER ORDERED THAT defendants' Motion to Exclude Expert Opinions of Professor Einer Elhauge (Doc. 1604) is granted in part and denied in part, as specified in this Order.

IT IS FURTHER ORDERED THAT defendants' Motion to Exclude Opinions and Proposed Testimony of Andrew K. Torrance (Doc. 1847) is denied.

IT IS FURTHER ORDERED THAT the putative class plaintiffs' Motion to Strike the Testimony of Professor **[*157]** James Hughes (Doc. 1852) is denied.

IT IS SO ORDERED.

Dated this 27th day of February, 2020, at Kansas City, Kansas.

/s/ Daniel D. Crabtree

Daniel D. Crabtree

United States District Judge

In re EpiPen Mktg., Sales Practices & Antitrust Litig.

United States District Court for the District of Kansas

February 27, 2020, Decided; March 10, 2020, Filed

MDL No: 2785; Case No. 17-md-2785-DDC-TJJ

Reporter

2020 U.S. Dist. LEXIS 40789 *; 2020-1 Trade Cas. (CCH) P81,128; 2020 WL 1873989

IN RE: EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation; (This Document Applies to Consumer Class Cases)

Subsequent History: Petition denied by, Motion granted by *Pfizer, Inc. v. All Plaintiffs, 2020 U.S. App. LEXIS 22856, 2020 WL 4048681 (10th Cir., May 26, 2020)*

Prior History: *In re EpiPen Mktg., 268 F. Supp. 3d 1356, 2017 U.S. Dist. LEXIS 121974, 2017 WL 3297989 (J.P.M.L., Aug. 3, 2017)*

Core Terms

defendants', class member, damages, generic, predominance, classwide, class certification, certification, plaintiffs', consumers, payors, calculating, uninjured, named plaintiff, prices, causation, third-party, class action, ascertainability, expert report, branded, definitions, switch, antitrust, settlements, questions, certify, common question, common issue, entities

LexisNexis® Headnotes

Civil Procedure > Pleading & Practice > Motion Practice > Content & Form

Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda

Civil Procedure > Pleading & Practice > Motion Practice > Supporting Memoranda

HN1[] **Motion Practice, Content & Form**

The court's local rules limit briefing on motions to the motion, a memorandum in support, a response, and a reply. D. Kan. R. 7.1(a) & (c). Surreplies are typically not allowed. On other grounds, Instead, sur-replies are permitted only with leave of court under rare circumstances. For example, when a moving party raises new material for the first time in a reply, the district court has discretion to grant leave to file a sur-reply to afford the opposing party an opportunity to respond to the new material. The rules limiting sur-replies are not only fair and reasonable, but they assist the court in defining when briefed matters are finally submitted and in minimizing the battles over which side should have the last word.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN2[] Class Actions, Certification of Classes

The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. The court has considerable discretion when deciding whether to certify a class action. But when exercising this discretion, district courts must conduct a rigorous analysis and decide whether the putative class satisfies the requirements of *Fed. R. Civ. P. 23*.

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

HN3[] Class Actions, Prerequisites for Class Action

The elements of the class certification standard are (1) numerosity, (2) commonality, (3) typicality, and (4) adequate representation, plus one of the requirements established by *Fed. R. Civ. P. 23(b)(1)*, *(b)(2)*, or *(b)(3)*. *Fed. R. Civ. P. 23(a)-(b)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > Remedies > Injunctions

Civil Procedure > Judgments > Declaratory Judgments > Federal Declaratory Judgments

HN4[] Prerequisites for Class Action, Commonality

Fed. R. Civ. P. 23(b)(2) applies when final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. *Rule 23(b)(3)*-based motions require plaintiffs to demonstrate that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

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

HN5[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23 does not set forth a mere pleading standard. As the party requesting class certification, plaintiffs bear the burden of affirmatively demonstrating compliance with the rule's requirements. Plaintiffs must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc. When deciding whether plaintiffs have met their burden, the court must accept the substantive allegations of the complaint as true, but it cannot blindly rely on conclusory allegations which parrot *Rule 23*. The court is not limited to the pleadings but may probe behind the pleadings' and examine the facts and evidence in the case. Actual, not presumed, conformance with Rule 23(a) is required.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

HN6[] Class Actions, Certification of Classes

The court's rigorous analysis frequently will entail some overlap with the merits of the plaintiff's underlying claim. But the careful examination and rigorous analysis requirements do not authorize mini-trials to determine whether the class, if certified, actually could prevail on the merits of their claims. Fed. R. Civ. P. 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Rather, merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Fed. R. Civ. P. 23 prerequisites for class certification are satisfied.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN7[] Class Actions, Certification of Classes

Defining the class is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled under Fed. R. Civ. P. 23(c)(2) to the best notice practicable in a Rule 23(b)(3) action. Thus, the class definition must be precise, objective and presently ascertainable.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN8[] Class Actions, Certification of Classes

Case authorities permit the court to refine the class definitions. A court is not bound by the class definition proposed in the complaint and should not dismiss the action simply because the complaint seeks to define the class too broadly. Holding plaintiffs to the plain language of their definition would ignore the ongoing refinement and give-and-take inherent in class action litigation, particularly in the formation of a workable class definition. If the class definition should require tailoring as the litigation progresses, the Court and parties are authorized to do so. Fed. R. Civ. P. 23(c)(1), (d).

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

HN9[] Class Actions, Prerequisites for Class Action

Plaintiffs seeking to certify a class under Fed. R. Civ. P. 23 must first satisfy Rule 23(a)'s prerequisites of numerosity, commonality, typicality, and adequacy of representation, along with the elements for one of the three types of class actions described in Rule 23(b).

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

HN10[] Class Actions, Certification of Classes

It is unsettled whether ascertainability is a separate and distinct requirement for class certification under *Fed. R. Civ. P. 23(b)(3)*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN11[] Class Actions, Certification of Classes

The Seventh Circuit's "weak" version of ascertainability requires that the class definition must not be too vague, the class must not be defined by subjective criteria, and the class must not be defined in terms of success on the merits. The court predicts that the Tenth Circuit, if confronted with this question, would decline to recognize ascertainability as a separate, unstated requirement of *Fed. R. Civ. P. 23* requiring certification movants to satisfy the more stringent ascertainability standard adopted by the Third Circuit. Instead, the court predicts that the Tenth Circuit would follow the Seventh Circuit's approach, applying the less restrictive ascertainability test on certification.

Civil Procedure > Special Proceedings > Class Actions > Class Members

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN12[] Class Actions, Class Members

As long as at least one plaintiff has standing with respect to each claim alleged, it will satisfy the injury requirement of standing.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN13[] Prerequisites for Class Action, Numerosity

To be certified, a proposed class must be so numerous that joinder of all members is impracticable. *Fed. R. Civ. P. 23(a)(1)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN14[] Prerequisites for Class Action, Commonality

Fed. R. Civ. P. 23 requires a court to find that there are questions of law or fact common to the class. *Fed. R. Civ. P. 23(a)(2)*. Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This same injury requirement does not mean merely that they have all suffered a violation of the same provision of law. Instead, the claims of the putative class plaintiffs must depend upon a common contention that is of such a nature that it is capable of classwide resolution. This requirement means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. Although even a single common question will do, the focus is not on common questions but on the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN15[] **Prerequisites for Class Action, Commonality**

Plaintiffs satisfy the commonality requirement where numerous class-wide questions of law and fact may be resolved with common answers drawn from common proof. As the Tenth Circuit has recognized, any one of these questions alone would satisfy the commonality requirement. A finding of commonality requires only a single question of law or fact common to the entire class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN16[] **Prerequisites for Class Action, Typicality**

The typicality element requires a finding that the claims of representative plaintiffs are typical of the claims of the proposed class. *Fed. R. Civ. P. 23(a)(3)*. But, the named plaintiffs' interests and claims need not be identical to those of the putative class members. As long as the claims of the named plaintiff and class members are based on the same legal or remedial theory, differing fact situations of the class members do not defeat typicality.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN17[] **Prerequisites for Class Action, Typicality**

The typicality requirement asks whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN18[] **Prerequisites for Class Action, Commonality**

The typicality and commonality requirements are similar because both serve as guideposts for determining whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected. The typicality requirement has been liberally construed by courts, and in the antitrust context, typicality will be established by plaintiffs and all class members alleging the same antitrust violations by defendants. If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN19[] **Claims, Fraud**

First-party reliance is not required to establish a RICO claim premised on the predicate act of mail fraud. The U.S. Supreme Court has recognized that RICO provides a cause of action for any person injured in his business or property by reason of a violation of the statute. *18 U.S.C.S. § 1964(c)*. And, the Court has found it "difficult to derive a first-party reliance requirement" from the words of the statute. Thus, the Supreme Court refused to read a first-party reliance requirement into a statute that by its terms suggests none.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN20[] **Prerequisites for Class Action, Adequacy of Representation**

A certified class must have representative parties who will fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)(4)*. The adequacy requirement asks whether the named plaintiffs and counsel (a) have any conflicts of interest with other class members and (b) will prosecute the action vigorously on behalf of the class. Minor conflicts among class members do not defeat certification. Only a fundamental conflict about the specific issues in controversy will prevent a named plaintiff from representing the interests of the class adequately. A fundamental conflict exists where some class members claim an injury resulting from conduct that benefited other class members. Defeating the adequacy requirement of *Rule 23* requires a conflict that is more than merely speculative or hypothetical.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN21[] **Prerequisites for Class Action, Adequacy of Representation**

In the context of the class action adequacy requirement, binding authority from the Tenth Circuit recognizes that defendants can claim no interest in the method of distributing the aggregate damages award among the class members.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN22[] **Prerequisites for Class Action, Superiority**

To certify a class under *Fed. R. Civ. P. 23(b)(3)*, a class action proceeding must be superior to other available methods for fairly and efficiently adjudicating the controversy. *Fed. R. Civ. P. 23(b)(3)*. It is enough that class treatment is superior because it will achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN23[] **Prerequisites for Class Action, Predominance**

Fed. R. Civ. P. 23(b)(3) also requires a plaintiff to show that common questions subject to generalized, class-wide proof predominate over individual questions. This requirement does not mean a plaintiff must show that all of the elements of the claim entail questions of fact and law that are common to the class or that the answers to those common questions are dispositive of the claim. Instead, the predominance inquiry asks whether the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. To decide whether a plaintiff can satisfy the predominance requirement, a court must first characterize the issues in the case as common or not, and then weigh which issues predominate. Critically, so long as at least one common issue predominates, a plaintiff can satisfy *Rule 23(b)(3)*—even if individual issues (such as damages) remain and require the court to try them separately. The determination whether questions of law or fact common to class members predominate begins, of course, with the elements of the underlying cause of action. Fed. R. Civ. P. 23(b)(3).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN24[] Prerequisites for Class Action, Predominance

The fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification. Instead, the Tenth Circuit has explained, material differences in damages determinations will destroy predominance only if those individualized issues will overwhelm questions common to the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN25[] Prerequisites for Class Action, Predominance

In the context of predominance, the court has concluded that the U.S. Supreme Court does not require a class-wide damages model for certification under Fed. R. Civ. P. 23(b)(3).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN26[] Prerequisites for Class Action, Predominance

The court can not decide the issue of whether plaintiffs' expert reports actually prove classwide damages—on a certification motion. At the class certification stage, plaintiffs need not prove that the predominating question will be answered in their favor; ultimate failure of proof on essential element dooms claim, but does not mean individualized claims predominate. The issue at class certification is not which expert is the most credible, or the most accurate modeler, but rather have the plaintiffs demonstrated that there is a way to prove a class-wide measure of damages through generalized proof. To determine predominance, a court need not plunge into the weeds of an expert dispute about potential technical flaws in an expert methodology.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN27[] Prerequisites for Class Action, Predominance

At class certification, plaintiffs need not prove that a proposed method for determining damages is valid; instead, the proper inquiry at this stage asks whether damages are capable of proof on a classwide basis. And, if each expert's approach is plausible based on classwide proof and does not rely on or implicate individualized questions that will predominate over common ones, it is sufficient at the class certification stage to note that both sides' expert methods are plausible approaches.

Torts > Remedies > Damages > Collateral Source Rule

HN28[] Damages, Collateral Source Rule

The Tenth Circuit has explained that the collateral source rule is derived from the common law and posits that payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable. This rule thus permits an injured plaintiff to recover more than the damages he has suffered as the result of an injury. The Circuit has explained the rationale for applying the rule: Public policy favors giving the plaintiff a double recovery rather than allowing a wrongdoer to enjoy reduced liability simply because the plaintiff received compensation from an independent source. Thus, courts have applied the rule when the injured plaintiff has been compensated by, for example, the plaintiff's own insurance.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Class Members

HN29[] **Class Actions, Certification of Classes**

The court and parties are authorized to narrow the class definitions if the class definition should require tailoring as the litigation progresses.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Class Members

HN30[] **Class Actions, Certification of Classes**

The Tenth Circuit explained that *Fed. R. Civ. P. 23*'s certification requirements neither require all class members to suffer harm or threat of immediate harm nor Named Plaintiffs to prove class members have suffered such harm. The Circuit recognized: A class will often include persons who have not been injured by the defendant's conduct. Such a possibility or indeed inevitability does not preclude class certification.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Class Members

HN31[] **Class Actions, Certification of Classes**

A class will almost inevitably include persons who have not been injured by the defendant's conduct, and that fact (or even inevitability) does not preclude certification.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Evidence > Burdens of Proof > Initial Burden of Persuasion

HN32[] **Prerequisites for Class Action, Predominance**

Plaintiffs' burden at certification is to show predominance; they need not convince the court that their evidence will prevail at trial.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Class Members

HN33[] Class Actions, Certification of Classes

The court has followed Seventh Circuit precedent when analyzing whether the presence of uninjured class members defeats certification. As the Seventh Circuit has held, a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant. If the definition is so broad that it sweeps within it persons who could not have been injured by the defendant's conduct, it is too broad. But this is distinguishable from a proposed class consisting largely (or entirely, for that matter) of members who are ultimately shown to have suffered no harm, as that may not mean that the class was improperly certified but only that the class failed to meet its burden of proof on the merits. There is no precise measure for a "great" many. How many is too many is a matter of degree, and will turn on the facts as they appear from case to case.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Class Members

HN34[] Class Actions, Certification of Classes

The Seventh Circuit has not provided a formula for determining how many uninjured class members is a great many that would preclude certification. The Seventh Circuit says too many is a matter of degree, and will turn on the facts as they appear from case to case.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN35[] Prerequisites for Class Action, Predominance

In the context of predominance, depending on the ultimate size of the class at issue, the factual record eventually may develop more fully and show that the number of uninjured class members is "more significant" than it initially appears. As the Seventh Circuit recognizes, the court is free to revisit this issue if that, in fact, occurs.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Evidence > Burdens of Proof > Burdens of Production

HN36[] Prerequisites for Class Action, Predominance

As the Tenth Circuit has recognized, class-wide proof is not required for all issues on certification. Instead, *Fed. R. Civ. P. 23(b)(3)* simply requires a showing that the questions common to the class predominate over individualized questions. So long as at least one common issue predominates, a plaintiff can satisfy *Rule 23(b)(3)*—even if there remain individual issues, such as damages, that must be tried separately.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN37[] Grounds for Injunctions, Irreparable Harm

The Tenth Circuit has held, in the *Fed. R. Civ. P. 23(b)(2)* context, that only named plaintiffs in a class action seeking prospective injunctive relief must demonstrate standing by establishing they are suffering a continuing injury or are under an imminent threat of being injured in the future.

Civil Procedure > ... > Justiciability > Standing > Personal Stake

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN38[] Standing, Personal Stake

U.S. Const. art. III standing does not require that each member of a class submit evidence of personal standing.

Civil Procedure > Special Proceedings > Class Actions > Class Members

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN39[] Class Actions, Class Members

Unnamed plaintiffs need not make any individual showing of standing in order to obtain relief. Whether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a standing issue nor a U.S. Const. art. III case or controversy issue but depends rather on meeting the prerequisites of *Fed. R. Civ. P. 23* governing class actions.

Civil Procedure > Special Proceedings > Class Actions > Class Members

HN40[] Class Actions, Class Members

The court has refused to apply a standard—one not adopted by the Tenth Circuit—that would preclude certification without a showing that class members may be determined in an administratively feasible manner. When a class action involves an aggregate damage calculation, the identity of particular class members does not implicate the defendant's due process interest at all because the addition or subtraction of individual class members affects neither the defendant's liability nor the total amount of damages it owes to the class.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN41[] Racketeer Influenced & Corrupt Organizations, Claims

When considering whether the *Fed R. Civ. P. 23* predominance requirement is satisfied in a RICO action, the court must survey the elements of the class's RICO claims to consider (1) which of those elements are susceptible to generalized proof, and (2) whether those that are so susceptible predominate over those that are not. So, the analysis whether questions of law or fact common to class members predominate begins, of course, with the elements of the underlying cause of action. *Fed. R. Civ. P. 23*. Or, more simply, deciding whether a class can rely on classwide proof starts with what the law requires the class to prove.

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

HN42[] Racketeer Influenced & Corrupt Organizations, Claims

RICO establishes a civil cause of action for persons injured as a result of a prohibited racketeering activity. *18 U.S.C.S. § 1962(c)*. A RICO violation has four elements: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. To prove a RICO violation, a plaintiff must show that the defendant violated the RICO statute, and the plaintiff was injured by reason of that violation. *18 U.S.C.S. § 1962*; *18 U.S.C.S. § 1964(c)*.

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

HN43[] Racketeer Influenced & Corrupt Organizations, Claims

The Tenth Circuit has explained that RICO's by reason of requirement requires a plaintiff to show a RICO predicate offense not only was a but for cause of his injury, but was the proximate cause as well. Sufficiently establishing the element of causation—both actual and proximate—is crucial to proving any violation of RICO.

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

HN44[] Racketeer Influenced & Corrupt Organizations, Claims

The U.S. Supreme Court has defined RICO proximate causation as a flexible concept that does not lend itself to a black-letter rule that will dictate the result in every case. Proximate cause provides a label generically for the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. And, it includes a particular emphasis on the demand for some direct relation between the injury asserted and the injurious conduct alleged. Thus, when a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries. The Supreme Court has instructed that no need exists to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly.

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

HN45[] Racketeer Influenced & Corrupt Organizations, Claims

In the context of RICO claims premised on predicate acts of mail fraud, the U.S. Supreme Court has held that a plaintiff is not required to plead that he is a victim of the defendant's underlying crime (e.g., that he relied on the fraudulent mailings) to establish a direct injury. Rather, a plaintiff may establish proximate causation by plausibly pleading that his business or property has been directly injured as a result of the defendants' *18 U.S.C.S. § 1962* violation.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN46[] Racketeer Influenced & Corrupt Organizations, Claims

When a federal court decides whether issues of RICO causation satisfy the *Fed. R. Civ. P. 23* predominance inquiry, the question is whether the link between defendants' actions and the class's injuries can be adduced through common evidence. The Tenth Circuit has explained that, in RICO actions, individualized issues of reliance often preclude a finding of predominance. Since reliance is often a highly idiosyncratic issue that might require unique evidence from individual plaintiffs, it may present an impediment to the economies of time and scale that encourage class actions as an alternative to traditional litigation.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN47[] **Racketeer Influenced & Corrupt Organizations, Claims**

Class certification of a RICO claim is proper when causation can be established through an inference of reliance where the behavior of plaintiffs and the members of the class cannot be explained in any way other than reliance upon the defendant's conduct. In such a situation, where circumstantial evidence of reliance can be found through generalized, classwide proof, then common questions will predominate and class treatment is valuable in order to take advantage of the efficiencies essential to class actions. The causation element is susceptible to generalized proof and thus cannot defeat class certification under *Fed. R. Civ. P. 23(b)(3)*'s predominance requirement. when class allegations are based on a single, common scheme, class members share the relevant circumstantial evidence in common, thus making class-wide proof possible.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Types of Evidence > Testimony > Expert Witnesses

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

HN48[] **Class Actions, Certification of Classes**

Persuasiveness of an expert's opinion showing classwide liability is, in general, a matter for the jury.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN49[] **Prerequisites for Class Action, Predominance**

When addressing the issue of uninjured class members—the court has recognized that a class will almost inevitably include persons who have not been injured by the defendant's conduct, and that fact (or even inevitability) does not preclude certification. Instead, a class is too broad to permit certification only if it includes a great number of members who could not have been harmed by the defendant's conduct (as opposed to a great number who ultimately are shown to have suffered no harm).

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

Civil Procedure > Special Proceedings > Class Actions > Class Members

HN50[] **Racketeer Influenced & Corrupt Organizations, Claims**

The court can revise its certification decision or even limit plaintiffs' use of certain factual theories to support their RICO class claim. *Fed. R. Civ. P. 23(d)(1)(A)* provides that in conducting an action under this rule, the court may issue orders that determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument. A district court may create subclasses sua sponte as a way to segregate plaintiffs with different factual and individual circumstances used to support their claim. Certifying subclass serves several purposes including an ability to conduct the trial in a more orderly manner, by tying the order of proof to particular claims raised by the individual subclasses and one possible method of developing proper subclasses would divide the present class based on the commonality of the class members' particular circumstances or the type of harm the class members allegedly have suffered.

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

HN51[] Racketeer Influenced & Corrupt Organizations, Claims

First-party reliance is not required to establish a RICO claim that relies on the predicate act of mail fraud. Instead, RICO provides a cause of action for any person injured in his business or property by reason of a violation of the statute. *18 U.S.C.S. § 1964(c)*. The U.S. Supreme Court has reasoned that this statutory language suggests a breadth of coverage not easily reconciled with an implicit requirement that the plaintiff show reliance in addition to injury in his business or property.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN52[] Racketeer Influenced & Corrupt Organizations, Claims

Issues of reliance can be disposed of on a classwide basis without individualized attention at trial. For example, where circumstantial evidence of reliance can be found through generalized, classwide proof, then common questions will predominate and class treatment is valuable in order to take advantage of the efficiencies essential to class actions.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN53[] Racketeer Influenced & Corrupt Organizations, Claims

In certain circumstances it is beneficial to permit a commonsense inference of reliance applicable to the entire class to answer a predominating question as required by *Fed. R. Civ. P. 23*. And, in the RICO context, class certification is proper when causation can be established through an inference of reliance where the behavior of plaintiffs and the members of the class cannot be explained in any way other than reliance upon the defendant's conduct.

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

Evidence > Weight & Sufficiency

HN54[] Jury Trials, Province of Court & Jury

Ultimately, it is a jury's task to weigh the individual testimony presented by a defendant against the aggregate and circumstantial evidence presented by plaintiffs.

Antitrust & Trade Law > Regulated Practices > Private Actions

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN55[] **Regulated Practices, Private Actions**

At the class certification stage, any model supporting a plaintiff's damages case must be consistent with its liability case. Plaintiffs must tie each theory of antitrust impact to an exact calculation of damages.

Antitrust & Trade Law > Regulated Practices > Private Actions

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN56[] **Regulated Practices, Private Actions**

The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. At the certification stage, plaintiffs do not have to prove impact; instead, they need only to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.

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

HN57[] **Concerted Action, Civil Conspiracy**

Members of a conspiracy are liable for acts committed by their co-conspirators in furtherance of the conspiracy. The law on civil conspiracy imposes liability on co-conspirators for acts that are a reasonably foreseeable consequence of the scheme.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

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

HN58[] **Prerequisites for Class Action, Predominance**

Proof of a conspiracy is a common question that may predominate over the other issues in the case and has the effect of satisfying the first prerequisite in *Fed. R. Civ. P. 23(b)(3)*.

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

HN59[] **Deceptive & Unfair Trade Practices, State Regulation**

States apply different tests when determining what qualifies as unfair conduct prohibited by a particular consumer protection statute.

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

HN60[] Deceptive & Unfair Trade Practices, State Regulation

The state laws use a variety of tests to define the form of conduct that will qualify as anticompetitive or unfair conduct prohibited under the consumer statutes. Some states consider the following factors: (1) whether the practice offends public policy, the common law, or otherwise; (2) whether it is immoral, unethical, oppressive, or unscrupulous; or (3) whether it causes substantial injury to consumers. Other states examine whether the act or practice: (1) causes or is likely to cause substantial injury to consumers; (2) which is not reasonably avoidable by the consumer; and (3) not outweighed by countervailing benefits to consumers or to competition.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN61[] Deceptive & Unfair Trade Practices, State Regulation

Differences in state laws do not always preclude class certification under *Fed. R. Civ. P. 23(b)(3)*'s predominance requirement. Courts have found class certification warranted when the idiosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate over the shared claims. But varying state laws may defeat predominance in other situations. (In a multi-state class action, variations in state law may swamp any common issues and defeat predominance.). Indeed, the Supreme Court has observed that differences in state law can compound the disparities among the factual questions, thus undermining class cohesion.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN62[] Prerequisites for Class Action, Commonality

Courts have declined to certify class actions when the legal differences among varying state laws dominate the common questions.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN63[] Equitable Relief, Quantum Meruit

Unjust enrichment claims generally require plaintiffs to prove three things: (a) defendant received a benefit; (b) at plaintiff's expense; and (c) retention of the benefit would be unjust without compensation. The basic elements of a claim based on a theory of unjust enrichment are threefold: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN64[] Class Actions, Certification of Classes

The court has noted that differences among state law definitions of unjust enrichment and its availability as a remedy make federal courts, in general, reluctant to certify a nationwide class on this theory. Because of such variations among state laws, federal courts have generally refused to certify a nationwide class based upon a theory of unjust enrichment.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

Civil Procedure > Remedies > Injunctions > Grounds for Injunctions

HN65[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23(b)(2) allows a court to certify a class action if the requirements of *Rule 23(a)* are satisfied and if the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. *Fed. R. Civ. P. 23(b)(2)*. The Tenth Circuit has explained that *Rule 23(b)(2)* demands at the class certification stage plaintiffs describe in reasonably particular detail the injunctive relief they seek such that the district court can at least conceive of an injunction that would satisfy *Rule 65(d)*'s requirements, as well as the requirements of *Rule 23(b)(2)*.

Civil Procedure > Remedies > Injunctions

HN66[] Remedies, Injunctions

Fed. R. Civ. P. 65(d) requires that injunctions be specific in terms and describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. *Fed. R. Civ. P. 65(d)*.

Civil Procedure > ... > Class Actions > Class Attorneys > Appointments

HN67[] Class Attorneys, Appointments

Fed. R. Civ. P. 23(g)(1) requires that a court certifying a class must appoint class counsel. When making this appointment, the court must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. *Fed. R. Civ. P. 23(g)(1)(A)*. The court may appoint an applicant as class counsel only if the applicant is adequate under *Rule 23(g)(1)*'s criteria and if the applicant will adhere to *Rule 23(g)(4)*'s requirement that the applicant fairly and adequately represent the interests of the class. *Fed. R. Civ. P. 23(g)(2)*.

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

HN68[] Class Actions, Notice of Class Action

When a court certifies a *Fed. R. Civ. P. 23(b)(3)* class, *Rule 23(c)(2)(B)* provides the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

Counsel: **[*1]** For All Plaintiffs (for Lead/Liaison Counsel ONLY), In Re: Amanda Klevorn, Korey Nelson, Burns Charest, LLP - New Orleans, New Orleans, LA; Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Rex A. Sharp, Ryan C. Hudson, LEAD ATTORNEYS, Rex A. Sharp, PA, Prairie Village, KS; Warren T. Burns, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX.

For Consumer Class Cases Plaintiffs, (For Filings as to All Consumer Class Cases Plaintiffs), In Re: Alison Elizabeth Chase, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLP - Santa Barbara, Santa Barbara, CA; Amanda Klevorn, LEAD ATTORNEY, Burns Charest, LLP - New Orleans, New Orleans, LA; Arthur L. Shingler, III, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Daniel E. Gustafson, Daniel C. Hedlund, LEAD ATTORNEYS, PRO HAC VICE, Gustafson Gluek, PLLC, Minneapolis, MN; Devon Paul Allard, Mahde Youssef Abdallah, Sharon S. Almonrode, William L. Kalas, LEAD ATTORNEYS, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Eric Fierro, LEAD **[*2]** ATTORNEY, PRO HAC VICE, Keller Rohrback, LLP - Phoenix, Phoenix, AZ; Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Maxwell Goins, Ryan McDevitt, LEAD ATTORNEYS, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Rex A. Sharp, Ryan C. Hudson, LEAD ATTORNEYS, Rex A. Sharp, PA, Prairie Village, KS; Spencer Cox, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX; Stuart A. Davidson, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Tanya Korkhov, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLP - New York, New York, NY; Warren T. Burns, LEAD ATTORNEY, Burns Charest, LLP - Dallas, Dallas, TX.

For All Defendants (for Lead/Liaison Counsel ONLY), In Re: Philip A. Sechler, LEAD ATTORNEY, PRO HAC VICE, Robbins, Russell, Englert, Orseck, Untereiner & Sauber, LLP, Washington, DC.

For Rosetta Serrano, -- Consumer Class -- (KS #16-2711) on behalf of themselves, Plaintiff: Amanda Klevorn, Korey Nelson, Lydia Wright, LEAD ATTORNEYS, PRO HAC VICE, Burns Charest, LLP - New Orleans, New Orleans, LA; Arthur R. Miller, Cristina R. Delise, LEAD ATTORNEYS, PRO HAC VICE, The Lanier Law Firm, **[*3]** PC, New York, NY; Charles Jacob Gower, LEAD ATTORNEY, PRO HAC VICE, CAD Law, LC, Salina, KS; Christopher J. Cormier, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Greenwood Village, Greenwood Village, CO; Dennis Lienhardt, Jr., Derek William Loeser, Gretchen Freeman Cappio, Lynn Lincoln Sarko, LEAD ATTORNEYS, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; E. Powell Miller, Elizabeth C. Pritzker, LEAD ATTORNEYS, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, Ryan C. Hudson, Scott B. Goodger, LEAD ATTORNEYS, Rex A. Sharp, PA, Prairie Village, KS; Sharon S. Almonrode, Spencer Cox, LEAD ATTORNEYS, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Stephen J. Fearon, Jr., LEAD ATTORNEY, PRO HAC VICE, Squitieri **[*4]** & Fearon, LLP, New York, NY; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX; Warren T. Burns, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX.

For Shannon Clements, -- Consumer Class -- (KS #16-2711) on behalf of themselves and all other similiarly situated, Annette Sutorik, -- Consumer Class -- (KS #16-2711) on behalf of themselves and all other similiarly situated, formerly known as Annette P. Wilcome Sutorik, Plaintiffs: Arthur R. Miller, Cristina R. Delise, LEAD ATTORNEYS, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., E. Powell Miller, Sharon S. Almonrode, LEAD ATTORNEYS, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Derek William Loeser, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Elizabeth C. Pritzker, Gretchen Freeman Cappio, LEAD ATTORNEYS, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. **[*5]** Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Lynn Lincoln Sarko, LEAD ATTORNEY, PRO HAC VICE, Keller Rohrback, LLC - Seattle, Seattle, WA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller

Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, Ryan C. Hudson, Scott B. Goodger, LEAD ATTORNEYS, Rex A. Sharp, PA, Prairie Village, KS; Spencer Cox, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX; Stephen J. Fearon, Jr., LEAD ATTORNEY, PRO HAC VICE, Squitieri & Fearon, LLP, New York, NY; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX; Warren T. Burns, LEAD ATTORNEY, PRO HAC VICE, Burns Charest, LLP - Dallas, Dallas, TX.

For Lesley Huston, -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, Cristina R. Delise, LEAD ATTORNEYS, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Charles T. Schimmel, W. Greg Wright, LEAD ATTORNEYS, Wright Schimmel, LLC, Overland Park, KS; Dennis Lienhardt, **[*6]** Jr., E. Powell Miller, Elizabeth C. Pritzker, LEAD ATTORNEYS, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Isaac L. Diel, LEAD ATTORNEY, Sharp McQueen, PA - OP, Overland Park, KS; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, Ryan C. Hudson, Scott B. Goodger, LEAD ATTORNEYS, Rex A. Sharp, PA, Prairie Village, KS; Sharon S. Almonrode, LEAD ATTORNEY, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Chris Rippy, -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, Cristina R. Delise, LEAD ATTORNEYS, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, **[*7]** Jr., E. Powell Miller, Sharon S. Almonrode, LEAD ATTORNEYS, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jonathan K. Levine, LEAD ATTORNEY, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, Ryan C. Hudson, Scott B. Goodger, LEAD ATTORNEYS, Rex A. Sharp, PA, Prairie Village, KS; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Raymond C. Buchta, III, -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, Cristina R. Delise, LEAD ATTORNEYS, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., E. Powell Miller, Sharon S. Almonrode, LEAD ATTORNEYS, PRO **[*8]** HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, Jonathan K. Levine, LEAD ATTORNEYS, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jason Scott Goldstein, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, New York, NY; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, Ryan C. Hudson, Scott B. Goodger, LEAD ATTORNEYS, Rex A. Sharp, PA, Prairie Village, KS; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Lee Seltzer, -- Consumer Class -- (KS #16-2711), Joy Shepard, -- Consumer Class -- (KS #16-2711), Lorraine Wight, -- Consumer Class -- (KS #16-2711), Teia Amell, -- Consumer Class -- (KS #16-2711), Todd Beaulieu, -- Consumer Class -- (KS #16-2711), Plaintiffs: Arthur R. Miller, Cristina R. Delise, LEAD **[*9]** ATTORNEYS, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., E. Powell Miller, Sharon S. Almonrode, LEAD ATTORNEYS, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, Jonathan K. Levine, LEAD ATTORNEYS, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Joseph G. Sauder, LEAD ATTORNEY, PRO

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For Heather DeStefano, -- Consumer Class -- (KS #16-2711), Sonya North, -- Consumer Class -- (KS #16-2711), Plaintiffs: Arthur R. Miller, Cristina R. Delise, LEAD ATTORNEYS, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, **[*10]** Jr., E. Powell Miller, Sharon S. Almonrode, LEAD ATTORNEYS, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, Jonathan K. Levine, LEAD ATTORNEYS, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, Ryan C. Hudson, Scott B. Goodger, LEAD ATTORNEYS, Rex A. Sharp, PA, Prairie Village, KS; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Laura Chapin, -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, Cristina R. Delise, LEAD ATTORNEYS, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., E. Powell Miller, Sharon S. Almonrode, LEAD ATTORNEYS, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, **[*11]** Jonathan K. Levine, LEAD ATTORNEYS, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Emily Hughes, LEAD ATTORNEY, PRO HAC VICE, Miller Law Firm, PC, Rochester, MI; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, Ryan C. Hudson, Scott B. Goodger, LEAD ATTORNEYS, Rex A. Sharp, PA, Prairie Village, KS; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Nikitia Marshall, -- Consumer Class -- (KS #16-2711), Linda Wagner, -- Consumer Class -- (KS #16-2711), Mark Kovarik, -- Consumer Class -- (KS #16-2711), Plaintiffs: Arthur R. Miller, Cristina R. Delise, LEAD ATTORNEYS, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., E. Powell Miller, Sharon S. Almonrode, LEAD ATTORNEYS, PRO HAC VICE, The Miller Law Firm, **[*12]** PC, Rochester, MI; Elizabeth C. Pritzker, Jonathan K. Levine, LEAD ATTORNEYS, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, Ryan C. Hudson, Scott B. Goodger, LEAD ATTORNEYS, Rex A. Sharp, PA, Prairie Village, KS; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Anastasia Johnston, -- Consumer Class -- (KS #16-2711), Elizabeth Williamson, -- Consumer Class -- (KS #16-2711), Plaintiffs: Arthur R. Miller, Cristina R. Delise, LEAD ATTORNEYS, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., E. Powell Miller, Sharon S. Almonrode, LEAD ATTORNEYS, PRO HAC VICE, The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, Jonathan K. Levine, LEAD ATTORNEYS, **[*13]** PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Emily Hughes, LEAD ATTORNEY, PRO HAC VICE, Miller Law Firm, PC, Rochester, MI; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, Ryan C. Hudson, Scott B. Goodger, LEAD ATTORNEYS, Rex A. Sharp, PA, Prairie Village, KS; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Suzanne Harwood, -- Consumer Class -- (KS #16-2711), Donna Wemple -- Consumer Class -- (KS #16-2711), Jennifer Walton -- Consumer Class -- (KS #16-2711), Meredith Krimmel -- Consumer Class -- (KS #16-2711), Plaintiff: Arthur R. Miller, Cristina R. Delise, LEAD ATTORNEYS, PRO HAC VICE, The Lanier Law Firm, PC, New York, NY; Dennis Lienhardt, Jr., E. Powell Miller, Sharon S. Almonrode, LEAD ATTORNEYS, PRO HAC VICE, **[*14]** The Miller Law Firm, PC, Rochester, MI; Elizabeth C. Pritzker, Jonathan K. Levine, LEAD ATTORNEYS, PRO HAC VICE, Pritzker Levine, LLP, Oakland, CA; Emily Hughes, LEAD ATTORNEY, PRO HAC VICE, Miller Law Firm, PC, Rochester, MI; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Joseph G. Sauder, LEAD ATTORNEY, PRO HAC VICE, McCune Wright Arevalo, LLP, Berwyn, PA; Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Reagan E. Bradford, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Oklahoma City, OK; Rex A. Sharp, Ryan C. Hudson, Scott B. Goodger, LEAD ATTORNEYS, Rex A. Sharp, PA, Prairie Village, KS; Steven N. Williams, LEAD ATTORNEY, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; W. Mark Lanier, LEAD ATTORNEY, PRO HAC VICE, The Lanier Law Firm, PC, Houston, TX.

For Vishal Aggarwal, -- Consumer Class -- (ILN #17-2189 / KS #17-2450) individually and on behalf of all other similarly situated, Plaintiff: Ben Barnow, Erich Paul Schork, LEAD ATTORNEYS, PRO HAC VICE, Barnow and Associates, PC, Chicago, IL; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; **[*15]** Paul J. Geller, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Rex A. Sharp, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS; Rosemary Medellin Rivas, LEAD ATTORNEY, PRO HAC VICE, Levi & Korsinsky, LLP, San Francisco, CA; Timothy Gordon Blood, LEAD ATTORNEY, PRO HAC VICE, Blood Hurst & O'Reardon, LLP, San Diego, CA.

For Angie Nordstrum, -- Consumer Class -- (NJ #17-2401 / KS #17-2451) Individually and on Behalf of All Others Similarly Situated, Carly Bowersock, -- Consumer Class -- (NJ #17-2401 / KS #17-2451) Individually and on Behalf of All Others Similarly Situated, Plaintiffs: Arthur L. Shingler, III, Brian O. O'Mara, LEAD ATTORNEYS, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Bradley Beall, LEAD ATTORNEY, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Brian D. Penny, LEAD ATTORNEY, PRO HAC VICE, Goldman Scarlato & Penny, PC, Conshohocken, PA; Damien J. Marshall, Duane L. Loft, LEAD ATTORNEYS, PRO HAC VICE, Boies, Schiller & Flexner, LLP - NY, New York, NY; Donald A. Ecklund, James E. Cecchi, LEAD ATTORNEYS, PRO HAC VICE, Carella, Byrne, Cecchi, Olstein, Brody & Agnello, PC, Roseland, **[*16]** NJ; Eugene Mikolajczyk, Lea Bays, LEAD ATTORNEYS, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - San Diego, San Diego, CA; Ian S. Millican, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan LLP, New York, NY; Jennifer Kan, Matthew S. Tripolitsiotis, LEAD ATTORNEYS, PRO HAC VICE, Boies, Schiller & Flexner, LLP - Armonk, Armonk, NY; Joseph Alm, LEAD ATTORNEY, PRO HAC VICE, Boies, Schiller & Flexner, LLP - DC, Washington, DC; Paul J. Geller, Stuart A. Davidson, LEAD ATTORNEYS, PRO HAC VICE, Robbins Geller Rudman & Dowd, LLP - Boca Raton, Boca Raton, FL; Rex A. Sharp, LEAD ATTORNEY, Rex A. Sharp, PA, Prairie Village, KS.

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For Elan Klein, (Plaintiff in MN#17-1884 Klein, et al. v. Prime Therapeutics, LLC, et al.), Adam Klein, (Plaintiff in MN#17-1884 **[*24]** Klein, et al. v. Prime Therapeutics, LLC, et al.), Leah Weaver, (Plaintiff in MN#17-1884 Klein, et al. v. Prime Therapeutics, LLC, et al.), Arissa Paschalidis, (Plaintiff in MN#17-1884 Klein, et al. v. Prime Therapeutics, LLC, et al.), Miscellaneous: Patrick Thomas Egan, LEAD ATTORNEY, PRO HAC VICE, Berman Tabacco, Boston, MA.

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Judges: Daniel D. Crabtree, United States District Judge.

Opinion by: Daniel D. Crabtree

Opinion

MEMORANDUM AND ORDER

Class plaintiffs filed a motion for class certification (Doc. 1353), seeking to represent five classes of end-payors in the United States who paid or reimbursed others for some or all of the purchase price of branded or authorized generic EpiPens. Plaintiffs allege that the Mylan defendants (composed of Mylan N.V., Mylan Specialty, L.P., Mylan Pharmaceuticals, Inc., and Mylan's CEO Heather Bresch) as distributors of the EpiPen, and the Pfizer defendants (composed of Pfizer, Inc., King Pharmaceuticals, Inc., and Meridian Medical Technologies, Inc.) as manufacturers of the EpiPen, have maintained a monopoly over the epinephrine auto-injector ("EAI") market and its profitable revenues by devising an illegal scheme to monopolize the market for EAI devices. For the reasons explained below, the court grants the motion in part and denies it in part.

The Consolidated Class Action Complaint ("Class Complaint") (Doc. 60) asserts the collective **[*28]** claims of five consumer class cases transferred by the Judicial Panel on Multidistrict Litigation.[1] The Class Complaint asserts federal and state antitrust claims, federal RICO Act violations, various state consumer protection law violations, and unjust enrichment claims. The Class Complaint asserts its claims against the two groups of defendants who either sell or manufacture the EpiPen, the Mylan defendants and the Pfizer defendants. When referring to both sets of defendants, this Order calls them, collectively, "defendants."

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[1] The JMPL also transferred a case filed by Sanofi-Aventis U.S. LLC ("Sanofi") as part of this Multidistrict Litigation. It proceeds on a separate track, and this certification motion does not affect the claims or defenses in Sanofi's case.

I. Factual Background[2]

The EpiPen is a portable EAI device used to administer epinephrine to treat an anaphylactic reaction to an allergen. In 2007, Mylan acquired the right to market and distribute the EpiPen. Pfizer supplies Mylan with 100% of its EpiPen supply through two wholly-owned subsidiaries—King Pharmaceuticals, Inc., and Meridian Medical Technologies, Inc.—who manufacture the epinephrine and hold the EpiPen patents. Since at least 2009, Mylan's market share of EAI devices in the United States EAI market has remained above 80%. And, since 2009, Mylan's market share consistently has exceeded 90%, and, in 2012, its share was almost 100%. During the same time—and while the cost of the EpiPen's dose of epinephrine has remained about $1—Mylan has raised the EpiPen's price by more than 600%. In 2007, Mylan priced the EpiPen at $100. By 2016, **[*30]** Mylan was charging more than $600. In 2015, Mylan announced that the EpiPen had reached $1 billion in annual sales for the second consecutive year—up from $200 million in 2007.

Mylan's Dealings with Pharmacy Benefit Managers (PBMs)

Pharmacy Benefit Managers ("PBMs") are third-party administrators of prescription drug programs for commercial health plans, self-insured employer plans, Medicare Part D plans, the Federal Employees Health Benefits Program, and state government employee plans. More specifically, PBMs administer a health coverage provider's prescription benefit program by developing the coverage provider's formulary (the list of prescription benefits included in the coverage at various pricing "tiers"), processing claims, creating a network of retail pharmacies who provide discounts in exchange for access to a provider's plan participants, and negotiating with drug manufacturers. A significant majority of patients with prescription drug insurance coverage receive their benefits through a third-party payor whose drug formulary is determined by a PBM. From 2013 to 2015, commercial third-party payors accounted for about 71% of the EAI drug device market in the United States. So, **[*31]** for a competitor to enter and compete vigorously in the EAI drug device market, it is imperative that the competitor access these third-party payors' drug formularies.

Between 2013 and 2015, Mylan significantly increased the EpiPen's price. Plaintiffs allege Mylan then used the additional profit margins to offer PBMs significantly higher rebates and percentage discounts if the PBM would provide exclusive or preferred placement for EpiPen on the PBM's drug formulary. In 2013, when Sanofi launched a

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[2] To determine whether plaintiffs have met their burden of affirmatively demonstrating compliance with *Rule 23*'s requirements, the court "must accept the substantive allegations of the complaint as true." *Shook v. El Paso Cty., 386 F.3d 963, 968 (10th Cir. 2004)* (citing *J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1290 n.7 (10th Cir. 1999))*.

rival EAI device—Auvi-Q—Mylan began taking steps to block Auvi-Q from drug formularies, plaintiffs contend. It did so by offering large rebates—30% or higher—to PBMs who controlled formularies for third-party payors and expressly conditioning those rebates on the PBMs: (a) granting the EpiPen exclusive position on the formulary; and (b) removing or severely restricting access to Auvi-Q. Adrenaclick, another rival EAI device, achieved a market share that ranged from 2% in 2013 to 8% in 2016. In 2014, CVS Caremark added Adrenaclick to its Formulary Drug Removals List, effectively eliminating a consumer or other end-payor's opportunity to purchase Adrenaclick as an alternative to the EpiPen. **[*32]** Plaintiffs contend Mylan knew that neither Adrenaclick nor Auvi-Q could raise prices to inflate their margins sufficiently to offer rebates or discounts similar to those Mylan was offering to PBMs.

Defendants' Pricing Scheme

Plaintiffs allege defendants implemented a pricing scheme that defrauded U.S. consumers into paying an inflated price for the EpiPen—one that climbed by more than 500%, in nine years. Plaintiffs assert that defendants' exclusionary pricing scheme deprives patients of a fair price for EAI devices—the price that would result from normal market forces. They describe the pricing scheme this way: Mylan, instead of lowering its prices to gain market share, bargains for market share by providing ever-larger rebates and other kickbacks to PBMs, conditioned on exclusive relationships with those PBMs. Mylan can place itself on the drug formularies by using its monopoly power to charge consumers higher prices for its product. It then can share these revenues with the PBMs (the ones who create the formularies) through substantially enhanced rebates conditioned on excluding insurance coverage for rival products. This conduct, in turn, inflates the prices that consumers pay for **[*33]** the EpiPen so that Mylan can preserve its net realized price and sales volumes. Plaintiffs contend that the net effect of this scheme harms both consumers and competitors alike.

Mylan primarily is a generics pharmaceutical company that makes low margins on drug sales. But the EpiPen, a specialty branded drug, represented a unique and highly profitable revenue stream for Mylan. Plaintiffs assert that Mylan CEO Heather Bresch and other executives recognized this opportunity and decided to exploit the EpiPen to generate billions of dollars in revenue. One of the ways defendants allegedly implemented their pricing scheme was to change the way Mylan sold the EpiPen.

On August 24, 2011, Mylan announced that it no longer would sell individual EpiPens in the United States. Instead, Mylan began selling EpiPens in just one kind of packaging—the EpiPen 2-Pak. This configuration forced U.S. consumers to purchase EpiPens in pairs. Plaintiffs refer to this change as the "hard switch," and allege that it forced consumers and third-party payors to overpay for the EpiPen 2-Pak because the switch effectively doubled the EpiPen's price. While Mylan asserts a medical necessity supported the switch, plaintiffs **[*34]** contend nothing changed in 2011 that required Mylan to sell the EpiPen in a 2-Pak. Moreover, Mylan continued selling EpiPens individually in every other country where Mylan markets the product.[3]

Beginning in 2011, Mylan began raising the EpiPen's price while forcing customers to buy EpiPens in the 2-Pak. In October 2011, Mylan increased the price of an EpiPen 2-Pak to $181. And by May 2016, the price of an EpiPen 2-Pak had jumped to $608.

According to plaintiffs, Mylan developed and implemented a pricing scheme to monopolize the EAI market. This scheme, plaintiffs allege, used a variety of tactics. They included spreading false and misleading information and omitting material information. Plaintiffs contend defendants and the PBMs distracted consumers and regulators from the reality that Mylan was raising the price of the EpiPen from $100 to $600 by launching a campaign of false and misleading statements and actions. These statements and actions include: (a) distributing misinformation about Auvi-Q intended to undermine the FDA's conclusion that Auvi-Q had demonstrated bioequivalence to the epinephrine in the EpiPen; (b) paying formularies to exclude Auvi-Q from coverage, while telling **[*35]** physicians about the exclusion and suggesting the decision was based on clinical recommendations, rather than large, conditional rebate offers; and (c) issuing a fraudulent and misleading press release about the "hard switch" to the 2-

[3] The lone exception is France, where Mylan also sells the EpiPen in just one packaging format: the 2-Pak.

Pak that included erroneous medical claims. Plaintiffs also contend that Mylan CEO Heather Bresch testified untruthfully in a Congressional hearing on September 21, 2016. Specifically, they assert, Ms. Bresch misrepresented that: (a) Mylan's profit on the EpiPen as $50 per device when its profits were reportedly 60% higher than that amount; (b) the investment Mylan had made in EpiPen as $1 billion (when Mylan, in fact, had acquired the EpiPen in 2007 without incurring any research and development expenses); (c) Mylan had reduced U.S. healthcare costs by about $180 billion; and (d) 85% of EpiPen patients pay less than $100 for a 2-Pak and a majority pay less than $50.

Patent Infringement Lawsuits

The Pfizer defendants own the patents protecting the EpiPen and serve as contract supplier of the product. The Mylan defendants own the trademarked brand names and control the worldwide marketing and sale of the product. Together, plaintiffs assert, defendants have **[*36]** a unified interest in protecting the EpiPen's alleged monopoly. To that end, defendants allegedly added patents to the already-patented EpiPen to stop generic competitors. For instance, on September 14, 2010, Meridian (a Pfizer subsidiary) secured U.S. Patent No. 7,794,432, just three weeks before Intelliject submitted a New Drug Application ("NDA") to the FDA for Auvi-Q.

Defendants also filed patent infringement lawsuits against two generic EpiPen rivals—Teva and Intelliject—and then entered into settlements with these impending generic manufacturers which, plaintiffs assert, were anticompetitive.[4] In December 2008, Teva filed an Abbreviated New Drug Application ("ANDA") seeking FDA approval to market a generic EpiPen. In August 2009, Pfizer's subsidiaries, King and Meridian, sued Teva for infringing U.S. Patent No. 7,449,012 ("the Teva patent litigation"). In November 2010, King and Meridian filed a First Amended Complaint that included a claim for infringing the newly secured '432 patent. Later, King and Meridian dropped their claims based on the '012 patent, leaving only the infringement claims for the '432 patent. On April 27, 2012, the parties settled the Teva patent litigation. According to plaintiffs, defendants and Teva entered into an unlawful settlement **[*37]** agreement requiring Teva to delay launching its generic EAI for three years—until June 22, 2015—in exchange for defendants providing significant consideration, incentives, and benefits to Teva. Plaintiffs allege the settlement included a substantial "reverse payment" from defendants to Teva to convince Teva to delay bringing its competing product to market. Plaintiffs offer expert testimony from Prof. Andrew K. Torrance about (a) Teva's likelihood of success in the Teva patent litigation, and (b) the costs and duration of that litigation had the parties not settled it.

Defendants also initiated another patent lawsuit against Intelliject, the inventor of Auvi-Q, when Intelliject sought FDA approval for its competing EAI. On January 11, 2011, King filed suit against Intelliject seeking to block FDA approval of Intelliject's NDA for the product that later became known as Auvi-Q. On August 1, 2011, the FDA announced that it was giving Intelliject's EAI "tentative final approval," pending resolution of the patent litigation King had filed. Doc. 1500 at 33. Six months later, the parties announced that they had settled the Intelliject litigation, with Mylan making the announcement jointly **[*38]** for itself and Pfizer. The settlement included an agreement by Intelliject and Sanofi not to enter the EAI market until November 15, 2012, in exchange for valuable consideration. Plaintiffs allege that defendants, through the Intelliject patent litigation, forestalled competition that Intelliject's competing device would have presented for nearly two years.

II. Procedural History

On August 20, 2018, the court granted in part and denied in part defendants' motions to dismiss the Class Complaint (Doc. 896). The court directed the parties to conduct coordinated discovery for both the consumer class cases and the Sanofi case, followed by dispositive motions in the Sanofi case and a motion for class certification in the consumer class cases. Class plaintiffs now have moved for class certification (Doc. 1353). In response, the

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[4] The Class Complaint also describes patent litigation with Sandoz, but plaintiffs do not include any allegations about that litigation in their certification motion.

Mylan defendants filed an opposition to class plaintiffs' motion (Doc. 1636, Doc. 1834 (sealed)), as did the Pfizer defendants (Doc. 1841).[5] Class plaintiffs filed a reply memorandum supporting their motion for class certification (Doc. 1837, Doc. 1839 (sealed)). On June 11 and 12, 2019, the court conducted a hearing on the class certification motion and took it under **[*39]** advisement.

After briefing on plaintiff's Motion for Class Certification had closed, defendants filed a Motion for Leave to File a Sur-reply. Doc. 1574. Defendants assert that plaintiffs improperly presented two new arguments in their Reply to the Motion for Class Certification. Specifically, defendants assert that the Reply raised new arguments about Prof. Rosenthal's probability analysis and the collateral source rule. Defendants thus ask the court for leave to file a Sur-reply to address these two arguments. Defendants have attached their purposed Sur-reply to their motion (Doc. 1574-1).

Plaintiffs respond that defendants' Motion for Leave to File a Sur-reply is baseless. Plaintiffs contend they properly offered their arguments about the collateral source rule and Prof. Rosenthal's probability analysis to respond to arguments defendants had raised in their response brief opposing class certification. Hedging their bets, plaintiffs say they don't oppose defendants' Motion for Leave to File a Sur-reply, so long as the court allows them to file a short response to defendants' arguments in the Sur-reply. Plaintiffs have submitted their proposed response to defendants' Sur-reply as an **[*40]** attachment to their Response (Doc. 1579-1). And, plaintiffs contend, they should have the last word on their Motion for Class Certification because they are the moving party.

HN1[] The court's local rules limit briefing on motions to the motion, a memorandum in support, a response, and a reply. D. Kan. Rule 7.1(a) & (c). "Surreplies are typically not allowed." *Taylor v. Sebelius, 350 F. Supp. 2d 888, 900 (D. Kan. 2004)*, *aff'd on other grounds*, *189 F. App'x 752 (10th Cir. 2006)*. Instead, sur-replies are permitted only with leave of court under "rare circumstances." *Humphries v. Williams Nat. Gas Co., No. 96-4196-SAC, 1998 U.S. Dist. LEXIS 21196, 1998 WL 982903, at *1 (D. Kan. Sept. 23, 1998)* (citations omitted). For example, when a moving party raises new material for the first time in a reply, the district court has discretion to grant leave to file a sur-reply to afford the opposing party an opportunity to respond to the new material. *Green v. New Mexico, 420 F.3d 1189, 1196 (10th Cir. 2005)*; *Doebele v. Sprint/United Mgmt. Co., 342 F.3d 1117, 1139 n.13 (10th Cir. 2003)*. The rules limiting sur-replies "are not only fair and reasonable, but they assist the court in defining when briefed matters are finally submitted and in minimizing the battles over which side should have the last word." *Humphries, 1998 U.S. Dist. LEXIS 21196, 1998 WL 982903, at *1*.

Here, the court concludes that plaintiffs' Reply didn't improperly assert new arguments. As plaintiffs explain, they presented arguments about the collateral source rule and Prof. Rosenthal's probability analysis in direct response to defendants' arguments opposing **[*41]** class certification. Specifically, defendants' Opposition to class certification argued that the court should not certify plaintiffs' putative classes because the proposed definitions include uninjured class members—for example, consumers who used a co-pay to purchase their EpiPens. In their Reply, plaintiffs responded that the collateral source rule bars this argument because that rule requires the court to exclude evidence of payments from a third-party (such as an insurer) that would reduce a tortfeasor's liability. Doc. 1837 at 14. Also, plaintiffs cited a probability analysis that Prof. Rosenthal presented in her rebuttal report to show that the number of uninjured class plaintiffs in each class is *de minimis. Id.* at 19-22. It was proper for plaintiffs to assert these arguments in their Reply because they responded directly to assertions in defendants' Opposition claiming that the proposed classes include uninjured class members.

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[5] In their brief, the Pfizer defendants join the arguments in the Mylan defendants' brief, but they also separately argue two other issues. So, arguments made by the Mylan defendants are also attributable to the Pfizer defendants. For ease, the court refers to arguments asserted by the Mylan defendants as ones asserted by Mylan. And it refers to arguments asserted separately by the Pfizer defendants as ones asserted by Pfizer. Also, this Order generally identifies which party made an argument or asserted a position. If neither defendant has addressed an issue that applies to both Mylan and Pfizer, the court notes that defendants have not addressed the issue.

Yet, it is equally true that these two arguments are "new" in the sense they don't appear in the class certification briefing until the Reply. And, the court finds the parties' additional submissions helpful to the court's consideration of the difficult issues raised **[*42]** in the class certification briefing.

While this court limits sur-replies and such to "rare circumstances," *Humphries, 1998 U.S. Dist. LEXIS 21196, 1998 WL 982903, at *1*, there's nothing ordinary about this case or this certification motion. The rare circumstances presented in this case warrant granting leave for a sur-reply. Exercising its discretion, the court grants defendants' Motion for Leave to File a Sur-reply (Doc. 1574). Also, the court grants plaintiffs' request to file a response to defendants' Sur-reply. The court will consider the arguments presented by defendants' Sur-reply (Doc. 1574-1) and plaintiffs' Response (Doc. 1579-1) in its analysis, below.

III. Legal Standard

HN2[] "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)* (quoting *Califano v. Yamasaki, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979))*. The court has considerable discretion when deciding whether to certify a class action. *Tabor v. Hilti, Inc., 703 F.3d 1206, 1227 (10th Cir. 2013)* (because class certification involves "intensely practical considerations," decision rests within trial court's discretion (citation and internal quotation marks omitted)). But when exercising this discretion, district courts must conduct a "rigorous analysis" and decide whether the putative class satisfies the requirements of *Federal Rule of Civil Procedure 23*. *Comcast, 569 U.S. at 33* (citation **[*43]** and internal quotation marks omitted); *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350-51, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*.

HN3[] The elements of the class certification standard are (1) numerosity, (2) commonality, (3) typicality, and (4) adequate representation, plus one of the requirements established by *Rule 23(b)(1)*, *(b)(2)*, or *(b)(3)*. *See* *Fed. R. Civ. P. 23(a)-(b)*. Here, plaintiffs seek certification under *Rules 23(b)(2)* and *(3)*. ***HN4***[] *Rule 23(b)(2)* applies when "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Rule 23(b)(3)*-based motions require plaintiffs to demonstrate that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

HN5[] *Rule 23* "'does not set forth a mere pleading standard.'" *Comcast, 569 U.S. at 33* (quoting *Dukes, 564 U.S. at 350*). As the party requesting class certification, plaintiffs bear the burden of "'affirmatively demonstrat[ing]'" compliance with the rule's requirements. *Id.* (quoting *Dukes, 564 U.S. at 350*). Plaintiffs "must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Dukes, 564 U.S. at 350*. When deciding whether plaintiffs have met their burden, the court "must accept the substantive allegations of the complaint as true," but it **[*44]** cannot "'blindly rely on conclusory allegations which parrot *Rule 23*.'" *Shook v. El Paso Cty., 386 F.3d 963, 968 (10th Cir. 2004)* (quoting *J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1290 n.7 (10th Cir. 1999))*. The court "is not limited to the pleadings but may 'probe behind the pleadings' and examine the facts and evidence in the case." *Tabor, 703 F.3d at 1227-28* (quoting *Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982))*; *see also* *Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011)* (rigorous analysis requires evaluations about persuasiveness of evidence). "[A]ctual, not presumed, conformance with *Rule 23(a)*" is required. *Falcon, 457 U.S. at 160*.

HN6[] The court's "rigorous analysis" "[f]requently . . . will entail some overlap with the merits of the plaintiff's underlying claim." *Dukes, 564 U.S. at 351*. But the careful examination and rigorous analysis requirements do not authorize mini-trials to determinine whether the class, if certified, actually could prevail on the merits of their claims. *See* *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 465-66, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)*; *Dukes, 564 U.S. at 351 n.6*. "*Rule 23* grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen, 568 U.S. at 466*. Rather, "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the *Rule 23* prerequisites for class certification are satisfied." *Id.*

IV. Discussion

A. Proposed Class Definitions

HN7[] "Defining the class is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled under *Rule 23(c)(2)* to the 'best **[*45]** notice practicable' in a *Rule 23(b)(3)* action." *Sibley v. Sprint Nextel Corp., 254 F.R.D. 662, 670 (D. Kan. 2008)* (quoting *Manual for Complex Litigation* § 21.222 (4th ed. 2004)). Thus, "[t]he [class] definition must be precise, objective and presently ascertainable." *Id.*

Class plaintiffs ask the court to certify five classes. They are:

> **1. Nationwide Injunctive Relief Class ("Injunctive Class")**. All persons and entities in the United States who paid or provided reimbursement for some or all of the purchase price of Branded or authorized generic[6] EpiPens for the purpose of consumption, and not resale, by themselves, their family member(s), insureds, plan participants, employees, or beneficiaries, at any time from August 24, 2011, until the effects of defendants' unlawful conduct cease.[7]
>
> **2. Nationwide RICO Damages Class ("RICO Class")**. The proposed nationwide RICO Class is coterminous with the Injunctive Class.
>
> **3. State Antitrust Damages Class ("State Antitrust Class")**. All persons and entities in the Antitrust States[8] who paid or provided reimbursement for some or all of the purchase price of Branded EpiPens at any time from January 28, 2013, until the effects of defendants' unlawful conduct cease, for the purpose of consumption, and not resale, by themselves, their **[*46]** family member(s), insureds, plan participants, employees, or beneficiaries.

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[6] Class plaintiffs' original definition for classes 1, 2, and 5 contained the phrase "Branded or AB-rated" EpiPens instead of "Branded or authorized generic EpiPens." An AB-rated device is one the U.S. Food and Drug Administration (FDA) rates as therapeutically equivalent to the brand device. U.S. FOOD & DRUG ADMIN., APPROVED DRUG PRODUCTS WITH THERAPEUTIC EQUIVALENCE EVALUATIONS xvi (2019), https://www.fda.gov/media/71474/download. An authorized generic is an approved brand-name drug that is marketed without the brand name on its label, either by the brand name drug company or another company with the brand company's permission. *FDA List of Authorized Generic Drugs*, U.S. Food & Drug Admin., https://www.fda.gov/drugs/abbreviated-new-drug-application-anda/fda-list-authorized-generic-drugs (last updated Dec. 19, 2019). Plaintiffs' first version of the proposed definitions seemed to include a mistake because the only AB-rated product available during the defined period is one manufactured by Teva Pharmaceuticals. Plaintiffs report they never intended purchasers of that product to qualify as members of any putative class. And, in their Reply, plaintiffs explain that "reference in the class definitions to 'AB-rated generic EpiPens' should be changed to 'authorized generic EpiPens.'" Doc. 1837 at 13 n.6. Consistent with plaintiffs' request, the court makes this change to the class definitions.

[7] During the hearing on class certification, class plaintiffs' counsel suggested that "until the effects of Defendants' unlawful conduct cease" should refer to the date when class notice is given. Doc. 1789 at 133 (Tr. of Mot. Hr'g Class Certification — Phase II 133:17-18).

[8] Plaintiffs define the "Antitrust States" as: Alabama, Arizona, California, the District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin. As discussed below, even if class certification is warranted under *Rule 23*, plaintiffs cannot assert class action claims under some of these state laws because no named plaintiff resides in the particular state.

4. Consumer Protection Damages Class ("CP Class"). All persons and entities in the Consumer Protection States[9] who paid or provided reimbursement for some or all of the purchase price of Branded EpiPens at any time from August 24, 2011, until the effects of defendants' unlawful conduct cease, for the purpose of consumption, and not resale, by themselves, their family member(s), insureds, plan participants, employees, or beneficiaries.

5. Unjust Enrichment Class ("UE Class"). All persons and entities in the Unjust Enrichment States[10] who paid or provided reimbursement for some or all of the purchase price of Branded or authorized generic EpiPens for the purpose of consumption, and not resale, by themselves, their family member(s), insureds, plan participants, employees, or beneficiaries, at any time from August 24, 2011, until the effects of defendants' unlawful conduct cease.

1. Nationwide Injunctive Relief Class ("Injunctive Class"). All persons and entities in the United States who paid or provided reimbursement for some or all of the purchase price of Branded or authorized generic[6] EpiPens for the purpose of consumption, and not resale, by themselves, their family member(s), insureds, plan participants, employees, or beneficiaries, at any time from August 24, 2011, until the effects of defendants' unlawful conduct cease.[7]

2. Nationwide RICO Damages Class ("RICO Class"). The proposed nationwide RICO Class is coterminous with the Injunctive Class.

3. State Antitrust Damages Class ("State Antitrust Class"). All persons and entities in the Antitrust States[8] who paid or provided reimbursement for some or all of the purchase price of Branded EpiPens at any time from

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[9] Plaintiffs define the "Consumer Protection States" as: Alaska, California, Connecticut, the District of Columbia, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, Vermont, Washington, and West Virginia. As discussed below, even if class certification is warranted under *Rule 23*, plaintiffs cannot assert class action claims under some of these state laws because no named plaintiff resides in the particular state.

[10] Class plaintiffs assert all 50 states are "Unjust Enrichment States." If one of the other remedies eventually provides a remedy at law, class plaintiffs intend to exclude Arizona, Delaware, Louisiana, and North Dakota from this class.

[6] Class plaintiffs' original definition for classes 1, 2, and 5 contained the phrase "Branded or AB-rated" EpiPens instead of "Branded or authorized generic EpiPens." An AB-rated device is one the U.S. Food and Drug Administration (FDA) rates as therapeutically equivalent to the brand device. U.S. FOOD & DRUG ADMIN., APPROVED DRUG PRODUCTS WITH THERAPEUTIC EQUIVALENCE EVALUATIONS xvi (2019), https://www.fda.gov/media/71474/download. An authorized generic is an approved brand-name drug that is marketed without the brand name on its label, either by the brand name drug company or another company with the brand company's permission. *FDA List of Authorized Generic Drugs*, U.S. Food & Drug Admin., https://www.fda.gov/drugs/abbreviated-new-drug-application-anda/fda-list-authorized-generic-drugs (last updated Dec. 19, 2019). Plaintiffs' first version of the proposed definitions seemed to include a mistake because the only AB-rated product available during the defined period is one manufactured by Teva Pharmaceuticals. Plaintiffs report they never intended purchasers of that product to qualify as members of any putative class. And, in their Reply, plaintiffs explain that "reference in the class definitions to 'AB-rated generic EpiPens' should be changed to 'authorized generic EpiPens.'" Doc. 1837 at 13 n.6. Consistent with plaintiffs' request, the court makes this change to the class definitions.

[7] During the hearing on class certification, class plaintiffs' counsel suggested that "until the effects of Defendants' unlawful conduct cease" should refer to the date when class notice is given. Doc. 1789 at 133 (Tr. of Mot. Hr'g Class Certification — Phase II 133:17-18).

[8] Plaintiffs define the "Antitrust States" as: Alabama, Arizona, California, the District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin. As discussed below, even if class certification is warranted under *Rule 23*, plaintiffs cannot assert class action claims under some of these state laws because no named plaintiff resides in the particular state.

January 28, 2013, until the effects of defendants' unlawful conduct cease, for the purpose of consumption, and not resale, by themselves, their family member(s), insureds, plan participants, employees, or beneficiaries.

4. Consumer Protection Damages Class ("CP Class"). All persons and entities in the Consumer Protection States[9] who paid or provided reimbursement for some or all of the purchase price of Branded EpiPens at any time from August 24, 2011, until the effects of defendants' unlawful conduct cease, for the purpose of consumption, and not resale, by themselves, their family member(s), insureds, plan participants, employees, or beneficiaries.

5. Unjust Enrichment Class ("UE Class"). All persons and entities in the Unjust Enrichment States[10] who paid or provided reimbursement for some or all of the purchase price of Branded or authorized generic EpiPens for the purpose of consumption, and not resale, by themselves, their family member(s), insureds, plan participants, employees, or beneficiaries, at any time from August 24, 2011, until the effects of defendants' unlawful conduct cease.

B. Proposed Class Exclusions

Plaintiffs' motion lists the following groups as ones who are excluded from each of the classes:

(a) Defendants and their officers, directors, management, employees, subsidiaries, and affiliates;

(b) Government entities, **[*47]** other than government-funded employee benefit plans;

(c) Fully insured health plans (*i.e.*, plans that purchased insurance that covered 100% of the plan's reimbursement obligations to its members);

(d) "Single flat co-pay" consumers who purchased EpiPens or generic EpiPens only via a fixed dollar co-payment that is the same for all covered devices, whether branded or generic (*e.g.*, $20 for all branded and generic devices);

(e) Consumers who purchased or received EpiPens or authorized generic equivalents only through a Medicaid program;

(f) All persons or entities who purchased branded or generic EpiPens directly from defendants; and

(g) The judges in this case and members of their immediate families.

Also, at oral argument on the certification motion, plaintiffs conceded that the classes should exclude another group of entities. Specifically, the court raised concern about including "third-party payors who in effect run their own PBMs." Doc. 1789 at 27 (Tr. of Mot. Hr'g Class Certification — Phase II 27:13-16). Plaintiffs conceded that these "separate entities [who] fill the PBM role . . . should still be excluded from the class[es]." *Id. at 27-28* (Tr. of Mot. Hr'g Class Certification — Phase II 27:17-28:4). **[*48]** To the extent plaintiffs seek to limit this exclusion to the PBMs themselves,[11] the court broadens the exclusion to include third-party payors who own or otherwise function

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[9] Plaintiffs define the "Consumer Protection States" as: Alaska, California, Connecticut, the District of Columbia, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, Vermont, Washington, and West Virginia. As discussed below, even if class certification is warranted under *Rule 23*, plaintiffs cannot assert class action claims under some of these state laws because no named plaintiff resides in the particular state.

[10] Class plaintiffs assert all 50 states are "Unjust Enrichment States." If one of the other remedies eventually provides a remedy at law, class plaintiffs intend to exclude Arizona, Delaware, Louisiana, and North Dakota from this class.

[11] The following exchange between the court and plaintiffs' counsel occurred at oral argument:

as a PBM or control an entity who functions as a PBM. This exclusion is needed to avoid the potential conflict that otherwise could arise by including entities in the classes who allegedly sustained harm from defendants' conduct but who also, allegedly, benefited from defendants' exclusive dealing arrangements.

In their reply brief, plaintiffs offer another exclusion to the class definitions, if necessary. Doc. 1837 at 23. Plaintiffs assert that this exclusion would address the issue of including potential "uninjured class members" in the classes. The proposed exclusion excludes from each class definition individual consumers whose only purchases of an EpiPen occurred before March 13, 2014 (the "Generic Start Date").[12] To avoid the potential that a class would include **[*49]** a great number of members who sustained no injury, the court adds this exclusion to the class definitions. The court more fully explains the reasons for this additional exclusion to the class definitions in Part IV.E.2.b.i., below.

The case authorities permit the court to refine the class definitions. ***HN8***[] "A court is not bound by the class definition proposed in the complaint and should not dismiss the action simply because the complaint seeks to define the class too broadly." *Robidoux v. Celani, 987 F.2d 931, 937 (2d Cir. 1993)*; *see also* *In re Monumental Life Ins. Co., 365 F.3d 408, 414 (5th Cir. 2004)* ("[H]olding plaintiffs to the plain language of their definition would ignore the ongoing refinement and give-and-take inherent in class action litigation, particularly in the formation of a workable class definition."); *Sibley v. Sprint Nextel Corp., 254 F.R.D. 662, 671 (D. Kan. 2008)* ("If the class definition should require tailoring as the litigation progresses, the Court and parties are authorized to do so." (citing *Fed. R. Civ. P. 23(c)(1)*, *(d)*)).

Plaintiffs also ask the court to select the named plaintiffs as class representatives. For the damages classes, Mylan opposes this request to an extent. It argues certain named plaintiffs are uninjured and are, therefore, inadequate class representatives. The court will address this issue in its analysis of *Rule 23(b)(3)*'s requirement of typicality, below. **[*50]** *See infra* Part IV.D.3.b.

Finally, plaintiffs ask the court to appoint Warren T. Burns, Paul J. Geller, Lynn Lincoln Sarko, and Rex Sharp as co-class counsel for class plaintiffs. Mylan does not question the experience of plaintiffs' counsel. But asserts, albeit in conclusory fashion, that it is inappropriate to have the same counsel represent plaintiffs with different theories of injury and competing damages claims. The court will address the request to appoint class counsel at the conclusion of this Order, in Part VI.

C. Class Certification under *Rule 23*

HN9[] Plaintiffs seeking to certify a class under *Rule 23* must first satisfy *Rule 23(a)*'s prerequisites of numerosity, commonality, typicality, and adequacy of representation, along with the elements for one of the three types of class actions described in *Rule 23(b)*. As referenced above, class plaintiffs here seek to certify four classes under *Rule 23(b)(3)* and one class for injunctive relief under *Rule 23(b)(2)*. Mylan argues, that in addition to these explicit requirements, *Rule 23* also requires ascertainable classes. In other words, Mylan contends, class plaintiffs must demonstrate the definition of each putative class is sufficiently definite to allow the court to ascertain class

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> THE COURT: You lost me. Those—you're talking about now CVS and—what was the other one—Humana? They should be excluded?
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> MR. BURNS: Their PBMs should be.
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> THE COURT: They should be but third-party payors should not?
>
> MR. BURNS: Right. Third-party payors should not.

Doc. 1789 at 28 (Tr. of Mot. Hr'g Class Certification — Phase II 28:11-18).

[12] March 13, 2014 is the date class plaintiffs refer to as the "Generic Start Date," arrived at by their experts as the date when a generic device would have entered the EAI market but for defendants' allegedly anticompetitive behavior. Plaintiffs concede that subsequent discovery may shift this date forward in time, *i.e.* later than March 2014.

membership. Mylan also **[*51]** argues that plaintiffs have ignored the ascertainability requirement. And, their failure to address ascertainability, Mylan contends, requires the court to reject plaintiffs' motion altogether. The court thus begins its analysis of the certification motion by considering whether plaintiffs must satisfy an ascertainability requirement as a prerequisite to certification.

1. Ascertainability

It is unsettled whether ascertainability is a separate and distinct requirement for class certification under *Rule 23(b)(3)*. ***HN10***[] Some courts, including the Third Circuit, have held that "[t]he predominance and ascertainability inquiries are distinct[.]" *Byrd v. Aaron's Inc., 784 F.3d 154, 164 (3d Cir. 2015)*; *see also* *Brecher v. Republic of Argentina, 806 F.3d 22, 24 (2d Cir. 2015)* (recognizing an implied requirement of ascertainability that is "distinct from predominance"). The Third Circuit has explained how the two inquires differ: "'[T]he ascertainability requirement focuses on whether individuals fitting the class definition may be identified without resort to mini-trials, whereas the predominance requirement focuses on whether essential elements of the class's claims can be proven at trial with common, as opposed to individualized, evidence.'" *Id.* (quoting *Grandalski v. Quest Diagnostics Inc., 767 F.3d 175, 184 (3d Cir. 2014))*. Thus, courts in the Third Circuit have concluded that "[a]scertainability **[*52]** should not be conflated with other *Rule 23* requirements, such as the predominance requirement of *Rule 23(b)(3)*." *In re Wellbutrin XL Antitrust Litig., 308 F.R.D. 134, 147 (E.D. Pa. 2015)*; *see also* *In re Thalomid and Revlimid Antitrust Litig., No. 14-6997, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *18 (D.N.J. Oct. 30, 2018)* ("Ascertainability should not be conflated with the predominance requirement.").

The Third Circuit requires a class movant to demonstrate ascertainability by: (1) showing the class is "defined with reference to objective criteria," and (2) providing "some assurance that there can be a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Byrd, 784 F.3d at 164-65* (citation and internal quotation marks omitted); *see also* *Brecher, 806 F.3d at 24* (clarifying that the Second Circuit's test for ascertainability asks "whether the class is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member" (citation and internal quotation marks omitted)).

In contrast, other Circuits conclude that *Rule 23(b)(3)* includes an implied requirement of ascertainability, but they have rejected the Third Circuit's "administrative feasibility" standard for determining ascertainability. These Circuits apply a less stringent test. *See* *Mullins v. Direct Dig., LLC, 795 F.3d 654, 657, 662-72 (7th Cir. 2015)* (recognizing "an implicit requirement under *Rule 23*" to establish ascertainability but rejecting **[*53]** the "heightened ascertainability requirement" imposed by the Third Circuit); *see also* *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., 821 F.3d 992, 996 (8th Cir. 2016)* (discussing criticism of the Third Circuit's standard and refusing to install "a separate, preliminary [ascertainability] requirement"); *Rikos v. Procter & Gamble Co., 799 F.3d 497, 525 (6th Cir. 2015)* ("We see no reason to follow [the Third Circuit's ascertainability standard], particularly given the strong criticism it has attracted from other courts.").

Here, Mylan begins its ascertainability argument by contending the class definitions for the injunction, RICO, and unjust enrichment classes are defective because they include consumers and entities who purchased or reimbursed Teva's generic EAI. Recognizing this error, plaintiffs have suggested the substitution of "AB-rated" with "authorized generic" in those class definitions, as discussed *supra* in footnote 6. The court is satisfied that the substituted language cures Mylan's threshold issue.

Returning to the broader ascertainability debate, the court has found no Tenth Circuit case that specifically addresses whether ascertainability is a separate requirement under *Rule 23(b)(3)*.[13] But the most recent class

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[13] The court recognizes that the Tenth Circuit has held that an ascertainability requirement does not apply to certification under *Rule 23(b)(2)*. *See* *Shook v. El Paso Cty., 386 F.3d 963, (10th Cir. 2004)* (noting the *Rule 23(b)(2)* is "well suited for cases where the composition of a class is *not* readily ascertainable (emphasis added)). But the court has found no case discussing whether an ascertainability requirement applies to *Rule 23(b)(3)* cases.

action case from our Circuit includes a footnote acknowledging that the defendant there had asserted Rule 23 includes an implied **[*54]** requirement of ascertainability. *See* Naylor Farms, Inc. v. Chaparral Energy, LLC, 923 F.3d 779, 788 n.9 (10th Cir. 2019) ("[Defendant] asserts that Rule 23 includes an implied requirement of ascertainability and that [plaintiff] cannot satisfy this implied requirement here." (citations and internal quotation marks omitted)). The Circuit did not address this argument though, because defendant could not show it had raised the issue to the district court. *Id.* (declining to address the ascertainability argument because defendant "fails to 'cite the precise references in the record where' this ascertainability argument 'was raised and ruled on' below" and "also fails to make a case for plain error on appeal" (quoting *10th Cir. Rule 28.1(A)*)).

In contrast, this court explicitly considered whether ascertainability is an independent requisite for class certification. *See*,In re Syngenta AG MIR 162 Corn Litig., No. 14-md-2591-JWL, 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *2-3 (D. Kan. Sept. 26, 2016). The defendants in that case argued that the putative class proposed by plaintiffs was not sufficiently ascertainable. 2016 U.S. Dist. LEXIS 132549, [WL] at *2. Finding no answer in Tenth Circuit decisions, Judge Lungstrum summarized the holdings from other circuits, most of which have imposed a requirement that the proposed class be readily identifiable. *Id.* (citing Sandusky Wellness Ctr., 821 F.3d at 995 (collecting cases)). Also, Judge **[*55]** Lungstrum recognized that "[a] few circuit courts have applied a stricter standard of ascertainability, by which the plaintiff must show not only that the class is defined by reference to objective criteria, but also that class members may be determined in an economical and 'administratively feasible manner,' such that 'class members can be identified without extensive and individualized fact-finding or mini-trials.'" *Id.* (first quoting Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013); then citing Brecher v. Republic of Argentina, 806 F.3d 22, 24 (2d Cir. 2015); and then citing Karhu v. Vital Pharms., Inc., 621 F. App'x 945, 947 (11th Cir. 2015)). But, Judge Lungstrum also noted, "[o]ther courts have criticized and rejected such a heightened standard for ascertainability." *Id.* (first citing Mullins v. Direct Dig., LLC, 795 F.3d 654, 659-72 (7th Cir. 2015); then citing Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., 821 F.3d 992, 996 (8th Cir. 2016); and then citing Rikos v. Procter & Gamble Co., 799 F.3d 497, 525 (6th Cir. 2015)).

In the end, Judge Lungstrum was persuaded by the Seventh Circuit's "thorough and well-reasoned analysis" in *Mullins*. 2016 U.S. Dist. LEXIS 132549, [WL] at *3. *Mullins* had rejected a strict standard requiring an administratively feasible mechanism for identifying class members. 2016 U.S. Dist. LEXIS 132549, [WL] at *2 (citing *Mullin*s, 795 F.3d at 662). Specifically, Judge Lungstrum was persuaded that a stricter view of ascertainability furthers no interest not already protected by Rule 23's explicit requirements, nor is it necessary to prevent unfairness to absent class members. *Id.* (citing Mullins, 795 F.3d at 662-72). Moreover, Judge Lungstrum recognized that the Seventh Circuit **[*56]** had concluded that the risk of fraudulent claims is low, and applying a lower standard does not deny the defendant due process. *Id.* (citing Mullins, 795 F.3d at 665-72).

After coming to this conclusion, Judge Lungstrum applied the Seventh Circuit's "'weak' version of ascertainability." 2016 U.S. Dist. LEXIS 132549, [WL] at *2-3. ***HN11***[] This test requires that "the class definition must not be too vague, the class must not be defined by subjective criteria, and the class must not be defined in terms of success on the merits." 2016 U.S. Dist. LEXIS 132549, [WL] at *2 (citing Mullins, 795 F.3d at 659-60). And, he concluded, the proposed class definitions in *Syngenta* satisfied the ascertainability requirement because they were "sufficiently definite and objective." 2016 U.S. Dist. LEXIS 132549, [WL] at *3-4.

The court concurs with Judge Lungstrum's conclusions. It thus predicts that the Tenth Circuit, if confronted with this question, would decline to recognize ascertainability as a separate, unstated requirement of Rule 23 requiring certification movants to satisfy the more stringent ascertainability standard adopted by the Third Circuit. Instead, the

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Quoting four words from In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litig., 790 F.3d 1112, 1118 (10th Cir. 2015), Mylan suggests they demonstrate that the Tenth Circuit requires ascertainability. Doc. 1636 at 63. But the phrase "establishing an ascertainable class" appears in a sentence where the court is criticizing plaintiffs for belatedly moving to compel arbitration until after the class was certified. Whether the class should have been certified, and whether it was sufficiently ascertainable, was not at issue in that case. So, the court doesn't view *Cox Enterprises* the same way Mylan does.

court predicts that our Circuit would follow the Seventh Circuit's approach, applying the less restrictive ascertainability test on certification.[14]

Applying that standard to the class definitions here, the court concludes **[*57]** that they satisfy the *Mullins* criteria. Specifically, the class definitions are based on objective criteria—*i.e.*, each one defines a class member as a person or entity who paid part of the purchase price for an EpiPen during a specific date range. Also, the definitions aren't impermissibly vague, and they are not defined in terms of success on the merits.

Relying on the opinions of their expert, defendants assert that Prof. James Hughes concluded that none of the data found in the record allows plaintiffs to identify who meets the class definitions and exclusions. *See* Doc. 1636-4 at 30-40 (Hughes Expert Report ¶¶ 63-84). Thus, defendants argue, plaintiffs can't satisfy the ascertainability standard. But Prof. Hughes's opinions don't identify any ascertainability issues with third-party payors. Doc. 1837-12 at 9 (Hughes Dep. 113:7-114:1). And, as Prof. Hughes testified, to ascertain whether a person or entity qualifies as a class member, he must "demonstrate that [he] paid or provided reimbursement for some or all of the purchase price" of an EpiPen. *Id.* at 8 (Hughes Dep. 111:16-23). This criteria is sufficiently precise and objective to satisfy the Seventh Circuit's version of the ascertainability **[*58]** standard and, by extension, the standard the court predicts our Circuit would adopt.[15] Thus, the court finds that the proposed class definitions are sufficiently ascertainable.

2. Standing

For the most part, defendants concede that plaintiffs have standing. ***HN12***[] As our court has recognized, "as long as at least one plaintiff has standing with respect to each claim alleged . . . , it will satisfy the injury requirement of standing." *Roco, Inc. v. EOG Res., Inc., No. 14-1065-JAR-KMH, 2014 U.S. Dist. LEXIS 152203, 2014 WL 5430251,*

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[14] *But cf. Cline v. Sunoco, Inc. (R&M), 333 F.R.D. 676, 2019 WL 4879187, at *8-9 (E.D. Okla. Oct. 3, 2019)* (recognizing Tenth Circuit does not consider ascertainability a separate *Rule 23* factor but concluding that class definition must make class membership determination administratively feasible (citing *Carrera, 727 F.3d at 306-07*)).

[15] The court recognizes that Prof. Hughes's Report focuses on the data produced in the case and concludes that "[p]laintiffs have not provided a reliable methodology for identifying who is included or excluded from the class." Doc. 1636-4 at 30-31 (Hughes Expert Report ¶ 63). As discussed above, the court rejects defendants' assertion that plaintiffs must satisfy this heightened standard of ascertainability at certification. But, even if the court applied this heightened standard, plaintiffs assert that they can identify such class members using pharmacy and medical records. Indeed, plaintiffs' expert, Prof. Meredith Rosenthal, has identified various data that, she says, will allow plaintiffs to ascertain who qualifies as a class member. This information includes data from PBMs, pharmacy records, and individuals' own records documenting EpiPen purchases. Doc. 1711-1 at 15-16, 28-29 (Rosenthal Reply Report ¶¶ 20-21, 46-49). Other courts have noted that, in prescription medication cases, this kind of information makes it "fairly easy to identify potential class members through pharmacy and medical records." *Krueger v. Wyeth, Inc., No. 03CV2496 JAH (AJB), 2011 U.S. Dist. LEXIS 154478, 2011 WL 8984448, at *2-3 (S.D. Cal. July 13, 2011)*; *see also In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 214 F.R.D. 614, 619 (W.D. Wash. 2003)* (contrasting cases "involving . . . prescription medication verifiable by medical and pharmacy records" from the current case involving over-the-counter medication where "the process of simply identifying who rightfully belongs within the proposed class would entail a host of mini-trials"). Thus, even under a heightened ascertainability standard, plaintiffs have identified a viable method for identifying members of the classes.

In reaching this conclusion, the court recognizes that defendants have challenged Prof. Rosenthal's ascertainability opinions with a *Daubert* motion. By separate Order, the court denies defendants' motion, concluding that Prof. Rosenthal's opinions are sufficiently reliable for the court to consider on class certification. As discussed in that Order, defendants question whether the data identified by Prof. Rosenthal is capable of identifying class members or even if it still exists. The court recognizes that merits discovery may establish that these records can't discharge the task Prof. Rosenthal assigns to them (specifically, identifying consumers who paid nothing for EpiPens, those who used a flat co-pay, or individuals who paid cash for their EpiPens). But, for now, and on the current record, Prof. Rosenthal supplies a reasonably reliable and plausible method for identifying putative class members sufficient to respond to Prof. Hughes's criticisms.

at *3 (D. Kan. Oct. 24, 2014). But Mylan does challenge plaintiffs' standing in one important respect. It contends plaintiffs lack standing to assert state law claims for states where no named plaintiff resides.[16]

Plaintiffs respond, contending they have standing to bring 33 state-law claims because at least one named plaintiff lives in those 33 states. For the other states, plaintiffs cite *Roco*, and argue they are entitled to amend to add additional plaintiffs to cure standing issues for specific states where, currently, no named plaintiff reside. *See* 2014 U.S. Dist. LEXIS 152203, [WL] at *4, 6 (granting leave to amend to add additional plaintiff to fix standing issues). Mylan has the better of this issue. The court declines to certify a class claim for states **[*59]** lacking a named plaintiff to represent the classes. And, the court revises the class definitions to make appropriate exclusions for states where no named plaintiff resides.

Defendants also assert that plaintiffs have a standing problem because many named plaintiffs are uninjured under the legal theories at issue in the certification motion. And, defendants argue, the court cannot certify state law claims for states where th2014 U.S. Dist. LEXIS 152203, [WL] at *4, 6 (granting leave to amend to add additional plaintiff to fix standing issues). Mylan has the better of this issue. The court declines to certify a class claime only named representative is an uninjured plaintiff. The court addresses this argument in the typicality section below. *See infra* Part IV.D.3.b. As that section explains, the current record doesn't establish a standing problem for the named plaintiffs.

In sum, the court finds that plaintiffs have standing to assert their class action claims for states where at least one named plaintiff resides in the state. The court now turns to the Rule 23 requirements.

D. *Rule 23(a)* Requirements

The universal prerequisites for class certification are (1) numerosity, (2) commonality, (3) typicality, and (4) adequate representation. Fed. R. Civ. P. 23(a). They apply to every certification request made under Rule 23. *See* Fed. R. Civ. P. 23(b) ("A class action may be maintained if Rule 23(a) is satisfied *and* if" one of the requirements in Rule 23(b)(1), (b)(2), or (b)(3) is met (emphasis **[*60]** added)). The next four subsections consider these four requirements.

1. Numerosity

HN13[] To be certified, a proposed class must be so "numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Defendants do not contest this element, and for good reason. Plaintiffs assert there are hundreds of thousands of EpiPen users and millions of EpiPen devices are sold every year in the United States. Those numbers easily satisfy the numerosity requirement.[17]

2. Commonality

HN14[] Next, Rule 23 requires a court to find that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349-50, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)).

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[16] The "reside there" requirement is likely imprecise. The court can imagine a named plaintiff who may have purchased EpiPens in a nearby state where the plaintiff doesn't reside. Such a named plaintiff could have standing to bring a state law claim under the laws of the place of purchase even though the plaintiff doesn't reside in that state. But plaintiffs never argue this nuance and nothing suggests the court needs to consider it here.

[17] *See* 1 William B. Rubenstein, *Newberg on Class Actions* § 3:12 (5th ed. 2013) (suggesting that a class of 40 or more members should presumptively satisfy numerosity).

As the Supreme Court has explained, this "same injury" requirement "does not mean merely that they have all suffered a violation of the same provision of law." *Id. at 350*. Instead, the claims of the putative class plaintiffs "must depend upon a common contention" that is "of such a nature that it is capable of classwide resolution." *Id.* This requirement "means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Although **[*61]** "[e]ven a single [common] question will do," *id. at 359* (citation and internal quotation marks omitted), the focus is not on common questions but on "the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id. at 350* (citation and internal quotation marks omitted).

Defendants do not address commonality as a separate requirement. Instead, Mylan argues that plaintiffs have not met their burden to prove that common questions predominate, nor have they demonstrated commonality for each factual theory of harm plaintiffs assert. Mylan also argues that each of the *Rule 23(b)(3)* classes fails the commonality and predominance requirements. In other words, Mylan does not make any commonality arguments that are independent of the predominance analysis.

The court find that plaintiffs have satisfied the commonality requirement for each of the five classes they ask the court to certify. They have identified a number of questions with common answers that "would 'resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Menocal v. GEO Grp., Inc., 882 F.3d 905, 916 (10th Cir. 2018)* (quoting *Dukes, 564 U.S. at 350*). The questions include: (1) whether defendants used anticompetitive pay-for-delay settlements that delayed generic **[*62]** entry into the EAI market, (2) whether defendants entered unlawful exclusive dealing agreements with PBMs in an effort to protect their monopoly and drive up the price of the EpiPen, and (3) whether defendants unlawfully forced consumers to purchase the EpiPen exclusively in a 2-Pak based on a purported medical necessity when defendants' true motive for removing single EpiPens from the market was to increase profit. Each of these questions involves common factual and legal issues about the existence, scope, and legality of defendants' conduct. *See, e.g., Beltran v. InterExchange, Inc., No. 14-CV-03074-CMA-CBS, 2018 U.S. Dist. LEXIS 23940, 2018 WL 1948687, at *4 (D. Colo. Feb. 2, 2018)* ("Numerous courts have determined that the commonality prerequisite of *Rule 23(a)* was satisfied in antitrust and RICO class actions" because they involve common factual and legal questions about defendants' conduct). To resolve these questions, plaintiffs will rely on common evidence to generate common answers. *Id.* (concluding that plaintiffs satisfied the commonality requirement where "numerous class-wide questions of law and fact may be resolved with common answers drawn from common proof"). ***HN15***[] Also, as our Circuit has recognized, "any one of these questions alone would satisfy the commonality **[*63]** requirement . . . ." *Menocal, 882 F.3d at 916-17*; *see also id. at 914* ("A finding of commonality requires only a single question of law or fact common to the entire class." (citation and internal quotation marks omitted)).

In sum, each of the putative classes satisfies the commonality requirement of *Rule 23(a)(2)*.

3. Typicality

HN16[] The typicality element requires a finding that the claims of representative plaintiffs are typical of the claims of the proposed class. *Fed. R. Civ. P. 23(a)(3)*. But, the named plaintiffs' interests and claims "need not be identical" to those of the putative class members. *DG ex rel. Stricklin v. Devaughn, 594 F.3d 1188, 1198 (10th Cir. 2010)*. As long as the claims of the named plaintiff and class members "are based on the same legal or remedial theory, differing fact situations of the class members do not defeat typicality." *Id. at 1198-99*; *see also Menocal v. GEO Grp., Inc., 882 F.3d 905, 914 (10th Cir. 2018)* (same).

HN17[] The typicality requirement asks:

> whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff's claim is typical if it arises **[*64]** from the same

> event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.

In re Pharm. Indus. Average Wholesale Price Litig., 230 F.R.D. 61, 78 (D. Mass. 2005) (quoting *In re Am. Med. Sys., Inc., 75 F.3d 1069, 1082 (6th Cir. 1996)* (quoting 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 3.13 (3d ed. 1992))).

HN18[] The typicality and commonality requirements are similar because "'[b]oth serve as guideposts for determining . . . whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected . . . .'" *Dukes, 564 U.S. at 349 n.5* (quoting *Falcon, 457 U.S. at 157 n.13*). The typicality "requirement has been liberally construed by courts[,]" and "in the antitrust context, typicality 'will be established by plaintiffs and all class members alleging the same antitrust violations by defendants.'" *In re Vitamins Antitrust Litig., 209 F.R.D. 251, 260 (D.D.C. 2002)* (quoting *In re Playmobil Antitrust Litig., 35 F. Supp. 2d 231, 241 (E.D.N.Y. 1998))*. "If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183-84 (3d Cir. 2001)*.

Plaintiffs assert every class member here relies on the same legal theory—they all paid artificially elevated prices for or were oversold EpiPens—and the claims of the named plaintiffs are typical of the claims of the proposed classes. **[*65]** Mylan disagrees, arguing (1) named plaintiff Local 282 Welfare Trust Fund ("Local 282") is not a typical payor, and (2) many of the named plaintiffs are not typical because they are uninjured.[18] The court examines Mylan's two arguments, below.

a. Local 282

Local 282 is an employee health and welfare benefit plan, and it is a named plaintiff in this lawsuit. Mylan argues Local 282 is atypical and its interests actually conflict with other third-party payors because it does not bear the price risk of increased drug costs. According to Mylan, Local 282's costs are fully reimbursed by the employers who fund it. In other words, if costs increase, Local 282 simply goes back to the union and negotiates higher contribution rates for union contributions to the Welfare Trust Fund.

To support its argument, Mylan cites the deposition testimony of a Local 282 representative. The representative was asked what it would mean for an insured member of Local 282's health plan if Local 282 prevails in this lawsuit. The representative answered by explaining that members of the plan are not insured. Instead, he testified, plan members are owners of self-insured trust funds. If the plan were to receive reimbursement **[*66]** funds by prevailing in this action, it would:

> stem[] the tide of potentially having to go back—for the union to have to go back and negotiate higher contribution rates to the welfare trust fund. If those rates do not have to go up, then the members in a roundabout way can then receive higher wages. . . . They will not be reimbursed with a check per se after settlement if one does occur.

Doc. 1636-34 at 4-5 (Bulding Dep. 59:21-60:7).

Citing the testimony of the same union representative, plaintiffs dispute the proposition that Local 282 bears no price risk. Asked who pays the remaining cost of an EAI for a member who pays a co-pay for the device, the witness answered that the Local 282 Welfare Trust Fund pays the cost. Doc. 1839-10 at 4-5 (Bulding Dep. 197:10-198:18). No insurance company pays any portion of the remaining cost, nor does the Welfare Trust Fund seek reimbursement for any part of that cost from any other person or entity. *Id.*

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[18] Mylan makes these same arguments to assert that the named plaintiffs are inadequate class representatives. Thus, Mylan also contends that plaintiffs can't satisfy *Rule 23(a)*'s fourth requirement—adequacy. The court addresses the adequacy argument below, *infra* note 24.

Plaintiffs also note that Dr. Johnson's[19] report concedes that self-insured plans—such as Local 282's plan—pay for claims using their own funds, including premiums collected from employees, and assume all insurance risk. Dr. Johnson acknowledges that these **[*67]** self-insured plans are responsible for a portion (or even all) of the cost of covered drugs. Doc. 1636-2 at 39-40 (Johnson Expert Report ¶ 41).

The court rejects Mylan's assertion that Local 282 bears no price risk for increased drug costs. The record simply won't support that conclusion. Even if a union whose members participate in Local 282 negotiated higher contributions from employers sufficient to offset increased costs caused by EpiPen overcharges, that is a forward-looking exercise. Local 282 still has sustained injury when the benefit plan was overcharged (if it was). *See* *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-md-02503, 017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *18 (D. Mass. Oct. 16, 2017)* (explaining that even when institutional payors can offset overcharges by increasing premiums after the fact, the institutional payors "experience[ ] antitrust impact at the time of the initial overcharge"). Mylan's argument does not persuade the court that Local 282's injuries are atypical of the classes it seeks to represent.

Mylan next asserts that Local 282, because it is a small not-for-profit trust who does not own its own PBM or negotiate directly with Mylan, does not have the same bargaining power as large payors with millions **[*68]** of members. As a consequence, Mylan argues, the court shouldn't let Local 282 represent the interests of other payors who have not sought to participate in this case and who have different interests. Mylan cites third-party payors such as Anthem, Express Scripts, Inc., Caremark, Change Healthcare, and Humana as companies with a significantly greater number of members and larger revenues. Describing the differences between Local 282 and large third-party payors as a fundamental and uncontroverted conflict, Mylan cites deposition testimony from Humana, Anthem, Cigna Presbyterian, Magellan, MedImpact, Aetna, and United showing each one favors rebates because they produce lower costs. Doc. 1636 at 87-88. It's no surprise those third-party payors would favor higher rebates and the profits they capture from the current pricing regime. But, Mylan offers no evidence tending to establish a "fundamental and uncontroverted conflict" between larger third-party payors and Local 282, *id.* at 87, nor does it make a convincing argument that the number of members in larger third-party payors affects Local 282's typicality. Our court's precedent is more forgiving than Mylan suggests.

For instance, Mylan quotes **[*69]** *Nieberding v. Barrette Outdoor Living, Inc., 302 F.R.D. 600, 610 (D. Kan. 2014)* as recognizing that typicality requires all class members to be "at risk of being subjected to the same harmful practices." But this characterization of *Nieberding*, while accurate, stops too soon. The court's observation about typicality continued beyond the words quoted by Mylan: "The interests and claims of the named plaintiff and class members need not be identical to satisfy typicality; so long as the claims of the named plaintiff and class members are based on the same legal or remedial theory, differing fact situations of the class members do not defeat typicality." *Id.* (citing *Devaughn, 594 F.3d at 1198-99*). Under this standard, it is possible for Local 282 to serve as a class representative of third-party payors even if some of them were harmed by defendants' alleged efforts to prevent competitors from entering the market but also benefited from rebates Mylan paid them. Also, the court already has addressed Mylan's concerns. As discussed above, and during oral argument, *see* Doc. 1789 at 27-28 (Tr. of Mot. Hr'g Class Certification — Phase II 27:13-28:18), the court will exclude from the class definitions third-party payors who own or otherwise function as a PBM (or control any entity that functions as **[*70]** a PBM). Mylan's argument that Local 282 cannot represent the interests of payors who benefit from owning or controlling their own PBM is unpersuasive.

Finally, Mylan contends Local 282 is an atypical representative because it lacks familiarity with how rebating works. Mylan cites testimony by a representative of Local 282 but it does not support the conclusion Mylan attributes to it.

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[19] John Johnson, Ph.D. is an antitrust economist and statistician, retained by defendants, to evaluate the damage models prepared by plaintiffs' experts, Professors Rosenthal and Elhauge. Defendants did not ask Dr. Johnson to prepare an affirmative methodology for assessing impact or damages, and he did not offer such an assessment. *See* Doc. 1724 at 91-92 (Tr. of Mot. Hr'g Class Certification — Phase I 91:25-92:5 ("Q: Were you asked to offer any affirmative assessment of a classwide method for assessing impact or damages in this case? A: No. My assignment was not to put forward an affirmative methodology, it was to assess the work of Professor Rosenthal and Professor Elhauge.").

See Doc. 1636 at 85 n.120, 88 n.126. The witness was never asked to explain how rebating works. Instead, the submitted transcript pages show that Local 282 used the services of The Segal Group to negotiate with PBMs on its behalf, and that it joined other benefit trust funds as a member of the National Alliance of Labor Health Care Organizations to negotiate collectively with PBMs for a better deal. Doc. 1636-34 at 7, 8 (Bulding Dep. 98:5-14, 103:4-18). Moreover, Mylan never explains why it matters whether Local 282 negotiates its own rebates or, instead, hires The Segal Group to negotiate on its behalf. Indeed, it appears common for third-party payors to employ services of a consultant like The Segal Group. *See* *In re Pharm. Indus. Average Wholesale Price Litig., 230 F.R.D. 61, 72 (D. Mass. 2005)* ("A TPP considering the use of a PBM will typically send out a request for proposals, describing **[*71]** its goals. . . . Throughout the process, TPPs are commonly advised by benefits consulting companies like Segal Company . . . In virtually all instances, self-insured employers and union benefit funds retain consultants to represent them in negotiations with PBMs . . . .").

The court is not persuaded that Local 282 is atypical, nor is the court convinced that it should reject Local 282 as a class representative because its interests conflict with the classes it is nominated to represent. Defendants have failed to support their claim that any particular number of third-party payors are potentially adverse, nor have they demonstrated that any third-party payors (other than those with their own PBMs) are indeed adverse.[20] The court has excluded from the class definitions any third-party payors who have separate entities filling the PBM role. In short, the injury claimed by Local 282 "arises from or is directly related to the wrong" claimed by the classes. *In re Pharm. Indus. Average Wholesale Price Litig., 230 F.R.D. at 78* (citations and internal quotation marks omitted). Plaintiffs have discharged their burden to demonstrate that Local 282's claims typify those that the classes seek to assert.

b. Named Plaintiffs

Next, Mylan argues that most of the other named **[*72]** plaintiffs are atypical of the classes they seek to represent because they are uninjured. By Mylan's count, nine named plaintiffs cannot establish injury under any of plaintiffs' legal theories; more than 75% are uninjured under the 2-Pak theory based on their reported purchases; at least 50% are uninjured under the Auvi-Q foreclosure theory based on their reported purchases (or lack of them) during the relevant period; and at least 50% are uninjured under the generic delay theory based on their preferences. Mylan also asserts no named plaintiff can represent the RICO class because every named plaintiff either acknowledged that they did not rely on an alleged misrepresentation or their testimony requires additional inquiry to determine whether they relied on a misrepresentation.

HN19[] Mylan's RICO argument is unpersuasive. The Supreme Court has held—explicitly—that first-party reliance is not required to establish a RICO claim premised on the predicate act of mail fraud. *Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 649, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008)*. The Supreme Court recognized that RICO provides a cause of action for "'[a]ny person injured in his business or property by reason of a violation of'" the statute. *Id.* (quoting *18 U.S.C. § 1964(c)*). And, the Court found it "difficult to derive **[*73]** a first-party reliance requirement" from the words of the statute. *Id.* Thus, the Supreme Court refused to "read a first-party reliance requirement into a statute that by its terms suggests none." *Id. at 650*.

Applied here, *Bridge* means the named plaintiffs need not establish first-party reliance to assert their fraud-based RICO claim. Instead, the named plaintiffs just need to establish an injury to business or property "by reason of" defendants' RICO violations. Plaintiffs assert that the named plaintiffs satisfy this requirement for their RICO

[20] Although not highlighted in Mylan's brief, Dr. Hughes's Expert Report notes: "Of the 50,216 group health plans of all types in the US in 2009, only 1,801, or less than 4 percent, are multiemployer, collectively bargained plans like Local 282." Doc. 1636-4 at 24 n.58 (Hughes Expert Report ¶ 47 n.58) (citing U.S. DEPT. OF LABOR, EMP. BENEFITS SEC. ADMIN., GROUP HEALTH PLANS REPORT: ABSTRACT OF 2009 FORM 550 ANNUAL REPORTS REFLECTING STATISTICAL YEAR FILINGS 6, tbl.A2 (2012), https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/annual-report-on-self-insured-group-health-plans-2012-appendix-a.pdf.). While multiemployer, collectively-bargained plans may represent a relatively small proportion of group plans, the raw number of plans similar to Local 282 is nonetheless a significant number of similar plans.

claim—and all other claims—because, they allege, all named plaintiffs have sustained injury from defendants' conduct. Specifically, plaintiffs assert that each named plaintiff sustained injury under at least one of their theories—the generic delay theory. And, they argue, this showing suffices to establish that each named plaintiff sustained an injury from defendants' conduct.

But Mylan argues that many named plaintiffs aren't injured under this theory. According to Mylan, seven named plaintiffs preferred the branded EpiPen or purchased a branded EpiPen after the launch of the EpiPen AG (an authorized generic of the EpiPen, made by Pfizer and sold by Mylan); **[*74]** at least six named plaintiffs paid less for their EpiPens than plaintiff's expert, Prof. Rosenthal, calculates they would have paid in the but-for world; and at least one named plaintiff concedes that it is his own fault that he never researched whether alternative generic EAIs were available for him to purchase. Plaintiffs respond with three reasons supporting their argument that all named plaintiffs sustained injury under the generic delay theory.

First, plaintiffs argue that a consumer's preference for or purchase of a branded EpiPen instead of the EpiPen AG is not an appropriate proxy to demonstrate the absence of injury. Plaintiffs cite Prof. Rosenthal's opinions and argue that each named plaintiff sustained injury from the delayed generic entry because the delay affected consumer switching patterns.[21] Prof. Rosenthal calculates plaintiffs' alleged damages using "various but-for entry scenarios," using an assumed generic entry date of March 13, 2014. Doc. 1711-1 at 5, 36-37 (Rosenthal Reply Report ¶¶ 4.e, 60). And, in the but-for world, Prof. Rosenthal calculates a generic penetration rate, recognizing several factors that would drive consumers to switch from a branded EpiPen to **[*75]** a generic. *See id.* at 19-20 (Rosenthal Reply Report ¶ 28 (explaining that consumers are likely to switch to a generic because the EpiPen is more expensive and because it is a product that consumers don't use regularly, thus they aren't likely to develop brand affinity)). As Prof. Rosenthal explained, her opinions take into account consumer switching patterns in a but-for world, which she explained, would have begun once the authorized generic becomes available. *See* Doc. 1711-5 at 7-8 (Rosenthal Dep. 145:15-146:23). And, she didn't use market share data from the EpiPen AG's entry to form her opinions because the entry of an authorized generic sold by Mylan wasn't a competitive situation and not the same as an independent generic device entering the market. *Id.* at 9-10 (Rosenthal Dep. 156:2-160:18). Based on Prof. Rosenthal's opinions, plaintiffs have made a plausible showing that each named plaintiff—even if he or she purchased the branded EpiPen in the real world after the launch of the EpiPen AG—sustained injury from the delayed generic entry.[22]

Second, plaintiffs refute defendants' argument that some named plaintiffs aren't injured because they paid less for their EpiPens than Prof. Rosenthal **[*76]** calculates they would have paid in the but-for world. Plaintiffs argue that comparing an insured's actual co-pay amount to a but-for co-pay amount improperly equates real-world transactions with hypothetical averages used as input for a damages calculation. As Prof. Rosenthal explains, her hypothetical average is just that—an average of aggregate damages. Doc. 1711-1 at 21 (Rosenthal Reply Report ¶ 32). Prof. Rosenthal asserts that when the time comes to determine individual damages for a named plaintiff, "the relevant question will be what the Class member's generic copayments would have been at the same point in time

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[21] Defendants have sought to exclude Prof. Rosenthal's opinions about injured class members by *Daubert* motion. By separate Order, the court denies defendants' motion, concluding the opinions are sufficiently reliable for the court to consider at class certification. The court concludes in this Order that Prof. Rosenthal's opinions support plaintiffs' assertion that each named class member sustained injury. The court recognizes that defendants' expert has criticized Prof. Rosenthal's assumptions and attacked her calculated generic penetration rate as flawed. But, the court finds that Prof. Rosenthal has shown she used a reasonable method to reach her opinions, and her opinions plausibly establish that each named class member sustained an injury.

[22] Also, plaintiffs' expert, Prof. Elhauge, opines that brand loyalists sustained harm under the PBM foreclosure theory because "[t]he foreclosure of brand-brand competition between EpiPen and Auvi-Q would predictably have an additional adverse price effect not only on customers who would have continued to buy branded EpiPens but paid a lower price in the but-for world for it, but also on customers who would have bought a generic at a discount from what would have been a lower branded EpiPen price." Doc. 1711-2 at 89-90 (Elhauge Reply Report ¶ 123). So, Prof. Elhauge opines, "during the overlap period [*i.e.*, months when there is an overlap between the foreclosure of Auvi-Q and the exclusion of the generic], all customers would suffer one harm or the other, whether or not they were brand loyalists." *Id.*

as the brand purchase they made." *Id.* So, Prof. Rosenthal credibly explains, her calculations don't suggest that any named plaintiffs escaped injury because of what they paid for their EpiPens. *Id.* The court finds this explanation sufficient to establish that each named plaintiff has a colorable claim of injury under the generic delay theory.

Finally, plaintiffs contend, because generic delay involves a but-for world, whether a consumer actually knew about EpiPen alternatives is a meaningless point. As Prof. Rosenthal opines, in the but-for world, the rates at which consumers **[*77]** would switch from the branded EpiPen to a generic differ from what actually happened in the real world where, plaintiffs allege, defendants prevented a generic product from entering the market at an earlier date. *Id.* at 19-20 (Rosenthal Reply Report ¶ 28); Doc. 1711-5 at 7-8, 9-10 (Rosenthal Dep. 145:15-146:23, 156:2-160:18).

In sum, the court concludes plaintiffs have presented plausible evidence sufficient to establish that each named plaintiff has sustained an injury under at least one of plaintiffs' theories—*i.e.*, the generic delay theory.[23] Prof. Rosenthal's opinions sufficiently support plaintiffs' assertions that each named plaintiff sustained injury sufficient to make their legal theories typical of the other class members they seek to represent. *See* *Menocal v. GEO Grp., Inc., 882 F.3d 905, 914 (10th Cir. 2018)* (holding that plaintiffs satisfied the typicality requirement where "the claims of all the class members—including the representatives—share the same theory" and "present no circumstances that would give rise to a different theory of liability"). The court concludes plaintiffs have satisfied *Rule 23*'s typicality requirement.

4. Adequacy

HN20[] A certified class must have representative parties who will fairly and adequately protect the interests of the **[*78]** class. *Fed. R. Civ. P. 23(a)(4)*. The adequacy requirement asks whether the named plaintiffs and counsel (a) "have any conflicts of interest with other class members" and (b) will prosecute the action vigorously on behalf of the class. *In re Motor Fuel Temperature Sales Practices Litig., 292 F.R.D. 652, 671 (D. Kan. 2013)* (citing *E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977)* (further citations omitted)). "Minor conflicts among class members do not defeat certification[.]" *Id.* Only a "fundamental conflict" about the specific issues in controversy will prevent a named plaintiff from representing the interests of the class adequately. *Id.* A fundamental conflict exists where some class members claim an injury resulting from conduct that benefited other class members. *Id.* Defeating "[the] adequacy requirement of *Rule 23*" requires a conflict that is "more than merely speculative or hypothetical." *Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 430 (4th Cir. 2003)* (citation and internal quotation marks omitted).

Mylan submits that significant intra-class conflicts exist, making the named plaintiffs inadequate class representatives and thus precluding certification.[24] Mylan described the first such conflict by arguing that Local 282

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[23] Because each named plaintiff has sustained injury under one of plaintiffs' theories, the named plaintiffs are typical representatives of the classes they seek to represent. To the extent named plaintiffs were injured by plaintiffs' other two theories (*i.e.*, the 2-Pak and PBM foreclosure theories), those plaintiffs are typical of class members who also allegedly sustained injury under the other two theories. The court recognizes that if plaintiffs' generic delay theory fails on its merits, the court may have to revisit the typicality requirement to determine whether the named plaintiffs are typical of the classes they seek to represent.

[24] As discussed above, *supra* note 18, Mylan also asserts that Local 282 is an inadequate class representative because it differs from other payors in the classes. Also, Mylan asserts that many named plaintiffs are inadequate class representatives because they are uninjured. The court rejected Mylan's arguments in the preceding section, finding that these arguments don't establish that the named plaintiffs are atypical of the classes they seek to represent. *See supra* Part IV.D.3. For the same reasons, the court concludes that defendants' arguments don't prevent the named plaintiffs from fairly and adequately representing the classes.

is not typical of other payors who benefit from Mylan's rebating practices that plaintiffs challenge.[25] The court already has addressed this challenge, *see supra* Part IV.D.3.a., and explained **[*79]** why it is unpersuasive.

Mylan also contends a conflict exists between consumers and payors within the proposed classes because plaintiffs have not tried to apportion among themselves the alleged overcharge for each EpiPen purchase. Delving into what it perceives as plaintiffs' strategy, Mylan describes how plaintiffs could have avoided an alleged conflict by proposing a class consisting solely of consumers, thereby avoiding prejudice to the legal arguments and damage recovery for both consumers and payors. Plaintiffs respond, saying the allocation between consumers and third-party payors will be governed by factors such as the proportion each of them paid toward the cost of the EpiPen in a given transaction. At this point, however, the issue is merely speculative. Mylan has not shown that the composition of any class will create internal competition for damages shares. ***HN21***[] Moreover, binding authority from the Circuit recognizes that defendants can claim "no interest in the method of distributing the aggregate damages award among the class members." *In re Urethane Antitrust Litig., 768 F.3d 1245, 1269 (10th Cir. 2014)*.

Also, other courts have considered objections similar to Mylan's argument here and have rejected the challenges. For **[*80]** example, in *In re Lidoderm Antitrust Litigation, No. 14-md-2521-WHO, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367 (N.D. Cal. Feb. 21, 2017)*, defendants asserted that conflicts between consumers and third-party payors precluded certification. *2017 U.S. Dist. LEXIS 24097, [WL] at *26*. Specifically, defendants in that case asserted (a) the amount of overcharge damages would need to be assigned between third-party payors and consumers, "putting the parties into conflict over who gets what recovery," and (b) some third-party payors "would prefer different legal theories about what would have happened in the but-for world, creating conflicts." *Id.* The court rejected both challenges. *First*, the court found defendants had not shown the alleged conflict "would permeate the aggregate damages calculation." *Id.* Instead, the court reasoned, the conflict would arise when damages are allocated. *Id.* And, at that point, claims mechanisms may be used to resolve any conflict "between, for example, an end payor consumer and her health insurance plan over how their overcharge damages should be split." *Id.* Thus, the court concluded the purported conflict "[did] not create a type of conflict that precludes certification." *Id. Second*, the court found the mere possibility of differing opinions over damage theories might **[*81]** arise among third-party payors did not create a conflict preventing certification. *Id.* The court noted that, if such a situation arose, then third-party payors who wanted to pursue different damage theories simply could opt out of the class. *Id.*

Likewise, in *In re Solodyn (Minocycline Hydrochloride) Antitrust Litigation, No. 14-md-02503, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777 (D. Mass. Oct. 16, 2017)*, defendants challenged the end payors' showing of adequacy of representation because third-party insurers and consumers are fundamentally different groups. *2017 U.S. Dist. LEXIS 170676, [WL] at *12*. The court rejected this argument, finding those parties shared a common goal. Each wanted to show they all were injured in the same way by overcharges, and through the same illegal conduct by defendants. *Id.* This, the court ruled, created an "alignment of incentives" sufficient to overcome the conflict challenge. *Id.* Also, defendants argued that class members would compete with one another for damage shares. *2017 U.S. Dist. LEXIS 170676, [WL] at *13*. Citing *Lidoderm*, the court concluded it could address this issue, if necessary, when damages were allocated. *2017 U.S. Dist. LEXIS 170676, [WL] at *13* (citing *In re Lidoderm Antitrust Litig., 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *26-27)*.

Likewise, here, defendants don't persuade the court that the alleged conflict between consumers and third-party payors precludes class certification. To the contrary, the **[*82]** current record shows that consumers and third-party payors share an "alignment of incentives" because they both seek to prove that defendants' illegal conduct caused them to sustain injuries in the form of overpaying for the EpiPen. *In re Solodyn (Minocycline Hydrochloride) Antitrust*

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[25] Mylan also asserts that PBMs likely are class members, and that conflicts exist between plaintiffs and PBMs because plaintiffs allege the PBMs are RICO co-conspirators. As plaintiffs point out, however, no PBM can qualify as a class member under the class definitions. The proposed definition requires that the entity must have (a) paid or provided reimbursement for an EpiPen; (b) for the purpose of consumption, not resale; and (c) that purchase was intended for consumption by themselves, their family member(s), insureds, plan participants, employees, or beneficiaries. Also, the court has added an exclusion to the class definitions, excluding all third-party payors who own, operate, or control their own PBM. *See supra* Part IV.B. So, nothing suggests a PBM will qualify under the class definitions. Mylan certainly hasn't identified any PBMs who would qualify.

Litig., 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *12. Defendants haven't shown that the alleged conflict in apportioning damages among consumers and third-party payors "would permeate the aggregate *damages calculation*." In re Lidoderm Antitrust Litig., 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *26 (emphasis added). As other courts have recognized, the court can address this issue, if a conflict actually emerges, when damages are allocated. In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *13 ("Defendants have not shown that alleged conflicts among putative class members would 'permeate the aggregate damages calculation' and not merely arise at the time damages are allocated, which can be addressed then." (quoting In re Lidoderm Antitrust Litig., 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *26)). For these reasons, the court doesn't find an intra-conflict exists that precludes certification.

Instead, the court concludes that plaintiffs have established that the named plaintiffs can fairly and adequately represent the interests of the classes. As discussed above, the named plaintiffs' claims are typical of the classes they seek to represent because they allege they sustained the same injuries as a result of defendants' **[*83]** illegal conduct. And, based on the history of the case to date, the named plaintiffs have prosecuted the action vigorously on behalf of the classes through discovery and the class certification proceedings. *See* Syngenta, 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *5 (finding the adequacy requirement was met where "[t]he class representatives' claims are typical" and defendant hasn't "suggested any reason why the class representatives lack sufficient incentive to prosecute fully the claims on the behalf of the classes"). The court thus concludes that plaintiffs satisfy Rule 23's adequacy requirement.

In sum, the court finds plaintiffs satisfy each prerequisite for class certification under Rule 23(a). Accordingly, the analysis now turns to the elements of Rule 23(b)(3) in the context of the proposed RICO, state antitrust, consumer protection, unjust enrichment, and injunctive classes.

E. Rule 23(b)(3) Requirements

1. Superiority

HN22[] To certify a class under Rule 23(b)(3), a class action proceeding must be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "It is enough that class treatment is superior because it will 'achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural **[*84]** fairness or bringing about other undesirable results.'" CGC Holding Co. v. Broad & Cassel, 773 F.3d 1076, 1096 (10th Cir. 2014) (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)).

Mylan contests superiority. It asserts that differently situated plaintiffs with divergent claims, many of whom are uninjured, will require extended, individualized examination and cross-examination. So, Mylan contends, plaintiffs have not shown a class action is the most efficient way to litigate the claims at issue.

Plaintiffs assert the individual claims are negative value claims: they would cost far more to litigate than they are worth. They also assert that most of the class members are geographically dispersed. So, plaintiffs say, the claims of individual class members will be doomed if individual members are forced to take on defendants alone.

The scale of this case, the desirability for uniformity of decision, and the continued economies of time, effort, and expense all support a finding that class treatment is the superior method to decide this dispute fairly and efficiently. Defendants identify no better alternative method, and a class action will protect defendants from multiple or inconsistent verdicts. The court thus finds that the Rule 23(b)(3) superiority requirement is satisfied here.

2. Predominance

HN23[] *Rule 23(b)(3)* also requires a **[*85]** plaintiff to "show that common questions subject to generalized, classwide proof *predominate* over individual questions." *CGC Holding Co. v. Broad & Cassel, 773 F.3d 1076, 1087 (10th Cir. 2014)*. This requirement does not mean a plaintiff must show "that all of the elements of the claim entail questions of fact and law that are common to the class" or "that the answers to those common questions [are] dispositive" of the claim. *Id.* (citation omitted). Instead, the predominance inquiry "'asks whether the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Id.* (quoting 2 William B. Rubenstein, *Newberg on Class Actions* *§ 4:40* (5th ed. 2012)). To decide whether a plaintiff can satisfy the predominance requirement, a court must first "*characterize* the issues in the case as common or not, and then *weigh* which issues predominate." *Id.* Critically, so long as at least one common issue predominates, a plaintiff can satisfy *Rule 23(b)(3)*—even if individual issues (such as damages) remain and require the court to try them separately. *Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016)*.

The determination "'whether "questions of law or fact common to class members predominate" begins, of course, with the elements of the underlying cause of action.'" **[*86]** *CGC Holding Co., 773 F.3d at 1088* (quoting *Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011)* (quoting *Fed. R. Civ. P. 23(b)(3)*)). Here, plaintiffs argue, common issues predominate each of their asserted legal claims because they intend to prove the elements of their RICO, antitrust, state consumer protection, and unjust enrichment claims using common, classwide evidence. Mylan disagrees. Mylan argues that plaintiffs have not met their burden to show common issues predominate over individual questions. Generally, Mylan asserts three arguments to support its position that individual issues overwhelm the common questions here, thus precluding certification.

First, Mylan argues, the damage calculations for each plaintiff require individualized inquiries that will overwhelm the common questions for all of their legal claims. *Second*, Mylan asserts, plaintiffs cannot prove through common evidence that all class plaintiffs sustained injury. *Finally*, Mylan argues, individual questions predominate over the common issues presented by each of plaintiffs' five proposed classes: the RICO class, the state antitrust class, the state consumer protection class, the unjust enrichment class, and the injunctive class. The court addresses each argument, in turn, below.

a. Individual Damages Issues

Mylan argues **[*87]** plaintiffs have not met their burden to show common issues predominate because, according to Mylan, individual questions about each plaintiff's damages calculation overwhelm the common issues. More specifically, Mylan asserts that plaintiffs haven't provided a common method for measuring damages for each class member. Mylan contends that the damage calculation for each plaintiff requires an individual inquiry about the dates and amounts of each EpiPen purchase, the specifics of the individual's health plan and rebate arrangements, and the action that defendants took to cause that particular plaintiff to sustain harm (*i.e.*, a plaintiff claiming generic delay could not recover damages before the Generic Start Date or after generic delay ended).

Plaintiffs respond that the Tenth Circuit has rejected the argument that individual damages issues preclude certification. **HN24**[] Indeed, the Tenth Circuit recently held: "'The fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification.'" *Naylor Farms, Inc. v. Chaparral Energy, LLC, 923 F.3d 779, 798 (10th Cir. 2019)* (quoting *Menocal v. GEO Group, Inc., 882 F.3d 905, 922 (10th Cir. 2018))*. Instead, the Circuit explained, "'material differences in damages determinations'" will destroy predominance only "if those 'individualized **[*88]** issues will overwhelm . . . questions common to the class.'" *Id.* (quoting *Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc., 725 F.3d 1213, 1220 (10th Cir. 2013))*. In *Naylor Farms*, the Tenth Circuit concluded that plaintiffs' expert report provided evidence that the expert could determine damages on a classwide basis through use of a specified model. *Id.* And, the court noted, defendant had failed to explain why the expert's model was inaccurate or unworkable. *Id.* The Circuit thus affirmed the district court's conclusion that individual questions about damages did not defeat predominance. *Id.*

HN25[] This court has concluded that the Supreme Court's *Comcast* opinion does not require a classwide damages model for certification under *Rule 23(b)(3)*. In *Syngenta*, Judge Lungstrum rejected defendant's argument that plaintiffs "must provide a damages model that 'establish[es] that damages are susceptible of measurement across the entire class for purposes of *Rule 23(b)(3)*.'" *2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *9* (citing *Comcast Corp. v. Behrend, 569 U.S. 27, 35, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013))*. Judge Lungstrum explained: "Multiple circuit courts . . . including the Tenth Circuit, have rejected such a reading of *Comcast*, which did not create a broadly applicable rule as suggested by [defendant]." *Id.* (first citing *XTO, 725 F.3d at 1220*; then citing *Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 374-75, 75 n.10 (3d Cir. 2015)*; then citing *In re Deepwater Horizon, 739 F.3d 790, 815 (5th Cir. 2014)*; then citing *In re Urethane Antitrust Litig., 768 F.3d 1245, 1258 (10th Cir. 2014))*; *see also* *In re Urethane Antitrust Litig., 768 F.3d at 1258* (refusing to apply *Comcast* because, "unlike the claimants **[*89]** in *Comcast*, our plaintiffs did not concede that class certification required a method to prove class-wide damages through a common methodology")); *XTO, 725 F.3d at 1220* (explaining that, after *Comcast*, still "there are ways to preserve the class action model in the face of individualized damages").

Even so, Judge Lungstrum then recognized that "plaintiffs here *do* rely on a class-wide method to show damages", using their experts' models to calculate aggregate damages. *Syngenta, 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *9-10*; *see also* *In re Urethane Antitrust Litig., 768 F.3d at 1268-69* (affirming jury's damage award calculated on an aggregate basis and, after trial, was distributed among the class members using an expert's damages model). And, Judge Lungstrum concluded, this method sufficed to establish "that common questions predominate here despite any possible individual questions" about damages. *Syngenta, 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *10*.

Applying the Tenth Circuit's holdings in *Naylor Farms* and *Urethane* and Judge Lungstrum's reasoning in *Syngenta* to the facts here, the court concludes that the individual damages questions that defendants have identified don't preclude class certification. Like the plaintiffs in *Syngenta* and *Urethane*, plaintiffs here have proposed a common methodology for calculating damages on an aggregate basis through opinions by **[*90]** their experts, Profs. Rosenthal and Elhauge. Specifically, Prof. Rosenthal has proposed a methodology for calculating damages classwide resulting from defendants' alleged anticompetitive conduct in delaying generic entry and forcing customers to purchase the EpiPen exclusively in a 2-Pak. *See* Doc. 1500-3 at 21-35 (Rosenthal Expert Report ¶¶ 47-82) (describing her methodology for calculating: (1) damages caused by generic delay for plaintiffs' RICO, antitrust, and consumer protection claims; (2) damages caused by the forced purchase of 2-Paks for plaintiffs' RICO and consumer protection claims; (3) damages based on unjust profits realized as a result of defendants' alleged misconduct for plaintiffs' unjust enrichment claims; and (4) an alternative damages theory for defendants' alleged pricing scheme to support plaintiffs' RICO claim); *see also* Doc. 1497-3 at 21-35 (Rosenthal Expert Report ¶¶ 47-82) (sealed version). And, Prof. Elhauge has proposed a methodology for calculating aggregate damages in the form of alleged EpiPen overcharges arising from defendants' foreclosure of brand competition through use of exclusionary contracts with PBMs. *See* Doc. 1500-2 at 56-64, 66 (Elhauge Expert **[*91]** Report ¶¶ 110-120, Table 4) (providing a classwide methodology for calculating share and price impacts of PBM coverage restrictions); *see also* Doc. 1497-2 at 56-64, 66 (Elhauge Expert Report ¶¶ 110-120, Table 4) (sealed version).[26]

Mylan criticizes Profs. Rosenthal and Elhauge's methodologies for calculating classwide damages.[27] This criticism relies on defendants' expert's report that identifies purported flaws in: (1) Prof. Rosenthal's method for calculating classwide damages resulting from defendants' switch to the 2-Pak and generic delay, *see, e.g.*, Doc. 1636-2 at 47-58, 133-34 (Johnson Expert Report ¶¶ 54-72, 166-67), *see also* Doc. 1503-4 at 47-58, 133-34 (Johnson Expert Report ¶¶ 54-72, 166-67) (sealed version); and (2) Prof. Elhauge's method for determining classwide damages

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[26] Mylan asserts that Profs. Rosenthal and Elhauge's models contradict each other, and they criticize plaintiffs for not providing a method to determine which model applies to any particular plaintiff. Plaintiffs respond that Mylan's argument presents no problem on class certification. Instead, plaintiffs argue, Mylan's argument goes to the issue of damage allocation, and damage allocation will occur at a later stage of the proceeding, based on a jury's findings. Plaintiffs also explain, at that stage, the court can allocate the damage award based on a jury's findings in a way that prevents double recovery. The court agrees that Mylan's argument goes to damage allocation, not to the question whether plaintiffs can prove damages on a classwide basis.

[27] Also, by separate motions, defendants ask the court to exclude Profs. Rosenthal and Elhauge's opinions under *Daubert*. By separate Order, the court denies those motions.

caused by defendants' alleged use of exclusionary contracts with PBMs, *see, e.g.*, Doc. 1636-2 at 62-71, 74-81 (Johnson Expert Report ¶¶ 78-89, 92-99), *see also* Doc. 1503-4 at 62-71, 74-81 (Johnson Expert Report ¶¶ 78-89, 92-99) (sealed version).

HN26[] But the court can't decide this issue—*i.e.*, whether plaintiffs' expert reports actually prove classwide damages—on a certification motion. *See* Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 468-69, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013) (at class certification **[*92]** stage, plaintiffs "need not . . . prove that the predominating question will be answered in their favor"; ultimate failure of proof on essential element dooms claim, but does not mean individualized claims predominate); *see also* In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 100 (D. Conn. 2009) ("[T]he issue at class certification is not which expert is the most credible, or the most accurate modeler, but rather have the plaintiffs demonstrated that there is a way to prove a class-wide measure of damages through generalized proof."); Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Ltd., 247 F.R.D. 253, 270 (D. Mass. 2008) ("To determine predominance, a court need not plunge into the weeds of an expert dispute about potential technical flaws in an expert methodology.").

HN27[] At class certification, plaintiffs need not prove that a proposed method for determining damages is valid; instead, the proper inquiry at this stage asks whether damages are capable of proof on a classwide basis. *See* Comcast Corp. v. Behrend, 569 U.S. 27, 34, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013) (holding that plaintiffs failed to establish predominance because their damages model "falls far short of establishing that damages are capable of measurement on a classwide basis"); *see also* In re Wellbutrin XL Antitrust Litig., 282 F.R.D. 126, 144 (E.D. Pa. 2011) ("At the class certification stage, the plaintiffs are not required to prove damages by calculating specific damages figures for each member of the class, but rather **[*93]** they must show that a reliable method is available to prove damages on a class-wide basis." (first citing In re Neurontin Antitrust Litig., No. 02-1390, 2011 U.S. Dist. LEXIS 7453, 2011 WL 286118, at *9 (D.N.J. Jan. 25, 2011); then citing Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 303 (5th Cir. 2003))). And, if each expert's approach is plausible based on classwide proof and does not rely on or implicate individualized questions that will predominate over common ones, "[i]t is sufficient at [the class certification stage] to note that both [experts'] methods . . . are plausible approaches . . . ." In re Lidoderm Antitrust Litig., No. 14-md-02521-WHO, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *18 (N.D. Cal. Feb. 21, 2017) (recognizing that, "in the end," deciding which expert opinion accurately estimates the but-for prices of generic and branded drugs "is subject to further merits-based determinations and findings by the trier of fact"). *Cf.* Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, No. 04-5898, 2010 U.S. Dist. LEXIS 105646, 2010 WL 3855552, at *6 (E.D. Pa. Sept. 30, 2010) (explaining that "resolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court" and "[w]eighing expert opinions is not only permissible; it may be integral to the rigorous analysis Rule 23 demands" if the expert opinion is necessary to determine whether plaintiff satisfies the certification requirement (citations and internal quotations omitted)).

Here, plaintiffs have come forward with a plausible method for **[*94]** determining classwide damages through the opinions of Profs. Rosenthal and Elhauge.[28] Mylan's attacks against these experts' methodologies don't undermine their plausibility for establishing classwide damages; instead, they go to the weight the trier of fact should give them when it decides whether the methodologies, in fact, establish that the classes—as a whole—have sustained damage. *See* Syngenta, 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *10 (concluding that defendants' criticisms about plaintiffs' experts' methodologies failed to show that they "are so unreliable as to preclude certification" but instead, "[m]ore importantly for purposes of certification, these criticisms present common questions that do not undermine a finding of predominance"); *see also* In re Solodyn (Minocycline Hydrochloride)

[28] The court recognizes that this case involves no competing expert methodologies for calculating damages. Defendants' expert, Dr. Johnson, explicitly states that his opinions, to date, advance no methodology for calculating damages. Doc. 1724 at 91-92 (Tr. of Mot. Hr'g Class Certification — Phase I 91:25-92:5 ("Q: Were you asked to offer any affirmative assessment of a classwide method for assessing impact or damages in this case? A: No. My assignment was not to put forward an affirmative methodology, it was to assess the work of Professor Rosenthal and Professor Elhauge.")). And, even if the certification decision required the court to weigh opposing expert opinions, which it does not, *see* In re Lidoderm Antitrust Litig., 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *18, that exercise would not apply to damage calculations.

Antitrust Litig., No. 14-md-02503, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *10 (D. Mass. Oct. 16, 2017) (concluding, at the class certification stage, "any disagreement [about expert's method of calculating damages] does not overcome the Plaintiff's showing that damages will be substantially shown by common proof"). Plaintiffs here have shouldered their burden to establish that common issues predominate the damages inquiry by presenting a common method for calculating classwide damages on an aggregate basis. **[*95]** This showing satisfies Rule 23's predominance requirement.

b. Uninjured Class Members

Next, Mylan argues that plaintiffs cannot shoulder their burden to establish predominance because they cannot show that all putative class members sustained injury. Instead, Mylan argues, plaintiffs' proposed class definitions contain too many uninjured class members for the court to certify a class action under Rule 23. According to Mylan, predominance fails for each of plaintiffs' liability theories—*i.e.*, the 2-Pak theory, the Auvi-Q foreclosure theory, and the generic delay theory—across all proposed classes because there are uninjured class members who cannot be identified without mini-trials. Mylan criticizes the alleged absence of or flawed analyses by plaintiffs' expert witnesses which, it contends, accounts for plaintiffs' failure to carry their burden to show all class members were injured under any of plaintiffs' legal theories. For these reasons, Mylan urges the court to deny certification for lack of predominance.

Plaintiffs respond with two arguments. First, plaintiffs argue that the collateral source doctrine bars Mylan's argument that the proposed class definitions contain class members who are **[*96]** uninjured because they used a co-pay, coinsurance, or deductible to pay for their EpiPens, and thus had their EpiPens paid for by insurance companies. Second, plaintiffs argue that they have established, through common evidence, that the proposed classes have sustained injury classwide sufficient to satisfy the Tenth Circuit's requirements for certification. According to plaintiffs, Mylan demands a standard of proof that the law in our Circuit does not require. And, plaintiffs assert, their experts provide ample support to show an injury sustained across the classes. Also, plaintiffs argue, all class members have sustained injury because defendants' conduct deprived them of a choice in the market, whether that loss of choice involved the absence of a less expensive generic, foreclosed access to competing brands, or a preference for a single purchase EpiPen. The court addresses each argument, separately, below.

i. Collateral Source Doctrine

Plaintiffs assert that the collateral source doctrine bars Mylan's arguments that certain class plaintiffs—ones who used insurance to pay for their EpiPens—are not injured. ***HN28***[] The Tenth Circuit has explained that the collateral source rule is "[d]erived **[*97]** from the common law [and] posits that '[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.'" Friedland v. TIC-The Indus. Co., 566 F.3d 1203, 1205-06 (10th Cir. 2009) (quoting Restatement (Second) of Torts § 920A(2) & cmt. d (1979)). "Th[is] rule thus permits an injured plaintiff to recover more than the damages he has suffered as the result of an injury." Id. at 1206. The Circuit has explained the rationale for applying the rule: "'[P]ublic policy favors giving the plaintiff a double recovery rather than allowing a wrongdoer to enjoy reduced liability simply because the plaintiff received compensation from an independent source.'" Prager v. Campbell Cty. Mem'l Hosp., 731 F.3d 1046, 1059 (10th Cir. 2013) (quoting Green v. Denver & Rio Grande W. R.R. Co., 59 F.3d 1029, 1032 (10th Cir. 1995)). "Thus, courts have applied the rule when the injured plaintiff has been compensated by, for example, . . . the plaintiff's [own] insurance." Friedland, 566 F.3d at 1206 (citation omitted).

Defendants argue that the collateral source rule doesn't apply here. Specifically, they argue that the collateral source rule contradicts the way plaintiffs have litigated the case to date—*i.e.*, choosing to include both consumers and third-party payors as class members in the proposed class definitions. Defendants argue there is no need to include payors **[*98]** in the classes if consumers can assert injuries for the amounts paid by those payors. Also, defendants assert that applying the collateral source doctrine would raise conflicts between class members over who can recover for what payments.

Defendants also emphasize that plaintiffs repeatedly have described their EpiPen expenses as payments made "out of pocket, after insurance." *See, e.g.*, Doc. 60 at 11, 23-24 (Class Compl. ¶¶ 11, 13, 62-64). Plaintiffs' expert has calculated damages separately for consumers and third-party payors. *See, e.g.*, Doc. 1500-3 at 29 (Rosenthal Expert Report ¶ 67) (separating damages for third-party payors, insured consumers, and cash payers). And, importantly, plaintiffs expressly have excluded from the class definitions: "Single flat co-pay" consumers who purchased EpiPens or generic EpiPens only via a fixed dollar co-payment that is the same for all covered devices, whether branded or generic (*e.g.*, $20 for all branded and generic devices).[29] Defendants suggest that plaintiffs excluded this group because they recognize that a consumer who paid a single, flat co-pay didn't sustain any damage. For all these reasons, defendants argue the collateral source doctrine **[*99]** shouldn't apply to a case where plaintiffs have chosen to bring a class action on behalf of consumers and third-party payors collectively.

The court concludes that it need not decide—as a matter of law—whether the collateral source rule applies to plaintiffs' claims here on this certification motion. As Judge Lungstrum found in *Syngenta*, the court didn't need to decide on certification the "legal issue" whether the collateral source doctrine barred defendants from offsetting benefits realized by certain putative class members. 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *9. Instead, the question was whether "the necessary individual inquiries [to determine whether a class member sustained injury] would be so overwhelming as to defeat predominance . . . ." *Id.* Judge Lungstrum concluded that they weren't. *Id.* Judge Lungstrum also found it was "worth noting that the availability of such offsets presents a common question." *Id.*

Similarly, here, the court must decide whether individual questions about the putative class members' injuries overwhelm the common issues. As discussed below, even without considering or applying the collateral source doctrine, plaintiffs have presented **[*100]** sufficient classwide evidence in their expert reports that the amount of potentially uninjured class members in the putative classes isn't so large that it precludes class certification under Tenth Circuit case law. Also, as Judge Lungstrum recognized in *Syngenta*, the question whether the collateral source doctrine applies to plaintiffs who used insurance to pay for their EpiPen purchases is a legal issue that presents a common question that applies classwide.

Defendants disagree. They argue that applying the collateral source rule raises even more individual questions because the collateral source rule is a creature of state law, at least when it is applied to plaintiffs' state law claims. *See* Blanke v. Alexander, 152 F.3d 1224, 1231 (10th Cir. 1998) (identifying the collateral source rule as a "substantive state rule[ ] of evidence" (citation and internal quotation marks omitted)). And, defendants contend, many states have abolished or limited the collateral source rule in recent years. Thus, they argue, differences in

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[29] At oral argument on the certification motion, plaintiffs' counsel suggested that this exclusion isn't necessary if the court applies the collateral source doctrine to plaintiffs' claims. Doc. 1789 at 26 (Tr. of Mot. Hr'g Class Certification — Phase II 26:9-20). Regardless whether the collateral source doctrine applies to plaintiffs' claims, the court refuses to remove this exclusion from the proposed class definition. As defendants asserted at oral argument, plaintiffs included this proposed exclusion in their original motion. Defendants have litigated the certification motion on the understanding that plaintiffs' class definition excluded single, flat co-pay consumers. Id. at 94 (Tr. of Mot. Hr'g Class Certification — Phase II 94:4-95:11). And defendants' expert prepared his report based on his assumption that this exclusion was part of the class definitions. Thus, defendants argue, the court shouldn't permit plaintiffs to remove the exclusion at this late stage.

The court agrees with defendants. The court will not expand the class definitions from the ones plaintiffs previously proposed. *See* In re Wholesale Grocery Prods. Antitrust Litig., No. 09-MD-2090 ADM/TNL, 2016 U.S. Dist. LEXIS 121006, 2016 WL 4697338, at *5-6 (D. Minn. Sept. 7, 2016) (rejecting plaintiffs' revised class definition that included more putative plaintiffs on certification motion because "[p]laintiffs [had] impermissibly expanded the class definition"); *see also* Costelo v. Chertoff, 258 F.R.D. 600, 604-05 (C.D. Cal. 2009) ("The Court is bound to class definitions provided in the complaint and, absent an amended complaint, will not consider certification beyond it."). And, the court finds no reason to remove the exclusion based on an assertion made by plaintiffs at oral argument.

state laws will require individual inquiries to determine whether and how to apply a particular state's collateral source rule to specific class members.

Plaintiffs respond, arguing that recent modifications to state rules **[*101]** governing the collateral source doctrine apply to cases involving medical malpractice, personal injury, or wrongful death. *See* Bryce Benjet, *A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Awards*, 76 Def. Counsel. J. 210, 211 (Apr. 2009) (explaining that "collateral source damages are often limited in health care liability cases as part of broader tort-reform legislation"); *see also generally id.* (describing the differences among the states' collateral source rules). But, plaintiffs contend, defendants haven't identified any state law departures from the collateral source rule under the federal common law that would apply to the claims asserted here. The court agrees that—to the extent the collateral source doctrine applies to plaintiffs' claims here—any variations in the state laws governing the collateral source rule don't raise individual issues that will overwhelm the common questions.

Finally, in both their Reply and their Response to Defendants' Surreply, plaintiffs offer to exclude another group of individuals from the class definitions.[30] Doc. 1837 at 23; Doc. 1579-1 at 7. Plaintiffs suggest that the class definitions could exclude individual consumers who did **[*102]** not purchase an EpiPen after the Generic Start Date. Plaintiffs question whether more than a *de minimis* number of such consumers exist when most EAI consumers make repeat purchases every year so that they have an EAI device on hand to treat anaphylaxis. In any event, plaintiffs concede that removing these individuals from the class definitions would reduce the number of purportedly uninjured class members. And, plaintiffs explain, their expert has provided damages calculations that segregate these consumers from her aggregate damage calculations. Doc. 1711-1 at 23-24 (Rosenthal Reply Report ¶ 36, Tables 6-7). Defendants never argue that the court should reject plaintiffs' proposed exclusion. After considering plaintiffs' proposal, the court agrees that this exclusion further protects against including uninjured class members in the classes. ***HN29***[] And, as our court has recognized, "the [c]ourt and parties are authorized" to narrow the class definitions "[i]f the class definition should require tailoring as the litigation progresses[.]" *Sibley v. Sprint Nextel Corp., 254 F.R.D. 662, 671 (2008)*; *see also* *McCurley v. Royal Seas Cruises, Inc., 331 F.R.D. 142, 162 (S.D. Cal. 2019)* ("A plaintiff may properly narrow the class for which it seeks class certification even in a reply brief."); *Abraham v. WPX Energy Prod., LLC, 322 F.R.D. 592, 611 (D.N.M. 2017)* (holding that "a plaintiff is not **[*103]** bound to the class definition in the operative complaint" and concluding that "[s]ome flexibility . . . is needed in crafting a class action where one is warranted"). So, the court will add this exclusion to the class definitions.

ii. The Presence of Uninjured Class Members

Next, Mylan asserts that plaintiffs fail to shoulder their burden to establish predominance because they cannot prove that all putative class members sustained injury. Relying on cases from other Circuits, Mylan argues that the law requires plaintiffs to "show that they can prove, through common evidence, that all class members were in fact injured by" defendants' conduct. *In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252, 406 U.S. App. D.C. 371 (D.C. Cir. 2013)*; *see also* *In re Rail Freight Fuel Surcharge Antitrust Litig., 934 F.3d 619, 623-24 (D.C. Cir. 2019)* [hereinafter "*Rail Freight II*"] (affirming district court's denial of class certification because plaintiffs had failed to establish classwide injury; instead, the evidence showed that 2,037 putative class members sustained no injury, and that finding established a need for individual inquiries that defeated predominance);[31] *In re Asacol Antitrust*

[30] Plaintiffs propose this exclusion as an "alternative to applying the collateral source rule." Doc. 1579-1 at 7. Although the court doesn't decide whether to apply the collateral source rule now, it concludes that this exclusion is warranted because it removes from the class definitions individual consumers who could not have sustained injury because their only EpiPen purchases occurred before the Generic Start Date.

[31] After oral argument, defendants submitted a letter to the court citing as supplemental authority the *Rail Freight II* opinion and another case from the District of Massachusetts. Doc. 1859 (first citing *Rail Freight II, 934 F.3d 619*; then citing **[*104]** *In re Intuniv Antitrust Litig., No. 1:16-cv-12396-ADB, 2019 U.S. Dist. LEXIS 141643, 2019 WL 3947262 (D. Mass. Aug. 21, 2019)*). Plaintiffs responded to defendants' submission, arguing that the supplement authority doesn't apply to this case because it is

Litig., 907 F.3d 42, 57-58 (1st Cir. 2018) (reversing district court's grant of certification because Rule 23 does not permit "a trial in which thousands of class members [must] testify" to establish that they sustained injury).

Mylan's position relies heavily on the First Circuit's opinion in *Asacol*. The Tenth Circuit has not examined *Asacol* or otherwise indicated if it would follow the case. The analysis that follows is, therefore, an assessment of *Asacol*, relevant Tenth Circuit law, and a prediction whether the Tenth Circuit would adopt *Asacol*.

(a) Legal Standard

In *Asacol*, union-sponsored benefit plans sued drug manufacturer Warner Chilcott Limited on behalf of a class of similarly situated indirect purchasers, including individual consumers. 907 F.3d at 45. The plaintiffs alleged that Warner had suppressed entry of a generic drug by removing it from the market at the same time a new drug was introduced. *Id.* The district court had estimated that 10% of class members had not been injured by defendants' alleged anticompetitive conduct. *Id. at 46-47*. The court based its finding on conclusions drawn by both sides' experts who inferred the 10% figure from the number of brand loyalists who had purchased similar pharmaceutical products. *Id. at 47*. In other words, the 10% figure measured the percentage of brand-loyal customers would not have switched to the generic alternative, even if a lower-priced generic alternative were available, had **[*105]** it entered the market. *Id.* Nevertheless, the district court found that the number of uninjured class members—*i.e.*, 10%—was *de minimis*, and thus did not preclude class certification. *Id.* The First Circuit accepted the district court's estimate and found it necessary to consider how to treat these uninjured class members in the face of the principle requiring plaintiffs to show proof of injury. *Id. at 51*. The First Circuit framed the question as one asking whether a class can be certified "even though the injury-in-fact will be an individual issue, the resolution of which will vary among class members." *Id.*

In its order granting class certification, the *Asacol* district court had approved plaintiffs' proposal for a process to cull out uninjured class members before judgment. *Id. at 52*. Under the process approved by the district court, class members would receive notice asking them to submit a claim form, along with data and documentation. *Id.* A claims administrator then would evaluate each claim under a court-approved formula, individuals could contest the calculations, and the court would review the administrator's report and make any necessary changes. *Id.*

On appeal, the First Circuit concluded that review **[*106]** by a claims administrator of defendants' already-announced intention to challenge any affidavits would deprive defendants of their Seventh Amendment right to a jury trial and their due process rights. *Id. at 53* ("Plaintiffs' proposed claims process provides defendants no meaningful opportunity to contest whether an individual would have, in fact, purchased a generic drug had one been available."). Also, the First Circuit found, plaintiffs hadn't established that the number of affidavits to which defendants could raise a legitimate challenge "is so small that it will be administratively feasible to require those challenged affiants to testify at trial." *Id. at 53*. The First Circuit concluded the need to identify thousands of uninjured individuals would predominate over common questions and "render an adjudication unmanageable absent evidence such as . . . unrebutted affidavits . . . or some other mechanism that can manageably remove uninjured persons from the class in a manner that protects the parties' rights." *Id. at 53-54*.

The First Circuit also rejected plaintiffs' fallback position. This alternative argued that plaintiffs could prove classwide impact through testimony by their expert, who calculated that "a generic substitute **[*107]** drug would have achieved approximately ninety percent market penetration in a but-for world, from which, in part, the district court estimated that about ten percent of the class was likely brand loyal and thus uninjured." *Id. at 54*. The First Circuit held that where the aggregate damage amount is the sum of damages sustained by a number of individuals and determining whether any individual was injured "turns on an assessment of the individual facts concerning that person," the defendant must receive the opportunity to "challenge each class member's proof that the defendant is liable to that class member." *Id. at 55*. And whether that inquiry precludes class certification because it threatens predominance "turns on whether such challenges are reasonably plausible in a given case and whether the plaintiff

authority from outside the Tenth Circuit and factually different from the class certification record here. Doc. 1881. The court addresses these arguments more fully in the analysis below.

cannot demonstrate that allowing for such challenges in a manner that protects the defendant's rights will be manageable and superior to the alternatives." *Id.*

No Tenth Circuit case has addressed the First Circuit's *Asacol* opinion. And Mylan's brief appears to concede that the Tenth Circuit has not embraced *Asacol*. But during oral argument at the class certification hearing, Mylan tried to distinguish **[*108]** *DG ex rel. Stricklin v. Devaughn, 594 F.3d 1188 (10th Cir. 2010)*, and two cases from this District that appear to conflict with *Asacol*. Mylan urged the court to adopt *Asacol*. In sum, Mylan's view is that, as counsel argued, *Asacol* is "a better read of the law." Doc. 1789 at 64 (Tr. of Mot. Hr'g Class Certification — Phase II 64:17-20).

The court agrees with Mylan on some fronts. *DeVaughn* doesn't provide direct Tenth Circuit authority on this issue. ***HN30***[] In *Devaughn*, the Tenth Circuit explained that "*Rule 23*'s certification requirements neither require all class members to suffer harm or threat of immediate harm nor Named Plaintiffs to prove class members have suffered such harm." *594 F.3d at 1198*. The Circuit recognized: "'[A] class will often include persons who have not been injured by the defendant's conduct. . . . Such a possibility or indeed inevitability does not preclude class certification.'" *Id.* (quoting *Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 677 (7th Cir. 2009))*. But, as Mylan posits, *Devaughn* is different because it was an injunction class case under *Rule 23(b)(2)*, and thus the Tenth Circuit never has discussed whether *Rule 23* permits certification of a class with uninjured class members in the context of a class seeking money damages under *Rule 23(b)(3)*.

But, the court disagrees with Mylan on other fronts. For example, Mylan asserts that the two cases **[*109]** from this District—*Syngenta* and *Urethane*—differ from the question presented here. To the contrary, the court finds these two cases—both decided by Judge Lungstrum—highly persuasive on the question of what standard the Tenth Circuit would apply when deciding whether plaintiffs have made a sufficient showing of classwide injury for certification under *Rule 23*.

First, in *Urethane*, Judge Lungstrum denied a motion to decertify the class he previously had certified. *In re Urethane Antitrust Litig., No. 14-1616-JWL, 2013 U.S. Dist. LEXIS 69784, 2013 WL 2097346, at *1 (D. Kan. May 15, 2013)*. Defendant argued that events after certification confirmed some class members sustained no damages, thereby making certification inappropriate. *2013 U.S. Dist. LEXIS 69784, [WL] at *2*. Plaintiffs conceded the premise of the argument—that not every class member had sustained compensable damage. *Id.* Plaintiffs argued, instead, that all class members had been affected by a conspiracy to elevate prices, even if some may have mitigated their damages or otherwise did not sustain damages that could be quantified. *Id.* Judge Lungstrum found that these facts didn't prevent class certification. *Id.* He noted that defendant "has not cited any authority supporting the argument that the presence of a few 'zero-damages' class members necessarily **[*110]** defeats certification." *Id.* ***HN31***[] And, citing Seventh Circuit case law, Judge Lungstrum recognized that "a class will almost inevitably include persons who have not been injured by the defendant's conduct, and that fact (or even inevitability) does not preclude certification." *Id.* (citing *Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 823 (7th Cir. 2012))*. Judge Lungstrum wrote that the Seventh Circuit's opinion in *Messner* also "noted that a class is too broad to permit certification only if it includes a great number of members who *could* not have been harmed by the defendant's conduct (as opposed to a great number who *ultimately* are shown to have suffered no harm)." *In re Urethane Antitrust Litig., 2013 U.S. Dist. LEXIS 69784, 2013 WL 2097346, at *2* (citing *Messner, 669 F.3d at 824*).

Judge Lungstrum's opinion in *Urethane* doesn't quantify what number would amount to a "great number" of members who sustained no harm. But, Judge Lungstrum denied the motion to decertify, finding that "plaintiffs have shown persuasively that only a very small percentage of class members suffered no damages." *Id.* And, Judge Lungstrum signaled his agreement with the Seventh Circuit's analysis by concluding, "the presence of those few members does not compel decertification." *Id.*

The Tenth Circuit affirmed Judge Lungstrum's certification order. *In re Urethane Antitrust Litig., 768 F.3d 1245 (10th Cir. 2014)*, *cert. denied 137 S. Ct. 291 (2016)*. Although the Tenth Circuit **[*111]** never addressed explicitly whether Judge Lungstrum correctly applied the Seventh Circuit's test for determining when certification of a class containing uninjured class members is appropriate, the Circuit affirmed Judge Lungstrum's certification decision, noting that the "presence of individualized damages issues" did not preclude certification because "[c]lass-wide proof is not required for all issues" as long as plaintiffs made "a showing that the questions common to the class predominate over individualized questions." *Id. at 1255*.

In the second case in this District—*Syngenta*—Judge Lungstrum again relied on the Seventh Circuit's standard for determining whether the presence of uninjured putative class members defeats certification. *Syngenta, 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *4*. Judge Lungstrum held that "the possibility or even inevitability that the class will include members not injured by the defendant's conduct does not preclude class certification." *Id.* (citing *Kohen v.. Pac. Inv. Mgmt. Co., 571 F.3d 672, 677 (7th Cir. 2009))*. Instead, again applying *Messner*, Judge Lungstrum recited the Seventh Circuit's test from that case: "[I]f 'a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, **[*112]** the class is defined too broadly to permit certification.'" *Id.* (quoting *Messner, 669 F.3d at 824*). Judge Lungstrum then considered defendants' arguments that some plaintiff corn producers may not have sustained injury based on a drop in central market corn prices because that price decrease didn't affect local pricing, or because some plaintiffs sold specialty corn, or because some plaintiffs benefitted by selling other crops or feeding livestock. *Id.* Judge Lungstrum concluded that the arguments were "merits-based defenses" and provided "no basis to conclude that a 'great number' of members *could not have been harmed* as alleged by plaintiffs." *Id.* (citing *Messner, 669 F.3d at 824*); *see also* *Messner, 669 F.3d at 824* (noting the "critical" distinction between a "fatally overbroad" class and one that "consists largely (or entirely, for that matter) of members who are ultimately shown to have suffered no harm" because "that may not mean that the class was improperly certified but only that the class failed to meet its burden of proof on the merits")).

In *Syngenta*'s predominance analysis, Judge Lungstrum noted several commonalities among the putative class members, including that plaintiffs' expert opinions would show both the fact of damage and the amount **[*113]** using classwide proof. *Syngenta, 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *5*. Judge Lungstrum rejected defendants' argument that the fact and amount of damages presented individual issues "that are so important [they] defeat predominance." *2016 U.S. Dist. LEXIS 132549, [WL] at *6*. Defendants based their argument on the parties' competing expert opinions, which they urged Judge Lungstrum to weigh and to declare defendants the winner. *Id.* But Judge Lungstrum declined to perform that weighing function at certification, concluding that "the persuasiveness of such evidence [was a question] for the jury at trial." *2016 U.S. Dist. LEXIS 132549, [WL] at *7*. ***HN32***[] Plaintiffs' burden at certification is to show predominance; they need not convince the court that their evidence will prevail at trial. *Id.* And, Judge Lungstrum concluded, "a reasonable juror could believe that" all class members sustained injury from a decrease in "local corn prices [that] reflect[ed] changes in the [Chicago Board of Trade] futures price, as opined by plaintiffs' experts." *Id.* Because the Supreme Court has allowed the use of such representative evidence to show classwide liability in a class action, Judge Lungstrum concluded that certification was warranted. *Id.* (citing *Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016))*. As Judge Lungstrum noted, "[p]laintiffs are required to offer evidence to show **[*114]** predominance," and, he concluded, "they have done so here." *Id.* [32]

As Judge Lungstrum's two opinions show, our court has followed Seventh Circuit precedent when analyzing whether the presence of uninjured class members defeats certification. ***HN33***[] That is, as the Seventh Circuit has held, "a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant . . . ." *Kohen, 571 F.3d at 677-78* (citations omitted). *Kohen* determined that this issue is best averted by focusing on the class definition. *Id. at 677*. "[I]f the definition is so broad that it sweeps within it persons who could not have been injured by the defendant's conduct, it is too broad." *Id.*[33] The Seventh

[32] Defendants filed an interlocutory *Rule 23(f)* Petition for Permission to Appeal Class Certification Order. The Tenth Circuit denied the request, noting that the decision to grant a *Rule 23(f)* petition is purely discretionary and finding that defendants had not established a reason warranting appellate review such as manifest error or an unresolved legal issue. Order, *In re Syngenta AG MIR 162 Corn Litig.*, No. 16-607 (10th Cir. Dec. 7, 2016), ECF No. 01019731851. The Circuit also described Judge Lungstrum's certification decision as "well-researched and reasoned, and if any rulings are error, those errors can be addressed on appeal, if necessary." *Id.* at 3.

Circuit repeated this observation in *Messner* and distinguished it from a proposed class consisting "largely (or entirely, for that matter) of members who are ultimately shown to have suffered no harm, [as] that may not mean that the class was improperly certified but only that the class failed to meet its burden of proof on the merits." *Messner, 669 F.3d at 824* (citing *Schleicher v. Wendt, 618 F.3d 679, 686 (7th Cir. 2010))*; *see also* *Schleicher, 618 F.3d at 686* ("*Rule 23* allows certification of classes that are fated to lose as well as classes that are sure to win."). **[*115]** But neither *Messner* nor *Kohen* provides a formula for determining when a class includes too many uninjured members. *See* *Messner, 669 F.3d at 825* ("There is no precise measure for 'a great many.'"). How many is "too many" is "a matter of degree, and will turn on the facts as they appear from case to case." *Id. at 825*.[34]

Given the certification motion plaintiffs make here, the court finds persuasive the approach used by the Seventh Circuit and Judge Lungstrum.[35] And, the court predicts the Tenth Circuit would follow those cases if presented with the issue. The court also concludes that the Tenth Circuit wouldn't follow *Asacol*.[36]

Thus, the court applies the standard articled by the Seventh Circuit and applied by Judge Lungstrum, below. And so, the court must answer the following question: Is class certification precluded here because the putative class definitions "'contain[ ] a great many persons who have suffered no injury at the hands of the defendant[?]'" *Messner, 669 F.3d at 825* (quoting *Kohen, 571 F.3d at 677*).

(b) Prof. Rosenthal's Probability Analysis

Plaintiffs rely on a probability analysis **[*116]** conducted by Prof. Rosenthal to assert that the proposed classes do not contain great numbers of class members who didn't sustain harm. To the contrary, plaintiffs contend that the number of uninjured class plaintiffs in each class, if any, is *de minimis*. First, Prof. Rosenthal estimates that the

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[33] On the other hand, the definition cannot narrow the class so much that it becomes an inappropriate fail-safe class, *i.e.*, one where the court has to decide the merits of each prospective individual class members' claims to determine class membership, thereby defining the class in terms of the legal injury. *See* *Messner, 669 F.3d at 825*.

[34] In *Asacol*, the district court found 10% a *de minimis* number of uninjured class members. *907 F.3d at 47*. When reversing the district court's certification decision, the First Circuit did not specify the percentage of uninjured plaintiffs that are "too many" to permit certification. Though later cases cite *Asacol* to find that 10% is not *de minimis*, this finding—if indeed *Asacol* made it—is an implicit conclusion.

[35] Our court also cited *Urethane* approvingly in another case. *See* *Sibley v. Sprint Nextel Corp., 315 F.R.D. 642, 664 (D. Kan. 2016)* ("[G]iven that so many cases and treatises agree that the need for individualized damage determinations does *not* defeat commonality or predominance, it follows that the fact that some class members suffered no damages *also* does not defeat commonality or predominance." (citing *In re Urethane Antitrust Litig., 2013 U.S. Dist. LEXIS 69784, 2013 WL 2097346, at *2* (other citations omitted))).

[36] Two district courts have issued recent orders that sharply criticize *Asacol* and its effect on consumers' ability to bring class actions. *See In re Loestrin* *24 FE Antitrust Litig., 410 F. Supp. 3d 352, 404 (D.R.I. 2019)* (denying motion to certify a class of end-payor plaintiffs ("EPP") because *Asacol* left the court "no room to rewrite what the First Circuit has clearly scripted" but still the court was "troubled that over ninety percent of consumers in the proposed EPP class may have been injured by Defendants' alleged unlawful conduct, but now have no practical recourse under ***antitrust law***"); *see also* *In re Intuniv Antitrust Litig., No. 1:16-cv-12396-ADB, 2019 U.S. Dist. LEXIS 141643, 2019 WL 3947262, at *7 n.8, *8 (D. Mass. Aug. 21, 2019)* (denying motion to certify class because "*In re Asacol* dictates the outcome here" but also recognizing "*In re Asacol* is likely a death knell for pharmaceutical, antitrust class actions brought by indirect purchasers [because] [g]iven the myriad ways in which consumers could theoretically be uninjured, once a defendant asserts an intent to challenge each claim to have been affected by their conduct, it becomes nearly impossible for indirect purchasers to show that common issues will predominate under *In re Asacol*," so "[a]bsent class certification, it is likely that most putative class members' claims will go unremedied," and "assuming that Defendants engaged in anticompetitive conduct, although *In re Asacol* eliminates the possibility that some consumers might obtain a recovery for damages they did not suffer, it also ensures that a much larger number of Intuniv consumers will receive no remedy for harm [they] actually suffered").

likelihood that a third-party payor who covered as few as five prescriptions sustained injury from generic delay is 99.999% or better. Doc. 1711-1 at 30-32 (Rosenthal Reply Report ¶¶ 53, 54, Table 8).[37] Second, Prof. Rosenthal opines the likelihood that a third-party payor who reimbursed at least 10 patients for EpiPens was injured by Mylan's switch to the 2-Pak is 99%. *Id. at 32-33* (Rosenthal Reply Report ¶¶ 55-56). Third, Prof. Rosenthal estimates that the likelihood that individual consumers sustained injury from generic delay or Mylan's switch to the 2-Pak is about 95%. *Id. at 34-37* (Rosenthal Reply Report ¶¶ 58-60). Finally, Prof. Rosenthal opines that all third-party payors and all cash payor consumers sustained injury from brand foreclosure. *Id. at 33-34* (Rosenthal Reply Report ¶ 57).[38]

Defendants criticize Prof. Rosenthal's probability analysis and urge the court to disregard it as unreliable. By separate **[*117]** Order, the court denies defendants' motion to exclude Prof. Rosenthal's probability analysis under *Daubert*. Also, the court finds that defendants' criticisms of the probability analysis don't undermine its usefulness to the court's certification decision. The court already has addressed many of these criticisms in the *Daubert* Order[39] and in this Order, *see supra* Part IV.D.3.b.

For example, defendants assert that Prof. Rosenthal's analysis fails to account properly for "brand loyalists," *i.e.*, consumers who would continue purchasing the EpiPen even when a generic is available. Prof. Rosenthal's analysis uses a 95% estimate to calculate the rate consumers would have switched from the EpiPen to a generic EAI device. But, defendants' expert provides his own opinion about the proper switching rate to show that Prof. Rosenthal's estimate is wrong. Doc. 1503-4 at 145-46 (Johnson Expert Report ¶ 180) (sealed version). Prof. Rosenthal responds that defendants' expert has used the wrong metric: He estimates brand loyalty by using the switching rates from the EpiPen to Mylan's own authorized generic. As Prof. Rosenthal explains, those switching rates aren't an accurate indicator of brand **[*118]** loyalty because they aren't drawn from a competitive market. Instead, Prof. Rosenthal has explained how her analysis more accurately reflects a 95% switching rate in a but-for world where a generic is available in a competitive market.

Also, defendants argue that some consumers aren't injured because they paid less for their EpiPens than the but-for price calculated by Prof. Rosenthal. But, as plaintiffs argue, comparing the actual price a consumer paid with a but-for price used to calculate aggregate damages is like comparing apples to oranges. As discussed above, *supra* Part IV.D.3.b., Prof. Rosenthal's average but-for price is an average used to calculate aggregate damages. And, that average isn't relevant to determining an individual class member's damages. Instead, individual damages are assessed by determining the but-for generic price that an individual class member would have paid at the point in

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[37] Defendants assert that plaintiffs don't define the classes to include third-party payors who have covered *five or more* prescriptions. So, defendants contend, Prof. Rosenthal's conclusion shouldn't apply here. But, as plaintiffs argue, Prof. Rosenthal's probability analysis estimates that the likelihood that a third-party payor who covered just two prescriptions sustained injury is between 98.9% and 99.3%. Plaintiffs assert that these figures for just two purchases also demonstrate a very low probability that the putative classes include uninjured class members. Also, as plaintiffs have demonstrated, most third-party payor plans involve thousands of consumers. And, given the prevalence of anaphylaxis, it seems unlikely that a third-party payor would have covered just two, three, four, or even five EpiPen prescriptions during the class period.

[38] Prof. Rosenthal recognizes that "[c]onsumers with copayments that would not have varied for Auvi-Q vs. EpiPen would not have paid this overcharge directly." Doc. 1711-1 at 33-34 (Rosenthal Reply Report ¶ 57). She estimates that such consumers represent between 41% and 71% of consumers, depending on a consumer's plan structure and EpiPen tier placement. *Id.* Plaintiffs assert that these consumers still sustained injury because the collateral source doctrine bars defendants from using insurance payments as an offset. As discussed above, the court need not decide whether the collateral source doctrine applies on class certification. But still, it presents another issue common to the classes. And, if the collateral source doctrine doesn't apply and excludes evidence of such plaintiffs, the presence of these consumers doesn't present individual questions that overwhelm the common questions because Prof. Rosenthal has provided a method for identifying these consumers. *See supra* Part IV.C.1 & n.15. Using that method, plaintiffs can remove those uninjured consumers from the classes, if a merits determination finds that these consumers sustained no injury.

[39] *See* pages 37-45 of the court's Memorandum and Order ruling the *Daubert* motions.

time when the class member made a branded purchase. Also, to the extent defendants' arguments about but-for prices are merit-based arguments, the court can't decide them now.

In sum, none of defendants' criticisms convince the court to disregard Prof. Rosenthal's probability analysis **[*119]** on class certification. Instead, the court agrees with plaintiffs: Prof. Rosenthal's probability analysis provides a plausible method for determining—across the classes—the number of class members who may not have sustained injury from defendants' purported conduct. Indeed, the First Circuit recently considered a similar analysis conducted by Prof. Rosenthal, albeit in the summary judgment context. *See In re Celexa & Lexapro Mktg. & Sales Practices Litig., 915 F.3d 1, 12-13 (1st Cir. 2019)*. Decided after *Asacol, Celexa & Lexapro* reversed the district court's summary judgment ruling against a third-party payor plaintiff's RICO claim, finding that plaintiff's causation evidence "does not seem clearly insufficient" to survive summary judgment. *Id. at 12*. In particular, the court recognized that Prof. Rosenthal "estimated that if [the third-party payor plaintiff] paid for as few as five independent prescriptions, there would be a 98% chance that at least one was the result of off-label marketing." *Id. at 13*. Because the record showed that plaintiff "likely paid for the Celexa or Lexapro prescriptions of more than five different patients[,]" the court found that "the odds that [plaintiff] was not harmed if the drugs were, indeed, ineffective was likely *infinitesimal* (assuming the prescriptions **[*120]** were independent of one another)." *Id.* (emphasis added).

Here, plaintiffs argue that Prof. Rosenthal performed a similar analysis and with more compelling results. And, they urge the court to accept her findings as classwide evidence of an "infinitesimal" number of uninjured class members that doesn't preclude certification. Doc. 1837 at 19 (citing *Celexa & Lexapro, 915 F.3d at 13*). Although *Celexa & Lexapro* affirmed the district court's decision to deny class certification on statute of limitations grounds, the First Circuit, in *dicta*, disagreed with the district court's conclusion that causation and injury issues defeated predominance. *Celexa & Lexapro, 915 F.3d at 14*. Instead, the First Circuit found, the third-party payor's "clinical and statistical evidence, if believed, could establish causation and injury at least for any TPP who paid for more than a handful of different patients' prescriptions." *Id.* Indeed, the First Circuit criticized the district court for "gaug[ing] the substantiality or merit of plaintiffs' proof [of causation] in the context of a *Rule 23* motion." *Id. at 12*. The First Circuit recognized that "[c]ertainly there is room for reasonable disagreement on the merits of Dr. Rosenthal['s] assumption[,]" but, the First Circuit emphasized that **[*121]** "[t]he central issue [on certification] is not whether the method of proof would or could prevail" but "whether the method of proof would apply in common to all class members." *Id.* (citing *Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1047, 194 L. Ed. 2d 124 (2016))*.

Here, the court also recognizes the possibility for reasonable disagreement with Prof. Rosenthal's probability opinion. But, the court cannot decide the merits of those disagreements at the class certification stage. Instead, the court considers whether Prof Rosenthal has provided a plausible method for proving injury among the classes sufficient for the court to consider her opinion on certification. She has. So, the court accepts Prof. Rosenthal's analysis on this motion.

(c) Number of Uninjured Class Members

Now, the court must decide, based on the data produced by Prof. Rosenthal, if her numbers estimating the likelihood of uninjured class members preclude class certification because they show that the putative class definitions "contain[ ] a great many persons who have suffered no injury at the hands of the defendant." *Messner, 669 F.3d at 825*. As recited above, plaintiffs assert that Prof. Rosenthal's calculations establish that the number of uninjured class members in each putative class is *de minimis*. Thus, plaintiffs **[*122]** argue, Prof. Rosenthal's analysis supports class certification.[40]

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[40] Briefly, in their Reply, plaintiffs assert that "[a]ll individual class members were injured by the loss of choice in the market . . . ." Doc. 1837 at 23. At oral argument, plaintiffs again asserted this argument and cited a Sixth Circuit case to support it. *See Energy Conversion Devices Liquidation Tr. v. Trina Solar Ltd., 833 F.3d 680, 690 (6th Cir. 2016)* (noting "caselaw saying that a reduction in consumer choice can show anti-competitive harm" (first citing *Blue Shield of Va. v. McCready, 457 U.S. 465, 481-84, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*; then citing *Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 789-90 (6th Cir. 2002))*. The court recognizes some courts have applied such a rule in antitrust cases. *See Ross v. Bank of Am., N.A., 524 F.3d*

Mylan disagrees. It asserts that, even accepting Prof. Rosenthal's calculations, the number of uninjured class members in this putative class action simply is too great to permit certification.[41] For support, Mylan relies on cases from outside our Circuit denying class certification because the proposed classes contained too many uninjured class members. *See, e.g.,* Rail Freight II, 934 F.3d at 623, 625 (affirming the district court's denial of class certification because plaintiffs' damages model showed "that 2,037 members of the proposed class—or 12.7 percent—suffered 'only negative overcharges' and thus *no* injury" and, as a consequence, the "need [for] individualized adjudications of causation and injury" to determine which class members sustained no injury defeated predominance); Asacol, 907 F.3d at 53-54 (reversing district court's certification order where about 10% of the class was uninjured because, the court found, "there are apparently thousands who in fact suffered no injury" and "[t]he need to identify those individuals will predominate and render an adjudication unmanageable absent . . . [a] mechanism that can manageably remove uninjured persons from the class in **[*123]** a manner that protects the parties' rights"); In re Intuniv Antitrust Litig., No. 1:16-cv-12396-ADB, 2019 U.S. Dist. LEXIS 141643, 2019 WL 3947262, at *8 (D. Mass. Aug. 21, 2019) (concluding that where one putative class contained some 25,000 uninjured class members and another class exceeded 10,000 uninjured members and plaintiffs had "failed to put forth a reasonable and workable plan to weed out the . . . uninjured class members in each putative class[,]" plaintiffs couldn't establish that common issues "'[will] predominate over any questions affecting only individual members'" (quoting Fed. R. Civ. P. 23(b)(3))).

Plaintiffs respond that the court need not follow these cases because they aren't binding precedent in this Circuit. And, plaintiffs assert, they contradict the case law from our court applying the Seventh Circuit's standard. For example, in *Urethane*, Judge Lungstrum refused to decertify a class where "plaintiffs [had] shown persuasively that only a very small percentage of class members suffered no damages . . . ." In re Urethane Antitrust Litig., 2013 U.S. Dist. LEXIS 69784, 2013 WL 2097346, at *2. Plaintiffs argue, like the percentage at issue in *Urethane*, the percentage here is very small—less than 5% for individual consumers and less than .001% for third-party payors.

HN34[] As discussed above, the Seventh Circuit hasn't provided a formula for determining how **[*124]** many uninjured class members is a "great many" that would preclude certification. The Seventh Circuit says "too many" is "a matter of degree, and will turn on the facts as they appear from case to case." Messner, 669 F.3d at 825. In *Messner*, the defendant had conceded that "only about 2.4 percent of the putative class members" did not sustain injury. Id. at 826. The Seventh Circuit recognized the percentage "may prove, depending on the ultimate size of the class at issue here, to be a significant number of additional plaintiffs," but, it concluded, "a 2.4 percent decrease in the size of the class is certainly not significant enough to justify denial of certification." *Id.* Also, the Seventh Circuit noted, "the district court is free to revisit this issue at a later time if discovery shows that the number of members who could not have been harmed . . . was more significant than it appears at this time." *Id.* (citing Kohen, 571 F.3d at 679).

Other courts have reached similar conclusions based on the percentage of uninjured class members. *See, e.g.,* Brown v. Hain Celestial Grp. Inc., No. C 11-03082 LB, 2014 U.S. Dist. LEXIS 162038, 2014 WL 6483216, at *8 (N.D. Cal. Nov. 18, 2014) (granting certification under Rule 23(b)(3) and recognizing that "a small percentage of uninjured persons does not defeat" certification); **[*125]** Mayo v. UBS Real Estate Sec., Inc., No. 08-00568-CV-W-DGK, 2012 U.S. Dist. LEXIS 135454, 2012 WL 4361571, at *3 (W.D. Mo. Sept. 21, 2012) (holding that a putative

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217, 226 (2d Cir. 2008) (holding that plaintiffs sufficiently alleged antitrust injuries in the form of reductions in "consumer choice" and the "quality of [ ] services offered"); Laumann v. Nat'l Hockey League, 105 F. Supp. 3d 384, 397 (S.D.N.Y. 2015) ("[A]nticompetitive conduct is injurious if it limits consumer options."). But the court doesn't address plaintiffs' argument here for two reasons. One, plaintiffs didn't develop this argument until the hearing on the certification motion. And two, the court finds that plaintiffs have shown plausibly that they can prove classwide injury using classwide evidence and the presence of uninjured class members doesn't defeat predominance.

[41] At oral argument, Mylan's counsel provided an estimate of the number of uninjured class members using Prof. Rosenthal's analysis: "If you have a class of 2 million plaintiffs, . . . if you even have just 5 percent of the class that is uninjured, you're talking about 100,000 people who will be getting damages under the plaintiffs' models that we know are not [ ]injured and that the plaintiffs have no way to identify without individualized inquiries and many trials." Doc. 1789 at 73 (Tr. of Mot. Hr'g Class Certification — Phase II 73:13-20).

class definition was not overbroad when "at least 94%" of its members sustained harm from defendants' purported conduct but denying class certification for other reasons). *Cf.* *Koss v. Norwood, 305 F. Supp. 3d 897, 916 (N.D. Ill. 2018)* ("While it is possible that some class members will turn out not to have good claims, that possibility does not defeat certification, and nothing in the definition or evidence tells the court how many, and so it is not 'apparent that it contains a great many persons who have suffered no injury at the hands of the defendant.'" (quoting *Messner, 669 F.3d at 825*)).

Similarly here, the court finds that plaintiffs have shown, at least at the class certification stage, that the percentages of uninjured class members are small enough that they don't preclude class certification. Still, the court recognizes that "depending on the ultimate size of the class at issue here," the factual record eventually may develop more fully and show that the number of uninjured class members is "more significant" than it now appears. *Messner, 669 F.3d at 826*. ***HN35***[] As the Seventh Circuit recognizes, the court "is free to revisit this issue" if that, in fact, occurs. *Id.* For now, the court finds that the current record doesn't defeat the predominance **[*126]** requirement simply because the putative class definitions contain a percentage of uninjured class members.

Also, as plaintiffs argue, even if the existence of uninjured class members presents an individual issue, it doesn't predominate over the common questions that plaintiffs say they will prove using class wide evidence. ***HN36***[] As the Tenth Circuit has recognized, "[c]lass-wide proof is not required for all issues" on certification. *In re Urethane Antitrust Litig., 768 F.3d 1245, 1255 (10th Cir. 2014)*. "Instead, *Rule 23(b)(3)* simply requires a showing that the questions common to the class predominate over individualized questions." *Id.* (citing *Amgen v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 468, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)*). Just this past year, our Circuit held, "so long as at least one common issue predominates, a plaintiff can satisfy *Rule 23(b)(3)*—even if there remain individual issues, such as damages, that must be tried separately." *Naylor Farms, Inc. v. Chaparral Energy, LLC, 923 F.3d 779, 789 (10th Cir. 2019)* (citing *Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016)*); *see also* *In re Urethane Antitrust Litig., 768 F.3d at 1254* (affirming certification and noting that "some of the plaintiffs may have successfully avoided damages" but defendant "has not shown that the district court abused its discretion in finding that class-wide issues predominated over individualized issues" such as the existence and impact of an alleged price-fixing conspiracy that "raised common questions that were capable of class-wide proof").

Here, plaintiffs **[*127]** have presented common questions that are capable of resolution through classwide proof through use of expert opinions and aggregate data. Specifically, those questions are whether defendants committed the alleged unlawful conduct and whether that alleged unlawful conduct affected consumers adversely. The court agrees that these common issues predominate. And, any questions about the absence of injury for some class members don't overwhelm the common issues and defeat predominance on class certification.

(d) Constitutional Considerations

Mylan also argues that the court shouldn't certify classes with uninjured class members because it would violate Article III standing and defendants' constitutional right of due process. Tenth Circuit precedent rejects Mylan's standing argument. ***HN37***[] The Tenth Circuit has held, in the *Rule 23(b)(2)* context, that "only named plaintiffs in a class action seeking prospective injunctive relief must demonstrate standing by establishing they are suffering a continuing injury or are under an imminent threat of being injured in the future." *Colo. Cross Disability Coal. v. Abercrombie & Fitch Co., 765 F.3d 1205, 1214 (10th Cir. 2014)* (citation and internal quotation marks omitted). Although a *Rule 23(b)(2)* case, *Colorado Cross Disability Coalition* approvingly cited another case "support[ing] **[*128]** the notion that class 'standing' does not require individualized proof from class members" in the *Rule 23(b)(3)* context. *Id.* (citing *Denney v. Deutsche Bank AG, 443 F.3d 253, 263 (2d Cir. 2006)* (other citation omitted)). ***HN38***[] *Denney* held that Article III standing does "not require that each member of a class submit evidence of personal standing." *443 F.3d at 263*.

Also, *Colorado Cross Disability Coalition* cited the concurring opinion in [Lewis v. Casey, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)], where "[t]hree Justices of the Supreme Court favorably quoted this principle from a leading class action treatise." *Id.* They said:

> "'[Unnamed plaintiffs] need not make any individual showing of standing [in order to obtain relief]. . . . **HN39**[] Whether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions.'"

Id. (quoting Lewis, 518 U.S. at 395-96 (Souter, J., concurring) (quoting 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 2.07 (3d ed. 1992))). The Tenth Circuit noted that the majority "seemed to agree" with the concurring opinion's conclusion because it "point[ed] out that its holding did 'not rest upon the application of standing rules.'" *Id.* (quoting Lewis, 518 U.S. at 360 n.7 **[*129]**). Thus, the Tenth Circuit framed the certification question as one "not answered by demanding proof of standing from each class member but by application of Rule 23." *Id.*

Applying the Tenth Circuit's holding in *Colorado Cross Disability Coalition* and the authorities that it cites favorably, the court finds that the Article III standing requirement does not demand that plaintiffs establish each putative class member has sustained injury. Instead, here, plaintiffs have satisfied Article III standing by showing that each named plaintiff has sustained injury sufficient to confer standing. *See supra* Part IV.D.3.b. And, as the Tenth Circuit directs, the court has answered the question whether plaintiffs can represent a class that includes uninjured class members by applying Rule 23. *See supra* Part IV.E.2.b.ii.(c).

The court also rejects Mylan's due process argument. To support this argument, Mylan again invokes *Asacol*. As discussed above, *Asacol* held that plaintiffs' proposed claims process—which involved a claims administrator reviewing contested claim forms—failed to protect defendants' Seventh Amendment and due process rights because the process "provides defendants no meaningful opportunity to contest whether an individual **[*130]** would have, in fact, purchased a generic drug had one been available." Asacol, 907 F.3d at 53. The First Circuit criticized plaintiffs for failing to establish that the number of affidavits to which defendants could raise a legitimate challenge "is so small that it will be administratively feasible to require those challenged affiants to testify at trial." *Id.* And, because plaintiffs had failed to make the "administratively feasible" showing, the First Circuit held that plaintiffs failed the predominance requirement. Id. at 53-54. But *Asacol* isn't the governing law in our Circuit. And for reasons already explained, the court declines to apply *Asacol*.

HN40[] Instead, as discussed above, our court has refused "to apply a standard—one not adopted by the Tenth Circuit—that would preclude certification without a showing that class members may be determined in an administratively feasible manner." Syngenta, 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *3. In reaching this conclusion, Judge Lungstrum was persuaded by "the thorough and well-reasoned analysis of the Seventh Circuit" in Mullins v. Direct Digital, LLC, 795 F.3d 654 (7th Cir. 2015). Syngenta, 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *3. *Mullins* explained that, when a class action involves an aggregate damage calculation, "the identity of particular class members does not implicate the defendant's due process interest at all" because "[t]he **[*131]** addition or subtraction of individual class members affects neither the defendant's liability nor the total amount of damages it owes to the class." Mullins, 795 F.3d at 670 (citations omitted). In reaching this conclusion, *Mullins* cited the Tenth Circuit's opinion in *Urethane* as support because, there, the Tenth Circuit had rejected a "Seventh Amendment challenge to allocation of damages award among class members because defendant 'has no interest in the method of distributing the aggregate damages award among the class members[.]'" *Id.* (quoting In re Urethane Antitrust Litig., 768 F.3d 1245, 1269 (10th Cir. 2014)).

For the same reasons, the court finds that Mylan's due process rights aren't implicated here. Plaintiffs have made a plausible showing that they can prove damages on a classwide basis using an aggregate calculation based on their experts' opinions. And, using the Seventh Circuit's reasoning in *Mullins*, the court concludes that Mylan's constitutional arguments don't preclude certification here.

c. RICO

Plaintiffs premise their RICO claim on defendants' alleged EpiPen pricing scheme. Plaintiffs describe this scheme as a national, unified scheme to defraud. And, plaintiffs contend, the scheme did not vary among individual plaintiffs because defendants generally deployed it across the **[*132]** entire U.S. market. Thus, plaintiffs contend, the issues presented by the RICO claim are inherently classwide and subject to classwide proof because all of the claim's elements turn on defendants' conduct. Specifically, plaintiffs identify defendants' conduct susceptible to classwide proof as "the RICO enterprise involving the Mylan Defendants, the Pfizer Defendants, and the co-conspirator PBMs; the pattern of racketeering committed by the Mylan and Pfizer Defendants so that they could raise the price of the EpiPen without any fear of competition, consumer backlash, or regulatory oversight from Congress; the elimination of the EpiPen single pack; and causation and damages stemming from this misconduct." Doc. 1500 at 59-60.

HN41[] When considering whether the *Rule 23* predominance requirement is satisfied in a RICO action, the court must "survey the elements of the class's RICO claims to consider (1) which of those elements are susceptible to generalized proof, and (2) whether those that are so susceptible predominate over those that are not." *CGC Holding Co., LLC v. Broad & Cassel, 773 F.3d 1076, 1087 (10th Cir. 2014)* (citations omitted). So, the analysis "'whether "questions of law or fact common to class members predominate" begins, of course, with the elements of the underlying **[*133]** cause of action.'" *Id. at 1088* (quoting *Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011)* (quoting *Fed. R. Civ. P. 23*)). Or, more simply, deciding whether a class can rely on classwide proof starts with what the law requires the class to prove.

HN42[] RICO "establishes a civil cause of action for persons injured as a result of a prohibited racketeering activity." *Id.* (citing *18 U.S.C. § 1962(c)*). A RICO violation has "four elements: '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *Robbins v. Wilkie, 300 F.3d 1208, 1210 (10th Cir. 2002)* (first quoting *Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*; then citing *BancOklahoma Mortg. Corp. v. Capital Title Co., Inc., 194 F.3d 1089, 1100 (10th Cir.1999))*. And, "[t]o prove a RICO violation, a plaintiff must show that the defendant violated the RICO statute, and the plaintiff was injured 'by reason of' that violation." *CGC Holding, 773 F.3d at 1088* (first citing *18 U.S.C. § 1962*; then quoting *§ 1964(c)*).

Here, plaintiffs' RICO claim alleges an illegal scheme conducted by an "association-in-fact enterprise," consisting of the RICO Defendants (Mylan N.V., Mylan Specialty, LP, Heather Bresch, Pfizer, King Pharmaceuticals, and Meridian) and the PBM Conspirators (defined as at least four PBMs: CVS Health Corporation, Express Scripts Inc., Optum Rx Inc., and Prime Therapeutics LLC), "whose purpose was to fraudulently mislead and deceive American consumers to purchase the EpiPen at an inflated price, to purchase the EpiPen as a 2-Pak only, and to cause **[*134]** consumers to pay an artificially inflated price for EpiPens" from 2011[42] to the present. Class Compl. ¶¶ 600, 604.

Plaintiffs claim they will prove each element of their RICO claim using classwide evidence. Thus, they contend, the common issues of the RICO claim "predominate over any questions affecting only individual members." *Fed. R. Civ. P. 23(b)(3)*. Specifically, plaintiffs assert that they will prove the first and second elements of their RICO claim with common evidence showing that the RICO Defendants formed an enterprise with the PBM Conspirators and, together, they committed various acts as part of an effort to raise the price of EpiPens. Plaintiffs contend that they will prove the third and fourth elements of their RICO claim with common evidence of a pattern of racketeering activity that includes: (1) removing single EpiPens from the market and forcing consumers to buy EpiPens in the 2-Pak; (2) paying kickbacks to PBMs in exchange for exclusive formulary status; (3) adding patents to the EpiPen to prevent generic competition, filing patent infringement lawsuits against generic rivals, and issuing fraudulent press releases suggesting that settlements of patent lawsuits were legitimate; and (4) making **[*135]** false and misleading

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[42] Mylan launched the EpiPen 2-Pak on August 24, 2011. Plaintiffs use this date as the earliest date when the putative class sustained damages.

statements (a) about rival product, Auvi-Q, (b) about the reasons for the switch to the 2-Pak, (c) about coupons and rebates, and (d) during Heather Bresch's testimony under oath to Congress on September 21, 2016.

Plaintiffs also claim they will prove causation and damages on a classwide basis. Specifically, plaintiffs contend that they will offer generalized proof of RICO causation because their RICO claim is based on a single, common scheme, and thus, class members share common relevant circumstantial evidence showing causation. And, plaintiffs argue, they can prove on a classwide basis that defendants' RICO violations caused plaintiffs to sustain common damages in the form of overpayments for EpiPens. In short, plaintiffs predict their RICO evidence will focus on defendants' conduct.

Defendants respond, arguing the court should not certify the proposed RICO class because individual issues of causation and damages will overwhelm the common issues.[43] Thus, defendants argue, plaintiffs' RICO claim cannot satisfy *Rule 23(b)(3)*'s predominance requirement. The court addresses each of defendants' predominance arguments separately, below.

i. RICO Causation

HN43[] The Tenth Circuit has explained **[*136]** that RICO's "'by reason of'" requirement requires a plaintiff to show "'a RICO predicate offense "not only was a 'but for' cause of his injury, but was the proximate cause as well."'" *CGC Holding, 773 F.3d at 1088* (quoting *Hemi Grp., LLC v. City of N.Y.C., 559 U.S. 1, 9, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010)* (quoting *Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992))*). "Sufficiently establishing the element of causation—both actual and proximate—is crucial to proving any violation of RICO." *Id.* (citing *Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 656-60, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008))*.

HN44[] The Supreme Court has defined RICO proximate causation as "a flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case.'" *Bridge, 553 U.S. at 654* (quoting *Holmes, 503 U.S. at 272 n.20*). Proximate cause provides a "'label generically [for] the judicial tools used to limit a person's responsibility for the consequences of that person's own acts . . . .'" *Id.* (quoting *Holmes, 503 U.S. at 268*). And, it includes "a particular emphasis on the 'demand for some direct relation between the injury asserted and the injurious conduct alleged.'" *Id.* (quoting *Holmes, 503 U.S. at 268*).

Thus, "'[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries.'" *Safe Streets All. v. Hickenlooper, 859 F.3d 865, 889 (10th Cir. 2017)* (quoting *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006))*. The Supreme Court has instructed that "'no need [exists] to broaden the universe of actionable harms to permit RICO suits by parties **[*137]** who have been injured only indirectly.'" *Id.* (quoting *Anza, 547 U.S. at 460*).

HN45[] But, in the context of RICO claims premised on predicate acts of mail fraud, the Supreme Court has held that "a plaintiff is not required to plead that he is a victim of the defendant's underlying crime (*e.g.*, that he relied on the fraudulent mailings) to establish a direct injury." *Id.* (citing *Bridge, 553 U.S. at 649-50*). "Rather, a plaintiff may establish proximate causation by plausibly pleading that his business or property has been directly injured as a result of the defendants' *§ 1962* violation." *Id.* (citing *Bridge, 553 U.S. at 649-50*).

HN46[] When a federal court decides whether issues of RICO causation satisfy the *Rule 23* predominance inquiry, "the question is whether the link between defendants' actions and the class's injuries can be adduced through common evidence." *GCG Holding, 773 F.3d at 1088*. Our Circuit has explained that, in RICO actions, "individualized issues of reliance often preclude a finding of predominance." *Id.* "Since reliance is often a highly idiosyncratic issue that might require unique evidence from individual plaintiffs, it may present an impediment to the

[43] Defendants don't argue that the other elements of plaintiffs' RICO claim involve individual issues that defeat predominance.

economies of time and scale that encourage class actions as an alternative to traditional litigation." *Id.* But, the Circuit found, this isn't always **[*138]** the case. *Id.*

HN47[] In *GCG Holding*, the Circuit explained that certification of a RICO claim is proper when "'causation can be established through an inference of reliance where the behavior of plaintiffs and the members of the class cannot be explained in any way other than reliance upon the defendant's conduct.'" *Id. at 1089-90* (quoting *In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig., 277 F.R.D. 586, 603 (S.D. Cal. 2011))*. In such a situation, "where circumstantial evidence of reliance can be found through generalized, classwide proof, then common questions will predominate and class treatment is valuable in order to take advantage of the efficiencies essential to class actions." *Id.; see also* *Menocal v. GEO Grp., Inc., 882 F.3d 905, 918 (10th Cir. 2018)* (holding that the "causation element is susceptible to generalized proof and thus cannot defeat class certification under Rule 23(b)(3)'s predominance requirement"); *see also* *id. at 20* (explaining that when "class allegations are based on a single, common scheme, class members share the relevant circumstantial evidence in common, thus making class-wide proof possible").

Defendants argue that plaintiffs have not shouldered their burden to show how they can prove RICO causation on a classwide basis. More specifically, defendants assert, plaintiffs cannot show a "causal chain between any specific [RICO predicate] act and **[*139]** the amount paid by each plaintiff" for an EpiPen, much less that they can demonstrate the necessary causal chain through classwide proof. Doc. 1636 at 69. Plaintiffs respond, explaining how they will use classwide evidence to prove three components of the EpiPen pricing scheme using: (1) the "hard switch" to the 2-Pak and the elimination of single EpiPens from the market; (2) the delay of generic competition to the market; and (3) the elimination of branded competition by entering into exclusive dealing contracts with PBMs. The court addresses these three components, below.

(a) Switch to 2-Pak

Plaintiffs contend they will prove that defendants engaged in a pattern of racketeering activity that included removing single EpiPens from the market and forcing consumers to buy EpiPens two at a time in the 2-Pak. And, plaintiffs argue, they will establish RICO causation using generalized proof that defendants' actions caused plaintiffs to pay more for EpiPens because defendants' actions forced them to buy two EpiPens.

To support this argument, plaintiffs rely on the Reports of their expert, Prof. Meredith Rosenthal. Prof. Rosenthal opines that Mylan's switch to the 2-Pak "led to an immediate **[*140]** and permanent increase in the number of [EpiPens] per prescription of approximately 0.5." Doc. 1497-3 at 24 (Rosenthal Expert Report ¶ 54). Prof. Rosenthal opines that this increase "represents the amount by which Class members were required to increase their consumption of EpiPens when they were constrained by the 2-Pak." *Id.; see also* Doc. 1711-1 at 13-14 (Rosenthal Reply Report ¶ 17) (explaining that her study supports a "causal inference" that "[t]he withdrawal of the single injector EpiPen forced the Class to purchase more pens than it would have [purchased] otherwise," and observing that "Mylan's own analysis makes the same causal inference: An EpiPen market review from 2012 cites a 0.23 pen per prescription increase from the end of 2011 compared to the 2012 average, noting 'Much of this growth was driven by elimination of Single Pack.'").[44]

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[44] Defendants have challenged the reliability of Prof. Rosenthal's event study in a *Daubert* motion. The court's Order deciding that motion explains that defendants' challenges to Prof. Rosenthal's opinions go to the weight of her opinions but they don't preclude admissibility. The court thus considers her event study when deciding plaintiffs' Motion for Class Certification. And, the court finds, her opinions support class certification at this stage of the litigation.

At this stage, plaintiffs don't need to establish that Prof. Rosenthal's opinions are indisputably correct. Instead, they merely must demonstrate that her opinions are capable of showing RICO causation on a classwide basis. The court finds they do. The persuasiveness of Prof. Rosenthal's opinions for proving classwide liability is a matter for the factfinder to consider at a later stage in the case. ***HN48***[] *See* *In re Syngenta AG MIR 162 Litig., No. 14-md-2591-JWL, 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *6 (D. Kan. Sept. 26, 2016)* (explaining that "'persuasiveness [of an expert's opinion showing classwide liability]

After the switch to the 2-Pak, Prof. Rosenthal calculates that the ratio of EpiPens sold per prescription was more than 2.0. Doc. 1497-3 at 24 (Rosenthal Expert Report ¶ 54). By comparison, in Canada, where consumers still can buy EpiPens in a single pack, the average number of EAIs dispensed per prescription **[*141]** is about 1.5 or 1.48. Doc. 1499-5 at 4 (Rocheleau Dep. 176:3-25).

This evidence, plaintiffs assert, shows defendants' conduct involved "group coercion." *See Menocal v. GEO Grp., Inc., 882 F.3d 905, 922 n.13 (10th Cir. 2018)* (recognizing that alleged group coercion can support an inference of reliance). Plaintiffs describe defendants' coercion as having forced all consumers—as a group—to purchase EpiPens in sets of two. And, plaintiffs assert, our Circuit has held that allegations of "group coercion rather than individual arm's length transacting . . . not only allows for a class-wide inference of causation . . . but arguably supports an even stronger inference." *Id.* (affirming certification of a class of immigration detainees who alleged a private detention facility's sanitation policy violated the Trafficking Victim Protection Act's ("TVPA") prohibition against forced labor, and specifically holding that "a reasonable factfinder [could] conclude by a preponderance of the evidence that each TVPA class member would not have performed his or her assigned cleaning duties without being subject to the Sanitation Policy," and thus "a factfinder could—but need to—accept a class-wide inference of causation," *id. at 922*).

Plaintiffs also assert that Mylan's internal **[*142]** documents contradict its justification for switching to the 2-Pak. Mylan asserts that it made the switch based on medical guidance recommending that patients carry more than one EpiPen with them at all times. But, plaintiffs argue, Mylan's internal documents confirm that profit was the real reason for imposing the switch to the 2-Pak. *See, e.g.*, Doc. 1499-8 at 4 (Mylan slide deck explaining two reasons for eliminating the single EpiPen: (1) "Double the revenue per RX of 2 pack vs single" and (2) "Strong potential generic defense"); Doc. 1499-22 at 10 (Mylan slide deck projecting the "Impact of Eliminating Single Dose" included "Increase revenue by $81 million and gross profit by $41 million annually"). Plaintiffs argue that this evidence reveals Mylan's true motive for switching to the 2-Pak, and this evidence applies across the board, showing defendants' conduct injured the putative class plaintiffs by requiring them to pay more for EpiPens.

In response, defendants argue that RICO causation is not susceptible to classwide proof because not all plaintiffs would have purchased a single EpiPen instead of the 2-Pak—had the single EpiPen remained available for purchase.[45] Indeed, defendants **[*143]** cite deposition testimony by some named plaintiffs who testified that they preferred to purchase a 2-Pak even if they had the choice to buy one EpiPen at a time, in a single dose. Doc. 1835-2 at 2-10. Thus, defendants argue, the alleged RICO violations did not coerce these plaintiffs into paying more for the EpiPen. And, defendants contend, individualized issues like this one—*i.e.*, identifying which class member would have purchased a 2-Pak even if a single dose was available—outweigh common issues embedded in the causation element. The court disagrees.

HN49[] As discussed above—when addressing the issue of uninjured class members—this court has recognized that "a class will almost inevitably include persons who have not been injured by the defendant's conduct, and that fact (or even inevitability) does not preclude certification." *In re Urethane Antitrust Litig., No. 04-1616-JWL, 2013 U.S. Dist. LEXIS 69784, 2013 WL 2097346, at *2 (D. Kan. May 15, 2013)* (citing *Messner v. Northshore Univ.*

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is, in general, a matter for the jury'" (quoting *Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1049, 194 L. Ed. 2d 124 (2016))*.

[45] Defendants also argue that a RICO plaintiff must show that "commission of the predicate acts" caused plaintiff's injuries. *Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*. Here, defendants contend plaintiffs can't show that any specific RICO predicate act caused plaintiffs' injuries as opposed to Mylan's decision to stop selling the EpiPen in single doses. Doc. 1636 at 72. This argument misses the mark. The predicate acts plaintiffs rely on to support their RICO claims are the false and misleading statements that defendants made about the medical justification for the switch to the 2-Pak. *See, e.g.*, Doc. 60 at 172 (Class Compl. ¶ 655.b.). Plaintiffs assert that they will show that defendants committed these predicate acts as part of a pattern of racketeering activity that included removing single doses of the EpiPen from the market and forcing consumers to buy the EpiPen in a 2-Pak. And, plaintiffs assert, they will show that defendants' conduct caused classwide injury because it forced consumers to buy more EpiPens. These allegations suffice to establish that plaintiffs will rely on classwide evidence to support their RICO theory that defendants' alleged commission of predicate acts caused plaintiffs' injuries.

HealthSystem, 669 F.3d 802, 823 (7th Cir. 2012)). Instead, "a class is too broad to permit certification only if it includes a great number of members who could not have been harmed by the defendant's conduct (as opposed to a great number who ultimately are shown to have suffered no harm)." *Id.* (citing Messner, 669 F.3d at 824).

Here, defendants rely on evidence that, ultimately, **[*144]** may show certain putative class members sustained no harm because they would have purchased the 2-Pak, even if a single dose product was available for purchase. But, at this stage of the litigation, the court is unpersuaded that the putative class includes "great numbers" of class members who *could not have been harmed* by defendants' switch to the 2-Pak. *See supra* Part IV.E.2.b. Plaintiffs have presented sufficient evidence that defendants' switch to the 2-Pak caused injury to the putative class on a classwide basis in the form of overpayment for the EpiPen. And thus, plaintiffs have shown that common issues of RICO causation predominate. *Cf.* In re Syngenta AG MIR 162 Corn Litig., No. 14-md-2591-JWL, 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *7 (D. Kan. Sept. 26, 2016) (rejecting defendant's argument that "the fact and amount of injury present individual issues because the [Chicago Board of Trade ("CBOT")] price is not sufficiently tied to local corn prices," and explaining that the court would not "weigh the class-wide evidence concerning the relationship between CBOT and local prices" because "the persuasiveness of such evidence is for the jury at trial," and concluding that "a reasonable juror could believe that local corn prices do reflect changes in **[*145]** the CBOT futures price, as opined by plaintiffs' experts.").

In reaching this conclusion, the court recognizes that plaintiffs' 2-Pak theory is but one of the factual theories plaintiffs rely on to support their RICO claim. And, after ruling the class certification motion, the court still retains jurisdiction to refine and limit the scope of the class RICO claims. At this stage of the proceeding, defendants haven't convinced the court that the putative class includes "great numbers" of class members uninjured by the switch to the 2-Pak. But, the court is mindful that defendants have presented evidence in the form of deposition testimony showing that the 2-Pak switch may not have injured some named plaintiffs. If the evidence develops to show that "great numbers" of putative class plaintiffs were unharmed by the 2-Pak switch, the court retains the flexibility to modify its class certification decision and preclude plaintiffs from using the 2-Pak theory to support the RICO class claims. *See, e.g.,* Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 823 (7th Cir. 2012) (recognizing that "depending on the ultimate size of the class at issue here," the estimated percentage of uninjured class members "may prove . . . to be a significant number of additional **[*146]** plaintiffs" but noting, "the district court is free to revisit this issue at a later time if discovery shows that the number of members . . . was more significant than it appears at this time"). ***HN50***[] The court can revise its certification decision or even limit plaintiffs' use of certain factual theories to support their RICO class claim. *See* Fed. R. Civ. P. 23(d)(1)(A) ("In conducting an action under this rule, the court may issue orders that . . . determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument."). *Cf.* Shook v. Bd. of Cty. Comm'rs, 543 F.3d 597, 606-07 (10th Cir. 2008) (recognizing that a district court may create subclasses *sua sponte* as a way to segregate plaintiffs with different factual and individual circumstances used to support their claim); Marisol A. v. Giuliani, 126 F.3d 372, 379 (2d Cir. 1997) (recognizing that certifying subclass serves several purposes including an ability "to conduct the trial in a more orderly manner, by tying the order of proof to particular claims raised by the individual subclasses" and noting that "[o]ne possible method of developing proper subclasses would divide the present class based on the commonality of the [class members'] particular circumstances [or] the type of harm the [class members] allegedly have **[*147]** suffered . . . .")

Should defendants convince the court that "great numbers" of putative class members never could have been harmed by the switch to the 2-Pak because they would have purchased two EpiPens even if defendants had continued to make the single dose available in the market, the court has authority and discretion to modify its ruling.

(b) Delay of Generic Competition Through "Pay For Delay" Settlements

Plaintiffs also assert that their generic delay theory uses classwide proof to establish RICO causation. Plaintiffs allege that one component of the EpiPen pricing scheme was defendants' use of reverse payment settlements to resolve EpiPen patent litigation. Plaintiffs describe the reverse payment settlements as anticompetitive "pay for delay" settlements that effectively delayed generic competition from entering the EAI market for more than three years. Doc. 60 at 172 (Compl. ¶ 655.c.). To support their RICO claim, plaintiffs allege that defendants committed predicate RICO acts by making false statements in press releases about the settlements, describing them as a legitimate means to resolve patent litigation and concealing the true, anti-competitive reasons for the agreements. **[*148]** *Id.; see also id. at 176* (Compl. ¶ 659.e.). And, plaintiffs allege, defendants' RICO violations succeeded in delaying generic competition which, in turn, protected Mylan's monopoly in the EAI market and allowed defendants to continue to raise the EpiPen's price.

Through expert testimony by Profs. Einer Elhauge and Andrew Torrance, plaintiffs offer evidence that the patent settlements were not legitimate settlements. Instead, the two professors opine the settlements really were unlawful reverse payment settlements contrived to delay generic competition. Plaintiffs assert that their evidence supporting this theory is common to all class members. The court agrees with them. The evidence focuses entirely on defendants' conduct and motivations. It thus applies to each putative class plaintiffs' claims and either fails or succeeds "in one stroke." *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*.

Also, through Prof. Rosenthal's testimony, plaintiffs offer evidence that defendants' misconduct delaying generic competition caused the RICO class—as a whole—to overpay for the EpiPen.[46] Specifically, Prof. Rosenthal calculated overcharges from delayed generic entry on a classwide basis using classwide data and information (calculated separately for TPPs, **[*149]** insured consumers, and cash payors). Doc. 1497-3 at 30, 77-82 (Rosenthal Expert Report ¶ 68, Attach. C.7.a—C.7.e).

Defendants respond that plaintiffs can't rely on their generic delay theory to establish RICO causation on a classwide basis because they can't show that all plaintiffs knew about, much less relied on, defendants' misrepresentations about the legitimacy of the patent litigation settlements. Doc. 1636 at 72-73. Thus, defendants contend, plaintiffs can't connect the specific RICO predicate acts to any overpayment by any particular plaintiff. *Id.* Plaintiffs disagree. They contend that defendants' argument improperly assumes plaintiffs must show evidence of first-party reliance to prevail on a RICO claim. Plaintiffs have the better end of this dispute.

HN51[] The Supreme Court has held—explicitly—that first-party reliance is not required to establish a RICO claim that relies on the predicate act of mail fraud. *Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 649, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008)*. Instead, RICO provides a cause of action for "[a]ny person injured in his business or property by reason of a violation of" the statute. *18 U.S.C. § 1964(c)*. The Supreme Court reasoned that this statutory language "suggest[s] a breadth of coverage not easily reconciled with an implicit **[*150]** requirement that the plaintiff show reliance in addition to injury in his business or property." *Bridge, 553 U.S. at 649*. So, plaintiffs argue, RICO doesn't require them to show classwide evidence of first-party reliance on defendants' misrepresentations. Instead, plaintiffs assert, they just need to show classwide evidence of injury to business of property "by reason of" defendants' RICO violations.

Bridge illustrates this principle. In that case, the Supreme Court held that a plaintiff could allege a RICO injury "'by reason of' a pattern of mail fraud even if he has not relied on any misrepresentations." *Id. at 649*. The Court found that plaintiffs' allegations "clearly" established that they "were injured by [defendants'] scheme." *Id.* Plaintiffs had alleged: "As a result of [defendants'] fraud, [plaintiffs] lost valuable liens they otherwise would have been awarded."

[46] Defendants separately filed *Daubert* motions challenging the reliability of Profs. Torrance, Elhauge, and Rosenthal's opinions. The court's Order denying those motions explains that defendants' challenges go to the weight of expert opinions but don't preclude the court from "admitting them," *i.e.*, considering them when deciding the class certification motion. Thus, on the class certification motion, the court considers these expert opinions. And, the court concludes that they support class certification because they plausibly offer a classwide method for proving RICO liability.

Defendants' challenges to the persuasiveness of these experts' opinions is a different matter. The factfinder can decide how persuasive these opinions are when deciding the merits of the case—*i.e.*, whether the opinions prove that defendants entered unlawful reverse payment settlements that violated RICO. But for current purposes, the opinions present sufficient evidence of classwide causation to support plaintiffs' class certification motion.

Id. This was "true even though [plaintiffs] did not rely on [defendants'] false attestations of compliance with the county's rules." *Id.*

Likewise here, plaintiffs offer classwide evidence that one component of defendants' EpiPen pricing scheme—reverse payment settlements that delayed generic competition—injured plaintiffs by forcing them to overpay for **[*151]** the EpiPen. Like *Bridge*, plaintiffs have asserted an actionable RICO claim even if they didn't rely on defendants' alleged misrepresentations about the settlements' legitimacy.

But, defendants assert, *Bridge* still requires plaintiffs to support their RICO claim with evidence that "*someone* relied on the defendant's misrepresentations." *Id. at 658*. Whether plaintiffs can marshal evidence to make that showing is a merits-based determination that the court cannot make now. Instead, what matters now is whether plaintiffs can prove this requirement of their RICO claim with common evidence.

Plaintiffs assert that they can make this showing on class certification through an classwide inference of reliance. That is, according to plaintiffs, each plaintiff's payment for an EpiPen gives rise to an inference that he relied on defendants' fraudulent statements—or more specifically, defendants' fraudulent omissions[47]—about the EpiPen pricing scheme. ***HN52***[] Indeed, the Tenth Circuit has recognized that "issues of reliance can be disposed of on a classwide basis without individualized attention at trial." *CGC Holding Co., LLC v. Broad & Cassel, 773 F.3d 1076, 1089 (10th Cir. 2014)* (citations omitted). "For example, where circumstantial evidence of reliance can be found through generalized, classwide **[*152]** proof, then common questions will predominate and class treatment is valuable in order to take advantage of the efficiencies essential to class actions." *Id.*

HN53[] Also, in "certain circumstances . . . it is beneficial to permit a commonsense inference of reliance applicable to the entire class to answer a predominating question as required by *Rule 23*." *Id.* (citations omitted). And, "[i]n the RICO context, class certification is proper when 'causation can be established through an inference of reliance where the behavior of plaintiffs and the members of the class cannot be explained in any way other than reliance upon the defendant's conduct.'" *Id. at 1089-90* (quoting *In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig., 277 F.R.D. 586, 603 (S.D. Cal. 2011))*.

In *CGC Holding*, the Circuit held that "evidence of payment for [a] loan commitment—more specifically, the inference that arises from it—is sufficient to present a predominating question related to class member reliance that can resolve a central issue of this litigation in one swoop." *Id. at 1091*. "More specifically the fact that a class member paid [a] nonrefundable up-front fee in exchange for the loan commitment constitutes circumstantial proof of reliance on the misrepresentations and omissions regarding [one of the defendant's] past and the defendant **[*153]** entities' ability or intent to actually fund the promised loan." *Id. at 1091-92*.

Similarly, here, plaintiffs argue that the court can infer that the putative plaintiffs relied on defendants' misrepresentations or omissions about the EpiPen pricing scheme when purchasing their EpiPens. Defendants disagree. They assert that the Tenth Circuit has cautioned that an inference of RICO causation "would not be appropriate in most RICO class actions." *Id. at 1091 n.9*. But, in that same footnote, the Tenth Circuit said: "[T]he inference of reliance here is limited to transactional situations—almost always financial transactions—where it is sensible to assume that rational economic actors would not make a payment unless they assumed that they were receiving some form of the promised benefit in return." *Id.* That's the scenario we have in this case. It is "sensible to assume" that the putative plaintiffs "would not [have made] a payment for" their EpiPens had they known—as plaintiffs allege—that they were paying an inflated price for that product due to defendants' misconduct in delaying generic competition. *Id.* But, defendants argue, "the record is replete with examples of named plaintiffs who bought EpiPen products for rational **[*154]** reasons that had nothing to do with Mylan's alleged misconduct." Doc. 1636 at 71 n.79. These are merits-based defenses. Defendants assert they can rebut the classwide presumption of reliance

[47] The court recognizes that "deceitful concealment of material facts may constitute actual fraud" sufficient to support a wire fraud claim. *United States v. Cochran, 109 F.3d 660, 665 (10th Cir. 1997)*. "[A] misleading omission is actionable as fraud . . . if it is intended to induce a false belief and resulting action to the advantage of the misleader and the disadvantage of the misled." *Id.* (citation, internal quotation marks, and internal alternations omitted).

with evidence that some plaintiffs would have purchased their EpiPens even if they had known about defendants' alleged misconduct. But, here, the question on class certification is whether plaintiffs can prove reliance using classwide evidence. The court determines that they can—by using a classwide inference, as approved by our Circuit in *CGC Holding*. And this showing suffices to establish that common issues of RICO causation predominate under plaintiffs' generic delay theory.

(c) Exclusive Dealing Contracts with PBMs

Last, plaintiffs assert they will rely on common evidence to prove a third component of the EpiPen pricing scheme—*i.e.*, defendants' use of exclusive dealing contracts with PBMs. Plaintiffs assert that defendants' exclusionary contracts blocked branded competition from the market and allowed Mylan to raise the EpiPen's price which, in turn, caused plaintiffs to sustain injury in the form of overpaying for the EpiPen. To support this argument, plaintiffs rely on Prof. Elhauge's Expert **[*155]** Report.[48]

Prof. Elhauge opines that Mylan's exclusive dealing contracts successfully foreclosed rival product Auvi-Q from accessing a percentage of the EAI market. Doc. 1497-2 at 52-53 (Elhauge Expert Report ¶ 101). Using classwide methodology, Prof. Elhauge has calculated the effects of this foreclosure on EpiPen sales and its price. *Id. at 56-66* (Elhauge Expert Report ¶¶ 110-20). He then used those calculations to quantify overcharges incurred by EpiPen consumers. *Id. at 64-66* (Elhauge Expert Report ¶ 120, Table 3-4). As Prof. Elhauge explains, his method of calculating the overcharges caused by defendants' exclusive dealing contracts with PBMs "is common to the class, based on classwide evidence, and produces a conclusion about the foreclosure share that is common to the class." *Id. at 52-53* (Elhauge Expert Report ¶ 101); *see also* *id. at 54-55* (Elhauge Expert Report ¶ 104) (describing his "method of calculating" the foreclosing effects on Auvi-Q sales and EpiPen's market price inflation as "common to the class, based on classwide evidence, and [one that] produces conclusions about the foreclosing effect and market price inflation that are common to the class").

Defendants respond that too many individual issues exist for the **[*156]** court to conclude that plaintiffs can satisfy the predominance requirement. Defendants argue that the drug supply chain is complex, and it involves too many participants who ultimately affect drug prices. As an example, defendants direct the court to Local 282's experience. Local 282, a named plaintiff and a putative class representative, hired The Segal Group to negotiate drug prices with Local 282's PBM, which, in turn, negotiated with Mylan. Defendants argue that Local 282's experience shows there is an immutable impediment to class certification. And, defendants contend, Local 282's experience is similar to other putative class members' purchasing experiences. According to defendants, Local 282's experience shows there simply are too many intervening and individualized issues in the causal chain between the alleged predicate acts and each plaintiff's ultimate purchase of an EpiPen at a price negotiated by other parties. Thus, defendants argue, common causation issues don't predominate over individuals ones.

Plaintiffs urge the court to find their method of proving causation is sound under the approach approved by the First Circuit in three RICO cases collectively known as *In re* ***[*157]*** *Neurontin Marketing & Sales Practices Litigation*.[49] Drug manufacturer Pfizer, the defendant in each case, asserted that intervening causes—in particular, actions of prescribing doctors—broke the chain of RICO causation between Pfizer's alleged misrepresentations when marketing the drug Neurontin and plaintiffs' injury. The First Circuit rejected Pfizer's argument for several reasons.

First, the First Circuit recognized that the Supreme Court had held in *Bridge* that first-party reliance on a defendant's misrepresentations is not required. *Kaiser, 712 F.3d at 36* (citing *Bridge, 553 U.S. at 642*); *Aetna, 712*

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[48] For the same reasons discussed above, *supra* note 46, the court finds Prof. Elhauge's opinions sufficient to establish that plaintiffs will offer classwide evidence of causation to support their RICO claims.

[49] The three cases are *Kaiser Foundation Health Plan v. Pfizer, Inc., 712 F.3d 21 (1st Cir. 2013)*, *Aetna, Inc. v. Pfizer, Inc., 712 F.3d 51 (1st Cir. 2013)*, and *Harden Manufacturing Co. v. Pfizer, Inc., 712 F.3d 60 (1st Cir. 2013)*. *Harden* was a class action of third-party payors; the other two cases were individual cases pursued by third-party payors.

F.3d at 58 (citing Bridge, 553 U.S. at 642); Harden, 712 F.3d at 66-67 (citing Bridge, 553 U.S. at 642). Thus, the First Circuit concluded, *Bridge* foreclosed Pfizer's argument that any alleged misrepresentations it had made were made to the prescribing doctors—and not to the doctors' patients or others—and broke the causal link for third-party payors. Kaiser, 712 F.3d at 36-37; *see also* Harden, 712 F.3d at 67; Aetna, 712 F.3d at 58.

Second, the First Circuit found that plaintiffs could prove a "'direct relationship between the injury asserted and the injurious conduct alleged.'" Harden, 712 F.3d at 67 (quoting Holmes, 503 U.S. at 268). The First Circuit noted that plaintiffs in all three cases were the "primary and intended" victims of Pfizer's scheme to defraud. Kaiser, 712 F.3d at 37; *see also* Harden, 712 F.3d at 67; Aetna, 712 F.3d at 58. Thus, plaintiffs' injuries were "a 'foreseeable **[*158]** and natural consequence' of Pfizer's scheme—a scheme that was designed to fraudulently inflate the number of Neurontin prescriptions for which TPPs paid." Kaiser, 712 F.3d at 37 (quoting Bridge, 553 U.S. at 658); *see also* Harden, 712 F.3d at 67; Aetna, 712 F.3d at 58.

The First Circuit's conclusion in the *Neurontin* cases applies with equal force here. Plaintiffs allege that the RICO defendants implemented an EpiPen pricing scheme designed to foreclose competition in the EAI market, protect the EpiPen monopoly, and allow defendants to raise the EpiPen's price. Here, the putative plaintiffs—consumers who paid for the EpiPen—were the primary and intended victims of the alleged pricing scheme. Thus, plaintiffs' alleged injuries—overpayments for the EpiPen—were a foreseeable consequence of defendants' alleged scheme. Defendants' arguments about the complexity of the drug supply chain and the involvement of other actors in that chain "does not add such attenuation to the casual chain as to eliminate proximate cause" but, instead, these arguments "present[ ] a question of proof, to be resolved at trial, regarding the total number of prescriptions (if any) that were attributable to [defendants'] actions." Harden, 712 F.3d at 67; *see also* Kaiser, 712 F.3d at 39; Aetna, 712 F.3d at 59. And, to prove their allegations, plaintiffs will rely on **[*159]** common evidence about defendants' conduct in the EpiPen pricing scheme, the intended targets of that scheme, and how that scheme injured the plaintiff class as a whole.

Also, the *Neurontin* cases held that aggregate statistical evidence presented by Professor Meredith Rosenthal—the same expert plaintiffs rely on here—and other circumstantial evidence provided strong evidence of but-for causation. Harden, 712 F.3d at 68; *see also* Kaiser, 712 F.3d at 45-46; Aetna, 712 F.3d at 57-58. This meant, the First Circuit held, that plaintiffs could show Pfizer's fraud had caused plaintiffs to pay more for Neurontin than they otherwise would have paid. Harden, 712 F.3d at 68; *see also* Kaiser, 712 F.3d at 45-46; Aetna, 712 F.3d at 57-58. The Circuit recognized that some prescribing doctors had testified that they decided to prescribe Neurontin without relying on Pfizer's alleged misrepresentations. Harden, 712 F.3d at 68; *see also* Kaiser, 712 F.3d at 45; Aetna, 712 F.3d at 57-58. But, *Neurontin* also held, such evidence did not preclude plaintiffs from proving but-for causation. Harden, 712 F.3d at 68-69; *see also* Kaiser, 712 F.3d at 45; Aetna, 712 F.3d at 57-58. ***HN54***[] Instead, this case explained: "Ultimately, it is a jury's task to weigh the individual testimony presented by Pfizer against the aggregate and circumstantial evidence presented by . . . plaintiffs." Harden, 712 F.3d at 69; *see also* Kaiser, 712 F.3d at 45; Aetna, 712 F.3d at 57-58. The same is true here. The court finds that a factfinder can weigh any individual issues of causation **[*160]** against plaintiffs' projected common evidence to attempt to prove classwide RICO causation.

Defendants discredit plaintiffs' reliance on the *Neurontin* decisions, noting that the cases didn't decide class certification. Defendants are right. Defendants also correctly note that other Circuits have refused to apply *Neurontin* in the class certification context. *See* Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP, 806 F.3d 71, 95-97 (2d Cir. 2015) (affirming district court's decision denying class certification and holding Prof. Rosenthal's regression analysis didn't support plaintiffs' classwide RICO causation theory because plaintiffs hadn't offered "anything beyond mere correlation that might support a reasonable inference that a [drug company's] alleged withholding of safety information played a legally sufficient causal role in the number of . . . prescriptions written"); *see also* Sidney Hillman Health Ctr. of Rochester v. Abbott Labs., 873 F.3d 574, 578 (7th Cir. 2017) (affirming dismissal of RICO class action claims after concluding that "improper representations made to physicians do not support a RICO claim by Payors" because they are "several levels removed in the causal sequence"). *But see* Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co. Ltd., 943 F.3d 1243, 1257-58 (9th Cir. 2019) (holding that plaintiffs sufficiently alleged proximate causation because their RICO claims sought "to hold Defendants liable for the consequences of their own **[*161]** acts and omissions toward

Plaintiffs: the money spent by Plaintiffs to purchase" a pharmaceutical product and rejecting defendants' argument that "prescribing physicians' and pharmacy benefit managers' decisions constitute an intervening cause to sever the chain of proximate cause" because such a result "would . . . insulate [drug manufacturers] from liability for their fraudulent marketing schemes, as they could continuously hide behind prescribing physicians and pharmacy benefit managers" which is "not the purpose the requirement of proximate cause is intended to serve").

Indeed, the Ninth Circuit has recognized that an "inter-circuit split" exists over the question "whether patients and TPPs suing pharmaceutical companies for concealing an allegedly known safety risk about a drug can satisfy RICO's proximate cause requirement." *Painters & Allied Trades, 943 F.3d at 1253*. The Ninth Circuit elected to join the First and Third Circuits and concluded that "prescribing physicians do not constitute an intervening cause to cut off the chain of proximate cause" needed to support a RICO claim. *Id. at 1257*; *see also id.* (holding that the First and Third Circuits "have it right because their reasoning is more consistent with the Supreme Court's **[*162]** direct relation requirement"). The Ninth Circuit recognized that "prescribing physicians serve as intermediaries between Defendants' fraudulent omission . . . and Plaintiffs' payments for [the drug]," but that "prescribing physicians do not constitute an intervening cause to cut off the chain of proximate cause" because their involvement in defendants' alleged scheme was foreseeable. *Id.* (concluding that "it was perfectly foreseeable that physicians who *prescribed* [the drug] would play a causative role in Defendants' alleged fraudulent scheme to increase [the drug's] revenue"). Also, the Ninth Circuit found that defendants "have always known that 'physicians would not be the ones paying for the drugs they prescribed,'" but instead, defendants "are well aware that TPPs and individual patients pay for the drugs." *Id.* (quoting *Neurontin, 712 F.3d at 38-39*). And, it recognized that "[d]efendants' alleged fraudulent marketing scheme, which was intended to increase [the drug's] sales, 'only became successful once [they] received payments for the additional [drug] prescriptions [they] induced'—the very injury for which Plaintiffs seek recovery." *Id.* (quoting *Neurontin*, 712 F.3d at 39). In sum, the Ninth Circuit held, plaintiffs had satisfied **[*163]** "the Supreme Court's requirement that the proximate cause inquiry focus on the direct relation between the alleged violation and alleged injury." *Id.* (citing *Hemi Grp., 559 U.S. at 12*).

While the facts alleged here don't present the exact same issue decided by *Painters & Allied Trades* or *Neurontin*, the court still finds the reasoning of these Circuit decisions persuasive. And, the court predicts, the Tenth Circuit would follow their lead and apply their principles to this case. Thus, the court concludes that the presence of intermediary players in the drug supply chain don't present individual causation issues that overwhelm common questions of RICO causation. Instead, the court holds, putative class plaintiffs have shown how they could prove RICO causation from classwide proof that could persuade the factfinder that the purpose of defendants' EpiPen pricing scheme was to raise the price of the EpiPen. In turn, plaintiffs also have shown how classwide proof could provide a basis to conclude that defendants' alleged scheme caused plaintiffs—the ones ultimately paying for the EpiPen—to pay more for the product than they otherwise would have paid without defendants' unlawful acts. This is the very injury that **[*164]** plaintiffs seek to redress.

Plaintiffs have discharged their burden to demonstrate that they can prove RICO causation with classwide evidence. Here, Prof. Elhauge's analysis of the effect of defendants' exclusionary contracts on the price of the EpiPen plausibly demonstrates classwide causation.[50] As his Report explains, Prof. Elhauge used a regression

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[50] The court recognizes that, in *Sergeants Benevolent*, the Second Circuit held that plaintiffs failed their burden to show they could prove RICO causation with classwide evidence because their expert (Prof. Rosenthal) provided "mere correlation evidence" that didn't suffice to prove classwide causation. *806 F.3d at 96*. But, the Second Circuit contrasted Prof. Rosenthal's analysis there with her analysis in *Neurontin* that involved an aggregate regression analysis. *Id.* The Second Circuit recognized: "*Neurontin* does indicate that where individual physicians' reliance on a pharmaceutical company's misrepresentations forms a necessary link in the causal chain between those misrepresentations and the plaintiffs' injury, such reliance can be proved to a jury with sufficiently powerful aggregate evidence, as opposed to individualized inquiries as to each prescribing physician's actual decisionmaking." *Id. at 97*. Nevertheless, the Second Circuit concluded, it "need not (and do[es] not intend to) express any view here on whether or when an aggregate regression analysis similar to the one deployed in *Neurontin* might be sufficient to prove causation on a class-wide basis in other pharmaceutical-marketing cases alleging a pattern of mail fraud actionable under RICO" because plaintiffs' causation evidence there was too "simplistic" to support classwide evidence of causation. *Id.* In contrast, as discussed above, plaintiffs here have offered classwide evidence of causation through Prof. Elhauge's regression

model to "estimate the total impact of the restrictive PBM formulary positions on the quantity of [rival product Auvi-Q] pens Sanofi was able to sell each month that it was on the market." Doc. 1497-2 at 58 (Elhauge Expert Report ¶ 113). Next, Prof. Elhauge estimated Mylan's price elasticity when Auvi-Q was on the market. *Id. at 62* (Elhauge Expert Report ¶ 119). Then, using his estimates about the impact of PBM restrictions on quantity and Mylan's price elasticity, Prof. Elhauge calculated the price of the EpiPen caused by PBM foreclosure, multiplied that foreclosure by the quantity of Mylan's actual sales, and determined the total amount of overcharge caused by PBM foreclosure. *Id. at 64-66* (Elhauge Expert Report ¶ 120, Table 3-4). Plaintiffs here have come forward with far more than "mere correlation evidence." *Cf. Sergeants Benevolent, 806 F.3d at 96* (holding that expert's analysis provided **[*165]** only "mere correlation evidence" that didn't support RICO causation). The court thus finds that Prof. Elhauge's expert opinion suffices to establish how plaintiffs will rely on classwide evidence to show RICO causation. And, the court concludes that the common causation issues predominate over individual ones on plaintiffs' RICO claim premised on the theory that defendants' use of exclusive dealing contracts with PBMs caused plaintiffs to pay more for the EpiPen.

For all these reasons, the court finds that plaintiffs have established that common issues of RICO causation predominate over individual issues sufficient to satisfy the *Rule 23(b)(3)* requirement.

ii. RICO Damages

Next, when it comes to RICO damages, defendants argue that plaintiffs cannot satisfy *Rule 23*'s predominance requirement. Plaintiffs respond, arguing that the Expert Reports for Profs. Elhauge and Rosenthal sufficiently demonstrate how plaintiffs can prove their RICO damages on a classwide basis. Defendants dispute this proposition, contending plaintiffs' RICO damage calculations run afoul of *Comcast Corp. v. Behrend, 569 U.S. 27, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*.

HN55[] In *Comcast*, the Supreme Court determined that at the class certification stage, "any model supporting **[*166]** a 'plaintiff's damages case must be consistent with its liability case.'" *569 U.S. at 35* (quoting ABA Section of ***Antitrust Law***, Proving Antitrust Damages: Legal and Economic Issues 57, 62 (2d ed. 2010)). Thus, in that antitrust case, *Comcast* held that plaintiffs must "tie each theory of antitrust impact to an exact calculation of damages." *Id. at 37*. The *Comcast* plaintiffs had alleged four different theories of antitrust impact, but the district court "accepted [just one of those theories] of antitrust impact as capable of classwide proof and rejected the rest." *Id. at 31*. Nevertheless, the district court certified a class based on an expert's regression model that "assumed the validity of all four theories of antitrust impact initially advanced" by plaintiffs. *Id. at 36*. On defendant's *Rule 23(f)* petition for interlocutory appeal, the Third Circuit affirmed the certification order. *Behrend v. Comcast Corp., 655 F.3d 182 (3d Cir. 2011)*. The Supreme Court reversed, holding the district court had erred when it accepted plaintiffs' regression model because it "falls far short of establishing that damages are capable of measurement on a classwide basis." *Comcast, 569 U.S. at 35*. And, "[w]ithout presenting another methodology," plaintiffs could not prove "*Rule 23(b)(3)* predominance." *Id.* Instead, the Court reasoned, "[q]uestions **[*167]** of individual damage calculations will inevitability overwhelm questions common to the class." *Id.*

Here, defendants argue Prof. Rosenthal's alternative RICO damages model contravenes *Comcast*'s requirement that class plaintiffs must connect each theory of liability to an exact calculation of damages. They assert that Prof. Rosenthal's calculation would require every class member to have sustained injury under every allegation in the Complaint for every transaction. The court rejects defendants' argument for two reasons.

First, defendants' argument ignores Prof. Rosenthal's actual estimate of RICO damages. In her analysis, she provided separate RICO damage estimates for plaintiffs' generic delay and single pack withdrawal theories and disaggregated each estimate among the affected group, *e.g.*, TPPs, insured consumers, and cash payors. *See*

model. And, as the court concludes above, this showing suffices to establish that common issues predominate the RICO causation analysis.

Doc. 1500-3 at 29, 31 (Rosenthal Expert Report ¶¶ 67, 72). Simply put, defendants' characterization of Prof. Rosenthal's work contradicts the content of the certification record.[51]

Second, as Prof. Rosenthal has explained, her alternative RICO damages calculation merely represents how plaintiffs' allegations—collectively—show that defendants' **[*168]** conduct permitted Mylan to raise prices on the EpiPen. It presents a summary of aggregate damages caused by defendants' alleged RICO violations, calculated by comparing the actual price per pen to the but-for price that, in her opinion, would have existed absent the EpiPen pricing scheme. Unlike the problematic damages evidence in *Comcast*, Prof. Rosenthal's alternative theory doesn't include a theory of liability that the court has excluded. Thus, Prof. Rosenthal's theory is consistent with *Comcast* because her work honors the Supreme Court's rule that "a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to that theory." *Id. at 35*. Plaintiffs here have identified several theories that purportedly injured the putative class members and thus produced damages. Prof. Rosenthal's alternative RICO damages calculation properly combines plaintiffs' theories of liability. And, at the same time, her other analyses disaggregate plaintiffs' damages based on plaintiffs' legal theories.

As the Seventh Circuit has recognized, "it was not the existence of multiple theories in [*Comcast*] that precluded class certification; it was the plaintiffs' failure **[*169]** to base all the damages they sought on the antitrust impact—the injury—of which the plaintiffs were complaining." *Butler v. Sears, Roebuck & Co., 727 F.3d 796, 800 (7th Cir. 2013)*. The *Comcast* scenario is not present here. Plaintiffs have presented a damages model that is consistent with their liability theories. It does not contravene *Comcast*. And, it doesn't matter that they also have presented an alternative model.

Last, defendants assert that plaintiffs can't show classwide proof of damages because "some plaintiffs purchased EpiPen devices prior to events alleged in the Complaint." Doc. 1636 at 73. But, as plaintiffs explain, their class definitions dispense with this argument. The class definitions only include persons and entities who purchased the EpiPen after August 24, 2011—the date when Mylan launched the 2-Pak. Doc. 1353 at 2. Thus, the class definitions only include persons injured during the time defendants allegedly were executing the EpiPen pricing scheme. The court thus rejects defendants' argument that individual issues overwhelm the common issues of RICO damages.

For all these reasons, the court concludes that plaintiffs have demonstrated that common issues predominate the elements of their RICO claim sufficient to satisfy the class **[*170]** certification requirement of *Rule 23(b)(3)*.

d. Antitrust

Plaintiffs ask the court to certify as a class action their state antitrust claims under the laws of 27 states and the District of Columbia.[52] Plaintiffs assert that their theories of antitrust liability involve common questions because they focus squarely on defendants' allegedly unlawful conduct: (a) exclusive dealing arrangements where Mylan

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[51] Also, Prof. Elhauge provided a separate damage calculation for plaintiffs' other theory—exclusive dealing through defendants' use of exclusionary PBM contract. *See* Doc. 1500-2 at 56-66 (Elhauge Expert Report ¶¶ 110-120); *see also* Doc. 1497-2 at 56-66 (Elhauge Expert Report ¶¶ 110-120) (sealed version).

[52] The 27 states are: Alabama, Arizona, California, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin. And, as noted above, plaintiffs also ask the court to certify a class under the laws of the District of Columbia.

But the court already has dismissed the state law antitrust claims brought under the laws of Arizona, the District of Columbia, Iowa, New Mexico, North and South Dakota, Oregon, Rhode Island, Vermont, West Virginia, and Wisconsin because the Class Complaint includes no named plaintiff residing in any of these states. *See* Doc. 896 at 127; Doc. 1292 at 3. So, the court cannot certify a class action asserting antitrust violations under the laws of these states. That leaves 17 states subject to this portion of the certification motion.

gave discounts to certain PBMs who drove and kept EpiPen prices above competitive levels; and (b) reverse payment patent litigation settlements where, plaintiffs allege, the EpiPen patent holder provided consideration to the alleged generic competitor/infringer in exchange for the generic competitor agreeing to delay entry of its generic product into the EAI market, thereby producing inflated EpiPen prices. Defendants argue that plaintiffs cannot prove either antitrust theory on a classwide basis because they can't use common evidence to prove the required element of market power. Also, defendants argue that plaintiffs cannot prove other elements of either one of their antitrust theories using classwide evidence. Instead, defendants contend, individual issues predominate the analysis, thus precluding certification. **[*171]** The court addresses defendants' arguments separately, below.[53]

i. Market Power

Defendants assert that plaintiffs can't show market power in the EAI market with common evidence. Plaintiffs respond, relying on Prof. Elhauge's report and his opinions about market power. He opines that market power can be established through common proof, including proof sufficient to establish the relevant product and geographic markets, and Mylan's dominant position in that market. According to Prof. Elhauge, Mylan held—at least—an 80% market share throughout the class period. Doc. 1500-2 at 11, 15 (Elhauge Expert Report fig.1, ¶ 22); *see also* Doc. 1497-2 at 11, 15 (Elhauge Expert Report fig.1, ¶ 22) (sealed version). And, according to Prof. Elhauge's calculations, Mylan's market power was even greater than 80% for much of the relevant period. *Id.*

Mylan asserts, in response, that Prof. Elhauge's opinions don't establish marker power for at least two reasons.[54] *First*, Mylan asserts that Prof. Elhauge's calculations used incorrect data. According to Mylan's expert, Dr. Johnson, plaintiffs' entire model is flawed and Prof. Elhauge's conclusions about market power **[*172]** are unreliable. *Second*, Mylan argues, when PBMs shift to the lowest current formulary bid, it quickly changes the market share calculation. Mylan contends that its market share and ability to change prices vary dramatically across PBMs and formularies. Mylan asserts that Prof. Elhauge's failure to account for these variances undermines his conclusions. These showings, Mylan asserts, demonstrate that plaintiffs can't establish market power with evidence common to the entire class.

Mylan's arguments are not persuasive. As already discussed, on class certification, the court need not determine that Prof. Elhauge's calculations are right. Plaintiffs only need to demonstrate that his analysis applies to the claims for all class members and the issue does not affect class members differently. Plaintiffs have shouldered that responsibility. The court thus finds plaintiffs have made a plausible showing that they can establish market power in a relevant market with common evidence.

ii. Exclusive Dealing Arrangements

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[53] Plaintiffs' opening brief acknowledges they must use common evidence to show that defendants inflicted antitrust impact, or injury, on the class. Doc. 1500 at 73-74. ***HN56***[] The antitrust injury requirement "'ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior.'" *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co., 407 F.3d 1091, 1124-25 (10th Cir. 2005)* (quoting *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))*. At the certification stage, plaintiffs do not have to prove impact; instead, they need "only to demonstrate that the element of antitrust impact *is capable of proof at trial* through evidence that is common to the class rather than individual to its members." *Messner v. Northshore Univ. Healthsystem, 669 F.3d 802, 818 (7th Cir. 2012)* (citation and internal quotation marks omitted). As discussed above, plaintiffs have provided a common methodology for calculating aggregate damages stemming from defendants' alleged antitrust violations through Profs. Elhauge and Rosenthal's expert opinions, and these calculations apply classwide for each of plaintiffs' antitrust theories. *See supra* Part IV.E.2.b. The court finds that this showing suffices to establish that plaintiffs are capable of presenting common evidence of antitrust impact.

[54] Defendants haven't asserted a *Daubert* challenge to Prof. Elhauge's opinions about market definition and market power. But defendants assert that they are reserving their right to challenge these opinions at a later stage. Doc. 1886 at 9 n.1.

Next, defendants deny that plaintiffs can show "exclusive dealing" through common evidence. They argue that the alleged exclusionary contracts that plaintiffs rely on to support **[*173]** their antitrust claims are with different PBMs across different formularies at different times. Consequently, defendants assert, determining whether each consumer or payor's formula constitutes an "exclusive agreement" requires individualized inquiry.

In response, plaintiffs assert that Prof. Elhauge's PBM foreclosure analysis is common to all class members because Mylan's complete foreclosure across the EAI market increased prices for all payors, not just those foreclosed. Prof. Elhauge explained that Mylan, through rebates it offered to PBMs—conditioned on exclusionary terms requiring Auvi-Q to be placed in a less favorable formulary position than EpiPen—gave PBMs the highest rebates and significantly affected the share of EAI doses that EpiPen and Auvi-Q sold within each PBM. Stated differently, Prof. Elhauge opined that Mylan's conditional rebating strategy managed to restrict a substantial portion of the market. According to his calculations, based on Mylan, IQVIA Xponent,[55] and Sanofi's data, Mylan's exclusionary PBM contracts, once fully implemented, consistently foreclosed more than 30% of all formulary lives—and, they typically foreclosed 40%-60% of them. *See* Doc. 1500-2 at 52-53 **[*174]** (Elhauge Expert Report ¶¶ 99-101) (providing a classwide methodology for calculating share and price impacts of PBM coverage restrictions); *see also* Doc. 1497-2 at 52-53 (Elhauge Expert Report ¶¶ 99-101) (sealed version). Prof. Elhauge then analyzed the price impact of defendants' exclusionary conduct to estimate prices but for defendants' alleged misconduct. *See* Doc. 1500-2 at 56-64, 66 (Elhauge Expert Report ¶¶ 110-120, Table 4) (providing a classwide methodology for calculating share and price impacts of PBM coverage restrictions); *see also* Doc. 1497-2 at 56-64, 66 (Elhauge Expert Report ¶¶ 110-120, Table 4) (sealed version).

To Mylan's argument that the numerous and varying agreements between Mylan and PBMs preclude predominance, plaintiffs rely on Prof. Rosenthal's findings. She opines that the prices paid by third-party payors and cash payors directly correlated to the EpiPen's WAC price[56] (a 99.9% and 99.8% correlation, respectively). Doc. 1711-1 at 8-9 (Rosenthal Reply Report ¶ 7, n.11, fig.2). Combining this correlation evidence with Prof. Elhauge's analysis, plaintiffs contend, shows that Mylan's actions raised baseline prices for all payors, even those on non-foreclosed formularies **[*175]** and despite the presence of prices negotiated from that baseline. Such common evidence supports a finding of predominance. *See* *In re Syngenta AG MIR 162 Corn Litig., No. 14-md-2591-JWL, 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856, at *6-7 (D. Kan. Sept. 26, 2016)* (holding plaintiffs satisfied the predominance requirement by showing that they would prove, through expert opinion, that defendants' actions caused a "general market price decrease" that applied across the board to each class member's corn sales); *see also* *In re Urethane Antitrust Litig., 768 F.3d 1245, 1254 (10th Cir. 2014)* (holding district court did not abuse its discretion by determining that the antitrust impact of defendants' alleged conduct "involved a common question that would override other individualized issues" because defendants' alleged price-fixing "creat[ed] an inference of class-wide impact even when prices are individually negotiated[,]" especially when the evidence showed that defendants' "conspiracy artificially inflated the baseline for price negotiations"); *see also* *In re Lidoderm Antitrust Litigation, No. 14-md-2521-WHO, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *20-21 (N.D. Cal. Feb. 21, 2017)* (rejecting defendants' argument that "the terms of the rebates [for third-party payors ("TPPs")] vary across the board and require individualized review depending on the size of the TPP, the type of TPP . . . , and the TPP plan" because **[*176]** plaintiffs had provided a "common method of proof by [their] expert, who determined the existence of overcharges on all purchases after determining a but-for price and after taking into account rebates[,]" and thus differences in TPP rebates didn't defeat predominance requirement).

The court has found Profs. Elhauge and Rosenthal's methodologies sufficiently sound to withstand defendants' *Daubert* challenges. On certification, Mylan criticizes Prof. Elhauge's opinion as flawed because, defendants

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[55] The IQVIA Xponent data consists of pharmacy records that plaintiffs produced. Doc. 1711-1 at 29 (Rosenthal Reply Report ¶ 48).

[56] As Prof. Rosenthal explained, the WAC price is the wholesale acquisition cost. Doc. 1724 at 15 (Tr. of Mot. Hr'g Class Certification — Phase I 15:12-22). It is the list price set by the manufacturer. *Id.* Once a manufacturer has determined a drug's WAC price, that price is typically used in transactions between the manufacturer and wholesaler. *Id.* It is essentially the benchmark the wholesaler uses for many of its sales to pharmacies. *Id.*

contend, he improperly defined "foreclosure." But, for purposes of the certification motion, the court need not determine whether Prof. Elhauge's opinion is correct. Instead, the court must decide whether plaintiffs have presented a plausible method for proving their antitrust claim using classwide evidence. *See* *In re Lidoderm Antitrust Litigation, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *23* ("A rigorous review of [the experts'] opinions and their reasoning, as required under recent Supreme Court precedent, establishes that the concepts and designs of their models are solid. What facts and assumptions are appropriate to include in those models (and which model is preferred) are not issues [the court] can or should resolve on *this* [certification] motion."). The **[*177]** court concludes that plaintiffs have satisfied this burden with their experts' opinions. They explain how aggregate foreclosure and price increases applied classwide, even if a particular class member wasn't subject to a foreclosed PBM formulary. The court thus finds that plaintiffs have satisfied the predominance requirement, as used to support their exclusive dealing claim. Some individual questions likely remain, but the common questions dominate the analysis.

iii. Generic Delay

Defendants sharply contest plaintiffs' theory that defendants used a reverse payment settlement to delay entry of a generic EAI competitor. Defendants argue that plaintiffs can't show predominance of common issues for this theory. Plaintiffs respond, arguing that their expert opinions provide common evidence to support their generic delay claim, thus satisfying the predominance requirement.

Specifically, plaintiffs rely on Prof. Elhauge to (a) explain how reverse payment settlements can divide markets over time by delaying generic entry beyond what one otherwise would expect in a way that creates anticompetitive profits split among the settling parties; and (b) describe a methodology to calculate the economically **[*178]** rational entry date for the parties to have accepted in a no-payment settlement (had they been prevented from reaching a reverse payment settlement). Doc. 1500-2 at 17, 33-38 (Elhauge Expert Report ¶¶ 26, 56-66); *see also* Doc. 1497-2 at 17, 33-38 (Elhauge Expert Report ¶¶ ¶¶ 26, 56-66) (sealed version). Prof. Elhauge, in turn, employs Prof. Torrance's analysis of the EpiPen patents and related litigation to derive a generic entry date. Doc. 1500-2 at 39, 42 (Elhauge Expert Report ¶¶ 70, 75).

Using Prof. Elhauge's calculated generic entry date, Prof. Rosenthal analyzes how the reverse payment settlement produced supra-competitive prices for the EpiPen, thus forcing consumers to pay inflated EpiPen prices. Doc. 1500-3 at 22-23 (Rosenthal Expert Report ¶¶ 48-53); *see also* Doc. 1497-3 at 22-23 (Rosenthal Expert Report ¶¶ 48-53) (sealed version). Prof. Rosenthal has calculated the classwide overcharges paid by EpiPen consumers, and she also has provided an aggregate damage calculation for the antitrust class based on defendants' alleged use of an unlawful reverse payment settlement. Doc. 1500-3 at 27-30 (Rosenthal Expert Report ¶¶ 58-68); *see also* Doc. 1497-3 at 27-30 (Rosenthal Expert **[*179]** Report ¶¶ 58-68) (sealed version).

Defendants take issue with each of these expert opinions. Defendants try to undermine both Profs. Elhauge's and Torrance's opinions by citing the opinion of their own expert, Mr. Folsom, to demonstrate that Teva's chances for success at trial were much lower than Prof. Torrance opines. Also, Mylan criticizes Prof. Rosenthal's opinion about the number of class members who would have switched to a generic product had one been available in the market (*i.e.*, the inverse of the proportion of "brand loyalists"), and her calculation of the average price consumers would have paid in the but-for world where Teva's generic entered the market.

Separately, Pfizer attacks Prof. Elhauge's analysis on two grounds. *First*, Pfizer contends that Prof. Elhauge's analysis fails to consider (a) Pfizer's economic incentives for settling the patent litigation (and also incorrectly calculates Teva's economic incentives), and (b) the merits of the patent claims in the litigation.[57] Plaintiffs respond,

[57] Plaintiffs don't respond specifically to Pfizer's arguments about the merits of the patent claims. Defendants criticize Prof. Elhauge's reliance on Prof. Torrance's opinion that Teva had more than a 70% chance of prevailing in the patent litigation. Defendants levied the same attacks against Prof. Torrance's opinion in the *Daubert* motion. As the court discussed in its Order denying that motion, defendants' arguments go to the weight of Prof. Torrance's opinions but don't preclude their admissibility.

citing Prof. Elhauge's Reply Report. He opines that Pfizer and its subsidiaries—as the sole manufacturer and supplier of the EpiPen—"would benefit from any entry delay caused by **[*180]** the reverse payment, since that would give them more profits under their agreement to supply Mylan." Doc. 1711-2 at 18 (Elhauge Reply Report ¶ 34). Thus, Prof. Elhauge concludes, "Pfizer and its subsidiaries, regardless of their settlement or litigation payoffs, would have found it economically rational to agree to any reverse-payment settlement that was expected to delay Teva's entry." *Id.* And, Prof. Elhauge correctly notes, "any disputes about the extent to which Mylan drove bargaining about the delay in settlement entry date obtained for the reverse payment would be resolvable based on classwide evidence and any resolution of that issue would be common to the class." *Id.*

Second, Pfizer contends that plaintiffs cannot hold it liable under the generic delay theory because the record contains no evidence that Pfizer induced any generic delay for the EpiPen. Plaintiffs premise their generic delay theory on an allegation that the "reverse payment" that purportedly induced Teva to delay its generic EpiPen was an agreement by Mylan to delay entry of a Nuvigil generic—the product that was the subject of a separate lawsuit between Mylan and a Teva affiliate. Pfizer argues that plaintiffs **[*181]** have adduced no evidence connecting Pfizer to the Nuvigil litigation when it settled the EpiPen patent litigation with Teva. These arguments appear to address the merits of plaintiffs' antitrust claim against Pfizer—*i.e.*, whether plaintiffs can marshal evidence showing that Pfizer participated in the alleged unlawful reverse payment settlement. The court need not—indeed, cannot decide the merits of that issue on certification. In any event, as plaintiffs argue, they allege an antitrust conspiracy in this case. ***HN57***[] Members of a conspiracy are liable for acts committed by their co-conspirators in furtherance of the conspiracy. *Pinkerton v. United States, 328 U.S. 640, 646-48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946)*; *see also* *Halberstam v. Welch, 705 F.2d 472, 487, 227 U.S. App. D.C. 167 (D.C. Cir. 1983)* (holding "the law on civil conspiracy" imposes liability on co-conspirators for acts that are "a reasonably foreseeable consequence of the scheme"). So, if plaintiffs can prove that defendants engaged in a conspiracy, the law will hold Pfizer liable for the acts of Mylan as its co-conspirator. ***HN58***[] Also, as one leading treatise has noted, proof of a conspiracy "is a common question that is thought to predominate over the other issues in the case and has the effect of satisfying the first prerequisite in *Rule 23(b)(3)*." 7AA Charles Alan Wright, *et al., Federal Practice &* ***[*182]*** *Procedure* § 1781 (3d ed. 2005). The court rejects Pfizer's argument that its purported lack of participation in a reverse payment settlement precludes certification.

The court already has addressed many of defendants' other criticisms about plaintiffs' experts' methodologies and the accuracy of their calculations. By separate Order, the court has found these experts have substantiated their conclusions sufficient to survive *Daubert* challenges at this stage. Whether these expert opinions ultimately will persuade a factfinder that defendants violated the antitrust laws by delaying generic entry is not something the court can decide at certification. Nor do plaintiffs need to prove that these experts' opinions and calculations are accurate. Instead, to shoulder their certification burden, plaintiffs must show that common issues subject to classwide evidence predominate over individual questions. The court finds that plaintiffs have satisfied that burden. Plaintiffs' experts have presented a plausible method for proving their antitrust claims under a generic delay theory with evidence that applies on a classwide basis. This suffices to establish predominance to support plaintiffs' generic delay **[*183]** theory.

For the above reasons, the court finds that that plaintiffs have shouldered their burden to establish that common issues predominate their antitrust claim sufficient to satisfy the class certification requirement of *Rule 23(b)(3)*.

e. Consumer Protection

And, here, on certification, the court need not weigh whether Prof. Torrance accurately opines about Teva's chances of success in the patent litigation. Instead, the court must determine whether Prof. Elhauge's opinions, relying on Prof. Torrance's opinions, provide a plausible method for proving plaintiffs' generic delay theory on a classwide basis. The court finds that they do.

Plaintiffs ask the court to certify as a class action their state consumer protection law claims under the laws of 20 states and the District of Columbia[58] that prohibit anticompetitive conduct or unfair practices. Defendants oppose certification of any state consumer protection class action. They contend that variations among the states' laws preclude certification because states use different tests to determine what is unfair conduct violating consumer protection statutes.[59] The court agrees with defendants. The differences among state consumer protection statutes are significant, they present individual issues, and they overwhelm the common questions. As a consequence, plaintiffs fail to establish predominance, and thus, these individual issues defeat class certification of the state consumer protection class under *Rule 23(b)(3)*.

HN59[] As plaintiffs concede, states apply different tests when determining what qualifies as unfair conduct prohibited by a **[*184]** particular consumer protection statute. Doc. 1500 at 89; Doc. 1837 at 39-40. But, plaintiffs dismiss these differences, arguing they are just "[m]inor variations" in the laws. Doc. 1837 at 40. And, plaintiffs assert, the court can manage the differences by submitting special verdict forms or using other "mechanisms." *Id.*[60] The court disagrees.

HN60[] The state laws at issue here use a variety of tests to define the form of conduct that will qualify as anticompetitive or unfair conduct prohibited under the consumer statutes. For example, some states consider the following factors: (1) whether the practice offends public policy, the common law, or otherwise; (2) whether it is immoral, unethical, oppressive, or unscrupulous; or (3) whether it causes substantial injury to consumers.[61] Other

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[58] The 20 states are: Alaska, California, Connecticut, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, Vermont, Washington, and West Virginia. Doc. 1500 at 86, 88. And, as noted, plaintiffs also seek certification under the laws of the District of Columbia.

The court notes that the Consolidated Class Action Complaint doesn't plead a violation of the state consumer protection laws in Alaska, the District of Columbia, or Rhode Island. *See* Doc. 60 at 182-394. It only alleges violation of those three jurisdictions' antitrust laws. *See* *id. at 145-47, 149-50, 152-54, 157-59*. But the court has dismissed those three state law antitrust claims because the Class Complaint includes no named plaintiff residing in any of the three. *See* Doc. 896 at 127 (dismissing "the class plaintiffs' state law antitrust claims asserted against both sets of defendants under the laws of Alaska, . . . the District of Columbia, [and] Rhode Island . . . because the Class Complaint includes no named plaintiff who resides in any of these states"). Also, the court has dismissed the state consumer protection law claims brought under the laws of New Mexico, Vermont, Washington, and West Virginia because the Class Complaint includes no named plaintiff residing in those states. Doc. 896 at 127, Doc. 1292 at 3.

[59] Defendants also make three other arguments. They contend that the state consumer protection statutes at issue here award different types of damages, use varying rules for eligibility to sue, and impose differing statutes of limitations. And, defendants argue, these differences in state laws present individual issues that overwhelm the common questions. Because the court agrees with defendants' argument that differences in how the state laws define unfair conduct prevent certification, the court does not need to reach defendants' other arguments against certification.

[60] Plaintiffs don't identify the other mechanisms the court could employ. But, they cite *In re Syngenta AG MIR 162 Corn Litig., No. 14-md-2591-JWL, 2016 U.S. Dist. LEXIS 132549, 2016 WL 5371856 (D. Kan. Sept. 26, 2016)*, where our court certified eight, separate statewide class actions. *2016 U.S. Dist. LEXIS 132549, [WL] at *12-15* (certifying separate statewide classes consisting of corn producers in Arkansas, Illinois, Iowa, Kansas, Missouri, Nebraska, Ohio, and South Dakota). But this comparison isn't an apt one. Here, plaintiffs don't ask the court to certify separate statewide classes. Instead, they ask the court to certify one "Consumer Protection Damages Class" consisting of all persons and entities in the "Consumer Protection States" who purchased or paid for EpiPens. Doc. 1353 at 3.

[61] These states include: ***Connecticut*** *(Cenatiempo v. Bank of Am., N.A., 333 Conn. 769, 219 A.3d 767, 790 (Conn. 2019)* (discussing requirements of Connecticut Unfair Trade Practices Act)); ***Florida*** *(PNR, Inc. v. Beacon Prop. Mgmt., Inc., 842 So.2d 773, 777 (Fla. 2003)* (discussing requirements of the Florida Deceptive and Unfair Trade Practices Act)); ***Hawaii*** *(Hungate v. Law Office of David B. Rosen, 139 Haw. 394, 391 P.3d 1, 18 (Haw. 2017)* (discussing requirements of *Haw. Rev. Stat. § 480-2*)); ***Illinois*** *(Robinson v. Toyota Motor Credit Corp., 201 Ill. 2d 403, 775 N.E.2d 951, 961, 266 Ill. Dec. 879 (Ill. 2002)* (discussing requirements of the Illinois Consumer Fraud and Deceptive Business Practices Act)); ***Massachusetts*** *(Purity Supreme, Inc. v. Attorney Gen., 380 Mass. 762, 407 N.E.2d 297, 307 (Mass. 1980)* (discussing requirements of *Mass. Gen. Laws ch. 93A, § 2*)); ***Missouri*** *(Chochorowski v. Home Depot U.S.A., 404 S.W.3d 220, 226 (Mo. 2013)* (en banc) (discussing requirements of the

states examine whether the act or practice: (1) causes or is likely to cause substantial injury to consumers; (2) which is not reasonably avoidable by the consumer; and (3) not outweighed by countervailing benefits to consumers or to competition.[62] Nebraska, New Hampshire, and New Mexico apply their own standards to define unfair conduct under their state consumer protection statutes. **[*185]** [63] Nevada's statute only prohibits deceptive conduct, not unfair conduct.[64] And, in California, there is internal dissonance about the test courts should use under California's act. Courts there have applied two different tests to determine what is an unfair practice under the California Unfair Competition Law.[65]

Missouri Merchandising Practices Act)); ***North Carolina** (Bumpers v. Cmty. Bank of N. Va., 367 N.C. 81, 747 S.E.2d 220, 228 (N.C. 2013)* (discussing requirements of North Carolina's Unfair and Deceptive Practices Act)); **Oklahoma** (*Okla. Stat. tit. 15, § 752(14)* (Oklahoma Consumer Protection Act)); and ***Vermont** (Christie v. Dalmig, Inc., 136 Vt. 597, 396 A.2d 1385, 1388 (Vt. 1979)* (discussing requirements of Vermont Consumer Fraud Act)).

[62] These states include: ***Maine** (Searles v. Fleetwood Homes of Pa., Inc., 2005 ME 94, 878 A.2d 509, 519 n.10 (Me. 2005)* (discussing requirements of the Maine Unfair Trade Practices Act)); and ***Maryland** (Sager v. Hous. Comm'n of Anne Arundel Cty., 957 F. Supp. 2d 627, 642 (D. Md. 2013)* (discussing the requirements of the Maryland Consumer Protection Act and citing *Legg v. Castruccio, 100 Md. App. 748, 642 A.2d 906, 916 (Md. Ct. Spec. App. 1994))*. Also, **West Virginia** has not adopted this test explicitly, but the West Virginia Consumer Credit and Protection Act instructs courts construing that act to "be guided by the policies of the Federal Trade Commission and interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act . . . ." *W.Va. Code § 46A-6-101(1)*. *Section 45(a)(1)* of Title 15 to the United States Code declares unlawful "[u]nfair methods of competition in or affecting commerce" and "unfair or deceptive acts or practices in or affecting commerce." *Section 45(n)* prohibits the FTC from declaring an act unlawful on the ground that it is "unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." The court predicts that West Virginia would apply this test when determining whether an act is an unfair act prohibited by the West Virginia Consumer Credit and Protection Act.

[63] **Nebraska** requires the plaintiff asserting a Nebraska Consumer Protection Act claim to "prove that the practice either '(1) fell within some common-law, statutory, or other established concept of unfairness or (2) was immoral, unethical, oppressive, or unscrupulous.'" *State ex rel. Stenberg v. Consumer's Choice Foods, Inc., 276 Neb. 481, 755 N.W. 2d 583, 591 (Neb. 2008)* (quoting *Raad v. Wal-Mart Stores, Inc., 13 F. Supp. 2d 1003, 1014 (D. Neb. 1998)* and noting that the Nebraska Supreme Court has not defined unfair practices under the state consumer protection act but recognizing that the Nebraska federal court defined the term in *Raad*). **New Hampshire** applies "the rascality test" to determine whether an act is an unfair or deceptive act prohibited by the New Hampshire Consumer Protection Act. *Axenics, Inc. v. Turner Constr. Co., 164 N.H. 659, 675-76, 62 A.3d 754 (N.H. 2013)*. The rascality test requires that "the objectionable conduct . . . attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." *Id.* (citation and internal quotation marks omitted). **New Mexico**'s Unfair Trade Practices Act specifically defines the conduct prohibited by the statute. *See* *N.M. Stat. Ann. § 57-12-2(E)* (defining an "unconscionable trade practice" as "an act or practice . . . that to a person's detriment: (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) results in a gross disparity between the value received by a person and the price paid"). And New Mexico courts apply the statute's definition when determining whether conduct violates the statute. *See, e.g.,* *State ex rel. King v. B & B Inv. Grp., Inc., 2014-NMSC 024, 329 P.3d 658, 665 (N.M. 2014)* (applying *N.M. Stat. Ann. § 57-12-2(E)*'s definition of "unconscionable trade practice").

[64] The Nevada Deceptive Trade Practices Act allows "any person who is a victim of consumer fraud" to bring an action under the statute. *Nev. Rev. Stat. § 41.600(1)*. "Consumer fraud" includes "deceptive trade practices" as defined in *§§ 598.0915 to 597.0925*. *Nev. Rev. Stat. § 41.600(2)(e)*. The Nevada federal district court has interpreted the statute's plain language to require a plaintiff to "show a defendant engaged in a consumer fraud of which the plaintiff was a victim." *Picus v. Wal-Mart Stores, Inc., 256 F.R.D. 651, 657 (D. Nev. 2009)*.

[65] The Ninth Circuit has recognized that the California Unfair Competition Law ("UCL") "does not define the term unfair" and "the proper definition of unfair conduct against consumers is currently in flux among California courts." *Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1169 (9th Cir. 2012)* (citation and internal quotation marks omitted). The Ninth Circuit has cited two tests that the California courts have used to determine whether alleged conduct violates the UCL. *Id.* at 1169-70.

HN61[] The court recognizes that differences in state laws don't always preclude class certification under Rule 23(b)(3)'s predominance requirement. Courts have found class certification warranted when "the idiosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate over the shared claims." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022-23 (9th Cir. 1998), *overruled on other grounds by* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011); *see also* Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 296 (1st Cir. 2000) ("As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of [state law] will not automatically foreclose class certification under Rule 23(b)(3).").

But "varying state laws may defeat predominance" in other situations. Senne v. Kan. City Royals Baseball Corp., 934 F.3d 918, 928 (9th Cir. 2019); *see also* Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996) ("In a multi-state class action, variations in state law may swamp any common **[*186]** issues and defeat predominance."). Indeed, the Supreme Court has observed that "[d]ifferences in state law [can] compound . . . the disparities" among the factual questions, thus "undermining class cohesion." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 624, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

HN62[] Courts have declined to certify class actions when the legal differences among varying state laws dominate the common questions. *See, e.g.,* Pilgrim v. Universal Health Card, LLC, 660 F.3d 943, 944 (6th Cir. 2011) (holding that "[t]he consumer-protection laws of many States . . . govern these claims and factual variations among the claims abound, making a class action in this setting neither efficient nor workable nor above all consistent with the requirements of Rule 23"); Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1189-90 (9th Cir. 2001) (affirming denial of class certification of a products liability action because "variances in state laws overwhelm common issues of fact"); In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300-02 (7th Cir. 1995) (decertifying class action and recognizing that negligence laws may vary among states "only in nuance" but "nuance can be important" and a review of differing state pattern instructions and judicial viewpoints about the meaning of negligence show that "the states of the United States sing negligence with a different pitch," thus the district court erred by finding that it could give a single instruction on negligence—one that "merg[ed] the negligence **[*187]** standards of the 50 states and the District of Columbia"); Commander Props. Corp. v. Beech Aircraft Corp., 164 F.R.D. 529, 541 (D. Kan. 1995) (O'Connor, J.) (denying class certification when "the significant number of individual inquiries required by the various state law claims make them ill-suited for class action treatment"); Aks v. Bennett, 150 F.R.D. 187, 192 (D. Kan. 1993) (Lungstrum, J.) (denying class certification because "common questions of law and fact [did] not predominate" when the claims were "subject to various state trust laws" and thus required analysis on a "state by state basis"). *Cf.* Doll v. Chi. Title Ins. Co., 246 F.R.D 683, 689 (D. Kan. 2007) (Lungstrum, J.) (refusing to certify a class action that involved "varying limitations laws for tort claims in the 18 jurisdictions in which the class members resided" because "[t]he complexity of these analyses of differing states' laws makes the class action proposed by plaintiffs unmanageable and weighs against a finding that a class action would be superior").

This case presents the same situation. The disparity of standards the states use to define unfair conduct under various consumer protection statutes present individual issues, and they overwhelm the common issues. As

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First, under the *South Bay* test, "'unfair' conduct occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" Id. at 1169 (quoting S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 85 Cal. Rptr. 2d 301, 316 (Cal. Ct. App. 1999)). *Second*, under the *Cel-Tech* test, a finding of "unfairness" under the UCL "'[must] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.'" *Id.* at 1700 (quoting Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 544 (Cal. 1999)). In *Davis*, the Ninth Circuit did not decide which of the two tests defines unfair conduct under the UCL because, it determined, plaintiff had failed "to state a claim under either definition." *Id.* The Ninth Circuit and California federal courts have followed *Davis*'s guidance and have applied both tests when determining whether alleged conduct qualifies as "unfair" conduct prohibited by the UCL. *See, e.g.,* Hodsdon v. Mars, Inc., 891 F.3d 857, 866-67 (9th Cir. 2018); Rhodeman v. Ocwen Loan Servicing, LLC, No. EDCV 18-2363 JGB(KKx), 2019 U.S. Dist. LEXIS 197944, 2019 WL 5955368, at *17 (C.D. Cal. Nov. 12, 2019); In re Apple Inc. Device Performance Litig., 347 F. Supp. 3d 434, 463-64 (N.D. Cal. 2018).

defendants argue, a factfinder would have to apply each state's law to determine whether the conduct violates a specific state consumer **[*188]** protection statute. And, the factfinder properly could reach different conclusions about the legality of the same conduct based on the varying state law tests it must apply. It is difficult to imagine instructions that could fairly guide a jury to make classwide findings on varying state consumer protection laws and their many standards for defining prohibited conduct. Defendants have persuaded the court that this complexity would confuse the jury or prejudice defendants. The court finds that the variations among state consumer protection laws preclude predominance and thus make it inappropriate to certify the state consumer protection claims as a class action under *Rule 23(b)(3)*.

f. Unjust Enrichment

HN63[] Unjust enrichment claims generally require plaintiffs to prove three things: (a) defendant received a benefit; (b) at plaintiff's expense; and (c) retention of the benefit would be unjust without compensation. *See, e.g., Haz-Mat Response v. Certified Waste Serv. Ltd., 910 P.2d 839, 847 (Kan. 1996)* ("The basic elements of a claim based on a theory of unjust enrichment are threefold: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention by the defendant of the benefit under **[*189]** such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value." (citation and internal quotation mark omitted)).

Plaintiffs contend defendants received increased profits at plaintiffs' expense, which they acquired unjustly and as a result of their own allegedly unlawful conduct. Plaintiffs assert their unjust enrichment claims satisfy the predominance requirement because they premise their claims on many of the same alleged facts and will prove them using much of the same evidence as their other claims—*i.e.*, evidence focused on defendants' conduct as applied to the entire class. While plaintiffs acknowledge some variations among the states' unjust enrichment laws, they dismiss those differences as minor or idiosyncratic and assert they do not significantly alter the central issue or manner or proof. Mylan disagrees, arguing that the elements of an unjust enrichment claim are not uniform across all the states and the District of Columbia, which could produce different outcomes for different plaintiffs in different states. These differences, Mylan argues, mandate individualized inquiry and preclude certification of an unjust enrichment **[*190]** class.

Plaintiffs urge the court to follow *Menocal v. GEO Group, Inc., 882 F.3d 905 (10th Cir. 2018)*, where the Tenth Circuit affirmed class certification of an unjust enrichment class. But the class claim there was brought under the law of a single state (Colorado), and defendant only challenged the predominance element, as it applied to the unjustness element and damages. *Id. at 925-27*. The Tenth Circuit concluded that even though unjustness requires a "fact-intensive inquiry," it presented a common question in that case because the theory depended on shared facts focusing on defendant's pay policy that applied uniformly to all class members. *Id. at 925*. On damages, the Tenth Circuit acknowledged damages would have to be ascertained on an individual basis, but agreed with the district court's finding that they should be easily calculable using a simple formula. *Id. at 27*.

This case is significantly different than *Menocal*, where plaintiffs asserted an unjust enrichment claim under the laws of just one state—Colorado. Here, plaintiffs want to certify a nationwide class to assert unjust enrichment claims. ***HN64***[] Our court has noted that differences among state law definitions of unjust enrichment and its availability as a remedy make federal courts, in general, reluctant to certify **[*191]** a nationwide class on this theory. *Thompson v. Jiffy Lube Int'l, Inc., 250 F.R.D. 607, 626 (D. Kan. 2008)* ("Because of such variations [among state laws], federal courts have generally refused to certify a nationwide class based upon a theory of unjust enrichment.").

For the same reasons, the court finds here that the individualized inquiries required to determine claims from plaintiffs in 50 states plus the District of Columbia—such as whether a plaintiff conferred a benefit *directly* on defendants,[66] or whether the type of alleged misconduct satisfies a particular state's law,[67] or assessing compliance with different statutes of limitations[68]—would present significant manageability issues. Also, as plaintiffs concede, certain states preclude plaintiffs from maintaining an unjust enrichment claim if they have another available remedy at law.[69] These questions demand an individualized inquiry that will swamp the common questions. Because these variations exist and pose troubling case management obstacles, the court follows the rule recognized in *Thompson*. Exercising its discretion, the court denies plaintiffs' request to certify a nationwide class based on an unjust enrichment theory.

F. *Rule 23(b)(2)* Injunction Class

Plaintiffs also seek to certify an injunctive relief class under *Rule 23(b)(2)*. They make this request in addition to their requests that the court certify several *Rule 23(b)(3)* plaintiff classes to seek monetary damages. *See, e.g.*, Doc. 1353 at 2-3. Plaintiffs explain that the putative *Rule 23(b)(2)* plaintiff class seeks injunctive relief sufficient to restore consumer choice to the market and the natural competitive equilibrium that would exist but-for Mylan's decision to sell the EpiPen exclusively in the 2-Pak. Plaintiffs allege that selling the EpiPen exclusively in a 2-Pak has caused consumers to pay more to purchase EpiPens than they would have paid if they could have purchased EpiPens in a single dose. And, plaintiffs assert, they will continue to sustain injury as long as defendants continue to sell the EpiPen exclusively in the 2-Pak under the false pretext of medical necessity. In simple terms, plaintiffs ask the court to enjoin Mylan from selling the Epi-Pen exclusively in the 2-Pak.

HN65[] *Rule 23(b)(2)* allows a court to certify a class action if the requirements of *Rule 23(a)* are satisfied and "if the party **[*193]** opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Fed. R. Civ. P. 23(b)(2)*.[70] The Tenth Circuit has explained that *Rule 23(b)(2)* "demands at the class certification stage plaintiffs

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[66] *See, e.g.,* **[*192]** *Danny Lynn Elec. & Plumbing, LLC v. Veolia ES Solid Waste Se., Inc., No. 2:09cv192-MHT, 2011 U.S. Dist. LEXIS 78557, 2011 WL 2893629, at *6 (M.D. Ala. July 19, 2011)* (dismissing Alabama unjust enrichment claim because "the individual defendants enjoyed no *direct* benefit") (emphasis added)); *Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 944 N.E.2d 1104, 1111, 919 N.Y.S.2d 465 (N.Y. 2011)* (holding that New York unjust enrichment claim failed because "the connection between the parties is too attenuated" and "the pleadings failed to indicate a relationship between the parties that could have caused reliance or inducement").

[67] *See, e.g., Bland v. Abbott Labs., Inc., No. 3:11-CV-430-H, 2012 U.S. Dist. LEXIS 1732, 2012 WL 32577, at *2 (W.D. Ky. Jan. 6, 2012)* (noting that a Kentucky unjust enrichment claim requires proof of defendants' bad faith and dismissing unjust enrichment claim for failing to allege bad faith); *Bimbo Bakeries USA, Inc. v. Pinckney Molded Plastics, Inc., No. 4:06-CV-180-A, 2007 U.S. Dist. LEXIS 19578, 2007 WL 836874, at *6 (N.D. Tex. Mar. 20, 2007)* (dismissing Texas unjust enrichment claim because a viable claim requires "some type of unlawful behavior" and there was no "evidence of fraud, duress, or undue advantage" to support the claim).

[68] An unjust enrichment claim in Kansas has a three year statute of limitations, *Kan. Stat. Ann. § 60-512*, and begins to run "when the enrichment becomes unjust[,]" ***Estate of Draper v. Bank of Am., N.A., 288 Kan. 510, 205 P.3d 698, 715 (Kan. 2009)*** (internal citation and quotation marks omitted). In contrast, an unjust enrichment claim in Michigan "accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results," *Mich. Comp. Laws § 600.5827*, and the statute of limitations is six years, *Williams v. Chase Bank, No. 15-10565, 2015 U.S. Dist. LEXIS 98587, 2015 WL 4600067, at *4 (E.D. Mich. July 29, 2015)* (citing *Mich. Comp. Laws § 600.5813*)).

[69] *See, e.g., KLE Constr., LLC v. Twalker Dev., LLC, 2016 ND 229, 887 N.W.2d 536, 538 (N.D. 2016)* (including as one of the elements of a North Dakota unjust enrichment claim "the absence of a remedy provided by law"); *Freeman v. Sorchych, 226 Ariz. 242, 245 P.3d 927, 936 (Ariz. Ct. App. 2011)* (listing one of the elements of an Arizona unjust enrichment claims as "the absence of a remedy provided by law"); *Cantor Fitzgerald, L.P. v. Cantor, 724 A.2d 571, 585 (Del. Ch. 1998)* (reciting the elements of a Delaware unjust enrichment claim as including "the absence of a remedy provided by law").

describe in reasonably particular detail the injunctive relief they seek 'such that the district court can at least "conceive of an injunction that would satisfy [Rule 65(d)'s] requirements," as well as the requirements of Rule 23(b)(2).'" D.G. ex rel. Stricklin v. Devaughn, 594 F.3d 1188, 1200 (10th Cir. 2010) (quoting Shook v. Bd. of Cty. Comm'rs, 543 F.3d 597, 605 (10th Cir. 2008) (quoting Monreal v. Potter, 367 F.3d 1224, 1236 (10th Cir. 2004))).

Plaintiffs' Rule 23(b)(2) certification request here doesn't satisfy this requirement. Indeed, defendants oppose plaintiffs' request for certification of a Rule 23(b)(2) class for this very reason. They argue that plaintiffs never identify the specific declaratory or injunctive relief they seek or the legal authority under which they seek it.

Plaintiffs respond to defendants' argument by explaining that "the precise form of this injunctive relief will take shape as the Court rules on the Parties' forthcoming dispositive motions and at trial." Doc. 1837 at 54. As one example, plaintiffs suggest that the court **[*194]** could order defendants to add a label to the EpiPen that recites no medical necessity exists to sell the device in a 2-Pak. *Id.* at 54 n.228. This vague, partially formulated request for injunctive relief doesn't meet the standard for certification under Rule 23(b)(2).

HN66[] As our Circuit has explained, "*Federal Rule of Civil Procedure 65(d)* requires that injunctions be 'specific in terms' and 'describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained.'" *Monreal, 367 F.3d at 1236* (quoting *Fed. R. Civ. P. 65(d)*). Here, plaintiffs' Rule 23(b)(2) certification request fails to describe the injunctive relief they seek with sufficient detail and, as a consequence, the court cannot determine whether classwide injunctive relief is appropriate under Rule 23(b)(2). *See id. at 1236* (affirming district court's refusal to certify at Rule 23(b)(2) class because plaintiffs didn't specify the type of injunctive relief they sought and the Circuit couldn't "conceive of an injunction that would satisfy [Rule 65(d)'s] requirements"); *see also In re YRC Worldwide, Inc. ERISA Litig., No. 09-2593-JWL, 2011 U.S. Dist. LEXIS 37270, 2011 WL 1303367, at *14 (D. Kan. Apr. 6, 2011)* (denying certification under Rule 23(b)(2) when plaintiffs didn't "identify any particular injunctive relief with sufficient specificity to enable the court to 'see how it might satisfy Rule 65(d)'s constraints and thus conform with Rule 23(b)(2)'s requirement'" **[*195]** (quoting *Shook, 543 F.3d at 605 n.4*)).

In short, plaintiffs have failed to shoulder their burden to show that Rule 23(b)(2) class certification is warranted. They haven't provided sufficient information for the court to conclude that "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Fed. R. Civ. P. 23(b)(2)*. The court thus exercises its discretion and denies plaintiffs' request to certify a Rule 23(b)(2) class.

V. Class Definitions

Consistent with its analysis above, the court certifies the two following classes under Rule 23(b)(3):

> **1. Nationwide RICO Damages Class ("RICO Class")**. All persons and entities in the United States who paid or provided reimbursement for some or all of the purchase price of Branded or authorized generic EpiPens for

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[70] The Supreme Court has explained that "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*. But Rule 23(b)(2) "does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant," or "when each class member would be entitled to an individualized award of monetary damages." *Id. at 360-61*.

After *Dukes*, a "sort of hybrid certification" has "gain[ed] ground in class actions suits." *Ebert v. Gen. Mills, Inc., 823 F.3d 472, 480 (8th Cir. 2016)* (citing 2 William B. Rubenstein, *Newberg on Class Actions* § 4:38 (5th ed. 2019)); *see also West v. Cal. Servs. Bureau, Inc., 323 F.R.D. 295, 307 (N.D. Cal. 2017)* ("District courts may certify both a 23(b)(2) class for the portion of the case concerning injunctive and declaratory relief and a 23(b)(3) class for the portion of the case requesting monetary damages." (citing *Newberg on Class Actions* § 4:38)). Plaintiffs don't refer to this aspect of their certification motion as a request for a "hybrid" or "dual" class action under both Rule 23(b)(2) and 23(b)(3). But the court assumes that's what plaintiffs intended to do because they ask the court to certify several different classes under either Rule 23(b)(2) or 23(b)(3).

the purpose of consumption, and not resale, by themselves, their family member(s), insureds, plan participants, employees, or beneficiaries, at any time between August 24, 2011, and [specific date to be inserted when class notice is finalized].[71]

2. State Antitrust Damages Class ("State Antitrust Class"). All persons and entities in the Antitrust States[72] who paid or provided reimbursement for some or all of the purchase price of Branded EpiPens at any time between January 28, 2013, **[*196]** and [specific date to be inserted when class notice is finalized], for the purpose of consumption, and not resale, by themselves, their family member(s), insureds, plan participants, employees, or beneficiaries.

The court excludes the following groups from each of the classes:

(a) Defendants and their officers, directors, management, employees, subsidiaries, and affiliates;

(b) Government entities, other than government-funded employee benefit plans;

(c) Fully insured health plans (*i.e.*, plans that purchased insurance that covered 100% of the plan's reimbursement obligations to its members);

(d) "Single flat co-pay" consumers who purchased EpiPens or generic EpiPens only via a fixed dollar co-payment that is the same for all covered devices, whether branded or generic (*e.g.*, $20 for all branded and generic devices);

(e) Consumers who purchased or received EpiPens or authorized generic equivalents only through a Medicaid program;

(f) All persons or entities who purchased branded or generic EpiPens directly from defendants;

(g) The judges in this case and members of their immediate families;

(h) All third-party payors who own or otherwise function as a Pharmacy Benefit Manager **[*197]** or control an entity who functions as a Pharmacy Benefit Manager; and

(i) Individual consumers whose only purchases of an EpiPen occurred before March 13, 2014 (the Generic Start Date).

The court appoints the named plaintiffs proposed as representatives in plaintiffs' Consolidated Class Action Complaint as class representatives for these two classes.

VI. Appointment of Class Counsel

HN67[] *Rule 23(g)(1)* requires that a court certifying a class must appoint class counsel. When making this appointment, the court "must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims

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[71] As described above, *supra* Part IV.A. & n.7, plaintiffs' original certification motion proposed that the class period would run "until the effects of Defendants' unlawful conduct cease." *See, e.g.*, Doc. 1353 at 2-3. At oral argument, plaintiffs proposed to change this part of the class definitions to define the class period as ending on the date when class notice is given. The court adopts that change in the certified class definitions.

[72] As discussed above, *supra* note 52, the court cannot certify a class asserting antitrust violations under the laws of states where no plaintiff resides. So, the court redefines the "Antitrust States" from the definition proposed by plaintiffs to remove those states that have no named plaintiff. The court thus defines the "Antitrust States" to include: Alabama, California, Florida, Hawaii, Illinois, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New York, North Carolina, Tennessee, and Utah.

asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class[.]" *Fed. R. Civ. P. 23(g)(1)(A)*. The court may appoint an applicant as class counsel "only if the applicant is adequate" under *Rule 23(g)(1)*'s criteria and if the applicant will adhere to *Rule 23(g)(4)*'s requirement that the applicant "fairly and adequately represent the interests of the class." *Fed. R. Civ. P. 23(g)(2)*.

Plaintiffs ask the court to appoint Warren T. Burns, Paul J. Geller, Lynn Lincoln Sarko, and Rex Sharp **[*198]** as class counsel. The court finds these attorneys have adequately prosecuted the interests of the classes since the court appointed them as co-lead counsel.[73] Aside from Mylan's conclusory statement that it is inappropriate to have the same counsel represent plaintiffs with different theories of injury and competing damage claims, defendants do not challenge their appointment as class counsel. After considering *Rule 23(g)*'s factors, the court finds that appointing these attorneys as co-lead counsel is warranted here. Also, the court appoints one more lawyer to the group representing plaintiffs as class counsel—Elizabeth C. Pritzker. Ms. Pritzker has served as Chair of plaintiffs' Steering Committee since the court appointed her in that role. The court thus appoints Warren T. Burns, Paul J. Geller, Lynn Lincoln Sarko, Rex Sharp, and Elizabeth C. Pritzker as co-lead counsel for the class plaintiffs.

VII. Notice

HN68[] When a court certifies a *Rule 23(b)(3)* class, *Rule 23(c)(2)(B)* provides "the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Because plaintiffs have not proposed a form or manner of notice **[*199]** under this rule, the court defers its direction of notice to the certified classes. The court orders plaintiffs to submit to the court a proposed plan for notice to the class members consistent with *Rule 23(c)(2)(B)* **on or before March 31, 2020**. The plan must include a proposed form of notice.

IT IS THEREFORE ORDERED BY THE COURT THAT the plaintiffs' Motion for Class Certification (Doc. 1353) is granted in part and denied in part. The court certifies a nationwide RICO damages class and a state antitrust damages class under *Rule 23(b)(3)*, as set forth in this Order. The court denies the motion in all other respects.

IT IS FURTHER ORDERED THAT defendants' Motion for Leave to File a Sur-reply (Doc. 1574) is granted. The court orders defendants to file their proposed Sur-reply (Doc. 1574-1) as a separate docket entry. Also, the court orders plaintiffs to file their proposed Response to Defendants' Sur-reply (Doc. 1579-1) as a separate docket entry.

IT IS FURTHERED ORDERED THAT plaintiffs must submit a proposed plan for notice to the class members consistent with *Rule 23(c)(2)(B)* **on or before March 31, 2020. IT IS SO ORDERED**.

Dated this 27th day of February, 2020, at Kansas City, Kansas.

/s/ Daniel D. Crabtree

Daniel D. Crabtree

United States [*200] District Judge

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[73] The court also appointed Eric Hochstradt, counsel for Sanofi, as co-lead counsel.

Hannan v. Rose

United States District Court for the Southern District of New York

February 28, 2020, Decided; February 28, 2020, Filed

18cv9878 (PGG) (DF)

Reporter

2020 U.S. Dist. LEXIS 35840 *; 2020 WL 3965341

MATTHEW HANNAN, Plaintiff, -against- AMY ROSE, et al., Defendants.

Subsequent History: Adopted by, Dismissed by, Without prejudice, in part, Motion denied by, in part *Hannan v. Rose, 2020 U.S. Dist. LEXIS 68436 (S.D.N.Y., Apr. 17, 2020)*

Motion granted by, Motion granted by, in part *Hannan v. City of New York, 2020 U.S. Dist. LEXIS 121789 (S.D.N.Y., July 10, 2020)*

Core Terms

Housing, Defendants', motion to dismiss, apartment, eviction, plaintiff's claim, tenant, pleadings, rights, pro se, recommend, Notice, district court, court action, allegations, lease, subject matter jurisdiction, state actor, resident, private right of action, low-income, entity, futile, cases, state court, inter alia, asserts, reasons, Reply, constitutional claim

Counsel: [*1] Matthew Hannan, Plaintiff, Pro se, New York, NY.

For Amy Rose, in her capacity as President and CEO of Rose Associates, Kevin Rodriguez, Yamile Zarzuela, in her capacity as Senior LIHTC Compliance Administrator at Henry Hall, Defendants: Felice B. Ekelman, LEAD ATTORNEY, Ryan Christopher Chapoteau, Jackson Lewis P.C. (NY), New York, NY.

For CITY OF NEW YORK, Defendant: Thomas John Rizzuti, New York City Law Department, New York, NY.

Judges: DEBRA FREEMAN, United States Magistrate Judge.

Opinion by: DEBRA FREEMAN

Opinion

REPORT AND RECOMMENDATION

TO THE HONORABLE PAUL G. GARDEPHE, U.S.D.J.:

In this *pro se* action, plaintiff Matthew Hannan ("Plaintiff") invokes federal, state, and local law to challenge his eviction from the New York City apartment where he had been residing. Specifically, in his Complaint, Plaintiff invokes *42 U.S.C. § 1983* ("*Section 1983*"); the *Federal Trade Commission Act*, *15 U.S.C. § 41, et seq.* (the "FTCA"); the *Fair Housing Act*, *42 U.S.C. § 3601, et seq.*, (the "FHA"); the *Rehabilitation Act of 1973*, *29 U.S.C. § 701 et seq.* (the "Rehab Act"); the New York State Constitution; *New York Real Property Actions Law § 713* ("*Section 713*"), and the New York City Administrative Code *§ 26-521* ("*Section 26-521*"). Currently before the Court is a motion by three of the named defendants, Amy Rose ("Rose"), Kevin Rodrigues ("Rodrigues"), and Yamile Zarzuela ("Zarzuela") (all associated **[*2]** with Rose Associates, Inc. ("Rose Associates") and, collectively, for purposes of this Report and Recommendation, the "Moving Defendants" or "Defendants"),[1] to dismiss all of Plaintiff's claims against them pursuant to *Rules 12(b)(1)* or *12(b)(6) of the Federal Rules of Civil Procedure*. (Dkt. 31.) Also before the Court is a submission filed by Plaintiff as a "Motion for Summary Judgment" (Dkt. 42) which, for reasons discussed below, will be treated as an opposition to Defendants' motion to dismiss.

Based on its review of the parties' submissions, this Court first concludes, with respect to the arguments raised by Defendants related to subject matter jurisdiction, that the Court is not barred by the *Rooker-Feldman* doctrine from reviewing Plaintiff's claims. This Court does find, however, that Plaintiff lacks standing to assert his claim under the FTCA, requiring the dismissal of that claim with prejudice. This Court also understands Defendants to be challenging Plaintiff's FHA claim for lack of standing, but recommends that Plaintiff be allowed to proceed on that claim.

With respect to the Moving Defendants' alternative argument that Plaintiff has failed to state claims against them upon which relief may be granted, this Court finds that **[*3]** some, but not all, of Plaintiff's remaining claims are defectively pleaded, and that, as to the pleading defects, some, but not all, could potentially be cured by amendment. Specifically, for the reasons discussed below, I recommend (1) that Plaintiff's *Section 713* claim be dismissed for failure to state a claim, and, further, that this claim be dismissed with prejudice, as amendment would be futile; (2) that Plaintiff's *Section 1983* and state constitutional claims also be dismissed, either as non-cognizable or as insufficiently pleaded, but that Plaintiff be afforded an opportunity to replead certain of those claims, if facts exist that would enable him to remedy their deficiencies; and (3) that Defendants' motion to dismiss Plaintiff's claims under the Rehab Act and *Section 26-521* be denied.

BACKGROUND

A. **Factual Background**

The following facts are taken from the Complaint and are presumed to be true for purposes of this motion:

Plaintiff is "a homosexual male [] who suffers from HIV and has a disability." (Complaint, dated Oct. 25, 2018 ("Compl.") (Dkt. 2) ¶ 4.) On February 1, 2018, Plaintiff moved into an apartment in Henry Hall, on West 38th Street in Manhattan, with his friend Jimmie Orr ("Orr"), who was the "tenant **[*4]** of record" for the apartment. (*Id.* ¶¶ 6, 20.) Henry Hall was managed by Rose Associates, which provided leasing, building management, security, and eviction services for the building. (*Id.* ¶ 15.) During the relevant time period, Henry Hall received certain government funding for providing low-income housing. (*See id.* ¶¶ 5, 12.) As noted above, the Moving Defendants are each affiliated with Rose Associates: according to Plaintiff, Rose is its CEO; Rodrigues serves as one of its "security guards," and Zarzuela acts as its Senior Low-Income Housing Tax Credit Compliance Administrator. (Compl. ¶¶ 12-13, 17.)

During his time at Henry Hall, Plaintiff had his own keys to the apartment he shared with Orr, and he paid Orr rent in the amount of $700 per month. (Compl. ¶ 21; Plaintiff's Declaration [titled by Plaintiff as an "Affidavit," even though

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[1] In his original Complaint, Plaintiff named a number of other defendants, including Maria Torres-Springer ("Torres-Springer"), in her official capacity as the Commissioner of the New York City Department of Housing Preservation and Development. (*See* Dkt. 2.) By Order dated November 13, 2018, the Court dismissed Plaintiffs claims against Torres-Springer and certain of the other originally named defendants and directed that the City of New York (the "City") be substituted as a defendant for the City agency. (*See* Dkt. 13.) The Court also directed Rose Associates, which it understood to have been the employer of certain security guards listed by Plaintiff as "Doe" defendants, to identify those security guards, so that their full names could be included in the caption. (*See id.*) Neither Plaintiff's claims against the City, nor his potential claims against the security guards, are directly implicated in the motion to dismiss that is currently pending before the Court.

unsworn] in Support of Complaint, dated Nov. 2, 2018 ("Pl. Decl.") (Dkt. 9) ¶ 2.)[2] On the date of his move-in or shortly thereafter, Plaintiff, along with Orr, registered with the "security guards" at Henry Hall by "presenting an ID, taking a photo and signing his name." (Compl. ¶ 22.) Plaintiff asserts that this process accorded him status "as a legal **[*5]** resident of the building." (*Id.*) Plaintiff also moved in his own furniture, with help from building maintenance personnel. (*Id.* ¶ 23.)

Plaintiff alleges that, "[t]owards the end of February, 2018," the "security guards" of Henry Hall began to "harass" him, by barring him from facilities like the gym, rejecting his mail, and "screen[ing]" him as a guest, only allowing him entrance with Orr's permission. (*Id.* ¶¶ 26-27.) Around this same time, Plaintiff alleges that "the Landlord started to have talks with [] Orr to add [Plaintiff] to the lease." (Pl. Decl. ¶ 12.) Thereafter, on March 7, 2018, Zarzuela sent a letter to Orr, stating that it had come to Rose Associates' attention that, "[s]ince the time [Orr] ha[d] moved in to Henry Hall, [Plaintiff] ha[d] been residing in [Orr's] unit"; that, "[a]s a participant in the Low Income Housing program, it [was] a requirement under [Orr's] lease that all adult household members be certified"; that, for his "initial certification," Orr had "signed documentation indicating that [he was] the only household member"; that the provision of "false information" was considered a breach of the lease; that Plaintiff was required to "vacate **[*6]** immediately"; and that, if Plaintiff failed to vacate the apartment, this would also be considered a breach of the lease. (*See* Compl. ¶ 28 (quoting letter in part); *see also* Plaintiff's Memorandum of Laws in Support of Motion for Summary Judgme[n]t Against Rose Associates Defendants, dated Mar. 25, 2019 ("Pl. Mem.") (Dkt. 43) (attaching copy of letter[3]).)

It is not clear from the Complaint what, if anything, transpired in the 10 days between March 7, 2018 and March 17, 2018, but, on the latter date, Plaintiff alleges that he received a phone message from Orr stating that Rose Associates "didn't want [Plaintiff] back in [the apartment]." (Pl. Decl. ¶ 23.) Plaintiff went to the building to retrieve his belongings, but he was "kept from entering the building by the security guards" and was "escorted out of the building," with a security guard allegedly stating that, if Plaintiff did not leave, he would "drag [Plaintiff] out . . . and get [him] arrested." (Compl. ¶¶ 30-31.) Orr permitted Plaintiff to pick up some items from the apartment on the morning of March 18, 2018 (*id.* ¶ 33), and Plaintiff has been out of the apartment since that time (*id.* ¶ 34), except that he was **[*7]** permitted to retrieve his remaining belongings "almost seven months later" (*id.* ¶ 44). Plaintiff alleges that he "tried to come back to the building several times after the lockout[,] but was not allowed entry by the security guards." (*Id.* ¶ 57.)

B. Procedural History

1. Plaintiff's Housing Court Action

After Plaintiff was prohibited from occupying the apartment at Henry Hall, he commenced an action in the Housing Part of the New York City Civil Court, New York County (the "Housing Court Action"), where he asserted a claim to possession of the apartment and of the right to enter to retrieve his belongings. (*Id.* ¶ 60.) On July 26, 2018, Plaintiff attended a hearing on his claims, but, according to him, he "didn't have key evidence to prove his residence for the

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[2] Consistent with its obligation to construe *pro se* pleadings liberally (*see* Discussion, *infra*, at Section I(B)), this Court will consider as true, for purposes of the pending motion to dismiss, the factual allegations contained in submissions that Plaintiff apparently intended to augment or clarify his Complaint.

[3] After Defendants submitted a purportedly true and correct copy of this letter in support of their motion to dismiss (*see* Declaration of Yamile Zarzuela in Support of Rose Associates Defendants' Motion To Dismiss Plaintiff's Complaint, dated Mar. 6, 2019 ("Zarzuela Decl.") ¶ 7 and Ex. B thereto), Plaintiff submitted a different version of the same letter (Pl. Mem., at the page numbered "15" by the Court's Electronic Case Filing ("ECF") system (*i.e.*, "ECF 15")), and argued that Defendants' submitted version was "false and forged" (*id.*, at 2). The distinction between the two versions of this letter is that the one submitted by Defendants refers to Plaintiff only as Orr's "guest," while the one submitted by Plaintiff refers to him by name. (*Compare* Zarzuela Decl, Ex. B., *with* Pl. Mem., at ECF 15.)

period required for statutory rights under State and City laws." (*Id.* ¶¶ 60-61.) At some point thereafter, Housing Court Judge Anne Katz issued an undated Decision and Order rejecting Plaintiff's request for possession of the apartment, noting that Plaintiff had not properly served Orr with process and that "the landlord . . . had nothing to do w[ith] either the letting or the alleged lockout." (*Id.; see also* Declaration of Felice **[*8]** B. Ekelman, Esq., in Support of Rose Associates Defendants' Motion To Dismiss Plaintiff's Complaint, dated Mar. 11, 2019 ("Ekelman Decl.") (Dkt. 33), Ex. E (the "Housing Court Order") (Dkt. 33-5).) While Plaintiff apparently took steps to appeal that Order prior to commencing this suit (*see* Compl. ¶ 63), he now asserts that he "procedurally abandoned [his] appeal by purposely failing to perfect it by the deadline" (Letter to the Court from Plaintiff, dated May 6, 2019 ("Plaintiff's 5/6/19 Ltr.") (Dkt. 62) at 2).

2. The Current Action and Motions Before the Court

On October 25, 2018, Plaintiff filed the Complaint in this action. (Compl.) Although Plaintiff's Complaint is not entirely clear as to which claims Plaintiff is asserting against which defendants, it appears that, with respect to the Moving Defendants, Plaintiff is alleging (1) that Defendants' conduct in evicting him from Henry Hall and not permitting him to regain occupancy of the apartment there, or to recover his belongings, violated a number of his federal constitutional rights, giving him a right of action against them under *Section 1983* (*see id.* ¶¶ 74-75 (alleging that Defendants' conduct "amounted to malicious abuse of process, failure **[*9]** to intervene, unreasonable search and seizure, abuse of authority, unlawful taking of private property, pattern of harassment, conspiracy, discrimination, selective enforcement, fabrication of evidence, denial of equal protection of the laws, denial of right to a fair trial, denial of due process rights [] and malicious prosecution," in "violat[ion] [of] [P]laintiff's rights under *42 U.S.C. § 1983* and the *First*, *Fourth* and *Fourteenth Amendments*")); (2) that, in evicting him from Henry Hall, Defendants discriminated against him based on family size, gender, and disability, in violation of the Rehab Act and the FHA (*id.* ¶ 81); (3) that he was subjected to violations of certain provisions of *Article 1 of the New York State constitution*, including the sections "prohibiting cruel and unusual punishment[]," "providing for due process," "guaranteeing freedom of speech," "prohibiting discrimination in civil rights and providing for equal protection of laws," and "prohibiting unreasonable searches [and] seizures" (*id.* ¶ 83); (4) that he was evicted without a court order after occupying a dwelling unit for more than 30 days, in violation of *Section 26-521* (*id.* ¶ 87); (5) that Defendants failed to provide him with "a 10-day Notice to Quit," in violation of *Section 713* (*id.*); and (6) that Defendants falsely **[*10]** advertised that their business "generously contribut[es] to society . . . [but] in all actuality injures its residents," in violation of *Section 45 of the FTCA* (*id.* ¶ 92).[4]

On November 2, 2018, Plaintiff filed a so-called "Related Case Statement" (Dkt. 10), apparently to inform the Court that this case is "related" to the action he had previously filed in the Housing Court (*see id.*, at 2 (identifying the Housing Court Action as "the illegal lockout case that is being discussed in the Complaint and the basis for this new case")).

On March 11, 2019, the Moving Defendants timely filed a motion to dismiss Plaintiff's claims against them pursuant to *Rules 12(b)(1)* or *12(b)(6) of the Federal Rules of Civil Procedure*. (*See* Memorandum of Law in Support of Defendants' Motion To Dismiss Plaintiff's Complaint, dated Mar. 11, 2019 ("Def. Mem.") (Dkt. 32).) Defendants argued in their motion that (1) the Court should dismiss Plaintiff's claims pursuant to the *Rooker-Feldman* doctrine, as the Housing Court had determined that Plaintiff was not a tenant; and (2) in any event, Plaintiff's allegations against them fail to state a plausible claim for relief because he was not a tenant, and because the FTCA does not afford Plaintiff a private right of action. (*Id.*) In support of their motion, **[*11]** Defendants submitted, *inter alia*, a copy of the Order to Show Cause filed by Plaintiff in the Housing Court Action and a copy of the Order entered by Judge Katz in that action. (*See* Ekelman Decl., Ex. D; Housing Court Order.) Defendants also submitted a Declaration from Zarzuela, attaching a copy of Orr's lease for the apartment, as well as an unsigned copy of the letter purportedly sent by Defendants to Orr on March 7, 2018, informing Orr that Plaintiff would have to vacate the

[4] On the same day that he filed his Complaint, Plaintiff also filed a "Motion for Emergency Preliminary Monetary Substitution Injunction," seeking payment of $45,000, purportedly to finance this litigation. (Dkts. 3-4, 7-8.) That motion was denied by the Court on November 20, 2018. (*See* Dkt. 15.)

apartment. (*See* Zarzuela Decl., Exs. A-B; *see also supra*, at n.3.) Defendants also duly filed proof that they had served Plaintiff with the Notice required under *Local Civil Rule 12.1*, to advise him that, as they had submitted evidence outside the pleadings in connection with their motion, the Court could convert the motion to one for summary judgment, under *Rule 56 of the Federal Rules of Civil Procedure*. (*See* Dkt. 35.)

On March 25, 2019, Plaintiff responded to Defendants' motion by making certain submissions that he characterized as a motion for summary judgment against Defendants. (*See* Plaintiff's Notice and Affirmation in Support of Motion for Summary Judgme[n]t Against Rose Associates Defendants, dated Mar. 25, 2019 ("Pl. Notice") (Dkt. 42); Pl. Mem. (Dkt. 43); Witness **[*12]** Affidavit [of Mickey Barreto] in Support of Motions, sworn to Mar. 26, 2019 (Dkt. 47).) In those submissions, Plaintiff argued, *inter alia*, that (1) he was a tenant because he had resided in the apartment at Henry Hall for more than 30 days, and therefore could not be evicted without due process; and (2) that Defendants had acted under color of law when they barred him from returning to Henry Hall. (*See generally id.*)

Treating Plaintiff's submissions as an opposition to their motion to dismiss, Defendants filed a reply on May 3, 2019, noting that Plaintiff had not contested application of the *Rooker-Feldman* doctrine, or that he lacked a private right of action to bring a claim under the FTCA, and reiterating their arguments regarding Plaintiff's status as a non-tenant. (*See* Reply Memorandum of Law in Further Support of Defendants' Motion To Dismiss Plaintiff's Complaint, dated May 3, 2019 ("Def. Reply") (Dkt. 60).) Defendants also stated that they presumed the Court would treat Plaintiff's "motion" as an opposition to their motion to dismiss. (*Id.*)

On May 6, 2019, Plaintiff filed a letter requesting an opportunity to submit a response to Defendants' reply brief and insisting that his **[*13]** motion be treated as one for summary judgment. (Plaintiff's 5/6/19 Ltr., at 1-2.) In that letter, Plaintiff also asserted that the *Rooker-Feldman* doctrine does not apply because the Housing Court "[didn't] even have the jurisdiction for the relief I am asking in this Court," and he had abandoned his appeal of the Housing Court Action. (*Id.*, at 2.) Plaintiff also asserted that he had not raised constitutional claims in the Housing Court Action. (*Id.*) On May 9, 2019, Defendants filed a response to Plaintiff's letter, asserting that, if Plaintiff's opposition were treated as a motion for summary judgment, then it should be denied for certain procedural deficiencies, and that Defendants' motion to dismiss should be granted as unopposed. (Letter to the Court from Felice B. Ekelman, Esq., dated May 9, 2019 (Dkt. 63).)

On June 5, 2019, this Court held a conference with Plaintiff and counsel for all parties present, in order to clarify the various filings on the Docket. (*See* Transcript of June 5, 2019 conference (Dkt. 68).) During that conference, this Court explained to Plaintiff the distinction between a motion to dismiss and a motion for summary judgment (*id.*, at 3-6), and, in light of that explanation, **[*14]** asked Plaintiff if he wished for his briefing to be treated as responsive to the motion to dismiss (*id.*, at 10-11). Plaintiff said that he did (*id.*), and this Court informed the parties that it would recommend to Judge Gardephe that he treat the submissions at Dockets 31-35, 42-43, 47, and 60-63 as constituting a fully-briefed motion to dismiss (*see id.* at 14-15).

On July 9, 2019, Plaintiff filed a document that was titled a "reply" in support of Plaintiff's "motion for summary judgment" (Dkt. 67), but that appears to be an unsigned, undated version of the same memorandum of law that Plaintiff had filed in March (*compare id.* with Pl. Mem.). Thereafter, Defendants' motion to dismiss, together with Plaintiff's submissions, were referred to this Court by Judge Gardephe for a report and recommendation. (Dkt. 67.)

DISCUSSION

I. APPLICABLE LEGAL STANDARDS

A. *Rule 12(b)(1)*

1. Subject Matter Jurisdiction

An action should be dismissed pursuant to *Rule 12(b)(1)* where it is apparent that the court lacks subject matter jurisdiction to hear the case. *See* *Fed. R. Civ. P. 12(b)(1)*; *Thomas v. Metro. Correction Ctr., No. 09cv1769 (PGG), 2010 U.S. Dist. LEXIS 61457, 2010 WL 2507041, at *1 (S.D.N.Y. June 21, 2010)* ("A claim is properly dismissed for lack of subject matter jurisdiction under *Rule 12(b)(1)* when the district court lacks the statutory or constitutional power to **[*15]** adjudicate it." (citation omitted)). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)*. A district court must consider a challenge to subject matter jurisdiction before addressing other grounds for dismissal. *Rhulen Agency, Inc. v. Alabama Ins. Guaranty Ass'n, 896 F.2d 674, 678 (2d Cir. 1990)*.

While, on a *Rule 12(b)(1)* motion, a court should accept all material factual allegations in the complaint as true, the court is "not to draw inferences from the complaint favorable to plaintiffs" on such a motion. *J.S. ex rel. N.S. v. Attica Cent. Sch., 386 F.3d 107, 110 (2d Cir. 2004)*. Further, in reviewing a motion under *Rule 12(b)(1)*, a court may consider evidence outside of the pleadings to resolve disputed factual issues relating to jurisdiction. *See* *Malik v. Meissner, 82 F.3d 560, 562 (2d Cir. 1996)* (citing *Zappia Middle E. Constr. Co. Ltd. v. Emirate of Abu Dhabi, 215 F.3d 247, 253 (2d Cir. 2000))*; *see also* *Martinez v. Riverbay Corp., No. 16cv547 (KPF), 2016 U.S. Dist. LEXIS 138411, 2016 WL 5818594, at *3 (S.D.N.Y. Oct. 4, 2016)* ("where subject matter jurisdiction is contested, a district court is permitted to consider evidence outside the pleadings, such as affidavits and exhibits").

2. The *Rooker-Feldman* Doctrine

Under the *Rooker-Feldman* doctrine, which is based on Supreme Court holdings in *Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923)* and *District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983)*, federal district courts lack subject matter jurisdiction over cases "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and **[*16]** inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)*. In contrast, the *Rooker-Feldman* doctrine does not deprive a federal court of jurisdiction where the plaintiff "present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party." *Id. at 293* (citation omitted). In such a case, jurisdiction exists, and "state law determines whether the defendant prevails under principles of preclusion." *Id.*

Thus, "the applicability of the *Rooker-Feldman* doctrine turns not on the *similarity* between a party's state-court and federal-court claims . . . but rather on the *causal relationship* between the state-court judgment and the injury of which the party complains in federal court." *McKithen v. Brown, 481 F.3d 89, 97-98 (2d Cir. 2007)* (emphasis in original). "[A] federal suit complains of injury from a state-court judgment," and thus falls within the *Rooker-Feldman* doctrine, even where the federal suit "appears to complain only of a third party's actions," as long as "the third party's actions are produced by [the] state-court judgment and not simply ratified, acquiesced in, or left unpunished by it." *Hoblock v. Albany Cty. Bd. of Elections, 422 F.3d 77, 88 (2d Cir. 2005)*; *see* *Gabriele v. Am. Home Mortg. Servicing, Inc., 503 F. App'x 89, 92 (2d Cir. 2012)* (Summary Order) (citing *Hoblock*).

3. Standing

"The doctrine of standing **[*17]** asks whether a litigant is entitled to have a federal court resolve his grievance. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limits on its exercise." *United States v. Suarez, 791 F.3d 363, 366 (2d Cir. 2015)* (internal quotation marks and citation). To establish constitutional standing, a plaintiff must show that he has (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)* (citing *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*. The requisite "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized[;] . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan, 504 U.S. at 560* (internal quotation marks and citations omitted). Where a statute creates private rights, the violation of those rights may constitute an injury in fact sufficient to confer standing. *See* [Spokeo, 136 S. Ct. at 1549](). Conversely, a plaintiff lacks standing to assert a claim under a statute that does not afford a private right of action. *See* [Naylor v. Case & McGrath, Inc., 585 F.2d 557, 561 (2d Cir. 1978)]().

The plaintiff bears the burden of establishing the elements of standing, [Spokeo, 136 S. Ct. at 1547]() (citation omitted), and, "at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' **[*18]** each element," *id.* (quoting [Warth v. Seldin, 422 U.S. 490, 518, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)]()). "A motion to dismiss a complaint for lack of standing is properly brought pursuant to [Rule 12(b)(1)]() . . . because it relates to the court's subject matter jurisdiction." [ED Capital, LLC v. Bloomfield Inv. Res. Corp., 155 F. Supp. 3d 434, 446 (S.D.N.Y. 2016)](), *aff'd in part, vacated in part*, [660 F. App'x 27 (2d Cir. 2016)]().

B. *Rule 12(b)(6)*

A complaint may be dismissed pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* where it fails to state a claim upon which relief can be granted. *Fed. R. Civ. P. (12)(b)(6)*. In deciding a motion to dismiss, the Court must "accept as true all factual statements alleged in the complaint and draw all reasonable inferences in favor of the non-moving party." *McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007)*; *accord* *Jaghory v. New York State Dep't of Ed., 131 F.3d 326, 329 (2d Cir. 1997)*. The issue is not whether the plaintiff will ultimately prevail, but whether his claim, as pleaded, is sufficient to afford him the opportunity to proceed on the evidence. *See* *Chance v. Armstrong, 143 F.3d 698, 701 (2d Cir. 1998)*.

Thus, the court's function on a motion to dismiss is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." *Kopec v. Coughlin, 922 F.2d 152, 155 (2d Cir. 1991)* (citation omitted). At the same time, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss." *Achtman v. Kirby, McInerney, & Squire, LLP, 464 F.3d 328, 337 (2d Cir. 2006)* (citation omitted). To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted **[*19]** as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 (2d Cir. 2010)* (quoting *Iqbal, 556 U.S. at 666*), *cert. denied*, *562 U.S. 1168, 131 S. Ct. 901, 178 L. Ed. 2d 803 (2011)*.

Additionally, "[i]t is well established that the submissions of a *pro se* litigant must be construed liberally and interpreted 'to raise the strongest arguments that they suggest.'" *Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006)* (collecting cases); *see also* *Hughes v. Rowe, 449 U.S. 5, 9-10, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980)* (noting that a *pro se* party's pleadings must be liberally construed in his favor and are held to a less stringent standard than the pleadings drafted by lawyers); *Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009)* ("Even after *Twombly*, . . . we remain obligated to construe a *pro se* complaint liberally."); *Lerman v. Board of Elections, 232 F.3d 135, 139-40 (2d Cir. 2000)* ("Since most *pro se* plaintiffs lack familiarity with the formalities of pleading requirements, [a court] must construe *pro se* complaints liberally, applying a more flexible standard to evaluate their sufficiency."). This is especially true in the context of civil rights complaints. *See* *Weinstein v. Albright, 261 F.3d 127, 132 (2d Cir. 2001)*; *see also* *Gregory v. Daly, 243 F.3d 687, 691 (2d Cir. 2001)* (noting that a court must be "mindful of the care exercised in this Circuit to avoid hastily dismissing complaints of civil rights violations"). **[*20]**

On a motion to dismiss a complaint, while a court is generally constrained to look only to the pleadings, *see* *Fed. R. Civ. P. 12(b)*; *Calcutti v. SBU, Inc., 273 F. Supp. 2d 488, 492 (S.D.N.Y. 2003)*, "the mandate to read the papers of *pro se* litigants generously makes it appropriate to consider plaintiff's additional materials, such as his opposition memorandum" to supplement the allegations in the complaint, *Burgess v. Goord, No. 98cv2077 (SAS), 1999 U.S. Dist. LEXIS 611, 1999 WL 33458, at *1 n.1 (S.D.N.Y. Jan 26, 1999)* (internal quotation marks and citations omitted); *see also, e.g.,* *Samuels v. Fischer, 168 F. Supp. 3d 625, 645 n.11 (S.D.N.Y. 2016)* (finding, in resolving motion to dismiss, that it was "appropriate to consider allegations contained in [p]laintiff's [o]pposition"); *Goldson v. Kral,* Clerkin, Redmond, Ryan, Perry, & Van Etten, LLP, No. 13cv2737 (GBD) (FM), 2014 U.S. Dist. LEXIS 95668, 2014 WL 4061157, at *3 (S.D.N.Y. July 11, 2014) (amended report and recommendation) ("When a plaintiff is proceeding *pro se*, the Court also may rely on any opposition papers in assessing the legal sufficiency of the plaintiff's claims"), *adopted by*, 2014 U.S. Dist. LEXIS 112291, 2014 WL 3974584 (Aug. 13, 2014); Sommersett v. City of New York, No. 09cv5916 (LTS), 2011 U.S. Dist. LEXIS 71357, 2011 WL 2565301, at *3 (S.D.N.Y. June 28, 2011) ("[W]here a *pro se* plaintiff has submitted other papers to the [c]ourt, such as legal memoranda, the [c]ourt may consider statements in such papers to supplement or clarify the plaintiff's pleaded allegations.").

Although courts have not followed this approach in every case, *see, e.g.,* Brunson v. Duffy, No. 12cv9465 (KBF), 2015 U.S. Dist. LEXIS 29015, at *4 (S.D.N.Y. Mar. 6, 2015) **[*21]** (citing *pro se* cases where courts declined to consider new facts included in opposition), it is certainly true that the papers submitted by a *pro se* plaintiff in opposition to a Rule 12(b)(6) motion may offer clarification or context that can aid the Court in understanding the plaintiff's pleading and in affording it a liberal construction, *see id.*, at n.4 (noting that "a district court needs to assess each case on an individual basis"). Especially in the civil rights context, where courts should act with particular care before dismissing a plaintiff's complaint, taking the step of examining a *pro se* plaintiff's opposition papers to see if they shed light on his initial allegations "is consistent with the principle that a court may not dismiss a *pro se* complaint unless it is beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," Johnson v. Wright, 234 F. Supp. 2d 352, 356 (S.D.N.Y. 2002) (internal quotation marks and citation omitted).

Rule 12(d) of the Federal Rules of Civil Procedure governs situations in which "matters outside the pleadings" are presented to the court on a motion to dismiss pursuant to Rule 12(b)(6). Fed. R. Civ. P. 12(d). "Pursuant to Rule 12(d), the Court must determine whether the newly presented documents are (1) part of the pleadings such that the Court may **[*22]** consider them as part of the instant motion; (2) not part of the pleadings such that the documents should be excluded in deciding [the] motion to dismiss; or (3) not part of the pleadings but should be considered by converting the instant motion to dismiss to one for summary judgment." Madu, Edozie & Madu, P.C. v. SocketWorks Ltd. Nig., No. 07cv11028 (PKL), 265 F.R.D. 106, 122 (S.D.N.Y. 2010). Where a party presents materials outside the pleadings, "it is within the Court's "discretion . . . to convert a motion filed under Fed. R. Civ. P. 12(b)(6) into one seeking summary judgment," or to disregard the outside material and treat the motion as one under Rule 12(b)(6). Aetna Cas. & Surety Co. v. Aniero Concrete Co., 404 F.3d 566, 573 (2d Cir. 2005) (internal quotation marks and citation omitted).

C. Amendment of Pleadings

Under Rule 15 of the Federal Rules of Civil Procedure, a district court should "freely give leave to amend when justice so requires." Fed. R. Civ. P. 15(a)(2). Further, as a general matter, a court should not dismiss claims asserted by a *pro se* plaintiff for failure to state a claim without granting at least one opportunity for the plaintiff to amend the complaint to cure any pleading defects. Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000) (holding that district courts "should not dismiss [a *pro se* complaint] without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might **[*23]** be stated." (quoting Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 795 (2d Cir. 1999))). "Where an amendment would be futile, however, leave to amend is not required." Brodsky v. Carter, No. 15cv3469 (GBD) (DF), 2015 U.S. Dist. LEXIS 169104, 2015 WL 13746671, at *13 (S.D.N.Y. Dec. 15, 2015) (citing Hill v. Curcione, 657 F.3d 116, 123-24 (2d Cir. 2011)), *report and recommendation adopted sub nom*. Brodsky v. New York City Campaign Fin. Bd., No. 15cv03469 (GBD) (DF), 2016 U.S. Dist. LEXIS 40461, 2016 WL 1258986 (Mar. 28, 2016), *aff'd sub nom.* Brodsky v. Carter, 673 F. App'x 42 (2d Cir. 2016). An amendment or supplement to a pleading is considered futile when the proposed new claim "could not withstand a motion to dismiss pursuant to Rule 12(b)(6)" of the Federal Rules of Civil Procedure. Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 88 (2d Cir. 2002).

II. DEFENDANTS' MOTION TO DISMISS

A. *Rule 12(b)(1)*

1. The *Rooker-Feldman* Doctrine Does Not Deprive This Court of Jurisdiction Over Plaintiff's Claims.

The Moving Defendants' principal argument in support of their assertion that the Court lacks subject matter jurisdiction over Plaintiff's claims is that the claims are barred by the *Rooker-Feldman* doctrine. (Def. Mem., at 8-9.) The Second Circuit has articulated four requirements which must be met for that doctrine to apply: (1) the plaintiff must have lost in state court; (2) the plaintiff must complain of injuries caused by the state court's judgment; (3) the plaintiff must "invite district court review and rejection of that judgment"; and (4) the state court judgment must have been rendered before **[*24]** plaintiff brought suit in district court. *Hoblock, 422 F.3d at 85* (citing *Exxon Mobil*).

In support of their argument that *Rooker-Feldman* applies here, Defendants have attached the Housing Court Order, which the Court may consider in determining whether it has jurisdiction over the claims in this case. *Martinez, 2016 U.S. Dist. LEXIS 138411, 2016 WL 5818594, at *3*. Plaintiff acknowledges that he lost his Housing Court case (*see* Compl. ¶¶ 60-63), and he effectively concedes that the judgment entered against him by that court occurred prior to the commencement of this action (*see id.* ¶ 63). The question remains, however, whether Plaintiff is "complain[ing] of injuries caused by" the state court judgment and is "invit[ing] district court review and rejection of th[at] judgment." *Hoblock, 422 F.3d at 85*.

Defendants argue that the Housing Court Action and this action are "inextricably intertwined," such that this Court's consideration of the claims that Plaintiff has asserted here would constitute an improper review (and possible rejection) of a state court judgment. (Def. Mem., at 8.) This argument is unpersuasive, as it misapprehends the current state of the law and ignores the import of *Exxon Mobil*. Specifically, the Court notes that Defendants principally rely on *Moccio v. New York State Office of Court Admin., 95 F.3d 195, 199 (2d Cir. 1996)*, in which the Second Circuit **[*25]** held that "at a minimum, where a federal plaintiff had an opportunity to litigate a claim in a state proceeding . . . subsequent litigation of the claim will be barred under the *Rooker-Feldman* doctrine if it would be barred under the principles of preclusion," *id. at 199-200* (quoted in Def. Mem., at 8). What Defendants fail to recognize is that this holding was expressly abrogated by the Supreme Court's ruling in *Exxon Mobil. See id. at 283* (citing *Moccio* as an example of a case which overextended the application of *Rooker-Feldman*); *see Hoblock v. Albany Cty. Bd. of Elections, 422 F.3d 77, 85 (2d Cir. 2005)* ("The Supreme Court has now told us that *Moccio* . . . was incorrect."). In their *Rooker-Feldman* analysis, Defendants do not grapple with, or indeed even mention, this more recent and controlling case law. Instead, Defendants rely on an overly broad interpretation of *Rooker-Feldman* that does not comport with either *Exxon Mobil* or the subsequent decisions in this Circuit that have applied the principles of *Exxon Mobil*.

To be sure, there are several indicators in the parties' submissions suggesting that the state court action and the action currently before this court are substantially similar. In both cases, it would appear that Plaintiff's complained-of injury is his eviction **[*26]** from the apartment at Henry Hall. (*Compare* Housing Court Order *with* Compl.) Plaintiff himself has acknowledged this similarity, given that he filed a so-called "Related Case Statement" in this matter, referring to the Housing Court Action as the purported "basis for this new case." (*See* Dkt. 10.) The Housing Court Action was brought against Rose Associates, the entity with which each of the Moving Defendants is affiliated. (*Id.*) Further, it appears that the remedies sought by Plaintiff in the Housing Court Action and in this action, for his allegedly wrongful eviction, are essentially identical: restoration to an apartment in Henry Hall, and money damages. (*Id.*)

Nonetheless, as the Second Circuit has explained, post-*Exxon Mobil*, mere similarity of issues between a state court action or judgment and a subsequent federal court action is not sufficient for application of the *Rooker-Feldman* doctrine. *McKithen, 481 F.3d 89, 97-98*. Instead, the Court looks to whether there is a "causal relationship" between the state court judgment and the alleged injury. *Id. at 98*. Put another way, the court must ask whether the injury was "produced by a state-court judgment," or if, to the contrary, the injury was "simply ratified, acquiesced **[*27]** in, or left unpunished by [the state court]." *Hoblock, 422 F.3d at 88*. Here, the specific injury alleged by Plaintiff — his removal from Henry Hall — was not *caused* by the Housing Court judgment. Rather, Plaintiff's eviction was a "preexisting injury" that "existed in its exact form prior to the state-court judgment." McKithen, 481 F.3d at 98. In light of that clear and uncontested fact, this Court cannot conclude that Plaintiff is "inviting District Court review and rejection" of the Housing Court's decision, Exxon Mobil, 544 U.S. at 284, rather than raising an independent federal claim that "denies a legal conclusion that a state court has reached in a case to which he was a party," id. at 293.[5]

This Court therefore concludes that the Rooker-Feldman doctrine does not deprive this Court of jurisdiction over Plaintiff's claims, and that his claims should not be dismissed on that ground.

2. Plaintiff Lacks Standing To Assert His Claim Under the FTCA.

Defendants also argue that Plaintiff's claim of "false advertisement and unfair and deceptive actions," which he purports to raise pursuant to 15 U.S.C. § 45 (a section of the FTCA), must be dismissed because that statute provides no private right of action. (Compl. ¶¶ 89-93; Def. Mem., at 14-15.) Defendants raise this issue last in their **[*28]** brief, and separately from their discussion of subject matter jurisdiction (Def. Mem., at 14-15), but, as the issue is appropriately analyzed as a question of standing, this Court will address it as a threshold jurisdictional issue, under Rule 12(b)(1) (*see* Discussion, *supra*, at Section I(A)(3)).

Defendants correctly note that there is no private right of action under 15 U.S.C. § 45, and courts in this District have routinely dismissed claims by private plaintiffs brought pursuant to that section. *See* Naylor, 585 F.2d at 561 ("it is clear that no private right of action arises under [15 U.S.C. § 45]") (collecting cases); Shostack v. Diller, No. 15cv2255 (GBD) (JLC), 2015 U.S. Dist. LEXIS 123777, 2015 WL 5535808, at *9 (S.D.N.Y. Sept. 16, 2015) (recommending dismissal of claim under 15 U.S.C. § 45 for lack of a private right of action), *report and recommendation adopted*, 2016 U.S. Dist. LEXIS 30354, 2016 WL 958687 (S.D.N.Y. Mar. 8, 2016); Oliver v. U.S. Bancorp, No. 14cv8948 (PKC), 2015 U.S. Dist. LEXIS 88713, 2015 WL 4111908, at *6 (S.D.N.Y. July 8, 2015) (same); Rotblut v. Ben Hur Moving & Storage, Inc., 585 F. Supp. 2d 557, 560 (S.D.N.Y. 2008) ("the [FTCA], which prohibits unfair or deceptive practices, does not provide for a private cause of action"); *see also* Yerushalayim v. Liecthung, No. 19CV4101 (AMD) (LB), 2019 U.S. Dist. LEXIS 136800, 2019 WL 3817125, at *3 (E.D.N.Y. Aug. 13, 2019) (same).

Plaintiff cites to 15 U.S.C. Section 26 as support for the proposition that he can personally bring suit for an alleged violation of the Act. (Compl. ¶ 93.) While Section 26 provides for a private right of action for injunctive relief for certain ***antitrust-law*** violations (none of which are alleged in the Complaint), **[*29]** it does not confer a private right of action for unfair or deceptive practices prohibited by Section 45. (*Compare* 15 U.S.C. §§ 26, 45.) As Plaintiff lacks standing to enforce the provisions of Section 45 through this private suit, I recommend that Plaintiff's claim pursuant to that statute be dismissed.

Although a *pro se* Plaintiff should generally be granted at least one opportunity to amend, Cuoco, 222 F.3d at 112, leave to amend need not be granted where amendment would be futile, Brodsky, 2015 U.S. Dist. LEXIS 169104, 2015 WL 13746671, at *13. Plaintiff's claim for "false advertising" and "unfair and deceptive practices" pursuant to the FTCA should be dismissed with prejudice because Plaintiff's lack of standing to assert a claim pursuant to 15 U.S.C. § 45 is a legal flaw that cannot be cured through amendment. *See* Cain v. Christine Valmy Int'l Sch. of Esthetics, Skin Care, & Makeup, 216 F. Supp. 3d 328, 336 (S.D.N.Y. 2016) (amendment futile for claim based on statute without a private right of action).

3. Plaintiff's Allegations Are Sufficient, at the Pleading Stage, to Demonstrate Standing Under the FHA.

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[5] In this regard, the Court also notes that Defendants characterize the Decision and Order of the Housing Court as containing a finding that Plaintiff was not a tenant. (Def. Mem., at 5, 9.) The actual language of the Decision and Order, however, is not so clear. (Housing Court Order (finding that "the landlord had nothing to do w[ith] either the letting or the alleged lockout").)

The FHA makes it unlawful to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of," *inter alia*, their sex, familial status, and/or a handicap, or to discriminate "in the provision of services or facilities in connection [with a sale or rental]" based on any of those protected **[*30]** characteristics. *42 U.S.C. § 3604(a)*, *(b)*, *(f)*. The FHA permits any "aggrieved person" to bring suit to remedy a violation of the Act. *42 U.S.C. § 3613(a)*. In their motion, Defendants do not argue that Plaintiff has failed to allege that he falls within one of the protected categories; nor do they argue that he has failed to plead sufficient facts to raise a plausible inference that Defendants' actions were taken because of his membership in a protected class; nor do they argue that their alleged conduct towards Plaintiff was not the type of conduct contemplated by the statute. (*See generally* Def. Mem.; Def. Reply.) This Court therefore focuses on the sole argument made by Defendants that Plaintiff was not an "aggrieved person" under the FHA. As the question of whether a party is an "aggrieved person" under the Act is a question of standing, *Bank of Am. Corp. v. City of Miami, Fla., 137 S. Ct. 1296, 1303, 197 L. Ed. 2d 678 (2017)*, this Court addresses Defendants' argument in connection with their *Rule 12(b)(1)* motion, despite Defendants' having raised the issue in connection with their motion under *Rule 12(b)(6)*.

The Moving Defendants rely on *Walker v. Cox, No. 95 CV 1219 (EHN), 1999 U.S. Dist. LEXIS 5620, 1999 WL 294723 (E.D.N.Y. Mar. 17, 1999)*, for the proposition that "'aggrieved parties' . . . do not include unlawful tenants" (Def. Mem., at 12). The FHA, however, merely defines an "aggrieved person" as "any **[*31]** person who (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." *42 U.S.C. §§ 3602(i)(1)*, *(2)*. Nowhere does the text of the statute limit standing only to "lawful tenants." *See id.* To the contrary, the Supreme Court "has repeatedly written that the FHA's definition of person 'aggrieved' reflects a congressional intent to confer standing broadly," *Bank of Am. Corp., 137 S. Ct. at 1303*, and indeed, "[s]tanding under the Fair Housing Act is as broad as Article III permits." *Fair Hous. Justice Ctr., Inc. v. Cuomo, No. 18cv3196 (VSB), 2019 U.S. Dist. LEXIS 170119, 2019 WL 4805550, at *6 (S.D.N.Y. Sept. 30, 2019)* (quoting *Mhany Mgmt., Inc. v. Cty. of Nassau, 819 F.3d 581, 600 (2d Cir. 2016))*.

Moreover, the Supreme Court has recognized that standing under the FHA exists in a variety of contexts, including instances where the plaintiffs are not "tenants." *Bank of Am. Corp., 137 S. Ct. at 1303* (collecting cases). Under circumstances similar to those alleged in this case, this Court has recognized that even residents who are not "tenants of record" for a dwelling may nonetheless be able to challenge their eviction for discriminatory reasons. *Andujar v. Hewitt, No. 02cv2223 (SAS), 2002 U.S. Dist. LEXIS 14294, 2002 WL 1792065, at *9 (S.D.N.Y. Aug. 2, 2002)* (goddaughter of leaseholder had standing under the FHA to challenge eviction based on assertion of familial status). Defendants' conclusory argument **[*32]** that the protections of the FHA are limited only to "lawful tenants" fails to address or even acknowledge the broad scope of the statute.

Finally, even if this Court were to adopt the reasoning of the Eastern District in *Walker*, which found that an "unauthorized" resident who would, in any event, be subject to eviction, lacked standing to sue under the FHA, Defendants — for reasons discussed below (*see* Discussion, *infra*, at Section II(B)) — have failed to support their argument that they are entitled, at this stage of these proceedings, to a judicial finding that, despite his allegations, Plaintiff was not, as a matter of law, "authorized" to reside in Orr's apartment. For these reasons, I recommend that the Court decline to dismiss Plaintiff's FHA claim.

B. *Rule 12(b)(6)*

This Court turns next to Defendants' contentions that Plaintiff's remaining claims should be dismissed pursuant to *Rule 12(b)(6)* for failure to state a claim. Defendants argue that Plaintiff has failed to state *any* claim upon which relief may be granted because, as a factual matter, Plaintiff was not a lawful tenant of Henry Hall. (*See generally* Def. Mem.; Def. Reply.) Plaintiff, for his part, insists that he was. (*See generally* Compl.; Pl. Decl.; **[*33]** Pl. Notice; Pl. Mem.) In support of their argument, Defendants repeatedly point to the conceded fact that Orr, not Plaintiff, was the "tenant of record" for the apartment (*see* Def. Mem., at 3 (citing Compl. ¶ 20)) and that Plaintiff paid rent to Orr, not to Defendants (*see id.*, at 4; Compl. ¶ 21; Pl. Decl. ¶ 2). Plaintiff, however, has alleged that, regardless of whether he was named on the lease for the apartment, he had permission to live there, as indicated by (1) the fact that he had "registered with the security guards" by producing a valid form of government identification, having his photograph taken, and signing his name (Compl. ¶ 22; Pl. Decl. ¶ 4); (2) the fact that this registration was recorded in the landlord's computer system, such that, whenever he arrived at the building (at least until late February 2018), security staff would see that he was a resident and allow him in without asking Orr for permission (Pl. Decl. ¶ 7; *see also* Compl. ¶ 26); (3) the fact that, when he once locked himself out of the apartment, the landlord gave him a spare key to let him in (Pl. Decl. ¶ 9); (4) the fact that building staff helped him move his furniture into the apartment (Compl. ¶ 23); and (5) **[*34]** the fact that the landlord knowingly allowed him to reside in the apartment for over 30 days (Pl. Decl. ¶¶ 5, 11). Plaintiff also suggests, although without further explanation, that he met an applicable definition for being a member of Orr's "household," perhaps because he and Orr were financially interdependent. (*See* Pl. Mem., at 4.)

In their briefing, Defendants do not even attempt to explain the circumstances under which a landlord-tenant relationship may, and may not, be created under New York law, and, more specifically, they do not cite authority for the proposition that, as they suggest, only an individual who is the "tenant of record" and signatory to the prime lease may be considered a lawful tenant or otherwise have legal rights that are capable of being violated by forceable eviction. On this point, Defendants fail to address how any financial relationship between Plaintiff and Orr, or Defendants' alleged notice of and acquiescence in Plaintiff's shared occupancy of the apartment (*see* Compl. ¶ 22; Pl. Decl. ¶¶ 4-11), may have affected Plaintiff's status or his rights. Further, Defendants fail to explain what Plaintiff's status *was*, if not that of a "lawful tenant" — for **[*35]** instance, whether he could have been considered a licensee — and how such status would affect his ability to assert claims under the various laws he invokes. (*See generally* Def. Mem.; Def. Reply.) Absent briefing on these subjects, this Court cannot conclude, at the pleading stage, that Defendants have adequately demonstrated that Plaintiff's purported lack of "lawful tenancy" status precludes him, as a matter of law, from proceeding with any and all of his asserted claims.

Moreover, while, on Defendants' *Rule 12(b)(6)* motion, the Court may take judicial notice of documents integral to and incorporated in the Complaint by reference, *see* *Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002)*, and while this may include the letter sent by Zarzuela to Orr on March 7, 2018, directing Orr to have Plaintiff vacate the apartment (*see* Compl. ¶ 28 (quoting letter)), Plaintiff has, as noted above, submitted a version of that letter that is different from the version submitted by Defendants, raising a question as to the authenticity of the version on which Defendants rely (*see supra*, at n.3). If there is a legitimate dispute regarding the authenticity of a document, then it may not serve as the basis for dismissal. *MMA Consultants 1, Inc. v. Republic of Peru, 245 F. Supp. 3d 486, 498-99 (S.D.N.Y. 2017)* ("a document outside the complaint may not **[*36]** serve as the basis for a dismissal unless it is clear on the record that no dispute exists regarding the authenticity or accuracy of the document" (internal quotation marks and citation omitted)), *aff'd*, *719 F. App'x 47 (2d Cir. 2017)* (Summary Order). Further, even if the core contents of that letter are not disputed, Defendants' assertion that Plaintiff was not a lawful tenant largely relies on the substance of Orr's lease (*see* Def. Mem., at 3-4 (quoting extensively from lease, attached as Exhibit A to the Zazuela Decl.)), and it is not clear that Plaintiff's mere allegation that Orr was the "tenant of record" (Compl. ¶ 20) would be sufficient to allow the Court to consider the full terms of the lease without converting Defendants' *Rule 12(b)(6)* motion to one for summary judgment. Absent a discovery record that develops the facts relevant to Plaintiff's occupancy status, this Court does not recommend conversion of the motion. *See, e.g.,* *Speedmark Transp., Inc. v. Mui, 778 F. Supp. 2d 439, 441 n.1 (S.D.N.Y. 2011)* (collecting cases declining to convert a motion to dismiss to one for summary judgment where relevant discovery had not been completed).

It may well be that, under the applicable law, the evidence will eventually demonstrate that Plaintiff was neither a lawful tenant of Henry Hall, nor otherwise **[*37]** a person whose status entitled him to challenge Defendants' conduct in evicting him from the premises or denying him access to his property. For the reasons discussed below, however, these issues should not be resolved at this juncture. For other reasons, discussed below, certain of Plaintiff's remaining claims are defective on their face and should be dismissed. It is premature, though, for the Court to accept the limited evidence that Defendants have proffered; to accept their blanket assertions that, based on that limited evidence, Plaintiff was not a "lawful tenant" and thus had no legal rights to occupy the apartment, to be free from forceable removal from the premises, or to recover his personal property; and to determine that all of Plaintiff's claims should be dismissed on that basis.

1. Plaintiff's *Section 713* Claim Should Be Dismissed as Noncognizable.

Plaintiff's claim that the Moving Defendants violated *Section 713* by failing to provide him with "a 10-day Notice to Quit" (Compl. ¶ 87) is defective. The purported notice requirement cited by Plaintiff relates to special proceedings that, under *Section 713*, "may be maintained" to remove individuals from occupancy "where no landlord-tenant relationship exists." **[*38]** *N.Y. Real Prop. Actions L. § 713*. Such proceedings may be commenced when, *inter alia*, an individual "is a licensee of the person entitled to possession of the property . . . [and] his license has been revoked by the licensor." *Id.* *§ 713(7)(b)*.

Construing Plaintiff's Complaint to suggest that he may have been "a licensee of the person entitled to possession" of the apartment at Henry Hall, this Court finds it plausible that Defendants could have commenced a *Section 713* special proceeding to evict Plaintiff, thereby entitling him to statutory notice. There is no indication in Plaintiff's Complaint, however, that Defendants ever *did* start such a proceeding; to the contrary, Plaintiff asserts that he was forced out of the apartment through an "illegal self-help eviction." (Pl. Decl. ¶ 29.) Nor does *Section 713* make it mandatory for a landlord to use the procedures set out in that statute to effectuate an eviction of a licensee. Instead, the statute expressly provides for an *optional* method of removing a licensee whose license to occupy real property has been revoked. *See* *N.Y. Real Prop. Actions L. § 713* (providing that a special proceeding under the statute "may" be maintained); *see also* Def. Mem., at 13 (citing *Pelt v. City of New York, No. 11-CV-5633 KAM CLP, 2013 U.S. Dist. LEXIS 122848, 2013 WL 4647500, at *9 (E.D.N.Y. Aug. 28, 2013)* ("New York state courts have repeatedly **[*39]** clarified that *§ 713* does not replace an owner's common-law right to oust an interloper without legal process." (internal quotation marks omitted; collecting cases))); *De Villar v. City of New York, 628 F. Supp. 80, 84 (S.D.N.Y. 1986)* ("The fact that a court will not issue a judgment of eviction without ten days notice [pursuant to *Section 713*] in no way implies that an owner is barred by law from removing a trespasser or illegal occupant.").

As Defendants allegedly did not commence — and, under the law, were not required to commence — a special proceeding under *Section 713*, they were also not bound by the obligation imposed by that Section to provide Plaintiff with 10 days' notice of his removal from occupancy. For this reason, Plaintiff has no cognizable claim pursuant to *Section 713*. Moreover, as Plaintiff cannot claim entitlement to the procedures outlined in the statute as a matter of law, granting him leave to amend his *Section 713* claim would be futile, and, for this reason, this claim should be dismissed with prejudice.

2. Plaintiff's *Section 1983* and State Constitutional Claims Are Defective as Pleaded, But Plaintiff Should Be Granted Leave To Amend Certain of These Claims.

Although Defendants spend the majority of their analysis of Plaintiff's constitutional claims on the issue of whether Plaintiff **[*40]** may assert those claims absent status as a lawful tenant (Def. Mem., at 9-11),[6] Defendants also raise, albeit in a footnote, the argument that they were not state actors, and therefore cannot be said to have violated Plaintiff's rights "under color of state law," as would be required for Plaintiff to state a viable claim for federal or state constitutional violations (*id., at 11 n.4* (citing, *inter alia,* *Murray v. N.Y.C. Dep't of Corr., No. 13 CV 7090, 2016 U.S. Dist. LEXIS 110982, at *28, 2016 WL 11395007, at *11 (E.D.N.Y. Aug. 18, 2016))*; *see also* Def. Reply, at 8 n.8). This Court agrees that Plaintiff has not adequately pleaded that Defendants were state actors, and that dismissal of Plaintiff's constitutional claims is therefore warranted.

Pleading standards under both *Section 1983* and the New York State Constitution require that a plaintiff plead plausible factual allegations that the defendant against whom the claims are asserted was a "state actor." *Aponte v. Diego Beekman M.H.A. HDFC, No. 16cv8479 (JPO), 2019 U.S. Dist. LEXIS 12367, 2019 WL 316003, at *11-13 (S.D.N.Y. Jan. 24, 2019)* (dismissing *Section 1983* claims where plaintiff failed to allege defendants were state

[6] The Court notes that while Defendants assert that Plaintiff's purported lack of status as a lawful tenant is fatal to all of his numerous constitutional claims, Defendants only substantively address Plaintiff's due-process claim related to the alleged lockout.

actors); *Algarin v. New York City Dep't of Corr., No. 06cv508 (JSR), 2006 U.S. Dist. LEXIS 31375, 2006 WL 1379605, at *2 (S.D.N.Y. May 19, 2006)* (dismissing claims under *Section 1983* and the New York State Constitution where plaintiff failed to allege that defendant was a state actor); *see also* *Rendell-Baker v. Kohn, 457 U.S. 830, 842, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982)*. In this case, the Defendants are private individuals who have been **[*41]** sued by Plaintiff in their capacity as employees of a private corporation that managed Henry Hall during the relevant time period. (Compl. ¶¶ 12, 13, 15, 17.) Under only certain limited circumstances may "the actions of a "nominally private entity" be "attributable to the state." *Aponte, 2019 U.S. Dist. LEXIS 12367, 2019 WL 316003, at *12*. Such circumstances include where (1) the nominally private entity acts "pursuant to the 'coercive power' of the state or is 'controlled' by the state"; (2) the state encourages, or the entity willfully participates, in a joint activity with the state, or "the entity's functions are 'entwined' with state policies"; or (3) the entity "has been delegated a public function by the state." *Sybalski v. Indep. Grp. Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008)*. Plaintiff has not plausibly alleged the existence of any of those circumstances here.

The Complaint does plead that the Moving Defendants received certain financing from the state in order to provide low-income housing to residents. (Compl. ¶¶ 14, 16-18.) Plaintiff also alleges (in connection with his claim against the City (*see id.* (Second Cause of Action)) that the City's Department of Housing Preservation and Development acted through Defendants to evict Plaintiff unlawfully and by force and to deprive him of his property **[*42]** illegally (*id.* ¶ 78). Further, in opposition to Defendants' argument that they are not state actors, Plaintiff contends that Defendants were "doing the government's job of deciding who receives rental assistance" (Pl. Notice ¶ 5); and that Defendants "abide[d] by and answer[ed] to the Federal Government" (Pl. Mem. ¶ 12). Liberally construing Plaintiff's factual allegations to raise the strongest arguments they suggest, this Court interprets Plaintiff's pleading and other submissions to assert that (1) Rose Associates' receipt of government funding for low-income housing rendered it, and its principals, so "entwined" with the state that the Moving Defendants were essentially state actors, *see* *Aponte, 2019 U.S. Dist. LEXIS 12367, 2019 WL 316003, at *12*; (2) that the Moving Defendants, in providing low-income housing, were performing a "public function, or, in other words, wield[ing] a power traditionally exclusively reserved to the State," *2019 U.S. Dist. LEXIS 12367, [WL] at *12-13* (internal quotation marks and citation omitted); and (3) that the Moving Defendants were "joint participants" with the City in evicting him from Henry Hall, *see* *2019 U.S. Dist. LEXIS 12367, [WL] at *12*. None of these assertions, however, are sufficient to render plausible Plaintiff's claims, as currently pleaded, that the Moving Defendants deprived **[*43]** him of his federal and state constitutional rights under color of state law.

First, it is well established that receipt of government funding, "no matter how extensive, is insufficient to transform otherwise private conduct into state action." *Young v. Halle Hous. Assocs., L.P., 152 F. Supp. 2d 355, 362 (S.D.N.Y. 2001)*; *Aponte, 2019 U.S. Dist. LEXIS 12367, 2019 WL 316003, at *12* (dismissing *Section 1983* claims based on "entwinement" theory where plaintiffs alleged that landlord "receive[d] public funds and tax exemptions in exchange for providing low-income housing," and holding that entities do not become state actors "simply because those entities receive state funding for providing a public service" (citing *Rendell-Baker, 457 U.S. at 841*)); *Holden v. E. Hampton Town, No. 15-CV-4478, 2017 U.S. Dist. LEXIS 53135, 2017 WL 1317825, at *5-6 (E.D.N.Y. Mar. 31, 2017)* (landlord was not a state actor despite its "accept[ance of] subsidized rental payments from the Town[] . . . for qualified low-income tenants"). Therefore, Plaintiff's allegation that the Moving Defendants, in their capacity as officers or employees of a private entity, accepted government financing for the provision of low-income housing is insufficient to raise a plausible inference that Defendants were state actors.

Second, it is equally settled law that the provision of housing, even so-called low-income housing, is not a function that is "traditionally exclusively reserved to the State." *Aponte, 2019 U.S. Dist. LEXIS 12367, 2019 WL 316003, at *13* ("the provision of housing, **[*44]** for the poor or for anyone else, has never been the exclusive preserve for the state, but has been left to a regulated, and occasionally subsidized, private marketplace" (citing *Young, 152 F. Supp. 2d at 365*)); *Holden, 2017 U.S. Dist. LEXIS 53135, 2017 WL 1317825, at *5* ("Providing low-cost housing does not constitute a 'public function' within the meaning of *Section 1983* because it is not an activity or function exclusively reserved by the state." (citing *Young, 152 F. Supp. 2d at 365*)). Further, Plaintiff's allegation that Defendants assumed a public function by "deciding who receives rental assistance" (Pl. Notice ¶ 5) is purely conclusory and, in any event, unsupported by any factual allegations that any government delegated such a power to Defendants — indeed, Plaintiff's claims essentially allege that it was contrary to state and local law for

Defendants to assume that authority (*see id.*; *see also* *Aponte, 2019 U.S. Dist. LEXIS 12367, 2019 WL 316003 at *13* (rejecting theory that defendant was a state actor when he assumed "[the] power to make 'decisions regarding eligibility for public benefits,'" where plaintiffs' claims were based on laws which, "in [p]laintiffs' view, *require*[*d*] [defendant] to provide them with the benefit they seek")).

Third, Plaintiff's Complaint contains no factual allegations regarding any actual joint conduct between the Moving Defendants **[*45]** and City agents that could be viewed as giving rise to Plaintiff's constitutional claims. The Complaint does not allege, for example, facts that would raise a plausible inference that the City coerced Defendants into removing him from Henry Hall, *Sybalski, 546 F.3d at 257*, that the City or City agents "reached an understanding" with Defendants to evict Plaintiff from Henry Hall and deny him access to his possessions, *Adickes v. S. H. Kress & Co., 398 U.S. 144, 152, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)*; *see also* *Mercer v. Schriro, 337 F. Supp. 3d 109, 146 (D. Conn. 2018)*, or that the City was involved in implementing or enforcing the terms of Orr's lease, *see* *Young, 152 F. Supp. 2d at 365*. Standing alone, Plaintiff's bare allegation that the City, by its Department of Housing Preservation and Development, "act[ed] through" the Moving Defendants to violate his rights (Compl. ¶ 78) cannot render his constitutional claims against the Moving Defendants plausible.

For these reasons, Plaintiff's constitutional claims against the Moving Defendants, as pleaded, are subject to dismissal. Moreover, it would be futile for the Court to permit Plaintiff to amend certain of those claims, as Plaintiff has given absolutely no indication that, in connection with his eviction, he was criminally charged, detained, prosecuted, tried, convicted, or incarcerated. In these circumstances, Plaintiff can **[*46]** have no cognizable claims — against any defendant — for malicious prosecution, denial of the right to a fair trial, cruel and unusual punishment, or any other abuses of criminal process. *See, e.g.,* *Willey v. Kirkpatrick, 801 F.3d 51, 70 (2d Cir. 2015)* (malicious prosecution claim requires, *inter alia*, that a plaintiff plead he was subject to "the initiation or continuation of a criminal proceeding"); *Cuffee v. City of New York, No. 15cv8916 (PGG) (DF), 2017 U.S. Dist. LEXIS 31604, 2017 WL 1232737, at *6 (S.D.N.Y. Mar. 3, 2017)*, *report and recommendation adopted*, *2017 U.S. Dist. LEXIS 44552, 2017 WL 1134768 (S.D.N.Y. Mar. 27, 2017)* (*Eighth Amendment* applies only to individuals who have been "incarcerated pursuant to a conviction").

It is possible, however, that Plaintiff may be able to allege facts giving rise to an inference that the Moving Defendants acted jointly with City officials to effect his removal from the apartment at Henry Hall and to deny him later access to retrieve his property, such that any potential liability of the City for violating Plaintiff's civil rights (such as his rights to due process and equal protection) could extend to the Moving Defendants as well. Given that a *pro se* plaintiff should generally be afforded at least one chance to amend, *Cuoco, 222 F.3d at 112*, and that an amendment of Plaintiff's constitutional claims (with the exception of claims that would relate to criminal process and incarceration) **[*47]** would not obviously be futile, I recommend that Plaintiff's *Section 1983* and state constitutional claims be dismissed without prejudice to replead any such claims that relate to civil process.

3. Defendants' Motion To Dismiss Plaintiff's Claims Under the Rehab Act and *Section 26-521* Should Be Denied.

This Court turns finally to Plaintiffs' claims under the Rehab Act and *Section 26-521* of the New York City Administrative Code. As to each of these claims, the law cited by the Moving Defendants does not actually support their arguments that the claims are inadequately pleaded, and, accordingly, this Court recommends that Defendants' motion to dismiss these claims be denied.

a. Plaintiff's Rehab Act Claim

The Rehab Act provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *29 U.S.C. § 794(a)*. To establish a claim under the Rehab Act, a plaintiff must allege the following elements: (1) that he is a "qualified individual" with a disability; (2) that the defendants receive federal financial assistance; **[*48]** and (3) that he was denied the participation in defendants' services, programs, or activities, or otherwise discriminated against by defendants, because of his disability. *See* *Powell v. Nat'l Bd. of Med. Examiners, 511 F.3d 238 (2d Cir. 2004)*; *Burris v. Hous. & Servs. Inc., No. 17cv9289 (JGK), 2019 U.S. Dist. LEXIS 43972, 2019 WL 1244494, at *5 (S.D.N.Y. Mar. 18, 2019)*. A "qualified individual" is defined as "an individual with a disability who . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities" provided by an entity that receives federal funding. *Fulton v. Goord, 591 F.3d 37, 43 (2d Cir. 2009)* (quoting *42 U.S.C. § 12131(2)*).

The Moving Defendants argue that any claim Petitioner is attempting to assert under *Section 504* of the Rehab Act should be dismissed because "[t]o establish a *Section 504* claim, a plaintiff must receive federal funding that is tied to defendant's purported discriminatory action." (Def. Mem., at 12 (citing *O'Neill v. Hernandez, No. 08cv1689 (KMW), 2010 U.S. Dist. LEXIS 33262, 2010 WL 1257512, at *1 (S.D.N.Y. Mar. 25, 2010))*. Defendants' argument has no merit, as the Rehab Act has no requirement that a plaintiff "receive federal funding." Indeed, the one case that Defendants cite in support of their argument, *O'Neill*, holds no such thing. Rather, upon addressing a plaintiff's Rehab Act claim in a summary-judgment context, the court, in *O'Neill*, noted that one of the elements that the plaintiff would need **[*49]** to establish to prevail on his claim was that the *defendant* received federal funding. *2010 U.S. Dist. LEXIS 33262, [WL] at *7*; *see also* *Burris, 2019 U.S. Dist. LEXIS 43972, 2019 WL 1244494, at *5*. This, of course, accords with the purpose of *Section 504* of the Rehab Act, which prohibits individuals with disabilities from, *inter alia*, being discriminated against by "any program or activity *receiving Federal financial assistance."* *29 U.S.C. § 794(a)* (emphasis added).

To the extent Defendants may be trying to argue that Plaintiff was not a "qualified individual" because he was not eligible for the low-income housing benefits provided by Defendants, through the federal funding that *Defendants* received (*see* Def. Mem., at 13 (arguing that "Plaintiff does not — and cannot — allege that he received . . . federal funding . . . because Mr. Orr was the sole individual who was the beneficiary of this subsidy")), Defendants have failed to explain that argument. The words "qualified" or "eligible" do not appear anywhere in Defendants' briefing, and Defendants certainly have not undertaken to explain the "essential eligibility requirements" that Plaintiff would have needed to meet to state a Rehab Act claim. (*See generally* Def. Mem.) Furthermore, *O'Neill*, on which Defendants purport to rely, does not address issues of eligibility **[*50]** or contain any discussion as to whether the plaintiff in that case was a "qualified individual." *See generally* *O'Neill, 2010 U.S. Dist. LEXIS 33262, 2010 WL 1257512*.

This Court also notes that Defendants' single-sentence argument that only "lawful tenants" may bring a claim under the Rehab Act (Def. Mem., at 13) is wholly conclusory and unsupported by any citation to law. As discussed above, neither the Rehab Act nor the definition of "qualified individual" indicates, on its face, that only a "lawful tenant" may assert a claim under the Act, and Defendants have wholly failed to address whether the particular facts alleged by Plaintiff could be sufficient to afford Plaintiff coverage by the Act's anti-discrimination requirements. As this Court cannot conclude, on the briefing submitted by Defendants, that Plaintiff was not a "qualified individual" under the Rehab Act, and as Defendants have advanced no other argument as to why Plaintiff should not be permitted to proceed on his Rehab Act claim, I recommend that Defendants' motion to dismiss that claim be denied.

b. Plaintiff's *Section 26-521(a)* Claim

Plaintiff also asserts a claim under *Section 26-521(a)*, which, *inter alia*, makes it

> unlawful for any person to evict . . . an occupant of a dwelling unit who has lawfully occupied **[*51]** the dwelling unit for thirty consecutive days or longer . . ., except to the extent permitted by law pursuant to a warrant of eviction or other order of a court of competent jurisdiction or a governmental vacate order by . . . using or threatening the use of force to induce the occupant to vacate the dwelling unit.

N.Y.C. Admin. Code *§ 26-521(a)(1)*; *see* Compl. ¶ 87. Similar to the arguments that they raise in opposition to Plaintiff's other claims, the Moving Defendants' sole *Rule 12(b)(6)* argument for dismissal of Plaintiff's *Section 26-*

521(a) claim is that the law invoked by Plaintiff applies only to "legitimate tenants." (Def. Mem., at 13 (quoting Section 26-521(a) as providing that "[i]t shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has *lawfully* occupied the dwelling unit" (emphasis added by Defendants)).) Once again, however, Defendants entirely fail to recognize that the law invoked by Plaintiff does not only serve to protect lawful "tenants" (*i.e.*, leaseholders). In fact, on its face, Section 26-521(a) extends its protections to any "occupant" of a dwelling unit who has "lawfully occupied" that unit for the specified period of time "*or* who has entered into a lease with respect to such dwelling . . ." N.Y.C. **[*52]** Admin. Code § 26-521(a).

Furthermore, the only case cited by Defendants to support their position as to the meaning of this Administrative Code provision is *Sasmor v. Powell, No. 11-CV-4645 KAM JO, 2015 U.S. Dist. LEXIS 124461, 2015 WL 5458020 (E.D.N.Y. Sept. 17, 2015)*, *aff'd*, *699 F. App'x 65 (2d Cir. 2017)* (Summary Order) (cited in Def. Mem., at 13), where the issue for the court was only whether, in the context of a Section 1983 claim, Section 26-521(a) could be found to have created any property rights in the plaintiff's favor, *see 2015 U.S. Dist. LEXIS 124461, [WL] at *3*. The court adopted a magistrate judge's recommendation that the relevant Section 1983 claims be dismissed because Section 26-521 created no "independent rights of possession." *See id.* (*adopting report and recommendation, separately published at 2015 U.S. Dist. LEXIS 124907, 2015 WL 5458009, at *4 (E.D.N.Y. July 20, 2015))*. This does not address the question of whether Plaintiff could have a viable claim against Defendants under Section 26-521, separate from any constitutional claim alleging interference with property interests.

If Plaintiff had been residing in the apartment for more than 30 days as a lawful licensee, then Plaintiff may potentially have a viable argument that Defendants violated his rights under Section 26-521(a) by removing him from the apartment by force or threatened force, without a court order. *See Andrews v. Acacia Network, 59 Misc. 3d 10, 70 N.Y.S.3d 744, 746 (N.Y. App. Term. 2018)* (suggesting that violation of Section 26-521 as to a licensee may "subject a violator to criminal liability and civil penalties"); **[*53]** *Chow v. 86 Bay LLC, 59 Misc. 3d 1229(A), 108 N.Y.S.3d 688 (Civ. Ct. N.Y. Cty. 2018)* (same); *but see Tantaro v. Common Ground Community Hous. Dev. Fund, Inc., No. 152701/2103, 2015 N.Y. Misc. LEXIS 824, 2015 WL 1227944, at *7 (S. Ct. N.Y. Cty. 2015)* (dismissing Section 26-521 claim where plaintiff was a "mere licensee" and was therefore "not entitled to legal process prior to being restricted from the Building"). Further, while Section 26-521(a) would not entitle an evicted person to repossession of his former dwelling, *see Andrews, 70 N.Y.S.3d at 746*; *Chow, 108 N.Y.S.3d at 688*, *Clarke v. Copenhagen Leasing, L.P., 48 Misc. 3d 27, 12 N.Y.S.3d 489, 490 (N.Y. App. Term. 2015)*, nor directly entitle him to monetary relief, *see Truglio v. VNO 11 E. 68th St. LLC, 35 Misc. 3d 1227[A], 953 N.Y.S.2d 554 [Civ. Ct. N.Y. Cty. 2012]* (noting that the Section "adds civil penalties and criminal penalties . . . which can only be enforced by the Corporation Counsel on behalf of the City of New York"), violations of the Section have nonetheless been held to be remediable under other provisions of the Administrative Code, *see SITC Inc. v. Riverplace I Holding LLC, 23 Misc. 3d 219, 870 N.Y.S.2d 879, 885 (Civ. Ct. N.Y. Cty. 2008)* (noting, *inter alia*, the potential for a person who was unlawfully evicted under Section 26-521(a) to recover treble damages under N.Y. R.P.A. § 853).

Under the circumstances, Defendants have not shown a basis for dismissing Plaintiff's Section 26-521(a) claim as insufficiently pleaded under Rule 12(b)(6).

CONCLUSION

For all of the foregoing reasons, I respectfully recommend that Defendants' motion to dismiss (Dkt. 31) be granted in part and denied in part, as follows:

(1) As to Plaintiff's claim against the Moving Defendants under the Federal **[*54]** Trade Commission Act, the motion to dismiss should be granted under Rule 12(b)(1) with prejudice, as amendment would be futile;

(2) As to Plaintiff's claim against the Moving Defendants under Section 713 of the New York Real Property Actions Law, the motion to dismiss should be granted under Rule 12(b)(6) with prejudice, as amendment would be futile;

(3) As to Plaintiff's claims against the Moving Defendants under *42 U.S.C. § 1983* and the New York State Constitution, the motion (a) should be granted under *Rule 12(b)(6)* with prejudice to the extent such claims are grounded in constitutional protections related to criminal process or incarceration (as Plaintiff does not assert that he was criminally prosecuted), but (b) otherwise should be granted under *Rule 12(b)(6)* without prejudice to replead; and

(4) As to Plaintiff's claims against the Moving Defendants under (a) the Rehabilitation Act of 1973, (b) the Fair Housing Act, and (c) *Section 26-521* of the New York City Administrative Code, the motion to dismiss should be denied.

I further recommend that the Moving Defendants' motion under *Rule 12(b)(6)* not be converted to one for summary judgment, as to do so would be premature, and that Plaintiff's so-called "summary judgment motion" (Dkt. 42) be construed as his opposition to the motion to **[*55]** dismiss and terminated on the Docket to the extent it is reflected there as a separate motion.

Pursuant to *28 U.S.C. § 636(b)(1)* and *Rule 72(b) of the Federal Rules of Civil Procedure*, the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* *Fed. R. Civ. P. 6* (allowing three (3) additional days for service by mail). Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Paul G. Gardephe, United States Courthouse, 500 Pearl Street, Room 2204, New York, New York 10007, and to the chambers of the undersigned, United States Courthouse, 500 Pearl Street, Room 1660, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Gardephe. FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. *See* *Thomas v. Arn, 474 U.S. 140, 155, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; *IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993)*; *Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992)*; *Wesolek v. Canadair Ltd., 838 F.2d 55, 58 (2d Cir. 1988)*; *McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983)*.

If Plaintiff does not have access to cases cited herein that are reported only on Westlaw or LexisNexis, he may request copies from Defendants' counsel. *See* *Local Civ. R. 7.2* ("Upon request, counsel shall provide the *pro se* litigant with copies of [cases and other authorities that are unpublished or reported exclusively on computerized **[*56]** databases that are] cited in a decision of the Court and were not previously cited by any party").

Dated: New York, New York

February 28, 2020

Respectfully submitted,

/s/ Debra Freeman

DEBRA FREEMAN

United States Magistrate Judge

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Manookian v. Flippin

United States District Court for the Middle District of Tennessee, Nashville Division

February 28, 2020, Decided; February 28, 2020, Filed

NO. 3:19-cv-00350

Reporter
2020 U.S. Dist. LEXIS 34445 *; 2020-1 Trade Cas. (CCH) P81,118; 2020 WL 978638

BRIAN P. MANOOKIAN, Plaintiff, v. FLOYD FLIPPIN et al., Defendants.

Subsequent History: Dismissed by, in part, Injunction denied by, As moot, Stay granted by *Manookian v. Flippin, 2020 U.S. Dist. LEXIS 34489 (M.D. Tenn., Feb. 28, 2020)*

Related proceeding at *Manookian v. Bona Law P.C., 2021 U.S. Dist. LEXIS 215653 (S.D. Cal., Nov. 8, 2021)*

Prior History: *In re Manookian, 2018 Tenn. LEXIS 780 (Tenn., Sept. 21, 2018)*

Core Terms

temporary suspension, immunity, proceedings, license, ongoing, disciplinary, disciplinary proceeding, suspension, antitrust, quasi-judicial, abstention, motion to dismiss, optometrists, allegations, reinstate, sovereign, bias, recommendations, damages, enjoin, plaintiff's claim, Injunction, temporary, restrain, suspend, report and recommendation, petition for dissolution, anticompetitive conduct, underlying proceeding, individual member

Counsel: **[*1]** For Brian Manookian, Plaintiff: Aaron Gott, David C. Codell, Jarod Bona, Bona Law PC, La Jolla, CA; Daniel A. Horwitz, Law Office of Daniel A. Horwitz, Nashville, TN.

For Floyd Flippin, in his official and individual capacities, Dana Dye, in her official and individual capacities, John Kitch, in his official and individual capacities, Joe Looney, in his official and individual capacities, Odell Horton, Jr., in his official and individual capacities, Ruth Ellis, in her official and individual capacities, Jody Pickens, in her official and individual capacities, Bridget J. Willhite, in her official and individual capacities, Jimmie Miller, in her official and individual capacities, Defendants: Talmage M. Watts, Tennessee Attorney General's Office, Nashville, TN.

Judges: WILLIAM L. CAMPBELL, JR., UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM L. CAMPBELL, JR.

Opinion

MEMORANDUM

Before the Court is Defendants' Motion to Dismiss. (Doc. No. 23). Plaintiff filed a Response (Doc. No. 28), Defendants filed a Reply (Doc. No. 31), and Plaintiff filed a Sur-Reply (Doc. No. 37-1). Also pending before the Court is Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction. (Doc. No. 44). Defendants filed **[*2]** a Response (Doc. No. 49) and Plaintiff filed a Reply (Doc. No. 56). The Court previously denied Plaintiff's motion for a temporary restraining order (Doc. No. 47) and now considers the Motion for Preliminary Injunction.

Plaintiff Brian Manookian is an attorney whose license to practice law in Tennessee was temporarily suspended on September 21, 2018, by the Supreme Court of Tennessee. The Tennessee Supreme Court found that Plaintiff represented a "substantial threat to the public." Order of Temp. Suspension, *In re: Brian Phillip Manookian, BPR #026455, No. M2018-01711-SC-BAR-BP, 2018 Tenn. LEXIS 780 (Tenn. Sept. 21, 2018)* (Doc. No. 24-1).

Plaintiff's claims the Board of Professional Responsibility of the Supreme Court of Tennessee ("BPR") filed the petition for temporary suspension in retaliation for Plaintiff's suit against a state court judge filed one day earlier. In addition, he claims the temporary suspension is a conspiracy by Defendants, who are individual members of the BPR, to restrain trade and exclude Plaintiff from the legal market in Tennessee. Plaintiff filed this case on April 29, 2019, asserting claims under *42 U.S.C. § 1983* for violation of his rights to free speech, due process, and equal protection, and **[*3]** a claim for conspiracy to restrain trade under the *Sherman Act*, *15 U.S.C. § 1*.

I. PROCEDURAL BACKGROUND

After filing this case, the disciplinary proceedings at the Tennessee Supreme Court and before the BPR have proceeded.[1] After the September 21, 2018 Order of Temporary Suspension, Plaintiff sought dissolution of the temporary suspension three times—on November 21, 2018, February 27, 2019, and April 9, 2019. At the direction of the Tennessee Supreme Court, a panel held hearings on Plaintiff's petitions for dissolution and issued reports and recommendations. The Tennessee Supreme Court adopted the recommendations of the panels, denying the first two petitions, and granting the third petition on May 17, 2019, subject to Plaintiff's "ongoing compliance with conditions set forth in the panel's Report and Recommendation." Shortly after the initial order of temporary suspension was dissolved, on June 24, 2019, the BPR filed a petition for reinstatement of the temporary suspension. The Tennessee Supreme Court referred the matter for a hearing to the panel that had heard Plaintiff's second and third petitions for dissolution and ordered the panel to submit a report and recommendation on the petition for **[*4]** reinstatement of the temporary suspension. The BPR filed a supplemental petition on August 6, 2019. This petition was referred for hearing and report and recommendation to the same panel. After several delays, the panel conducted a hearing on September 26, 2019, and filed its report and recommendation on October 7, 2019. Plaintiff filed a "Motion to Dismiss Supplemental Petition to Reinstate Temporary Suspension and Objection to the Report and Recommendation" and a supplement to the motion to dismiss. In these motions he argued that the petition does not provide a sufficient basis to reinstate the temporary suspension, that two members of the panel should have recused themselves because they are defendants in this action, and that Tennessee Supreme Court Rule 9, section 12.3, governing attorney disciplinary enforcement, is unconstitutional. The Tennessee Supreme Court denied Plaintiff's motion to dismiss and adopted the panel's finding that Plaintiff "violated a condition of the Order Granting Petition for Dissolution of Order of Temporary Suspension." The court also found Plaintiff "poses a threat of substantial harm to the public" and determined that it "should reinstate the temporary suspension of [Plaintiff's] law license." **[*5]**

The same day the Tennessee Supreme Court issued the Order reinstating Plaintiff's temporary suspension, Plaintiff again petitioned that Court for dissolution of the temporary suspension, which the Court denied on October 17, 2019. In the October 17, 2019 Order, the Tennessee Supreme Court stated, "The most recent hearing demonstrated ample basis for determining that Mr. Manookian poses a threat of substantial harm to the public and for the reinstatement of his temporary suspension." The Court acknowledged pending disciplinary charges and

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[1] The procedural background of the underlying disciplinary proceeding is summarized from the Tennessee Supreme Court's October 11, 2019 Order Reinstating Temporary Suspension. *In re Brian Phillip Manookian, BPR #026455*, No. M2019-00630-SC-BAR-BP (Tenn. Oct. 11, 2019) (recounting procedural history) and from the Order Denying Petition for Dissolution of Order of Temporary Suspension, *In re Brian Phillip Manookian, BPR #026455*, No. M2019-00630-SC-BAR-BP (Tenn. Oct. 17, 2019). The details of the complaints in the disciplinary proceeding are not relevant to the Court's opinion.

directed that "Mr. Manookian and the Board shall proceed with all due speed toward ultimate resolution of the petition for discipline currently pending before the Board." *Id.*

On October 26, 2019, Plaintiff filed with this Court a Motion for Temporary Restraining Order and/or Preliminary Injunction. (Doc. No. 44). Through that motion, Plaintiff asked the Court to restrain Defendants from "again 'temporarily' suspending Mr. Manookian's law license without due process" and enjoin Defendants from "further retaliating against him for his protected *First Amendment* activity." (*Id.*) The Court **[*6]** denied Plaintiff's motion for a temporary restraining order on grounds that Plaintiff did not show immediate irreparable harm. (Doc. No. 47).

Plaintiff filed this case against the attorney members of the BPR in their official and individual capacities. He alleges the actions of the BPR constitute a violation of federal antitrust regulations, and violations of his rights to free speech, due process and equal protection. He alleges that the temporary suspension mechanism in Tennessee Supreme Court Rule 9, section 12.3 is unconstitutional on its face and as applied to him. Defendants' moved to dismiss the complaint on grounds of sovereign immunity, *Parker* immunity, and quasi-judicial immunity, and argue that the *Younger* abstention doctrine bars involvement in ongoing attorney disciplinary proceedings.

II. STANDARD OF REVIEW[2]

In deciding a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*, a court must take all the factual allegations in the complaint as true. *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. To survive a motion to dismiss, a complaint must contain sufficient factual allegations, accepted as true, to state a claim for relief that is plausible on its face. *Id.* A claim has facial plausibility when the plaintiff pleads facts that allow the court to draw the reasonable inference that the defendant **[*7]** is liable for the misconduct alleged. *Id.* In reviewing a motion to dismiss, the Court construes the complaint in the light most favorable to the plaintiff, accepts its allegations as true, and draws all reasonable inferences in favor of the plaintiff. *Directv, Inc. v. Treesh, 487 F.3d 471, 476 (6th Cir. 2007)*.

In considering a *Rule 12(b)(6)* motion, the Court may consider the complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to Defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims. *Bassett v. National Collegiate Athletic Assn., 528 F.3d 426, 430 (6th Cir. 2008)*; *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)* (on a motion to dismiss the Court may consider documents referenced in a plaintiff's complaint that are central to plaintiff's claims, matters of which a court may take judicial notice, documents that are a matter of public record, and letters that constitute decisions of a government agency). The Court has considered the record of the disciplinary proceedings before the Supreme Court of Tennessee as referred to in the Complaint and as public records.

III. ANALYSIS

Defendants assert a variety of abstention and immunity defense as a bar to Plaintiff's claims. Defendants argue: (1) the *Younger v. Harris* abstention doctrine bars claims arising out of **[*8]** the ongoing state disciplinary proceeding; (2) claims for damages in their official capacity are barred by sovereign immunity; (3) claims for damages in their individual capacity are barred by quasi-judicial immunity; and (4) antitrust claims are barred by *Parker* immunity.[3]

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[2] Defendants' Motion to Dismiss is filed pursuant to both *Rule 12(b)(1)* and *12(b)(6)*. The Court did not reach the sovereign immunity defense and accordingly decided the Motion under the standard prescribed by *Rule 12(b)(6)*.

[3] Defendants also raise the *Rooker-Feldman* Doctrine as a bar to review of state court decisions "[t]o the extent the state disciplinary proceedings have been concluded." As the state disciplinary proceedings have not concluded and the Court finds Plaintiff's claims are otherwise barred, the Court does not reach the *Rooker-Feldman* issue.

A. *Parker* Immunity Bars Plaintiff's Antitrust Claim

Plaintiff claims "the BPR, along with individual market-participant defendants, entered into an agreement to exclude one of the state's most competitively successful medical malpractice lawyers, Mr. Manookian, from the market." (Comp., Doc. No. 1, ¶ 132). Plaintiff claims the alleged agreement was the decision to "punish" Plaintiff with a temporary suspension of his law license, to publicize the suspension to the media, and to "resist all efforts by Mr. Manookian to petition for dissolution of the suspension." (*Id.*, ¶ 134). Plaintiff seeks treble damages under *15 U.S.C. § 15* and injunctive relief under *15 U.S.C. § 26*. (*Id.*, ¶ 145).

Defendants urge dismissal of Plaintiff's Sherman Act claims on the ground that the action complained of—the temporary suspension—was an act of the Tennessee Supreme Court and entitled to sovereign immunity under the *Eleventh Amendment* and state-action immunity **[*9]** under *Parker*. Plaintiff argues that the BPR is not entitled to state-action immunity because it did not act pursuant to clearly articulated state policy and was not actively supervised by the Supreme Court.

In *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, the Supreme Court, relying on principles of federalism and state sovereignty, interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. *N.C. State Bd. of Dental Examiners, 574 U.S. 494, 135 S. Ct. 1101, 1110, 191 L. Ed. 2d 35 (2015)*. Without *Parker* immunity, "federal ***antitrust law*** would impose an impermissible burden on the States' power" to subordinate market competition to "other values a State may deem fundamental." *Id. at 1109*. "[A] decision of a state supreme court, acting legislatively rather than judicially, is exempt from Sherman Act liability as state action." *Hoover v. Ronwin, 466 U.S. 558, 568, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984)* (citing *Goldfarb v. Virginia State Bar, 421 U.S. 773, 790, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975))*; *see also*, N.C. State Bd. *135 S. Ct. at 1110* ("State legislation and 'decision[s] of a state supreme court, acting legislatively rather than judicially,' ... '*ipso facto* are exempt from the operation of the antitrust laws' because they are an undoubted exercise of state sovereign authority.").

If the action is not "an exercise of state sovereign authority," but is instead a non-sovereign state agency controlled by active market participants, state-action immunity applies **[*10]** only if the actions meets the two-part *Midcal*[4] test as articulated by the Supreme Court in *N.C. State Board. 135 S. Ct. at 1112*. Under *Midcal*, "[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear ... policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct." *Id.* (quoting *F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 634, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992))*.

Here, the conduct complained of is that of the Tennessee Supreme Court. The Tennessee Supreme Court issued the Order of Temporary Suspension. "Where the conduct is that of the sovereign itself, ... the danger of unauthorized restraint of trade does not arise." *Hoover, 466 U.S. at 569*. The Tennessee Supreme Court Rules specify that the Disciplinary Counsel may petition the court for an order of temporary suspension, but only the Tennessee Supreme Court can temporarily suspend an attorney. Tenn.Sup. Ct. R. 9, § 12.3. At best, Defendants' authority under the Rules was limited to petitioning for an order of temporary suspension and filing reports and recommendations with the Tennessee Supreme Court.[5] Ultimate action on the petition or report and recommendation is vested solely with the Tennessee Supreme Court.

The Supreme Court considered a similar circumstance **[*11]** in *Hoover v. Ronwin, 466 U.S. 558, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984)*. In *Hoover*, the plaintiff alleged anticompetitive conduct with regard to bar admission on the

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[4] *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*.

[5] The Rules do not even appear to confer this much authority on the members of the BPR. The Rules provide that a petition for temporary suspension may be made by Disciplinary Counsel, who reports to the BPR. *Tenn. Ct. App. R. 9*, §§ 7.1, 12.3. The Board or a panel conducts hearings on a petition for dissolution of temporary suspension and files a report and recommendation with the Tennessee Supreme Court. Id. at § 12.3(d).

part of individual members of Arizona Supreme Court's Committee on Examinations and Admission. The Supreme Court found that although the Arizona Supreme Court had "necessarily delegated the administration of the admissions process to the Committee," because the court itself had made the final decision to admit or deny admission to practice, the "conduct [the plaintiff] challenges was in reality that of the Arizona Supreme Court" and "is therefore exempt from Sherman Act liability under the state-action doctrine of *Parker v. Brown." Id. at 573*. In *Hoover*, the Supreme Court stated that it did not need to address issues of "clear articulation" and "active supervision" when the conduct at issue was in fact that of the Supreme Court. *Id. at 569*.

The Court finds that the *Midcal* test does not apply because the anticompetitive activity complained of was that of the Tennessee Supreme Court which is *ipso facto* exempt from the antitrust laws. Plaintiff cannot evade state-action immunity by suing only the members of the BPR and not the sovereign entity. "If a government actor is independently responsible for causing the **[*12]** alleged antitrust injury, 'once [it] is determined to be immune ..., the immunity should be extended to include private parties acting under [its] direction." *Edinboro College Park Apartments v. Edinboro Univ., 850 F.3d 567, 574 (3d Cir. 2017)* (quoting *Zimomra v. Alamo Rent-A-Car, Inc. 111 F.3d 1495, 1500 (10th Cir. 1997))*. "Otherwise, plaintiffs could sue only the private parties and by winning antitrust judgments against then, could thwart state policies as if there were no state [i]mmunity." *Id.* (quoting *A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc., 263 F.3d 239, 256 (3d Cir. 2001))*; *see also, Hoover, 466 U.S. 569* (alleged anticompetitive conduct by individual members of the bar admissions committee was subject to Parker immunity because the actions complained of were taken by the state supreme court, a sovereign entity).

Although Plaintiff has brought suit against the individual members of the BPR, the anticompetitive action complained of—temporary suspension and dissolution of temporary suspension—was that of the Tennessee Supreme Court, which is immune from antitrust laws under the claims presented in this case.

B. Absolute Quasi-Judicial Immunity Bars Claims Against Defendants

Defendants assert they are absolutely immune to suits for damages under the doctrine of quasi-judicial immunity. The Court agrees.[6]

Judges are entitled to absolute judicial immunity from suits for money damages for all actions taken in the judge's official **[*13]** capacity, unless they were taken in the complete absence of jurisdiction. *Bush v. Rauch, 38 F.3d 842, 847 (6th Cir. 1994)*. "[S]uch immunity has also been extended to non-judicial officers performing 'quasi-judicial' duties." *Quatkemeyer v. Kentucky Bd. of Med. Licensure, 506 F. App'x 342, 345 (6th Cir. 2012)*. "Quasi-judicial immunity extends to those persons performing tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune." *Bush, 38 F.3d at 847*. Quasi-judicial immunity has been extended to members of professional licensing or disciplinary boards that perform investigatory, prosecutorial or judicial functions. *See Moncier v. Jones, 557 F. App'x 407, 409 (6th Cir. 2014)* (holding that Chief Disciplinary Counsel for the Board was entitled to quasi-judicial immunity); *Quatkemeyer, 506 F. App'x at 345-49* (members of the Board of Medical Licensure, an agency of the state, were entitled to quasi-judicial immunity); *Watts v. Burkhart, 978 F.2d 269, 276 (6th Cir. 1992)* (members of state medical licensing board entitled to absolute immunity).

In *Moncier v. Jones*, the Sixth Circuit affirmed dismissal of claims for damages against the Chief Disciplinary Counsel of the Tennessee Board of Professional Responsibility, when the conduct alleged to have violated the plaintiff's civil rights occurred when the defendant was performing her official role as Chief Disciplinary Counsel. *557 Fed. Appx. 407, 409 (6th Cir. 2014)*. The same conclusion is warranted here. The conduct **[*14]** alleged to have

[6] Plaintiff only seeks damages against Defendants in their individual capacities for the *Section 1983* claims. However, to the extent damages are sought against Defendants in their official capacities, such claims are barred by the *Eleventh Amendment*. *See Moncier v. Jones, 557 F. App'x 407, 409 (6th Cir. 2014)* ("[T]he *Eleventh Amendment* bars official-capacity claims for damages against state officials") (citing *Will v. Mich. Dept. of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989))*.

violated Defendant's civil rights—petitioning the Tennessee Supreme Court for temporary suspension of Plaintiff's law license, conducting hearings at the direction of the Court, and drafting reports and recommendations—falls squarely within the duties and obligations delegated by the Tennessee Supreme Court. *See* *Tenn. Sup. Ct. R. 9*, *§ 4*. Accordingly, Defendants are entitled to absolute quasi-judicial immunity from Plaintiff's claims for damages against them personally.

C. The *Younger v. Harris* Abstention Doctrine Bars Involvement in the Ongoing State Disciplinary Proceedings

Defendants argue the Court should abstain from review of the merits of this case pursuant to *Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)*. "In *Younger*, the United States Supreme Court counseled federal courts to abstain from enjoining certain pending state court criminal proceedings." *Danner v. Bd of Prof'l Responsibility of the Tenn. Sup. Ct, 277 F. App'x 575, 577 (6th Cir. 2008)*. "This doctrine is borne out of a 'proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* (quoting *Younger, 401 U.S. at 44*). The doctrine **[*15]** has been extended to ongoing civil proceedings and ongoing state administrative proceedings. *Id.* (citing *Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S. Ct. 1200, 43 L. Ed. 2d 482 (1975)*; *Middlesex Cty Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982))*. *Younger* counsels that a federal district court should abstain when: "(1) the underlying proceedings constitute an ongoing state judicial proceeding; (2) the proceedings implicate important state interests; and (3) there is an adequate opportunity to raise constitutional challenges in the course of the underlying proceeding." *Danner, 277 F. App'x at 578*.

Plaintiff does not challenge that the State has an important interest in regulating the practice of law or that there is adequate opportunity to raise constitutional challenges in the courts of the underlying proceeding.[7] Instead, Plaintiff argues that *Younger* abstention does not apply because the underlying proceedings are not "ongoing judicial proceedings," and that the claims at issue fall within an exception to the application of *Younger* because the members of the BPR are biased.

State bar disciplinary proceedings are "judicial proceedings." *See* *Danner, 277 F. App'x at 578-79*; *Fieger v. Thomas, 74 F.3d 740 (6th Cir. 1996)* (holding a board was enforcing rules of professional conduct was performing an adjudicative function and thus satisfied the first requirement for *Younger*); *Berger v. Cuyahoga Bar Ass'n., 983 F.2d 718 (6th Cir. 1993)* (ruling that when **[*16]** a state supreme court is the ultimate decision maker in attorney discipline proceedings, those proceedings are judicial in nature for *Younger* purposes); *Squire v. Coughlan, 469 F.3d 551 (6th Cir. 2006)* (investigations into judicial misconduct are an adjudicative function for *Younger* purposes). In *Danner*, the Sixth Circuit specifically considered disciplinary proceedings of the Tennessee Board of Professional Responsibility and held that "the Tennessee disciplinary proceedings at issue are judicial in nature." *277 F. App'x at 579*.

If the state proceeding was pending at the time of the filing, the matter is considered "ongoing." *Id. at 579*. The action "remains pending until the litigant has exhausted his state appellate remedies." *Id.* (quoting *Huffman, 420 U.S. at 609*). Plaintiff argues that the proceedings are not "ongoing" because the Order of Temporary Suspension has already been entered and that because the temporary suspension was "not brought in conjunction with any underlying disciplinary action, the proceedings regarding the now-dissolved suspension are not ongoing now." (Pl. Resp., Doc. No. 28 at 23). This argument is flatly contradicted by the long procedural history in the disciplinary proceeding recounted by the Tennessee Supreme Court. *See In re Manookian*, BPR #026455, No. **[*17]** M2019-00630-SC-BAR-BP (Tenn. Oct. 11, 2019). This history shows that not only was the disciplinary proceeding pending

[7] During the course of the underlying disciplinary proceedings before the Tennessee Supreme Court, Plaintiff raised and the Tennessee Supreme Court rejected the constitutional challenge to Rule 9, § 12.3. *See* Order Reinstating Temp. Suspension, *In re Brian Phillip Manookian*, BPR #026455, No. M2019-00630-SC-BAR-BP (Tenn. Oct. 11, 2019).

at the time the complaint was filed, it is still pending. Moreover, the October 17, 2019 Order Denying Petition for Dissolution of Order of Temporary Suspension clearly indicates that the temporary suspension is part of an underlying disciplinary complaint that is unresolved. *In re Manookian*, BPR #026455, No. M2019-00630-SCBAR-BP (Tenn. Oct. 17, 2019) (ordering the parties to "proceed with all due speed toward ultimate resolution of the petition for discipline currently pending before the Board").

Even Plaintiff recognizes, in the context of a claim preclusion, that the proceedings are not yet final, arguing that "there has simply not been a final state-court judgment for preclusion purposes because the underlying disciplinary charges—including those from the original suspension have not been heard." (Pl. Reply, Doc. No. 56 at 1). The Court does not suggest Plaintiff is disingenuous in his arguments. Rather, the evolution of Plaintiff's argument reflects the ongoing nature of the disciplinary proceedings at issue and underscores the rationale for abstention from those **[*18]** proceedings.

Plaintiff maintains that even if the prerequisites for *Younger* abstention have been met, the following exceptions to the doctrine allow the case to proceed: bad faith, harassment, and bias. Plaintiff alleges the initial temporary suspension was initiated in retaliation for Plaintiff's filing a lawsuit against a state court judge and issuing a subpoena to the BPR and that thereafter "Defendants and their agents have engaged in an unprecedented, aggressive pursuit of [Plaintiff] since he first sued a state court judge and served a subpoena on the board in the fall of 2018. Specifically they have: (i) pursued a temporary suspension based on protected out-of-court speech; (ii) failed to bring or adjudicate underlying disciplinary charges for months, asserted that [Plaintiff] had the burden of proof to dissolve the suspension; (iii) engaged in extensive gamesmanship to prevent hearings that would actually put them to their proof; (iv) brought new disciplinary petitions immediately after a suspension was dissolved; (v) filed a new petition to reinstate the temporary suspension based on flagrantly baseless allegations of noncompliance and fabricated misconduct complaints; (vi) **[*19]** refused to recuse themselves; and (vii) disregarded evidence that contradicted their preordained result." (Pl. Br. on Mot. for Prelim. Inj., Doc. No. 43 at 13). The allegations of bias are directed at the alleged financial incentive for the Board Members to remove Plaintiff as competition in the legal market, and the three-member panel that held a hearing on the petition to reinstate temporary suspension when two of the members of the panel are defendants in this case.

"While bias is an exception to *Younger* abstention, it is an extraordinary one, and the petitioner alleging such must offer 'actual evidence to overcome the presumption of honesty and integrity in those serving as adjudicators.'" *Danner, 277 F. App'x at 580*. *Younger* "requires more than mere allegation and more than a conclusory finding to bring a case within the harassment exception. It appears that such a finding must be supported by specific evidence from which it can be inferred that state officials have been enforcing the statute against the plaintiffs in bad faith for purposes of harassment." *Grandco Corp. v. Rochford, 536 F.2d 197, 203 (7th Cir. 1976))*. Exceptions to *Younger* abstention have been interpreted narrowly. *Zalman v. Armstrong, 802 F.2d 199, 205 (6th Cir. 1986)*.

Importantly, the body that effected the temporary suspension was not the BPR, but **[*20]** the Tennessee Supreme Court. The Rules provide that a petition for temporary suspension is made by Disciplinary Counsel to the Tennessee Supreme Court and that "the Court may issue an order ... temporarily suspending said attorney." Tenn. Sup. Ct. R. 9, § 12.3. As the temporary suspension was not ultimately carried out by the BPR, any alleged bias imputed to the BPR is irrelevant, or, at a minimum, would be cured when the Tennessee Supreme Court reviews the petition. Here, the Tennessee Supreme Court specifically found on more than one occasion that Plaintiff posed a threat of substantial harm to the public that justified the temporary suspension of his law license. There is no allegation that the Tennessee Supreme Court reached this conclusion because of its bias against Plaintiff.

The case cited by Plaintiff, *Gibson v. Berryhill, 411 U.S. 564, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973)*, involved a level of institutional bias not established by Plaintiff's conclusory allegations against individual BPR members. *Gibson* involved a state optometry board on which only independent optometrists were eligible to serve. Plaintiffs were licensed optometrists employed by corporations (i.e. not independent optometrists) who sought to enjoin license revocation hearings before the state optometry **[*21]** board on charges of unprofessional conduct. The alleged unprofessional conduct was employment by a corporation. At the time, almost half of the state's optometrists were employed by corporations. The Supreme Court noted that *Younger* "presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved" and that the state board was "incompetent by reason of bias to adjudicate the issues pending before it." *Id. at 577-78*. The board, which was composed entirely of independent optometrists, sought to revoke the licenses of "all optometrists in the State who were employed by business corporations ..., and that these optometrists accounted for nearly half of all the optometrists practicing in Alabama." *Id. at 578*. The Supreme Court affirmed that "the pecuniary interest of the members of the Board of Optometry had sufficient substance to disqualify them, given the context in which the case arose." *Id. at 579*.

The facts alleged here do not present such an extreme circumstance. First, unlike in the *Gibson* where the Board of Optometry had the authority to suspend licenses, the temporary suspensions at issue are made by the Tennessee Supreme Court in the first instance on petition **[*22]** by the Disciplinary Counsel and later on report and recommendation by a three-member panel. At no point in the proceedings to date did the BPR temporarily suspend Plaintiff's law license, nor could it. More importantly, however, the pecuniary interest of the board in *Gibson* is not present here. In *Gibson*, the board effectively sought to revoke licenses of half of the optometrists in the state when those to be excluded from practice were also categorically excluded from participation on the board.

The BPR does not have a pecuniary interest comparable to that of the board in *Gibson* that would disqualify them from hearing the disciplinary charges. The temporary suspension is directed at a single attorney, not an entire category of practitioners; nor is the Rule of Professional Conduct on which Plaintiff's suspension was based a rule that affects Plaintiff but not any of the members of the BPR. Nor is there any indication that the members of the BPR have a pecuniary interest in Plaintiff's suspension sufficient to render the BPR incompetent to adjudicate complaints against Plaintiff. There are over 18,000 licensed attorneys in Tennessee.[8] It strains credulity to conclude that the individual **[*23]** member of the BPR would benefit substantially from the removal of a single attorney, no matter how successful he is.

Moreover, it appears from the record in the disciplinary proceedings before the Tennessee Supreme Court, that Plaintiff is able to raise complaints of bias before the Tennessee Supreme Court. Indeed, in his objections to the report and recommendation of the panel recommending reimposition of the temporary suspension, Plaintiff objected to the alleged bias of members of the panel. The Tennessee Supreme Court considered and overruled the objection.

Finally, Plaintiff argues that *Younger* abstention does not apply to claims for prospective equitable relief. Plaintiff claims he "specifically seeks prospective relief unrelated to the proceedings that have already occurred." (Pl. Resp., Doc. No. 28 at 22). He requests: (1) that the Court "enjoin defendants from utilizing the 'good cause' standard of § 12.3 or otherwise placing the burden of proof on Mr. Manookian or others"; (2) "enjoin defendants from violating their own procedural rules"; and (3) "enjoin defendants from suspending Mr. Manookian's law license based upon any evidence that it not admissible under the rules of evidence." **[*24]** Although in some circumstances, *Younger* does not preclude prospective equitable relief, the injunctive relief sought here directly and unequivocally applies to the ongoing disciplinary proceedings and is precisely the sort of interference in ongoing state proceedings *Younger* seeks to avoid.

The case cited by Plaintiff, *Wooley v. Maynard, 430 U.S. 705, 710, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977)*, involved an entirely different procedural posture. In *Wooley*, the Plaintiff did not seek prospective relief regarding an ongoing case, but to enjoin future prosecution under a state statute he argued was unconstitutional. The *Wooley* plaintiff had been convicted of violating the state statute multiple times and served time in jail rather than pay a fine, but he did not seek to overturn his previous convictions or expunge his criminal record or any other action that would touch upon the concluded criminal proceedings. Instead, the plaintiff sought to enjoin the state from prosecuting him again. In contrast, the underlying proceeding Plaintiff seeks to affect is still ongoing. As Plaintiff stated, "[T]he Rule contemplates that further proceedings should be adjudicated ... the charges underlying the original suspension have not yet been decided." (Pl. Reply, Doc. No. 56 **[*25]** at 1).

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[8] *See* American Bar Association National Lawyer Population Survey (2019), available at https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2019.pdf

Based on the foregoing, the Court finds that abstention pursuant to *Younger v. Harris* is warranted.

IV. CONCLUSION

For the reasons stated, Defendants' Motion to Dismiss (Doc. No. 23) is **GRANTED, in part**. Plaintiff's antitrust claim in Court IV is subject to *Parker* immunity and is **DISMISSED WITH PREJUDICE**. The claims for damages against Defendants under *42 U.S.C. § 1983* in Counts I, II, and III are barred by quasi-judicial immunity and are **DISMISSED WITH PREJUDICE**. The remaining claims for injunctive and declaratory relief are **STAYED** pursuant to *Younger v. Harris. See Quackenbush, 517 U.S. at 721* (recognizing the court's power to stay cases based on abstention principles where the relief sought is equitable in nature). In light of the ruling on Defendants' Motion to Dismiss, Plaintiff's Motion for Preliminary Injunction (Doc. No. 44) is **MOOT**.

/s/ Illiam L. Campbell, Jr.

ILLIAM L. CAMPBELL, JR.

WILLIAM UNITED STATES DISTRICT JUDGE

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Staley v. Gilead Scis., Inc.

United States District Court for the Northern District of California

March 3, 2020, Decided; March 3, 2020, Filed

Case No. 19-cv-02573-EMC

Reporter

446 F. Supp. 3d 578 *; 2020 U.S. Dist. LEXIS 36747 **; 2020-1 Trade Cas. (CCH) P81,109; 2020 WL 1032320

STALEY, et al., Plaintiffs, v. GILEAD SCIENCES, INC., et al., Defendants.

Subsequent History: Dismissed by, in part, Motion denied by, in part *Staley v. Gilead Scis., Inc., 2020 U.S. Dist. LEXIS 167071, 2020 WL 5507555 (N.D. Cal., July 24, 2020)*

Later proceeding at *Staley v. Gilead Scis., Inc., 2020 U.S. Dist. LEXIS 156831 (N.D. Cal., Aug. 28, 2020)*

Costs and fees proceeding at, Motion denied by *Staley v. Gilead Scis., Inc., 2021 U.S. Dist. LEXIS 5047 (N.D. Cal., Jan. 11, 2021)*

Motion denied by, Dismissed by, in part, Motion denied by, in part *Staley v. Gilead Scis., 2021 U.S. Dist. LEXIS 222257 (N.D. Cal., Mar. 8, 2021)*

Motion granted by *Staley v. Gilead Scis., 2021 U.S. Dist. LEXIS 222229 (N.D. Cal., Mar. 12, 2021)*

Later proceeding at *Staley v. Gilead Scis., Inc., 2021 U.S. Dist. LEXIS 111315, 2021 WL 2416993 (N.D. Cal., June 14, 2021)*

Motion denied by *Staley v. Gilead Scis., Inc., 2021 U.S. Dist. LEXIS 114520 (N.D. Cal., June 18, 2021)*

Motion denied by *Staley v. Gilead Scis. Inc., 2021 U.S. Dist. LEXIS 132958, 2021 WL 4318403 (N.D. Cal., July 16, 2021)*

Motion granted by *Staley v. Gilead Scis., Inc., 2021 U.S. Dist. LEXIS 134232, 2021 WL 4318404 (N.D. Cal., July 19, 2021)*

Motion granted by *Staley v. Gilead Scis., Inc., 2021 U.S. Dist. LEXIS 239943, 2021 WL 5906049 (N.D. Cal., Dec. 14, 2021)*

Dismissed by, in part *Staley v. Gilead Scis., Inc., 2022 U.S. Dist. LEXIS 7124, 2022 WL 126116 (N.D. Cal., Jan. 13, 2022)*

Request denied by *Staley v. Gilead Scis., 2022 U.S. Dist. LEXIS 18495, 2022 WL 252681 (N.D. Cal., Jan. 27, 2022)*

Motion granted by, in part, Motion denied by, in part, Dismissed by, in part, Dismissed by, in part, Without prejudice *Staley v. Gilead Scis., Inc., 589 F. Supp. 3d 1132, 2022 U.S. Dist. LEXIS 40909, 2022 WL 684158 (N.D. Cal., Mar. 8, 2022)*

Motion denied by *Staley v. Gilead Scis., Inc., 2022 U.S. Dist. LEXIS 44935, 2022 WL 789123 (N.D. Cal., Mar. 14, 2022)*

Motion denied by, Motion granted by *Staley v. Gilead Scis., Inc., 2022 U.S. Dist. LEXIS 45194, 2022 WL 789125 (N.D. Cal., Mar. 14, 2022)*

Motion denied by *Staley v. Gilead Scis., Inc., 2022 U.S. Dist. LEXIS 57367, 2022 WL 913093 (N.D. Cal., Mar. 29, 2022)*

Motion granted by, Dismissed by, in part *Staley v. Gilead Scis., Inc., 2022 U.S. Dist. LEXIS 71853, 2022 WL 1158006 (N.D. Cal., Apr. 11, 2022)*

Later proceeding at *Staley v. Gilead Sciences, Inc., 2022 U.S. Dist. LEXIS 101111, 2022 WL 1836820 (N.D. Cal., June 3, 2022)*

Dismissed by *Staley v. Gilead Scis., Inc., 2022 U.S. Dist. LEXIS 226735 (N.D. Cal., Aug. 5, 2022)*

Request denied by *Staley v. Gilead Sciences, Inc., 2022 U.S. Dist. LEXIS 157722, 2022 WL 3974092 (N.D. Cal., Aug. 30, 2022)*

Core Terms

generic, patent, purchasers, antitrust, consumer, drugs, manufacturer, indirect, unfair, consumer protection, antitrust claim, anticompetitive, motion to dismiss, conspiracy, standalone, expire, joint venture, commerce, damages, deceptive act, anti trust law, deceptive, practices, ancillary, anticompetitive conduct, Defendants', license, brand, cART, rule of reason

LexisNexis® Headnotes

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

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

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

Fed. R. Civ. P. 8(a)(2) requires a complaint to include a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. A complaint that fails to meet this standard may be dismissed pursuant to *Fed. R. Civ. P. 12(b)(6)*. *Fed. R. Civ. P. 12(b)(6)*. To overcome a *Rule 12(b)(6)* motion to dismiss, a plaintiff's factual allegations in the complaint must suggest that the claim has at least a plausible chance of success. The court accepts factual allegations in the complaint as true and construes the pleadings in the light most favorable to the nonmoving party. But allegations in a complaint may not simply recite the elements of a cause of action and must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal

HN2[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

As a general matter, agreements between competitors — what are known as horizontal agreements — are suspect from an antitrust perspective. That being said, not all horizontal agreements are antitrust violations. Joint ventures or other business collaborations between competitors can actually be procompetitive — offering to the market a product that could not otherwise be offered in the absence of the joint undertaking.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN3[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The creation of a joint venture is not deemed invalid per se but rather is evaluated under the rule of reason. In contrast, where there is, in fact, a legitimate joint venture, and the only issue is whether specific conduct of the joint venture violates ***antitrust law***, then a court must decide what mode of analysis to apply: the rule of per se illegality or the rule of reason.

Antitrust & Trade Law > Sherman Act > Claims

HN4[] **Sherman Act, Claims**

Cases often address joint ventures in the context of § 1 of the Sherman Act since § 1 covers agreements to restrain trade. There is no reason not to apply a similar analysis to § 2 claims for conspiracy to monopolize as such claims require a showing of anticompetitive conduct.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN5[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In addressing whether restraints are valid or invalid under ***antitrust law***, a court is ordinarily confronted with the question of whether to apply the rule of per se illegality or instead the rule of reason. The decision of what mode of analysis to apply is entirely a question of law for the court, although that legal question might involve factual disputes.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

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

When restraints on competition are essential if the product is to be available at all, per se rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.

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

HN7[] Regulated Practices, Price Fixing & Restraints of Trade

Where a core restraint is at issue, the ancillary restraints doctrine is entirely inapplicable. The U.S. Court of Appeals for the Sixth Circuit has indicated that core restraints are those that are integral to the running of the joint venture whereas a restraint is ancillary if it bears a reasonable relationship to the joint venture's success.

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

HN8[] Regulated Practices, Price Fixing & Restraints of Trade

The ancillary restraints doctrine governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities — activities outside of the joint venture.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN9[] Price Fixing & Restraints of Trade, Horizontal Market Allocation

Agreements between competitors to allocate territories to minimize competition are illegal.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

HN10[] Ownership & Transfer of Rights, Licenses

What patent law permits (i.e., exclusive licenses) is not dispositive of legality for antitrust purposes. A patent license may be impermissibly anti-competitive.

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

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

HN11[] Regulated Practices, Price Fixing & Restraints of Trade

In the antitrust context, Twombly and Iqbal require specific allegations plausibly suggesting a conspiracy (or anti-competitive agreement). Without more, parallel conduct does not suggest conspiracy; at the pleading stage, there must be allegations plausibly suggesting (not merely consistent with) agreement.

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

HN12[] Private Actions, Remedies

Antitrust injury consists of four elements: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent.

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

Antitrust & Trade Law > Sherman Act > Claims

HN13[] **Actual Monopolization, Claims**

Sherman Act § 2 law does not condemn the success of a monopolist where it is based on invention and innovation. Thus, as a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design changes. But changes in product design are not immune from antitrust scrutiny and in certain cases may constitute an unlawful means of maintaining a monopoly under § 2.

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

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

HN14[] **Actual Monopolization, Claims**

Where a design change does improve a product by providing a new benefit to consumers, it does not violate Sherman Act § 2 absent some associated anticompetitive conduct.

Antitrust & Trade Law > Sherman Act > Claims

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

HN15[] **Sherman Act, Claims**

Antitrust claims (whether based on an unreasonable restraint of trade under Sherman Act § 1 or monopolization under § 2, and whether based on federal or state law) require the definition of a product market.

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

HN16[] **Relevant Market, Product Market Definition**

A product market encompasses the product at issue as well as all economic substitutes for the product. The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. Elasticity of demand is a concept used to signify the relationship between changes in price and responsive changes in demand.

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

HN17[] **Relevant Market, Product Market Definition**

What the appropriate product market is depends on what anticompetitive harm is being claimed. Defining a product market is simply a way to determine whether a defendant has market power. Market power, in turn, is simply a way to assess whether the defendant's conduct has anticompetitive effects.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Choice of Law

Civil Procedure > Special Proceedings > Class Actions

HN18[] **Federal & State Interrelationships, Choice of Law**

The law of any particular state may not be applied to a nationwide class unless (1) the chosen state's law does not conflict with the law of another jurisdiction that has an interest in the case, and (2) the chosen state has a significant contact or significant aggregation of contacts to claims asserted by each member of the plaintiff class such that the choice of that state's law is not arbitrary or unfair.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

HN19[] **Purchasers, Indirect Purchasers**

There is no dispute that, under federal ***antitrust law***, indirect purchasers are not entitled to damages.

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

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

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

HN20[] **Regulated Practices, Price Fixing & Restraints of Trade**

Anticompetitive conduct by a defendant within a state that is related to a plaintiff's alleged injuries and is not slight and casual establishes a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair. Specifically, California's Cartwright Act can be lawfully applied without violating a defendant's due process rights when more than a de minimis amount of that defendant's alleged conspiratorial activity leading to the sale of price-fixed goods to plaintiffs took place in California. Such a defendant cannot reasonably complain that the application of California law is arbitrary or unfair when its alleged conspiracy took place, at least in part, in California.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Governmental Interests

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process

HN21[] **Choice of Law, Governmental Interests**

The Due Process Clause does nothing but circumscribe the universe of state laws that can be constitutionally applied to a given case, and objections based on the interests of other states are more properly raised under a choice of law analysis.

Civil Procedure > ... > Class Actions > Class Members > Named Members

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN22[] **Class Members, Named Members**

Once a named plaintiff demonstrates individual standing for a claim, the standing inquiry is satisfied and any issue regarding the relationship between the named plaintiff and the members of the putative class is relevant only to class certification, not standing.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

HN23[] **Purchasers, Indirect Purchasers**

As reflected by the language of *740 ILCS 10/7*, an indirect purchaser may sue for damages for a violation of the Illinois Antitrust Act — thus making Illinois an Illinois Brick repealer state for purposes of state ***antitrust law*** — except that no person shall be authorized to maintain a class action in any court of the State for indirect purchasers asserting claims under the Act. *740 ILCS 10/7*.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Civil Procedure > Special Proceedings > Class Actions

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN24[] **Purchasers, Indirect Purchasers**

Because the indirect purchaser restrictions of the Illinois Antitrust Act are intertwined with the underlying substantive right, application of *Fed. R. Civ. P. 23* would abridge, enlarge or modify Illinois' substantive rights, and therefore Illinois' restrictions on indirect purchaser actions must be applied in federal court.

Civil Procedure > Special Proceedings > Class Actions

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN25[] **Special Proceedings, Class Actions**

There are some state procedural rules that federal courts must apply in diversity cases because they function as part of the state's definition of the substantive rights and remedies. *Fed. R. Civ. P. 23* will not govern here if the state statutes are procedural in the ordinary use of the term but are so intertwined with a state right or remedy that it functions to define the scope of the state-created right.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

HN26[] **Purchasers, Indirect Purchasers**

Puerto Rico ***antitrust law*** has been interpreted in accordance with federal ***antitrust law***, which does not allow claims from indirect purchasers following Illinois Brick.

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > Retrospective Operation

HN27[] **Effect & Operation, Prospective Operation**

Generally, it is presumed that statutes and their amendments are to operate prospectively unless it appears by clear, strong language or by necessary implication that the Legislature intended to give the statute retroactive effect. If a statute lacks clear direction or necessary implication concerning its retroactive application, the difference between a substantive statute and a remedial or procedural statute becomes relevant. Substantive statutes, which create, define, or regulate substantive legal rights, must be applied prospectively. In contrast, remedial and procedural statutes, which do not impair or increase substantive rights but rather prescribe methods for enforcing such rights, may be construed to operate retroactively.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Governments > Legislation > Effect & Operation > Retrospective Operation

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

HN28[] **Purchasers, Indirect Purchasers**

Because there is no clear and strong language directing that the Rhode Island repealer statute be given retroactive effort, there is no retroactive application for the Rhode Island Illinois Brick repealer statute.

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

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

HN29[] **Private Actions, State Regulation**

Massachusetts courts have indicated that the difference between *Mass. Gen. Laws ch. 93A, §§ 9* and *§ 11* is that *§ 9* makes consumer claims actionable while *§ 11* makes business claims actionable. Although the dividing line between a consumer claim and a business claim for purposes of *§§ 9* and *11* is not always clear, the choice appears to turn on whether a given party has undertaken the transaction in question for business reasons, or has engaged in it for purely personal reasons Any transaction in which the plaintiff is motivated by business considerations gives rise to claims under the statute's business section, and the fact that a transaction may be an isolated one not in the normal course of business does not insulate it from the reach of *§ 11*.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

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

HN30[] Purchasers, Indirect Purchasers

Under *Mass. Gen. Laws ch. 93A, § 11*, claims by indirect purchasers are not permissible — in contrast to *Mass. Gen. Laws ch. 93A, § 9* consumer claims which do allow for claims by indirect purchasers.

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

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

HN31[] Private Actions, State Regulation

There is case law indicating that a party's status as a non-profit influences the analysis as to whether it has a *Mass. Gen. Laws ch. 93A, §§ 9* or *11*; in most circumstances, a charitable institution will not be engaged in trade or commerce when it undertakes activities in furtherance of its core mission.

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

HN32[] Deceptive & Unfair Trade Practices, State Regulation

Although an insurer who purchases a pharmaceutical product does not make that purchase for its own use, its role is located on the retail side of the transaction given that it is essentially acting as a proxy for its insured. Absent legislative history indicating that "consumer" as used in consumer protection statutes means an individual or business purchasing for his, her, or its use only, the court does not limit application of the statutes in such way.

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

HN33[] Deceptive & Unfair Trade Practices, State Regulation

Unlike other consumer protection statutes, the Utah Consumer Sales Practices Act contemplates sales made both "to" and "apparently to" a person for personal, family, or household purposes.

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Judges: EDWARD M. CHEN, United States District Judge.

Opinion by: EDWARD M. CHEN

Opinion

[*584] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS

Docket Nos. 143, 149, 158, 159

Plaintiffs in this putative class action are:

(1) individuals who purchased and/or paid for some or all of the purchase price for certain HIV medications and

(2) health and welfare trust funds/plans that purchased or provided reimbursement for **[**8]** some or all of the purchase price for certain HIV medications.

Plaintiffs have filed suit against companies that are the new drug application holders[1] for, or otherwise manufacture, sell, and/or distribute, those HIV medications, namely:

(1) Gilead[2];
(2) Bristol-Myers Squibb ("BMS")[3];
(3) Japan Tobacco; and
(4) Janssen.[4]

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[1] Before a drug manufacturer can sell a drug on the market, it must get approval from the Food and Drug Administration ("FDA"). It does so by submitting a new drug application. *See* *FTC v. Actavis, Inc., 570 U.S. 136, 142, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*.

[2] Plaintiffs have formally sued multiple Gilead entities: Gilead Sciences, Inc.; Gilead Holdings, LLC; Gilead Sciences, LLC; and Gilead Sciences Ireland UC.

[3] Plaintiffs have formally sued multiple BMS entities: Bristol-Myers Squibb Company and E.R. Squibb & Sons, L.L.C.

[4] Plaintiffs have formally sued multiple Janssen entities: Johnson & Johnson and Janssen R&D Ireland.

The bulk of Plaintiffs' claims against Defendants are antitrust claims, both federal and state (Counts 1-6 and 8-13). Plaintiffs have also asserted a claim based on violation of state consumer protection laws (Count 7). Currently pending before the Court are four motions to dismiss, one filed by each defendant named above. Two amicus briefs have also been submitted: one from the Federal Trade Commission ("FTC") and one from a group of nonprofit organizations that do HIV-related work.

Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** in part and **DENIES** in part the motions to dismiss.

I. FACTUAL & PROCEDURAL BACKGROUND

The operative complaint is the corrected consolidated class action complaint ("CAC"). In that pleading, Plaintiffs allege as follows.

A. Regulatory Background

1. New Drugs and Generic **[**9]** Drugs

Drug manufacturers must obtain approval from the Food and Drug Administration ("FDA") before they can market and sell their drugs. If a drug manufacturer wants to sell a new drug, it must file a New Drug Application ("NDA") with the FDA. *See* CAC ¶ 68. Another process applies to generic drugs.

> [O]nce the FDA has approved a brand-name drug for marketing, a manufacturer of a generic drug can obtain similar marketing approval through use of abbreviated procedures. The *Hatch-Waxman Act* permits a generic manufacturer to file an Abbreviated New Drug Application ["ANDA"] specifying that the generic **[*585]** has the "same active ingredients as," and is "biologically equivalent" to the already-approved brand-name drug." In this way the generic manufacturer can obtain approval while avoiding the "costly and time-consuming studies" needed to obtain approval "for a pioneer drug." The Hatch-Waxman process, by allowing the generic to piggyback on the pioneer's approval efforts, "speed[s] the introduction of low-cost generic drugs to market."

FTC v. Actavis, Inc., 570 U.S. 136, 142, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013).

"The FDA assigns generic drugs that are pharmaceutical equivalents of branded drugs an 'AB' rating." CAC ¶ 71. State laws "either require or permit pharmacies to **[**10]** substitute AB-rated generic equivalents for branded prescriptions (unless the prescribing doctor has specifically ordered otherwise)." CAC ¶ 91.

2. Generic Manufacturers and Paragraph IV Certifications

New drugs, of course, are often protected by patents which, in theory, prevent the sale of generic versions of the new drugs — at least until the patents expire. Those patents, however, like any patents, may be challenged before their expiration dates.

A generic manufacturer may effectively raise a challenge to a patent by including in its ANDA what is known as a Paragraph IV certification — *i.e.*, a statement that the brand drug is covered by a patent but that the patent is invalid or will not be infringed by the generic drug. *See* CAC ¶ 75. A generic manufacturer has an incentive to include a Paragraph IV certification so that it can sell the generic drug before the patent on the brand drug expires on its own terms.

In addition, the *first* generic manufacturer to file an ANDA with a Paragraph IV certification gets an added benefit: it is "entitled to 180 days of ANDA Exclusivity," meaning that the FDA cannot approve any other generic version of the drug "until 180 days after the first-filer **[**11]** enters the market." CAC ¶ 77 (emphasis added). As the Supreme Court has noted, ANDA Exclusivity "can prove valuable, possibly worth several hundred million dollars. Indeed, the Generic Pharmaceutical Association said in 2006 that the vast majority of potential profits for a generic drug manufacturer materialize during the 180-day exclusivity period." *Actavis, 570 U.S. at 144*. (ANDA Exclusivity can be forfeited under certain circumstances.[5]) "The first-filing generic manufacturer is guaranteed [the] exclusivity period even if it settles litigation with a patent owner without resolving the invalidity or noninfringement issues." *AIDS Healthcare Foundation, Inc. v. Gilead Sciences, Inc., No. C 16-00443 WHA, 2016 U.S. Dist. LEXIS 87578, at *4-5 (N.D. Cal. July 6, 2016)*.

In turn, when a Paragraph IV certification is made, a brand manufacturer has an incentive to sue the generic manufacturer for patent infringement because, if it does so within 45 days of receiving the Paragraph IV certification, it may delay approval of the ANDA. More specifically, if the brand manufacturer files suit within 45 days, then the FDA is automatically barred from granting approval to the generic manufacturer's ANDA "until the earlier of (a) the passage of 30 months, or (b) the issuance of a decision by **[**12]** a court that the patent is invalid or not infringed." CAC ¶ 76.

[*586] Notably, even if a generic manufacturer wants to file an ANDA with a Paragraph IV certification as soon as possible (given the above), it cannot do so in all circumstances. In particular, "where the FDA has approved a new chemical entity ['NCE'] (a drug substance that the FDA has not previously approved), no other manufacturer may seek FDA approval for a product containing that drug substance until five years after the FDA first approved it." CAC ¶ 86. Thus, the FDA cannot accept an ANDA from a generic manufacturer if the generic drug contains a NCE until the five-year "NCE Exclusivity" period has expired. *See* CAC ¶ 87. NCE Exclusivity thus "operates independent of any patent protection." *AIDS Healthcare, 2016 U.S. Dist. LEXIS 87578, at *7*.

B. Science Background

1. cART Regimen

The modern HIV treatment regimen is known as cART, which stands for combination antiretroviral therapy. *See* CAC ¶ 1. A combination — or "cocktail" — is usually made up of:

(1) Two NRTIs (nucleotide/nucleoside analogue reverse transcriptase inhibitors); and
(2) A third agent (also known as a core agent).

See CAC ¶¶ 2, 56. A cocktail may also include a third class of drug — namely, a booster. Boosters not **[**13]** taken for any anti-HIV property in the drug but rather for their ability to inhibit the breakdown of some third agents. *See* CAC ¶¶ 64-65.

"The need to use multiple drugs in cART regimens can be a barrier to patient compliance." CAC ¶ 63. Thus, to reduce the burden on the patient, multiple drugs are often coformulated together into a single pill known as an FDC, which stands for fixed-dose combination. *See* CAC ¶ 63. An FDC can be made up of drugs made by one manufacturer or by more than one manufacturer, if the manufacturers can reach agreement.

2. Gilead's Drugs

Gilead makes various drugs that are used in cART regimens. The main ones at issue in the instant case are as follows:

• TDF and TAF (NRTIs). Tenofovir is one of the principal NRTIs used in cART regimens. It is one of the principal NRTIs because it has medical benefits over other NRTIs. *See* CAC ¶¶ 58, 382 (alleging that other NRTIs need to be triple phosphorylated for the drug to be activated, but Tenofovir only needs to be phosphorylated twice); CAC ¶¶ 383-90 (discussing additional problems with other NRTIs, *e.g.*, side effects). Because Tenofovir cannot be administered orally by itself, Gilead developed two different "prodrugs" **[**14]** of Tenofovir that allow it to be swallowed: TDF and TAF. *See* CAC ¶¶ 57, 59 (alleging that "[p]rodrugs are pharmacologically inactive compounds that can be more efficiently absorbed and then converted into the active form of the drug within the body"). TAF is essentially the successor drug to TDF and is superior to TDF (*e.g.*,

[5] For example, if the first filer does not get tentative approval of the generic drug within 30 months, the ANDA Exclusivity is forfeited. *See* CAC ¶ 78. The first filer also forfeits if "it fails to market its generic drug within 75 days after another manufacturer obtains a final decision that the brand manufacturer's patents are invalid or not infringed." CAC ¶ 78.

fewer side effects). A generic version of TDF became available in December 2017. *See* CAC ¶ 98. There is no generic TAF available yet. "Tenofovir is almost always used alongside another NRTI" because, when an HIV virus becomes resistant to the other NRTI, "the virus's susceptibility to Tenofovir increases." CAC ¶ 60 (emphasis omitted).

• FTC (an NRTI). FTC is one of the NRTIs commonly used with Tenofovir in cART regimens. *See* CAC ¶ 60. **[*587]** Generic FTC will become available in September 2020. *See* Opp'n at 9; CAC ¶ 357.

○ Even though there is no generic FTC available yet, there is another drug — 3TC — that Gilead does not manufacture and that may be used as a substitute for FTC. *See* CAC ¶ 61 (alleging that "[b]oth the United States Department of Health and Human Services . . . and the World Health Organization . . . guidelines stipulate that the drugs, when used for HIV **[**15]** treatment, can be used interchangeably"). Generic 3TC has been available since 2012. *See* CAC ¶¶ 62, 97-98.

• TDF/FTC (an FDC). Gilead makes an FDC made up of two of the above NRTIs — *i.e.*, TDF/FTC. It appears that generic TDF/FTC will become available in September 2020. *See* Opp'n at 9, 51; CAC ¶ 357.

• COBI (a booster). There is no generic COBI available yet. *See* CAC ¶¶ 64-65.

○ Even though there is no generic COBI available yet, there is another drug — RTV — that Gilead does not manufacture and that may be used as a substitute for COBI. Generic RTV has been available since March 2018. *See* CAC ¶¶ 65, 112.

C. Anticompetitive Conduct

The anticompetitive conduct identified in Plaintiffs' CAC falls into the following three categories:

(1) Agreements between Gilead and one of the other defendants that contain "No-Generics Restraints."

(2) Patent settlement agreements between Gilead and a generic manufacturer, Teva, under which Teva agreed to delay entry into the market in exchange for certain benefits.

(3) Gilead's commercialization of one of its drugs known as TAF.

1. Agreements with No-Generics Restraints

TDF, FTC, and TDF/FTC were critical drugs for Gilead's business because of the medical benefits **[**16]** of Tenofovir over other NRTIs. By their terms, the patents protecting TDF were not due to expire until January 2018. As for the patents protecting FTC and TDF/FTC, they were not due to expire until September 2021 and January 2024, respectively. *See* CAC ¶ 96. However, Gilead expected to face generic competition for TDF, FTC, and TDF/FTC far earlier — *i.e.*, in 2009, 2011, and 2011 — because the patents protecting the drugs were weak and thus generic manufacturers would challenge the patents. *See, e.g.*, CAC ¶ 96 (indicating, *e.g.*, that the NCE Exclusivity for TDF expired in October 2006, so if a generic manufacturer thereafter filed an ANDA with a Paragraph IV certification, then Gilead would bring a patent infringement suit which would delay the ANDA process for about 30 months — *i.e.*, until 2009).

To protect its vulnerable NRTIs, Gilead began — starting in December 2004 — to enter into agreements with other drug manufacturers, in particular, those who made third agents (instead of NRTIs).[6] **[*588]** Under a typical

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[6] The rough timeline is as follows:

• December 2004: Gilead entered into an agreement with BMS (the Atripla Agreement).

• March 2005: Gilead entered into an agreement with Japan Tobacco.

• July 2009: Gilead entered into an agreement with Janssen (the Complera Agreement).

• June 2011: Gilead entered into another agreement with Janssen (the Prezcobix Agreement). This agreement allegedly protected one of Janssen's vulnerable drugs, not Gilead's.

agreement, Gilead and the other drug manufacturer would agree to coformulate a FDC made up of (1) Gilead's vulnerable NRTIs and (2) the other drug manufacturer's third agent, which had **[**17]** a longer patent life (assuming that Gilead's NRTIs would face generic competition in 2009, 2011, and 2011, respectively). The agreement would also contain a provision that, even when generic versions of Gilead's NRTIs became available (*e.g.*, if the patents were successfully challenged), the other drug manufacturer would not, on its own, offer a competing FDC made of (1) generic versions of Gilead's NRTIs and (2) the other drug manufacturer's third agent. Plaintiffs call this provision a "No-Generics Restraint" and, for ease of reference, the Court shall do the same.

According to Plaintiffs, they are not claiming as anticompetitive conduct any agreement to coformulate a FDC. Indeed, they concede that the FDCs benefit people with HIV, making available to them products that would not otherwise exist.[7] What Plaintiffs do contest are the No-Generics Restraints in the agreements because, as alleged, the restraints effectively protect Gilead's NRTIs by precluding the other drug manufacturer from selling FDCs that incorporate generic versions of Gilead's NRTIs *even after the patents protecting the NRTIs expire*. (According to Plaintiffs, Gilead entered into "reciprocal" agreements with BMS and Janssen wherein Gilead and the other company agreed to pair in a FDC one of Gilead's drugs (the booster known as COBI) with one of the other company's vulnerable drugs.)

The agreements with the No-Generics Restraints — by themselves — only provided limited protection for Gilead's NRTIs. When generic versions of the NRTIs became available, individuals with HIV could, at least in theory, buy generic TDF, generic FTC, **[**19]** and/or generic TDF/FTC as "standalones" — *i.e.*, instead of as part of a FDC. But, as Plaintiffs allege, there are benefits to purchasing and using a FDC over purchasing and using standalone components to that FDC. *See* CAC ¶ 63 (alleging that "[t]he need to use multiple drugs in cART regimens can be a barrier to patient compliance"). Moreover, according to Plaintiffs, Gilead also took affirmative steps to move its customer base from standalone TDF, FTC, and/or TDF/FTC to the FDCs, as the FDCs would be protected by the No-Generics Restraints.[8] *See, e.g.*, CAC ¶ 4 (alleging that the No-Generics Restraints "gave Gilead an enormous financial incentive to move prescriptions from its standalone version of TDF to the FDCs, which would be insulated from generic competition even after the TDF[] patents expired"). According to Plaintiffs, once individuals with HIV have moved over to the FDCs, they are not likely to move back "to the original product or regimen, even if a generic version of the original product becomes available at a much **[*589]** lower price" for various reasons — *e.g.*, "[d]octors who have switched patients from one HIV product or HIV drug regimen to another are very reluctant to switch **[**20]** patients back." CAC ¶ 181. Also, "[s]witching costs (e.g., the need for another visit to the doctor for a new prescription) impair a move back," and "pharmaceuticals are 'experience' goods that consumers and physicians are hesitant to change if they are working."[9] CAC ¶ 181.

Plaintiffs further note that, once a person is prescribed an FDC, it is not possible for the pharmacist to fill the prescription with standalone components for the FDC (*i.e.*, standalone generic TDF, FTC, and/or TDF/FTC along with standalone of the other company's drug). This is because standalone components of an FDC are not AB-rated to the FDC. *See* CAC ¶ 183 (alleging that "[g]eneric versions of TDF and/or FTC are not AB-rated to, and therefore not automatically substitutable for, the TDF-based FDCs"); *see also* Opp'n at 3(asserting that, "[u]nder state drug-

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- October 2011: Gilead entered into a second agreement with BMS (the Evotaz Agreement). This agreement allegedly protected one of BMS's vulnerable drugs, not Gilead's.

- December 2014: Gilead entered into more agreements with **[**18]** Janssen (the Odefsey Agreement and the Symtuza Agreements). The Symtuza Agreement allegedly protected one of Janssen's vulnerable drug, not Gilead's.

[7] And Defendants point out that the federal government has applauded some of the business collaborations. *See* Gilead Mot. at 9 (citing to comments made by the Secretary of Health & Human Services with respect to business collaboration between Gilead and BMS on a FDC commercially known as Atripla).

[8] Plaintiffs suggest that Gilead was able to do this through use of "large sales forces that visit doctors' offices and persuade them to prescribe" certain products. *See* CAC ¶ 368.

[9] Plaintiffs also allege that "doctors typically are not aware of the relative costs of brand pharmaceuticals and, even when they are aware of costs, are largely insensitive to price differences because they do not pay for the products." CAC ¶ 368.

substitution laws, pharmacists receiving a prescription for the FDC cannot dispense generic versions of the standalone components").

According to Plaintiffs, one effect of the No-Generics Restraints was that Gilead decided to shelve further development of TAF (the superior successor drug to TDF) — *i.e.*, Gilead no longer had to roll out TAF in order to be competitive **[**21]** in the market but rather could "make more profits by defeating generic competition to TDF and then rolling out TAF much later as part of a line extension." CAC ¶ 214; *see also* CAC ¶ 202 *et seq.* (explaining that TAF is a superior product compared to TDF because the former has significantly less risk of side effects).

Plaintiffs add that, although Gilead has now rolled out TAF, it has done so in an anticompetitive way, including, *e.g.*, by making agreements with the other defendants to protect TAF, *even after the patents on that drug expire*, through No-Generics Restraints. *See* CAC ¶ 192 (alleging that "Defendants are *repeating this anticompetitive cycle again* with respect to the TAF-based FDCs") (emphasis added); CAC ¶ 428 (alleging that, "[u]nless enjoined by this Court, Defendants' unlawful conduct will have additional and intensified anticompetitive effects once generic versions of [*inter alia*] TAF . . . become available").

2. Patent Settlement Agreements with Teva

The prospect of generic competition for Gilead's vulnerable NRTIs (*i.e.*, TDF, FTC, and/or TDF/FTC) became a concrete reality by 2008 when Teva began to challenge the patents protecting the drugs through Paragraph IV certifications. **[**22]** Other generic manufacturers followed suit. *See* CAC ¶ 313. According to Plaintiffs, these challenges to TDF, FTC, and/or TDF/FTC prompted Gilead to get moving with TAF — in particular, moving its customer base over from TDF-based FDCs to TAF-based FDCs, which would also be protected by No-Generics Restraints. *See* CAC ¶ 314.

Gilead was able to settle its patent infringement lawsuits with Teva and get Teva to agree to delay entry into the market for the above drugs (a benefit for Gilead); in exchange, Gilead gave Teva Most-Favored Entry ("MFE") and Most-Favored Entry Plus ("MFEP") clauses in the settlement agreements, a benefit over **[*590]** *other* generic manufacturers. As described in the complaint:

> An agreement with an MFE clause arises when the brand manufacturer and the "first-filer" — the generic manufacturer that filed the first ANDA with a Paragraph IV certification — settle the patent litigation, with the generic manufacturer agreeing to delay entering the market until a specified date. The MFE clause provides that if any other generic manufacturer (a "second-filer") succeeds in entering the market before that date, the first-filer may enter at the same time.

CAC ¶ 317. According to Plaintiffs, **[**23]** a MFE is anticompetitive in nature not only because it delays the first filer's entry into the market but also because it "delay[s] generic entry by reducing a second-filer's incentive to try to enter the market before the first-filer." CAC ¶ 317; *see also* CAC ¶ 319 (alleging that a MFE eliminates the possibility that a second filer could enter the market before the first filer).

As for a MFEP clause, it

> provides that the brand manufacturer will not grant a license to any second-filer to enter the market until a defined period of time after the first-filer enters. The clause might provide, for example, that the brand manufacturer will not grant a license to any second-filer to enter the market until 180 days after the first-filer enters.

CAC ¶ 320 (emphasis in original). It thus affirmatively favors the first filer with whom the manufacturer has negotiated. According to Plaintiffs, a MFEP delays generic entry both by delaying the entry of the first filer and "dramatically reduc[ing] a second-filer's incentive to try to enter the market before the first-filer." CAC ¶ 320.

Gilead ultimately entered into two different settlement agreements with Teva.

- The first agreement (dated April 2013) **[**24]** applied to TDF. *See* CAC ¶ 340. Gilead's patents protecting TDF were to expire, by their own terms, in January 2018. *See* CAC ¶ 96. "Under the agreement, Teva agreed to delay marketing its generic [TDF] and any TDF-containing product until December 15, 2017" — *i.e.*, just a few weeks before the TDF patents were due to expire. CAC ¶ 342. Teva was willing to put off its entry date until such a late date because it received, in exchange, the MFE and MFEP clauses in the settlement agreement. The MFEP clause "provided that Gilead would not grant any other manufacturer a license to enter the market with generic [TDF] until at least *six weeks* after Teva's agreed entry date." CAC ¶ 343 (emphasis added).

• The second agreement (dated February 2014) applied to TDF/FTC and a drug that Gilead coformulated with BMS that contains TDF/FTC. (The commercial name for that drug is Atripla.) The agreement was reached after the parties had tried the patent infringement case and were awaiting certain decisions from the trial court. *See* CAC ¶ 354. Under the agreement, Teva agreed not to launch generics for TDF/FTC and the other drug until September 2020 — "just one year before the end of the patent term" for **[**25]** FTC. CAC ¶ 357. In exchange, Teva was given MFE and MFEP clauses in the settlement agreement. "The MFEP provided that Gilead would not grant a license to any other manufacturer to enter the market . . . until at least *six months* after Teva's agreed entry date." CAC ¶ 357 (emphasis in original).

[*591] 3. Commercialization of TAF

As noted above, Plaintiffs maintain that one effect of the No-Generics Restraints was that Gilead could shelve TAF (the successor drug to TDF) — *i.e.*, Gilead no longer had to roll out TAF in order to be competitive in the market but rather could "make more profits by defeating generic competition to TDF and then rolling out TAF much later as part of a line extension." CAC ¶ 214; *see also* CAC ¶ 202 *et seq.* (explaining that TAF is a superior product compared to TDF because the former has significantly less risk of side effects). Plaintiffs also maintain that, although Gilead has now rolled out TAF, it has done so in an anticompetitive way — for instance, by making agreements with the other defendants to protect TAF, even after the patents on the drug expire, through No-Generics Restraints.

According to Plaintiffs, however, this was not the only way that Gilead commercialized **[**26]** TAF in an anticompetitive way. Plaintiffs assert that Gilead had the goal of moving over prescriptions from TDF-based FDCs to TAF-based FDCs precisely because the FDCs (unlike any standalone drugs) would be protected by the No-Generics Restraints. To move over to TAF-based FDCs, Gilead took steps to: (1) make the TDF-based FDCs less desirable, and (2) ensure that TAF standalone could or would not be used in conjunction with other standalone drugs in place of a TAF-based FDC. For example:

• Gilead intentionally degraded the safety of one of its TDF-based FDCs, commercially known as Stribild (*i.e.*, by keeping the strength of TDF at a certain level when a lower level would produce fewer side effects), and further artificially raised the price of the drug. *See generally* CAC ¶ 242 *et seq.*

• When Gilead released TAF standalone (after withholding it from the market from about 2015-2016), Gilead labeled the drug as a treatment for chronic Hepatitis B only (and not HIV as well)[10] and further intentionally degraded the drug (*i.e.*, by selling it at a strength that produced more side effects instead of a lower strength). *See generally* CAC ¶ 250 *et seq.*

II. PLAINTIFFS' CAUSES OF ACTION

Based on, **[**27]** *inter alia*, the above allegations, Plaintiffs have asserted the following causes of action:

(1) Conspiracy to monopolize in violation of *§§ 1* and *2 of the Sherman Act* (against all Defendants and implicating all three categories of anticompetitive conduct). *See* *15 U.S.C. §§ 1-2*.

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[10] According to Plaintiffs, theoretically, doctors could prescribe TAF for an off-label use — *i.e.*, to treat HIV. "But, in fact, substantial numbers of doctors will not do so. And federal law (*21 C.F.R. § 202.1*) makes it unlawful for a pharmaceutical manufacturer to actively encourage doctors to prescribe the product for off-label use." CAC ¶ 307.

(2) Conspiracy to monopolize in violation of state antitrust laws (against all Defendants and implicating all three categories of anticompetitive conduct).

(3) Monopolization in violation of *§ 2 of the Sherman Act* (against Gilead only and implicating all three categories of anticompetitive conduct). *See id. § 2*.
(4) Monopolization in violation of state antitrust laws (against Gilead only and implicating all three categories of anticompetitive conduct).

(5) Attempted monopolization in violation of *§ 2 of the Sherman Act* **[*592]** (against Gilead only and implicating all three categories of anticompetitive conduct). *See id.*
(6) Attempted monopolization in violation of state antitrust laws (against Gilead only and implicating all three categories of anticompetitive conduct).
(7) Violation of state consumer protection laws (against all Defendants and implicating all three categories of anticompetitive conduct).

(8) Conspiracy in violation of *§ 1 of the Sherman Act* **[**28]** (against Gilead and Janssen only and implicating the No-Generics Restraints only). *See id. § 1*.
(9) Conspiracy in violation of state antitrust laws (against Gilead and Janssen only and implicating the No-Generics Restraints only).

(10) Conspiracy in violation of *§ 1 of the Sherman Act* (against Gilead and Japan Tobacco only and implicating the No-Generics Restraints only). *See id.*
(11) Conspiracy in violation of state antitrust laws (against Gilead and Japan Tobacco only and implicating the No-Generics Restraints only).

(12) Conspiracy in violation of *§ 1 of the Sherman Act* (against Gilead and BMS only and implicating the No-Generics Restraints only).
(13) Conspiracy in violation of state antitrust laws (against Gilead and BMS only and implicating the No-Generics Restraints only).

II. LEGAL STANDARD

HN1[] *Federal Rule of Civil Procedure 8(a)(2)* requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. A complaint that fails to meet this standard may be dismissed pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. *See Fed. R. Civ. P. 12(b)(6)*. To overcome a *Rule 12(b)(6)* motion to dismiss after the Supreme Court's decisions in *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, and *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, a plaintiff's "factual allegations [in the complaint] 'must . . . suggest that the claim has at least a plausible chance **[**29]** of success.'" *Levitt v. Yelp! Inc., 765 F.3d 1123, 1135 (9th Cir. 2014)*. The court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*. But "allegations in a complaint . . . may not simply recite the elements of a cause of action [and] must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Levitt, 765 F.3d at 1135* (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*. "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted).

III. ANTITRUST CLAIMS BASED ON OVERARCHING CONSPIRACY — COUNTS ONE AND TWO

In Counts One and Two of the CAC, Plaintiffs allege an overarching conspiracy involving all Defendants and implicating all three categories of anticompetitive conduct. Defendants move to dismiss the causes of action on the basis that Plaintiffs have failed to adequately allege all Defendants **[*593]** were **[**30]** involved in one overarching conspiracy. Defendants underscore that nowhere in the CAC do Plaintiffs suggest that there was any collective agreement among BMS, Japan Tobacco, and Janssen to assist Gilead. *See, e.g.*, BMS Mot. at 12-13 (asserting that "[n]ot a single factual allegation supports the theory that all defendants knowingly and willfully joined together" to assist Gilead in protecting its drugs from competition; adding that "Plaintiffs here allege only that Gilead over the course of a decade, entered into separate, bilateral agreements with BMS, Janssen, and Japan Tobacco").

In response, Plaintiffs admit that BMS, Japan Tobacco, and Janssen were each acting separately, and not acting collectively, with Gilead. *See, e.g.*, Opp'n at 44 (asserting that "[e]ach of BMS, Janssen, and Japan Tobacco separately, not acting collectively, conspired with Gilead"). And consistent with this admission, Plaintiffs do not make any claim that, *e.g.*, BMS or Japan Tobacco could be held liable for the alleged conspiracy between Janssen and Gilead to restrain trade in or monopolize the market for the Janssen/Gilead coformulated FDCs and their generic equivalents.

Plaintiffs, however, do argue that **[**31]** there is a viable overarching conspiracy claim based on a broader product market — *i.e.*, the market for cART drugs. *See* Opp'n at 42 (arguing that each non-Gilead defendant conspired with Gilead to maintain its cART monopoly); *see also* CAC ¶¶ 442, 451 (for Counts One and Two, referring to "monopoly power in the cART Market"). That is, Plaintiffs contend that there was a conspiracy to restrain trade in or monopolize the market for cART drugs; that each non-Gilead defendant knew of and contributed to that conspiracy by separately conspiring with Gilead; and that each non-Gilead defendant is therefore liable for the conspiracy "even if the defendant did not know all the conspirators [*i.e.*, the other non-Gilead defendants], did not participate in the conspiracy from its beginning or participate in all its enterprises, or otherwise know all its details." *United States v. Grasso, 724 F.3d 1077, 1086 (9th Cir. 2013)* (addressing criminal case involving conspiracy to defraud); *cf. United States v. Friedman, 593 F.2d 109, 117 (9th Cir. 1979)* (in criminal case involving drug conspiracy, stating that "[t]he standard for determining the existence of a single conspiracy is whether there was a single overall agreement among the co-conspirators to perform various functions to carry out the objectives of the conspiracy"; **[**32]** "the performance by a conspirator of separate and independent acts in furtherance of the conspiracy is not inconsistent with the existence of a single overall agreement").

The Court dismisses Plaintiffs' overarching conspiracy claim because, as discussed below, Plaintiffs have not adequately alleged a cART product market. *See* Part VIII, *infra*. In addition, Plaintiffs have failed to adequately allege that each non-Gilead defendant knew of its connection to a conspiracy to restrain trade in or monopolize that broader product market (as opposed to the narrower product markets consisting of each FDC coformulated by a non-Gilead defendant and Gilead, and its generic equivalent).[11] *Cf. Grasso, 724 F.3d at 1086 (9th Cir. 2013)* (stating that, "[w]here the defendant has a connection (even if slight) to the conspiracy, the government must also show that the defendant's connection to the conspiracy is knowledgeable; 'that is, the government **[*594]** must prove beyond a reasonable doubt that the defendant knew of his connection to the charged conspiracy'" — *i.e.*, that "the defendant was aware of 'the unlawful object toward which the agreement [was] directed'"). Plaintiffs have leave to amend.

IV. ANTITRUST CLAIMS BASED ON NO-GENERICS RESTRAINTS [**33] — COUNTS THREE THROUGH SIX AND COUNTS EIGHT THROUGH THIRTEEN

In the remaining antitrust claims — Counts Three through Six and Counts Eight through Thirteen — Plaintiffs claim anticompetitive conduct based on one or more of the three categories identified above. Here, the Court addresses the first category of anticompetitive conduct, *i.e.*, the No-Generics Restraints contained in the agreements that Gilead entered into with the other defendants. As noted above, Plaintiffs maintain that they are not challenging

[11] Notably, Plaintiffs do not allege that a non-Gilead defendant got any benefit out of the agreements that Gilead had with the other non-Gilead defendants. It is not obvious why knowledge of a conspiracy should be inferred under these circumstances absent specific supporting facts.

Defendants' agreements to create FDCs (which are beneficial to individuals with HIV). Rather, Plaintiffs contest only the No-Generics Restraints in the agreements.

A. Ancillary Restraints Doctrine

According to Defendants, even if the agreements did contain No-Generics Restraints (as discussed below, not all defendants agree that there are, in fact, such restraints in the contracts at issue), the No-Generics Restraints are, effectively, per se valid under the ancillary restraints doctrine. The gist of Defendants' ancillary restraints argument is that, where competitors enter into a joint venture (or other business collaboration), it is reasonable to have a provision barring members **[**34]** of the joint venture from competing with the joint venture — or else there would be no incentive to enter into the joint venture in the first place. In other words, here, where Gilead and another defendant entered into agreement to create an FDC made up of Gilead's drugs and the other defendant's drug, it was reasonable to include a provision that would keep the contracting parties from creating a competing FDC using generic versions of those drugs. Defendants underscore that this prevented competition only with respect to the *specific* FDC at issue; it would not bar the contracting parties from using their drugs in other ways, including as standalones or in combination with different drugs to create different FDCs.

HN2[] In evaluating this argument, the Court begins with the principle that, as a general matter, agreements between competitors — what are known as "horizontal agreements" — are suspect from an antitrust perspective. *See* Betkerur v. Aultman Hosp. Ass'n, 78 F.3d 1079, 1092 (6th Cir. 1996) (stating that "'horizontal' restraints — that is, agreements among competitors at the same level of the market structure — are particularly suspect because they typically serve no purpose other than to stifle competition"); *cf.* Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717, 737 (7th Cir. 2004) (noting that "horizontal agreements **[**35]** are generally more suspect than vertical agreements"). That being said, not all horizontal agreements are antitrust violations. Joint ventures or other business collaborations between competitors can actually be procompetitive — offering to the market a product that could not otherwise be offered in the absence of the joint undertaking.[12] *Cf.* **[*595]** NCAA v. Board of Regents, 468 U.S. 85, 102, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) (noting that "the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable[;] [i]n performing this role, its actions widen consumer choice — not only the choices available to sports fans but also those available to athletes — and hence can be viewed as procompetitive"); Addamax Corp. v. Open Software Found, Inc., 152 F.3d 48, 52 (1st Cir. 1998) (noting that "[j]oint venture enterprises . . . , unless they amount to complete shams, are rarely susceptible to per se treatment"; in fact, "[w]here the venture is producing a new product . . . there is patently a potential for a productive contribution to the economy").

HN3[] Consistent with the above, the Supreme Court has held that the creation of a joint venture is not deemed invalid per se but rather is evaluated under the rule of reason.[13] *See* Texaco Inc. v. Dagher, 547 U.S. 1, 6 n.1, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006) (indicating that the **[**36]** creation of a joint venture can be anticompetitive; whether it is anticompetitive must be assessed "under the rule of reason"); *see also* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 885-86, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007) (stating that, under the rule of reason, "'the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition'"; in contrast, where the per se illegality rule applies, there is no "need to study the reasonableness of an individual restraint in light of the real market forces at

[12] Although the Court shall hereinafter refer to "joint ventures" only, it notes that it is not limiting its discussion to joint ventures alone — *i.e.*, the ancillary restraints doctrine also has application to other business forms or structures such as business collaborations. *See* Texaco Inc. v. Dagher, 547 U.S. 1, 7, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006) (noting that the ancillary restraints doctrine "governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities").

[13] **HN4**[] Cases often address joint ventures in the context of § 1 of the Sherman Act since § 1 covers agreements to restrain trade. There is no reason not to apply a similar analysis to § 2 claims for conspiracy to monopolize as such claims require a showing of anticompetitive conduct. Furthermore, the parties have not made any argument that the § 1 and § 2 conspiracy claims should be treated differently in this regard.

work"). In contrast, where there is, in fact, a legitimate joint venture, and the only issue is whether specific conduct of the joint venture violates ***antitrust law***, then a court must decide what mode of analysis to apply: the rule of per se illegality or the rule of reason. *See* *In re ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003, 1012 (N.D. Cal. 2008)*.

In their opposition, Plaintiffs contend that they are challenging to whether joint ventures were, in fact, created. That is, Plaintiffs assert that, as a factual matter, not all of the agreements at issue actually create joint ventures, and, at the very least, it is a factual question whether the joint ventures are legitimate — both of which thereby make dismissal at the 12(b)(6) phase of proceedings **[**37]** improper. For purposes of this order, the Court assumes the agreements constituted joint ventures and that the only issue for the Court to resolve is whether the specific conduct of the joint ventures — *i.e.*, the No-Generics Restraints — plausibly constitutes anticompetitive conduct.

Here, there is no dispute that Plaintiffs have adequately alleged that the No-Generics Restraints are *some* kind of restraint on trade. Plaintiffs have alleged that the non-Gilead defendants are not able to offer certain FDCs that compete with the joint venture FDCs — *i.e.*, the same FDCs except using generic versions of Gilead's drugs after the patents on Gilead's drugs expire. The only question is, as noted above, whether the restraints are valid or invalid under ***antitrust law***.

[*596] ***HN5***[] In addressing this specific issue, the Court would ordinarily be confronted with the question of whether to apply the rule of per se illegality or instead the rule of reason. *See* *ATM Fee, 554 F. Supp. 2d at 1010* (noting that "the decision of what mode of analysis to apply . . . is entirely a question of law for the Court," although that legal question "might involve factual disputes"); *accord* *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 61 (1st Cir. 2004)*. Defendants argue, however, that the Court need not apply even the rule **[**38]** of reason because the No-Generics Restraints may, in effect, be deemed per se *valid* under the ancillary restraints doctrine. According to Defendants, under this doctrine, so long as a restraint supports or benefits the (legitimate) joint venture,[14] then it is deemed per se valid under the Supreme Court's decision in *Dagher*; the restraint is not even subject to a rule-of-reason analysis. Defendants rely on the following language from *Dagher*: "Under the [ancillary restraints] doctrine, courts must determine whether the nonventure restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid." *Dagher, 547 U.S. at 7*.

The Court rejects Defendants' argument. The above language, taken in isolation, might suggest that once a restriction supports or benefits the joint venture, it is deemed per se valid. However, as Plaintiffs point out, the context of *Dagher* must be taken into account. In *Dagher*, the plaintiffs simply claimed that a pricing policy of a joint

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[14] Lower courts have varied somewhat as to how they define "ancillary restraint." *See, e.g.,* *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 345-46 (3d Cir. 2010)* ("Ancillary restraints are 'those that are part of a larger endeavor whose success they promote.'"); *Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1072 (11th Cir. 2005)* ("Ancillary restraints are generally permitted if they are 'reasonably necessary' toward the contract's objective of utility and efficiency."); *Sullivan v. NFL, 34 F.3d 1091, 1102 (1st Cir. 1994)* ("[A] 'restraint' that is ancillary to the functioning of . . . a joint activity [is] one that is required to make the joint activity more efficient . . . ."); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224, 253 U.S. App. D.C. 142 (D.C. Cir. 1986)* ("To be ancillary, . . . an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose."); *Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 188-89 (7th Cir. 1985)* ("'[A]ncillary restraints . . . are part of a larger endeavor whose success they promote.'"); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1395 (9th Cir. 1984)* ("[T]he ancillary restraints doctrine teaches that some agreements which restrain competition may be valid if they are 'subordinate and collateral to another legitimate transaction and necessary to make that transaction effective.'"); *see also* *Major League Baseball Props., Inc. v. Salvino, 542 F.3d 290, 339 (2d Cir. 2008)* (Sotomayor, J., concurring) ("The [ancillary restraints] doctrine recognizes that a restraint that is unnecessary to achieve a joint venture's efficiency-enhancing benefits may not be justified based on those benefits. Accordingly, a challenged restraint must have a reasonable procompetitive justification, related to the efficiency-enhancing purposes of the joint venture, before that restraint will be analyzed as part of the venture.").

The Supreme Court has noted that "[t]he classic 'ancillary' restraint is an agreement by the seller of a business not to compete within the market." *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 729 n.3, 08 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*.

venture was per se illegal; they did *not* "put forth a rule of reason claim." *Id. at 7 n.2*. Because they did not assert a rule-of-reason claim, **[**39]** a conclusion that the pricing policy was not per se illegal meant, by default, that it was valid. *See also* *id. at 7* ("If [the joint venture's] price **[*597]** unification policy is anticompetitive, then respondents should have challenged it pursuant to the rule of reason. But it would be inconsistent with this Court's antitrust precedents to condemn the internal pricing decisions of a legitimate joint venture as *per se* unlawful.").

Moreover, the Court does not view *Dagher* as some kind of sea change that displaced the prior law — as articulated by both the Supreme Court and the lower courts — that the rule of reason applies to ancillary restraints. *See, e.g., Nat'l Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 689, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)* (stating that the rule of reason "has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business"); *Addamax, 152 F.3d at 52* (in a pre-*Dagher* case, stating that "conduct that is strictly ancillary to [the joint venture's] productive effort . . . is evaluated under the rule of reason"); *Polk Bros., 776 F.2d at 188-89* (in a pre-*Dagher* case, stating that "[a] court must distinguish between 'naked' restraints, those in which the restriction on competition is **[**40]** unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote"; ancillary restraints are evaluated under the rule of reason); *L.A. Mem'l, 726 F.2d at 1395* (in a pre-*Dagher* case, stating that "[t]he ancillary restraint must . . . be tested under the rule of reason, the relevance of ancillarity being it 'increases the probability that the restraint will be found reasonable'"); *Aydin Corp. v. Loral Corp., 718 F.2d 897, 901 (9th Cir. 1983)* (in a pre-*Dagher* case, stating that "[t]he proper function of ancillarity in antitrust analysis 'is to remove [in some instances] the per se label from restraints otherwise falling within the category'[;] [w]hether a restraint that does not fall within a per se category is ancillary to a valid agreement is relevant only in the sense that ancillarity increases the probability that the restraint will be found reasonable"). If the Supreme Court had intended to overturn both its and the lower courts' approach to the ancillary restraints doctrine, *i.e.*, replacing the rule of reason with a per se valid rule, it would have made that ruling more clearly. ***HN6***[] Furthermore, post-*Dagher*, the Supreme Court has indicated that the rule of reason continues to apply to ancillary restraints. **[**41]** *See* *Am. Needle v. NFL, 560 U.S. 183, 203, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* (stating that, "[w]hen 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason"); Areeda & Hovenkamp, ***Antitrust Law*** ¶ 1906 (noting that, in *American Needle, Inc.*, the Supreme Court applied the rule of reason in assessing a restraint in a license agreement that restricted NFL team members' ability to license their own individually owned intellectual property separately). Similarly, lower courts have continued to apply the rule of reason to such restraints. This includes the Federal Circuit as reflected in its decision *Princo Corp. v. ITC, 616 F.3d 1318 (Fed. Cir. 2010)*, a case on which Defendants heavily rely. *See* *id. at 1336* (stating that "[t]he 'ancillary restraints' that are often important to collaborative ventures, such as agreements between the collaborators not to compete against their joint venture, are also assessed under the rule of reason). *See also* *Major League Baseball, 542 F.3d at 339 n.7* (Sotomayor, J., concurring) (stating that "an ancillary restraint is not necessarily lawful[;] [i]ts competitive benefits and harms must still be weighed, as part of the joint venture, under a rule-of-reason analysis").

[*598] Ultimately, **[**42]** the Court understands *Dagher* as the Sixth Circuit has — *i.e.*, with pre-*Dagher* law distinguishing between "naked" and "ancillary" restraints, and with *Dagher* adding a third category of restraint to the mix, namely, "restraints that are *core* to the joint venture's efficiency enhancing purpose." *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys., 922 F.3d 713, 724-25 (6th Cir. 2019)* (emphasis added). ***HN7***[] Per *Dagher*, where a core restraint is at issue, the ancillary restraints doctrine is entirely inapplicable. *See* *Dagher, 547 U.S. at 7-8* ("agree[ing] . . . that the ancillary restraints doctrine *has no application here*, where the business practice being challenged involves the core activity of the joint venture itself — namely, the pricing of the very goods produced and sold by [the joint venture]") (emphasis added). The Sixth Circuit has indicated that core restraints are those that are "'integral to the running of the joint venture'" whereas "[a] restraint is ancillary if it bears a reasonable relationship to the joint venture's success." *Med. Ctr., 922 F.3d at 725*. Defendants do not, in their papers, claim that the No-Generics Restraints are core restraints that fall outside the application of the ancillary restraints doctrine. Furthermore, even if they had, the Court concludes that that position lacks merit.

In *Dagher*, the **[**43]** challenged pricing policy was a core restraint because it was required "in order to make the venture work" and the restraint "did not impose any limitations on nonventure activities" — *i.e.*, "setting a common price for commonly produced gasoline placed no limits on the *separate* activities of the joint venturers." ***HN8***[] Areeda & Hovenkamp, ***Antitrust Law*** ¶ 1906 (emphasis added); *see also* *Dagher, 547 U.S. at 7 (2006)* (noting that the ancillary restraints doctrine "governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, *on nonventure activities*" — activities outside of the joint venture) (emphasis added).

The situation in the instant case is different. Plaintiffs have put at issue a restraint on nonventure activities of the non-Gilead defendants — activities outside the joint production of their FDCs. Furthermore, it is far from clear that the No-Generics Restraints were required to make the joint ventures between Gilead and the non-Gilead defendants work. Whereas the pricing policy in *Dagher* "was very likely unavoidable" because "once the [joint venture] was found to be lawful, common pricing of a commonly produced product followed as a matter **[**44]** of course," Areeda & Hovenkamp, ***Antitrust Law*** ¶ 1906, the same cannot be said for the No-Generics Restraints because they prevented the non-Gilead defendants from using generic versions of Gilead's drugs *even after the patents protecting those drugs expired*.

Accordingly, the Court denies Defendants' motions to dismiss the antitrust claims based on the ancillary restraints doctrine. The No-Generics Restraints are not *per se* legal. They are subject to review under, at the very least, the rule of reason.

Because the Court rejects Defendants' ancillary restraints *per se* argument, it now turns to the specific agreements that Gilead entered into with BMS, Japan Tobacco, and Janssen.

B. Agreements with BMS

The Court first addresses the agreements between Gilead and BMS.

There are two agreements between Gilead and BMS:

> (1) The Atripla Agreement (December 2004). Atripla is the commercial name for the FDC that Gilead and BMS coformulated. Atripla is made **[*599]** of (1) TDF/FTC (Gilead's drugs) and (2) EFV (BMS's drug).
>
> (2) The Evotaz Agreement (October 2011). Evotaz is the commercial name for another FDC that Gilead and BMS coformulated. Evotaz is made up of (1) COBI (Gilead's drug) and (2) ATV (BMS's drug). **[**45]**

1. Atripla Agreement

The Atripla Agreement was purportedly for the benefit of Gilead — *i.e.*, to protect its vulnerable NRTIs. Gilead and BMS make several arguments as to why the Atripla Agreement cannot plausibly be seen as anticompetitive.

First, Gilead and BMS assert that it makes no sense that they entered into the agreement to protect Gilead's drugs (TDF, FTC, and TDF/FTC), because Gilead's drugs actually had longer patent lives compared to BMS's drug (EFV). *See* BMS Reply at 1 (noting that "[t]he patents covering the BMS components for Atripla expired before Gilead's, not after") (emphasis omitted); *see also* CAC ¶ 127 (alleging that "[t]he principal patents that protected BMS's EFV . . . were not scheduled to expire until 2018"); CAC ¶ 96 (alleging that the patents for TDF would expire "by their own terms" in January 2018; the patents for FTC in January 2021; and the patents for the combination drug TDF/FTC in January 2024). Although this is technically true (at least for FTC and TDF/FTC), Plaintiffs have alleged that Gilead expected to encounter generic competition to TDF, FTC, and TDF/FTC "as early as 2009, 2011, and 2011, respectively, if generic manufacturers successfully challenged **[**46]** the patents." CAC ¶ 96.

Second, Gilead and BMS seem to argue that the Atripla Agreement does not actually contain a No-Generics Restraint. But Plaintiffs have pointed to a provision in the agreement that is plausibly a No-Generics Restraint. That provision is § 2.9(a) of the Atripla Agreement. It provides in relevant part as follows:

> For the avoidance of doubt, nothing in this Agreement . . . shall be deemed to restrict or prohibit either Member Party or any of its Affiliates from . . . developing, manufacturing and commercializing combination products (**other than the Combination Product**) for the treatment of HIV infection or otherwise, including, without limitation, any product containing such Party's Single Agent Product(s) and/or Double Agent Product.

Ostrander Decl., Ex. A (Atripla Agreement § 2.9(a)) (emphasis added). In other words, under § 2.9(a), both Gilead and BMS were free to make FDCs "other than the Combination Product," and, according to Plaintiffs, "[t]he 'Combination Product' that the conspirators are prohibited from making outside their collaboration is a product comprising the pharmaceutical ingredients (brand *or generic*) TDF/FTC/EFV." Opp'n at 30 (emphasis in original). "Combination Product" **[**47]** is not clearly defined in the agreement as brand or generic TDF/FTC/EFV. *See* Ostrander Decl., Ex. A (Atripla Agreement § 1.50) (emphasis added) (defining "Combination Product" as "the fixed-dose co-formulated product developed pursuant to this Agreement containing, as its only active pharmaceutical ingredients per single daily dose, 300 mg TDF, 200 mg FTC and 600 mg EFV"). However, to the extent "Combination Product" has any ambiguity, that ambiguity cannot be resolved at the 12(b)(6) phase of proceedings.

Third, Gilead and BMS argue that, even if § 2.9(a) is considered some kind of No-Generics Restraint, there are additional provisions in the Atripla Agreement that effectively temper the restraint and render it valid from an antitrust perspective. *See* **[*600]** BMS Reply at 2. In particular, Gilead and BMS point out:

> • That the Atripla Agreement expressly contemplates that generic versions of the parties' drugs will become available and that either party is allowed to terminate because of the availability of a generic version of the other party's drug(s). *See, e.g.*, Ostrander Decl., Ex. A (Atripla Agreement § 14.5) (providing that "[e]ither Member Party (the 'Continuing Member Party') may terminate this Agreement **[**48]** by notice to the other member Party (the 'Terminated Member Party') in the event that there is the Launch in the Territory of at least one (1) Generic Version of all of the Single Agent Products (or the Double Agent Product[15]) of the Terminated Member Party (a 'Generic Version Launch') and the Continuing Member Party delivers notice of termination within thirty (30) days after the Generic Version Launch").
>
> • That, even if the No-Generics Restraint does not allow a party to create a competing FDC using generic versions of the other party's drugs, a party is still allowed to create a competing FDC that is *comparable* in nature. *See* CAC ¶ 140 (alleging that the Atripla Agreement "prohibited BMS from making a *generic* version of Atripla when generic TDF and generic FTC became available, but did *not* prohibit BMS from making a *comparable* version comprising generic TDF, 3TC (instead of Gilead's FTC), and EFV") (emphasis in original).

While Gilead and BMS's first point above is fair, the Court finds that there is nevertheless a factual question as to whether the specific No-Generics Restraint is anticompetitive under, at the very least, the rule of reason. As Plaintiffs point out, even though the **[**49]** Atripla Agreement has a termination provision, arguably, there was an incentive *not* to terminate because the terminating party would have to pay the terminated party royalty payments for three years. *See* CAC ¶ 124 (alleging that, "if BMS elected to terminate Gilead's interest [because generic versions of both TDF and FTC were available], BMS would be required to pay a substantial penalty to Gilead, comprising three years of additional royalty payments, at declining percentages over the three years[;] [t]he purpose and effect of the penalty provision was to dissuade BMS from terminating Gilead's participation in the joint venture even after its patents on TDF and/or FTC expired"); *see also* Ostrander Decl., Ex. A (Atripla Agreement § 14.6(b)(i)-(ii)) (providing, *inter alia*, that "[t]he Continuing Member Party shall pay or cause the JV to pay to the Terminated Party" royalty payments).

Gilead and BMS question how much of an incentive there actually was because the termination provision in the Atripla Agreement was actually invoked — and by Gilead, not BMS (even though the agreement was supposedly to protect Gilead's vulnerable drugs). *See* CAC ¶ 141 (alleging that "Gilead recently terminated BMS's participation **[**50]** in the Atripla joint venture, triggering Gilead's obligation to make the penalty payments

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[15] "'Single Agent Product' shall mean each of Viread [TDF], Emtriva [FTC], and Sustiva [EFV]." Ostrander Decl., Ex. A (Atripla Agreement § 1.196). "'Double Agent Product' shall mean Truvada, the co-formulated product developed by Gilead containing, as its only active pharmaceutical ingredients, TDF and FTC." Ostrander Decl., Ex. A (Atripla Agreement § 1.77).

described above"). Although this is a fair point, the Court still cannot say, at this early juncture in proceedings, **[*601]** that the No-Generics Restraint, as tempered by the termination provision, is valid as a matter of law. As alleged by Plaintiffs, the point of the Atripla Agreement was to protect Gilead's drugs; thus, even if Gilead ultimately decided to terminate because of a turn of events (*i.e.*, the TDF patents having longer lives than anticipated such that the EFV patents would expire first), that does not mean that there was not a substantial incentive on the part of BMS not to terminate.

As for the second point made by Gilead and BMS, here, it is a closer call. Plausibly, the No-Generics Restraint in the Atripla Agreement provided that the parties could not offer any FDC made up of brand or generic TDF, FTC, and EFV specifically. But the restraint did not prevent the parties from offering a *comparable* FDC. Accordingly, once the TDF patents were to expire (whether by their own terms or based on a successful challenge to them), BMS could sell an FDC made up of generic TDF, 3TC (a comparable to **[**51]** FTC), and EFV. And that is what seems to have happened. As Plaintiffs allege in the CAC, when generic TDF became available (in December 2017), BMS licensed Mylan Pharmaceuticals to produce a comparable FDC that competed with Atripla — formulated with generic TDF, 3TC, and EFV. *See* CAC ¶ 140. Thus, the No-Generics Restraint did not restrict all competition after the patents on TDF expired. Nonetheless, it still is a factual question as to whether the restriction on generics alone (as opposed to comparables) had enough anticompetitive effects to be deemed an antitrust violation.

2. <u>Evotaz Agreement</u>

Gilead and BMS entered into the Evotaz Agreement some seven years after the Atripla Agreement. Plaintiffs maintain that, while the Atripla Agreement was designed to protect Gilead's vulnerable drugs (TDF, FTC, and TDF/FTC), the Evotaz Agreement was designed to protect BMS's vulnerable drug (ATV).[16] Plaintiffs cite to the following provision as the No-Generics Restraint: "During the Term, without the prior written consent of BMS, (i) Gilead shall not . . . make, use, sell, [etc.] . . . in the Field in the Territory, the Combination Product (including any Generic Combination Product)."[17] Ostrander **[**52]** Decl., Ex. C (Evotaz Agreement § 14.2(a)).[18]

Unlike the Atripla Agreement, which the parties expressly labeled a "Collaboration Agreement," the Evotaz Agreement was expressly characterized as a "License Agreement." According to Gilead and BMS, the Evotaz Agreement is, as a matter of law, a lawful agreement because (1) **[*602]** a patent is a lawful monopoly and (2) the Evotaz Agreement simply reflects Gilead's right to grant to BMS an exclusive license to use the COBI patents in certain ways. *See* Ostrander Decl., Ex. C (Evotaz Agreement § 8.1(a)) (providing that "Gilead hereby grants to BMS an exclusive (even as to Gilead and its Affiliates and except as provided in Section 8.4), royalty-bearing license . . . under the Gilead Technology" to develop and commercialize the Licensed Combination Product (*i.e.*, COBI + ATV) and "not to Exploit the COBI API individually or in combination with any other API other than in the Licensed Combination Product"). The defendants cite to *Rail-Trailer Co. v. ACF Industries, Inc., 358 F.2d 15, 16-17 (7th Cir. 1966)*, where the court stated:

> [A] patentee may . . . grant an exclusive license for the manufacture of the patented device, which license serves to exclude the patentee himself from engaging in the manufacture of the device, and which action,

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[16] As alleged by Plaintiffs, BMS expected generic competition for ATV as early as 2012, if generic manufacturers were successful in challenging the patents protecting the drug. *See* CAC ¶ 132. This date was earlier than the date that Gilead's patents protecting COBI would expire (*i.e.*, 2029). *See* CAC ¶ 133.

[17] "'Combination Product' shall mean a fixed-dose co-formulated product in oral dosage form containing, as its only APIs, [ATV] and COBI . . . ." Ex. C (Evotaz Agreement § 1.48). "'Generic Combination Product' shall mean a generic version of the Combination Product that is approved for marketing in the Field under an [ANDA] . . . ." Ex. C (Evotaz Agreement § 1.90).

[18] The Evotaz Agreement also contains a similar No-Generics Restraint that restricts BMS: "During the Term, without the prior written consent of Gilead (i) BMS shall not . . . make, use, sell, [etc.] . . . in the Field in the Territory, the Combination Product (including any Generic Combination Product)." Ostrander Decl., Ex. C (Evotaz Agreement § 14.3(a)). However, for purposes of the instant case, the relevant No-Generics Restraint is § 14.2(a) given Plaintiffs' theory that the Evotaz Agreement was designed to protect BMS's vulnerable drug.

> *without* ***[**53]*** *more*, does not constitute an illegal restraint of trade or violation of the anti-trust laws. This is so because the restraint arises from the patent grant and a lawful transfer of a part of the rights to which that grant attached.

Id. at 16-17 (emphasis added).

Plaintiffs argue that the "without more" language is significant and that "exclusive licenses cannot avoid antitrust scrutiny where they are used in anticompetitive ways." *King Drug Co. of Florence, Inc. v. SmithKline Beecham Corp., 791 F.3d 388, 393, 407 (3d Cir. 2015)*; *cf.* *35 U.S.C. § 209(a)(4)* (providing that "[a] Federal agency may grant an exclusive or partially exclusive license on a federally owned invention . . . only if . . . granting the license will not tend to substantially lessen competition or create or maintain a violation of the Federal antitrust laws").

For example, in *Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)*, two companies that offered bar review courses were in competition with each other in Georgia.

> In early 1980, they entered into an agreement that gave [the Georgia company] an exclusive license to market [the Delaware company's] material in Georgia and to use its trade name . . . . The parties agreed that [the Delaware company] would not compete with [the Georgia company] in Georgia and that [the Georgia company] would not compete with [the Delaware company] outside of Georgia. **[**54]**

Id. at 47. ***HN9***[] The Supreme Court held that "agreements between competitors to allocate territories to minimize competition are illegal." *Id. at 49* (further stating that agreements "not to compete in the other's territories . . . are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other").

According to Plaintiffs, here, the exclusive license in the Evotaz Agreement has been also been used in an anticompetitive way — *i.e.*, through the No-Generics Restraint that is contained in the agreement. As noted above, the relevant No-Generics Restraint in the Evotaz Agreement prohibited Gilead from making, using or selling the "Combination Product (including any Generic Combination Product)." Ostrander Decl., Ex. C (Evotaz Agreement § 14.2(a)). In effect, Gilead promised not to sell a competing FDC using generics even after the vulnerable ATV patents expired. This would give BMS's ATV extended protection even after the patents on the drug would have expired.

Gilead and BMS suggest that this is necessarily a consequence of an exclusive **[*603]** license — *i.e.*, with an *exclusive* license, the patent holder is not just giving **[**55]** someone else the right to use the patent but also giving up the patent holder's own right to use the patent (in effect, not to "compete"). *Cf.* *35 U.S.C. § 271(d)(4)* (providing that a patent owner is not guilty of patent misuse because it has, *e.g.*, "refused to . . . use any rights to the patent"). ***HN10***[] But what patent law permits (*i.e.*, exclusive licenses) is not dispositive of legality for antitrust purposes.[19] A patent license may be impermissibly anti-competitive.

For example, in *Actavis, 570 U.S. at 136*, the Supreme Court was asked to consider a settlement in a patent infringement case where the patentee paid the alleged infringer instead of the other way around — what is known as a reverse payment settlement agreement. More specifically, the Supreme Court had to determine whether a reverse payment settlement agreement "can sometimes unreasonably diminish competition in violation of antitrust laws." *Id. at 141*. During proceedings below, the Eleventh Circuit had held that

> a reverse payment settlement agreement generally is "immune from antitrust attack so long as its anticompetitive effects fall *within the scope* of the exclusionary potential of the patent." And since the alleged infringer's promise not to enter the patentee's market expired **[**56]** before the patent's term ended, the Circuit found the agreement legal and dismissed the FTC complaint.

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[19] Indeed, as noted above, Defendants have taken the position that what constitutes patent misuse under patent law does not establish what is per se illegal under ***antitrust law***.

Id. The Supreme Court rejected the proposition that, so long as the anticompetitive effects were within the scope of the exclusionary potential of the patent, there could be no antitrust violation. *See* id. at 147 (stating that, just because anticompetitive effects fall within the scope of the exclusionary potential of the patent, that does not "immunize the agreement from antitrust attack"); *see also* King Drug, 791 F.3d at 399 (noting that, "in *Actavis*, the Supreme Court rejected the 'scope of the patent' test, a categorical rule that reverse payment patent settlements in the Hatch-Waxman context were immune from antitrust scrutiny so long as the asserted anticompetitive effects fell within the scope of the patent"). "[T]his Court has indicated that patent and antitrust policies are *both* relevant in determining the 'scope of the patent monopoly' — and consequently antitrust immunity — that is conferred by a patent." Actavis, 570 U.S. at 147 (emphasis added); *see also* id. at 151 (discussing precedent and holding that these cases "seek to accommodate patent and antitrust policies, finding challenged terms and conditions unlawful unless patent law policy **[**57]** offsets the ***antitrust law*** policy strongly favoring competition").

The Third Circuit's decision in *King Drug* also illustrates that an exclusive license permissible under patent law is not necessarily immune from scrutiny under ***antitrust law***. In *King Drug*, defendants were (1) GSK, the manufacturer of a brand drug (Lamictal), and (2) Teva, the manufacturer of a generic version of that drug.

> In earlier litigation, Teva had challenged the validity and enforceability of GSK's patents on lamotrigine, Lamictal's active ingredient. Teva was also the first to file an application with the FDA alleging patent invalidity or nonenforceability and seeking approval to produce generic lamotrigine tablets and chewable tablets for markets alleged to be annually worth $2 billion and $50 million, respectively. If the patent suit resulted in a judicial determination of invalidity or nonenforceability — or **[*604]** a settlement incorporating such terms — Teva would be statutorily entitled to a valuable 180-day period of market exclusivity, during which time only it and GSK could produce generic lamotrigine tablets. (The relevant statute permits the brand to produce an "authorized generic" during the exclusivity period.) **[**58]**
> After the judge presiding over the patent litigation ruled the patent's main claim invalid, GSK and Teva settled. They agreed Teva would end its challenge to GSK's patent in exchange for early entry into the $50 million annual lamotrigine chewables market and GSK's commitment not to produce its own, "authorized generic" version of Lamictal tablets for the market alleged to be worth $2 billion annually.

King Drug, 791 F.3d at 393-94.[20] The plaintiffs in *King Drug* filed suit against both GSK and Teva, asserting that the no authorized generics agreement ("no-AG agreement") violated ***antitrust law***.

In response, GSK and Teva argued, *inter alia*, that the no-AG agreements "are in essence 'exclusive licenses' and patent law expressly contemplates exclusive licenses." Id. at 406. The Third Circuit rejected the companies' position, stating as follows:

> [T]he "right" defendants seek is not in fact a patentee's right to grant licenses, exclusive or otherwise. Instead, it is a right to use valuable licensing in such a way as to induce a patent challenger's delay. . . . [In *Actavis*, where the Supreme Court held that reverse-payment settlements can sometimes violate ***antitrust law***], the patentee gave the challenger a license to enter **[**59]** 65 months before patent expiration, *plus* a reverse payment of "millions of dollars." This reverse payment was not immunized, of course, simply because of that early-entry "license." Similarly, the fact that a patent holder may generally have the right to grant licenses, exclusive or not, does not mean it also has the right to give a challenger a license along with a promise not to produce an authorized generic — i.e., a promise not to compete — *in order to induce the challenger "to respect its patent and quit [the competitor's] patent invalidity or noninfringement claim without any antitrust scrutiny*." In the *Actavis* Court's review, the question is not one of patent law, but of ***antitrust law***, the latter of which invalidates "the improper use of [a patent] monopoly." And as we read the Court's opinion, even exclusive license cannot avoid antitrust scrutiny where they are used in anticompetitive ways.

King Drug, 791 F.3d at 406-07 (emphasis in original and added).

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[20] *See also* In re Actos End Payor Antitrust Litig., No. 13-CV-9244 (RA), 2015 U.S. Dist. LEXIS 127748, at *15 (S.D.N.Y. Sept. 22, 2015) (noting that an authorized generic is one sold by the brand or through a licensed third-party generic manufacturer).

To be sure, *Actavis* and *King Drug* are not on all fours with the instant case. For example, in both *Actavis* and *King Drug*, the patent holder gave a license (on certain terms) to protect its own patents; here, Gilead (the patent holder) allegedly gave BMS **[**60]** a license to protect BMS (not Gilead itself) after the patent protections for the BMS drug expired. But there is no material distinction. In both situations, a patent right (*i.e.*, to give an exclusive license) has been used to restrain competition in an allegedly anticompetitive way. That is, Gilead agreed not to sell a competing FDC *even after the patents on BMS's drugs expired*. The alleged restraint on trade is not Gilead's giving BMS an exclusive license to make and use COBI + ATV; **[*605]** it is that Gilead is giving up the right to make COBI + ATV generic *even after the patents on ATV expire*. Such a restraint is not *per se* immune from review under rule of reason analysis simply because it is framed as an exclusive license.[21]

3. Summary

For the foregoing reasons, the Court denies Gilead and BMS's motions to dismiss the antitrust claims based on the Atripla and Evotaz Agreements.

C. Agreement with Japan Tobacco

Gilead and Japan Tobacco entered into one agreement only. That agreement, dated March 2015, is titled a "License Agreement" and concerns one of Japan Tobacco's drugs, EVG (also referred to as JTK-303 in the agreement). Gilead and Japan Tobacco entered into the agreement because "JT **[**61]** [had] developed a proprietary anti-viral compound designated as JTK-303 [*i.e.*, EVG], to be used in a product or products for the treatment of HIV" and "Gilead desire[d] to obtain the exclusive right to develop and commercialize, for itself and its Affiliates such formulations and dosages of [EVG] outside of Japan, and JT desire[d] to grant Gilead such rights." Ostrander Decl., Ex. D (EVG Agreement, Recitals). Gilead eventually developed and commercialized two drugs containing EVG: (1) Stribild (combining EVG with Gilead's drugs TDF, FTC, and COBI) and (2) Genvoya (combining EVG with Gilead's drugs TAF, FTC, and COBI). As noted above, Gilead expected to face generic competition for TDF, FTC, and TDF/FTC in 2009, 2011, and 2011, respectively. The main patents protecting Japan Tobacco's drug EVG are not scheduled to expire until 2026.[22] *See* CAC ¶ 108.

Similar to above, Gilead and Japan Tobacco argue that the antitrust claims predicated on this agreement should be dismissed because the agreement simply conveys an exclusive license, which is permissible under patent law. Gilead and Japan Tobacco add that Plaintiffs have not even been able to point to any actual provision in the **[**62]** license agreement that is a No-Generics Restraint.[23]

As discussed above, an exclusive license without more is not an antitrust violation, but an exclusive license may be used in anticompetitive ways. Here, the problem for Plaintiffs is that there is no indication that Gilead and Japan Tobacco agreed that the exclusive license would be used in an anticompetitive way. As Gilead and Japan Tobacco point out, the agreement between the companies did not contain an express provision containing a No-Generics Restraint. Plaintiffs contend that there is no dispute that the agreement implicitly barred Japan Tobacco from selling competing FDCs using generics. ***HN11***[] But **[*606]** *Twombly* and *Iqbal* require specific allegations plausibly suggesting a conspiracy (or anti-competitive agreement). *See* Twombly, 550 U.S. at 556-57 (stating that, "[w]ithout

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[21] This is not to say that every exclusive license may be subject to antitrust scrutiny. In many cases, such as where a manufacturer grants an exclusive license to one distributor, the licensor does not ordinarily compete with the licensee. The license in that context facilitates competition. In contrast, here, the licensor would ordinarily compete in the same market as the licensee but agrees as part of the license to withdraw from competition; thus, arguably there is at least an cognizable restraint of trade. Such a restraint may nonetheless be lawful under, *e.g.*, rule of reason, but it is not automatically immune from scrutiny.

[22] Although Gilead's COBI patents have a longer maximum patent life — until 2029 — Plaintiffs indicate that the inclusion of COBI in Stribild and Genvoya was not that significant because Japan Tobacco could have used an available substitute for COBI (*i.e.*, RTV or generic RTV) in a competing FDC. *See, e.g.*, CAC ¶ 112 (noting that generic RTV became available in March 2018).

[23] Gilead and Japan Tobacco raise additional arguments in their papers but, for the reasons discussed below, it is not necessary to address them.

more, parallel conduct does not suggest conspiracy"; at the pleading stage, there must be "allegations plausibly suggesting (not merely consistent with) agreement"); *Iqbal, 556 U.S. at 678* (stating that, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief"'"). Plaintiffs have failed to do **[**63]** so here.

Accordingly, the Court grants Gilead and Japan Tobacco's motions to dismiss the antitrust claims based on the agreement between the two companies. The dismissal is with prejudice because Plaintiffs have not suggested that they could amend to cure this deficiency.

D. Agreements with Janssen

There are four agreements between Gilead and Janssen:

(1) The Complera Agreement (July 2009). Complera is the commercial name for the FDC that Gilead and Janssen coformulated. Complera is made of (1) TDF/FTC (Gilead's drugs) and (2) RPV (Janssen's drug).

(2) The Odefsey Agreement (December 2014). Odefsey is the commercial name for another FDC that Gilead and Janssen coformulated — essentially the successor FDC to Complera. Odefsey is made up of (1) *TAF* and FTC (Gilead's drugs) and (2) RPV (Janssen's drug).

(3) The Prezcobix Agreement (June 2011). Prezcobix is the commercial name for an FDC that Gilead and Janssen coformulated. Prezcobix is made up of: (1) COBI (Gilead's drug) and (2) DRV (Janssen's drug).

(4) The Symtuza Agreement (December 2014). Symtuza is the commercial name for another FDC that Gilead and Janssen coformulated — essentially the successor FDC to Prezcobix. Symtuza is made up **[**64]** of (1) *TAF*, FTC, and COBI (Gilead's drugs) and (2) DRV (Janssen's drug).

The No-Generics Restraints for the above agreements are found at: § 17.2 in the Complera Agreement and § 17.2.1 in the Odefsey Agreement, and § 14.2(a) in the Prezcobix Agreement and § 14.3.2 in the Symtuza Agreement. At least some of the No-Generics Restraints seem to bar not only competing FDCs using generics but also comparable FDCs.[24]

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• Ostrander Decl., Ex. E (Complera Agreement § 17.2(a)) ("During the term of this Agreement, without the prior written consent of Gilead (i) [Janssen] will not import, sell or offer to sell . . . (A) the Combination Product other than pursuant to this Agreement, or (B) any other combination product that is a Derivative Combination Product . . . .").

• Ostrander Decl., Ex. G (Odefsey Agreement § 17.2.1) ("Without the prior written consent of Gilead: (i) Janssen shall not . . . make, have made, use, sell, have sold, offer for sale, or import . . . (A) a Combination Product other than pursuant to this Agreement or (B) any Other Combination Product . . . ."); Ostrander Decl., Ex. G (Odefsey Agreement § 1.265) ("'Other Combination Product' shall mean any fixed-dose, co-formulated combination product (other than a Combination Product) in oral **[**65]** dosage form that contains, as its sole APIs, all three (3) of (a) TAF or TDF, (b) FTC or 3TC, and (c) RPV.").

• Ostrander Decl., Ex. F (Prezcobix Agreement § 14.2(a)) ("During the term of this Agreement, without the prior written consent of [Janssen]: (i) Gilead shall not . . . make, use, sell, have sold, offer for sale, or import . . . (A) the Combination Product, or (B) any Other Combination Product . . . .").

• Ostrander Decl., Ex. H (Symtuza Agreement § 14.3.2) ("Without the prior written consent of Janssen, . . . Gilead shall not . . . make, have made, use, sell, have sold, offer for sale, or import . . . (A) the STR other than pursuant to this Agreement, (B) any Other STR, or (C) any Other Restricted Product . . . ."); Ostrander Decl., Ex. H (Symtuza Agreement § 1.299) ("'Other STR' shall mean any fixed-dose, co-formulated combination product in oral dosage form (other than the STR) that contains, as its only four (4) APIs, (a) COBI or RTV, (b) TAF or TDF, (c) FTC or 3TC and (d) DRV or a version of ATV sold by a Person other than BMS or any of its Affiliates or third party distributors."); Ostrander Decl., Ex. H (Symutza Agreement § 1.298) ("'Other Restricted Product' shall mean any fixed-dose, co-formulated **[**66]** combination product in oral dosage form that contains, as its only three (3) APIs, (a) DRV or a generic version of ATV and (b) any two of the following: (i) COBI or RTV and (b) any two of the following: (i) COBI or RTV, (ii) TAF or TDF or (iii) FTC or 3TC.").

[*607] Plaintiffs have characterized the Complera and Odefsey Agreements as agreements intended to protect Gilead's vulnerable drugs (TDF and FTC), *see* CAC ¶¶ 96, 150 (alleging that Janssen's RPV patents are not scheduled to expire until 2019 to 2025 whereas the Gilead expected to face generic competition for TDF and FTC in 2009 and 2011 if generic manufacturers successfully challenged the patents protecting the drugs), whereas the Prezcobix and Symtuza Agreements were agreements intended to protect Janssen's vulnerable drug (DRV). *See* CAC ¶¶ 133, 163 (alleging that Janssen expected generic competition for DRV as early as 2013, if generic manufacturers were successful in challenging the patents protecting the drug; in contrast, Gilead's patents protecting COBI would not expire until 2029).

With respect to the above agreements, Gilead and Janssen have essentially made only the ancillary restraints argument discussed above. Janssen also **[**67]** makes one additional argument — namely, that Plaintiffs have improperly named as a defendant one of the Janssen entities, Johnson & Johnson ("J&J"). According to Janssen, Plaintiffs have not adequately alleged that J&J was involved in any conspiracy — indeed, J&J was not a party to any of the collaboration agreements identified above. Although J&J is Janssen's corporate parent, Janssen maintains that "a corporate parent cannot be held liable merely because a *Sherman Act* claim has been asserted against its subsidiary." Janssen Mot. at 13.

In response, Plaintiffs argue that Janssen has glossed over the fact that Plaintiff has used the term "Janssen" in the CAC to refer to both the parent and the subsidiary — thus, "both defendants [parent J&J included] negotiated and abided by the No-Generics Restraints; both defendants encouraged doctors to switch prescriptions to the FDCs insulated form generic competition; and both defendants shared in the monopoly profits that the unlawful agreements generated." Opp'n at 35. Plaintiffs add that they have a factual basis for asserting that J&J was involved in the conspiracy:

> [First,] the Complera/Odefsey Agreement indicates that a Johnson & Johnson **[**68]** "Executive" has a significant management and oversight role with respect to Janssen and Gilead's collaboration, including patent matters and the development of marketing materials [citing, *inter alia*, the Odefsey Agreement §§ 1.103 and 6.7.1.2]. [Second,] [t]he agreement also requires the parties to send copies of all collaboration-related reports and communications to Johnson & Johnson's General Counsel [citing the Odefsey Agreement § 20.2]. Finally, in a **[*608]** press release attached to the agreement, Johnson & Johnson's Worldwide Chairman for Pharmaceuticals extols the company's agreement with Gilead.

Opp'n at 36.

The Court agrees that Plaintiffs have a factual basis for alleging that J&J was involved. In particular, § 6.7.1.2 of the Odefsey Agreement addresses marketing materials that Gilead shall develop and propose to Janssen (the subsidiary). If the parties are unable to reach agreement, they "may refer any disputed issues to the Executives for resolution pursuant to Section 20.6. If the Executives are unable to reach agreement with respect thereto within the Executives Review Period, Gilead shall have final decision-making authority with respect to such matter." Ostrander Decl., Ex. G (Odefsey Agreement § 6.7.1.2). "Executives" is defined **[**69]** in the agreement as follows: "(a) in the case of Gilead, the President and Chief Operating Officer of Gilead Parent, and (b) in the case of Janssen, a Worldwide Chairman of Janssen Parent's pharmaceutical group." Ostrander Decl., Ex. G (Odefsey Agreement § 1.103). Given the factual basis articulated by Plaintiffs, the Court does not dismiss at this time J&J from the proceedings. The Court cannot say, as a matter of law, that J&J did not play a role in the No-Generics Restraint scheme.

Accordingly, the Court denies Gilead and Janssen's motions to dismiss the antitrust claims based on the No-Generics Restraints in the Complera, Odefsey, Prezcobix, and Symtuza Agreements.

With respect to the antitrust claims based on the No-Generics Restraints, the Court rejects Defendants' ancillary restraints argument. However, the Court grants Gilead and Japan Tobacco's motions to dismiss the antitrust claims based on the specific agreement entered into by these two companies.

E. <u>Antitrust Injury</u>

The final issue for the Court to address is whether the remaining claims against Gilead, BMS, and Janssen should be dismissed for failure to allege antitrust injury. ***HN12***[] "[A]ntitrust injury consists of four elements: '(1) **[**70]** unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent.'" *Somers v. Apple, Inc., 729 F.3d 953, 963 (9th Cir. 2013)*. The main antitrust injury arguments are addressed below.

1. Standalone Components of FDC

Defendants argue first that Plaintiffs have failed to adequately allege any anticompetitive injury because, even if the joint venture members could not make a competing FDC using generics, nothing prevented patients from buying the standalone components to the FDCs (*i.e.*, a patient could buy generic TDF and/or FTC and then, separately, the other defendant's drug). *See, e.g.*, Gilead Mot. at 21; BMS Mot. at 11-12. But even if a patient could buy the standalone components of the joint venture FDC, that does not necessarily mean that the No-Generics Restraint did or does not have any anticompetitive effects. Plaintiffs have alleged that doctors were likely to prescribe brand FDCs[25] and that individuals who were prescribed such FDCs could not get their prescriptions filled with generic standalone components: "[u]nder state drug-substitution laws, pharmacists receiving a prescription for [an] FDC cannot dispense [in **[**71]** its place] generic versions of the standalone **[*609]** component[]" drugs, Opp'n at 3, because "[g]eneric versions of TDF and/or FTC are not AB-rated to, and therefore not automatically substitutable for, the TDF-based FDCs." CAC ¶ 183. Furthermore, getting standalone components would be contrary to the whole point of an FDC — *i.e.*, to get better patient compliance. *See* CAC ¶ 63 (alleging that "[t]he need to use multiple drugs in cART regimens can be a barrier to patient compliance" and "[t]o reduce this possible burden, multiple antiretroviral drugs are often coformulated together into a single pill," *i.e.*, FDC").[26]

2. Untainted Competitor

Second, Defendants argue that the antitrust injury claimed by Plaintiffs is too speculative. But a reasonable jury could infer that, absent the No-Generics Restraints, the other defendants would want to make competing FDCs once the generic versions of Gilead's vulnerable drugs became available (*i.e.*, once the patents protecting the drugs expired); that would be in their own self-interest. *Cf. King Drug, 791 F.3d at 405* (noting that, "[a]bsent a no-AG [authorized generics] promise, launching an authorized generic would seem to be economically rational for the brand [manufacturer]"). **[**72]** In this regard, it is notable that, when generic TDF became available in December 2017 (generic FTC will not become available until September 2020), BMS *did* come up with a competing FDC because its No-Generics Restraint with Gilead did not bar it from making a competing FDC that was *comparable* to the FDC covered by the joint venture agreement. *See* CAC ¶ 140 (alleging that, "[w]hen generic TDF became available, BMS licensed Mylan Pharmaceuticals to product [the] comparable version [to Atripla]" — *i.e.*, generic TDF, 3TC (instead of FTC), and EFV). Furthermore, Plaintiffs fairly make the point that, "if the conspirators were not likely to have marketed competing versions of the products, Defendants would have had no reason to include the No-Generics Restraint." Opp'n at 36.

Defendants make one additional argument on antitrust injury — *i.e.*, that it is speculative for Plaintiffs to assert that untainted competitors in BMS, Japan Tobacco, and Janssen's positions would actually have challenged Gilead's patents prior to their expiration dates (*e.g.*, instead of waiting for the TDF patents to expire in December 2017). *See, e.g.*, CAC ¶¶ 114, 130, 158. Defendants' contention is not without force. **[**73]** However, that asserted injury appears to be Plaintiffs' alternative position on antitrust injury and thus, even if credited, would not result in dismissal. Plaintiffs, however, have leave to provide a more definite statement regarding this antitrust injury theory.

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[25] As noted above, Plaintiffs suggest that Gilead was able to do this through use of "large sales forces that visit doctors' offices and persuade them to prescribe" certain products. *See* CAC ¶ 368.

[26] In its motion, BMS argues that "having to take two pills a day instead of one is not the type of interest protected by the antitrust laws, which concern quantifiable *economic* injury." BMS Mot. at 12 (emphasis in original). But Plaintiffs are claiming an economic injury — the inability to purchase a competing FDC made up (at least in part) of generics. The reason why Plaintiffs want to buy the competing FDC (*e.g.*, for convenience) should not mean there is not an economic injury.

V. ANTITRUST CLAIMS BASED ON TEVA PATENT SETTLEMENT AGREEMENTS — COUNTS THREE THROUGH SIX AND COUNTS EIGHT THROUGH THIRTEEN

In Counts Three through Six and Counts Eight through Thirteen, Plaintiffs also claim anticompetitive conduct based on patent settlement agreements between Gilead and Teva. As noted above, the agreements contained MFE and MFEP clauses, which are what allegedly induced Teva to delay its entry into the market.

> **[*610]** The MFE provided that, if any second filer entered the market before the agreed-upon date, Teva's entry date would be moved up accordingly. . . . The MFEP provided that Gilead would not grant a license for a second filer to enter the market any earlier than six weeks [in one case or six months in another] after Teva entered.

Opp'n at 8. Thus, according to Plaintiffs, the two clauses "insulated Teva from the . . . risk that one or more of the several subsequent filers lined up behind it would enter on **[**74]** or before the agreed-upon entry dates, either by succeeding in their own lawsuits or by using the leverage of their patent challenges to negotiate an entry date equal to or earlier than Teva's licensed entry date." Opp'n at 51.

As indicated above, Plaintiffs assert that the agreements are anticompetitive because (1) Teva agreed to delay its entry into the market in exchange for being given MFE and MFEP provisions and (2) the MFE and MFEP provisions also served as a "disincentive" for second filers to try to enter the market before Teva.

In its motion to dismiss, Gilead argues first that MFEs and MFEPs are basically most-favored nation ("MFN") clauses, and it is not uncommon to find MFN clauses in settlement agreements. While this may be true, it that does not mean MFN clauses are automatically free from antitrust scrutiny, and Gilead concedes as much. *See* Gilead Mot. at 10 (arguing that, "at most, . . . MFNs can be anticompetitive in rare circumstances") (emphasis omitted). That a MFE and/or MFEP is deserving of antitrust scrutiny — especially compared to other kinds of MFN clauses — is underscored by the fact that the whole point of a MFE and/or MFEP is about *entry, i.e.*, when competition **[**75]** is allowed into a market.

Gilead argues next that the MFE and MFEP at issue here are not enough to constitute anticompetitive conduct because they are actually procompetitive in nature. Gilead focuses on the MFE in particular: under the MFE, if a generic manufacturer obtains an earlier entry date than Teva does (*e.g.*, by prevailing in a patent infringement lawsuit initiated by Gilead), then Teva gets its entry date advanced; thus, that means *more* competition — *i.e.*, from both the generic manufacturer and Teva. This argument is problematic for at least three reasons: (1) it addresses only the MFE, and not the MFEP (which gives Teva a preferential entry date compared to other generic manufacturers); (2) it ignores Plaintiffs' theory that Teva agreed to a delayed entry date — *i.e.*, a later date than it otherwise would have — because it was given, in exchange, the benefits afforded by both the MFE and MFEP; and (3) it ignores Plaintiffs' theory that the MFE/MFEP combination deterred second filers from trying to get an earlier entry date.

To the extent Gilead relies on the Supreme Court's *Actavis* decision, *Actavis* does not hold that an early entry date (relative to the patent expiration date) **[**76]** is *automatically* procompetitive. In *Actavis*, the Supreme Court simply acknowledged that, as a general matter, "settlement on terms permitting the patent challenger to enter the market before the patent expires would also bring about competition, again to the consumer's benefit." *Actavis, 570 U.S. at 154*.[27] To the extent **[*611]** the New York district court in *Actos* suggested otherwise, *see* *Actos, 2015 U.S. Dist.*

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[27] As noted above, the *Actavis* Court ultimately held that a reverse payment settlement agreement could be anticompetitive in nature, even if the alleged infringer simply made the promise not to enter the patentee's market before the patent term ended. *See* *Actavis, 570 U.S. at 141*.

LEXIS 127748, at *45 (addressing a MFE which the court denominated an "acceleration clause"; stating that, "[a]t their core, the settlements at issue simply granted the Generic Defendants a compromise date of generic entry — the very type of settlement sanctioned by the *Actavis* Court"), the Court is not persuaded. Furthermore, the *Actos* court acknowledged that "another case may present circumstances" where it would be plausible that a MFE could deter a second filer from challenging a patent because, even if the second filer won, "it would be deprived of any period of market exclusivity" because the first filer could "also enter the market immediately thereafter." *Id. at *48-49*. The *Actos* court simply held that, in the case before it, a deterrent effect was not plausible. *See id. at *49* (noting, *inter alia*, that, even after the patent holder and certain generic manufacturers **[**77]** settled, another generic manufacturer continued to challenge the patent at issue). Finally, the court in *In re Loestrin 24 Fe Antitrust Litigation, 261 F. Supp. 3d 307 (D.R.I. 2017)*, did in fact hold that a plaintiff had plausibly alleged anticompetitive effects from a MFE. *See id. at 333-34* (taking note of plaintiff's allegations that, "with the acceleration clause in place, other generics did not have the opportunity, and thus the incentive to try, to enter the market before Watson's scheduled entry"; adding that "[i]t may be that with more factual and expert discovery, the . . . Defendants can establish that there were no anticompetitive effects, or that . . . the 'challenged payment was justified by some precompetitive objective[,]' [b]ut at this juncture, the Court is not prepared to hold that an acceleration clause like the one [here] may never be cognizable as a component of a complex settlement agreement amounting to a large and unjustified reverse payment").

Gilead protests still that the MFE and/or MFEP cannot be deemed anticompetitive when they do not represent "reverse payments" (from Gilead to Teva) in the first place; more specifically, they do not represent payments at all because "[Teva] received no compensation from **[**78]** [Gilead], but rather, [was] compensated only through the market when [it] began selling [its] generic product." *Actos, 2015 U.S. Dist. LEXIS 127748, at *48*. It is true that the MFE and/or MFEP may not be a "payment" from Gilead to Teva in the sense that cash was not being taken out of Gilead's pocket and being given to Teva — or even in the sense that Gilead was giving up a benefit that it otherwise would have had for Teva's benefit. *See, e.g., King Drug, 791 F.3d at 404-05* (stating that "no-AG [authorized generic] agreements are likely to present the same types of problems as reverse payments of cash" — *e.g.*, they "may be of great monetary value [to] the first-filing generic [manufacturer]" and "a brand[] [manufacturer's] commitment not to produce an authorized generic means that it must give up the valuable right to capture profits").

But *Actavis* did not preclude a patent settlement agreement from being anticompetitive in the absence of a reverse payment *if there were other circumstances* that posed potential anti-competitive concern. *See Actavis, 570 U.S. at 158* (suggesting that patent litigation **[*612]** could be settled "by allowing the generic manufacturer to enter the patentee's market prior to the patent expiration, without the patentee paying the challenger to stay out prior to **[**79]** that point"). In the instant case, Plaintiffs have pointed to indicators of anti-competitiveness. For instance, even though Teva was allowed to enter the market prior to the patent expiration dates, the entry date was, relatively speaking, quite late — *i.e.*, close in time to the patent expiration dates (in one case, only six weeks before the patent expiration date and, in the other case, only a year before the patent expiration date). Thus, this gives rise to a concern that Teva was induced to accept a late entry date (*i.e.*, giving up the right to pursue its challenge to the patent and earlier entry) in return for a significant benefit — even if that benefit did not come at Gilead's expense.

Another yellow flag is with respect to the MFEP clause specifically. The MFEP clause, in effect, gave Teva exclusivity for a period time (six weeks in one case and six months in another), but Plaintiffs have alleged that, "in the case of Truvada [TDF/FTC] (and possibly Atripla as well), . . . Teva had [already] forfeited" the 180-day ANDA Exclusivity "by filing to gain timely tentative approval from the FDA." Opp'n at 51. Thus, the MFEP clause was essentially "resurrect[ing]" ANDA Exclusivity or **[**80]** at least some kind of exclusivity where it no longer applied. Opp'n at 51. Resurrection of exclusivity could arguably be a significant deterrent to second filers.[28]

The Court notes that, although there appears to have been a MFE in *Actavis*, the MFE was not substantively discussed in the opinion. *See id. at 145* (noting that "Actavis [the generic manufacturer] agreed that it would not bring its generic to market until August 31, 65 months [more than 5 years] before Solvay's patent expired (unless someone else marketed a generic sooner)").

[28] As noted above, a "first-filing generic manufacturer is guaranteed [the ANDA] exclusivity period [of 180 days] even if it settles litigation with a patent owner without resolving the invalidity or noninfringement issues" — which serves as a disincentive for a

The Court acknowledges that the antitrust claims here would arguably be a closer call if the Court was dealing with just a MFE clause and not, in addition, a MFEP clause. A MFE clause is not as clear a deterrent to a second filer (as compared to a first filer) because a second filer is simply prevented from doing better than the first filer but is nevertheless guaranteed *equality* (although Plaintiffs argue that it is a factual question as to whether a MFE is enough of a deterrent). *See, e.g.*, Opp'n at 52 (noting that a former executive of Apotex, "one of the largest generic manufacturers in the world," testified before Congress that MFEs are "'poison pill' provisions" and "represent 'the primary anticompetitive aspects of settlements' insofar as they 'eliminate any incentive for a subsequent filer to continue to litigate for earlier market entry'"). In contrast, a MFEP clause guarantees a second filer that it will be in a *worse* position compared to the first filer even where there is no ANDA Exclusivity. Since **[**81]** the instant case presents a situation where there is both a MFE and a MFEP, it is different from those cited by Gilead, and the Court need not address the question of whether a MFE by itself can constitute anticompetitive conduct.

Accordingly, for the antitrust claims based on the MFE and MFEP clauses, Gilead's motion to dismiss is denied.[29]

[*613] VII. ANTITRUST CLAIMS BASED ON GILEAD'S COMMERCIALIZATION OF TAF — COUNTS THREE THROUGH SIX AND COUNTS EIGHT THROUGH THIRTEEN

Finally, in Counts Three through Six and Counts Eight through Thirteen, Plaintiffs claim anticompetitive conduct based on the way that Gilead commercialized TAF. As indicated above, Plaintiffs assert that Gilead commercialized TAF in a particular manner with the goal of moving over prescriptions from TDF-based FDCs to TAF-based FDCs because the FDCs (unlike any standalone drugs) would be protected by the No-Generics Restraints. According to Plaintiffs, to move over to TAF-based FDCs, Gilead took steps to make the TDF-based FDCs less desirable and further took purposeful steps to ensure that TAF standalone could or would not be used in conjunction with other standalone drugs in place of a TAF-based FDC. For example:

- Gilead **[**82]** intentionally degraded the safety of one of its TDF-based FDCs, commercially known as Stribild (*i.e.*, by keeping the strength of TDF at a certain level when a lower level would produce fewer side effects), and further artificially raised the price of the drug. *See generally* CAC ¶ 242 *et seq.*

- Gilead withheld standalone TAF from the market in or about the time period from 2015-2016 and then, when it released TAF standalone, labeled the drug as a treatment for chronic Hepatitis B only (and not HIV as well) and further intentionally degraded the drug (*i.e.*, by selling it at a strength that produced more side effects instead of a lower strength). *See generally* Opp'n at 47; CAC ¶ 250 *et seq.*

Gilead argues that the antitrust claims based on the commercialization of TAF should be dismissed because the same or similar types of claims were already dismissed in a case before Judge Alsup, *i.e., AIDS Healthcare, 2016 U.S. Dist. LEXIS 87578*. Because Gilead's argument largely depends on *AIDS Healthcare*, the Court briefly discusses the case below.

In *AIDS Healthcare*, the plaintiff brought a *§ 1* tying claim and a *§ 2* monopolization claim, both related to TAF. In the tying claim, the plaintiff alleged that "Gilead entered into agreements with Janssen **[**83]** and Japan Tobacco to tie sales of TAF to sales of [the other companies'] respective drugs by combining them into [FDCs]." *Id. at *19*. Judge Alsup noted that one element of a tying claim is that there be "'two distinct products . . . in different markets whose sales are tied together.'" *Id.* But here, TAF was not available as a standalone product as the FDA had not yet

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second filer to press a patent challenge — *AIDS Healthcare*, 2016 U.S. Dist. LEXIS 87578, at *4-5, but resurrection of ANDA Exclusivity is a different matter.

[29] Gilead suggests that the antitrust claims are predicated on Plaintiffs' position that the patents protecting TDF, FTC, and/or TDF/FTC are weak, but there are no factual allegations to explain why the patents are weak. *See* Gilead Mot. at 30-31. While this argument is not without some merit, it is reasonable to infer that there were problems with the patents as Teva and the multiple other generic manufacturers levied patent challenges. This is not a matter that can be determined as a matter of law at this juncture.

approved it. *See id. at *20* (stating that "[t]he extent of consumer demand for standalone TAF is irrelevant because TAF *cannot* be sold as a standalone product as a matter of law"). Judge Alsup added that Gilead "had no duty to pursue FDA approval of the standalone version. To hold otherwise would require manufacturers to seek approval of each component of the drug before seeking approval of the combination drug. This could entirely undermine the FDA's policy of encouraging the development of combination drugs." *Id. at *21*.

As for the § 2 claim, there, the plaintiff alleged that "Gilead improperly bundled TAF" with Janssen and Japan Tobacco's drugs to make certain FDCs

> as a means of maintaining its dominance in the TAF market. Specifically, it alleges that by bundling TAF with the other ingredients, it insulated the allegedly **[*614]** weak patents covering TAF from **[**84]** challenges, because any generic manufacturer seeking to produce a TAF product would need to invalidate all the patents [for the drugs making up the FDCs] before it could win FDA approval, rather than just the TAF patents.

*Id. at *22-23*. Judge Alsup dismissed the § 2 claim for several reasons. One of the reasons was that the plaintiff had failed to allege any anticompetitive conduct. Judge Alsup acknowledged that Gilead had chosen to release TAF as part of a FDC before seeking approval for TAF as a standalone; but,

> "[a]s a general rule, any firm, even a monopolist . . . [,] may bring its products to market whenever and however it chooses." *Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 545 (9th Cir. 1983)*. There is no legal basis for concluding that Gilead had a *duty* to release TAF as a standalone product. *See Allied Orthopedic, 592 F.3d at 1002* ("[A] monopolist has no duty to help its competitors survive or expand when introducing an improved product design.").

*Id. at *23-24* (emphasis added).

The above language from *AIDS Healthcare* lends some support to Gilead's position that it was free to withhold TAF as well as free to shape the product as it saw fit. But, as indicated above, Plaintiffs' antitrust claims here are not based on what Gilead did with TAF *alone*; they are also based on what Gilead did with TDF (*i.e.* ***[**85]*** , intentionally degrading Stribild and artificially raising its price).

Putting aside that point, Judge Alsup's concern in *AIDS Healthcare* seemed to be that Gilead should have been free to decide how to market TAF — *i.e.*, it was not unreasonable for Gilead to market the drug as part of a FDC first and put off selling the drug as a standalone. But here Plaintiffs are not just alleging that TAF standalone was put off for some time; rather, Plaintiffs are alleging that there was a deliberate choice to withhold TAF in order to get consumers to move over from TDF-based products to TAF-based products and to do so in a particular manner. Plaintiffs allege that, when TAF standalone was eventually released, it was in too high a strength, and it was not given with an indication that it could be used for treatment of HIV.

Finally, the Court notes that the following language from *AIDS Healthcare* — "'[a]s a general rule, any firm, even a monopolist . . . [,] may bring its products to market whenever and however it chooses,'" *id.* — comes from a Ninth Circuit opinion *Foremost*. *Foremost*, in turn, took this language from another Ninth Circuit case, *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979)*. In *Berkey*, the court immediately followed the statement **[**86]** above with the following footnote:

> This is not to say, of course, that new product introductions are Ipso facto immune from antitrust scrutiny, and we do not agree with Kodak's argument that they are, *See, e. g., Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701 (7th Cir. 1977)*, *Cert. denied*, *439 U.S. 822, 99 S. Ct. 87, 58 L. Ed. 2d 113 (1978)* (use of power over old product to promote sale of new); in all such cases, however, *it is not the product introduction itself, but some associated conduct, that supplies the violation*.

Id. at 286 n.30 (emphasis added).

That statement in *Berkey* is consistent with later Ninth Circuit law, including *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP, 592 F.3d 991 (9th Cir. 2010)*. ***HN13***[] In *Allied*, the Ninth Circuit noted that *§ 2* law does not condemn the **[*615]** success of a monopolist where it is based on invention and innovation. *See id. at 998*. Thus, "'[a]s a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design changes.'" *Id.* But, the court added, "changes in product design are not immune from antitrust scrutiny and in certain cases may constitute an unlawful means of maintaining a monopoly under *Section 2*." *Id.* Thus, for example, when Microsoft integrated its web browser into its operating system, an antitrust violation was found, particularly as Microsoft gave no procompetitive justification for that conduct. **[**87]** *See id.* ***HN14***[] The *Allied Orthopedic* court added that, where a design change does "improve[] a product by providing a new benefit to consumers," it "does not violate *Section 2* *absent* some associated anticompetitive conduct." *Id. at 998-99* (emphasis added); *see also id. at 999-1000* (noting that "*CalComp* and *Foremost* . . . stand for the uncontroversial proposition that product improvement *by itself* does not violate *Section 2*, even if it is performed by a monopolist and harms competitors as a result") (emphasis added).

With respect to the instant case, Plaintiffs are not contesting per se Gilead's introduction of the TAF-based FDCs — *i.e.*, the product introduction, improvement, and/or innovation. Rather, Plaintiffs are challenging Gilead's purposeful conduct — namely, moving consumers over to the TAF-based FDC (instead of letting the superiority of the products drive that change). For this conduct, Plaintiffs have a plausible argument that there is no procompetitive justification for the action. For instance, what purpose is served by Gilead degrading Stribild and/or standalone TAF? What purpose is served by Gilead not putting a HIV indication on TAF? Whether this was an unlawful restraint cannot be determined on this motion to dismiss.

[88]** The Court therefore denies Gilead's motion to dismiss the antitrust claims based on the commercialization of TAF.

VII. ALL ANTITRUST CLAIMS — RELEVANT MARKET AND MARKET POWER

Generally speaking, all of Plaintiffs' ***HN15***[] antitrust claims (whether based on an unreasonable restraint of trade under *§ 1* or monopolization under *§ 2*, and whether based on federal or state law) require the definition of a product market. *See, e.g., Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1104-05 (9th Cir. 1999)* ("Except when alleging a *per se* antitrust violation, Plaintiffs must identify the relevant geographic and product markets in which Plaintiffs and Defendants compete and allege facts demonstrating that Defendants' conduct has an anticompetitive effect on those markets. Market definition is also essential to establish a monopolization claim.").[30]

HN16[] A product market "encompass[es] the product at issue as well as all economic substitutes for the product." *Newcal Indus. v. Ikon Office Sol., 513 F.3d 1038, 1045 (9th Cir. 2008)*. "'The outer boundaries of a product market are determined by the reasonable interchangeability of use *or* the cross-elasticity of demand between the product itself and substitutes for it.'" *Id.* (emphasis added). "Elasticity of demand is a concept used to signify the relationship between changes in price and responsive changes in demand." **[**89]** *United States v. LSL Biotechnologies, 379 F.3d 672, 697 **[*616]** (9th Cir. 2004)*; *see also Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 469, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (indicating that cross-elasticity of demand refers to "the extent to which consumers will change their consumption of one product in response to a price change in another."). In the instant case, Plaintiffs have pointed to two product markets: (1) the broader market for cART drugs generally and (2) the narrower market for each brand drug (standalone or FDC) and its AB-rated generic equivalent. *See* CAC ¶ 376.

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[30] As indicated above, if the Court were to find per se illegality under *§ 1*, then Plaintiffs would not need to worry about market definition. But at this juncture of the proceedings, the Court has not made any conclusion as to whether the per se illegal rule applies.

To the extent Defendants suggest it is not permissible for Plaintiffs to base their antitrust claims on two different product markets, the Court does not agree. ***HN17***[] As both Plaintiffs and the FTC explain in their respective briefs, what the appropriate product market is depends on what anticompetitive harm is being claimed. *Cf.* *U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 598 (1st Cir. 1993)* (indicating that one must "remember[] to ask, in defining the market, *why* we are doing so: that is, what is the antitrust question in this case that market definition aims to answer?"; adding that "the nature of the claim can affect the proper market definition") (emphasis added). Defining a product market is simply a way to determine whether a defendant has market power. *See, e.g., Todd v. Exxon Corp., 275 F.3d 191, 199 (2d Cir. 2001)* (stating that "[o]ne traditional way to demonstrate market power **[**90]** is by defining the relevant product market and showing defendants' percentage share of that market"); *Bhan v. NME Hosps., Inc., 669 F. Supp. 998, 1018 (E.D. Cal. 1987)* (noting that, "[s]ince market power can only be measured in relationship to a particular product market, the market definition bears directly upon the degree of market power a firm has[;] [t]hus, to prove that a defendant has market power, the first crucial step is to establish the bounds of the relevant market"). Market power, in turn, is simply a way to assess whether the defendant's conduct has anticompetitive effects. *See, e.g., Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 496 (2d Cir. 2004)* (in discussing *§ 2* claim, stating that "[e]valuating market power begins with defining the relevant market[;] [t]his inquiry will also prove useful for analyzing the *§ 1* allegations because a market definition provides the context against which to measure the competitive effects of an agreement"); *In re Aggrenox Antitrust Litig., 199 F. Supp. 3d 662, 668 (D. Conn. 2016)* (stating that "articulating a relevant market definition is not an end in itself, but is in the service of answering the question of market power, which in turn 'is but a surrogate for detrimental effects'").

In the instant case, it is not unreasonable for Plaintiffs to have identified two different product markets because they have claimed harm to competition in **[**91]** two different ways. More specifically, Plaintiffs allege that (1) one "purpose and effect of Defendants' unlawful conduct was to impair competition among drugs used in the cART regimen," Opp'n at 65, and (2) another "purpose and effect of Defendants' . . . unlawful conduct was to impair competition from generic versions of each of the brand name drugs at issue." Opp'n at 63.

Defendants contend still that there are insufficient factual allegations to support each asserted product market. For the narrower market, the Court disagrees. For example, it is plausible each brand drug and its AB-rated generic version is not reasonably interchangeable with other drugs because, as Plaintiffs allege, "once the physician and patient find that one of these drugs is well tolerated, at competitive prices the doctor and patient are very unlikely to switch to a different HIV drug based on variations of price of 10% or less." CAC ¶ 364; *see also* CAC ¶ 181 (alleging that "pharmaceuticals are 'experience' **[*617]** goods that consumers and physicians are hesitant to change if they are working"). Plaintiffs also suggest that there is not reasonable interchangeability because each brand drug (and its AB-rated generic **[**92]** version), compared to other drugs, has "varying ability to treat the conditions for which it is prescribed" and a different "side-effects profile." CAC ¶ 363.

However, Defendants' position has merit on the broader market. That is, it is not clear from the CAC what exactly the cART product market is. Although the Court understands from the CAC that cART stands for combination antiretroviral therapy, that it is the modern means of treating HIV, and that it often consists of two NRTIs and a third agent, Plaintiffs have not explained, *e.g.*, how there is reasonable interchangeability of use with respect to different cART drugs.[31]

Because the Court concludes that Plaintiffs have not adequately alleged a cART market, it does not address Defendants' contention that the broader and narrower product markets contradict one another. However, the Court does note that, under Ninth Circuit law, "it is legally permissible to premise antitrust allegations on a submarket." *Newcal, 513 F.3d at 1045*.

In sum, because Plaintiffs have not adequately alleged a cART market, its antitrust claims based on that market (as opposed to the narrower market for each brand drug) are dismissed but with leave to amend.

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[31] For instance, which cART drugs are included and which are not? Is that market limited to those which contain a Gilead product or does it extend to all cART drugs?

VIII. STATE LAW CLAIMS — ANTITRUST [93] AND CONSUMER PROTECTION — COUNTS TWO, FOUR, SIX, SEVEN, NINE, ELEVEN, AND THIRTEEN**

As noted above, Plaintiffs bring two kinds of state law claims: state antitrust claims and state consumer protection claims. With respect to the state antitrust claims, Defendants argue that their arguments on the federal antitrust claims are also applicable. Defendants also make several other independent arguments in favor of dismissal of the state law claims, whether based on ***antitrust law*** or consumer protection law. Because most of these independent arguments are expressly made by Gilead, the Court largely refers to Gilead hereinafter.

A. Antitrust and Consumer Protection Claims: Application of California Law to Nationwide Purchases

For the most part, Plaintiffs claim violation of a particular state's law (whether antitrust or consumer protection) based on a purchase made in that state. The one exception is with respect to California law. Plaintiffs maintain that California law can apply to purchases made anywhere in the nation because Gilead is based in California. In its motion to dismiss, Gilead argues that it is a violation of due process to apply California law (antitrust or consumer protection) **[**94]** nationwide.

As an initial matter, Plaintiffs suggest that the Court should not rule on this issue in the context of a 12(b)(6) motion; rather, Plaintiffs assert, the issue should be reserved for class certification. *See, e.g., Bias v. Wells Fargo & Co., 942 F. Supp. 2d 915, 928 (N.D. Cal. 2013)* (Gonzalez-Rogers, J.) ("find[ing] that the choice of law determination in this case is better suited for the class certification stage because the record with respect to balancing the competing states' interests is not sufficiently developed"); *Khoa Nguyen v. Barnes & Noble, Inc., No. SACV 12-812-JLS (RNBx), 2015 U.S. Dist. LEXIS 187099, at *11 (C.D. Cal. Nov. 23, 2015)* **[*618]** (noting that, "[a]lthough there is some disagreement, most courts in this circuit hold that a claim should not be dismissed on a conflict of law analysis at the pleading stage, especially 'when dealing with a potential nationwide class action'"; therefore, "declin[ing] to engage in a choice of law analysis based solely on the pleadings"); *Andriesian v. Cosmetic Dermatology, Inc., No. 3:14-cv-01600-ST, 2015 U.S. Dist. LEXIS 50502, at *28 (D. Or. Mar. 3, 2015)* (citing cases in support of the proposition that "a case should not be dismissed based on a conflict of law analysis prior to class certification" — *i.e.*, a choice-of-law analysis at the pleading phase is "'premature'"). But Plaintiffs' position seems problematic, especially **[**95]** as the cases on which they rely hold that it is premature to make a choice-of-law decision prior to class certification. Here, Gilead is not really asking the Court to make a choice-of-law decision per se. Rather, Gilead is asking the Court to make a due process determination — *i.e.*, even though Plaintiffs claim that California law can be applied to purchases made outside the state ("extraterritorial" purchases), would application of California law violate Gilead's due process rights?[32]

The Court therefore addresses the due process argument now, leaving for another day the issue of whether California law is the correct choice of law. As to the due process argument, the parties essentially agree that the governing authority is *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)*. There, the defendant was an oil company that produced or purchased natural gas from leased land located in eleven different states, and that sold most of the gas in interstate commerce. The plaintiffs were the royalty owners possessing rights to the leases from which the defendant produced gas. *See id. at 799*. The plaintiffs brought a class action against the defendant in Kansas state court, "seeking to recover interest on royalty payments which had been delayed by [the **[**96]** defendant." *Id.* The trial court certified a class action under Kansas law. *See id. at 801*. The final certified class "contained 28,100 members" of which "[l]ess than 1,000 . . . resided in Kansas. [In addition,] [o]nly a miniscule amount, approximately one quarter of one percent, of the gas leases involved in the lawsuit were on Kansas land." *Id. at 801*.

One of the issues before the Supreme Court was whether it was appropriate to apply Kansas law to all of the class members' claims. *See id. at 802* (noting argument that "Kansas courts could not apply Kansas law to every claim in

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[32] To be sure, it may be argued that Gilead is asserting choice of law dressed up as a due process claim. But as noted herein, case law has established a distinct due process analytical framework.

the dispute"); *see also* *id. at 814-15* (noting that "[t]he Kansas courts applied Kansas contract law and Kansas equity law to every claim in this case, notwithstanding that over 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit"). According to the defendant, "total application of Kansas substantive law violated the constitutional limitations on choice of law mandated by the *Due Process Clause of the Fourteenth Amendment* and the *Full Faith and Credit Clause of Article IV, § 1*." *Id. at 816*.

The Supreme Court noted that it first had to "determine whether Kansas law conflicts in any material way with any other law which could apply. There can be no injury in applying **[**97]** Kansas law if it is not in conflict with that of any other jurisdiction **[*619]** connected to this suit." *Id.* Because there were at least some conflicts, the Court then asked whether Kansas had "'a significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of Kansas law is not arbitrary or unfair.'" *Id. at 821-22*. It concluded that, "[g]iven Kansas' lack of 'interest' in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits." *Id. at 822*.

HN18[] Accordingly, under *Phillips*,

> the law of any particular state may not be applied to a nationwide class unless (1) the chosen state's law does not conflict with the law of another jurisdiction that has an interest in the case, and (2) the chosen state has a significant contact or significant aggregation of contacts to claims asserted by each member of the plaintiff class such that the choice of that state's law is not arbitrary or unfair.

In re Capacitors Antitrust Litig., 106 F. Supp. 3d 1051, 1073 (N.D. Cal. 2015) (Donato, J.).

1. Conflict Between **[**98]** California Law and Law of Other States

According to Gilead, there is, in fact, a conflict between California law and the laws of other states. More specifically, Gilead argues that, under California ***antitrust law***, indirect purchasers may obtain damages but, under the laws of at least five states/jurisdictions whose laws have been implicated by the CAC, the opposite is true. *See* Gilead Mot. at 47-48 (citing Illinois, Puerto Rico, Rhode Island, Utah, and Maryland ***antitrust law***[33]); *see also* *Capacitors Antitrust, 106 F. Supp. 3d at 1073-74* ("find[ing] [a] potential conflict" because "'some states allow their citizens to sue for antitrust injuries as indirect purchasers (like California) and some do not'").[34]

Whether the ***antitrust law*** of the five states/jurisdictions at issue bar indirect purchasers from getting damages is addressed below. *See* Part IX.D, *infra*.

For the time being, however, the Court notes that Gilead has pointed to a conflict in ***antitrust law*** only, and not to any conflict in *consumer protection* law. In its motion to dismiss, Gilead does suggest that Plaintiffs cannot avoid the rule of no damages for indirect purchasers by recasting their state antitrust claims as state consumer protection claims. *See* Gilead Mot. **[**99]** at 37. However, in making this argument, Gilead addresses the laws of nine states/jurisdictions — of which only four overlap with the states/jurisdictions identified above (*i.e.*, Illinois, Puerto Rico, Rhode Island, and Utah).

Accordingly, at most, Gilead has pointed to a conflict with the antitrust laws of five states/jurisdictions and a conflict with the consumer protection laws of four states/jurisdictions.

2. Significant Contacts with California

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[33] Gilead also discusses Massachusetts law but based on a consumer protection statute, not ***antitrust law***.

[34] ***HN19***[] There is no dispute that, under federal ***antitrust law***, indirect purchasers are not entitled to damages. *See generally* *Ill. Brick Co. v. Ill., 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*.

If there are no conflicts between California antitrust or consumer protection law and the laws of other states/jurisdictions, then California law can be applied on a nationwide scale — *i.e.*, to purchases made **[*620]** in other states — without there being a due process problem.

If, however, there are conflicts, that does not mean that California law cannot apply. Rather, under *Phillips*, the question is whether California has a significant contact, or significant aggregation of contacts, to the claims asserted by each member of the plaintiff class; if so, there is no due process concern. In the instant case, Plaintiffs argue that there are significant contacts with California because Gilead is "headquartered in-state and the challenged conduct occurred **[**100]** within the state." *In re Charles Schwab Corp. Sec. Litig., 264 F.R.D. 531, 538 (N.D. Cal. 2009)* (Alsup, J.). That is, at least a part of the challenged conduct (whether based on the No-Generics Restraints, the Teva patent settlement agreements, or the commercialization of TAF) occurred within the state because Gilead's decisionmaking emanated from California.

Plaintiffs' position has merit. And although Gilead does have arguments to the contrary, they are not convincing. For example, Gilead argues that "the focus of the analysis is on the nexus between plaintiffs' claims and California, *not* defendants' contacts." Gilead Reply at 17 (emphasis in original). This is only partly true. It is correct that the Court must evaluate whether Plaintiffs' claims have a significant contact with California, but that does not mean that Gilead's contacts are thereby irrelevant. Plaintiffs' claims are based on wrongdoing committed by Gilead. Thus, where Gilead committed the wrongdoing is clearly significant. This case differs from *Phillips*.

The Ninth Circuit confirmed as much in *AT&T Mobility LLC v. AU Optronics Corp., 707 F.3d 1106 (9th Cir. 2013)*. ***HN20***[] There, the court held that

> anticompetitive conduct by a defendant within a state that is related to a plaintiff's alleged injuries and is not "slight and casual" establishes a "significant aggregation **[**101]** of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." Specifically, we hold in this case that *[California's] Cartwright Act* can be lawfully applied without violating a defendant's due process rights when more than a *de minimis* amount of that defendant's alleged conspiratorial activity leading to the sale of price-fixed goods to plaintiffs took place in California. Such a defendant cannot reasonably complain that the application of California law is arbitrary or unfair when its alleged conspiracy took place, at least in part, in California.

Id. at 1113; *see also* *id. at 1111-12* (criticizing the district court for "mak[ing] a single contact — the location of Plaintiffs' injury — dispositive"; "the relevant 'occurrence or transaction' in this case includes not only the sale of price-fixed goods, but Defendants' alleged agreements and conspiracies to fix LCD prices").

Admittedly, Gilead has cited some authority in support of its position, but that authority was issued before *AT&T*, is not binding, and is not persuasive. For instance, in *In re Relafen Antitrust Litigation, 221 F.R.D. 260 (D. Mass. 2004)*, the district court declined to apply Pennsylvania law to a nationwide class even though the company producing the drug **[**102]** was headquartered in the state and the product was sold and distributed from the state. Its rationale was that

> the primary aim of antitrust and consumer protection laws generally — and those of indirect purchaser states particularly — is compensating consumers, not policing corporate conduct. Accordingly, the Court considers the more significant contact in this context to be the location of the injury — that is, the location of the sales to the end payor plaintiffs.

[*621] *Id. at 277*. But even if the district court was correct in elevating injury to the end payor over the policing of corporate conduct, that does not mean that the policing of corporate conduct is not an important part of antitrust and consumer protection law — such that the location of the corporate conduct could not be a significant contact for purposes of due process analysis.

Gilead also relies on *In re Graphics Processing Units Antitrust Litigation, 527 F. Supp. 2d 1011 (N.D. Cal. 2007)* (hereinafter "*GPU*"), another decision that pre-dates *AT&T*. There, Judge Alsup held that there was no significant contact with California based on the specific allegations in the complaint. The plaintiffs in *GPU* had alleged that "secret meetings between defendants' representatives took place in California," that one defendant is "headquartered **[**103]** in California," and that another defendant had "at least some business operations . . . in California." *Id. at 1028*. According to Judge Alsup, these allegations were insufficient to establish significant contacts because "plaintiffs have never alleged the specific locations of any of the meetings between defendants" and one of the defendants "is organized in Canada and has its headquarters there." *Id.* Arguably, Judge Alsup's conclusion is problematic; it seems a fair inference that at least a fair amount of the alleged conspiracy between the defendants (*e.g.*, to fix prices) took place in California given that one defendant was based in the state and thus decisionmaking emanated from there. But, in any event, *GPU* is distinguishable from the instant case because, even if two of Plaintiffs' theories turn on Gilead's actions with other companies (*i.e.*, the claims based on the No-Generics Restraints and the Teva patent settlement agreements), one theory (*i.e.*, the claims based on the commercialization of TAF) does not.

Accordingly, the Court holds that it would not be a due process violation for California law to apply nationwide, *i.e.*, to purchases made outside the state. This ruling, however, is **[**104]** not dispositive of whether California law should in fact be the choice of law. ***HN21***[] The Court leaves that decision for another day, *see AT&T, 707 F.3d at 1113* (noting that "the *Due Process Clause* does nothing but circumscribe the universe of state laws that can be constitutionally applied to a given case, [and so] we 'need not . . . balance the competing interests of California and [other states]'[;] [o]bjections based on the interests of other states are more properly raised under a choice of law analysis") — especially since the main authority on which Plaintiffs rely, *In re Qualcomm Antitrust Litig., 328 F.R.D. 280 (N.D. Cal. 2018)* (Koh, J.), is currently on appeal. *See id. at 312* (conducting a choice-of-law analysis and concluding that California law — which permits damages for indirect purchasers — could apply to a nationwide class of consumers "because other states do not have an interest in barring their own citizens from recovering damages for a California-based corporation's anticompetitive conduct that took place almost entirely in California").

B. Antitrust and Consumer Protection Claims: Standing for 25 States/Jurisdictions

According to Gilead, Plaintiffs' state law claims implicate the laws of 36 different states; however, they have alleged that purchases were made in only 11 of those 36 **[**105]** states. "No purchase by any Plaintiff is alleged in the other 25 states." Gilead Mot. at 35. Gilead contends that, because Plaintiffs have not alleged purchases made in those 25 states, they lack standing to bring state law claims based on the laws of those 25 states. In response, Plaintiffs argue that any standing issue is, in effect, more appropriately addressed at the class certification **[*622]** stage, rather than the 12(b)(6) stage.

Plaintiffs have the better argument. This Court recently addressed the same basic issue in *In re Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Practices & Products Liability Litigation, 295 F. Supp. 3d 927 (N.D. Cal. 2018)* (hereinafter, "*FCA*"). In *FCA*, the Court explained that, in 2015, it held in a different case (*In re Carrier IQ, Inc. Consumer Privacy Litigation, 78 F. Supp. 3d 1051 (N.D. Cal. 2015))*, that it had discretion as to whether to defer questions of standing until class certification; however, just a few months later, the Ninth Circuit decided *Melendres v. Arpaio, 784 F.3d 1254 (9th Cir. 2015)*, holding that, ***HN22***[] once a named plaintiff demonstrates individual standing for a claim, the standing inquiry is satisfied and any issue regarding the relationship between the named plaintiff and the members of the putative class is relevant only to class certification, not standing. *See FCA, 295 F. Supp. 3d at 954-55*. This Court expressly found that *Melendres* was controlling, establishing a per se rule.

Gilead points out that the Court made an alternative **[**106]** holding in *FCA* — *i.e.*, "[e]ven if *Melendres* does not sweep so broadly as to impose a per se rule," a court should exercise its discretion to address standing *before* class certification where the named plaintiffs have ties to only a limited number of states on whose laws they have sued. *Id. at 956* (noting that, in *Carrier IQ*, "[t]he named plaintiffs came from 13 states, and there were no named plaintiffs from 35 other states," whereas, in *FCA*, "the named Plaintiffs reside in or purchased or leased Class Vehicles in 43 states, and there are no named Plaintiffs for only seven states and the District of Columbia"). However, this Court still found as an initial matter that *Melendres* was dispositive.

C. Antitrust and Consumer Protection Claims: Pre-Filing Requirement

Gilead argues that (1) the antitrust laws of Arizona, Hawaii, Nevada, and Utah and (2) the consumer protection laws of Alabama, Massachusetts, and West Virginia have pre-filing notice requirements that have not been met. *See* Gilead Mot. at 40.

- *Ariz. Rev. Stat. § 44-1415(A)*: "A person filing a complaint . . . for any violation of the provisions of this article [the *Antitrust Act*] shall simultaneously with the filing of the pleading in the superior court or, in the **[**107]** case of pendent state law claims in the federal court, serve a copy of the complaint . . . on the attorney general."

- *Haw. Rev. Stat. § 480-13.3(a)(1)*: "A class action for claims for a violation of this chapter [monopolies and restraint of trade] other than claims for unfair or deceptive acts or practices may be filed, and may be prosecuted on behalf of indirect purchasers by a person other than the attorney general as follows: (1) A filed copy of the complaint . . . shall be served on the attorney general not later than seven days after filing of the complaint." *See also id. § 480.13.3(a)(5)(B)* ("If the State files its own action involving the same or similar claim or claims set forth in the complaint filed by the proposed class representative, then the complaint filed by the proposed class representative shall be dismissed.").

- *Nev. Rev. Stat. § 598A.210(3)*: "Any person commencing an action for any violation of the provisions of this chapter shall, simultaneously with the filing of the complaint with the court, mail a copy of the complaint to the Attorney General."

[*623] • *Utah Code Ann. § 76-10-3109(9)*: "The attorney general shall be notified by the plaintiff about the filing of any class action involving antitrust violations that includes plaintiffs from this state."

- *Ala. Code § 8-19-10(e)*: "At least 15 days prior **[**108]** to the filing of any action under this section [deceptive trade practices], a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be communicated to any prospective respondent by placing in the United States mail or otherwise. Any person receiving such a demand for relief who, within 15 days of the delivering of the demand for relief, makes a written tender of settlement which is rejected by the claimant may, in any subsequent action, file the written tender and an affidavit concerning this rejection. If the court finds that the relief tendered was sufficient to compensate the petitioner for his or her actual damages, the court shall not award any additional damages or attorney's fees or costs to the petitioner."

- *Mass. G.L. ch. 93A, § 9(3)*: "At least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent. Any person receiving such a demand for relief who, within thirty days of the mailing or **[**109]** delivery of the demand for relief, makes a written tender of settlement which is rejected by the claimant may, in any subsequent action, file the written tender and an affidavit concerning its rejection and thereby limit any recovery to the relief tendered if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner."

- *W. Va. Code § 46A-6-106(c)*: "[N]o action . . . may be brought pursuant to the provisions of this section [consumer protection] until the person has informed the seller or lessor in writing and by certified mail, return receipt requested, of the alleged violation and provided the seller or lessor twenty days from receipt of the notice of violation but ten days in the case a cause of action has already been filed to make a cure offer: Provided, That the person shall have ten days from receipt of the cure offer to accept the cure offer or it is deemed refused and withdrawn."

In response, Plaintiffs maintain that they "are not required to plead compliance with [the notice] requirements to state a claim under the relevant statutes." Opp'n at 80. Plaintiffs add that, in any event, "on May 14, 2019, Plaintiffs notified the attorneys general **[**110]** of Arizona, Hawaii, Nevada, and Utah regarding the Complaint and the claims pursuant to the respective state antitrust statutes." Opp'n at 80; *see also* Goldstein Decl., Exs. P, Q, U, and W (letters to attorneys general of Nevada, Hawaii, Arizona, and Utah). In addition, on May 14, 2019, "Plaintiffs notified Defendants that the filed Complaint contained claims brought pursuant to the *Massachusetts Consumer Protection Act* and the *West Virginia Consumer Credit and Protection Act*." Opp'n at 80; Goldstein Decl., Exs. A-O (letters to

Defendants). As for the only remaining state, Alabama, Plaintiffs assert that no demand letter on Defendants was necessary because "that provision 'shall not apply if the prospective respondent does not maintain a place of **[*624]** business or does not keep assets within the state.'" Opp'n at 80 (quoting *Ala. Code § 8-19-10(e)*).

Gilead does not challenge the above in its reply brief. Accordingly, the Court rejects Gilead's argument for dismissal based on the pre-filing notice requirements.

D. Antitrust and Consumer Protection Claims: *Illinois Brick* Rule

As indicated above, there is no dispute that, under federal ***antitrust law***, indirect purchasers are not entitled to damages. *See generally* *Ill. Brick Co., 431 U.S. at 720* (decided **[**111]** in 1977). According to Gilead, several states/jurisdictions have the same or similar *Illinois Brick* rule, barring indirect purchasers from getting damages.

1. Illinois Antitrust Act

Illinois's Antitrust Act contains the following provision:

> No provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages. Provided, however, that in any case in which claims are asserted against a defendant by both direct and indirect purchasers, the court shall take all steps necessary to avoid duplicate liability for the same injury including transfer and consolidation of all actions. *Provided further* that no person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole exception of this State's Attorney General, who may maintain an action parens patriae as provided in this subsection.

740 Ill. Comp. Stat. § 10/7 (emphasis added).

HN23[] As reflected the language of the statute, an indirect purchaser *may* sue for damages for a violation of the Illinois Antitrust Act — thus making Illinois an "*Illinois Brick* repealer state" for purposes of state ***antitrust law*** — *except* that "no person shall be authorized to maintain **[**112]** a class action in any court of this State for indirect purchasers asserting claims under this Act." *Id.* Here, Plaintiffs have brought a class action. Thus, Gilead argues that Plaintiffs — as indirect purchasers — cannot assert any claim for damages.

"District courts are divided on whether the Illinois Antitrust Act precludes indirect purchasers from filing class actions [in federal court]." *In re Effexor Antitrust Litig., 357 F. Supp. 3d 363, 391 (D.N.J. 2018)*. *Compare, e.g.,* *In re Opana Er Antritrust Litigation, 162 F. Supp. 3d 704, 723 (N.D. Ill. 2016)* ("dismiss[ing] with prejudice [the] indirect purchaser antitrust claim brought under Illinois law"), *with* *In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 817-18 (N.D. Ill. 2017)* (refusing to dismiss "the Illinois antitrust claim on the basis of the Illinois[] class action bar").

It appears that the majority of cases are in line with *Opana. See* *Effexor, 357 F. Supp. 3d at 391*. Representative of these cases is a decision issued by Judge Orrick in 2014.

> The EPPs [end purchaser plaintiffs] contend that the Supreme Court decision in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 396, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010)*, holding that a New York law prohibiting class actions in suits seeking penalties or statutory minimum damages did not prevent a federal district court sitting in diversity from entertaining a class action under *Rule 23*, allows the Illinois claim here. Oppo. 31-32. The *In re Wellbutrin XL Antitrust Litig.* Court [from the Eastern District of Pennsylvania], in a very **[**113]** detailed analysis, rejected that very argument explaining "The Illinois restrictions on indirect **[*625]** purchaser actions are intertwined with Illinois substantive rights and remedies because (1) the restrictions apply only to the IAA [Illinois Antitrust Act], (2) they are incorporated in the same statutory provision as the underlying right, not a separate procedural rule, and (3) the restrictions appear to reflect a policy judgment about managing the danger of duplicative recoveries. ***HN24***[] Because the indirect purchaser restrictions of the IAA are 'intertwined' with the underlying substantive right, application of *Rule 23* would 'abridge, enlarge or modify' Illinois' substantive rights, and therefore Illinois' restrictions on indirect purchaser actions must be applied in federal court." *In re Wellbutrin XL Antitrust Litig., 756 F. Supp. 2d at 677*. I

> agree with Judge McLaughlin's analysis, *especially as the no indirect purchaser class action rule was expressly adopted as an integral part of the Illinois Antitrust Act's repeal of* Illinois Brick. As such, I conclude that the Illinois antitrust claims must be DISMISSED with prejudice.

United Food & Commer. Workers Local 1776 & Participating Emp'rs Health & Welfare Fund v. Teikoku Pharma USA, Inc., 74 F. Supp. 3d 1052, 1084 (N.D. Cal. 2014) (emphasis added).

The rationale provided by courts who have reached the opposite conclusion **[**114]** is typically as follows:

> The Court finds that *Shady Grove*'s reasoning with respect to New York's class action ban is equally applicable to Illinois's requirement that class actions be brought by the Attorney General. It is true that the Seventh Circuit has noted that Illinois's decision to repeal *Illinois Brick* and allow indirect purchaser lawsuits "reflects different judgments about the feasibility of trying such claims and the potential danger of duplicative recoveries." *Ill., ex rel. Burris v. Panhandle E. Pipe Line Co., 935 F.2d 1469, 1480 (7th Cir.1991)*. And some district courts have identified this statement as an indication that the Seventh Circuit considers decisions about the "feasibility" of indirect purchaser suits to be a substantive, not procedural, issue. *See In re Opana ER Antitrust Litig., 162 F. Supp. 3d at 723* (citing *In re Wellbutrin XL Antitrust Litig., 756 F. Supp. 2d 670, 677 (E.D. Pa. 2010))*. Moreover, the *Illinois Brick* issue — whether indirect purchasers can bring suit at all, even individually — is certainly substantive in that it affects the "rights and remedies" of indirect purchasers. But whether such plaintiffs may bring a class action does not affect their substantive rights. The availability of the class action procedure does not change the substantive rights or remedies available to them under Illinois law. *See In re Lithium Ion Batteries Antitrust Litig., 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377, at *21 (N.D. Cal. Oct. 2, 2014)* [Gonzalez-Rogers, J.]; *In re Aggrenox Antitrust Litig., 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at *6 (D. Conn. Aug. 9, 2016)*.

Broiler Chicken Antitrust, 290 F. Supp. 3d at 817-18.

The Court finds Judge Orrick's **[**115]** analysis in *United Food* more persuasive than the analysis in *Broiled Chicken Antitrust*. This is especially true given this Court's take on *Shady Grove* as articulated in *In re MyFord Touch Consumer Litigation, No. 13-cv-03072-EMC, 2016 U.S. Dist. LEXIS 179487 (N.D. Cal. Sep. 14, 2016)*. The Court noted as follows:

> While the Ninth Circuit has not expressly recognized this, it has relied on Justice Stevens's concurrence for the proposition that ***HN25***[↑] "there are some state procedural rules that federal courts must apply in diversity cases because they function as part of the State's definition of the substantive rights and remedies." **[*626]** *Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1187 (9th Cir. 2013)*. Under Justice Stevens's analysis, *Rule 23* will not govern here if the Colorado and Virginia statutes are "procedural in the ordinary use of the term but [are] so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Shady Grove, 559 U.S. 393, 423, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010)* (Stevens, J., concurring)."

*Id. at *77-78*. Here, the Illinois prohibition on class actions is deeply intertwined with the rights under the *Illinois Brick* repealer.

Accordingly, the Court grants Gilead's motion to dismiss on the Illinois Antitrust Act — more specifically, to the extent Plaintiffs seek damages as indirect purchasers for a violation of the state statute, such is **[**116]** not permissible.

2. Puerto Rico Antitrust Act

Title 10 of the Puerto Rico code deals with commerce, and Chapter 13 within that title deals with monopolies and restraint of trade. *See generally 10 L.P.R.A. §§ 251-276*. Unlike Illinois, Puerto Rico does not have an *Illinois Brick* repealer statute. *Section 268* of the code simply provides: "Any person who shall be injured in his business or property by any other person, by reason of acts or intended acts, forbidden or declared to be unlawful by the provisions of this chapter, except *§ 259* and *261* of this title, may sue therefor . . . ." *Id. § 268*.

Similar to above, there is conflicting authority as to whether Puerto Rico allows for damages for indirect purchasers under Puerto Rico law.

For example, in *United Food*, Judge Orrick took note that, in *Rivera-Muniz v. Horizon Lines Inc., 737 F. Supp. 2d 57, 61 (D.P.R. 2010)*, a district court from Puerto Rico held that, "'[b]ecause Puerto Rico liberally construes its standing requirements in private antitrust cases . . . it is immaterial whether Plaintiffs are direct or indirect purchasers of cabotage services.'" *United Food, 74 F. Supp. 3d at 1086* (quoting *Rivera-Muniz*). On the other hand, there were two decisions from the Northern District of California that favored the antitrust defendants.

> In the first, **[**117]** *In re TFT-LCD Antitrust Litig., 599 F. Supp. 2d 1179 (N.D. Cal. 2009)* the court dismissed the claims under Puerto Rico law because it was "reluctant to find standing in the absence of an explicit *Illinois Brick* repealer, either by statute or case law." *Id. at 1188*. . . . In the second, *In re Static Random Access Memory Antitrust Litig., Case No. 07-mdl-01819 CW, 2010 U.S. Dist. LEXIS 131002, (N.D. Cal. Dec. 8, 2010)*, the court dismissed the indirect purchaser claims because "IP Plaintiffs point to no authority that suggests that *Illinois Brick*'s interpretation of federal ***antitrust law*** would not be applied to Puerto Rico law" and because of the ruling in *In re TFT-LCD Antitrust Litig., 2010 U.S. Dist. LEXIS 131002*.

United Food, 74 F. Supp. 3d at 1086-87. Finally, Judge Orrick acknowledged that, in a district court case from Massachusetts, the court considered each of the three cases identified above and held that "'in light of the fact that ***HN26***[] Puerto Rico ***antitrust law*** has been interpreted in accordance with federal ***antitrust law***, which does not allow claims from indirect purchasers following *Illinois Brick* — this Court dismisses the claims arising under the Puerto Rico law.'" *Id. at 1087* (quoting *In re Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp. 2d 367, 410 (D. Mass. 2013))*.

After surveying this authority, Judge Orrick ultimately came down on the side of the antitrust defendant, particularly because **[*627]** he did not find *Rivera-Muniz* persuasive.

> I realize that the court in *Rivera-Muniz* first noted that the "[Puerto **[**118]** Rico Antitrust Act] is modeled after federal antitrust statutes" and then relied solely on *Pressure Vessels of P.R., Inc. v. Empire Gas de P.R., 137 P.R. Dec. 497, 509-18, 1994 Juris P.R. 144 (1994)* as authority that Puerto Rico nevertheless "explicitly rejects" the indirect purchaser standing limitations imposed under the federal statutes. *Id. at 737 F. Supp. 2d at 61*. However, the *Pressure Vehicles* court did not address the standing of indirect purchasers under the PRAA and did not discuss *Illinois Brick* or whether it had been repealed by Puerto Rico. Instead, the *Pressure Vehicles* court relied on cases recognizing the "liberal standing theory under *Clayton Act sec. 4*" and concluded that "plaintiff need not establish anything beyond a factual causal relation between the injury and the violation to meet the" pleading requirements under the PRAA; "it suffices that the plaintiff has been injured as a result of the statutory violation." *Pressure Vessels of Puerto v. Empire Gas P.R., 137 D.P.R. 497, 1994 Juris P.R. 144, 1994 WL 909547 (P.R. 1994)*.
>
> Because neither *Rivera-Muniz* nor *Pressure Vehicles* addressed *Illinois Brick*, I agree with the weight of authority and find that the claims under Puerto Rico's statute must be DISMISSED with prejudice.

Id. at 1087; *see also* *In re Loestrin 24 FE Antitrust Litig., 410 F. Supp. 3d 352, 2019 WL 5406077, at *7 (D.R.I. 2019)* ("join[ing] the majority of courts in concluding that the EPPs do not have standing to bring antitrust **[**119]** claims under Puerto Rico law"); *Opana, 162 F. Supp. 3d at 723* (finding *Rivera-Muniz* unpersuasive for similar reasons; stating that "[a]bsent an interpretation by the courts of Puerto Rico allowing antitrust recovery by indirect purchasers or an express *Illinois Brick* repealer statute enacted by the legislature, the Court concludes that EPPs' indirect purchaser antitrust claim is barred in Puerto Rico and must be dismissed with prejudice"); *In re Aggrenox Antitrust Litig., 94 F. Supp. 3d 224, 251 (D. Conn. 2015)* (noting that "*Pressure Vessels* did not address indirect-purchaser standing or the rule of *Illinois Brick*[,] [a]nd though I agree with the indirect purchasers' contention that the courts of a particular jurisdiction can authoritatively interpret their laws as allowing antitrust recovery by indirect purchasers even in the absence of an express *Illinois Brick* repealer by the legislature, I cannot conclude that *Pressure Vessels* is such an authoritative statement").

In contrast, a New York district court has found in favor of the antitrust plaintiff.

> The Court recognizes that many district courts in the continental United States have dismissed indirect purchaser claims under the PRAA for lack of standing, based on the idea that the PRAA is modeled on federal statutes that do not extend **[**120]** standing to indirect purchasers. *See, e.g.*, *Opana ER, 162 F.Supp.3d at 723* (collecting cases); *In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 413 (S.D.N.Y. 2011)*.
>
> Nonetheless, this Court finds that the U.S. District Court for the District of Puerto Rico has more faithfully interpreted the standing requirements of the PRAA, in light of how the Supreme Court of Puerto Rico reads that statute. *Rivera-Muniz, 737 F. Supp. 2d at 61* (citing *Pressure Vessels P.R. v. Empire Gas P.R., 137 D.P.R. 497, 520, 1994 Juris P.R. 144 (P.R. 1994))*.
>
> In *Pressure Vessels*, the Supreme Court of Puerto Rico interpreted the private damages section of the PRAA to hold that private remedies were available to any plaintiff who met the following conditions: **[*628]** (1) the person was harmed in his business or property (2) by reason of (3) actions prohibited by law. *137 D.P.R. at 518*. The Supreme Court of Puerto Rico reasoned that, in order to satisfy this second prong, a plaintiff need only allege that "as a consequence of the legal violation, he has been injured." *Id. at 520*. Based on this interpretation of the PRAA in *Pressure Vessels*, the Court in *Rivera-Muniz* held, "Because Puerto Rico liberally construes its standing requirements in private antitrust cases, it is immaterial whether Plaintiffs are direct or indirect purchasers." *Rivera-Muniz, 737 F. Supp. 2d at 61* (internal citation omitted).
>
> Defendants' motion to dismiss this claim is, therefore, DENIED.

[121]** *Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, plc, No. 15 CIV. 6549 (CM), 2018 U.S. Dist. LEXIS 220574, 2018 WL 7197233, at *23 (S.D.N.Y. Dec. 26, 2018)*.

As above, the Court finds Judge Orrick's *United Food* decision more persuasive. The Court therefore grants Gilead's motion to dismiss on the Puerto Rico Act, in particular, to the extent Plaintiffs seek damages as indirect purchasers.

3. Rhode Island Antitrust Act

For the Rhode Island Antitrust Act, Gilead argues that Rhode Island did not adopt an *Illinois Brick* repealer statute until July 15, 2013, *see* *R.I. Gen. Laws § 6-36-7(d)* (providing that, "[i]n any action under this chapter, the fact that a person or public body has not dealt directly with the defendant shall not bar or otherwise limit recovery[,] [p]rovided, however, that courts shall exclude from the amount of monetary relief awarded in the action any amount of monetary relief which duplicates amounts which have been awarded for the same injury"); 2013 R.I. SB 840 (July 15, 2013) (adding *§ 6-36-7(d)*); "[t]hus, any Rhode Island Antitrust Act claim for damages based on conduct prior to July 15, 2013 must be dismissed." Gilead Mot. at 36.

In response, Plaintiffs argue that "[t]he repealer provision should be applied retroactively." Opp'n at 72. But the cases on which Plaintiffs rely are not persuasive. For example, in *Landgraf v. Usi Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)*, the Supreme Court stated that **[**122]** there is a "traditional presumption against truly 'retrospective' application of a statute." *Id. at 279*. And with respect to *Pion v. Bess Eaton Donuts Flour Co., 637 A.2d 367 (R.I. 1994)*, Plaintiffs have taken a select quotation. ***HN27***[↑] The full context for the quotation is as follows:

> Generally, it is presumed that statutes and their amendments are "to operate prospectively unless it appears by clear, strong language or by necessary implication that the Legislature intended to give the statute retroactive effect." *VanMarter v. Royal Indemnity Co., 556 A.2d 41, 44 (R.I. 1989)*. If a statute lacks clear direction or necessary implication concerning its retroactive application, the difference between a substantive statute and a remedial or procedural statute becomes relevant. *See* *Lawrence v. Anheuser-Busch, Inc., 523 A.2d 864, 869 (R.I. 1987)*. Substantive statutes, which create, define, or regulate substantive legal rights, must be applied prospectively. *See id.* In contrast, remedial and procedural statutes, which do not impair or increase

> substantive rights but rather prescribe methods for enforcing such rights, may be construed to operate retroactively. *See id.*

Id. at 371.

HN28[] There is no clear and strong language directing that the Rhode Island repealer statute be given retroactive effort. Accordingly, the Court concludes that **[*629]** there is no retroactive application for the Rhode Island *Illinois Brick* ***[**123]*** repealer statute and, to that extent, Gilead's motion to dismiss is granted.

4. Utah Antitrust Act

The Utah code provides in relevant part that "[a] person who is a citizen of this state or a resident of this state and who is injured or is threatened with injury in his business or property by a violation of the Utah Antitrust Act may bring an action for injunctive relief and damages, regardless of whether the person dealt directly or indirectly with the defendant." *Utah Code Ann. § 76-10-3109(1)(a)*. Gilead underscores that "[t]he Utah Antitrust Act permits damages claims by indirect purchasers only if they are citizens or residents of the state," but here "[n]o Plaintiffs are alleged to meet this description." Gilead Mot. at 36. Gilead adds that "Plaintiffs cannot rely on absent class members to meet the . . . citizenship/residence requirement." Gilead Reply at 18.

The Court rejects Gilead's argument. This is essentially the *Melendres* issue discussed above. *See also* *In re Generic Pharms. Pricing Antitrust Litig., 368 F. Supp. 3d 814, 838 (E.D. Pa. 2019)* (noting that "'[a]llegations that members of the putative class presumably include Utah . . . citizens and residents are sufficient to overcome a motion to dismiss'"). Therefore, the motion to dismiss the damages claim under the Utah statute is denied without **[**124]** prejudice. The remedy is, however, restricted to citizens and residents of Utah.

5. Maryland Antitrust Act

In 1993, the Maryland code was amended to include the following provision: "A person whose business or property has been injured or threatened with injury by a violation of *§ 11-204* may maintain an action for damages or for an injunction or both against any person who has committed the violation." *Md. Code Ann. § 11-209(b)(2)(i)* (1993); *see also* 1993 MD. SB 196 (May 27, 1993). In 2002, a state appellate court held that *§ 11-209(b)(2)(i)* follows the *Illinois Brick* rule, particularly because "*section 11-202(a)(1)*[] states the purpose of [the Maryland Antitrust Act] is 'to complement the body of federal law governing restraints of trade, unfair competition, and unfair, deceptive, and fraudulent acts or practices.'" *Davidson v. Microsoft Corp., 143 Md. App. 43, 50, 792 A.2d 336 (2002)*. The appellate court also cited legislative history in support. *See* *id. at 51* (noting, *inter alia*, that a bill from 2001 which "would have amended 11-209(b) to permit suits by private parties who dealt indirectly with the violator . . . was defeated in committee").

In 2017, however, *§ 11-209(b)(2)(i)* was amended and now reads as follows: "A person whose business or property has been injured or threatened with injury by a violation of *Section 11-204* of this subtitle may maintain **[**125]** an action for damages or for an injunction or both against any person who has committed the violation *regardless of whether the person maintaining the action dealt directly or indirectly with the person who has committed the violation*." *Md. Code Ann. § 11-209(b)(2)(i)* (2017) (emphasis added); *see also* 2017 Md. HB 1415 (May 27, 2017); 2017 Md. SB 858 (May 27, 2017).

Based on the above, Gilead argues that, up until the 2017 *Illinois Brick* repealer statute, indirect purchasers could not get damages under Maryland law. *See* Gilead Reply at 18. ("Maryland's 2017 *Illinois Brick* repealer does not apply retroactively."). Plaintiffs do not appear to substantively dispute such — they do not, *e.g.*, argue for retroactive application. Hence, the antitrust claim based on Maryland law is dismissed to the extent damages to indirect **[*630]** purchasers are claimed prior to May 27, 2017.

6. Massachusetts Consumer Protection Act

Title XV of the Massachusetts code concerns the regulation of trade. The antitrust provisions in the Massachusetts code can be found in chapter 93. In turn, the regulation of business practices for the protection of consumers can be found in chapter 93A.

In chapter 93A, governing consumer protection, there **[**126]** are two different provisions giving rise to a private right of action for unfair methods of competition or deceptive acts or practices.

- *Section 9 of chapter 93A* provides: "Any person, other than a person entitled to bring action under *section 11* of this chapter, who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued thereunder . . . may bring an action in the superior court . . . for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper." *Mass. G.L. ch. 93A, § 9*.

- *Section 11 of chapter 93A* in turn provides: "Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person who engaged in any trade or commerce of any unfair method of competition or an unfair or deceptive act or practice declared unlawful by section two or by any rule or regulation issued under *paragraph (c)* of section two may, as hereinafter provided, bring an action in the superior court . . . for damages and such equitable relief, including an injunction, as the court deems to be proper and necessary." *Mass. G.L. ch. 93A, § 11*.

HN29[] Massachusetts **[**127]** courts have indicated that the difference between *§ 9* and *§ 11* is that *§ 9* makes "consumer claims" actionable while *§ 11* makes "business claims" actionable. *See* *Lantner v. Carson, 374 Mass. 606, 610, 373 N.E.2d 973 (1978)* (noting that, "where *§ 9* affords a private remedy to the individual consumer . . . , an entirely different section, *§ 11*, extends the same remedy to 'any person who engages in the conduct of any trade or commerce'"); *Frullo v. Landenberger, 61 Mass. App. Ct. 814, 821, 814 N.E.2d 1105 (2004)* (stating that "General Laws c. 93A distinguishes between 'consumer' and 'business' claims, the former actionable under *§ 9*, the latter actionable under *§ 11*"); *see also* *Continental Ins. Co. v. Bahnan, 216 F.3d 150, 156 (1st Cir. 2000)* (noting that "*section 11* affords no relief to consumers and, conversely, *section 9* affords no relief to persons engaged in trade or commerce"). Although "[t]he dividing line between a consumer claim and a business claim for purposes of *G.L. c. 93A, §§ 9* and *11*[] is not always clear," "the choice appears to turn on whether a given party has undertaken the transaction in question for business reasons, or has engaged in it for purely personal reasons (such as the purchase of an item for personal use)." *Id.* "[A]ny transaction in which the plaintiff is motivated by business considerations gives rise to claims under the statute's business section," and the fact "[t]hat a transaction may be an isolated **[**128]** one not in the normal course of business does not insulate it from the reach of . . . *§ 11*." *Id.*

In the instant case, Gilead contends that "five of the Plaintiffs . . . are union insurers, not consumers," Gilead Mot. at 36, and thus they can only bring *§ 11* claims. ***HN30***[] The Massachusetts Supreme Court has held **[*631]** that, under *§ 11*, claims by indirect purchasers are not permissible — in contrast to *§ 9* consumer claims which do allow for claims by indirect purchasers. This issue was addressed by the Massachusetts Supreme Court in *Ciardi v. F. Hoffman La Roche, Ltd., 436 Mass. 53, 762 N.E.2d 303 (2002)*.

There, the state Supreme Court began by noting that the Massachusetts Antitrust Act — covered by chapter 93 of the code as opposed to chapter 93A — was to be construed in harmony with federal ***antitrust law***. "Because the [Massachusetts] Antitrust Act is to be construed in harmony with judicial interpretations of comparable Federal antitrust statutes, the rule of law established in *Illinois Brick* . . . would apply with equal force to preclude claims brought under G.L. c. 93 by indirect purchasers in Massachusetts. *Id. at 57-58*. The plaintiff in *Ciardi*, however, was not bringing a claim under chapter 93 but rather under chapter 93A. "In analyzing what constitutes unfair methods of competition and **[**129]** unfair or deceptive acts or practices, which are not defined in G. L. c. 93A, this court looks to interpretations by the Federal Trade Commission and Federal courts of *§ 45(a)(1) of the Federal Trade Commission Act (FTC Act)*." *Id. at 59*. The FTC "may . . . enforce the antitrust laws." *Id.* Moreover,

> [t]he plain and unambiguous language of G.L. c. 93A reveals no legislative intent to limit lawsuits for price-fixing to direct purchasers. To the contrary, because the language of *G.L. c 93A, §§ 1*, *9(1)*, allows *any* person who has been injured by trade or commerce *indirectly* affecting the people of this Commonwealth to bring a cause of action, the plaintiff is the type of consumer the Legislature intended to protect.

Id. (emphasis in original). Finally, the state Supreme Court pointed out that "the language of the [Massachusetts] Antitrust Act unambiguously states that 'it shall have no effect upon the provisions of [c. 9A], except as *explicitly provided in said* [c. 93A].'" *Id. at 62* (emphasis in original). In contrast to *§ 9*, *§ 11* — *i.e.*, the provision giving rise to business claims instead of consumer claims — "*includes a specific provision that in any action brought under that section, the court shall be guided in its interpretation* ***[**130]*** *of unfair methods of competition by the provisions of the [Massachusetts] Antitrust Act. [Section] 9*[] contains no such explicit provision." *Id. at 62-63* (emphasis added); *see also United Food, 74 F. Supp. 3d at 1086* (noting that "indirect purchaser claims cannot be asserted under *Section 11*"); *In re Cathode Ray Tube (CRT) Antitrust Litig., No. C 07-5944 SC, 2014 U.S. Dist. LEXIS 35387, at *66 (N.D. Cal. Mar. 13, 2014)* (stating that, "while corporations engaged in commerce can bring suits under *Section 11* and potentially win them, a corporation engaged in commerce whose suit is based on indirect purchases will not have standing under *Section 11*"). Accordingly, as a general matter, *§ 9* consumer claims may be brought by indirect purchasers, but not *§ 11* business claims.

In the instant case, Gilead asserts that the union plaintiffs can bring only *§ 11* claims. As Gilead points out, two district courts have held that health and welfare funds have only *§ 11* claims when they purchase products not for their own personal use but rather for the use of their members. *See United Food, 74 F. Supp. 3d at 1085* (noting that, "according to their own complaint, the EPPs did not purchase the products (and/or provide reimbursement for those products) for their personal use, but for the use of their members[;] [t]he Plan and the City appear to be engaged in the 'trade or commerce' of providing health and welfare **[**131]** benefits"); *In re Asacol Antitrust Litig., No. 15-cv-12730-DJC,* ***[*632]*** *2016 U.S. Dist. LEXIS 94605, at *43-44 (D. Mass. July 20, 2016)* (stating that health fund plaintiffs — *i.e.*, organizations — "cannot bring a claim under *§ 9* as they cannot show that they undertook the relevant transactions 'for purely personal reasons (such as the purchase of an item for personal use)'").

HN31[] On the other hand, as Plaintiffs note, the union insurers are nonprofit entities, and there is case law indicating that "a party's status as a non-profit influences [the] analysis"; "'[i]n most circumstances, a charitable institution will not be engaged in trade or commerce *when it undertakes activities in furtherance of its core mission*.'" *In re Pharm. Indus. Avg. Wholesale Price Litig., 491 F. Supp. 2d 20, 81 (D. Mass. 2007)* (emphasis added; quoting *Linkage Corp. v. Trs. of Bos. Univ., 425 Mass. 1, 26, 679 N.E.2d 191 (1997))*. For example, in *In re Lorazepam & Clorazepate Antitrust Litigation, 295 F. Supp. 2d 30 (D.D.C. 2003)*, the plaintiff was Blue Cross Blue Shield of Massachusetts ("BCBS"). It brought an unfair competition claim against several pharmaceutical companies on its own behalf as a third-party payor of prescription drugs for its insureds. The court held that BCBS's claim fell under *§ 9* (instead of *§ 11*), explaining as follows:

> BCBS Massachusetts's charitable mission is set forth in its enabling statute, Mass. Gen Laws ch. 176B ("ch. 176B"). Further, BCBS Massachusetts has alleged that it is a medical service corporation under **[**132]** ch. 176B, and operates as a "nonprofit medical service plan" pursuant to which it provides "health services," including prescription drug benefits, to its members. *See* Complaint ¶ 14; *see also* generally ch. 176B. BCBS Massachusetts's core mission has been recognized by the First Circuit as well:
>
>> Blue Shield of Massachusetts, Inc. and Blue Cross of Massachusetts, Inc. are nonprofit, tax exempt medical service and hospital service corporations, organized to provide "for the preservation of the public health by furnishing medical services at low cost to members of the public who become subscribers. . . ." 1941 Mass. Acts c. 306, preamble. Mass. G.L. c. 176B (Blue Shield); c. 176A (Blue Cross).
>
> *Kartell v. Blue Shield of Massachusetts, Inc., 592 F.2d 1191, 1191 (1st Cir. 1979)*. The transactions identified by Plaintiff here — payment for members' prescription drug claims, *see, e.g.*, Complaint ¶¶ 1-8 — are clearly at the core of BCBS Massachusetts's charitable mission. Further, while the Court has not found cause to review any of Plaintiff's financial statements, the Court must construe the complaint in the light most favorable to the Plaintiff and accepts as true for purposes of the instant motion BCBS Massachusetts's allegation that it does not "profit" under the specific **[**133]** transactions at issue (i.e., payment for its members' prescription drug claims).

Id. at 45-46. The court added that "an absence of legislative mandate tend[s] to indicate the presence of *Section 11* 'trade or commerce,'" but here "BCBS Massachusetts is a creation of statutory law that [is] subject to both legislative mandate and constraint. For example, pursuant to *Mass. Gen. Laws ch. 176, § 23* and *ch. 176B, § 13*, the state commissioner of the Division of Insurance is responsible for ascertaining, *inter alia*, that BCBS Massachusetts is 'not being operated for profit' and is maintaining sufficient reserves." *Id. at 46*. *Compare S. Shore Hellenic Church, Inc. v. Artech Church Interiors, Inc., 183 F. Supp. 3d 197, 202 (D. Mass. 2016)* (noting that, *in Linkage* — where the plaintiff-company sued Boston University, a nonprofit entity, for unlawfully terminating an agreement under which the plaintiff provided educational, training, and other programs of a technical nature at a satellite **[*633]** facility owned by the university — the court held that the university had engaged in trade or commerce because "it [had] cut a private company out of a lucrative market").

Because a party's status as a nonprofit affects the analysis as to whether it has a *§ 9* or *§ 11* claim, the Court shall allow the union insurers' claims based on the Massachusetts Consumer Protection Act to proceed. **[**134]** The union insurers' role arguably is akin to that of consumers; the factual record must be developed in order for the Court or the trier of fact to make an informed determination as to whether the union insurers profit from paying its insureds' prescription drug claims.

7. Summary

Gilead's motion to dismiss the indirect purchaser claims for damages is granted as to the Illinois Antitrust Act and the *Puerto Rico Antitrust Act*. On the *Rhode Island Antitrust Act* and the *Maryland Antitrust Act*, Rhode Island and Maryland each has an *Illinois Brick* repealer statute but indirect purchaser claims for damages prior to the effective date of that statute are not viable. The motion to dismiss the indirect purchaser claims for damages under the *Utah Antitrust Act* and the Massachusetts Consumer Protection Act is denied without prejudice.

E. Consumer Protection Claims: Circumvention of the *Illinois Brick* Rule

Gilead notes that Plaintiffs have brought not only antitrust claims under state law but also state law consumer protection claims. According to Gilead, certain states have an *Illinois Brick* rule for their antitrust laws; to the extent they do, Plaintiffs cannot try to "end run" the *Illinois Brick* ***[**135]*** rule by recasting the antitrust claims as consumer protection claims. *See* Gilead Mot. at 37 (arguing that the "consumer-protection claims under the laws of Arkansas, Connecticut, Illinois, Idaho, Missouri, Montana, Puerto Rico, Rhode Island, and Utah must fail").

Gilead's argument is problematic. In support, Gilead cites *In re DDAVP Indirect Purchaser Antitrust Litig. v. Ferring Pharms. Inc., 903 F. Supp. 2d 198 (S.D.N.Y. 2012)*. But there the court simply agreed with other courts holding that, "'where the applicable state law bars antitrust actions for damages by indirect purchasers . . . a plaintiff cannot circumvent the statutory framework by recasting an antitrust claim as *one for unjust enrichment*.'" *Id. at 232*. Here, Plaintiffs are not bringing a claim for unjust enrichment but rather a statutory claim for consumer protection. Furthermore, as Plaintiffs note in their papers, "[m]any of the [the] statutes . . . contain 'harmonization' provisions providing a legislative mandate that the statutes be interpreted in accordance with the *Federal Trade Commission ('FTC') Act*." Opp'n at 75. Finally, the consumer protection statutes cover more than just anticompetitive conduct — typically covering unfair, unconscionable, or deceptive conduct. *See* Opp'n at 75.

Accordingly, the Court denies Gilead's motion **[**136]** to dismiss based on the "end run" argument (as applied to state consumer protection laws).

F. Consumer Protection Claims: Conclusorily Pled

Gilead argues, in effect, that the consumer protection claims have been conclusorily pled — "providing no information on how the claims at issue satisfy the particular requirements of each state's individual consumer-protection statutes." Gilead Mot. at 37; *see also* Gilead Reply at 19 (arguing that Plaintiffs "ignore the differences among state consumer-protection laws").

This argument has no merit. Plaintiffs have been clear about what wrongdoing has allegedly been committed by Gilead. If **[*634]** Gilead believes that specific elements of consumer protection claims have not been met, that is their obligation to identify those specific elements.

G. Consumer Protection Claims: Deceptive Conduct

According to Gilead, fifteen states require deceptive conduct, or at least conduct directed to and relied upon by a consumer, in order to state a consumer protection claim, but, here, "the Complaint alleges no such conduct." Gilead Mot. at 15. Gilead cites to the laws of Arizona, California, District of Columbia, Idaho, Illinois, Kansas, Maine, Michigan, New York, Nevada, **[**137]** New Mexico, Rhode Island, Tennessee, Utah, and West Virginia. Following are the specific state laws identified by Gilead:

• Arizona. "The act, use or employment by any person of any deception, deceptive or unfair act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely on such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice." *Ariz. Rev. Stat. § 44-1522(A)*; *see also id.* *§ 44-1522(C)* (providing that "[i]t is the intent of the legislature, in construing subsection A, that the courts may use as a guide interpretations given by the federal trade commission and the federal courts to *15 United States Code sections 45*, *52* and *55(a)(1)*").

• California. "[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with *Section 17500*) of Part 3 of Division 7 of the Business and Professions Code." *Cal. Bus. & Prof. Code § 17200*.

• District of Columbia. "It shall be a violation of this chapter for any person **[**138]** to engage in an unfair or deceptive trade practice, whether or not any consumer is in fact misled, deceived, or damaged thereby, including to: [*inter alia*] (f) fail to state a material fact is such failure tends to mislead." *D.C. Code § 28-3904(f)*; *see also id.* *§ 28-3901(d)* (providing that, "[i]n construing the term 'unfair or deceptive trade practice' due consideration and weight shall be given to the interpretation by the Federal Trade Commission and the federal courts of the term 'unfair or deceptive act or practice,' as employed in *section 5(a)* of An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes, approved September 26, 1914").

• Idaho. "The following unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful, whether a person knows, or in the exercise of due care should know, that he has in the past, or is: [*inter alia*] (17) Engaging in any act or practice which is otherwise misleading, false, or deceptive to the consumer." *Idaho Code § 48-603(17)*.

• Illinois. "Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false **[**139]** pretense, false promise, misrepresentation or the concealment, suppression or omission **[*635]** of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in *Section 2 of the 'Uniform Deceptive Trade Practices Act' [815 ILCS 510/2*], approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby." *815 Ill. Comp. Stat. § 505/2*.[35]

• Kansas. "No supplier shall engage in any deceptive act or practice in connection with a consumer transaction." *Kan. Ann. Stat. § 50-626(a)*. "Deceptive acts and practices include, but are not limited to the following, each of which is hereby declared to be a violation of this act, whether or not any consumer has in fact been misled: [*inter alia*] (3) the willful failure to state a material fact, or the willful concealment, suppression or omission of a material fact." *Id.* *§ 50-626(b)(3)*.

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[35] Regarding a claim of deception based on concealment or suppression, an Illinois state court has noted that "sellers have a duty not to conceal or suppress known material facts regarding products from potential buyers" and that, for liability to attach, "a plaintiff must establish that defendants intended that [the consumers] rely on the suppression in making their choice to buy." *Jensen v. Bayer AG, 371 Ill. App. 3d 682, 689, 862 N.E.2d 1091, 308 Ill. Dec. 888 (2007)*.

• Maine. "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful." *5 Me. Rev. Stat. § 207*; *see also id. § 207(1)* (providing that "[i]t is the intent of the Legislature that in construing this section the **[**140]** courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to *Section 45(a)(1) of the Federal Trade Commission Act* (*15 United States Code 45(a)(1)*), as from time to time amended").

• Michigan. "Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows: [*inter alia*] (s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer." *Mich. Comp. Laws § 445.903(1)(s)*.

• New York. "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." *N.Y. Gen. Bus. Law § 349(a)*.

• Nevada. "A person engages in a 'deceptive trade practice' if, in the course of his or her business or occupation, he or she: [*inter alia*] (15) Knowingly makes any other false representation in a transaction." *Nev. Rev. Stat. § 598.0915(15)*.

• New Mexico. "Unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful." *N.M. Stat. Ann. § 57-12-3*. "'[U]nfair or deceptive trade practice' means an act specifically declared unlawful pursuant to the *Unfair Practices Act*, a false or misleading oral or written **[**141]** statement, visual description or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services . . . that may, tends to or does **[*636]** deceive or mislead any person . . . ." *Id. § 57-12-2(D)*.

• Rhode Island. "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful." *R.I. Gen. Laws § 6-13.1-2*. "'Unfair methods of competition and unfair or deceptive acts or practices' means any one or more of the following: [*inter alia*] (xiii) Engaging in any act or practice that is unfair or deceptive to the consumer." *Id. § 6-13.1-1(6)(xiii)*:

• Tennessee. "Unfair or deceptive acts or practices affecting the conduct of any trade or commerce constitute unlawful acts or practices . . . ." *Tenn. Code § 47-18-104(a)*. "The following unfair or deceptive acts or practices affecting the conduct of any trade or commerce are declared to be unlawful and in violation of this part . . . ." *Id.* at *47-18-104(b)*; *see also id. § 47-18-115* (providing that "[i]t is the intent of the general assembly that this part shall be interpreted and construed consistently with the interpretations given by the federal trade commission and the federal courts pursuant to *§ 5(a)(1) of the Federal Trade Commission Act*, **[**142]** codified in *15 U.S.C. § 45(a)(1)*").[36]

• Utah. "A deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter . . . ." *Utah Code § 13-11-4(1)*. In addition, "[a]n unconscionable act or practice by a supplier in connection with a consumer transaction violates this act . . . ." *Id. § 13-11-5(1)*.

• West Virginia. "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." *W. Va. Code § 46A-6-104*. "'Unfair methods of competition and unfair or deceptive acts or practices' means and includes, but is not limited to, any one or more of the following: [*inter alia*] (M) The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or

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[36] *See also In re New Motor Vehicles Canadian Exp. Antitrust Litig., 350 F. Supp. 2d 160, 203 (D. Me. 2004)* (acknowledging that the Tennessee statute directs a court to look to federal interpretation of the FTC Act for guidance but nevertheless "follow[ing] the narrower interpretation of the Tennessee courts" — *i.e.*, "deception is required for a *TCPA* claim").

advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby." *Id.* § 46A-6-102(7)(M).[37]

As an initial matter, Gilead's position is questionable because it is not clear that all of the states identified condemn deceptive conduct only — *e.g.*, on their **[**143]** face, some of the statutes seem to implicate unfair conduct as well. *Compare* In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 516 F. Supp. 2d 1072, 1117 (N.D. Cal. 2007) (Hamilton, J.) (noting that **[*637]** the Utah statute — unlike the FTC Act — does *not* refer to unfair competition, and therefore "the FTCA's prohibition on antitrust price-fixing should not be read into the CSPA here") (emphasis omitted).

But putting aside that point, Plaintiffs fairly point out that they have claimed deception, more specifically in the form of concealment: "Plaintiffs have . . . alleg[ed] a conspiracy between Gilead and its coconspirators to monopolize the cART market and maintain artificially high prices, a fact that Defendants *concealed* from Plaintiffs." Opp'n at 77 (emphasis added). At least some courts have found this a plausible claim of deception. *See, e.g.,* GPU, 527 F. Supp. 2d at 1030 (Alsup, J.) (concluding that plaintiffs made sufficient allegations to state a claim under state consumer protection law because plaintiffs "contend that defendants have engaged in deceptive acts to conceal the alleged agreement to fix prices" — *i.e.*, "[d]efendants hid the alleged conspiracy from plaintiffs, resulting in plaintiffs paying higher prices"); *see also* In re Lamictal Indirect Purchaser & Antitrust Consumer Litig., 172 F. Supp. 3d 724, 752-53 (D.N.J. 2016) (stating that "anticompetitive conduct can violate § 349 [of New York law] if it is deceptive **[**144]** in nature" — *e.g.*, if defendants made efforts to conceal an anticompetitive agreement, if defendants secretly agreed to raise prices, or if defendants entered into secret anticompetitive agreements). *Compare* Leider v. Ralfe, 387 F. Supp. 2d 283, 295-97 (S.D.N.Y. 2005) (noting that § 349 refers to deceptive, but not unfair, practices; manipulation of a market is a generic antitrust scheme and not deception).

However, if the claim is based on such deception, it is not clear what relief Plaintiffs seek as a result of Defendants' deception. Arguably, Plaintiffs' cannot conflate harm from Defendants' deception with harm from Defendants' anticompetitive conduct. *Cf.* Motor Vehicles Canadian, 350 F. Supp. 2d at 176-77, 189 (rejecting argument that there was actionable deception under, *inter alia*, Michigan law, because defendants failed to inform consumers about conspiracy to keep out Canadian cars, which inflated new car prices in the United States; price differential was not hidden from or unknown to consumers — thus, "if United States consumers failed to acquire the cheaper Canadian vehicles, it was because they did not care to, or because the alleged conspiracy prevented Canadian dealers from selling to them . . . , not because the conspiracy was unknown"). The Court therefore orders Plaintiffs to provide **[**145]** a more definite statement as to what relief is sought for any deceptive conduct.

H. Consumer Protection Claims: Consumer Requirement

Gilead argues that ten states/jurisdictions "allow a plaintiff to sue only in its capacity' as a consumer," and, here, five of the plaintiffs are union insurers — who are not consumers but rather third-party payors. Gilead Mot. at 38 (citing to the laws of the District of Columbia, Hawaii, Kansas, Maine, Missouri, Montana, North Carolina, Rhode Island, Utah, and Vermont).

In response, Plaintiffs argue that the union insurers do constitute "consumers" because "third-party payor Plaintiffs participate in consumer transactions by paying some or all of the prices charged to individual consumers and, as a result, pay a portion of any overcharges. These purchases are made for the personal purposes of the patient." Opp'n at 77. Plaintiffs admit that the union insurers "do not personally use the products, [but] they nonetheless purchase them for others' personal use." Opp'n at 78.

The states at issue are addressed below.

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[37] Regarding a claim of deception based on concealment or suppression, a West Virginia state court has noted as follows: "Where concealment, suppression or omission is alleged, and proving reliance is an impossibility, the causal connection between the deceptive act and the ascertainable loss is established by presentation of facts showing that the deceptive conduct was the proximate cause of the loss." White v. Wyeth, 227 W. Va. 131, 140, 705 S.E.2d 828 (2010).

[*638] 1. District of Columbia

Under D.C. law, "[i]t shall be a violation of this chapter for any person to engage in an unfair or deceptive trade practice, **[**146]** whether or not any consumer is in fact misled, deceived or damaged thereby . . . ." *D.C. Code § 28-3904*. "A consumer may bring an action seeking relief from the use of a trade practice in violation of a law of the District." *Id. § 28-3905(k)(1)*. When used as a noun, "consumer" means "a person who, other than for purposes of resale, does or would purchase, lease (as lessee), or receive consumer goods or services, including as a co-obligor or surety, or does or would otherwise provide the economic demand for a trade practice." *Id. § 28-3901(a)(2)(A)*. When used as an adjective, "consumer" "describes anything, without exception, that: (i) A person does or would purchase, lease (as lessee), or receive and normally use for personal, household, or family purposes."

In *Lidoderm*, Judge Orrick evaluated the above statutes and found in favor of the defendants. *See Lidoderm, 103 F. Supp. 3d 1155* (Orrick, J.). His reasoning was as follows:

> As explained by the District of Columbia Court of Appeals, "the relevant distinction is one between retail and wholesale transactions. Transactions along the distribution chain that do not involve the ultimate retail consumer are not 'consumer transactions' that the Act seeks to reach. Rather, it is the ultimate retail transaction between the final distributor **[**147]** and the individual member of the consuming public that the Act covers. Accordingly, it is not the use to which the purchaser ultimately puts the goods or services, but rather the nature of the purchaser that determines the nature of the transaction."
>
> Here the purchase at issue — the one trying to secure a recovery for its indirect purchase — is GEHA [Government Employees Health Organization]. It is true that GEHA has pled it is a joint "end payor" for the Lidoderm patches, and that it has paid retail and mail order pharmacies in the District of Columbia $13,432.85 for Lidoderm patches during the relevant period. However, GEHA was not part of the "retail" transaction, in terms of deciding to purchase the product or actually purchasing it. It, instead, was required to pay the pharmacies for a portion of the expenses for the patches because its members filled personal prescriptions for Lidoderm patches. Although GEHA played a role in the retail transaction, its own transactions with the pharmacies were more akin to "wholesale" than retail transactions.

Id.

Respectfully, the Court disagrees with Judge Orrick's analysis. ***HN32***[] Although an insurer who purchases a pharmaceutical product does not make **[**148]** that purchase for its own use, its role is located on the retail side of the transaction given that it is essentially acting as a proxy for its insured. Absent legislative history indicating that "consumer" as used in the statutes means an individual or business purchasing for his, her, or its use only, the Court does not limit application of the statutes as argued by Gilead.

2. Hawaii

Under Hawaii law, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." *Haw. Rev. Stat. § 480-2(a)*. "No person other than a consumer, the attorney general or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section." *Id. § 480-2(d)*. "'Consumer' means a natural person who, primarily **[*639]** for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment." *Id. § 480-1*.

Because the Hawaii code refers specifically to a suit being brought by a consumer and then defines consumer as a "natural person," Gilead has the better position. *See also Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, PLC, No. 15 Civ. 6549, 2018 U.S. Dist. LEXIS 220574, at *109-10 (S.D.N.Y. Dec. 26, 2018)* (holding in favor of **[**149]** defendants on Hawaii code).

3. Kansas

Under Kansas law, "[n]o supplier shall engage in any deceptive act or practice in connection with a consumer transaction." *Kan. Stat. Ann. § 50-626(a)*. "'Consumer transaction' means a sale, lease, assignment or other disposition for value of property or services within this state . . . to a consumer." *Id.* *§ 50-624(c)*. "'Consumer' means an individual, husband and wife, sole proprietor, or family partnership who seeks or acquires property or services for personal, family, household, business or agricultural purposes." *Id.* *§ 50-624(b)*. "Whether a consumer seeks or is entitled to damages or otherwise has an adequate remedy at law or in equity, a consumer aggrieved by an alleged violation of this act may bring an action . . . ." *Id.* *§ 50-634(a)*.

Because the Kansas code specifically refers to a consumer bringing suit and defines "consumer" as it does above (excluding, *e.g.*, entities such as insurers), Gilead has the better position.

4. Maine

Under Maine law, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful." *5 Me. Rev. Stat. § 207*.

> Any person who purchases or leases goods, services or property, real or personal, primarily for personal, family, or household **[**150]** purposes and thereby suffers any loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by *section 207* . . . may bring an action . . . .

Id. *§ 213(1)*.

Although arguably a close call, the Court finds in Plaintiffs' favor. Defendants have not cited any legislative history or case law indicating that a person must purchase a good for his, her, or its *own* personal, family, or household purpose. As discussed above in conjunction with D.C. law, an insurer who purchases a pharmaceutical product essentially acts as a proxy for its insured, who clearly falls within the common understanding of a "consumer."

5. Missouri

Under Missouri law,

> [t]he act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in *section 407.453*, in or from the state of Missouri, is declared to be an unlawful practice.

Mo. Rev. Stat. § 407.020(1). Furthermore,

> [a]ny person who purchases or leases merchandise **[**151]** primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another **[*640]** person of a method, act or practice declared unlawful by *section 407.020*, may bring a private civil action . . . .

Id. *§ 407.025(1)*.

As above, although arguably a close call, Plaintiffs have the better position, particularly in the absence of legislative history indicating that a consumer is restricted to one who purchases for his, her, or its own use. *But see* *In re Actimmune Mktg. Litig., No. C 08-02376 MHP, 2010 U.S. Dist. LEXIS 90480, at *37 (N.D. Cal. Aug. 31, 2010)* (in discussing Missouri law, stating that, "[a]lthough the term 'person' explicitly includes corporations like GEHA, the statute has been interpreted as requiring that a person purchase the property for his, her or its own 'personal, family or household purposes'" and, "[a]ccordingly, the claims of health care plans and third-party payors have been dismissed for lack of standing").

6. Montana

Under Montana law, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." *Mont. Code § 30-14-103*. "A consumer who suffers any ascertainable loss of money or property, real or personal, as a result **[**152]** of the use or employment by another person of a method, act, or practice declared unlawful by 30-14-103 may bring an individual but not a class action." *Id. § 30-14-133(1)*. "'Consumer' means a person who purchases or leases goods, services, real property, or information primarily for personal, family, or household purposes." *Id. § 30-14-102(1)*.

As above, although arguably a close call, Plaintiffs have the better position, particularly in the absence of legislative history indicating otherwise. *But see Lidoderm, 103 F. Supp. 3d at 1165* (Orrick, J.) (dismissing the Montana claim because the statute "defines a 'consumer' as 'a person who purchases or leases goods, services, real property, or information primarily for personal, family, or household purposes'" and "[t]he statute excludes persons who buy goods for resale").

7. North Carolina

Under North Carolina law, "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *N.C. Gen. Stat. § 75-1.1(a)*.

> If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed, or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such **[**153]** person, firm or corporation so injured shall have a right of action on account of such injury done . . . .

Id. § 75-16. Given the broad language used in the statutes, the Court finds in favor of Plaintiffs. Gilead relies on *Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999)*, presumably because, there, the court noted that North Carolina "gives a private cause of action to consumers aggrieved by unfair or deceptive business practices." *Id. at 519*; *see also id. at 519-20* (adding that "businesses are sometimes allowed to assert claims against other businesses because 'unfair trade practices involving only businesses' can 'affect the consumer as well'"; however, "one business is permitted to assert an *UTPA* claim against another business only when the businesses are competitors (or potential competitors) or are engaged in commercial dealings with each other"). But the Fourth Circuit did not foreclose the possibility that a party involved in a consumer transaction, other than the consumer him/herself — such **[*641]** as a union insurer — could bring suit under the state consumer protection law.

8. Rhode Island UTPA

Under Rhode Island law, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful." *R.I. Gen. Laws § 6-13.1-2*.

> Any **[**154]** person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act, or practice declared unlawful by *Section 6-13.1-2*, may bring an action . . . .

Id. § 6-13.1-5.2(a). As above, although arguably a close call, Plaintiffs have the stronger position, particularly in the absence of any legislative history to the contrary.

9. Utah

Under Utah law, "[a] deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the transaction." *Utah. Code Ann. § 13-11-4(1)*. "'Consumer transaction' means a sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property, both tangible and intangible (except securities and insurance) to, or apparently to, a person for: (i) primarily personal, family, or household purposes." *Id.* § 13-11-3(2)(a). "Whether he seeks or is entitled to damages or otherwise has an adequate remedy at law, a consumer may bring an action" for certain relief. *Id.* § 13-11-19(1).

Whether a union insurer could be a "consumer" under Utah law **[**155]** is a close call. In Sergeants Benevolent, 2018 U.S. Dist. LEXIS 220574, at *135-38, the court found in favor of the plaintiffs and against the defendants. The court noted first that the Utah code does not define "consumer" but does define "consumer transaction" — covering not just a sale to a person for, *e.g.*, personal purposes but also *apparently to* a person for personal purposes. The court found that "apparently to" language critical. *See* id. at *137 **HN33**[] ("[U]nlike other consumer protection statutes reviewed by this Court, the UCSPA contemplates sales made both 'to' and 'apparently to' a person for personal, family, or household purposes."). "Construing the allegations in the Complaint in the light most favorable to the IPP [indirect purchaser plaintiff], . . . the Court finds that sales of Namenda were made either to or 'apparently to' consumers primarily for their personal, family, or household purposes. Therefore, the Complaint states a claim." Id. at *138. Because of the unique language in the Utah statute, the Court denies the motion to dismiss the union insurers' claims based on Utah law.

10. Vermont

Under Vermont law, "[u]nfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are hereby declared unlawful." 9 Vt. Stat. Ann. § 2453(a).

> Any consumer who **[**156]** contracts for goods or services in reliance upon false or fraudulent representations or practices prohibited by section 2453 of this title, or who sustains damages or injury as a result of any false or fraudulent representations or practices prohibited by section 2453 of this title, or prohibited by any rule or regulation made pursuant to section 2453 of this title may sue . . . .

Id. § 2461(b)(1).

> "Consumer" means any person who purchases, leases, contracts for, or otherwise **[*642]** agrees to pay consideration for goods or services not for resale in the ordinary course of his or her trade or business but for his or her use or benefit or the use or benefit of a member of his or her household . . . or a person who purchases, leases, contracts for, or otherwise agrees to pay consideration for goods or services not for resale in the ordinary course of his or her trade or business but for the use or benefit of his or her business or in connection with the operation of his or her business.

Id. § 2451a(a). Given that the Vermont code specifies that it is only a consumer who may bring suit and the specific definition of "consumer" above, Gilead has the better position.

11. Summary

In summary, the Court grants the motion to dismiss the union insurers' claims **[**157]** based on the consumer protection laws of the following states/jurisdictions: Hawaii, Kansas, and Vermont.

I. Antitrust Claims: Concerted Action Requirement

Counts 4 and 6 of the CAC are the state law causes of action for monopolization and attempted monopolization (as opposed to, *e.g.*, conspiracy to monopolize or conspiracy to restrain trade). These claims are pled against Gilead only. Gilead argues that certain states — namely, Kansas, New York, and Tennessee — only allow for antitrust claims where there is concerted action, *see* Gilead Mot. at 37 (arguing that "[t]he antitrust laws of Kansas, New York, and Tennessee apply only to agreements between two or more parties"),[38] and therefore Counts 4 and 6

[38] *See also* Kan. Stat. § 50-101 (providing that "a trust is a combination of capital, skill, or acts, by two or more persons" for the purpose of, *e.g.*, creating or carrying out restrictions in trade or commerce); N.Y. Gen. Bus. Law § 340(1) (declaring as illegal and void contracts, agreements, arrangements, or combinations for monopoly or in restraint of trade); Tenn. Code §§ 47-25-101 to -112 (addressing arrangements, contracts, agreements, trusts, or combinations between persons or corporations).

based on these states' laws must be dismissed. In response, Plaintiffs do not dispute that the above states' laws require concerted action. They point out, however, that Counts 4 and 6 are still based — at least in part — on concerted action, namely, the No-Generics Restraints and the Teva patent settlement agreements. In reply, Gilead asserts: "Counts 4 and 6 should be dismissed *to the extent* they claim unilateral conduct." Gilead Reply at 19 (emphasis omitted). Implicitly, Gilead is referring **[**158]** to the antitrust claims based on its commercialization of TAF. Because this appears to be unilateral action on the part of Gilead, the Court dismisses the above state law claims to this extent.

IX. CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss are granted in part and denied in part.

- The overarching conspiracy claims are dismissed with leave to amend.
- The motions to dismiss the antitrust claims based on the No-Generics Restraints are granted in part and denied in part. The claims based on the No-Generics Restraints in the Gilead/Japan Tobacco agreement are dismissed with prejudice. The claims based on the No-Generics Restraints in the Gilead/BMS agreements and the Gilead/Janssen agreements are allowed to proceed. Plaintiffs have leave to provide a more definite statement regarding their antitrust injury theory that untainted competitors in BMS, Japan Tobacco, and Janssen's positions would actually **[*643]** have challenged Gilead's patents prior to their expiration dates (*e.g.*, instead of waiting for the TDF patents to expire in December 2017).
- The motion to dismiss the antitrust claims based on the Teva settlement agreements is denied.
- The motion to dismiss **[**159]** the antitrust claims based on Gilead's commercialization of TAF is denied.
- The motion to dismiss based on a failure to adequately plead the relevant market is granted in part and denied in part. The motion is granted to the extent Plaintiffs have not adequately alleged a cART market. Plaintiffs have leave to amend.
- The motion to dismiss the state law claims (antitrust and consumer) is granted in part and denied in part.
    - ○ Applying California law to nationwide purchases is not a due process violation.
    - ○ The Court shall address at the class certification stage Gilead's argument that Plaintiffs cannot proceed with their state law claims for 25 states (*i.e.*, because "[n]o purchase by any Plaintiff is alleged in the . . . 25 states"). Gilead Mot. at 35.
    - ○ The motion to dismiss based on failure to satisfy pre-filing requirements is denied.
    - ○ The motion to dismiss the indirect purchaser claims for damages is granted as to the Illinois Antitrust Act and the Puerto Rico Antitrust Act. On the Rhode Island Antitrust Act and the Maryland Antitrust Act, Rhode Island and Maryland each has an *Illinois Brick* repealer statute but indirect purchaser claims for damages prior to the effective date of that **[**160]** statute are not viable. The motion to dismiss the indirect purchaser claims for damages under the Utah Antitrust Act and the Massachusetts Consumer Protection Act is denied without prejudice.
    - ○ The motion to dismiss certain consumer protection claims based on an "end run" argument (*i.e.*, around *Illinois Brick*) is denied.
    - ○ The motion to dismiss the consumer protection claims as conclusorily pled is denied.
    - ○ The motion to dismiss the consumer protection claims to the extent based on deceptive conduct is denied. However, the Court orders Plaintiffs to provide a more definite statement as to what relief is sought for any deceptive conduct.
    - ○ The motion to dismiss is granted with respect to the union insurers' claims based on the consumer protection laws of the following states/jurisdictions: Hawaii, Kansas, and Vermont.
    - ○ The motion to dismiss the monopolization and attempted monopolization claims under Kansas, New York, and Tennessee law is granted in part — *i.e.*, to the extent the claims are based on the unilateral conduct of Gilead in commercializing TAF.

To the extent the Court has allows Plaintiffs leave to amend, Plaintiffs' amended complaint shall be filed within 30 days from the date **[**161]** of this order. Thereafter, Defendants shall have 30 days to respond. If Defendants respond with another motion to dismiss, the Court strongly encourages Defendants (as before) to coordinate. Ideally, Defendants would be able to file a joint motion to dismiss, and the Court would extend page limitations to reflect the joint nature of the motion.

[*644] This order disposes of Docket Nos. 143, 149, 158, and 159.

IT IS SO ORDERED.

Dated: March 3, 2020

/s/ Edward M. Chen

EDWARD M. CHEN

United States District Judge

Chi. Mercantile Exch. Inc. v. ICE Clear US, Inc.

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

March 4, 2020, Decided; March 4, 2020, Filed

Case No. 18 C 1376

Reporter

2020 U.S. Dist. LEXIS 37150 *; 2020 U.S.P.Q.2D (BNA) 10112; 2020 WL 1042038

CHICAGO MERCANTILE EXCHANGE INC., Plaintiff, vs. ICE CLEAR US, INC., ICE CLEAR EUROPE LIMITED, and INTERCONTINENTAL EXCHANGE, INC., Defendants.

Subsequent History: As Amended April 12, 2020.

Prior History: *Chi. Mercantile Exch. Inc. v. Ice Clear US, Inc., 2019 U.S. Dist. LEXIS 15958, 2019 WL 414663 (N.D. Ill., Feb. 1, 2019)*

Core Terms

Licensees, trademark, license, license agreement, summary judgment, acquiescence, termination, parties, counterfeiting, implied license, contends, violations, defendants', marks, infringement, terms, summary judgment motion, counterclaims, allegations, margins, denies, calculation, generic, naked, reasonable jury, methodology, defenses, genuine, cross-motion, risk management

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For Intercontinental Exchange, Inc., Counter Claimant: Gina L. Durham, LEAD ATTORNEY, DLA Piper LLP (US), San Francisco, CA; Marc Evan Miller, PRO HAC VICE, DLA Piper LLP (US), New York, NY; Michael L. Burns, DLA Piper LLP US, Philadelphia, PA; Michael A. Geller, DLA Piper LLP (US), Chicago, IL; Paul Albert Taufer, DLA Piper LLP, Philadelphia, PA.

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Judges: MATTHEW F. KENNELLY, United States District Judge.

Opinion by: MATTHEW F. KENNELLY

Opinion

CORRECTED MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Chicago Mercantile Exchange Inc. (CME) has sued ICE Clear US, Inc., ICE Clear Europe, Limited, and Intercontinental Exchange, Inc. (ICE) for trademark violations, unfair competition, breach of contract, and deceptive practices. ICE Clear US and ICE Clear Europe (collectively, the ICE Licensees) have asserted counterclaims for breach of contract; ICE has asserted counterclaims alleging the invalidity of CME's mark due to genericness and abandonment **[*6]** by naked licensing; and the defendants all have asserted defenses to CME's claims. Each side has moved for partial summary judgment.

Background

A. Factual background

The following facts are undisputed except where otherwise noted. CME is a corporation that operates a clearinghouse and provides financial and risk management services to commodity traders. The ICE Licensees are corporations that are indirect subsidiaries of ICE and also operate clearinghouses. Clearinghouses act as intermediaries between buyers and sellers of commodities, thereby reducing the risk that parties will default on a trade and providing stability to markets. One way that clearinghouses ensure against default is by setting requirements for initial margins, which are upfront payments that the clearinghouses' members must make to use their services.

In the 1980s, CME developed a method, called the SPAN framework, for financial institutions to assess the risk of portfolios. The term SPAN is an acronym for standard portfolio analysis of risk. One aspect of the SPAN framework enables clearinghouses to set initial margins by determining how various scenarios or market conditions might affect an individual portfolio's **[*7]** profits or losses. CME owns four incontestable trademarks related to the SPAN framework. It licenses the use of its marks to third parties and makes available the licensees' daily risk array files, which contain data relating to their calculations of initial margins, on its FTP (file sharing) site.

In June and July 2007, CME entered into license agreements with ICE Clear Europe and ICE Clear US that permitted them to use for ten years "the name and mark SPAN® . . . in connection with a risk evaluation and margin framework." Pls.' *L.R. 56.1* Stmt., Ex.1, dkt. no. 165-3, at 2.[1] The license agreements stated that they were governed by Illinois law. They prohibited the ICE Licensees from using any mark that was "confusingly similar" to the SPAN mark during the terms of the agreements. *Id.* ¶ 7(f). They required the ICE Licensees to include statements on all their materials relating to the SPAN framework to disclose that the SPAN mark was a registered trademark of CME being used pursuant to a license. And they set out the parties' obligations with respect to the daily publication of the ICE Licensees' risk array files on CME's FTP site.

The agreements also required CME to "control the nature **[*8]** and quality of all goods and services identified by" the SPAN mark. *Id.* ¶ 1(c). They required the ICE Licensees to permit CME to review and inspect their goods and services that used the SPAN mark. They obligated the ICE Licensees to modify to their "SPAN-related performance bond calculation systems" when CME required them to do so in order to "conform" their calculations with CME's technical specifications. *Id.* ¶ 7(b). The agreements stated that they could be amended or modified only in writing. And they provided that upon their termination, the ICE Licensees agreed "not to use any mark that is confusingly similar to the SPAN Mark in connection with any other margining system or similar risk calculation." *Id.* ¶ 5(a).

In 2009, CME contacted ICE regarding ICE Clear Europe's use of the phrase "ICE SPAN" in relation to its risk management products and services. The parties dispute whether CME's license agreement with ICE Clear Europe permitted it to use that phrase. Nonetheless, ICE Clear Europe eliminated the phrase from its website, software,

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[1] The relevant portions of CME's license agreements with ICE Clear US and ICE Clear Europe are identical. When quoting from the agreements, Court cites to only the agreement with ICE Clear US, but the quoted language is also in CME's agreement with ICE Clear Europe under the same pincite. *See, e.g.*, Pls.' *L.R. 56.1* Stmt., Ex. 3, dkt. no. 165-5, at 2.

and other materials. The parties dispute whether ICE Clear Europe resumed using the phrase in 2015, but they do not dispute that ICE Clear US used **[*9]** it in 2015.

In 2014, CME had internal discussions regarding the ICE Licensees' SPAN implementations and those of another licensee, the London Clearing House. A CME employee involved in product management wrote in an e-mail that CME chose to "ignore" unilateral changes that the ICE Licensees made to the SPAN algorithm, which caused their calculations to "deviate." Defs.' *L.R. 56.1* Stmt., Ex. 73, dkt. no. 181-6, at 131-32. Another CME employee wrote that London Clearing House "changed the methodology that is native to SPAN." *Id.* at 131. In a subsequent e-mail, the first employee responded by saying that it appeared as though the London Clearing House may not have made "any actual changes" to SPAN and that "the issues could be with . . . functionality" and might be "easily" fixed. *Id.* at 130.

The license agreements expired in June and July 2017, but the ICE Licensees continued to use the term SPAN in reference to their risk management systems. Specifically, ICE Clear US continued to use the phrase "SPAN® Margin Model" in connection with its risk management services, ICE Clear Europe continued to use the word "SPAN" in connection with its services, and both ICE Licensees continued to include in their materials disclosures **[*10]** stating that the SPAN mark was a registered trademark of CME being used pursuant to a license. Pl.'s *L.R. 56.1* Stmt., dkt. no. 188, ¶¶ 59-62, 92, 193. In at least some instances, the ICE Licensees used the phrase "SPAN for ICE" in connection with their services.

There is evidence suggesting that, at first, none of the defendants were aware that the license agreements had terminated and that CME upheld at least some of its obligations under the agreements after their termination. According to CME's *Rule 30(b)(6)* witness, upon the termination of a license agreement, CME will stop publishing the licensee's data, and CME's software will no longer support the licensee's product. Despite this, the ICE Licensees' daily risk array files continued to be published on CME's FTP site. The parties dispute whether the ICE Licensees sent the files to CME to publish or whether the ICE Licensees themselves posted the files to the site.

On August 10, 2017, an in-house attorney for CME, Matthew Kelly, sent to ICE's general counsel, Jonathan Short, a letter stating that the ten-year term of the license agreements had run and that the ICE Licensees had no license to use the SPAN mark or framework. Kelly wrote that Short should **[*11]** contact him if ICE was "interested in discussing new licensing agreements with CME" and that, before entering into "new" agreements, "ICE must demonstrate its good faith efforts to cease the misuse of CME's SPAN® brand." Pls.' *L.R. 56.1* Stmt., Ex. 16, dkt. no. 165-18, at 3. Kelly also wrote that if ICE did not enter into an agreement with CME, then it must stop using CME's mark. In the letter, he identified several areas of alleged noncompliance by the ICE Licensees, including their alleged misuse of the SPAN mark in combination with ICE's marks and their failure to properly attribute the mark to CME. Near the conclusion of the letter, Kelly wrote, "We look forward to receiving confirmation that ICE is taking all necessary steps to comply with its obligations under the License Agreement." *Id.* at 5.

As general counsel for ICE, Short had the authority to enter into agreements valued at up to two or five million dollars on behalf of the company's subsidiaries, including the ICE licensees. The ICE Licensees also had their own general counsels, who reported directly to their presidents and indirectly to Short. A few days after Short received Kelly's letter, he called Kelly, and they discussed possible changes **[*12]** to CME's licensing model. Short has testified that he understood from the conversation that Kelly would follow up with him to provide a proposal for new license agreements after CME determined the financial terms of those agreements. They spoke again about a month later, when, according to Short, Kelly said that CME still was determining new license fees and that the parties also would need to agree on new disclaimers regarding the ICE Licensees' uses of the mark. There is no evidence suggesting that Kelly told Short the proposed terms of the new fees, including whether the fees would exceed two million dollars, or that Short agreed to those terms.

On September 15, Short sent an e-mail to Kelly with proposed disclaimers. A few days later, Kelly responded that the "disclaimers look good." Defs.' *L.R. 56.1* Stmt., dkt. no. 188, ¶ 340. The next day, ICE's associate general counsel sent to Kelly an e-mail stating that ICE would "start the process to update the website." *Id.* ¶ 341. According to Short, ICE then updated its website and other materials to include the new disclaimers. No one from CME contacted Short or ICE's associate general again until after CME filed this lawsuit in February 2018.

[*13] In the meantime, the ICE Licensees' risk array files continued to be published on CME's FTP site, and CME issued a notice to its clearing members that it planned to migrate the site, including data for ICE's exchanges, to a new host. According to testimony from some representatives of the ICE Licensees, they were still not aware that the licenses had terminated, that Kelly had sent a cease-and-desist letter, or that ICE and CME had been discussing the possibility of entering into new license agreements.

The defendants continued to use the SPAN mark and/or the phrase "SPAN for ICE" after CME filed suit. They contend that they removed references to SPAN on their online materials in May 2018, but CME contends that they continued to use the mark after that date. The parties do not dispute, however, that CME updated the functionality of a SPAN-related software program for certain risk array files, including those from the ICE Licensees, after the filing of the present suit. Nor do the parties dispute that the ICE Licensees' risk array files stopped being posted to CME's FTP site in August 2018.

B. Procedural background

As indicated, CME filed this lawsuit in February 2018. In counts 1 and 2 **[*14]** of the amended complaint, it alleges that the defendants violated *15 U.S.C. § 1114(1)* by counterfeiting and infringing its registered marks. In count 3, CME alleges that the defendants violated *15 U.S.C. § 1125(a)* by engaging in unfair competition. In count 4, it alleges that the ICE Licensees breached contracts. In counts 5 and 6, it alleges that the defendants violated the *Illinois Uniform Deceptive Trade Practices Act*, *815 Ill. Comp. Stat. 510/1*, and that they violated Illinois common law by engaging in unfair competition. The defendants raised numerous affirmative defenses, including, as relevant to this opinion, invalidity of marks due to genericness and abandonment through naked licensing (defenses raised only by ICE), trademark misuse, fair use, and a defense the defendants have framed as permission to use a mark under express or implied licenses. ICE asserted two counterclaims in which it alleges that the marks are invalid due to their genericness and abandonment by naked licensing. The ICE Licensees each have asserted a counterclaim for breach of contract.

The ICE Licensees previously moved to dismiss part of CME's breach of contract claim as it related to provisions requiring them to use their best efforts to protect the goodwill and reputation **[*15]** of CME and to provide notice of any infringement of the SPAN mark to CME in writing, and to strike allegations in the first amended complaint related those alleged breaches. The Court granted their motion. *Chicago Mercantile Exch. Inc. v. ICE Clear US, Inc., No. 18 C 1376, 2019 U.S. Dist. LEXIS 15958, 2019 WL 414663, at *3 (N.D. Ill. Feb. 1, 2019)*.

The parties have now filed motions for partial summary judgment.

Discussion

A party is entitled to summary judgment only if it demonstrates that "there is no genuine dispute as to any material fact and [it] is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A genuine dispute about a material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. On cross-motions for summary judgment, the Court draws inferences "in favor of the party against whom the motion under consideration is made." *Cremation Soc'y of Ill., Inc. v. Int'l Bhd. of Teamsters Local 727, 869 F.3d 610, 616 (7th Cir. 2017)* (citation omitted).[2]

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[2] CME asks the Court to deny the defendants' motions on the ground that their *Local Rule 56.1* statement of facts contain errors and misrepresentations. *See* *N.D. Ill. LR 56.1(b)(3)(A)* & *(B)*; *Malec v. Sanford, 191 F.R.D. 581, 584 (N.D. Ill. 2000)*. The Court declines this request but has not considered any assertions or denials that contain facts that misrepresent the cited portion of the record or improper legal conclusions.

A. Affirmative defenses

Each of the parties has moved for summary judgment on the defendants' affirmative defenses of trademark misuse; fair use; and implied consent, acquiescence, and/or estoppel by implied license.[3] No party has moved for summary judgment on the defendants' affirmative defense relating to an express license, but they all discuss it in their reply briefs. The Court begins its discussion of the summary judgment **[*16]** motions with the affirmative defenses because they present several threshold issues.

1. Trademark misuse

The defendants assert that CME engaged in trademark misuse by enforcing invalid trademark claims in an attempt to monopolize the market and eliminate competition. CME has moved for summary judgment against all of the defendants on this defense, and the defendants have filed a cross-motion for summary judgment.[4]

Although "courts have recognized the theoretical possibility of the antitrust misuse-unclean hands defense, in no final reported decision involving trademark infringement has a court actually refused to enforce a trademark because it was used in violation of ***antitrust law***." 2 McCarthy on Trademarks and Unfair Competition § 31:91 (5th ed. 2019); *see also Helene Curtis Indus., Inc. v. Church & Dwight Co., 560 F.2d 1325, 1337 (7th Cir. 1977)* (antitrust misuse defenses have limited viability). For such a defense, "it is not enough merely to prove that merchandise bearing a trademark . . . has been used in furtherance of antitrust violations." *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena, 298 F. Supp. 1309, 1315 (S.D.N.Y. 1969)*, *aff'd in relevant part*, *433 F.2d 686 (2d Cir. 1970)*. Rather, an "essential element of the antitrust misuse defense in a trademark case is proof that the mark itself has been the basic and fundamental vehicle required and used to accomplish the violation." **[*17]** *Id.; see also Helene Curtis, 560 F.2d at 1337*.

The defendants point to no evidence of antitrust violations by CME, let alone evidence that the SPAN mark was "the basic and fundamental vehicle required and used" to accomplish such violations. *See Carl Zeiss Stiftung, 298 F. Supp. at 1315*. Accordingly, Court grants summary judgment in favor of CME on the misuse defense and denies the defendants' cross-motion for summary judgment.

2. Fair use

CME has moved for summary judgment on the ICE Licensees' affirmative defense of fair use. The ICE Licensees do not contest the motion, so the Court grants it. *See, e.g., Nichols v. Michigan City Plant Planning Dep't, 755 F.3d 594, 600 (7th Cir. 2014)* ("The non-moving party waives any arguments that were not raised in its response to the moving party's motion for summary judgment.").

3. Acquiescence or implied licenses

The defendants asserted as an affirmative defense that CME permitted, pursuant to implied licenses, any infringing uses of the SPAN mark by the defendants that occurred after the termination of the license agreements. CME has moved for summary judgment on this defense with respect to the ICE Licensees by arguing that CME did not acquiesce to their uses of the mark. Without citing to authority, CME contends that courts apply to a defense

[3] The parties disagree whether the standards for implied consent, acquiescence, and/or estoppel by implied license are the same, an issue the Court addresses below.

[4] The defendants have indicated in their memorandum in support of their motion for summary judgment, but not in the motion itself, that they seek judgment on their misuse defense. The Court takes this as a cross-motion. This does not change the outcome of this decision.

involving implied licenses the same standard that they **[*18]** apply to a defense of acquiescence. The defendants also seek summary judgment on this defense, but they contend that a defense of estoppel by implied licenses is distinct from a defense of acquiescence.[5] To the extent the standard for acquiescence applies, the defendants suggest that CME acquiesced in their use of the SPAN mark until the parties had finalized new license agreements.

Regardless of how it is framed, the application of this defense is an issue for the Court; it is not an issue for the jury. *See* Sarkis' Cafe, Inc. v. Sarks in the Park, LLC, No. 12 C 9686, 2016 U.S. Dist. LEXIS 22566, 2016 WL 723135, at *2 (N.D. Ill. Feb. 24, 2016); *see* Federal Civil Jury Instructions of the Seventh Circuit 13.5.3 (2017) ("laches, acquiescence, and other equitable defenses to trademark infringement actions" are issues for the court, not the jury).

a. Standard

The Court begins by considering the proper standard for this defense. The Seventh Circuit applies the same three-part test to determine whether a trademark owner impliedly consented to or acquiesced in another party's use of its mark. *See* Hyson USA, Inc. v. Hyson 2U, Ltd., 821 F.3d 935, 941 (7th Cir. 2016) (stating the test for acquiescence); Wine & Canvas Dev., LLC v. Muylle, 868 F.3d 534, 539-40 (7th Cir. 2017) (indicating that the test for acquiescence applies to implied consent and treating the defenses as identical). To prove acquiescence, the ICE Licensees must show that **[*19]** (1) CME "actively represented that it would not assert a right or claim," (2) CME's "delay between the active representation and assertion of the right or claim was not excusable," and (3) "the delay caused the defendant[s] undue prejudice." Hyson USA, 821 F.3d at 941 (citation omitted). A trademark owner can convey an active representation through its "words or conduct." *Id. at 940*.[6] The parties dispute only the active representation element.

Citing *All Star Championship Racing, Inc. v. O'Reilly Automotive Stores, Inc., 940 F. Supp. 2d 850 (C.D. Ill. 2013)*, the ICE Licensees argue that they need not prove active representation. The court in *All Star* stated that "the entire course of conduct between a patent or trademark owner and an accused infringer may create an implied license." *Id. at 863* (quoting *McCoy v. Mitsuboshi Cutlery, Inc., 67 F.3d 917, 920 (Fed. Cir. 1995))*. In *All Star*, the plaintiff brought a breach of contract action against a trademark owner, who counterclaimed for trademark infringement and other claims. *All Star Championship Racing, 940 F. Supp. 2d at 856, 858*. The parties had entered into agreements that set out the plaintiff's obligations in using the defendant's marks but did not expressly license the marks to the plaintiff. *Id. at 863*. During the contested time period, the parties entered into subsequent agreements that included additional, express licensing terms, but those agreements were not binding because the defendant had not signed **[*20]** them. *Id. at 857, 863*. The plaintiff contended that it had the defendant's implied consent to use the marks and that, during part of the contested period, the defendant had provided the plaintiff with promotional items and approved all its promotions and advertisements. *Id. at 864*. In denying summary judgment with respect to the plaintiff's infringement claim for that time period, the court found that the plaintiff had an implied license to use the marks and that there was a genuine factual dispute regarding whether that implied license continued until the date on which the defendant sent the plaintiff a cease-and-desist letter. *See id. at 864-65*.

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[5] As with their trademark misuse defense, the defendants have indicated in their memorandum in support of their motion for summary judgment, though not in the motion itself, that they seek summary judgment on the defense they frame as estoppel by implied licenses. The Court assumes for purposes of discussion that they have cross-moved for summary judgment, but this does not change the outcome.

[6] The Court notes that the affirmative defense of laches is similar to that of acquiescence, but "acquiescence implies active consent," whereas "laches denotes a merely passive consent." Hyson USA, 821 F.3d at 940. Because neither party addressed the laches defense with respect to the defendants' conduct after the termination of the agreements, and because the defendants cite no case law relating to laches or suggesting that they have invoked the defense of laches in their contention there was an implied license, the Court need not address it. *See id.* ("[A]lthough our cases sometimes blend the doctrines of acquiescence and laches, they are formally distinct and should be analyzed separately.").

All Star does not support the ICE Licensees' contention that courts analyze the use of a trademark through an implied license differently from the way in which they analyze acquiescence. Although the court in *All Star* found the existence of an implied license, it did not indicate that it based that finding on a doctrine distinct from acquiescence (or, for that matter, implied consent). Indeed, the court entitled the section where it discussed the issue of an implied license "Consent and authorization," *id. at 862*, which suggests that it considered the issue as involving implied consent. **[*21]** And it discussed aspects of the trademark owner's actions—its provision of promotional materials to, and approval of promotions and advertisements by, the plaintiff—that appear analogous to active representations, as they indicated to the plaintiff that it could use the marks. *See id. at 864*. The fact that the court did not call these "active representations" does not matter; the Seventh Circuit had not yet articulated the standard for acquiescence or implied consent. *See Hyson USA, 821 F.3d at 941* (adopting the three-factor test for acquiescence and stating that the Circuit's prior cases "engage in essentially the same analysis (though without listing elements)"). Further, the other case to which the ICE Licensees cite to suggest that the standard for implied licenses is distinct from that of acquiescence is inapposite because it involved patents, not trademarks. *See Wang Labs., Inc. v. Mitsubishi Elecs. Am., Inc., 103 F.3d 1571, 1580 (Fed. Cir. 1997)*.

The Court concludes that the standard that applies to the defenses of implied consent and acquiescence is the one that governs the defense that the ICE Licensees frame as estoppel by implied license. Regardless, in order to fully address the ICE Licensees' arguments, the Court will also discuss the standard they propose. The Court considers the application **[*22]** of the defenses (to the extent they constitute separate defenses) for three separate time periods.

b. June and July 2017 to August 10, 2017

The Court first considers whether CME acquiesced in the ICE Licensees' uses of the SPAN marks from June and July 2017, when the license agreements expired, through August 10, 2017, when CME sent to ICE the cease-and-desist letter. The ICE Licensees argue that CME acquiesced in their uses of the mark or gave them an implied license to use the mark because it continued to perform its obligations under the license agreements and did not indicate that the ICE Licensees lacked its consent to uses the marks. Specifically, they point to testimony from CME's *Rule 30(b)(6)* witness that, upon the termination of a license agreement, CME would stop publishing the licensee's data, and its software would no longer support the licensee's product. It is undisputed that, during this timeframe, CME continued to make available to third parties the ICE Licensees' risk array files on its FTP site (although the parties dispute whether CME or the ICE Licensees published the files) and its software continued to support the ICE Licensees' services. It is further undisputed that CME did **[*23]** not notify the ICE Licensees regarding the termination of their agreements until August 10, 2017. The ICE Licensees contend that CME's conduct is indicative that it considered the licenses to remain operative.

CME contends that there can be no acquiescence or grant of an implied license during this timeframe because the parties had always governed their relationship through written agreements. It points to the provision in the license agreements stating that the agreements may be amended only in writing. Without citing to authority, CME also contends that the ICE Licensees could not have understood CME's actions to constitute the conveyance of implied licenses or acquiescence because they were unaware that the licenses had terminated in the first place.

The Court concludes that there is a genuine factual dispute regarding whether CME acquiesced to the ICE Licensees' uses of the SPAN mark (or, as the defendants put it, granted the ICE Licensees implied licenses) from the time of termination of the agreements in June and July 2017 until August 10, 2017. The Court therefore denies both sides' motions for summary judgment on this defense with respect to that time period.[7]

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[7] Even if the defendants ultimately establish their acquiescence defense, CME's claim could "be revived" if it "can show that 'inevitable confusion' would result from dual use of the marks." *Hyson USA, 821 F.3d at 941* (citation omitted). Because neither party raises this issue, the Court need not address it here.

c. August 10, 2017 [*24] to February 23, 2018

The Court next considers whether CME acquiesced in the ICE Licensees' uses of the SPAN mark from August 10, 2017, when CME sent to ICE the cease-and-desist letter, until February 23, 2018, when CME filed this lawsuit. The defendants argue that, during this time period, CME actively represented to them that it would not assert a right or claim. Specifically, they contend that the letter from CME's in-house counsel Kelly indicated that CME required them to cease using the SPAN mark only if they did not enter into new license agreements; Kelly promised to send to ICE new license agreements; and he approved of their uses of the mark until they entered into the new agreements. CME contends that the ICE Licensees cannot claim CME acquiesced because they did not know that Kelly had sent the letter to ICE or even that the agreements had ended. CME also contends that it provided no active representations that the ICE Licensees or ICE could continue to use its mark and, to the contrary, indicated that the defendants could use the mark only if the parties signed new, written license agreements.

As an initial matter, the ICE Licensees may be able to sustain an acquiescence defense **[*25]** despite their claimed lack of knowledge of the cease-and-desist letter or the termination of the agreements. Notice to a parent company is generally imputed to its subsidiaries, particularly where there is some interrelationship between the entities. *See* *Woods v. Indiana Univ.-Purdue Univ. at Indianapolis, 996 F.2d 880, 894 n. 9 (7th Cir.1993)* (Rovner, J., concurring); *Norton v. Int'l Harvester Co., 627 F.2d 18, 21 (7th Cir.1980)*. Here, ICE is the parent company, and the ICE Licensees are among its subsidiaries. ICE's general counsel, Short, had authority to enter into agreements on behalf its subsidiaries. He responded to Kelly's letter on the ICE Licensees' behalf and negotiated terms, such as disclosures, for their potential new license agreements. The ICE Licensees had their own general counsels, but they indirectly reported to Short. This is sufficient evidence of an interrelationship between the parent and its subsidiaries such that ICE's notice of the cease-and-desist letter and the agreements' termination can be imputed to the ICE Licensees.

Kelly's letter, however, did not constitute an active representation giving the defendants the rights to use the SPAN mark. Kelly wrote that ICE's general counsel should contact him if ICE was "interested in discussing new licensing agreements with CME" and that, before entering into a **[*26]** "new" agreement, "ICE must demonstrate its good faith efforts to cease the misuse of CME's SPAN® brand." Pls.' *L.R. 56.1* Stmt., Ex. 16, dkt. no. 165-18, at 3. Those statements do not suggest that the defendants could continue using the SPAN mark while the parties negotiated new agreements, as the defendants contend. To be sure, a couple of sentences in the letter described, in the present tense, CME's expectation that the defendants comply with their obligations under the agreements—phrasing that, if considered by itself, might imply that the parties' obligations were ongoing. But these sentences did not stand alone; they were part of a larger communication. Considering the entire letter, and particularly its statements that the license agreements had terminated and that the defendants must cease all uses of the SPAN mark unless the parties entered into new agreements, it is clear that no reasonable finding could be made that Kelly was indicating that the defendants had rights to use the mark in the interim.

Another case from this district, *Sarkis' Cafe*, is instructive regarding whether CME actively represented that the defendants had rights to use its mark. In *Sarkis' Cafe*, the court denied **[*27]** the plaintiff's acquiescence defense where the parties had taken "many steps . . . to formalize a franchising agreement" but "the negotiations came to a halt." *Sarkis' Cafe, 2016 U.S. Dist. LEXIS 22566, 2016 WL 723135, at *4-5*. The parties had never had a previous agreement. *See* *2016 U.S. Dist. LEXIS 22566, [WL] at *1*. The plaintiff operated a restaurant, andneeded to agree on new disclaimers regarding the defendants' uses of the mark. Although Kelly stated that ICE's proposed disclaimers "look[ed] good," there was evidence that its manager had trained the defendant's employees and acknowledged the defendant's restaurant as a franchisee in a media interview while they negotiated an agreement. *2016 U.S. Dist. LEXIS 22566, [WL] at *4*. The court found that "the negotiations cast a shadow over all of [the plaintiff's] actions" and thus none of those actions could "be taken as an affirmative word or deed conveying to [the defendant] a right to use the trademarks." *2016 U.S. Dist. LEXIS 22566, [WL] at *5*.

None of CME's communications with ICE affirmatively indicated that the ICE Licensees could continue using its mark. Specifically, Kelly never stated that the defendants could continue using CME's mark or approved of their continued uses of it. Rather, he repeatedly indicated that CME would propose (and the defendants would need to accept) new financial terms before they could enter into new agreements. But he never got to the point of providing new proposed terms. And he told ICE's general counsel that the parties **[*28]** needed to agree on new disclaimers regarding the defendants' uses of the mark. Although Kelly stated that ICE's proposed disclaimers "look[ed] good," Defs.' *L.R. 56.1* Stmt., dkt. no. 188, ¶ 340, he never told ICE that it could implement those disclaimers and use the mark.

There is, however, a genuine factual dispute regarding whether CME's conduct during the negotiations served as an active representation that the defendants could use the licenses. Specifically, the defendants contend that CME's continued performance of its obligations under the license agreements showed that the ICE Licensees had CME's permission to use the SPAN marks. As indicated, a trademark holder can convey an affirmative representation through its conduct, not just its words. *Hyson USA, 821 F.3d at 941*. Unlike the parties in *Sarkis' Cafe*, who previously had never entered into license agreements, CME and the ICE Licensees had had ten-year license agreements. Thus the lens through which the defendants would see CME's conduct differs from the negotiation for an initial license involved in *Sarkis' Cafe*. After the terminations of the ICE Licensees' agreements, while CME and ICE were negotiating over new agreements, CME continued to make available on **[*29]** its FTP site the ICE Licenses' risk array files and issued a notice to its clearing members that it planned to migrate the site, including data for ICE's clearinghouses, to a new host. (The parties dispute whether CME or the ICE Licensees posted the files to the FTP site.) The Court cannot determine without hearing testimony whether CME's conduct amounted to an active representation that the defendants could use the SPAN mark. Accordingly, CME is not entitled to summary judgment on the defense for the period from August 10, 2017 through February 23, 2018.

Turning to the defendants' motion, CME's claimed silence during the negotiations does not entitle defendants to summary judgment on their defense, as the defendants contend. In certain situations, a trademark owner's continued silence may constitute an active representation indicating its acquiescence in another party's use of its mark. *ProFitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C., 314 F.3d 62, 68 (2d Cir. 2002)*. In *ProFitness*, a trademark holder sent a cease-and-desist letter to its competitor, with whom it had never entered a license agreement. *Id. at 65*. The competitor ameliorated the effect of the letter by making a good faith proposal to change its allegedly infringing use and expressly requesting that the trademark **[*30]** holder respond to its proposal, with the caveat that the failure to respond would be construed as assent. *Id. at 65-66*. The trademark holder never responded. *Id. at 66*. The court found that, under the circumstances, the trademark holder's silence amounted to an active representation, and the competitor reasonably believed the holder had acquiesced in its use of the mark. *See id. at 68-69*. This case, however, is distinguishable from *ProFitness* because the defendants never requested CME's consent to continue their uses of its mark or told CME that they would interpret its silence as consent. The existence of the parties' prior written licensing arrangement further serves to distinguish this case from *Pro Fitness*. Accordingly, to the extent the defendants contend that the doctrine of estoppel by an implied license is distinct from the doctrines of acquiescence or implied consent, there is evidence that would permit a finding that they had implied licenses during this timeframe and evidence that would permit the opposite finding.

d. After February 23, 2018

CME argues that the ICE Licensees can point to no evidence showing acquiescence and/or grants of implied license after CME filed this lawsuit on February 23, 2018. The **[*31]** defendants argue that the parties' conduct after CME filed the lawsuit indicated that CME gave implied licenses or acquiesced in their use of the mark. That argument makes no sense. A trademark owner cannot be considered to have actively represented that it will not assert a claim against former licensees and their parent company for their uses of its mark—as required for the defense of acquiescence—when it already has asserted exactly such a claim. *See Restatement (Third) of Unfair Competition § 29 cmt. d* (Am. Law. Inst. 1995) (the commencement of an infringement action indicates that a trademark owner does not consent to the allegedly infringing party's use of its mark). The Court need not address the other two elements of an acquiescence because they "cannot alone support a finding of acquiescence." *Hyson USA, 821 F.3d at 941*. And even if, as the ICE Licensees contend, the active representation requirement does not apply, no jury could find that the defendants reasonably believed that CME had given them an implied license to use the mark once it had already sued them for use of the mark. Therefore, the Court grants CME's motion for summary judgment, and denies the defendants' cross-motion, on the defenses of acquiescence and/or estoppel by implied license **[*32]** as they pertain to the ICE Licensees' uses of the mark after February 23, 2018.

e. Summary

In sum, the Court grants CME's motion for summary judgment on the defenses of acquiescence and/or estoppel by implied license for trademark violations occurring after February 23, 2018 but declines to enter summary judgment in CME's favor on these defenses for the periods before that date. The Court denies the defendants' cross-motion for summary judgment on these defenses.

4. Express license

The defendants frame their fourth affirmative defense as a defense that any infringement was permitted under express or implied licenses. CME stated in its opening brief that it presumed that the defense related only to the existence of implied licenses through acquiescence. It thus moved for summary judgment on that defense as to the ICE Licensees based only on the issue of acquiescence, as the Court just addressed. In its reply brief, however, CME sought summary judgment on the express license defense. The defendants contend that CME waived that argument by failing to make it in its opening brief and, regardless, that its express license defense applies only to ICE.

A court is entitled to find that an argument **[*33]** raised for the first time in a reply brief is forfeited. *See, e.g., Narducci v. Moore, 572 F.3d 313, 324 (7th Cir. 2009)*. CME waived its argument for summary judgment on an express license defense by failing to make that argument. That said, the ICE Licensees conceded their express license defense by arguing that they had no express license. Accordingly, the Court finds that an express license defense is still at issue in this case only as it pertains to ICE, and neither party has moved for summary judgment on that issue.

B. Trademark-related claims

CME asserts claims against all of the defendants for trademark counterfeiting and infringement under *15 U.S.C. § 1114* and unfair competition under *15 U.S.C. § 1125(a)*, as well as parallel state law claims.[8] ICE has raised counterclaims challenging the protectability of the SPAN mark, as indicated. CME has moved for summary judgment on its claims against the ICE Licensees but not against ICE. The defendants have all cross-moved for summary judgment on CME's claims and certain counterclaims. Specifically, ICE seeks summary judgment on its counterclaims, and, with respect to CME's claims, all of the defendants argue that CME alleged no facts relating to trademark violations during the terms of the agreements and failed to prove **[*34]** violations after the agreements' termination.

The Court first addresses the issue of protectability. After that, the Court will turn to whether CME alleged facts relating to trademark violations during the terms of the license agreements. Next, the Court will discuss most of the trademark claims relating to the defendants' uses of the SPAN mark after the agreements' terminations, and, finally, the Court will discuss the counterfeiting claim, which entails a separate analysis.

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[8] CME alleges deceptive trade practices in violation of *815 Ill. Comp. Stat. 510/1* and unfair competition in violation of Illinois common law. Both claims are subject to the same standards as the federal infringement claims. *AHP Subsidiary Holding Co. v. Stuart Hale Co., 1 F.3d 611, 619 (7th Cir. 1993)*; *McGraw-Edison Co. v. Walt Disney Prods., 787 F.2d 1163, 1173 n.9, 1174 (7th Cir. 1986)*. Thus the Court need not engage in a separate analysis of these claims.

1. Protectability

A plaintiff may sue for trademark violations only if its mark is protectable. *See CAE, Inc. v. Clean Air Eng'g, Inc., 267 F.3d 660, 673 (7th Cir. 2001)*. ICE has moved for summary judgment on its counterclaims, which challenge the SPAN mark's protectability on the grounds that the mark is generic and that CME has abandoned it through naked licensing.[9] CME has not cross-moved for summary judgment on either counterclaim. The ICE Licensees have not challenged the mark's validity in the present motion; the doctrine of licensee estoppel precludes them from doing that.[10] *See Donald F. Duncan, Inc. v. Royal Tops Mfg. Co., 343 F.2d 655, 657 (7th Cir.1965)* (trademark licensees are estopped from disputing protectability); *Chrysler Motors Corp. v. Alloy Auto. Co., 661 F. Supp. 191, 193 (N.D. Ill. 1987)* (former licensees are estopped from challenging protectability except based on facts arising after the licenses' terminations). The Court **[*35]** addresses genericness first and then discusses abandonment.

a. Genericness

ICE has moved for summary judgment on its counterclaim alleging that SPAN has become a generic term referring to the calculation of initial margin and thus CME's mark is not legally protectable. "The term 'trademark' includes any word, name, symbol, or device . . . used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods." *15 U.S.C. § 1127*. "Marks are classified into five categories of increasing distinctiveness: 1) generic, 2) descriptive, 3) suggestive, 4) arbitrary, and 5) fanciful." *Mil-Mar Shoe Co. v. Shonac Corp., 75 F.3d 1153, 1156 (7th Cir. 1996)*. "[G]eneric terms receive no trademark protection." *Id.*

A generic term is one that is "commonly used to name or designate a kind of goods," whereas a trademark "identifies the source of a product." *Id. at 1157* (citation omitted). A determination that a trademark is generic is a "fateful step" that "penalizes the trademark's owner" for successfully "making the trademark a household name" and that "may confuse consumers who continue to associate the trademark with the owner's brand." *Ty Inc. v. Softbelly's Inc., 353 F.3d 528, 531 (7th Cir. 2003)*. Courts thus generally find that a trademark has become generic only where **[*36]** "the trademark has gone so far toward becoming the exclusive descriptor of [a] product that sellers of competing brands cannot compete effectively without using the name to designate the product they are selling." *Id.* Otherwise, if such words were considered protectable trademarks, sellers would be in a "pickle," as the Seventh Circuit has stated, because they would be "forbidden to use 'brassiere,' 'cellophane,' 'escalator,' 'thermos,' 'yo-yo,' or 'dry ice' to denote products—all being former trademarks that have become generic terms." *Id. at 531-32*.

Genericness is a question of fact. *See, e.g., id. at 530-31*. The registration of a trademark under the *Lanham Act* affords the registrant a rebuttable presumption of validity. *See 15 U.S.C. § 1115(a)*; *CAE, 267 F.3d at 673*. The Seventh Circuit has not directly addressed which party bears the burden of persuasion regarding the genericness of an incontestable mark. *Compare Te-Ta-Ma Truth Found. - Family of URI, Inc. v. World Church of the Creator, 297 F.3d 662, 665 (7th Cir. 2002)* (stating, without discussing which party bears the ultimate burden of persuasion, that "an incontestable registration is more like a bursting-bubble presumption of non-genericness than like [an] indomitable presumption") *with Reno Air Racing Ass'n., Inc. v. McCord, 452 F.3d 1126, 1135 (9th Cir. 2006)*

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[9] ICE also asserts affirmative defenses relating to these counterclaims. The Court need not address those defenses separately because the analysis is the same regardless of whether they are framed as counterclaims or defenses.

[10] The ICE Licensees challenged the mark's validity in their initial counterclaims and CME moved to dismiss those counterclaims due to licensee estoppel. CME contends in its opening brief that the Court granted that motion and dismissed the ICE Licensee's counterclaims due to licensee estoppel, but that does not appear to be correct. The Court did not grant that motion to dismiss. Rather, at a hearing on May 17, 2018, the Court instructed the defendants to file a response to the motion to dismiss addressing the issue of licensee estoppel, and the defendants indicated that they instead would amend their answer and counterclaims. The defendants amended the counterclaim so that only ICE raised the validity counterclaims, dkt. no. 41, and the Court terminated CME's motion to dismiss after CME filed an amended complaint, *see* dkts. no. 69, 74.

(defendant has the burden of showing the genericness of an incontestable mark). As previously explained in **[*37]** *Hickory Farms, Inc. v. Snackmasters, Inc., 500 F. Supp. 2d 789 (N.D. Ill. 2007)* (Kennelly, J.), this Court assumes the defendant bears the burden of persuasion on an incontestable trademark's genericness. *See* *id. at 793*; *see also* *Illinois Tamale Co. v. El-Greg, Inc., No. 16 C 5387, 2018 WL 1534971, at *3 (N.D. Ill. Mar. 29, 2018)* (Kennelly, J.).

The types of evidence relevant to a determination of genericness include consumer surveys, dictionary definitions, and the uses of the term by the trademark owner, its competitors, and the media. *See, e.g.*, McCarthy, *supra*, § 12:13. ICE contends that SPAN is generic based on survey results, a financial dictionary's definition, and uses of the term by CME, its competitors, the media, and academics. Viewing the evidence in the light most favorable to CME, the nonmoving party, there is a genuine factual dispute regarding whether the term is generic. For each category of evidence, the Court first addresses issues of admissibility and then describes the admissible evidence put forth by the parties. Finally, the Court explains why, considering all of the evidence, there is a genuine factual dispute.

i. Survey results

Surveys can provide evidence of genericness, but a party is not required to conduct a survey to establish that a disputed term is or is not generic. *See id.* § 12:14. ICE has presented a survey conducted by its retained expert witness, Phillip Johnson. **[*38]** CME has presented no survey of its own and challenges the admissibility and results of ICE's survey.

The admissibility of expert testimony is governed by *Federal Rule of Evidence 702* and *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. *See* *Gopalratnam v. Hewlett-Packard Co., 877 F.3d 771, 778 (7th Cir. 2017)*. The party "seeking to introduce the expert witness testimony bears the burden of demonstrating," by a preponderance of the evidence, that the testimony is admissible. *Id. at 782*. Expert testimony is admissible if the witness is qualified, applies reliable methodology, and renders testimony that will assist the trier of fact. *Id. at 779*. In considering the question of methodological reliability, the Court must take a "flexible" approach based on "the precise sort of testimony at issue and not any fixed evaluative factors." *Id. at 780*.

CME challenges the reliability of Johnson's survey on several grounds. First, CME argues that Johnson employed an unreliable methodology because, it contends, he surveyed an over- and underinclusive universe of respondents. The proper universe for a consumer survey on genericness is "the segment of the population whose perceptions and state of mind are relevant to the issues in [the] case." McCarthy, *supra*, § 32:159. If a survey's universe is "sufficiently precise," it is admissible, and any inadequacies in the scope of its universe go to the **[*39]** weight to be given to its results. *Piper Aircraft Corp. v. Wag-Aero, Inc., 741 F.2d 925, 930 (7th Cir. 1984)*. In *Piper Aircraft*, the Seventh Circuit found that a survey about the genericness of airplane parts was admissible where it included all owners of private airplanes, rather than only airplane owners likely to buy parts because they "work on, restore, or build their own aircraft." *Id.* Although the court found that the survey was somewhat overinclusive, it found that the views of all private airplane owners nonetheless were relevant because they had a "substantial interest in the quality of parts used in their planes." *Id.* The court found that the lesser probative value of the views of airplane owners who do not work on their own planes would affect only the weight to be given the survey, not its admissibility. *Id. at 930-31*.

CME contends that the survey's universe was underinclusive because it did not include all people who purchase financial risk management services or use those services to calculate initial margins and overinclusive because it included people who do not purchase or use those services. ICE's expert surveyed finance professionals who have Series 3 licenses (which qualifies them to trade commodities) and who are involved in commodity futures trading. **[*40]** Johnson testified that he selected this universe because people with such licenses are the "end users" of SPAN and are "subject to the SPAN calculation for the margin requirements on the trades that they make." Defs.' Add'l *L.R. 56.1* Stmt., dkt. no. 181-6, ¶¶ 111-12. CME contends that, although traders may be subject to margin requirements, those who are tasked with purchasing risk management services or calculating initial margins may not engage in trading and thus may not have Series 3 licenses. In support of this contention, CME's rebuttal expert reviewed job descriptions for risk management positions on job-search websites and the parties' websites and concluded that they generally do not require applicants to hold Series 3 licenses. He also examined the profiles of SPAN licensees' employees on a brokerage website and found that the profiles did not indicate that they held Series 3 licenses.

Johnson's survey was underinclusive to the extent that it may have excluded people who buy risk management services or calculate initial margins. The survey also was somewhat overinclusive. Although the views of people with Series 3 licenses are relevant regarding whether SPAN is a generic term because **[*41]** traders have a "substantial interest" in initial margins calculated through the SPAN framework, the views of people who buy or use risk management services but do not hold Series 3 licenses are also relevant. *See* *Piper Aircraft, 741 F.2d at 930*; *see also* *Black & Decker Corp. v. Positec USA Inc., No. 11-CV-5426, 2015 U.S. Dist. LEXIS 127193, 2015 WL 5612340, at *18 (N.D. Ill. Sept. 22, 2015)* (survey was overinclusive where it did not specify whether respondents who used a product were likely to purchase it). The universe, however, is not so "significantly skewed away from the proper group of people whose perception is at issue" as to render it unreliable and thus inadmissible. McCarthy, *supra*, § 32:159. Therefore, the survey is admissible; the objection affects only its weight.

CME contends that other aspects of Johnson's survey make its results unreliable. Specifically, because the survey defined brand names as names that can be used by only one company, CME argues that the survey could have caused respondents to misunderstand that trademarks can be used by multiple companies due to licensing arrangements. Citing *Sheetz of Delaware, Inc. v. Doctors Associates Inc., 108 U.S.P.Q.2d 1341 (T.T.A.B. 2013)*, ICE responds that courts have approved of similar definitions of brand names in other cases. But *Sheetz* is not on point; the administrative agency in that case did not address whether the definition at issue sufficed to distinguish between brand names used by **[*42]** multiple companies under license agreements. *See id.* at 1365. ICE also asserts that respondents took screening questions to ensure they could differentiate between brand names and generic terms, but there is no evidence indicating whether the screening questions involved terms used by multiple companies through license agreements.

A survey's questions and instructions "should not be slanted or leading so as to lead the respondent to a desired response." McCarthy, *supra*, § 32:172. In this case, the survey's definition of brand names could be confusing or slanted in that it suggested that only one company can use the term SPAN. This issue is somewhat mitigated, however, because respondents who were confused by the definition could indicate that they did not know whether SPAN was generic or not. *See* *Black & Decker, 2015 U.S. Dist. LEXIS 127193, 2015 WL 5612340, at *19* (the leading nature of a survey question can be somewhat mitigated where respondents can answer that they do not know the answer to a question). Accordingly, the Court again finds that CME's objection affects only the weight to be given to the survey, not its admissibility.

Additionally, CME argues that Johnson improperly excluded respondents because they had never heard of the term SPAN. CME contends that respondents' unawareness **[*43]** of a term is an indication that the term is not generic. This argument misses the mark. The relevant question for genericness is not whether respondents are aware of the term but, rather, whether people who are aware of a product commonly use the term to "name or designate" it. *See* *Mil-Mar Shoe, 75 F.3d at 1157*.

CME also argues that the survey's results are unreliable because Johnson did not include all respondents in his conclusions but rather included only the respondents who had heard of the term SPAN. But this argument effectively challenges how Johnson framed the results, not the reliability of his methodology. *Gopalratnam, 877 F.3d at 781* (*Rule 702* requires only an that an expert correctly apply "a reliable *methodology*," not that his conclusions are reliable). To the extent CME challenges Johnson's results or ICE's framing of the results, that goes to the survey's weight and is not grounds for excluding the survey. *See id.*

Accordingly, the Court concludes that Johnson's survey is admissible. Johnson found that sixty-nine percent of the respondents who had seen or heard of the term SPAN believed it to be a common name, twenty-nine percent believed it to be a brand name, and two percent did not know whether it was a common or brand name.

Defs.' **[*44]** *L.R. 56.1* Stmt., Ex. 87, dkt. no. 181-6, at 233. But around twenty-seven percent of the respondents had never heard of the term SPAN. *See* Pls.' Add'l *L.R. 56.1* Stmt., Ex. 18, dkt. no. 195-4, at 36. Although Johnson's survey provides support for ICE's claim of genericness, a jury might discount it for the reasons the Court has discussed. It is not conclusive evidence of genericness.

ii. Dictionary definition

Courts often look to dictionaries as a source of evidence on genericness because "generic use implies use consistent with common understanding." *Mil-Mar Shoe, 75 F.3d at 1158*. The term SPAN is not included in standard dictionaries. Investopedia, a website with an online financial dictionary, defines SPAN without referencing CME. ICE contends Investopedia's definition supports summary judgment on the issue of genericness. But another article on Investopedia attributes to SPAN methodology to CME. Again, the defendants' dictionary citation does not amount to conclusive evidence of genericness.

iii. Uses of the term

ICE also argues that usage of the term SPAN by CME, its competitors, the media, and academics indicate that the term is generic. Specifically, ICE points to evidence that CME recently started using the phrase "CME SPAN" **[*45]** to distinguish itself from other common references to the term. It also contends that CME uses SPAN as a noun, in the possessive form, and without the trademark symbol—uses that ICE contends show that the term is generic. It offers evidence from an expert, Robert Frank, who examined the uses of SPAN in media and Internet sources and concluded that the majority of those sources used the term SPAN as a noun, did not identify it as a trademark, and mentioned CME only to indicate that it invented the term. And it argues that CME failed to police third parties' uses of its mark, which it contends indicates that the mark has become generic.

As an initial matter, CME challenges the admissibility of Frank's expert report. As indicated, expert testimony is admissible if the witness is qualified, applies reliable methodology, and renders testimony that will assist the trier of fact. *Gopalratnam, 877 F.3d at 779*. CME challenges only the reliability of Frank's methodology. Because the Court serves a gatekeeping role rather than a factfinding one, its inquiry into the question of methodological reliability inquiry is limited to an expert's "principles and methodology, not the conclusions that [he] generate[s]." *Id. at 781* (quoting *Daubert, 509 U.S. at 595* **[*46]**).

CME contends that Frank's testimony is not reliable because, according to its two rebuttal experts, Frank overcounted the number of references to SPAN, ignored the context in which the mark was used, and improperly included references that are inapplicable to this case. Notably, CME does not object to the design of Frank's searches for articles referencing the term SPAN or to the nature of the news and academic articles on which he based his analysis. Instead, CME's objections relate to the conclusions that Frank drew and how he reached those conclusions, which go to only the weight to be given to his testimony, not to its reliability or admissibility. *See id.* The Court denies CME's request to bar Frank's testimony.

ICE, in turn, challenges the admissibility of CME's expert testimony as improper rebuttal evidence. According to ICE, CME's experts, David Gooder and Dr. Robert Leonard, responded to Frank's testimony by offering express opinions about the genericness of the SPAN mark, even though Frank never provided a conclusion on the mark's genericness. ICE further challenges the reliability of Gooder's expert opinion because, it contends, he provided improper legal analysis. The Court **[*47]** need not address the admissibility of Gooder's or Dr. Leonard's testimony, however, because their opinions do not affect the outcome of this decision. In particular, as the Court explains momentarily, even without these expert opinions, there is not enough evidence for summary judgment in favor of ICE.

Through its expert, ICE has offered evidence that CME, the media, and academics used the SPAN mark as a noun, without a trademark symbol, and in contexts indicating it was generic. But ICE's expert also identified the existence of instances where CME, the media, and academics used the SPAN mark as a trademark. And although ICE contends that CME failed to police the uses of its mark, ICE does not point to conclusive proof that they never policed the mark and, regardless, a trademark holder's failure to police the uses of its mark can, but does not always, indicate genericness. *See* McCarthy, *supra*, § 17:8.

iv. Conclusion

In sum, viewing the evidence, taken as a whole, in the light most favorable to CME, there is a genuine factual dispute regarding the genericness of the SPAN mark. Specifically, a reasonable jury could find that Johnson's survey provides support for ICE's claim of genericness, as the Court has discussed, but **[*48]** a reasonable jury could also reach the opposite conclusion. And to the extent Investopedia is considered an authoritative dictionary (an issue the Court need not decide), a reasonable jury could take its definition of SPAN as evidence of genericness or, considering Investopedia's article attributing the SPAN methodology to CME, as just the opposite. Nor does ICE's evidence of uses of the term SPAN provide conclusive evidence of genericness, as just discussed. In short, the evidence is not "so one-sided that there can be no doubt about how" a jury would answer the question of genericness, and thus summary judgment on that issue is inappropriate. *Door Sys., Inc. v. Pro-Line Door Sys., Inc., 83 F.3d 169, 171 (7th Cir. 1996)*. The Court therefore denies ICE's motion for summary judgment on the counterclaim relating to genericness.

b. Abandonment through naked licensing

ICE has also moved for summary judgment on its counterclaim that CME's trademark is invalid because it abandoned its rights in the mark through naked licensing. Abandonment through naked licensing occurs when a trademark owner allows "others to use the mark without exercising 'reasonable control over the nature and quality of the goods, services, or business on which the [mark] is used by the licensee.'" **[*49]** *Eva's Bridal Ltd. v. Halanick Enters., Inc., 639 F.3d 788, 789 (7th Cir. 2011)* (alteration in original) (quoting *Restatement (Third) of Unfair Competition § 33*). A party contending that a trademark owner engaged in naked licensing bears a "heavy burden." *TMT N. Am., Inc. v. Magic Touch GmbH, 124 F.3d 876, 885 (7th Cir. 1997)* (quoting *Restatement (Third) of Unfair Competition § 33 cmt. c*).

In making naked licensing determinations, the Seventh Circuit "tend[s] towards the view taken by the Restatement (Third) of Unfair Competition, which advocates a flexible approach but allows licensors to rely at least somewhat on the reputation and expertise of licensees." *Id.* Under that approach, if the trademark owner has a justification for relying on the licensee's reputation and expertise, "the existence of contractual obligations undertaken by the licensee may be sufficient in itself to constitute reasonable quality control . . . at least in the absence of evidence indicating significant deviations from the agreed standards or procedures." *Restatement (Third) of Unfair Competition § 33 cmt. c*. But more quality control may be necessary "if the licensee is inexperienced, or if the goods or services are particularly complex or otherwise require careful supervision, or if the risk to the public from inadequate supervision is substantial." *Id. See also Bodum USA, Inc. v. A Top New Casting, Inc., No. 16 C 2916, 2017 U.S. Dist. LEXIS 71108, 2017 WL 1927701, at *3 (N.D. Ill. May 10, 2017)* (Kennelly, J.) (declining to grant summary judgment on the issue of naked licensing where there was no evidence that a trademark owner was unjustified **[*50]** in relying on a licensee's expertise and fulfillment of its contractual obligations and no evidence of a deviation in the licensed products' quality).

ICE argues that CME failed to exercise reasonable quality control because it never exercised its contractual rights to control the goods or services related to its licenses. Specifically, ICE contends that CME provided licensees with few guidelines apart from the obligations set forth in license agreements regarding its standards for their services; had no approval or product accreditation process for licensees' services; would review licensees' services only at the start or end of their licenses' terms; never terminated a license agreement due to a licensee's quality of services; and never audited any licensee's services, advertisements, or software codes relating to the SPAN framework. CME contends that it exercised quality control through a six-month onboarding process for licensees (a process ICE contends is optional) and its role in helping to implement and validate licensees' software (another matter that ICE disputes). CME also points to the enforcement actions it took against ICE and the ICE Licensees in 2009 and 2017, but those **[*51]** actions are irrelevant regarding the issue of quality control because, in taking them, CME sought to address the ICE Licensees' uses of the mark, not to control the quality of their services. *See Slep-Tone Entm't Corp. v. Coyne, 141 F. Supp. 3d 813, 824 (N.D. Ill. 2015)* ("The 'control' required . . . is not control over the mark, but rather control over the *service* that the mark identifies.").

A reasonable jury, however, could find that CME did not need to exercise its contractual rights to exercise reasonable quality control. ICE compares this case to *Eva's Bridal*, an "extreme case" in which the Seventh Circuit found that a trademark holder had abandoned its license because neither its license agreement nor its "course of performance" indicated that it held or exercised any authority over its licensee. *Eva's Bridal, 639 F.3d at 790-91*. But unlike in *Eva's Bridal*, the license agreements granted CME the right to control the nature and quality of the ICE Licensees' services, perform inspections, and require the ICE Licensees to modify their SPAN-related systems in order to conform with its specifications. Because CME's licensees include sophisticated financial institutions such as clearinghouses and exchanges that are subject to federal regulation and have significant incentives to maintain **[*52]** the quality of CME's SPAN framework, a reasonable jury could find that CME was justified in relying on its licensees' reputations and expertise, absent a "significant deviation from" CME's quality standards. *See TMT N. Am., 124 F.3d at 886*. If the licensees' services significantly deviated from the quality of the SPAN framework, they could have faced regulatory, financial, and reputational consequences.

That said, there is a genuine factual dispute regarding whether licensees' uses of SPAN involved significant deviation from CME's quality standards. CME permitted licensees to develop their own implementations of the SPAN framework, which a reasonable jury could find entailed significant deviations from CME's standards. For example, as indicated, a CME employee involved in product management wrote in an e-mail that CME chose to "ignore" unilateral changes that the ICE Licensees made to the SPAN algorithm, which caused their calculations to "deviate." Defs.' *L.R. 56.1* Stmt., Ex. 73, dkt. no. 181-6, at 131-32. And an employee wrote that London Clearing House, another licensee of the SPAN mark, "changed the methodology that is native to SPAN." *Id.* at 131. But a reasonable jury also could find that the implementations did not constitute **[*53]** significant deviations. In a subsequent e-mail, an employee stated that the London Clearing House "might not have made any actual changes" to the algorithm for SPAN; he appeared to indicate that the changes could have been related to the functionality of software and may not have a major impact on the underlying methodology. *Id.* at 130.

The Court concludes that there is a genuine factual dispute regarding whether CME failed to exercise adequate quality control and thereby engaged in naked licensing. Therefore, the Court denies ICE's motion for summary judgment on its counterclaim of abandonment through naked licensing.

Because the Court denies ICE's motion for summary judgment with respect to both validity counterclaims, it need not address ICE's request for cancellation of CME's four trademark registrations relating to the SPAN framework.

2. Trademark violations during the terms of the license agreements

Assuming CME can prove at trial that its mark was protectable, it must also prove the other elements of its claims for trademark counterfeiting and infringement under *15 U.S.C. § 1114*, unfair competition under *15 U.S.C. § 1125(a)*, and parallel state law violations. As indicated, CME has moved for summary judgment against the ICE **[*54]** Licensees on these claims as they pertain to CME's liability, and the defendants have cross-moved for summary judgment.

CME argues that the ICE Licensees infringed the SPAN mark during the terms of the license agreements by using the phrase "ICE SPAN," a use of the SPAN mark it contends that the agreements did not permit. The defendants contend that they cannot be liable for trademark violations during the terms of the agreements because CME did not plead any facts to support this theory.

At the summary judgment stage, a plaintiff typically can assert new legal theories, but it cannot change the factual basis of its complaint. *BRC Rubber & Plastics, Inc. v. Cont'l Carbon Co., 900 F.3d 529, 541 (7th Cir. 2018)*. "Such an alteration would be an unacceptable attempt to amend the pleadings through summary judgment argument." *Id.* (internal quotation marks and citation omitted). Where a party raises a new argument in the course of summary judgment briefing that changes the factual theory set forth in the complaint, a "district court has discretion to deny the *de facto* amendment and to refuse to consider the new factual claims." *Id. at 540* (citation omitted). In exercising that discretion, "the court should consider the consequences of allowing the plaintiff's new theory"; where the **[*55]** amendment would "cause unreasonable delay, or make it more costly or difficult to defend the suit, the district court can and should hold the plaintiff to [its] original theory." *Id.* (internal quotation marks and citation omitted).

CME contends that two sentences in the complaint sufficiently allege that the ICE Licensees infringed the SPAN mark during the term of the license agreements. In those sentences, CME alleges that it determined that the defendants infringed upon its trademark rights, Am. Compl., dkt. no. 69, ¶ 39, and that it had previously contacted or communicated with the ICE Licensees regarding their allegedly infringing uses of the SPAN mark, *id.* ¶ 88. Neither of these allegations nor, for that matter, any other portion of the complaint, contains well-pleaded facts supporting a claim of infringement by ICE Licensees during the terms of the license agreements.

CME also contends that two exhibits attached to its complaint—printouts from the ICE Licensees' websites, totaling over 130 pages, that mention "ICE SPAN" about a dozen times—make clear that CME was alleging infringement by the ICE Licensees during the terms of the license agreements. *See* Am. Compl., Ex. C, dkt. no. **[*56]** 69-2, at 59; *id.*, Ex. D, at 80, 82, 84, 89, 92, 95. The contents of documents attached to a complaint "become part of the complaint" when the plaintiff "references and relies upon" those documents to support its claim. *Williamson v. Curran, 714 F.3d 432, 436 (7th Cir. 2013)*. CME's exhibits do not support allegations of infringement during the terms of the license agreements. *See* Am. Compl., Ex. C, at 59; *id.*, Ex. D, at 80, 82, 84, 89, 92, 95. Rather, CME's complaint references the exhibits to support facts regarding the ICE Licensees' allegedly infringement uses of the SPAN mark *after* the termination of the license agreements, not before it. *See* Am. Compl. ¶¶ 45-60, 62. And the contents of the exhibits do not clearly relate to allegations of trademark violations during the license agreements' terms. Accordingly, CME's allegations that the ICE Licensees infringed the SPAN mark during the terms of the ICE License agreements constitute a *de facto* amendment to its complaint.

The Court concludes that amendment of CME's complaint to include a claim regarding infringement during the terms of the license agreements factual allegations would cause unreasonable delay and unreasonably increase this lawsuit's costs for the defendants, particularly **[*57]** in light of the substantial discovery the parties have completed (the Court notes that discovery relating to liability is closed). CME's arguments to the contrary fall flat. It contends that the new allegations would not cause an unreasonable delay or additional expenses because the ICE Licensees were aware of these allegations. Many of CME's citations in support of this proposition relate to the relevant time period addressed in discovery requests, which included periods during and before the parties signed the license agreements, as set out in various reports and motions the parties filed before the Court. *See, e.g.*, Joint Stipulation, dkt. no. 75, ¶ 5; Parties' Joint Report on Discovery, dkt. no. 76, at 3.[11] But the proposition that the relevant time period of discovery put the defendants on notice that CME was asserting a claim involving trademark violations during the term of the license agreements is too much of a stretch. Furthermore, other issues in the case, such as whether CME abandoned the trademark through naked licensing, involve facts from that same timeframe.

As further support for its contention that the defendants were aware of these allegations, CME cites motions, reports, **[*58]** and the defendants' statement of facts regarding the ICE Licensees' uses of the phrase "ICE SPAN" during the term of the agreements. *See, e.g.*, Defs.' *L.R. 56.1* Stmt., dkt. no. 188, ¶¶ 145-48, 193-94.[12] But again,

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[11] CME has cited to six items on the docket in support of this proposition (as well as to six paragraphs in the defendants' *Local Rule 56.1* Statement of Facts that appear to provide support for a different proposition). The Court has cited to the only two relevant items that included pincites. CME also has cited to a nineteen-page motion for a protective order, dkt. no. 51, a five-page motion to compel a deposition, dkt. no. 101, an eleven-page memorandum in support of that motion, dkt. no. 104, and a six-page joint report on discovery, dkt. no. 170—all without pincites. None of the cited documents show that the defendants had notice of the new allegations.

because use of that phrase also relates to other issues in this case—such as whether CME engaged in naked licensing—these documents in no way suggest that the ICE Licensees had notice of these new claims.

For these reasons, the Court declines to approve CME's *de facto* amendment to the complaint. The Court therefore denies CME's motion for summary judgment. The Court disregards defendants' cross-motion for summary judgment regarding the trademark counterfeiting, trademark infringement, unfair competition, and parallel state law violations that CME alleges occurred during the term of the license agreements because "a party cannot obtain summary judgment on a matter not raised by the pleadings." *Roby v. Greenlee Textron, Inc., No. 94 C 50294, 1995 U.S. Dist. LEXIS 19234, 1995 WL 767819, at *5 (N.D. Ill. 1995)*; *see also* *Burks v. Wisconsin Dep't of Transp., 464 F.3d 744, 758 n.15 (7th Cir. 2006)*.[13]

3. Trademark infringement, unfair competition, and parallel state law after the termination of the license agreements

CME next argues that the ICE Licensees committed trademark violations after the termination of the license agreements. A licensee violates trademark law if it continues to use a trademark after the termination of a license agreement. *See* *Gorenstein Enters., Inc. v. Quality Care-USA, Inc., 874 F.2d 431, 435 (7th Cir. 1989)*. In their cross-motion for summary judgment, **[*59]** the defendants argue that CME has not met its burden to establish that any post-termination uses by the ICE Licensees created a likelihood of confusion. That is incorrect as a matter of law; the use of a trademark after a license agreement's termination by itself establishes a likelihood of confusion, subject to any applicable defenses. *See* *Burger King Corp. v. Mason, 710 F.2d 1480, 1493 (11th Cir. 1983)* ("[M]any courts have held that continued trademark use by one whose trademark license has been cancelled satisfies the likelihood of confusion test and constitutes trademark infringement."); *Ramada Franchise Sys., Inc. v. Royal Vale Hosp. of Cincinnati, Inc., No. 02 C 1941, 2005 U.S. Dist. LEXIS 8367, 2005 WL 435263, at *15 (N.D. Ill. Feb. 16, 2005)* (collecting cases).

It is undisputed that the ICE Licensees used the SPAN mark after the termination of the license agreements. Specifically, as indicated, ICE Clear US continued to use the phrase "SPAN® Margin Model" in connection with its risk management services, ICE Clear Europe continued to use the word "SPAN" in connection with its services, and both ICE Licensees continued to place disclosures on their materials stating that the SPAN mark was a registered trademark of CME being used pursuant to a license. Pl.'s *L.R. 56.1* Stmt., dkt. no. 188, ¶¶ 59-62, 92, 193.

To the extent the defendants suggest that there is no likelihood of confusion between their uses of the **[*60]** phrase "SPAN for ICE" and the SPAN mark, that argument is unavailing. A viewer of the "SPAN for ICE" phrase "would be likely to associate" SPAN's risk management services with CME's risk management services; no reasonable jury could find otherwise. *See* *AutoZone, Inc. v. Strick, 543 F.3d 923, 930 (7th Cir. 2008)* (explaining factors courts consider in addressing the likelihood of confusion); *see* *CAE, 267 F.3d at 678, 682* (finding that marks were indistinguishable where both parties used them in combination with the names of the their departments).[14] In particular, a reasonable jury would be required to find that participants in the financial risk services markets likely would confuse the phrase "SPAN for ICE" with the SPAN mark when the ICE Licensees used the phrase in connection with their risk management services, especially because they indicated that they had licenses from CME to use the mark, had held such licenses in the past, and offered similar products to the same market. *See* *id. at 677-87* (analyzing likelihood of confusion between two similar marks and affirming district court's grant of summary

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[12] In support of this proposition, the defendants also have cited to six documents described in the previous footnote. Again, none of these documents supports the defendants' contention that the ICE Licensees had notice of the new claims.

[13] Accordingly, the Court need not address the argument (raised only in the defendants' reply brief) that these claims are barred by the doctrine of laches.

[14] Courts generally consider seven factors in addressing a likelihood of confusion. *AutoZone, 543 F.3d at 929*. Because the parties do not address the seven factors, the Court need not address each factor in detail. Regardless, a discussion of all of the factors would lead to the same outcome.

judgment on that point). And, regardless, as indicated, there is evidence that the ICE Licensees used the SPAN mark in contexts separate from their uses of the phrase "SPAN for ICE." **[*61]**

Therefore, the Court grants CME's motion for summary judgment, and denies the defendants' cross-motion, on the question of liability on CME's claims of trademark infringement, unfair competition, and parallel state law violations relating to defendants' continued use of the marks following termination of the licenses.

4. Counterfeiting after the termination of the license agreements

The Court turns next to CME's trademark counterfeiting claim as it relates to the post-termination period. Though CME has asserted this claim against all of the defendants, it has moved for summary judgment only against the ICE Licensees. The defendants have all cross-moved for summary judgment on this claim.

The Lanham Act forbids the use of "any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale . . . of any goods or services [where] such use is likely to cause confusion . . . or to deceive." *15 U.S.C. § 1114(1)(a)*. It defines a counterfeit mark as "a spurious mark which is identical with, or substantially indistinguishable from, a registered mark." *Id.* *§ 1127*; *see also* McCarthy, *supra*, § 25:10 ("Counterfeiting is the act of producing or selling a product with a sham trademark that is an intentional and **[*62]** calculated reproduction of the genuine trademark.").

CME argues that the ICE Licensees engaged in counterfeiting by using the SPAN mark after the license agreements' termination for services that were identical to those covered by the trademark. The defendants contend that they did not engage in counterfeiting because the ICE Licensees identified themselves as the originators of the initial margin services they offered and because they did not use marks that were identical to or substantially indistinguishable from the SPAN mark.

Courts disagree on whether the continued use of a mark by a holdover licensee constitutes counterfeiting. *Id.; compare* *U.S. Structures, Inc. v. J.P. Structures, Inc., 130 F.3d 1185, 1192 (6th Cir. 1997)* (holdover franchisee's continued use of a trademark is not counterfeiting) *with* *State of Idaho Potato Comm'n v. G & T Terminal Packaging, Inc., 425 F.3d 708, 722 (9th Cir. 2005)* (holdover licensee's continued use of a certification mark constitutes counterfeiting where there is a likelihood of confusion and the mark owner cannot exercise quality control). The Seventh Circuit has not directly addressed the issue, but it has stated that the aim of the Lanham Act's counterfeiting provision is to prohibit the use of a trademark on an unauthorized product, not merely to prohibit literal counterfeiting through reproductions or imitations that **[*63]** deceive customers about the source of a product. *See* *Gen. Elec. Co. v. Speicher, 877 F.2d 531, 534 (7th Cir. 1989)*; *see also* *Century 21 Real Estate, LLC v. Destiny Real Estate Props., No. 4:11-CV-38 JD, 2011 U.S. Dist. LEXIS 147075, 2011 WL 6736060, at *5 (N.D. Ind. Dec. 19, 2011)* (finding that the Seventh Circuit's reasoning in *Speicher* suggests that ex-franchisee's continued use of a mark constitutes counterfeiting). The district court in *Century 21* reasoned that an ex-franchisee's continued use of a mark implicates the purposes underlying the counterfeiting provision—avoiding public confusion and safeguarding the value of trademark—because it increases the likelihood that customers will be confused regarding the genuineness of a product. *See* *id.*

The Court finds the reasoning in *Century 21* persuasive. A reasonable jury could find that that the defendants' continued use of the SPAN mark indicated that the ICE Licensees used the SPAN framework to calculate initial margins, which constitutes counterfeiting because it entails the unauthorized use of CME's mark.

But a reasonable jury would not be *required* to reach that conclusion. Marks may not be identical with or substantially distinguishable from each other, as necessary for counterfeiting, where they have general similarities **[*64]** but also have "minor differences that would not be apparent to the typical consumer." *AstraZeneca AB v. Dr. Reddy's Labs., Inc., 209 F. Supp. 3d 744, 755 (D. Del. 2016)* (denying motion for judgment on the pleadings regarding whether a pill was a counterfeit because there was a disputed question of fact regarding whether an average consumer would distinguish the defendant's generic two-toned purple pills from the plaintiff's single-tone purple pills); *see also* *Coach, Inc. v. Citi Trends, Inc., No. CV 17-4775-DMG (KSX), 2019 U.S. Dist.*

LEXIS 76417, 2019 WL 1940622, at *4 (C.D. Cal. Apr. 5, 2019) ("The fact that the designs [of the allegedly counterfeiting goods and the trademark holder's goods] are similar in a general sense, but different in several respects, prevents the Court from determining at [the summary judgment] stage that they are substantially indistinguishable."). And where the use of a mark does not deceive customers about its origin, even a mark that is identical or substantially indistinguishable from a trademark may not be a counterfeit. *See* GMA Accessories, Inc. v. BOP, LLC, 765 F. Supp. 2d 457, 472 (S.D.N.Y. 2011), *aff'd sub nom.* GMA Accessories, Inc. v. Elec. Wonderland, Inc., 558 F. App'x 116 (2d Cir. 2014) (granting summary judgment for defendants on a counterfeiting claim where there was no evidence that they deceptively suggested their products came from "an erroneous origin").

In this case, at least some of the defendants' allegedly counterfeiting uses of the SPAN mark entailed **[*65]** non-identical marks such as the phrase "SPAN for ICE." A reasonable jury could find that, due to these differences, the defendants' allegedly counterfeiting uses were not identical to or substantially indistinguishable from the SPAN mark. And the defendants used the allegedly counterfeiting mark in connection with their own clearinghouses. Given that context, a reasonable jury could find that traders or other relevant actors in the financial risk services market would not have been deceived about the mark's origin. Accordingly, there is a genuine factual dispute regarding whether the defendants engaged in counterfeiting. Therefore, the Court denies CME's motion and the defendants' cross-motion for summary judgment on the counterfeiting claim.

C. Breach of contract

Both sides have moved for summary judgment on CME's breach of contract claim, which CME has asserted against only the ICE Licensees.[15] Under Illinois law, which governs the license agreements, a plaintiff asserting a breach of contract claim must prove four elements: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) injury to the plaintiff. Hess v. Bresney, 784 F.3d 1154, 1158-59 (7th Cir. 2015) (Illinois **[*66]** law). The parties dispute only the third element.

The parties' arguments regarding breach of contract mirror their arguments with respect to the trademark claims. CME argues that the ICE Licensees breached the license agreements by using "ICE SPAN" during the term of the agreements and by continuing to use the SPAN mark after their termination. The ICE Licensees argue that CME has not properly asserted a claim for breach of contract during the term of the agreements and that CME has not established that any post-termination uses constituted a breach.

As indicated, CME's assertion in its summary judgment motion that the ICE Licensees breached the license agreements by using "ICE SPAN" during the term of the agreements amounts to a *de facto* amendment to the complaint. For the reasons previously stated, the Court declines to permit the amendment, denies CME's motion for summary judgment on the breach of contract claim as it pertains to claimed breaches during the agreements' terms, and declines to address the ICE Licensees' cross-motion for summary judgment on that issue.

The Court also concludes that CME is not entitled to summary judgment on its claim that the ICE Licensees breached the license agreements following their termination. The ICE Licensees agreed that **[*67]** following termination, they would "not . . . use any mark that is confusingly similar to the SPAN Mark in connection with any other margining system or similar risk calculation." Pls.' L.R. 56.1 Stmt., Ex. 1, dkt. no. 165-3, ¶ 5(a). The agreements do not define "confusingly similar." In its briefs, CME makes a summary argument that the phrase "SPAN for ICE" is confusingly similar to the SPAN mark, but it offers no definition of "confusingly similar" and points to no evidence showing why the phrase "SPAN for ICE" is confusingly similar to the SPAN mark. This is insufficient to "demonstrate the absence of a genuine issue of material fact," as CME must do to prevail on its motion for summary judgment. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

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[15] Although ICE has moved for summary judgment on the breach of contract claim, the motion is misplaced because CME did not allege in its complaint that ICE breached a contract.

Nor are the ICE Licensees entitled to summary judgment on the breach of contract issue for breaches following the licenses' terminations. In arguing that they did not breach the license agreements post-termination, the ICE Licensees contend that CME has put forth no evidence of actual or likely confusion by market participants. But they have made no effort to show or explain why that is the appropriate standard for breach of the contract. Nor have they pointed to evidence showing why its marks **[*68]** are not confusingly similar to the SPAN mark. Thus the ICE Licensees are not entitled to summary judgment on the breach of contract claim either.

Conclusion

For the foregoing reasons, the Court grants CME's motion for summary judgment [dkt. no. 165] on counts 2, 3, 5, and 6 against the ICE Licensees on the question of liability, to the extent those claims concern violations that occurred after the termination of the license agreements. The Court also grants summary judgment for CME on the defendants' trademark misuse defense, the ICE Licensees' fair use defense, and the ICE Licensees' defenses of acquiescence for trademark violations occurring after February 23, 2018. The Court denies CME's motion for summary judgment on counts 1 and 4; on counts 2, 3, 5, and 6 to the extent those claims concern violations that occurred during the term of the licenses; and against the ICE Licensees' defense of acquiescence for violations occurring before February 23, 2018.

The Court denies the defendants' cross-motion for summary judgment [dkt. no. 179] on their counterclaims relating to genericness and abandonment through naked licensing. The Court also denies the defendants' cross-motion on counts 2, 3, **[*69]** 5, and 6 against the ICE Licensees to the extent those claims concern violations that occurred after the termination of the license agreements and on counts 1 and 4. The Court denies the defendants' motion for summary judgment on their trademark misuse defense and their defense of estoppel by implied licenses. The Court disregards the defendants' cross-motion for summary judgment on counts 2 through 6 to the extent those claims concern violations that occurred during the term of the licenses, based on the Court's finding that CME did not plead facts supporting violations during that timeframe.

/s/ Matthew F. Kennelly

MATTHEW F. KENNELLY

United States District Judge

Date: April 12, 2020 (corrected April 17, 2020)

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John River Cartage, Inc. v. La. Generating, LLC

Court of Appeal of Louisiana, First Circuit

March 4, 2020, Judgment Rendered

NO. 2020 CA 0162

Reporter
300 So. 3d 437 *; 2020 La. App. LEXIS 391 **; 2020-1 Trade Cas. (CCH) P81,114; 2020 0162 (La.App. 1 Cir. 03/04/20);

JOHN RIVER CARTAGE, INC. VERSUS LOUISIANA GENERATING, LLC; NRG ENERGY, INC.; AND HEADWATERS RESOURCES, INC.

Prior History: **[**1]** Appealed from the Eighteenth Judicial District Court In and for the Parish of Pointe Coupee State of Louisiana. Case No. 44406. Honorable Alvin Batiste, Jr., Judge Presiding.

John River Cartage, Inc. v. La. Generating, LLC, 2018 La. App. Unpub. LEXIS 381 (La.App. 1 Cir., Dec. 19, 2018)

Core Terms

conspiracy, horizontal, prices, fly ash, partial summary judgment, antitrust, restraint of trade, marketing agreement, power company, ash, monopoly, marketing, joint venture, trial court, competitors, sales, antitrust claim, motions, genuine issue of material fact, summary judgment, producers, contends, hub-and-spoke, plant, factual support, assigned error, communications, contractual, monopolize, conspire

LexisNexis® Headnotes

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

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

HN1[] **Entitlement as Matter of Law, Appropriateness**

A motion for summary judgment is a procedural device used when there is no genuine issue of material fact for all or part of the relief prayed for by a litigant. A summary judgment is reviewed on appeal de novo, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate; i.e., whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law.

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

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

HN2[] Burdens of Proof, Movant Persuasion & Proof

On summary judgment. the burden of proof rests with the mover. *La. Code Civ. Proc. Ann. art. 966(D)(1)*. When the mover will bear the burden of proof at trial, the mover has the burden of showing that no genuine issue of material fact remains. Only when the mover makes this showing does the burden shift to the opposing party to present evidence demonstrating a material factual issue remains. If, however, the mover does not resolve all material issues of fact, the burden never shifts to the opposing party. In that situation, the opposing party has nothing to prove in response to the motion for summary judgment, and summary judgment should be denied.

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

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

HN3[] Burdens of Proof, Movant Persuasion & Proof

If the mover will not bear the burden of proof at trial on the issue raised in the motion, the mover's burden on the motion does not require it to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. *La. Code Civ. Proc. Ann. art. 966(D)(1)*. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can only be seen in light of the substantive law applicable to the case.

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

Antitrust & Trade Law > Sherman Act

HN4[] Regulated Practices, Price Fixing & Restraints of Trade

La. Rev. Stat. Ann. § 51:122(A) provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in this state is illegal. This statute is virtually identical to *§ 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.*, and federal analysis of the Sherman Antitrust Act is persuasive, though not controlling. The Louisiana statute applies to intrastate commerce, whereas the Sherman Antitrust Act applies to interstate commerce and foreign trade. *La. Rev. Stat. Ann. §§ 51:121*, *51:122*. *15 U.S.C.S. § 1*.

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

HN5[] Regulated Practices, Price Fixing & Restraints of Trade

The federal and state antitrust laws were intended to be sweeping in breadth, encompassing every conspiracy, contract, or combination that restrains trade. Not every business arrangement that restrains trade in some manner is illegal, however. Rather, *La. Rev. Stat. Ann. § 51:122* has been interpreted to prohibit only those agreements or conspiracies that unreasonably restrain trade. Thus, to establish an antitrust violation, a plaintiff must show both the existence of a conspiracy to restrain trade and that the intended restraint on trade is unreasonable.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

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

As to the existence of an agreement to restrain trade, the plain language of *La. Rev. Stat. Ann. § 51:122* requires a plurality of actors. A contract, a combination, and a conspiracy each suggests the participation of more than one person or entity. In determining whether the restraint of trade is unreasonable, three methods or modes of analysis have been developed for evaluating the reasonableness of a restraint on trade: the rule-of-reason analysis, the per se analysis, and the quick look analysis.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN7[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The rule-of-reason analysis, which is used to analyze the reasonableness of most trade-restraining agreements, requires the factfinder to determine whether the questioned practice imposes an unreasonable restraint on competition by considering a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN8[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Unlike the rule-of-reason analysis, the per se analysis does not allow inquiry into the intent behind the restraint, its procompetitive justifications, or its actual effect on competition. Instead, where a restraint is deemed per se unreasonable, a conclusive presumption of illegality applies.

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

Evidence > Burdens of Proof > Burden Shifting

HN9[] **Regulated Practices, Price Fixing & Restraints of Trade**

A third method of analyzing whether a conspiracy is unreasonable is the abbreviated quick look analysis under the rule of reason, which is applied when an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets. The quick-look approach does not require an elaborate industry analysis. Rather, when the restraint is not per se unreasonable, but the likelihood of anticompetitive effects is obvious, the proponent of the restraint must show some competitive justification for it. Thus, once the restraint is deemed facially anticompetitive, the burden shifts to its proponent for justification on procompetitive grounds.

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

HN10[] **Regulated Practices, Price Fixing & Restraints of Trade**

As a general rule, horizontal agreements, those involving coordination between competitors at the same level of a market structure, are considered to be per se unreasonable, whereas vertical agreements, created between parties at different levels of a market structure, are analyzed under the rule-of-reason analysis.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

HN11[] Actual Monopolization, Monopoly Power

La. Rev. Stat. Ann. § 51:123 provides, in part, that no person shall monopolize, or attempt to monopolize, or combine, or conspire with any other person to monopolize any part of the trade or commerce within this state. As an economic matter, monopoly power exists where prices can be raised above the levels that would be charged in a competitive market. To establish a claim for monopoly, a plaintiff must establish that: (1) the defendant possessed monopoly power in a clearly defined economic and geographic region (the relevant market); and (2) the defendant had the specific purpose or intent to exercise or maintain that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN12[] Actual Monopolization, Monopoly Power

Monopoly power is defined as the ability to control prices or to exclude competition from the market, and the relevant market is the area of effective competition within which the defendant operates. It includes a geographic market, which is the section of the country in which sellers of a particular product operate, as well as a product market, which encompasses the differences among various commodities and the willingness of buyers to substitute one product for another. Failure to define the market in which the monopoly is allegedly exercised is fatal to a monopolization claim.

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

Civil Procedure > Judgments > Summary Judgment > Motions for Summary Judgment

Civil Procedure > Discovery & Disclosure > Discovery

HN13[] Standards of Review, Abuse of Discretion

The requirement in *La. Code Civ. Proc. Ann. art. 966(A)(3)* that a summary judgment should be considered only after "an opportunity for adequate discovery" has been construed to mean that there is no absolute right to delay action on a motion for summary judgment until discovery is complete; rather, the requirement is only that the parties have a fair opportunity to carry out discovery and to present their claim. Additionally, trial courts in Louisiana have broad discretion when regulating pre-trial discovery, which discretion will not be disturbed on appeal absent a clear showing of abuse.

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

HN14[] Regulated Practices, Price Fixing & Restraints of Trade

To satisfy the elements of conspiracy, a plaintiff must show that the defendants engaged in concerted action, meaning a conscious commitment to a common scheme designed to achieve an unlawful objective. Moreover, to establish a per se unreasonable horizontal conspiracy, a plaintiff must establish that the conspiracy involved coordination between competitors at the same level of a market structure. Independent parallel conduct, or even conduct among competitors that is consciously parallel, does not alone establish the contract, combination, or conspiracy.

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

HN15[] **Appellate Review, Standards of Review**

Because the court reviews summary judgments de novo, the court afford no deference to the trial court's underlying reasoning for its judgment.

Business & Corporate Law > Joint Ventures

HN16[] **Business & Corporate Law, Joint Ventures**

A joint venture has been defined as a special combination of two or more persons, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation. Generally, the essential elements of a joint venture are the same as those of partnership, i.e., two or more parties combining their property, labor, skill, etc. In the conduct of a venture for joint profit, with each having some right of control. Thus, joint ventures are governed by the law of partnership and share the same requisites as follows: (1) a contract between two or more persons; (2) the establishment of a juridical entity or person; (3) contribution by all parties of either efforts or resources; (4) contribution in determinate proportions; (5) joint effort; (6) mutual risk vis-à-vis losses; and (7) a sharing of profits.

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

HN17[] **Regulated Practices, Price Fixing & Restraints of Trade**

Not all common selling agency agreements violate antitrust laws. However, such an agreement does violate antitrust laws where it is used as a concerted action by two or more horizontal competitors to accomplish a purpose that could not be lawfully accomplished by a direct agreement among the participating producers.

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

HN18[] **Regulated Practices, Price Fixing & Restraints of Trade**

A hub-and-spoke conspiracy is one in which an entity at one level of the market structure, the hub, coordinates an agreement among competitors at a different level, the spokes. A traditional hub-and-spoke conspiracy has three elements: (1) a hub, such as a dominant purchaser; (2) spokes, such as competing manufacturers or distributors that enter into vertical agreements with the hub; and (3) the rim of the wheel, which consists of horizontal agreements among the spokes.

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

Evidence > Inferences & Presumptions > Inferences

HN19[] Regulated Practices, Price Fixing & Restraints of Trade

Where no direct evidence exists for the third element, a horizontal agreement among the spokes (or competitors), courts evaluate circumstantial evidence, called plus factors, to determine whether a plaintiff's evidence is more probative of conspiracy than of conscious parallel behavior. Plus factors are economic actions and outcomes that are largely inconsistent with unilateral conduct, but largely consistent with explicitly coordinated action. Accordingly, they may raise an inference of conspiracy. These plus factors include: (1) a common motive to conspire, (2) evidence showing that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, (3) evidence of a high level of interfirm communications, and (4) historically unprecedented changes in pricing structure made at the very same time by multiple competitors for no other discernible reason.

Antitrust & Trade Law > Regulated Practices

HN20[] Antitrust & Trade Law, Regulated Practices

With regard to antitrust injury, a plaintiff suffers an antitrust injury only if its loss is the type of loss that the claimed antitrust violation is likely to cause. Antitrust injury is defined as the type of injury that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The requirement of an antitrust injury ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendants' behavior. A plaintiff must allege a causal connection between its alleged injury and the anticipated anticompetitive effect of the specific practice that allegedly violates ***antitrust law***.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal

HN21[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

A unilateral refusal to deal generally is not unlawful. However, a monopolist's refusal to deal becomes actionable under the antitrust laws where the refusal is designed to have an anticompetitive effect, whether to gain market share, to drive up prices, or to obtain some other illegal goal. Thus, monopolistic or other anticompetitive intent is the key factor in determining whether an antitrust violation has occurred.

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

HN22[] Relevant Market, Geographic Market Definition

With regard to the relevant geographic market, the geographic element of the relevant market consists of the area in which sellers of the defendants' product operate and to which buyers can practicably turn to obtain that product. Thus, the issue of geographic market is also a fact-intensive inquiry.

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Judges: BEFORE: McDONALD, THERIOT, AND CHUTZ, JJ.

Opinion by: CHUTZ

Opinion

[*443] [Pg 3] **CHUTZ, J**.

In this antitrust litigation, all parties appeal the trial court's judgment, which granted defendants' motions for partial summary judgment on the issue of plaintiff's *per se* antitrust claims under *La. R.S. 51:122* and dismissed those claims with prejudice, denied defendants' motions for partial summary judgment as to plaintiff's **[**2]** antitrust monopoly claim under *La. R.S. 51:123* and plaintiff's conversion claims, and denied plaintiff's motion for partial summary judgment on the issues of the antitrust mode of analysis and joint venture. For the following reasons, we affirm.

FACTUAL BACKGROUND

In Louisiana, there are three primary power companies operating coal-burning power plants: Entergy Gulf States, Inc. (Entergy), which operates the Nelson Power Station in Westlake, Louisiana; Cleco Power, LLC (Cleco), which owns and operates the Rodemacher Power Station **[*444]** near Boyce, Louisiana, Dolet Hills Power Station near Mansfield, Louisiana, and the Madison 3 Unit in Lena, Louisiana; and Louisiana Generating, LLC (LaGen), a subsidiary of NRG Energy, Inc. (NRG) and the majority owner and operator of the Big Cajun II fossil fuel steam-generating plant in New Roads, Louisiana.

As a result of burning coal, these plants produce byproducts called coal combustion products (CCPs). These CCPs include fly ash, bottom ash, and economizer ash. These CCPs are marketable for different uses depending on their characteristics. C-618 fly ash, a powdered fly ash that has never been hydrated, can be used in the concrete industry as a replacement for cement. **[**3]** When fly ash is exposed to water (hydrated), it hardens, and the resulting hydrated fly ash can be used as an aggregate in applications such as soil stabilization and the formation of roadbeds.

[Pg 4] The Nelson, Rodemacher, and Dolet Hills Power Stations and Big Cajun II produce C-618 fly ash. The Madison 3 Unit, which is a circulating fluidized bed (CFB) plant, produces a different type of ash other than that used in the concrete industry.

The normal coal-burning process used to generate electricity requires that CCPs be removed as they accumulate. Thus, coal-burning plants will contract with third parties for the removal and marketing, or, if not sold, the storage, of the CCPs they produce. As such, Entergy, Cleco, and LaGen have entered into marketing agreements for the removal, marketing, sale, and storage if necessary of CCPs on their plant sites.

With regard to Big Cajun II, Big River Industries, Inc. (Big River) held an exclusive marketing agreement for the removal, marketing, sale, and, if not sold, storage of CCPs produced at Big Cajun II for many years when Big Cajun II was owned and operated by Cajun Electric Power Cooperative, Inc. (Cajun Electric). Similarly, after LaGen **[**4]** became the owner and operator of Big Cajun II in 2000, LaGen entered into an Exclusive Marketing Agreement with Big River.

The agreement between LaGen and Big River was amended several times over the years. The last contract executed between LaGen and Big River, a January 29, 2009 Exclusive Marketing Agreement, provided that Big River was granted the "total responsibility for identification of uses, promotion, sales and delivery of Fly Ash, Bottom Ash, and other CCPs" produced at Big Cajun II (the LaGen/Big River Agreement). Moreover, Big River was also responsible for transporting all non-marketed CCPs from the area where they were temporarily placed by LaGen to LaGen's onsite ash storage pond and to manage those stockpiled CCPs. Big River was compensated based on a contractually established percentage of gross sales less transportation costs for the various forms of CCPs, with Big River guaranteeing the sale of a certain quantity of CCPs each year. Pursuant to the [Pg 5] LaGen/Big River Agreement, Big River was required to make a guaranteed per-ton payment for any shortfall in the guaranteed sales quantities of CCPs.

Meanwhile, at the time when Big Cajun II was still owned and operated **[**5]** by Cajun Electric, Big River began to experience a problem with an overabundance of hydrated ash on the Big Cajun II premises. Thus, on August 1, 1998, Big River entered into an agreement, the term of which was extended over the years, with plaintiff, John River Cartage, Inc. (JRC) to address the excess ash not sold to the outside market (the JRC/Big River Agreement).

Pursuant to the JRC/Big River Agreement, JRC agreed to purchase and to remove **[*445]** a specified minimum tonnage of hydrated fly ash and bottom ash at a price set forth therein. JRC was responsible for all costs associated with the recovery, loading, processing, and transportation of the hydrated fly ash and bottom ash from the ash disposal ponds onsite. JRC also agreed to purchase excess powdered fly ash at a higher set price.

The JRC/Big River Agreement further acknowledged that Big River held the exclusive marketing agreement for the marketing and sale of all fly ash and bottom ash produced from the Big Cajun II operations and that the JRC/Big River Agreement was made "expressly subject to the terms and conditions" of the LaGen/Big River Agreement. Further, JRC acknowledged that the LaGen/Big River Agreement could be amended **[**6]** "without prior notice or the consent of" JRC.

As a result of the JRC/Big River Agreement, JRC set up equipment on the Big Cajun II plant site and began the removal of the hydrated fly ash and bottom ash, which it processed into its product called "Grey Stone." Grey Stone is an aggregate material, manufactured with fly ash, black bottom ash, brown bottom ash, and water, which JRC marketed and sold for use in roadbeds and erosion control projects. As JRC produced its Grey Stone product, it stockpiled the product on the Big Cajun II site until such time that the material was sold and [Pg 6] transported off the premises. Pursuant to the JRC/Big River Agreement, JRC made payment of the contractual sum for the CCPs utilized when the product left the Big Cajun II premises. JRC also on occasion sold excess powdered fly ash within the state of Louisiana, but could do so only with Big River's express permission.

On January 20, 2011, LaGen entered into an Exclusive Marketing Agreement with Headwaters Resources, Inc. (HRI) for the marketing, sale, and delivery of CCPs produced at Big Cajun II (the LaGen/HRI Agreement). LaGen and Big River then agreed that the LaGen/Big River Agreement terminated **[**7]** effective January 21, 2011, and LaGen gave Big River thirty days from that date to remove its property and equipment from the site.

Big River then notified JRC that Big River had lost its contract with LaGen and, thus, JRC needed to remove all of its equipment from the Big Cajun II site. JRC removed its equipment but was not able to remove the stockpiled Grey Stone.

At the time LaGen awarded HRI the LaGen/HRI Agreement for Big Cajun II in 2011, HRI also held exclusive marketing agreements with Entergy for the Nelson Power Station and with Cleco for the Rodemacher and Dolet Hills Power Stations, and the Madison 3 Unit. Thus, HRI was the exclusive marketing agent of all sources of C-618 fly ash produced in Louisiana from 2011 until 2014.[1] Once HRI took over the exclusive marketing agreement for Big Cajun II in 2011, there was an initiative by HRI to increase fly ash prices previously paid by former Big River customers to a level HRI considered to be the "competitive price."

Following the termination of the LaGen/Big River Agreement and the resulting termination of the JRC/Big River Agreement, JRC could not sustain its business and eventually ceased all business operations.

[Pg 7] **PROCEDURAL [**8] HISTORY**

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[1] In 2014, HRI's competitor, Charah, became the exclusive marketing agent for the Rodemacher Power Station and Madison 3 Unit.

On January 26, 2012, JRC filed a petition seeking damages from HRI and NRG **[*446]** and LaGen (hereinafter collectively referred to as NRG/LaGen).[2] JRC filed several amending petitions, ultimately filing a First Amended Master Petition for Damages, wherein JRC sought compensatory and treble damages from HRI and NRG/LaGen due to their alleged: (1) wrongful conversion and conspiracy to commit conversion of JRC's stockpiled inventory of Grey Stone; (2) violations of the *Louisiana Unfair Trade Practices and Consumer Protection Law ("LUTPA"), La. R.S. 51:1401, et seq.*; and (3) violations of Louisiana's ***antitrust law***, including a conspiracy to restrain trade by fixing prices of C-618 fly ash marketed in Louisiana in violation of *La. R.S. 51:122*, and a conspiracy to monopolize the C-618 fly ash market in Louisiana in violation of *La. R.S. 51:123*.[3]

With regard to its antitrust claims, JRC alleged that HRI and Cleco, Entergy, and NRG/LaGen had entered into a horizontal conspiracy in restraint of trade. First, it alleged that HRI, as the common and exclusive marketing agent for Cleco, Entergy, and NRG/LaGen, operated a hub-and-spoke conspiracy on behalf of these power companies by setting uniform prices, taking orders, and allocating customers and **[**9]** production territory for coal ash they produced. Additionally, JRC averred that Cleco, Entergy, and NRG/LaGen knew or should have known that HRI was simultaneously representing their collective competitive business interests from 2011 through 2014. Thus, JRC alleged that a *per se* illegal [Pg 8] horizontal price-fixing agreement could be inferred from the parallel behavior of these various entities.[4]

Alternatively, JRC alleged that HRI and NRG/LaGen entered into a vertical price-fixing conspiracy when they executed the LaGen/HRI Agreement. With regard to this alleged conspiracy, JRC alternatively alleged that this vertical price-fixing conspiracy was subject to the *per se* mode of analysis, the "quick look" approach, or the full rule-of-reason analysis.

With regard to its monopoly claims, JRC averred that HRI and NRG officials conspired to create the monopoly that HRI ultimately exerted following the LaGen/HRI Agreement and that they conspired to monopolize and did monopolize the C-618 fly ash market in violation of *La. R.S. 51:123*.

JRC further alleged that HRI and NRG/LaGen were solidarily liable for JRC's damages resulting from their concerted and collective actions, which constituted intentional and **[**10]** willful acts.

JRC filed a motion for partial summary judgment on the issues of *per se* antitrust mode of analysis and joint venture, seeking a declaration that: (1) I-MI had entered into joint venture agreements with Cleco, Entergy, and NRG/LaGen; and/or (2) the *per se* antitrust mode of analysis was applicable to this matter.[5]

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[2] JRC referred to NRG and LaGen collectively in its First Amended Master Petition, and NRG and LaGen together filed pleadings below and in this appeal.

[3] In previous petitions, JRC had contended that HRI and NRG/LaGen had attempted to restrain trade and monopolize "the CCP market" or the market for "CCPs and related products." However, in its First Amended Master Petition for Damages, it more narrowly contended that these defendants had engaged in antitrust violations with regard to "Louisiana's C-618 fly ash industry."

[4] As noted by the trial court in its written reasons for judgment, neither Cleco nor Entergy are parties to this litigation.

[5] JRC's motion for partial summary judgment was actually filed prior to the filing of its First Amended Master Petition for Damages. The motion was scheduled for hearing together with exceptions of no cause of action filed by HRI and NRG/LaGen with regard to JRC's previous "Master Petition for Damages." Following that hearing, the trial court sustained the exceptions of no cause of action related to all of JRC's antitrust claims under *La. R.S. 51:122* and *51:123*, dismissing those claims without prejudice, subject to JRC's right to amend within thirty days. Accordingly, it also denied as moot JRC's motion for partial summary judgment. JRC then filed its First Amended Master Petition for Damages, and HRI and NRG/LaGen again filed exceptions of no cause of action.

However, on appeal of the trial court's subsequent judgment sustaining those exceptions of no cause of action and dismissing JRC's antitrust claims with prejudice, this court reversed the judgment sustaining the exceptions of no cause of action and also vacated the earlier judgment denying JRC's motion for partial summary judgment as moot. In doing so, this court noted that because the trial court's rulings with respect to the exceptions of no cause of action had been reversed, JRC's motion for partial summary judgment on the issues of *per se* antitrust mode of analysis and joint venture was "ripe for judicial determination."

[*447] [Pg 9] Defendant HRI also filed a motion for partial summary judgment, seeking dismissal of JRC's antitrust claims under both *La. R.S. 51:122* and *51:123*.[6] In support of its motion, HRI contended that it was entitled to dismissal of JRC's antitrust claims against it as follows: (1) JRC could not establish antitrust injury because its alleged injuries did not flow from the claimed anticompetitive conduct; (2) Hill's alleged conduct was subject to the rule of reason because JRC has identified nothing more than a series of vertical agreements; and (3) JRC's rule of reason and monopoly claims fail because the market alleged by JRC—the 50-mile radius extending from Big Cajun II—was not the relevant market.

Likewise, NRG/LaGen filed a motion for partial summary judgment, seeking dismissal of JRC's antitrust claims, averring that those claims should be dismissed because: (1) **[**11]** JRC had not suffered an antitrust injury; and (2) even if JRC could establish an antitrust injury, it had not alleged and could not prove a horizontal conspiracy between NRG, LaGen, and HRI or any agreement among those parties to restrain trade.[7]

Following a hearing on the motions, the trial court, by judgment dated December 4, 2019, denied JRC's motion for partial summary judgment; granted in part HRI's and NRG/LaGen's motions for summary judgment as to JRC's *per se* antitrust claims under *La. R.S. 51:122*; and denied in part those motions as to [Pg 10] JRC's monopoly claim under *La. R.S. 51:123*.[8]

JRC appealed the trial court's December 4, 2019 judgment, challenging, through **[*448]** six assignments of error, those portions of the judgment denying its motion for partial summary judgment and granting HRI's and NRG/LaGen's motions for partial summary judgment as to JRC's *per se* antitrust claims, dismissing those claims with prejudice.[9] HRI and NRG/LaGen also appealed the trial court's December 4, 2019 judgment, each contending through two assignments of error that the trial court erred in denying their motions for partial summary judgment as to JRC's monopoly claims.

LEGAL PRECEPTS

Summary Judgment

HN1[] A motion for summary judgment **[**12]** is a procedural device used when there is no genuine issue of material fact for all or part of the relief prayed for by a litigant. A summary judgment is reviewed on appeal *de novo*, with the appellate court using the same criteria that govern the trial court's determination of whether summary

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Thus, this court remanded the matter with instructions that the trial court "consider and rule on JRC's motion for partial summary judgment." ***John River Cartage, Inc. v. Louisiana Generating, LLC****, 2018-1611 (La. App. 1st Cir. 12/19/18), 2018 La. App. Unpub. LEXIS 381, 2018 WL 6629472 *6* (unpublished), writs denied, ***2019-0122, 2019-0111 (La. 4/15/19), 267 So. 3d 1122***, ***267 So. 3d 1129***.

On remand, JRC moved to reset its motion for partial summary judgment.

[6] Defendants HRI and NRG/LaGen also filed motions for partial summary judgment, seeking dismissal of JRC's conversion and conspiracy to commit conversion claims, contending that JRC could not establish that it owned the Grey Stone product it accused them of converting.

[7] In its memorandum in support of its motion, NRG/LaGen further stated that it joined in HRI's motion for partial summary judgment as to JRC's antitrust claims and adopted HRI's arguments.

[8] As to HRI's and NRG/LaGen's motions for partial summary judgment seeking dismissal of JRC's conversion claims, in its written reasons, the trial court found that genuine issues of material fact remained as to those claims. Accordingly, in its December 4, 2019 judgment, the trial court also denied those motions. Neither HRI nor NRG/LaGen has appealed that portion of the judgment, and, thus, the conversion claims are not before us.

[9] As set forth in *La. R.S. 51:135*, all interlocutory judgments in cases involving antitrust claims shall be appealable within five days and shall be heard and determined within twenty days after the appeal is lodged.

judgment is appropriate; i.e., whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law. ***Beer Indus. League of Louisiana v. City of New Orleans**, 2018-0280 (La. 6/27/18), 251 So. 3d 380, 385-86*.

HN2[] The burden of proof rests with the mover. *La. C.C.P. art. 966(D)(1)*. When the mover will bear the burden of proof at trial, the mover has the burden of showing that no genuine issue of material fact remains. Only when the mover makes this showing does the burden shift to the opposing party to present evidence [Pg 11] demonstrating a material factual issue remains. ***Action Oilfield Services, Inc. v. Energy Management Company**, 2018-1146 (La. App. 1st Cir. 4/17/19), 276 So. 3d 538, 541-542*. If, however, the mover does not resolve all material issues of fact, the burden never shifts to the opposing party. In that situation, the opposing party has nothing to prove in response to the motion for summary judgment, and summary judgment should be denied. See ***Hat's Equipment, Inc. v. WHM, L.L.C.**, 2011-1982 (La. App. 1st Cir. 5/4/12), 92 So. 3d 1072, 1076*.

HN3[] Nevertheless, if the mover will not bear the burden of proof at trial on the issue raised in the motion, the mover's burden on the motion does **[**13]** not require it to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. *La. C.C.P. art. 966(D)(1)*. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can only be seen in light of the substantive law applicable to the case. ***Pumphrey v. Harris**, 2012-0405 (La. App. 1st Cir. 11/2/12), 111 So. 3d 86, 89*.

Conspiracy in Restraint of Trade Pursuant to *La. R.S. 51:122*

HN4[] *Louisiana Revised Statutes 51:122(A)* provides, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in this state is illegal." This statute is virtually identical to *Section 1 of the Sherman Antitrust Act*, *15 U.S.C. § 1, et seq.*, **[*449]** and federal analysis of the Sherman Antitrust Act is persuasive, though not controlling.[10] ***HPC Biologicals, [Pg 12] Inc. v. UnitedHealthcare of Louisiana, Inc.**, 2016-0585 (La. App. 1st Cir. 5/26/16), 194 So. 3d 784, 792-93*.

HN5[] The federal and state antitrust laws were intended to be sweeping in breadth, encompassing every conspiracy, contract, or combination that restrains **[**14]** trade. ***Louisiana Power & Light Co. v. United Gas Pipe Line Co.**, 493 So. 2d 1149, 1154-55 & n.12 (La. 1986)*. Not every business arrangement that restrains trade in some manner is illegal, however. Rather, *La. R.S. 51:122* has been interpreted to prohibit only those agreements or conspiracies that unreasonably restrain trade. See ***Reppond v. City of Denham Springs**, 572 So. 2d 224, 230 (La. App. 1st Cir. 1990)*, and ***Clary v. State Farm Mutual Automobile Ins. Co.**, 2016-168 (La. App. 3rd Cir. 11/23/16), 204 So. 3d 1102, 1113*, writs denied, *2017-0209, 2017-0197 (La. 2/15/17), 215 So. 3d 702*, *215 So. 3d 703*. Thus, to establish an antitrust violation, a plaintiff must show both the existence of a conspiracy to restrain trade *and* that the intended restraint on trade is unreasonable. See ***Nafrawi v. Hendrick Medical Center**, 676 F. Supp. 770, 774 (N.D. Tex. 1987)*.

HN6[] As to the existence of an agreement to restrain trade, the plain language of *La. R.S. 51:122* requires a plurality of actors. A "contract," a "combination," and a "conspiracy" each suggests the participation of more than one person or entity. ***Louisiana Power & Light Co.**, 493 So. 2d at 1155*. In determining whether the restraint of trade is unreasonable, three methods or modes of analysis have been developed for evaluating the reasonableness of a restraint on trade: the rule-of-reason analysis, the *per se* analysis, and the "quick look" analysis. ***Craftsmen Limousine, Inc. v. Ford Motor Co.**, 363 F.3d 761, 772 (8th Cir. 2004)*.

[10] The Louisiana statute applies to intrastate commerce, whereas the Sherman Antitrust Act applies to interstate commerce and foreign trade. See *La. R.S. 51:121*, *La. R.S. 51:122*, & *15 U.S.C. § 1*.

HN7[] The rule-of-reason analysis, which is used to analyze the reasonableness of most trade-restraining agreements, requires the factfinder to determine whether the questioned practice imposes an unreasonable restraint on competition by considering a variety of factors, including specific **[**15]** information about the relevant [Pg 13] business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect. ***State Oil Co. v. Khan****, 522 U.S. 3, 10, 118 S. Ct. 275, 279, 139 L. Ed. 2d 199 (1997)*.

HN8[] Unlike the rule-of-reason analysis, the *per se* analysis does not allow inquiry into the intent behind the restraint, its procompetitive justifications, or its actual effect on competition. Instead, where a restraint is deemed *per se* unreasonable, a conclusive presumption of illegality applies.[11] ***Craftsmen Limousine, Inc.****, 363 F.3d at 773*.

[*450] ***HN10***[] As a general rule, horizontal agreements, those involving coordination between competitors at the same level of a market structure, are considered to be *per se* unreasonable, whereas vertical agreements, created between parties at different levels of a market structure, are analyzed under the rule-of-reason analysis. ***Van Hoose v. Gravois****, 2011-0976 (La. App. 1st Cir. 7/7/11), 70 So. 3d 1017, 1022*.

Monopoly Pursuant to *La. R.S. 51:123*

HN11[] *Louisiana Revised Statutes 51:123* provides, in part, that "[n]o person shall monopolize, or attempt to monopolize, or combine, or conspire with any other person to monopolize any part of the trade or commerce within this state." As an economic matter, monopoly power exists where prices can be raised above the levels that would be charged in a competitive market. To establish a claim for monopoly, a plaintiff must establish **[**16]** that: (1) the defendant possessed monopoly [Pg 14] power in a clearly defined economic and geographic region (the relevant market); and (2) the defendant had the specific purpose or intent to exercise or maintain that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. ***Plaquemine Marine, Inc. v. Mercury Marine****, 2003-1036 (La. App. 1st Cir. 7/25/03), 859 So. 2d 110, 119-20*.

HN12[] Monopoly power is defined as the ability to control prices or to exclude competition from the market, and the relevant market is the area of effective competition within which the defendant operates. ***Id.*** It includes a geographic market, which is the section of the country in which sellers of a particular product operate, as well as a product market, which encompasses the differences among various commodities and the willingness of buyers to substitute one product for another. Failure to define the market in which the monopoly is allegedly exercised is fatal to a monopolization claim. ***Id.**** at 120*.

DISCUSSION

From a review of the pleadings and memoranda filed herein, JRC's basic theories of antitrust violations can be summarized as follows. HRI, operating at the marketing and sales level of the Louisiana CCPs market, facilitated a scheme among Cleco, Entergy, **[**17]** and NRG/LaGen, competing producers of CCPs at the production level of the Louisiana CCPs market, to restrain trade within that market. This scheme was accomplished by first eliminating competition in the Louisiana CCPs market by replacing Big River, NRG/LaGen's prior exclusive marketing agent, with HRI, which already operated as the exclusive marketing agency for Cleco and Entergy. Thereafter, HRI,

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[11] ***HN9***[] A third method of analyzing whether a conspiracy is unreasonable is the abbreviated "quick look" analysis under the rule of reason, which is applied when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." ***California Dental Ass'n v. Fed. Trade Comm'n****, 526 U.S. 756, 770, 119 S. Ct. 1604, 1612, 143 L. Ed. 2d 935 (1999)*. The quick-look approach does not require an elaborate industry analysis. Rather, when the restraint is not *per se* unreasonable, but the likelihood of anticompetitive effects is obvious, the proponent of the restraint must show some competitive justification for it. Thus, once the restraint is deemed facially anticompetitive, the burden shifts to its proponent for justification on procompetitive grounds. ***Realcomp II, Ltd. v. Fed. Trade Comm'n****, 635 F.3d 815, 825 (6th Cir.)*, cert. denied, ***565 U.S. 942, 132 S. Ct. 400, 181 L. Ed. 2d 257 (2011)***.

operating as the common and exclusive sales agency for all three of these competing power companies, refused to deal with JRC by refusing to sell hydrated fly ash or excess powdered fly ash to JRC, thereby preventing JRC from continuing its production and sale of Grey [Pg 15] Stone in the secondary CCPs market. With Big River and JRC effectively removed from the Louisiana CCPs market, HRI, as the common and exclusive sales agency for Cleco, Entergy, and NRG/LaGen, and representing their collective business interests, stabilized Louisiana's CCPs market by imposing uniform price increases and controlling output.

JRC contends that this alleged conspiracy among HRI, Cleco, Entergy, and **[*451]** NRG/LaGen constitutes a horizontal restraint on trade that, under the *per se* antitrust mode of analysis, is **[**18]** deemed *per se* unreasonable in violation of *La. R.S. 51:122*. Alternatively, JRC alleges that the conspiracy in restraint of trade was a vertical price-fixing conspiracy between HRI and NRG/LaGen. Finally, JRC alleges that these actions constituted a conspiracy to monopolize in violation of *La. R.S. 51:123*.

The various motions for partial summary judgment addressed in the trial court's December 4, 2019 judgment focus on different aspects of these claims.

Denial of JRC's Motion for Partial Summary Judgment on the Issues of *Per Se* Antitrust Mode of Analysis and Joint Venture (JRC's Assignments of Error Nos. 1 and 6)

While JRC alternatively alleged in its First Amended Master Petition for Damages both a horizontal conspiracy and a vertical conspiracy in restraint of trade, in its motion for partial summary judgment, JRC focused on the horizontal conspiracy, seeking judgment declaring: (1) that MI had entered into joint venture agreements with Cleco, Entergy, and NRG/LaGen; and/or (2) that, given the law affecting joint venture, common and exclusive sales agency, or hub-and-spoke conspiracies, the *per se* antitrust mode of analysis was applicable to this matter.

In support of its motion, JRC alleged that when HRI entered **[**19]** into exclusive marketing agreements with Cleco, Entergy, and NRG/LaGen, MI entered into separate joint ventures for the sales of CCPs with each of these power companies. Additionally, it contended that the *per se* antitrust analysis applied to the alleged [Pg 16] conspiracy herein under three alternative theories: (1) HRI, as a common member of separate horizontally competing joint ventures with NRG/LaGen, Entergy, and Cleco, engaged in prohibited antitrust violations by fixing prices, allocating market territory, and refusing to deal with JRC on behalf of the three horizontal joint ventures; or (2) NRG/LaGen, Entergy, and Cleco delegated pricing, ordering, and production/market allocation to HRI as their common and exclusive sales agency, with the known and express purpose of fixing and stabilizing CCP commodity prices; or (3) HRI and NRG/LaGen, Entergy, and Cleco entered into a hub-and-spoke conspiracy by use of a common sales agency to carry out the unlawful scheme of fixing and stabilizing CCPs prices. JRC further averred that each of the three alternatively alleged arrangements between HRI and the power companies resulted in a horizontal restraint of trade, thus requiring application **[**20]** of the *per se* antitrust mode of analysis.

In denying JRC's motion, the trial court concluded in written reasons for judgment that JRC had failed to submit any factual support of a joint venture between HRI and Cleco, Entergy, or NRG/LaGen or of a horizontal conspiracy to restrain trade among these various entities. Thus, the court further reasoned that because JRC had failed to set forth facts to establish the existence of a conspiracy, there was no need to address the various theories alleged by JRC as requiring application of the *per se* antitrust mode of analysis.

On appeal, JRC contends in its sixth assignment of error that the trial court legally erred when it "defied" this court's instruction in the prior appeal in ***John River Cartage, Inc. v. Louisiana Generating, LLC****, 2018-1611 (La. App. 1st Cir. 12/19/18), 2018 La. App. Unpub. LEXIS 381, 2018 WL 6629472 at *6* (unpublished), writs denied, *2019-0122, 2019-0111 (La. 4/15/19), 267 So. 3d 1122*, *267 So. 3d 1129*, "by refusing to categorize the unlawful common selling **[*452]** agency alleged herein as a jurisprudentially recognized form of *per se* illegal horizontal agreement." However, as set forth in footnote 5 above, in [Pg 17] the prior appeal in this matter, this court, having reversed and vacated the trial court's rulings on defendants' exceptions of no cause of action, noted that JRC's motion for partial summary judgment, which the trial **[**21]** court had denied as moot, was "ripe for judicial determination." Thus, this court remanded the matter for the trial court to "consider and rule on JRC's motion for partial summary judgment,"

***John River Cartage, Inc.**, 2018 La. App. Unpub. LEXIS 381, 2018 WL 6629472 at *6*, which is precisely what the trial court did when it denied JRC's motion, finding that JRC had not proved its entitlement to summary judgment in its favor. Thus, we reject JRC's contention that the trial court defied any prior instruction in our prior decision.

Moreover, in light of our conclusion, as more fully discussed below, that the trial court properly dismissed JRC's *per se* antitrust claims on HRI's and NRG/LaGen's motions for partial summary judgment, we find it unnecessary to address JRC's contention in assignment of error number one that the trial court erred in failing to categorize the alleged unlawful common selling agency as a *per se* illegal horizontal agreement. Accordingly, we decline to address this issue and affirm the portion of the trial court's December 4, 2019 judgment denying JRC's motion for partial summary judgment.

Trial Court's Partial Grant of HRI's and NRG/LaGen's Motions for Partial Summary Judgment and Resulting Dismissal of JRC's *Per Se* Antitrust Claims under *La. R.S. 51:122* (JRC's [22] Assignments of Error Nos. 2, 3, 4 & 5)**

Next we turn to JRC's challenge to the portion of the trial court's judgment granting in part FIRI's and La/Gen's motions for partial summary judgment and dismissing JRC's *per se* antitrust claims. At the outset, we address JRC's contention that the trial court erred in deciding the issue of conspiracy on partial summary judgment where JRC had not been given a fair opportunity for discovery on this issue. ***HN13***[] The requirement in *La. C.C.P. art. 966(A)(3)* that a summary judgment should be considered only after "an opportunity for adequate discovery" [Pg 18] has been construed to mean that there is no absolute right to delay action on a motion for summary judgment until discovery is complete; rather, the requirement is only that the parties have a fair opportunity to carry out discovery and to present their claim. ***Primeaux v. Best Western Plus Houma Inn**, 2018-0841 (La. App. 1st Cir. 2/28/19), 274 So. 3d 20, 32*. Additionally, trial courts in Louisiana have broad discretion when regulating pre-trial discovery, which discretion will not be disturbed on appeal absent a clear showing of abuse. ***Id.***

We note that JRC's action has been pending since January of 2012. As early as September of 2015, JRC amended its petition to assert antitrust violations involving an alleged conspiracy **[**23]** in restraint of trade, again amending its petition in August of 2017, to allege that the horizontal conspiracy involved HRI, Cleco, Entergy, and NRG/LaGen. Moreover, HRI first sought dismissal of these antitrust claims in a motion for summary judgment it filed in February of 2017, thus affording JRC ample notice that this issue would be before the trial court. Accordingly, we find no clear abuse of the trial court's discretion in declining to delay ruling on this issue.

HN14[] Turning to the merits of this claim, to satisfy the elements of conspiracy, a plaintiff must show that the defendants engaged in concerted action, meaning **[*453]** a conscious commitment to a common scheme designed to achieve an unlawful objective. See ***HPC Biologicals, Inc.**, 194 So. 3d at 793*. Moreover, to establish a *per se* unreasonable horizontal conspiracy, a plaintiff must establish that the conspiracy involved coordination between competitors at the same level of a market structure. See ***Van Hoose**, 70 So. 3d at 1022*. Independent parallel conduct, or even conduct among competitors that is consciously parallel, does not alone establish the contract, combination, or conspiracy. ***Camsoft Data Systems, Inc. v. Southern Electronics Supply, Inc.**, 2018-1609 (La. App. 1st Cir. 12/3/18), [Pg 19] 276 So. 3d 1053, 1059*, writs denied, *2018-02088, 2018-02018 (La. 2/11/19), 263 So. 3d 1151*, *263 So. 3d 1153*.

Because JRC would have the burden of proof at trial to establish the existence of a horizontal **[**24]** conspiracy, HRI and NRG/LaGen only had to point to the absence of factual support for one element of that claim. In support of their motions, they asserted in part that there was an absence of factual support for an essential element of a *per se* antitrust violation under any of the theories JRC alleged, because there is no evidence of the existence of any agreement or conspiracy among Cleco, Entergy, and NRG/LaGen. We find that HRI and NRG/LaGen met that initial burden.

Thus, once HRI and NRG/LaGen successfully pointed to the lack of evidence of Cleco or Entergy engaging in any concerted actions with NRG/LaGen in furtherance of an alleged horizontal scheme in restraint of trade or of any knowledge or acquiescence by Cleco or Entergy to such a scheme, the burden shifted to JRC. JRC then had to produce factual support sufficient to establish the existence of a genuine issue of material fact as to a horizontal conspiracy in restraint of trade or that HRI and NRG/LaGen were not entitled to judgment as a matter of law. *La. C.C.P. art. 966(D)(1)*.

On appeal, JRC contends in its second and fifth assignments of error that it did produce factual support to establish the existence of genuine issues of material fact regarding: **[**25]** (1) an unlawful horizontal conspiracy among the power companies through either: (a) direct evidence of an unlawful common sales agency conspiracy, or (b) circumstantial evidence of a hub-and-spoke conspiracy coordinated by their common sales agency; or (2) a horizontal conspiracy by virtue [Pg 20] of a joint venture between HRI and Entergy and between HRI and Cleco, respectively.[12]

A. Joint Venture

Addressing JRC's joint venture claim first, JRC avers that the trial court erred in dismissing its *per se* antitrust claims where it demonstrated the existence of genuine issues of material fact as to the existence of joint ventures between HRI and Cleco, HRI and Entergy, and HRI and NRG/LaGen. Under this theory, JRC posits that because HRI was a common member of individual joint-venture partnerships with Cleco and Entergy, HRI's actions in inviting NRG/LaGen to join in a price-fixing and market-territory-allocation scheme were taken in the capacity of a pure, non-vertical, direct competitor, thus **[*454]** constituting horizontal action in restraint of trade.

HN16[] A joint venture has been defined as a special combination of two or more persons, where in some specific venture a profit is jointly **[**26]** sought without any actual partnership or corporate designation. ***Coffee Bay Investors, L.L.C. v. W.O.G.C. Company**, 2003-0406 (La. App. 1st Cir. 4/2/04), 878 So. 2d 665, 670*, writ denied, *2004-1084 (La. 6/25/04), 876 So. 2d 838*. Generally, the essential elements of a joint venture are the same as those of partnership, i.e., two or more parties combining their property, labor, skill, etc. in the conduct of a venture for joint profit, with each having some right of control. ***Cajun Electric Power Cooperative, Inc. v. McNamara**, 452 So. 2d 212, 215 (La. App. 1st Cir.)*, writ denied, *458 So. 2d 123 (La. 1984)*. Thus, joint ventures are governed by the law of partnership and share the same requisites as follows: (1) a contract between two or more persons; (2) the establishment of a juridical entity or person; (3) contribution [Pg 21] by all parties of either efforts or resources; (4) contribution in determinate proportions; (5) joint effort; (6) mutual risk vis-à-vis losses; and (7) a sharing of profits. ***Cajun Electric Power Cooperative, Inc.**, 452 So. 2d at 215*.

Based on our *de novo* review of the evidence, we conclude that JRC has failed to demonstrate a genuine issue of material fact as to several of these elements. Regarding joint effort, the power companies produce energy, and CCPs are merely a byproduct of that energy production. Because the accumulation of these CCPs can impede the energy-production process, these power companies contracted with HRI to manage these byproducts by transporting them out of **[**27]** the production and surrounding areas either for marketing and sale or alternatively for relocation to designated sites on the various plant premises. HRI alone was responsible for the efforts in transporting the CCPs from the production areas for sale or placement in other designated areas.

With regard to the element of the sharing of profits, while JRC contends that Entergy and Cleco shared. "net profits". with HRI, a review of the marketing agreements of record does not support that contention. Rather, HRI was *compensated* for the sale of fly ash and other CCPs under various formulas: a percentage of gross sales; a fixed per-ton price for CCPs sold; or a combination of a fixed component, a variable component and a percentage of net proceeds (sales revenues minus third-party transportation and handling costs for delivery to customer only).

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[12] We note that JRC contends in its fourth assignment of error that the trial court erred in concluding in its reasons for judgment that JRC could not establish a horizontal agreement absent first establishing a joint venture. ***HN15***[] Because this court reviews summary judgments *de novo*, we afford no deference to the trial court's underlying reasoning for its judgment. ***King v. Allen Court Apartments**, 2015-0858 (La. App. 1st Cir. 12/23/15), 185 So. 3d 835, 839*, writ denied, ***2016-0148 (La. 3/14/16), 189 So. 3d 1069***. Accordingly, we need not address this argument.

Additionally, regarding mutual risk vis-à-vis losses, HRI bore the risk of any losses it suffered in fulfilling these contractual duties. While HRI was allowed to account for some of its costs in the calculation of its compensation under the various agreements, it bore the responsibility of many of the costs associated with its contractual duties. **[**28]** HRI also bore the additional risk in some situations of required shortfall payments for its failure to sell designated tonnage amounts of [Pg 22] CCPs. Thus, the risk of whether its ultimate calculated compensation under the various marketing agreements covered or exceeded all of its other costs and resulted in profits was borne solely by HRI, such that JRC cannot demonstrate a genuine issue of material fact as to this element either.

Accordingly, JRC is unable to carry its burden of demonstrating the existence of an issue of material fact as to whether the marketing agreements MU entered into with Cleco or Entergy, or NRG/LaGen, constituted joint ventures or, consequently, whether a horizontal conspiracy in restraint of trade existed by virtue of HRI's **[*455]** actions as a pure, non-vertical, direct competitor of NRG/LaGen.

B. Unlawful Common Sales Agency Agreement

Turning next to JRC's claim of a horizontal conspiracy through the use of a common sales agency, we note that ***HN17***[] not all common selling agency agreements violate antitrust laws. See ***Virginia Excelsior Mills, Inc. v. Federal Trade Commission****, 256 F.2d 538, 541 (4th Cir. 1958)*. However, such an agreement does violate antitrust laws where it is used as a concerted action by two or more horizontal competitors to accomplish a purpose **[**29]** that could not be lawfully accomplished "by a direct agreement among the participating producers." ***Id.***

In ***Virginia Excelsior Mills, Inc.***, the United States Fourth Circuit Court of Appeals held that an agreement among competing producers to eliminate competition among themselves was a *per se* violation of *Section 1* of the Sherman Antitrust Act. The competing producers organized a new corporation, the stock of which the competing producers owned and the board of directors for which was selected from among the competing producers. The new corporation then entered into **identical** contracts with each producer-stockholder appointing the new corporation as each producer's exclusive sales agent. Moreover, by agreement of the producers, orders were to be allocated among them on the basis of their relative productive capacities, and no producer would increase its productive capacity. [Pg 23] ***Virginia Excelsior Mills, Inc.****, 256 F.2d at 539-540*. As such, the underlying agreement of these competitors to use a common selling agency to achieve their unlawful purpose was well established by evidence of a direct agreement or conspiracy among all of these competitors through the use of a separately created entity, owned and controlled by the horizontal competitors. **[**30]**

Nonetheless, given the absence of any evidence herein of such direct agreement among the power companies to use their common sales agency HRI for an unlawful purpose, JRC contends that it was never obligated to prove the horizontal agreement by direct communications among the power companies. Rather, citing ***United States v. Masonite Corporation****, 316 U.S. 265, 275, 62 S. Ct. 1070, 1075-1076, 86 L. Ed. 1461, 1942 Dec. Comm'r Pat. 777 (1942)*, JRC asserts that a plaintiff may establish the existence of a horizontal agreement by offering direct evidence of a common agent engaging in prohibited conduct for the group of horizontal competitors pursuant to the "express delegation, acquiescence, or understanding" of the competing horizontal members. See ***Masonite****, 316 U.S. at 276, 62 S. Ct. at 1076*. Moreover, JRC argues that it presented a genuine issue of fact of a horizontal conspiracy by offering direct evidence of HRI setting uniform market prices and controlling output pursuant to contractual delegation and/or acquiescence of Cleco, Entergy, and NRG/LaGen.

However, based on our *de novo* review of the evidence submitted, there is no evidence that HRI controlled output of fly ash or any other CCPs produced by Cleco, Entergy, or NRG/LaGen. To the contrary, a review of the marketing agreements of record demonstrates that the power companies controlled their own energy **[**31]** production levels and their own internal use of CCPs they produced, which, in turn, determined the quantity of CCPs made available for marketing. The Entergy marketing agreements for the Nelson Power Station indicate that the amount of ash available under the marketing agreement would be determined by [Pg 24] the operation of Nelson Unit 6, which operation **[*456]** would be controlled by Entergy "in its absolute discretion." Entergy further reserved the right to use any part of the CCPs produced by Nelson Unit 6. Similarly, the Cleco marketing agreements contained provisions indicating either that the quantity of ash produced would vary depending on many factors involved in plant operations, that Cleco made no guarantee as to quantity of ash that would be made available, or that Cleco would not alter its power supply to ensure a volume of ash. Cleco also reserved the right to use CCPs for its own benefit and even reserved the right to donate fly ash produced at the Dolet Hills Power Station for various purposes. Finally, the LaGen/HRI Agreement also provided that LaGen expressly made no warranties as to the quantity of CCPs and reserved the right to use CCPs produced at Big Cajun II for its **[**32]** own purposes.

Moreover, JRC failed to demonstrate the existence of a genuine issue of material fact as to the alleged acquiescence by Cleco or Entergy in any such scheme in a concerted effort to restrain trade. The record demonstrates that HRI contracted with these power companies years or even decades apart. HRI (or its predecessors) first contracted with Cleco (and its predecessors) in 1981 with regard to fly ash and other CCPs produced at the Rodemacher Power Station and thereafter in 2003 for fly ash produced at the Dolet Hills Power Station. HRI (or its predecessors) first contracted with Entergy (and its predecessors) in 1986 for ash marketing services at the Nelson Power Station. By contrast, it did not contract with NRG/LaGen until 2011.

Further, there is no evidence that either Cleco or Entergy had any knowledge of HRI's marketing agreements with each other or with NRG/LaGen, or of HRI's marketing efforts on behalf of those other entities. Nor is there any evidence that, in executing these marketing contracts years apart, the power companies agreed to, or even later acquiesced in, a scheme to fix market prices and control output. [Pg 25] Accordingly, we conclude that JRC failed **[**33]** to demonstrate the existence of a genuine issue of material fact as to an alleged horizontal conspiracy by Cleco, Entergy, and NRG/LaGen, implemented by HRI as their common sales agency, by either contractual delegation or acquiescence.

C. Hub-and-Spoke Conspiracy

JRC next contends that it demonstrated a genuine issue of material fact of a horizontal agreement in restraint of trade by offering circumstantial evidence of a "hub-and-spoke" conspiracy. ***HN18***[] A hub-and-spoke conspiracy is one in which an entity at one level of the market structure, the "hub," coordinates an agreement among competitors at a different level, the "spokes." ***U.S.v. Apple, Inc.****, 791 F.3d 290, 314 (2nd Cir. 2015)*, cert. denied sub nom., *__ U.S. __, 136 S. Ct. 1376, 194 L. Ed. 2d 360 (2016)*. A traditional hub-and-spoke conspiracy has three elements: (1) a hub, such as a dominant purchaser; (2) spokes, such as competing manufacturers or distributors that enter into vertical agreements with the hub; and (3) the rim of the wheel, which consists of horizontal agreements among the spokes. ***In re Musical Instruments and Equipment Antitrust Litigation****, 798 F.3d 1186, 1192*.

HN19[] Where no direct evidence exists for the third element, a horizontal agreement among the spokes (or competitors), courts evaluate circumstantial evidence, called "plus factors," to determine whether a plaintiff's evidence is more probative of **[**34]** conspiracy than of conscious parallel behavior. ***In re Disposable contact Lens Antitrust****, 215 F. Supp. 3d 1272, 1294* ***[*457]*** *(M.D. Fl. 2016)*. Plus factors are economic actions and outcomes that are largely inconsistent with unilateral conduct, but largely consistent with explicitly coordinated action. Accordingly, they may raise an inference of conspiracy. ***Id.*** *at 1294-1295*. These plus factors include: (1) a common motive to conspire, (2) evidence showing that the parallel acts were against the apparent individual economic self-interest of the alleged [Pg 26] conspirators, (3) evidence of a high level of interfirm communications, and (4) historically unprecedented changes in pricing structure made at the very same time by multiple competitors for no other discernible reason. ***Id.*** *at 1295*; ***Apple, Inc.****, 791 F.3d at 315*. JRC contends on appeal that it presented factual support demonstrating issues of material fact as to these plus factors and, thus, that summary judgment dismissing its *per se* antitrust claims was inappropriate.

First, regarding a common motive to conspire, JRC contends that there was a common motive to conspire because of excess supply of CCPs and Big River and HRI's "historical pricing competition," which "tended to" drive prices of CCPs downward or neutral. Based upon our *de novo* review of **[**35]** the summary judgment evidence, JRC did present some evidence from its economist that the price of CCPs was generally trending downward from 2008 through 2010.

Secondly, JRC contends that the each power company's separate marketing agreement with HRI was not in the individual company's economic self-interest where each "contractually relinquished [its] right to individually compete for CCPs sales" by authorizing HRI to centrally manage and control prices and output. However, JRC presented no evidence that the marketing agreements, entered into by the power companies years and even decades apart, were against their individual self-interests. Regarding controlling output, as discussed above, output of CCPs is determined by energy production levels, which are controlled by the individual power companies, and the quantity of CCPs made available for marketing is further dependent upon the power companies' discretionary use of the CCPs they produce. Additionally, the Cleco contracts of record for the Dolet Hills Power Station required minimum sales levels of CCPs with penalty payments for failure to meet those minimums, and the Entergy marketing agreement for the Nelson Power Station specifically **[**36]** provided that the marketing contractor would "use its best efforts to market **all ash"** delivered under the agreement. (Emphasis [Pg 27] added). These contractual provisions demonstrate that the power companies' overall objective was simply to remove CCPs from their premises — not, as JRC suggests, that they conspired through the use of marketing agreements to authorize HRI to control prices against their individual self-interests.

As to interfirm communications, JRC points to a letter from HRI to NRG/LaGen evidencing a possible scheme to raise prices. In the letter, HRI, in an attempt to gain the NRG/LaGen marketing contract, indicated that HRI managed "all other sources of C-618 fly ash produced in the State of Louisiana" and that HRI's involvement with Big Cajun II "could present significant opportunities for both companies to increase sales and to maximize pricing of the products."

Regarding the fourth plus factor, JRC did present evidence that the price of CCPs in Louisiana, while generally trending downward from 2008 through 2010, leveled off in 2011, just as the LaGen/HRI Agreement was executed, and then began to rise. Additionally, JRC offered evidence that once HRI entered into **[**37]** the LaGen/HRI **[*458]** Agreement, HRI instituted an initiative to raise prices for CCPs produced by Big Cajun II because HRI believed that the prices previously charged by Big River were below the "competitive rate." This initiative was further evidenced by HRI's email communication to one customer, identified as a former Big River customer, incrementally raising prices to that customer for an unidentified product over a seven-month period from February to September of 2011, shortly after HRI became the marketing agency for NRG/LaGen.

Nonetheless, based on our *de novo* review of the limited evidence upon which JRC relies to support the plus factors, we conclude that JRC did not demonstrate a genuine issue of fact as to whether a horizontal agreement among the power companies should be inferred. Specifically, while the evidence offered suggests that CCPs prices were generally trending downward from 2008 to 2010 and thereafter stabilized and began increasing, the graph presented by JRC's [Pg 28] economist is not broken down by prices charged individually by Cleco, Entergy, and NRG/LaGen. Thus, it is impossible to discern from the graph which of the power companies may have experienced decreasing **[**38]** prices or whether the upward trend in prices was a result of an increase in prices "by multiple competitors." See ***In re Disposable Contact Lens Antitrust**, 215 F. Supp. 3d at 1295*.

Additionally, as discussed above, the language of the various marketing agreements does not suggest that they were against the individual economic self-interests of the power companies. And the written communications from HRI to NRG/LaGen represent **vertical** communications between a marketing agency and one producer, wherein HRI suggested that HRI and NRG/LaGen could maximize pricing. JRC offered no evidence of any interfirm communications among or between the horizontal power companies Cleco, Entergy, or NRG/LaGen to suggest a conspiracy among them, and no communications between HRI and Cleco or Entergy, much less a high level of such communications. Moreover, the written communication from HRI to NRG/LaGen and the evidence of HRI's initiative to raise prices for CCPs produced by Big Cajun II indicates price changes for that one CCPs producer alone. ***Id.***

Accordingly, JRC failed to carry its burden of demonstrating a genuine issue of material fact as to whether a horizontal agreement among the power companies should be inferred. As such, there is likewise no genuine issue **[**39]** of fact as to whether HRI, Cleco, Entergy, and NRG/LaGen entered into a hub-and-spoke conspiracy. Having failed to demonstrate an issue of fact as to a horizontal conspiracy under any of the theories it has advanced, JRC has failed to establish that HRI and NRG/LaGen are not entitled to summary judgment dismissing

JRC's *per se* antitrust claims. Thus, the portion of the trial court's December 4, 2019 judgment dismissing JRC's *per se* antitrust claims is likewise affirmed.

[Pg 29] **Trial Court's Denial in Part of HRI's and NRG/LaGen's Motions for Partial Summary Judgment Seeking Dismissal of JRC's *La. R.S. 51:123* Monopoly Claim (HRI's and NRG/LaGen's Assignments of Error Nos. 1 & 2)**

In their appeals of the trial court's December 4, 2019 judgment, HRI and NRG/LaGen both contend that the trial court erred in denying in part their motions for partial summary judgment and refusing to dismiss JRC's monopoly claims under *La. R.S. 51:123*. HRI and NRG/LaGen each assert that the trial court erred in failing to grant its motion for summary **[*459]** judgment on the monopoly claims: (1) where JRC did not suffer antitrust injury; and (2) where JRC failed to define a geographic market.

HN20[] With regard to antitrust injury, a plaintiff suffers **[**40]** an antitrust injury only if its loss is the type of loss that the claimed antitrust violation is likely to cause. ***HPC Biologicals, Inc.****, 194 So. 3d at 797*. "Antitrust injury" is defined as the type of injury that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The requirement of an antitrust injury ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendants' behavior. ***Id.*** A plaintiff must allege a causal connection between its alleged injury and the anticipated anticompetitive effect of the specific practice that allegedly violates ***antitrust law***. ***BRFHH Shreveport, LLC v. Willis Knighton Medical Center****, 176 F. Supp. 3d 606, 626 (W.D. La. 2016)*.

HRI and NRG/LaGen assert that JRC did not suffer antitrust injury because it did not pay increased prices and, thus, did not suffer the "anticipated anticompetitive effect" of an alleged monopoly. According to HRI and NRG/LaGen, the causal connection here is lacking. They contend that the anticipated anticompetitive effect of an alleged monopoly is that the monopolist will raise prices to anticompetitive levels. Asserting that JRC never bought C-618 [Pg 30] fly ash directly from LaGen, NRG or HRI and, thus, never paid increased prices, defendants claim **[**41]** that JRC did not suffer the harm a monopoly is likely to cause.

However, the antitrust injury claimed by JRC is not that it was forced to pay higher prices for CCPs, but rather that it suffered antitrust injury from HRI's refusal to deal with JRC ***HN21***[] A unilateral refusal to deal generally is not unlawful. However, a monopolist's refusal to deal becomes actionable under the antitrust laws where the refusal is designed to have an anticompetitive effect, whether to gain market share, to drive up prices, or to obtain some other illegal goal. ***Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial, Inc.****, 919 F.2d 1517, 1522 (11th Cir. 1990)*, cert. denied sub nom., *502 U.S. 815, 112 S. Ct. 68, 116 L. Ed. 2d 43 (1991)*. Thus, monopolistic or other anticompetitive intent is the key factor in determining whether an antitrust violation has occurred. See ***Id.***

In the instant case, JRC presented evidence suggesting that HRI refused to deal with JRC once HRI became the marketing agency for NRG/LaGen. However, questions of material fact remain as to this issue. HRI and NRG/LaGen contend, nonetheless, that the sole exception to a company's lawful right to refuse to deal with its competitors is where a monopolist seeks to terminate a prior voluntary course of dealing with a competitor. See ***In re Elevator Antitrust Litigation****, 502 F.3d 47, 52 (2nd Cir. 2007)*. According to HRI and NRG/LaGen, JRC cannot establish a refusal-to-deal **[**42]** claim because JRC had no preexisting relationship with HRI or NRG/LaGen.

However, JRC notes that HRI was representing Cleco, Entergy, and NRG/LaGen as their exclusive marketing agency for CCPs sales at the time HRI allegedly refused to deal with JRC. Accordingly, JRC asserts that HRI's actions on behalf of all of the power companies would have effectively prevented JRC from dealing with any of these power companies. Additionally, JRC contends that a genuine issue of fact remains as to whether it had a prior legally enforceable [Pg 31] relationship with NRG/LaGen. Considering the foregoing and based on our review of the summary **[*460]** judgment evidence, we conclude that disputed issues of fact remain as to whether JRC suffered antitrust injury because of a refusal to deal.

HN22[] With regard to the relevant geographic market, the geographic element of the relevant market consists of the area in which sellers of the defendants' product operate and to which buyers can practicably turn to obtain that product. ***State ex rel. Ieyoub v. Racetrac Petroleum, Inc.****, 2001-0458 (La. App. 3rd Cir. 6/20/01), 790 So. 2d 673, 679*. Thus, the issue of geographic market is also a fact-intensive inquiry. Based on our *de novo* review of the evidence submitted, we likewise conclude that issues of fact remain as to the relevant **[**43]** geographic market. Accordingly, FRI and NRG/LaGen were not entitled to dismissal of JRC's monopoly claims on summary judgment. As such, the portion of the trial court's December 4, 2019 judgment denying in part HRI's and NRG/LaGen's motions for partial summary judgment as to JRC's monopoly claims is affirmed.

CONCLUSION

For the above and foregoing reasons, the trial court's December 4, 2019 judgment, denying the motion for partial summary judgment of plaintiff, John River Cartage, Inc., and granting in part and denying in part the motions for partial summary judgment filed by defendants, Headwaters Resources, Inc. and Louisiana Generating, LLC and NRG Energy, Inc., is affirmed. Costs of this appeal are assessed one-third to John River Cartage, Inc., one-third to Headwaters Resources, Inc., and one-third to Louisiana Generating, LLC and NRG Energy, Inc.

AFFIRMED.

In re Glumetza Antitrust Litig.

United States District Court for the Northern District of California

March 5, 2020, Decided; March 5, 2020, Filed

No. C 19-05822 WHA; No. C 19-05831 WHA; No. C 19-06138 WHA; No. C 19-06156 WHA; No. C 19-06839 WHA; No. C 19-07843 WHA; No. C 19-08155 WHA; No. C 20-01196 WHA; No. C 20-01198 WHA (Consolidated)

Reporter
611 F. Supp. 3d 848 *; 2020 U.S. Dist. LEXIS 39649 **; 2020-1 Trade Cas. (CCH) P81,122; 2020 WL 1066934

In re GLUMETZA ANTITRUST LITIGATION. This Document Relates to: ALL ACTIONS.

Subsequent History: Motion denied by *In re Glumetza Antitrust Litig., 2020 U.S. Dist. LEXIS 113357 (N.D. Cal., June 29, 2020)*

Motion denied by, As moot, Request denied by, Request granted, in part, Request denied by, in part, Motion granted by, Reserved by, in part *In re Glumetza Antitrust Litig., 2020 U.S. Dist. LEXIS 113361, 2020 WL 3498067 (N.D. Cal., June 29, 2020)*

Request denied by *In re Glumetza Antitrust Litig., 2020 U.S. Dist. LEXIS 136836 (N.D. Cal., July 22, 2020)*

Later proceeding at *In re Glumetza Antitrust Litig., 2020 U.S. Dist. LEXIS 136837, 2020 WL 4362247 (N.D. Cal., July 22, 2020)*

Class certification granted by *In re Glumetza Antitrust Litig., 336 F.R.D. 468, 2020 U.S. Dist. LEXIS 148096, 2020 WL 4732333 (N.D. Cal., Aug. 15, 2020)*

Dismissed by, in part *In re Glumetza Antitrust Litig., 2020 U.S. Dist. LEXIS 229398, 2020 WL 7122477 (N.D. Cal., Dec. 5, 2020)*

Motion denied by *In re Glumetza Antitrust Litig., 2021 U.S. Dist. LEXIS 19989, 2021 WL 352059 (N.D. Cal., Feb. 2, 2021)*

Summary judgment denied by, Partial summary judgment denied by *In re Glumetza Antitrust Litig., 2021 U.S. Dist. LEXIS 87085, 2021 WL 1817092 (N.D. Cal., May 6, 2021)*

Motion granted by, in part, Motion denied by, in part *In re Glumetza Antitrust Litig., 2021 U.S. Dist. LEXIS 161066, 2021 WL 3773621 (N.D. Cal., Aug. 25, 2021)*

Costs and fees proceeding at, Request granted, Settled by, Motion granted by, in part *In re Glumetza Antitrust Litig., 2022 U.S. Dist. LEXIS 20157 (N.D. Cal., Feb. 3, 2022)*

Prior History: *Depomed, Inc. v. Lupin Pharms., Inc., 2011 U.S. Dist. LEXIS 52839 (N.D. Cal., May 17, 2011)*

Core Terms

generic, patent, Consolid, antitrust, plaintiffs', conspiracy, settlement, end-payor, no-AG, defendants', alleges, unjust enrichment, continuing violation, pharmaceutical, retailer, complaints, concealed, brand, monopoly, fraudulent concealment, statute of limitations, purchasers, consumer protection, manufacturer, partial, sales, settlement agreement, antitrust claim, certification, marketed

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Experimental Use & Testing

Military & Veterans Law > Military Offenses > Controlled Substances

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food & Drugs Act

HN1[] **Defenses, Experimental Use & Testing**

All pharmaceutical drugs require FDA approval to enter the market and undergo a long and costly testing process. Only approved drugs reach the market. 21 U.S.C.S. § 355(a), (b)(1). To encourage generic pharmaceutical drugs, the Hatch-Waxman Act eases the approval process. A proposed generic manufacturer may submit an Abbreviated New Drug Application (ANDA), rely on testing data for the corresponding, already-approved brand-name drug, and avoid the costly and time-consuming studies needed for approval. 21 U.S.C.S. §§ 355(j)(2)(A)(ii), (iv).

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Experimental Use & Testing

Patent Law > ... > Defenses > Patent Invalidity > Notice

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN2[] **Defenses, Experimental Use & Testing**

In the context of an Abbreviated New Drug Application (ANDA), a certification of invalidity or noninfringement — usually called the Paragraph IV certification — is deemed a statutory act of patent infringement. And, if the brand manufacturer sues within 45 days, the FDA must stay the generic's approval for thirty months (or until the end of the suit, whichever comes first). 21 U.S.C.S. §§ 355(j)(2)(A)(vii)(I)-(IV), (5)(B)(iii); 35 U.S.C.S. § 271(e)(2)(A).

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

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

HN3[] **Motions to Dismiss, Failure to State Claim**

To survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss, a complaint must allege sufficient factual matter, accepted as true, to state a facially plausible claim for relief. Such a facially plausible claim requires sufficient factual allegations to draw a reasonable inference that defendants are liable for the misconduct alleged. A court must take all of the factual allegations in the complaint as true, but need not accept as true legal conclusions merely styled as facts. The factual allegations must raise a plaintiff's right to relief above the speculative level.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Clayton Act > Defenses

HN4[] **Sherman Act, Defenses**

Private plaintiffs must file an antitrust action within four years. *15 U.S.C.S. § 15b*. A claim may be dismissed as untimely pursuant to a *Fed. R. Civ. P. 12(b)(6)* motion only when the running of the statute of limitations is apparent on the face of the complaint.

Governments > Legislation > Statute of Limitations > Time Limitations

HN5[] **Statute of Limitations, Time Limitations**

An antitrust claim accrues when a defendant commits an unlawful act and injures a plaintiff.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN6[] **Sherman Act, Defenses**

In a conspiracy to violate antitrust laws, each time a plaintiff is injured by an act of the defendant, a cause of action accrues to him to recover the damages caused by that act. A continuing violation: (1) must be a new and independent act that is not merely a reaffirmation of a previous act; and (2) must inflict new and accumulating injury on the plaintiff.

Antitrust & Trade Law > Clayton Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

HN7[] **Clayton Act, Defenses**

Generally, the passive receipt of profits from an illegal contract by an antitrust defendant is not an overt act of enforcement which will restart the statute of limitations. After all, the mere possession of monopoly power, and charging of monopoly prices is not unlawful. Thus, the unabated inertial consequences of some pre-limitations action that are irrevocable, immutable, permanent, and final are not continuing violations.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

HN8[] **Remedies, Damages**

The continuing violation standard is meant to differentiate those cases where a continuing violation is ongoing — and an antitrust suit can therefore be maintained — from those where all of the harm occurred at the time of the initial violation. So, action taken under a pre-limitation contract can be sufficient to restart the statute of limitations so long as the defendant had the ability not to take the challenged action, even if that would have required breaching the allegedly anti-competitive contract.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Tolling

HN9[] **Tolling of Statute of Limitations, Fraudulent Concealment**

A statute of limitations may be tolled if the defendant fraudulently concealed the existence of a cause of action in such a way that the plaintiff, acting as a reasonable person, did not know of its existence. Plaintiffs must plead facts showing that defendants affirmatively misled them, and that plaintiffs had neither actual nor constructive knowledge of the facts giving rise to their claim despite their diligence in trying to uncover those facts. Diligent inquiry is required where facts exist that would excite the inquiry of a reasonable person. The circumstances of concealment and plaintiffs' diligent search must be plead with particularity.

Governments > Courts > Creation & Organization

HN10[] **Courts, Creation & Organization**

As the Supreme Court recognized in Actavis, the pay-for-delay scheme is unique to pharmaceutical patents.

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

HN11[] **Nondisclosure, Elements**

Failure to disclose information does not constitute affirmative concealment absent a duty to disclose. However, half-truths — representations that state the truth only so far as it goes, while omitting critical qualifying information — can be actionable misrepresentations. One who chooses to speak has a duty to include as much information as necessary to prevent misleading others.

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

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN12[] **Motions to Dismiss, Failure to State Claim**

Generally, a motion to dismiss turns on, and only on, the complaint. The judicial notice exception under *Fed. R. Evid. 201* permits district courts to consider a fact not subject to reasonable dispute because it is generally known or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN13[] **Inequitable Conduct, Anticompetitive Conduct**

Reverse payment settlements can sometimes violate the antitrust laws. But the Supreme Court has declined to find reverse payment settlement agreements presumptively unlawful. Instead, courts should apply the rule of reason to evaluate the agreements.

Antitrust & Trade Law > Sherman Act > Claims

Torts > ... > Concerted Action > Civil Conspiracy > Elements

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

HN14[] **Sherman Act, Claims**

The character and effect of an antitrust conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. It is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme.

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

HN15[] **Complaints, Requirements for Complaint**

A complaint plausibly alleges a conspiracy where it pleads enough factual matter (taken as true) to suggest the parties had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

Evidence > Burdens of Proof > Allocation

HN16[] **Burdens of Proof, Allocation**

Once a conspiracy is formed, it remains actionable until its purpose has been achieved or abandoned and an overt act of one partner may be the act of all without any new agreement specifically directed to that act. Thus, a plaintiff need not show that each defendant or all defendants have participated in each act or transaction. Involvement in but two of ten allegedly conspirational situations does not absolve a defendant from participation in the entire conspiracy if its involvement in the two was unlawful and knowingly and purposely performed.

Constitutional Law > ... > Case or Controversy > Standing > Elements

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > Standing

HN17[] Standing, Elements

Article III's irreducible constitutional minimum of standing to sue requires a plaintiff to have suffered: (1) an injury-in-fact; (2) that is fairly traceable to the defendant's conduct; and (3) is redressable by a favorable court decision. A plaintiff must demonstrate standing for each claim he seeks to press and separately for each form of relief sought. Just because a suit derives from a common nucleus of operative fact does not mean federal jurisdiction extends to all claims sufficiently related to a claim within Article III to be part of the same case.

Civil Procedure > ... > Justiciability > Standing > Personal Stake

HN18[] Standing, Personal Stake

At bottom, the injury a plaintiff suffers defines the scope of the controversy he or she is entitled to litigate.

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN19[] Standing, Particular Parties

Claims for relief under the laws of the several states are separate claims for relief and, per Daimler Chrysler, require separate proof of standing. Standing does not arise simply because illegality is in the air.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Antitrust & Trade Law > Clayton Act > Defenses

HN20[] Sherman Act, Defenses

California permits antitrust recovery for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct within the limitations period, and recognizes fraudulent concealment.

Governments > Legislation > Interpretation

HN21[] Legislation, Interpretation

New York's ***antitrust law*** should generally be construed in light of Federal antitrust precedent and given a different interpretation only where State policy, differences in the statutory language, or the legislative history justify such a result.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN22[] **Public Enforcement, State Civil Actions**

The Rhode Island Supreme Court has explained that the Rhode Island Antitrust Act must be construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable, except where provisions of this chapter are expressly contrary to applicable federal provisions as construed.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Contracts Law > Remedies > Restitution

HN23[] **Equitable Relief, Quantum Meruit**

When a plaintiff alleges unjust enrichment, a court may construe the cause of action as a quasi-contract claim seeking restitution.

Estate, Gift & Trust Law > Estate Administration > Intestate Succession > Escheat

Governments > Legislation > Statute of Limitations > Time Limitations

HN24[] **Intestate Succession, Escheat**

Unjust enrichment has a three-year statute of limitations. *Cal. Civ. Proc. Code § 338(d)*.

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

HN25[] **Nondisclosure, Elements**

California recognizes fraudulent concealment.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Begins to Run > Continuing Violations

HN26[] **Statute of Limitations, Time Limitations**

The consumer protection law has a three-year statute of limitations. And in New York, a continuing violation may only be predicated on continuing unlawful acts and not on continuing effects of earlier unlawful conduct.

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

HN27[] Deceptive & Unfair Trade Practices, State Regulation

N.Y. Bus. Law § 349 requires an act or practice that was misleading in a material way. But reliance is not an element — a plaintiff need only show the defendant's material deceptive act caused the injury. Section 349 has continually been interpreted to cover antitrust violations.

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For Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Movants (3:19-cv-05822-WHA): Anna Theresa Neill, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL; Alexander J. Egervary, Caitlin V. McHugh, Chelsea M. Nichols, PRO HAC VICE, Hangley Aronchick Segal Pudlin & Schiller, Philadelphia, PA; Barry L. Refsin, PRO HAC VICE, Hangley Aronchick Segal Pudlin Schiller, Philadelphia, PA; Eric L Bloom, Monica L. Kiley, **[**6]** PRO HAC VICE, Hangley Aronchick Segal Pudlin & Schiller, Harrisburg, PA.

For Service Employees International Union Local No. 1 Health Fund, Plaintiff (3:20-cv-01196-WHA): Whitney E. Street, Block & Leviton LLP, San Francisco, CA.

For Hy-Vee, Inc., Plaintiff (3:20-cv-01198-WHA): Anna Theresa Neill, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL.

For City of Providence, individually and on behalf of all others similarly situated, Plaintiff (3:19-cv-05831-WHA): Stephen J. Teti, PRO HAC VICE, Block & Leviton LLP, Boston, MA; Whitney E. Street, Block & Leviton LLP, San Francisco, CA.

For Bausch Health Companies Inc., Salix Pharmaceuticals, Ltd., Salix Pharmaceuticals, Inc, Santarus, Inc., Defendants (3:19-cv-05831-WHA): Laura S Shores, LEAD ATTORNEY, PRO HAC VICE, Arnold and Porter Kaye Scholer LLP, Washington, DC; Saul P. Morgenstern, LEAD ATTORNEY, Kaye Scholer LLP, New York, NY; Daniel B. Asimow, Arnold & Porter Kaye Scholer LLP, San Francisco, CA.

For Assertio Therapeutics, Inc., Defendant (3:19-cv-05831-WHA): Eric Jonathan Stock, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn, New York, NY; Victoria Leigh Weatherford, Durie Tangri LLP, San Francisco, CA.

For Lupin Pharmaceuticals, Inc., Lupin **[**7]** Ltd., Defendants (3:19-cv-05831-WHA): Jeffrey C. Bank, PRO HAC VICE, Wilson Sonsini Goodrich and Rosati, New York, NY; Wendy Lynn Devine, Wilson Sonsini Goodrich Rosati PC, San Francisco, CA.

For PDL Biopharma, Inc., Defendant (3:19-cv-05831-WHA): George G. Gordon, Thomas James Miller, LEAD ATTORNEYS, PRO HAC VICE, Dechert LLP, Philadelphia, PA; James Carl Otteson, Dechert LLP, Palo Alto, CA.

For CVS Pharmacy, Inc, Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Plaintiffs (3:19-cv-08155-WHA): Anna Theresa Neill, Kenny Nachwalter, P.A., Miami, FL.

For BI-LO, LLC, Winn-Dixie Logistics, Inc., Plaintiffs (3:19-cv-06138-WHA): Shana E. Scarlett, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Lauren G. Barnes, Thomas M. Sobol, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Matthew C. Weiner, PRO HAC VICE, Hilliard & Shadowen LLP, Austin, TX; Nicholas William Shadowen, Hilliard & Shadowen LLP, Austin, TX; Steve D. Shadowen, PRO HAC VICE, Hilliard & Shadowen, LLP, Austin, TX.

For Bausch Health Companies Inc., Salix Pharmaceuticals, Ltd., Salix Pharmaceuticals, Inc., Santarus, Inc., Defendants (3:19-cv-06138-WHA): Laura S Shores, LEAD ATTORNEY, PRO HAC VICE, Arnold and Porter Kaye **[**8]** Scholer LLP, Washington, DC; Saul P. Morgenstern, LEAD ATTORNEY, Kaye Scholer LLP, New York, NY; Daniel B. Asimow, Arnold & Porter Kaye Scholer LLP, San Francisco, CA.

For Assertio Therapeutics, Inc., Defendant (3:19-cv-06138-WHA): Eric Jonathan Stock, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn, New York, NY; Victoria Leigh Weatherford, Durie Tangri LLP, San Francisco, CA.

For Lupin Pharmaceuticals, Inc., Defendant (3:19-cv-06138-WHA): Jeffrey C. Bank, LEAD ATTORNEY, PRO HAC VICE, Wilson Sonsini Goodrich and Rosati, New York, NY; Wendy Lynn Devine, Wilson Sonsini Goodrich Rosati PC, San Francisco, CA.

For Lupin Ltd., Defendant (3:19-cv-06138-WHA): Jeffrey C. Bank, LEAD ATTORNEY, PRO HAC VICE, Wilson Sonsini Goodrich and Rosati, New York, NY; Wendy Lynn Devine, Wilson Sonsini Goodrich Rosati PC, San Francisco, CA.

For UFCW Local 1500 Welfare Fund, on behlaf of itself and all others similary situated, Plaintiff (3:19-cv-06156-WHA): Gregory Asciolla, Jay L. Himes, LEAD ATTORNEYS, PRO HAC VICE, Labaton Sucharow LLP, New York, NY; Ethan H. Kaminsky, Robin van der Meulen, PRO HAC VICE, Labaton Sucharow LLP, New York, NY.

For Pensioned Operating Engineers Health and Welfare Fund, Plaintiff (3:19-cv-06156-WHA): **[**9]** Jay L. Himes, LEAD ATTORNEY, PRO HAC VICE, Labaton Sucharow LLP, New York, NY; Robin van der Meulen, PRO HAC VICE, Labaton Sucharow LLP, New York, NY; Gregory Asciolla, Labaton Sucharow LLP, New York, NY.

For Bausch Health Companies, Inc., Salix Pharmaceuticals, Ltd., Salix Pharmaceuticals, Inc., Santarus, Inc., Defendants (3:19-cv-06156-WHA): Laura S Shores, LEAD ATTORNEY, PRO HAC VICE, Arnold and Porter Kaye Scholer LLP, Washington, DC; Saul P. Morgenstern, LEAD ATTORNEY, Kaye Scholer LLP, New York, NY; Daniel B. Asimow, Arnold & Porter Kaye Scholer LLP, San Francisco, CA.

For Assertio Therapeutics, Inc., Defendant (3:19-cv-06156-WHA): Eric Jonathan Stock, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn, New York, NY; Victoria Leigh Weatherford, Durie Tangri LLP, San Francisco, CA.

For Lupin Pharmaceuticals, Inc., Lupin, Ltd., Defendants (3:19-cv-06156-WHA): Jeffrey C. Bank, LEAD ATTORNEY, PRO HAC VICE, Wilson Sonsini Goodrich and Rosati, New York, NY; Wendy Lynn Devine, Wilson Sonsini Goodrich Rosati PC, San Francisco, CA.

For KPH Healthcare Services, Inc., individually and on behalf of all others similarly situated also known as Kinney Drugs, Inc., Plaintiff (3:19-cv-06839-WHA): A.J. De Bartolomeo, **[**10]** LEAD ATTORNEY, Tadler Law LLP, San Francisco, CA; Stephanie Smith, LEAD ATTORNEY, PRO HAC VICE, Little Rock, AR; Debra G Josephson, Karen Sharp Halbert, Michael Roberts, Sarah E. DeLoach, William Olson, PRO HAC VICE, Roberts Law Firm, P.A., Little Rock, AR; Michael L. Roberts, Roberts Law Firm, P.A., Little Rock, AR; Stephanie Egner Smith, PRO HAC VICE, Little Rock, AR.

For Bausch Health Companies Inc., Salix Pharmaceuticals, Ltd., Salix Pharmaceuticals, Inc., Santarus, Inc., Defendants (3:19-cv-06839-WHA): Laura S Shores, LEAD ATTORNEY, PRO HAC VICE, Arnold and Porter Kaye Scholer LLP, Washington, DC; Saul P. Morgenstern, LEAD ATTORNEY, Kaye Scholer LLP, New York, NY; Daniel B. Asimow, Arnold & Porter Kaye Scholer LLP, San Francisco, CA.

For Assertio Therapeutics, Inc., Defendant (3:19-cv-06839-WHA): Eric Jonathan Stock, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn, New York, NY; Victoria Leigh Weatherford, Durie Tangri LLP, San Francisco, CA.

For Lupin Pharmaceuticals, Inc., Defendant (3:19-cv-06839-WHA): Jeffrey C. Bank, LEAD ATTORNEY, Wilson Sonsini Goodrich and Rosati, New York, NY; Wendy Lynn Devine, Wilson Sonsini Goodrich Rosati PC, San Francisco, CA.

For Lupin Ltd., Defendant (3:19-cv-06839-WHA): **[**11]** Jeffrey C. Bank, LEAD ATTORNEY, Wilson Sonsini Goodrich and Rosati, New York, NY; Wendy Lynn Devine, Wilson Sonsini Goodrich Rosati PC, San Francisco, CA.

For Walgreen Co., The Kroger Co., Albertsons Companies Inc., H-E-B LP, Plaintiffs (3:19-cv-07843-WHA): Anna Theresa Neill, Kenny Nachwalter, P.A., Miami, FL.

Judges: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM ALSUP

Opinion

[*855] ORDER RE MOTIONS TO DISMISS

INTRODUCTION

In this antitrust action arising from an alleged reverse-payment settlement of a patent infringement suit between brand and generic marketers of the diabetes drug Glumetza, defendants move to dismiss the complaints as untimely. Because defendants actively continued and fraudulently concealed their conspiracy, plaintiffs' complaints are timely, at least at the pleading stage. Defendants' remaining standing, merits, and joinder arguments **[*856]** partially succeed. Thus, the motions are **GRANTED IN PART AND DENIED IN PART**.

STATEMENT

1. THE REGULATORY FRAMEWORK.

This case arises from the combined patent and pharmaceutical-regulatory framework established by the *Drug Price Competition and Patent Term Restoration Act of 1984, 98 Stat. 1585*, *21 U.S.C. § 301 et seq.*, *35 U.S.C § 156 et seq.* More commonly known as the "Hatch-Waxman Act," it implements a scheme **[**12]** of interlocking incentives to encourage timely introduction of low-cost generics into the pharmaceutical market yet still drive new drug development. Several prior cases summarize the Hatch-Waxman scheme. *See, e.g., FTC v. Actavis, 570 U.S. 136, 142-144, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*; *In re Aggrenox Antitrust Litigation, 94 F. Supp. 3d 224, 233-34 (D. Conn. 2015)* (Judge Stefan R. Underhill); *In re Niaspan Antitrust Litigation, 42 F. Supp. 3d 735, 740-41 (E.D. Pa. 2014)* (Judge Jan. E. DuBois). A few elements become relevant here.

To start, all pharmaceutical drugs require FDA approval to enter the market and undergo a long and costly testing process. Only approved drugs reach the market. *See 21 U.S.C. § 355(a)*, *(b)(1)*. To encourage *generic* pharmaceutical drugs, the Hatch-Waxman Act eases the approval process. ***HN1***[] A proposed generic manufacturer may submit an Abbreviated New Drug Application (ANDA), rely on testing data for the corresponding, already-approved brand-name drug, and avoid "the costly and time-consuming studies" needed for approval. *See Actavis, 570 U.S. at 142* (quotation omitted); *21 U.S.C. §§ 355(j)(2)(A)(ii)*, *(iv)*.

But piggybacking on a brand drug's testing removes only one barrier to entry, the FDA, for the patent barrier remains. New brand-drug applicants must list the patents (if any) covering the new drug, and generic applicants must certify to the FDA either that no patents cover the brand drug, that the relevant patents have expired, or that such patents are invalid or **[**13]** will not be infringed by the new drug. ***HN2***[] A certification of invalidity or noninfringement — usually called the "Paragraph IV certification" — is deemed a statutory act of patent infringement. And, if the brand manufacturer sues within 45 days, the FDA must stay the generic's approval for thirty months (or until the end of the suit, whichever comes first). *Actavis, 570 U.S. at 143*; *21 U.S.C. §§ 355(j)(2)(A)(vii)(I)-(IV)*, *(5)(B)(iii)*; *35 U.S.C. § 271(e)(2)(A)*; *see also In re Aggrenox, 94 F. Supp. 3d at 233-34*.

To encourage patent-challenging ANDAs with Paragraph IV certifications, the Hatch-Waxman Act grants the "first filer" 180 days of generic exclusivity, *i.e.* the first generic gets six months as the only generic to compete against the brand. This can be "worth several hundred million dollars" to the generic manufacturer, thus outweighing the risk of infringement suit. *Actavis, 570 U.S. at 143-44*; *21 U.S.C. § 355(j)(5)(B)(iv)*. Significantly, however, the 180-day exclusivity does not bar the brand manufacturer itself from marketing an "authorized generic" to recoup some of those millions. *See* *Teva Pharm. v. Crawford, 410 F.3d 51, 55, 366 U.S. App. D.C. 203 (D.C. Cir. 2005)*. And, the first filer can forfeit the 180-day exclusivity if it fails to market its generic within 75 days of *another* generic successfully challenging the brand's patents — but in that case, the 180-day exclusivity period vanishes; it does not transfer to any other manufacturer. *21 U.S.C. § 355(j)(5)(D)(i)(I)(aa)*, *(iii)*.

[**14] 2. FTC V. ACTAVIS.

So, the Hatch-Waxman scheme aims to bring generic drugs to market sooner. But, **[*857]** as the Supreme Court recognized in *Actavis*, sometimes that scheme can backfire. There, Solvay Pharmaceuticals marketed the brand-drug, AndroGel, and held a patent covering the drug. When Actavis filed a Paragraph IV certification of noninfringement and invalidity along with an ANDA to market a generic AndroGel, Solvay sued. When the thirty-month stay expired, the FDA approved Actavis' first-filer ANDA. But then the parties settled. Solvay would pay millions of dollars to Actavis, who would delay its generic market entry for several years, but still enter before the patent expired. *570 U.S. at 144-45*.

The Federal Trade Commission then sued everyone involved, arguing the settlement unlawfully shared in a monopoly. But the district court and the Court of Appeals for the Eleventh Circuit, following the weight of decision from other circuits, rejected the suit. Up to that point, the Courts of Appeals for the Second and Federal Circuits had held such patent settlements generally immune from antitrust attack. Only the Court of Appeals for the Third Circuit had held the reverse-payment settlement presumptively unlawful. **[**15]** *Id. at 145-47*.

The Supreme Court reversed, ruling largely for the FTC. To start, the Supreme Court held that patent settlements were *not*, and never had been, beyond the reach of antitrust scrutiny. Then, for several reasons, the Supreme Court found a reverse-payment settlement *could* violate ***antitrust law***. Of particular note, Justice Stephen Breyer explained for the Court that buying off patent challengers could be tantamount to simply buying a patentee's right to exclude, instead of earning that right from the Patent and Trademark Office and maintaining it against challenge on the merits. And, the reverse payment might indicate skewed interests, *i.e.* the brand manufacturer wasn't just fending off a patent challenge, but instead ushering the challenger *into the monopoly* by dangling a share of the profits. Last, the Court noted that "where only one party owns a patent, it is virtually unheard of outside of pharmaceuticals for [the patentee] to pay an accused infringer to settle a lawsuit." *See* *id. at 147-53, 153-58*.

But the Supreme Court did not go so far (as had the Third Circuit) as to hold reverse-payment settlements presumptively unlawful. Rather, the Court said such a settlement should be evaluated under the antitrust **[**16]** rule of reason. *Id. at 158-60*.

3. THE CHALLENGED CONSPIRACY.

Our complaint alleges a variation of the *Actavis* scheme. Instead of a cash payment, however, the patent owner gave something else of great value, a promise not to compete. Here are our facts, as alleged.

In 2002, one of defendant Bausch Health Companies Inc.'s predecessors, Depomed, Inc. (later Assertio Therapeutics, Inc.), developed a new controlled-release version of the classic diabetes medication, metformin. The FDA approved Assertio's NDA for 500 mg and 1000 mg formulations of Glumetza in June 2005. Assertio held several patents on their new drug (Consolid. Amd. Compl., Dkt. No. 53 at ¶¶ 77, 79, 81).

In July 2009, defendants Lupin Pharmaceuticals, Inc. and Lupin Ltd. (Lupin) filed an ANDA seeking approval to market generic versions of Glumetza. Lupin filed a Paragraph IV certification of noninfringement or invalidity against the four relevant patents: U.S. Patent Nos. 6,340,475; 6,635,280; 6,488,962; and 6,723,340. Lupin had successfully designed around the patents, which had claimed only a subset of the controlled-release technology that Glumetza employed. Assertio used, and had **[*858]** claimed, a polymeric "matrix" system, wherein the active drug was distributed throughout a polymer and formulated **[**17]** into a pill to time the release. Lupin, however, employed a "reservoir" system, wherein the active drug core was coated in an acrylic polymer to extend the drug's release (Consolid. Amd. Compl. at ¶¶ 82-99, 107-08, 113-14).

Assertio (the brand) sued Lupin (the proposed generic) in November 2009, triggering the thirty-month stay against FDA final approval. In January 2012, with the suit still going, the FDA tentatively approved the ANDA, meaning Lupin's generic had passed the review process and was finally approvable *but for* the thirty-month stay. One month later, Assertio and defendant Santarus, Inc., who now owned the commercialization rights to Glumetza (though Assertio retained the patents), settled with Lupin (Consolid. Amd. Compl. at ¶¶ 103-04, 110-11, 116-17, 121).

Lupin promised to walk away from the lawsuit, to no longer challenge the patents' validity, and to not market a generic version of Glumetza for four years. As payment for Lupin's delay, Assertio and Santarus promised to not market or permit another to market an authorized generic for at least 180 days following Lupin's generic market entry in 2016 (Consolid. Amd. Compl. at ¶¶ 121-24). *See Depomed, Inc. v. Lupin Pharms., Inc.*, No. C 09-05587 PJH, Dkt. No. 152 (N.D. Cal. Mar. 27, 2012) **[**18]** .

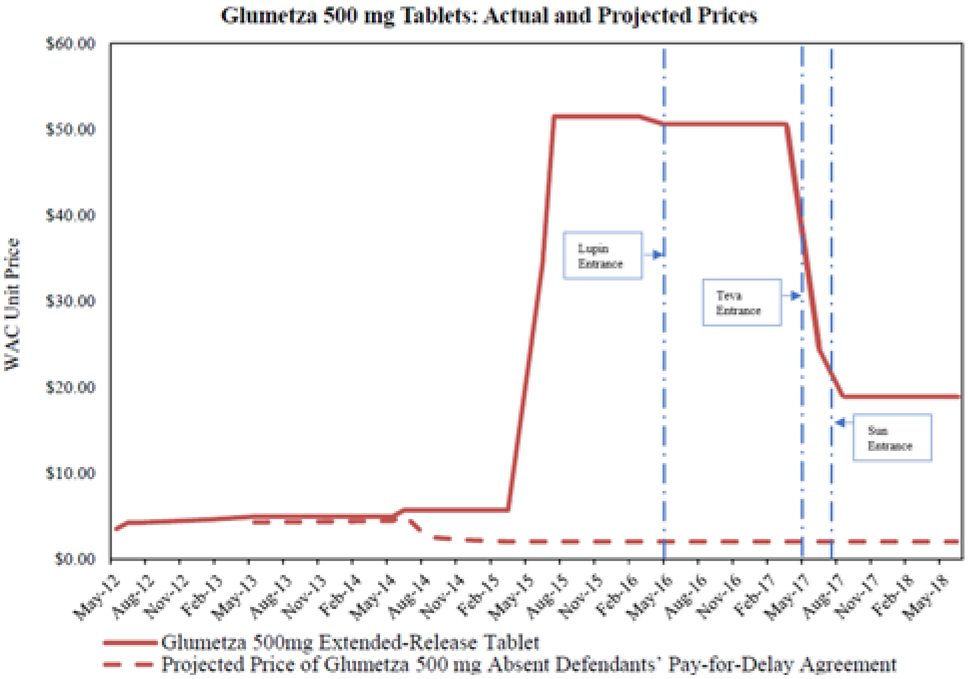
A distinction must be made. Two *separate* "180 day" periods hovered over Lupin's market entry: (1) the FDA-granted 180-day period during which the FDA would not permit any other generics to market (which, by statute, would run from Lupin's market entry); and (2) the settlement agreement 180-day period during which Assertio and Santarus would not market an authorized generic (which, by contract, would also run from Lupin's market entry) (Consolid. Amd. Compl. at ¶ 123). *See* *21 U.S.C. § 355(j)(5)(B)(iv)*. Lupin presumably gave up its statutory 180-day exclusivity period in favor of a contractual 180-day exclusivity period, enforced by Assertio and Santarus's assertion of patent rights against other generics (as detailed below).

To protect Lupin, the "no-authorized generic" clause allegedly included two more provisions. The "most-favored-entry" subclause expressly provided that if any other generic succeeded in marketing a generic Glumetza before February 2016, Lupin could market immediately. In addition, the "most-favored-entry-plus" subclause stated that Assertio and Santarus would not license any other generic Glumetza manufacturers until 180 days **[**19]** following Lupin's market entry (Consolid. Amd. Compl. at ¶¶ 151-52).

Defendants allegedly designed these provisions (collectively the "no-AG" provision) to undercut any incentive for other manufacturers to file a Paragraph IV certification, litigate an infringement suit to final decision, and (if successful) beat Lupin to market. If defendants' scheme worked, Lupin could keep *both* the FDA-granted exclusivity against other generics and Assertio and Santarus's promise to not market an authorized generic and, thus, be the *only* competitor to brand Glumetza for at least 180 days. The complaint calculates the added value of this provision to Lupin, looking prospectively from February 2012, at over fifty million dollars (Consolid. Amd. Compl. at ¶¶ 126-37, 148, 153-56).

The scheme worked. No generic manufacturers marketed a version of Glumetza before Lupin. Sun Pharmaceuticals filed an ANDA for generic Glumetza around May 2011. In June, Assertio and Santarus sued Sun, and by January 2013 those parties settled. Allegedly informed of Assertio, **[*859]** Santarus, and Lupin's no-AG scheme, Sun agreed not to market a generic Glumetza until August 2016. And when Watson Pharmaceuticals filed its ANDA for generic **[**20]** Glumetza in March 2012, Assertio and Santarus again sued in April, then settled in November 2013. Also allegedly informed of the no-AG scheme, Watson agreed to delay its market entry until August 2016. Ultimately, Sun and Watson (by then Teva Pharmaceutical Industries Ltd.) did not market any generic Glumetza until mid-2017 (Consolid. Amd. Compl. at ¶¶ 157-72, 192-94).

Assertio and Santarus milked their four-year preserved monopoly. In 2012, Glumetza sales yielded about $150 million. In November 2013, defendant Salix Pharmaceuticals bought Santarus for $2.6 billion and Bausch paid $14.5 billion for Salix (and the Glumetza machine) in April 2015 (Consolid. Amd. Compl. at ¶¶ 129, 176-79). Then Glumetza prices to diabetes patients skyrocketed, as shown in the figure below.



(Consolid. Amd. Compl. at ¶ 10).

In February 2015, a 500 mg Glumetza tablet cost $5.72 — by July, purchasers paid more than $51. The 1000 mg tablet jumped the same 800% from $12 to $111 in the same time period. Glumetza is one of the primary glucose regulation drugs for the more than thirty million diabetes patients in the United States, and it appears the ill had little choice but to pay the new prices. Glumetza produced **[**21]** $145 million in the first two quarters of 2015. In the latter two, Bausch reaped $818 million (Consolid. Amd. Compl. at ¶¶ 75-77, 184).

In February 2016, Lupin joined in the bonanza, charging $44 for a single 500 mg tablet of Glumetza. When Teva's generic Glumetza entered the market in May 2017, the price of a 500 mg tablet dropped to $23, and when Sun's generic entered in July the price dropped to $16, still approximately *three times* the early-2015 cost (Consolid. Amd. Compl. at ¶¶ 186-88, 192-94).

Beginning on August 29, 2019, plaintiffs began suing. As of now, ten suits have been filed in this District. Following a case management conference, nine remain active. **[*860]** The first, *FWK Holdings, LLC v. Bausch Health Companies Inc. et al.*, No. C 19-05426 WHA, was dismissed without prejudice (Dkt. No. 68 at ¶ 3). Plaintiffs divided into three groups: (1) the direct-purchaser plaintiffs and putative class (Consolid. Amd. Compl., Dkt. No. 53); (2) the end-payor plaintiffs and putative class (EPP Consolid. Amd. Compl., Dkt. No. 164); and (3) the retailer plaintiffs, who sue as the assignees of absent direct purchasers (Walgreen Compl., Dkt. No. 162; Rite Aid Compl., Dkt. No. 163). One defendant, **[**22]** PDL Biopharma left the case by voluntary dismissal in January (Dkt. No. 116). The remaining defendants have moved to dismiss all the complaints (Dkt. Nos. 76, 79, 80, 98). This order follows full briefing and oral argument. This order does not address the latest two additions, Nos. C 20-01196 WHA and C 20-01198 WHA, as they were filed after the present briefing completed.

ANALYSIS

HN3[] To survive a *Rule 12(b)(6)* motion to dismiss, a complaint must allege sufficient factual matter, accepted as true, to state a facially plausible claim for relief. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Such a facially plausible claim requires sufficient factual allegations to draw a reasonable inference that defendants are liable for the misconduct alleged. A court must take all of the factual allegations in the complaint as true, but need not accept as true legal conclusions merely styled as facts. The factual allegations must raise a plaintiff's right to relief above the speculative level. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

1. THE SHERMAN ACT AND THE STATUTE OF LIMITATIONS.

HN4[] Private plaintiffs must file an antitrust action within four years. *15 U.S.C. § 15b*; *Samsung Elecs. v. Panasonic Corp., 747 F.3d 1199, 1202 (9th Cir. 2014)*. "A claim may be dismissed as untimely pursuant to a 12(b)(6) motion only when the running of the statute [of limitations] is apparent on the face **[**23]** of the complaint." *United States ex rel. Air Ctrl. Techs. v. Pre Con Indus., 720 F.3d 1174, 1178 (9th Cir. 2010)* (alteration in original) (quotation omitted).

HN5[] An antitrust claim accrues when a defendant commits an unlawful act and injures a plaintiff. *Zenith Radio Corp. v. Hazeltine Res., 401 U.S. 321, 337-38, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*. In this context, the injury accrues "on the date that the generic firm would have entered the market but for the unlawful settlement." *See* II AREEDA & HOVENKAMP, ***ANTITRUST LAW***: AN ANALYSIS OF ANTITRUST PRINCIPLES & THEIR APPLICATION ¶ 320b (2014).

Plaintiffs allege that absent the unlawful agreement, Lupin would have marketed generic Glumetza: (1) "at risk" following the expiration of the thirty-month stay (May 6, 2012); (2) following Lupin's victory in the patent suit; or (3) earlier than February 1, 2016, on a date to be determined by the jury (Consolid. Amd. Compl. at ¶ 143).

The consolidated complaint plausibly alleges that Lupin did not infringe the patents because it designed around the patents using a "reservoir system" to "extend the drug's release" rather than use Assertio's "claimed polymeric matrix system" (Consolid. Amd. Compl. at ¶¶ 82-99, 112-13). So, at this stage, the complaint plausibly alleges Lupin would have won the patent suit and would have launched generic Glumetza in the summer or fall of 2012 after FDA **[**24]** final approval following the expiration of the thirty-month stay.

[*861] The problem is that this action commenced on August 29, 2019, so the limitations period only reaches back to August 29, 2015. Plaintiffs offer two counterarguments: (1) that defendants' continuing violations reset the statute of limitations; and (2) defendants' fraudulent concealment tolled the statute of limitations, both considered now.

A. THE COMPLAINT PLAUSIBLY ALLEGES CONTINUING VIOLATIONS.

To start, in play are all sales made by any defendant of Glumetza after August 29, 2015. Though the original sin occurred back in 2012, these later sales are continuing violations, not barred by the statute of limitations, because of both the defendants' maintenance of the Glumetza monopoly following the February 2012 settlement agreement and their careful February 2016 partition of the Glumetza market, between the brand drug and Lupin's sole generic.

HN6[] In a conspiracy to violate antitrust laws, "each time a plaintiff is injured by an act of the defendant[,] a cause of action accrues to him to recover the damages caused by that act." *Oliver v. SD-3C LLC, 751 F.3d 1081, 1086 (9th Cir. 2014)*. A continuing violation: (1) "must be a new and independent act that is not merely **[**25]** a reaffirmation of a previous act;" and (2) "must inflict new and accumulating injury on the plaintiff." *Samsung, 747 F.3d at 1202*; *Oliver, 751 F.3d at 1086*.

HN7[] Generally, "the passive receipt of profits from an illegal contract by an antitrust defendant is not an overt act of enforcement which will restart the statute of limitations." *Eichman v. Fotomat, 880 F.2d 149, 160 (9th Cir. 1989)*. After all, "[t]he mere possession of monopoly power, and . . . charging of monopoly prices" is not unlawful. *Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. Thus, the "unabated inertial consequences of some pre-limitations action" that are "irrevocable, immutable, permanent[,] and final" are not continuing violations. *In re Multidistrict Vehicle Air Pollution, 591 F.2d 68, 72 (9th Cir. 1979)*.

HN8[] But the continuing violation "standard is meant to differentiate those cases where a continuing *violation is ongoing* — and an antitrust suit can therefore be maintained — from those where all of the harm occurred *at the time of the initial violation*." So, "action taken under a pre-limitation contract [can be] sufficient to restart the statute of limitations so long as the defendant had the ability not to take the challenged action, even if that would have required breaching the allegedly anti-competitive contract." *Samsung, 747 F.3d at 1202-03* (emphasis added).

First, it is true that the sulphorous agreement occurred in 2012, but the *conduct taken* to cause competitive **[**26]** harm continued well into the later four-year period. *See Oliver, 751 F.3d at 1086*; *Samsung, 747 F.3d at 1202*. This order notes most other cases to address this question have concluded that continued overcharges constitute a continuing violation. *See In re Aggrenox, 94 F. Supp. 3d at 239*; *In re Niaspan, 42 F. Supp. 3d at 747*; *In re Nexium (Esomeprazole) Antitrust Litigation, 984 F. Supp. 2d 6, 9 (D. Mass. 2013)* (Judge William G. Young); *In re Skelaxin (Metaxalone) Antitrust Litigation, No. C 12-02343, 2013 U.S. Dist. LEXIS 70968, 2013 WL 2181185 at *6 (E.D. Tenn. May 20, 2013)* (Judge Curtis L. Collier); *In re K-Dur Antitrust Litigation, 338 F. Supp. 2d 517, 551 (D.N.J. 2004)* ((now Circuit) Judge Joseph A. Greenaway, Jr.); *In re Buspirone Patent Litigation, 185 F. Supp. 2d 363, 378 (S.D.N.Y. 2002)* (Judge John G. Koeltl).

Second, in February 2016, defendants carefully converted the Glumetza monopoly **[*862]** into a brand-versus-generic duopoly with a new round of conduct, a new form of antitrust violation, and *new harm to plaintiffs*. Plaintiffs may recover for overcharges flowing from defendants' split of the market. Assertio and Santarus describe their February 2016 conduct not as overt, but instead as inaction reflecting continued adherence to the 2012 settlement. Yes, they *defined* their duties in the 2012 settlement, but the price gouging anticipated by the agreement extended for years, well into the later four-year period. *See Multidistrict Vehicle, 591 F.2d at 72*; *Samsung, 747 F.3d at 1202*.

That said, a continuing violation did not, by itself, reset the statute of limitations for prior acts. Rather, each continuing violation (*i.e.*, each new sale) merely triggered the statute of limitations anew for *that act. See Oliver, 751 F.3d at 1086*. Thus, while plaintiffs' **[**27]** challenge to the Glumetza sales since August 29, 2015 — including the February 2016 conduct and its results — are timely, all earlier conduct and sales can only be reached via fraudulent concealment.*

B. The Complaint Plausibly Alleges Fraudulent Concealment.

Plaintiffs contend defendants' fraudulent concealment of their settlement agreement, specifically the no-AG provision, tolled the statute of limitations. This order agrees.

HN9[] "A statute of limitations may be tolled if the defendant fraudulently concealed the existence of a cause of action in such a way that the plaintiff, acting as a reasonable person, did not know of its existence." Plaintiffs "must plead facts showing that [defendants] affirmatively misled [them], and that [plaintiffs] had *neither actual nor constructive knowledge* of the facts giving rise to [their] claim despite [their] diligence in trying to uncover those facts." *Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1060 (9th Cir. 2012)*. Diligent inquiry is required where "facts exist that would excite the inquiry of a reasonable person." The circumstances of concealment and plaintiffs' diligent search must be plead with particularity. *Conmar Corp. v. Mitsui & Co. (U.S.A.), 858 F.2d 499, 502, 504 (9th Cir. 1988)*.

The thrust of the complaint is that Assertio and Santarus paid Lupin to end its patent challenge and **[**28]** grant them four more years of Glumetza monopoly, during which enormous price gouging occurred (Consolid. Amd. Compl. at ¶¶ 121-24, 184). HN10[] As the Supreme Court recognized in *Actavis*, the pay-for-delay scheme is unique to pharmaceutical patents. *570 U.S. at 155*. And, Lupin's *delay* of a generic Glumetza was public knowledge by March 2012 (Consolid. Amd. Compl. at ¶¶ 121, 248.b, fn. 11). *See Depomed*, No. C 09-05587 PJH, Dkt. No.

* Defendants concede direct-purchaser plaintiffs' first operative complaint was filed August 29, 2019, but contest whether that date should apply for the later filed end-payor plaintiffs. This issue need not be resolved here.

152. So, by then, plaintiffs were on notice of *two* key aspects of the pharmaceutical pay-for-delay scheme: a pharmaceutical patent case; and a settlement delaying generic market entry.

But they had no knowledge of the no-AG provision, Assertio and Santarus's promise to not market an authorized generic for 180 days after Lupin's market entry, to not license any other generics in that time, and that Lupin could market immediately if another generic succeeded in marketing. So the questions here are: (1) whether knowledge of this further no-AG scheme was required to excite the reasonable plaintiffs' curiosity; (2) whether defendants actually and improperly concealed the no-AG **[*863]** provision; and (3) whether the no-AG provision remained concealed until the current limitations period. *Cf.* ***[**29]*** *Conmar, 858 F.2d at 503*.

First, at least at this stage, the complaint plausibly shows that knowledge of the no-AG provision was necessary to excite the curiosity of the reasonable person. Though two of the relevant Glumetza patents expired in 2016, one allegedly did not expire until June 2020. And only one valid claim of one patent was necessary to block generic Lupin from the market. So viewed in February 2012, a proposed February 2016 market entry for Lupin meant halving the remaining patent term. This 50-50 compromise plausibly conveyed no impropriety to the reasonable observer (Consolid. Amd. Compl. at ¶¶ 81, 121).

Second, the complaint plausibly alleges defendants improperly concealed the existence and details of the no-AG provision. ***HN11***[] Failure to disclose information does not constitute affirmative concealment absent a duty to disclose. *Conmar, 858 F.2d at 505*. But defendants *were* under a duty to disclose. "[H]alf-truths — representations that state the truth only so far as it goes, while omitting critical qualifying information — can be actionable misrepresentations." One who *chooses* to speak has a duty to include as much information as necessary to prevent misleading others. *See* *Univ. Health Servs. v. United States, 579 U.S. __, 136 S. Ct. 1989, 2000, 195 L. Ed. 2d 348 (2016)*. Defendants sought the district court's blessing **[**30]** of their settlement agreement, yet deliberately failed to disclose a key term (Consolid. Amd. Compl. at ¶ 248). *See, Depomed*, No. C 09-05587 PJH, Dkt. No. 152. The alleged no-AG provision transformed the settlement from an apparent even split of the remaining patent term between defendants into the challenged conspiracy. And defendants' continued concealment of the no-AG provision strengthens the inference that the original omission was deliberate. Such deliberate, material omission supports an inference of fraudulent concealment.

Third, the complaint plausibly alleges defendants concealed the no-AG provision until within four years of this suit. Specifically, the complaint alleges Lupin did not reveal the no-AG provision until an earnings call on February 5, 2016 (Consolid. Amd. Compl. at ¶ 249). Defendants contend that plaintiffs were on notice of the no-AG provision months earlier, citing (and requesting judicial notice of) an earnings call on July 25, 2015, in which Lupin disclosed "Glumetza launches in February [2016] and we have an exclusivity for six months, *sole exclusivity* on Glumetza" (Dkt. No. 79 at 7, Ex. A) (emphasis added). ***HN12***[] Generally, however, a motion to dismiss turns **[**31]** on, and *only* on, the complaint. The judicial notice exception under *Federal Rule of Evidence 201* permits district courts to consider a fact "not subject to reasonable dispute" because it is "generally known" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Khoja v. Orexigen Therapeutics, 899 F.3d 988, 999 (9th Cir. 2018)*.

Defendants contend "sole exclusivity" obviously meant that Lupin's 180 days of exclusivity would not be compromised by an AG launch (*id.* at 7). But, recall, two 180-day exclusivity periods hover over Lupin's market entry: (1) the FDA-granted 180 days of exclusivity against *other* generics; and (2) the settlement-granted 180 days without an authorized generic. So facially, the subject of "sole exclusivity" is open to reasonable dispute.

It is undisputed that before Lupin uttered "sole exclusivity," the public had no knowledge of the no-AG provision. Perhaps, enjoying the facts *now known*, "sole exclusivity" clearly refers to the no-AG **[*864]** provision. But defendants' suggestion must be that the reasonable observer on *July 25, 2015*, would have construed the language as disclosing the *then-unknown* settlement provision, rather than the *known* FDA-granted exclusivity — an improper attribution of hindsight. Because the language **[**32]** was subject to reasonable dispute *when uttered*, judicial notice is improper. The concealment continued into the statutory four-year period, or so a reasonable jury could find.

In sum, plaintiffs' claims are timely. Their complaint plausibly alleges defendants' continuing conspiracy to suppress competition, first by propping up the Glumetza monopoly, then by carefully splitting the market between Assertio and Santarus's brand and Lupin's generic. This certainly permits plaintiffs to recover all sales since August 29, 2015. Yet the complaint also plausibly alleges defendants' fraudulent concealment of the conspiracy to undermine competition in the Glumetza market. The concealment started when defendants concealed key portions of their settlement from the district court and it continued until within the four-year limitations period. At this stage, at least, plaintiffs may pursue recovery back to the date our jury finds Lupin would have first marketed its generic Glumetza.

2. ASSERTIO SHOULD ANSWER ALONGSIDE ITS CO-DEFENDANTS.

Assertio attempts to disclaim liability in Santarus and Lupin's scheme. It notes that settlements, and accompanying payments, are usually encouraged and that a compromise **[**33]** entry date for the generic drug in pharmaceutical patent settlement is generally lawful. Assertio reads *Actavis* to hold that the "reverse payment" is the *only* unlawful aspect of a patent settlement and proclaims its only part in this story is as the patent holder and as a signatory to the settlement agreement. And, Assertio proclaims that it had already handed Glumetza commercialization over to Santarus by then, so it couldn't have monopolized a market it left, nor did it convey any value to Lupin via the no-AG provision.

These arguments misread *Actavis* and ignore ***antitrust law***. Assertio, Santarus, and Lupin's conduct cannot be so sequestered. *Their conspiracy to maintain a monopoly and then split the Glumetza market means each is liable for the entire course of conspiratorial conduct*. Assertio cannot lay the plans, reap its bargain, and then disclaim responsibility.

First, though Assertio is correct that *Actavis* did focus on the "reverse payment" as the primary indicator of an unlawful agreement, *Actavis* did *not* hold that a "reverse payment" is the *only* way to concoct a Sherman Act violation. Indeed, *Actavis* explicitly stated the question it answered: "whether such [a reverse payment **[**34]** settlement] agreement can sometimes unreasonably diminish competition in violation of the antitrust laws." *Actavis* answered clearly. "[R]everse payment settlements such as the agreement alleged in the complaint before us can sometimes violate the antitrust laws." But the Supreme Court declined to find reverse payment settlement agreements presumptively unlawful. ***HN13***[] Instead, courts should apply the rule of reason to evaluate the agreements. *570 U.S. at 141, 157-160*. So (despite Assertio's protestations) the settlement agreement here needs to go through that evaluation.

Second, Assertio may not split off its own allegedly lawful conduct. ***HN14***[] "The character and effect of a[n antitrust] conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." "[I]t is well settled that acts which are in themselves legal lose that character when they **[*865]** become constituent elements of an unlawful scheme." *Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 707, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*. Assertio's otherwise legal conduct, if part of an unlawful scheme, became unlawful.

Third, here, the complaint alleges not just an unlawful scheme, but an unlawful conspiracy. ***HN15***[] A complaint plausibly alleges a conspiracy where it pleads "enough factual matter (taken as true) **[**35]** to suggest" the parties "had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *See Twombly, 550 U.S. at 556*; *Am. Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*. Here, the complaint doesn't just allege parallel conduct — it alleges the actual *agreement*. In February 2012, defendants laid their plan. They would walk away from the patent suit, Lupin would stop challenging the patent, and Lupin would not market a generic, thus maintaining the brand monopoly. Then, in February 2016, Lupin would market a generic, Assertio and Santarus would not market an authorized generic, and the Glumetza market would be carefully split in two (Consolid. Amd. Compl. at ¶¶ 121-24).

Fourth, Assertio, Santarus, and Lupin's performance of the scheme applies to them all. ***HN16***[] Once a conspiracy is formed, "it remains actionable until its purpose has been achieved or abandoned" and "an overt act of one partner may be the act of all without any new agreement specifically directed to that act." *United States v.*

Inryco, Inc., 642 F.2d 290, 293 fn. 6 (9th Cir. 1981). Thus, a plaintiff need not "show that each defendant or all defendants . . . have participated in each act or transaction. Involvement in but two of ten allegedly conspirational [sic] situations does not absolve [a defendant] from participation **[**36]** in the entire conspiracy if its involvement in the two was unlawful and knowingly and purposely performed." Arandell v. Centerpoint Energy Services, 900 F.3d 623, 634 (9th Cir. 2018) (additions in original) (quotation omitted).

Assertio protests repeatedly that it left the Glumetza market months before the conspiracy, having turned over the drug's commercialization to Santarus. Thus, it had no ability to restrict competition in or monopolize the relevant market. *See* Mercy-Peninsula Ambulance v. Cty. of San Mateo, 791 F.2d 755, 759 (9th Cir. 1986). But as holder of the asserted patents, Assertio was an important signatory to and co-architect of the challenged conspiracy (Consolid. Amd. Compl. at ¶¶ 121-24). Along with Santarus and Lupin, Assertio knew the scheme's purpose and intended the subsequent performance. And, because "a Sherman Act conspiracy is . . . ripe when the agreement to restrain competition is formed," Assertio's part in designing the alleged scheme is enough to hold it liable alongside the more direct market actors, Santarus and Lupin. Inryco, 642 F.2d at 293.

Assertio finally appears to contend that criminal and civil antitrust conspiracies are governed by different rules but cites no law for this proposition. Regardless, this argument lacks merit. When our court of appeals evaluated an antitrust conspiracy in the civil context in Arandell, **[**37]** it turned to a *criminal* antitrust conspiracy case, Esco Corporation v. United States, 340 F.2d 1000 (9th Cir. 1965), and to a *criminal* drug and firearm conspiracy case, United States v. Reese, 775 F.2d 1066 (9th Cir. 1985). *See* Arandell, 900 F.3d at 634.

In sum, Assertio's argument that it just stood in the background while Santarus and Lupin did all the wrongs is unavailing. Assertio signed on to the conspiracy, even **[*866]** if its co-conspirators did the heavy lifting, and remains liable for every penny, if liability is established.

3. End-Payor Plaintiffs.

This order now turns to the state law claims and the question of standing.

A. End-Payor Plaintiffs Lack Standing Outside of California, New York, and Rhode Island.

The end-purchaser plaintiffs reside only in California, New York, and Rhode Island (not counting the new plaintiffs), yet they assert claims in nearly all fifty states, and the District of Columbia and Puerto Rico. Defendants contend the end-purchaser plaintiffs lack standing to assert claims in states where they do not reside (EPP Consolid. Amd. Compl. ¶¶ 19-21; Dkt. No. 80 at 4-6). This order agrees.

HN17[] Article III's "irreducible constitutional minimum of standing" to sue requires a plaintiff to have suffered: (1) an injury-in-fact; (2) that is fairly traceable to the defendant's conduct; and (3) is redressable by a favorable **[**38]** court decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "[A] plaintiff must demonstrate standing for each claim he seeks to press" and "separately for each form of relief sought." Just because a suit "derive[s] from a common nucleus of operative fact" does not mean "federal jurisdiction extends to all claims sufficiently related to a claim within Article III to be part of the same case." *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 351-52, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006).

HN18[] At bottom, "the injury a plaintiff suffers defines the scope of the controversy he or she is entitled to litigate." Melendres v. Arpaio, 784 F.3d 1254, 1261 (9th Cir. 2015). Here, the injury alleged is the overcharge at each purchase of Glumetza (EPP Consolid. Amd. Compl. at ¶ 224(o)). So, the scope of standing is limited to the locations of the purchases. Though it appears clear end-purchaser plaintiffs purchased Glumetza in their states of residence, there are no allegations that they suffered overcharges anywhere else (EPP Consolid. Amd. Compl. ¶¶ 19-21). **HN19**[] Claims for relief under the laws of the several states are *separate* claims for relief and, per DaimlerChrysler, require separate proof of standing. "Standing does not arise simply because illegality is in the air." In re Capacitors Antitrust Litigation, 154 F. Supp. 3d 918, 927 (N.D. Cal. 2015) (Judge James Donato). End-purchaser plaintiffs did not purchase, lack injury, and therefore lack standing in states other **[**39]** than California, New York, and Rhode Island.

Plaintiffs respond that this reasoning "conflates standing and class certification" and contravenes *Melendres*. Not so. There, plaintiffs all raised federal constitutional claims against the Maricopa County Sherriff's Department for conduct all within the District of Arizona. The short distinction is that *Melendres* did not address the circumstance here, where plaintiffs raise claims under several jurisdictions where they were not harmed. The legal distinction, though, is that the named plaintiffs in *Melendres* asserted the *same* constitutional injury as the class; they just alleged different circumstances. But the dissimilarity of circumstances raised *within the same claim* was "relevant only to class certification, not to standing." So, the question whether the named plaintiffs — who defendants conceded had standing — could present the *same* claim "on behalf of others who ha[d] similar, but not identical, interests" was one of "typicality and adequacy." *See* *Melendres, 784 F.3d at 1257-58, 1261-62*. Here, where plaintiffs raise *separate* claims under the laws of several states, the general requirement of standing **[*867]** for *each* claim and mode of relief articulated in *DaimlerChrysler* remains **[**40]** unsatisfied.

Plaintiffs remaining prudential arguments about the scope of discovery are unavailing because standing is a jurisdictional requirement.

B. END-PAYOR PLAINTIFFS' STATE ANTITRUST CLAIMS ARE TIMELY.

As above, end-payor plaintiffs may proceed only under California, New York, and Rhode Island law. State substantive law applies, including to statutes of limitations. *Erie R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)*; *Guaranty Trust Co. of New York v. York, 326 U.S. 99, 110, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945)*.

California, New York, and Rhode Island impose four-year antitrust statutes of limitations. *Cal. Bus. & Prof. Code §§ 16750.1*; *N.Y. Gen. Bus. Law § 340*; *R.I. Gen. Laws § 6-36-23*. ***HN20***[] California permits antitrust recovery "for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct within the limitations period," and recognizes fraudulent concealment. *See* *Richards v. CH2M Hill, 26 Cal. 4th 798, 111 Cal. Rptr. 2d 87, 29 P.3d 175, 183, 186 (Cal. 2001)*; *Fuller v. First Franklin Fin. Corp., 216 Cal. App. 4th 955, 962, 163 Cal. Rptr. 3d 44 (2013)*; *Grisham v. Philip Morris U.S.A., 40 Cal. 4th 623, 54 Cal. Rptr. 3d 735, 151 P.3d 1151, 1159 (Cal. 2007)*.

The New York Court of Appeals "has not determined if the continuing violations doctrine applies to claims brought under the Donnelly Act." *In re Pre-Filled Propane Tank Antitrust Litigation, No. 14-02567-MD-W-GAF, 2019 U.S. Dist. LEXIS 161394, 2019 WL 4796528 at *14 (W.D. Mo. 2019)* (Judge Gary A. Fenner). ***HN21***[] But, New York's ***antitrust law*** "should generally be construed in light of Federal [antitrust] precedent and given a different interpretation only where State policy, differences in the statutory language[,] or the legislative history justify such **[**41]** a result." *X.L.O. Concrete Corp. v. Rivergate Corp., 83 N.Y.2d 513, 634 N.E.2d 158, 161, 611 N.Y.S.2d 786 (N.Y. 1994)*. Here, defendants point to no distinctions in either the continuing violation or fraudulent concealment doctrines. Thus, the timeliness of end-payor plaintiffs' California and New York antitrust claims merges with the federal-claim analysis above.

The Rhode Island Antitrust Act also appears to contemplate continuing violations and tolling for fraudulent concealment. *See* *R.I. Gen. Laws § 6-36-23*. ***HN22***[] Regardless, the Rhode Island Supreme Court has explained that "the Rhode Island Antitrust Act must be construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable, except where provisions of this chapter are expressly contrary to applicable federal provisions as construed." *ERI Max Entm't v. Streisand, 690 A.2d 1351, 1353 (R.I. 1997)* (quotation omitted).

Defendants contend Rhode Island law did not permit indirect purchaser antitrust claims until July 2013. Because the challenged conduct was in early 2012, and Rhode Island's new claim is not retroactive, plaintiffs' claims are barred (Dkt. No. 80 at 7).

Defendants are partially correct. According to the only case out of Rhode Island or the District of Rhode Island applying the new statute:

> [T]he [Rhode Island] General Assembly passed an Illinois Brick-repealer statute, **[**42]** effective July 15, 2013, which expressly conveys standing to indirect purchasers. *R.I. Gen. Laws § 6-36-7(d)*. The . . . statute is presumed to apply only prospectively, **[*868]** absent evidence of legislative intent to the contrary. Therefore, the [end-payor plaintiffs'] recovery under the Rhode Island Antitrust Act is limited to damages incurred after July 15, 2013.

In re Loestrin 24 FE Antitrust Litigation, 410 F. Supp. 3d 352, 374 (D.R.I. 2019) (Judge William E. Smith) (citation and quotation omitted). But defendants apply this law too far. Rhode Island recognized the claim by 2013 and thus recognized plaintiffs' timely challenge to late 2015 Glumetza monopoly-sales and defendants' February 2016 conduct.

Plaintiffs contend that Rhode Island's new grant of indirect purchaser standing is merely a procedural rule which applies retroactively to permit end-purchasers to challenge the original 2012 conduct (Dkt. No. 118 at 5). While it is true the amendment does not impose new standards of conduct on defendants, it *redefines who was injured* by defendants' conduct. This order will not depart from *Loestrin* — Rhode Island's grant of end-purchaser standing is prospective only. Thus, the timeliness of end-payors' Rhode Island antitrust claim merges with the federal-claim analysis above, but **[**43]** with the caveat that no recovery will be permitted before July 15, 2013, when Rhode Island first recognized the indirect antitrust claim.

C. End-Payor Plaintiffs' Other State Claims.

End-payor plaintiffs also raise state consumer protection and unjust enrichment claims. Defendants challenge the timeliness and plausibility of each.

(i) California Claims.

End-payor plaintiffs invoke *California Business and Professions Code § 17200* in both their antitrust and consumer protection claims, but the consumer protection arm fails because the complaint does not plausibly allege consumer reliance — the crux of the claim — on any deceptive conduct by defendants. *See* *Kwikset v. Sup. Ct., 51 Cal. 4th 310, 120 Cal. Rptr. 3d 741, 246 P.3d 877, 890 (Cal. 2011)* ("would not have bought the product but for the misrepresentation"). The complaint admits that diabetic patients had little choice but to buy Glumetza, even with the existence of competing medications, because "Glumetza was . . . uniquely positioned in the market to offer patients with Type 2 diabetes an ability to reach their optimal dose of metformin with fewer GI side effects" (*see, e.g.*, EPP Consolid. Amd. Compl. at ¶¶ 90, 198). So, while end-payors' *§ 17200* antitrust prong proceeds, the consumer protection prong fails.

But plaintiffs' unjust enrichment claim may proceed. Defendants contend **[**44]** California does not recognize unjust enrichment as a distinct claim (Dkt. No. 118 at 23). Yes, it does. ***HN23***[] "When a plaintiff alleges unjust enrichment, a court may construe the cause of action as a quasi-contract claim seeking restitution." *See* *Astiana v. Hain Celestial Grp., 783 F.3d 753, 762 (9th Cir. 2015)* (quotation omitted).

HN24[] Unjust enrichment has a three-year statute of limitations. *Cal. Civ. Proc. Code § 338(d)*. This claim is timely as to conduct after August 29, 2016. Absent binding precedent to the contrary, this order will apply the continuing violations doctrine to this claim. Bausch did not market an authorized generic, and thus the scheme plausibly continued, until February 2017. For the reasons stated above, plaintiffs may recover for unjust enrichment upon Glumetza overcharges beginning on August 29, 2016.

HN25[] California also recognizes fraudulent concealment. *Fuller v. First Franklin Fin.* ***[*869]*** *Corp., 216 Cal. App. 4th 955, 962, 163 Cal. Rptr. 3d 44 (2013)*; *Grisham v. Philip Morris U.S.A., 40 Cal. 4th 623, 54 Cal. Rptr. 3d*

735, 151 P.3d 1151, 1159 (Cal. 2007); Cmm'ty Cause v. Boatwright, 124 Cal. App. 3d 888, 900, 177 Cal. Rptr. 657 (1981). But plaintiffs concede notice of the no-AG provision by February 2016, so the chain of concealment was broken (EPP Consolid. Amd. Compl. at ¶ 211). This doctrine does not permit earlier recovery.

(ii) New York Claims.

HN26[] The consumer protection law has a three-year statute of limitations. Morelli v. Weider Nutr. Grp., 275 A.D.2d 607, 608, 712 N.Y.S.2d 551 (2000). And in New York, a continuing violation "may only be predicated on continuing unlawful acts and not on continuing effects of **[**45]** earlier unlawful conduct." Selkirk v. State, 249 A.D.2d 818, 671 N.Y.S.2d 824, 825 (1998). But, as above, the continuing violation here is based upon defendants' *maintenance* of the precarious Glumetza monopoly, not the lingering effects of a final decision. On these grounds, plaintiffs' consumer protection claim remains timely as to overcharges since August 29, 2016. But, as above, because plaintiffs learned of the no-AG provision by February 2016, fraudulent concealment does not enable earlier recovery.

Moreover, the claim is plausibly alleged. Defendants contend the complaint does not allege any deceptive act or practice within the state of New York (Dkt. No. 80 at 10). **HN27**[] New York's § 349 requires an "act or practice" that was "misleading in a material way." But "reliance is not an element" — a plaintiff need only show the "defendant's material deceptive act caused the injury." Stutman v. Chem. Bank, 95 N.Y.2d 24, 731 N.E.2d 608, 611, 709 N.Y.S.2d 892 (N.Y. 2000) (quotation omitted). Section 349 has continually been interpreted to cover antitrust violations. *See, e.g.,* Loestrin, 410 F. Supp. 3d at 378; In re Effexor Antitrust Litigation, 337 F. Supp. 3d 435, 466 (D.N.J. 2018) (Judge Peter G. Sheridan); Macquarie Grp. v. Pac. Corp. Grp., No. C 08-02113-IEG-WMC, 2009 U.S. Dist. LEXIS 16554, 2009 WL 539928 at *9 (S.D. Cal. Mar. 2, 2009) (Judge Irma E. Gonzalez); New York v. Feldman, 210 F. Supp. 2d 294, 300-02 (S.D.N.Y. 2002) (Judge Shira A. Scheindlin). And the allegation that one end-payor plaintiff is the largest grocery union in New York with 23,000 plan participants leads to the plausible **[**46]** conclusion that a substantial number of Glumetza purchases "occur[ed] in New York." *See* Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 774 N.E.2d 1190, 1195, 746 N.Y.S.2d 858 (N.Y. 2002). Thus, plaintiffs' New York consumer protection claim stands.

But plaintiffs' unjust enrichment claim fails. Defendants correctly note New York's unjust enrichment claim requires that: (1) plaintiff conferred the benefit *directly* on defendant; and (2) plaintiff and defendant have a direct relationship (Dkt. No. 80 at 17, 19). In *Georgia Malone & Co. v. Rieder*, the New York Court of Appeals dismissed an unjust enrichment claim where the parties "simply had no dealings with each other" and did not have "any contact regarding the purchase transaction." 19 N.Y.3d 511, 973 N.E.2d 743, 747, 950 N.Y.S.2d 333 (N.Y. 2012). So too here. The end-payor plaintiffs, by definition, do not have direct relationships with defendants. Nor do they point to binding precedent tempering the requirement.

(iii) Rhode Island Claims.

Plaintiffs' consumer protection claim fails. Defendants contend it fails because: (1) defendants caused no confusion or misunderstanding among consumers; (2) because the end-payor plaintiffs are not "purchasers of products for household or **[*870]** personal purposes" (Dkt. No. 80 at 11-12). Plaintiffs misapprehend the second argument, responding that end-payor plaintiffs **[**47]** are "persons" under Rhode Island's broad definition. R.I. Gen. Laws § 6-13.1-1 ("any other legal entity"). But defendants actually point to § 6-13.1-5.2, which limits the class of private plaintiffs to "[a]ny person who purchases . . . goods or services primarily for personal, family, or household purposes . . . ." Under the plain text, end-payor plaintiffs (not being human) were not using Glumetza for "personal, family, or household purposes" but rather to provide Glumetza to subsequent consumers. As plaintiffs fail to respond to this argument, their Rhode Island deceptive trade practices claim fails.

But plaintiffs' unjust enrichment claim survives. Defendants contend Rhode Island's unjust enrichment claim requires: (1) plaintiff to directly confer the benefit on defendant; and (2) defendant to appreciate the benefit (Dkt.

Nos. 80 at 17; 146 at 12). Defendants cite no binding authority — and there appears to be none, at least since *Bailey v. West, 105 R.I. 61, 249 A.2d 414, 417 (R.I. 1969)* articulated the elements of quasi-contract — for their narrow view of the relationship between a plaintiff and defendant under Rhode Island unjust enrichment law. Moreover, defendants' assertion that "EPPs do not allege an appreciation by the defendant of the benefit conferred" is perplexing **[**48]** (Dkt. No. 146 at 12). End-payor plaintiffs allege Assertio and Santarus (later Salix, then Bausch) surely appreciated the over one billion dollars in Glumetza sales by 2016 and Lupin surely appreciated the nearly three hundred million dollars in generic sales during the first six months of 2016 (EPP Consolid. Amd. Compl. at ¶ 140(h)-(i)). If, however, defendants' argument is that each sale of Glumetza was, alone, too small to "appreciat[e]," the undersigned looks forward to the jury's reaction. Last, defendants do not contest the timeliness of the Rhode Island unjust enrichment claim (Dkt. No. 80 at 20 fn. 4). The claim stands.

The final question is whether plaintiffs may recover for unjust enrichment before July 15, 2013, when Rhode Island first recognized the indirect antitrust claim. Defendants contend permitting such recovery would circumvent *Illinois Brick*'s holding absent explicit direction to do so (Dkt. No. 146 at 9). This argument is an abbreviated preemption analysis. If defendants wish to argue the Sherman Act so preempts state common law, they may do so. But on the arguments presented, this order will not dismiss the Rhode Island unjust enrichment claim before July 15, 2013. **[**49]**

4. RETAILER PLAINTIFFS.

A. RETAILER PLAINTIFFS' OWN SHERMAN ACT CLAIMS FAIL.

Defendants challenge retailer plaintiffs' standing to sue on their own behalf under *Illinois Brick*, which bars federal antitrust damages claims by indirect purchasers. *See* *In re ATM Fee Antitrust Litigation, 686 F.3d 741, 748 (9th Cir. 2012)*. Retailer plaintiffs respond, and defendants do not contest, that *Illinois Brick* does not bar indirect purchasers' claims for injunctive relief (Dkt. No. 119 at 14-15). *See* *In re NFL's Sunday Ticket Antitrust Litigation, 933 F.3d 1136, 1156 fn. 6 (9th Cir. 2019)* (citing *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1235 (9th Cir. 1998)* (Judge Wallace Tashima, concurring)). Retailer plaintiffs also contend in their brief that certain of them *did* directly purchase Glumetza or generic Glumetza from defendants (Dkt. No. 119 at 14-15). But retailers' complaints neither allege direct purchase nor pray for injunctive relief. To the extent retailer plaintiffs seek relief *on their own behalf* **[*871]** under the Sherman Act, these claims are either barred or not alleged.

B. THE PARTIAL ASSIGNMENTS DO NOT YET WARRANT INTERVENTION OR JOINDER.

Retailer plaintiffs sue as assignees of various direct purchasers, including McKesson Corporation (CVS Compl. at ¶¶ 19-20; Walgreen Compl. at ¶¶ 19-22). Another assignee of McKesson, KPH Healthcare, is currently part of the putative direct-purchaser plaintiff class (Consolid. **[**50]** Amd. Compl. at ¶ 16). Defendants contend these split claims raise the specter of a "multiplicity of suits" and "duplicative recovery" and request dismissal or stay of the separate retailer complaints (Dkt. Nos. 98 at 8-10, 145 at 13).

Defendants do not challenge retailer plaintiffs' rights to opt-out of the direct-purchaser class, rather they argue *Rule 19* requires partial claim assignments to be raised in the assignor's complaint (Dkt. No. 145 at 11). They rely on *In re Fine Paper Litigation State of Washington* and *Bailey Lumber & Supply Co. v. Georgia-Pacific Corporation*, where the United States Court of Appeals for the Third Circuit and District Court for the Southern District of Mississippi (respectively) expressed concern that split partial claims would undermine the certainty of judgment or settlement, contravening *Rule 19*. *See* *632 F.2d 1081, 1091 (3rd Cir. 1980)*; *No. C 08-01394 LG-JMR, 2009 U.S. Dist. LEXIS 131486, 2009 WL 2872307, *6-7 (S.D. Miss. Aug. 10, 2009)* (Judge Louis Guirola, Jr.).

The circumstances here have already been persuasively addressed in this District:

> *Bailey Lumber* and *Fine Paper* stand for the principle that antitrust plaintiffs with partially assigned claims may not opt [out] of a class due to concerns that they will circumvent joinder rules or interfere with the rights of the defendant to be free **[**51]** of excessive and repeated suits growing out of same basic facts. They do not stand for the proposition that partially assigned claims must be dismissed or stayed in actions such as this, where there is no "prior history" of litigation of these claims in a different court.

*United Food & Comm. Workers Local 1776 & Part. Empls. Health & Welfare Fund v. Teikoku Pharma USA, Inc., No. MD 14-02521 WHO, 2015 U.S. Dist. LEXIS 94220, 2015 WL 4397396, at *6-7 (N.D. Cal. July 17, 2015)* (Judge William H. Orrick). Indeed, as Judge Orrick noted in *United Food*, both *Fine Paper* and *Bailey Lumber* addressed the scenario where classes had already been certified. And in *Bailey Lumber*, the plaintiff *had* filed a new case in a new venue. *See ibid.*; *Fine Paper, 632 F.2d at 1091*; *Bailey Lumber, 2009 U.S. Dist. LEXIS 131486, 2009 WL 2872307 at *1*.

Defendants' concerns are not ripe. As to defendants' complaint of the uncertainty from multiple suits — regardless of whether some partial assignees filed as direct-purchaser or retailer plaintiffs, all suits arising out of the challenged conduct are consolidated here. This order will not speculate about whether other complaints may be filed elsewhere. And as to defendants' fears of duplicative recovery, the Court is confident that the high-end lawyers in this case, following discovery, will obtain all the information necessary to ensure damages are **[**52]** tailored to each partial assignment. Again, this order will not speculate about harm that has not yet, and may never, occur.

CONCLUSION

At the pleading stage, plaintiffs' antitrust claims are timely and they may recover on Glumetza sales by any defendant beginning from the date when Lupin otherwise would have entered the market.

[*872] But, end-payor plaintiffs lack standing to pursue claims anywhere but California, New York, and Rhode Island. Their consumer protection claims fail in California and Rhode Island, but may proceed under New York law. And their unjust enrichment claims fail in New York, but may proceed under California and Rhode Island law. End-payors' claims raised under the laws of other states or territories are dismissed.

Then, to the extent retailer plaintiffs seek to sue under the Sherman Act on their *own* behalf, these claims are dismissed as not plead. But, at this stage, retailer plaintiffs' separate complaints will not be dismissed as improper partial-claim assignments.

Given the substantial time plaintiffs have had to amend and coordinate complaints since these cases were first filed, leave to further amend will not lightly be granted. Nevertheless, should plaintiffs wish **[**53]** to seek leave to file further amended complaints, they may do so by **MARCH 26 AT NOON**. Any such motions must include as an exhibit a redlined version of the proposed amendment that clearly identifies all changes from the amended complaint. This order highlighted certain deficiencies in the consolidated, amended complaints, but it will not necessarily be enough to add sentences parroting each missing item identified herein. If plaintiffs move for leave to file yet more consolidated amended complaints, they should be sure to plead their best case and consider all criticisms made by defendants, including those not reached by this order.

This order does not address the two latest complaints, Nos. C 20-01196 WHA and C 20-01198 WHA. Defendants may move to dismiss these two complaints by **MARCH 26 AT NOON** in a single, consolidated motion — addressing only issues not resolved herein — no longer than **15 PAGES**. Plaintiffs may respond in a single brief no more than **15 PAGES** by **APRIL 2 AT NOON**. Defendants may reply in a single brief no more than **5 PAGES** by **APRIL 9 AT NOON**. A hearing will take place on **APRIL 16 AT 8:00 A.M.**

IT IS SO ORDERED.

Dated: March 5, 2020.

/s/ William Alsup

WILLIAM ALSUP

UNITED **[**54]** STATES DISTRICT JUDGE

Comprehensive Sec., Inc. v. Metro. Gov't of Nashville

United States District Court for the Middle District of Tennessee, Nashville Division

March 6, 2020, Decided

NO. 3:18-cv-00375

Reporter
2020 U.S. Dist. LEXIS 272437 *; 2020 WL 13881229

COMPREHENSIVE SECURITY, INC., et al., Plaintiffs, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, Defendant.

Core Terms

pricing, private security, special event, predatory, monopolization, coordinators, summary judgment, anti-competitive, competitors, antitrust, relevant market, security service, cooperative, recoupment, contracts, hire, provide a service, market power, in limine, overt act, limitations, below-cost, geographic, contends, parties, reduces, venture, argues, drive

Counsel: [*1] For Comprehensive Security, Inc., Associated Protective Service, Inc., OnTrac Security, LLC, Plaintiffs: Bryant B. Kroll, W. Gary Blackburn, The Blackburn Firm, PLLC, Nashville, TN USA.

For Metropolitan Government of Nashville and Davidson County, Defendant: J. Brooks Fox, Metropolitan Legal Department, Nashville, TN USA.

Judges: WAVERLY D. CRENSHAW, JR., CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: WAVERLY D. CRENSHAW, JR.

Opinion

MEMORANDUM OPINION

Comprehensive Security, Inc., Associated Protective Service, Inc., and OnTrac Security, LLC ("Plaintiffs") allege that the Metropolitan Government of Nashville and Davidson County ("Metro") has engaged in anti-competitive conduct in the private security services market in Davidson County, Tennessee. Metro seeks summary judgment (Doc. Nos. 73, 89, 90, 92-1 to 92-15, 93, 94), presenting the narrow question of whether there are "genuine issues as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. Summary judgment is not appropriate if after all inferences made in the light most favorable to Plaintiffs, it is clear that a "rational trier of fact" could find for Plaintiffs because there are genuine issues for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)*. Applying **[*2]** that standard here, Metro's motion will be denied in part and granted in part.

I. The Summary Judgment Record in Plaintiffs Most Favorable Light[1]

A. Predatory pricing

Plaintiffs allege that Metro[2] engages in predatory pricing. In approximately 2013-14, Metro's price for private security services went from $66—$70 per hour to $40 per hour, and in 2017 increase to $44.50 per hour. (Doc. Nos. 90 at ¶¶ 1-4; 94 at ¶¶ 51, 56, 134.) Metro's lower price not only did not produce a profit, but was in fact below Metro's actual operating cost. (Doc. Nos. 90 at ¶ 2; 94 at ¶ 134.) This change was surprising according to MNPD Officer Kim Forsyth, who manages MNPD's security services contracts with private vendors. (Doc. No. 92-4 at 40.)

Her reaction arose from her personal knowledge that "all these vendors and companies [were] so comfortable paying $66 an hour for . . . probably 10, 20 years—for it to drop that low, . . . I didn't understand it." (Id. at 41.) Forsyth understood that the lower price would "undercut the private security agency rate." (Id.)

As a result, Plaintiffs began losing business to Metro. (Doc. No. 92-3 at 4.) At the same time, however, Metro continued to bill its departments (e.g., **[*3]** Metro Schools, Nashville Electric Service, Metro Water) $70.00 per hour for the same services. (Doc. No. 94 at ¶¶ 72-77.)

Plaintiff's expert Dr. Gilbert L. Mathis, Professor Emeritus of Economics at Murray State University, offers his expert opinion supporting Plaintiffs' pricing claim. Dr. Mathis explains that "the practice of pricing below the cost of production in the short run, to drive competitors out of business and to discourage new entrants into a market so that the firm can enjoy higher future prices and profits is considered predatory pricing. Offering a product or providing a service at zero cost would, more likely than not, be below the cost of production." (Doc. No. 92-8 at p. 10.) In Dr. Mathis's opinion, "MNPD's practice of providing a service below cost in the short run will, more likely than not, drive competitors out of business and discourage new entrants into the market and will enable MNPD to enjoy higher future prices and profits," and is therefore considered predatory pricing. (Id. at ¶ 15.)

B. Form 150

Plaintiffs allege that Metro uses Form 150 to deter Metro officers from seeking secondary security services employment in the private security market through Plaintiffs **[*4]** and other security firms. MNPD officers must submit Form 150 to get approval for secondary security services employment. (Doc. Nos. 94 at ¶ 24; 92-3 at ¶ 25.) Notwithstanding Metro's explanation that Form 150 ensures that supervisors can review where and when MNPD officers work (Doc. No. 90 ¶ 5; Doc. No. 73-2 at 100-01), Plaintiffs say that Form 150 is "a weapon" of deterrence. (Doc. No. 92-2 ¶ 2). According to Plaintiffs, Form 150 dissuades MNPD officers from working for secondary employers, because there are multiple and unnecessary levels of approval. (Doc. Nos. 90 ¶ 5; 94 at 24; 92-3 ¶ 25; 92-2 ¶¶ 1-3; 92-1 ¶¶ 1-2.) For example, Form 150 requires multiple "job letters" for each MNPD officer (Doc. No. 92-3 ¶ 25), requires daily lists of officers' locations (id.), and the approval process is delayed by Metro and sometimes is rejected. (Id. ¶¶ 29-30).

C. Requiring Special Event Coordinators to Use MNPD Officers

Plaintiffs also allege that Metro pushes them out of the private security market by requiring special event coordinators to use MNPD officers. Plaintiffs have evidence that MNPD has engaged in a concerted campaign to require special events coordinators to hire MNPD officers. **[*5]** Further, MNPD selectively provides free services to event coordinators to "take over" special events. (Doc. No. 90 at ¶¶ 13-14, 23-24.) As one example, Loyd Poteete, the owner of Comprehensive Security, says that his company lost numerous contracts because Metro required event coordinators to use the MNPD. (Doc. No. 92-3 at ¶¶ 14 16.) Of course, Metro disagrees and contends that Metro does not require special events coordinators to hire only MNPD officers. (Doc. Nos. 73-1 at ¶¶ 7-9; 90 at ¶¶

[1] The Court relies upon the parties competing responses to the statements of undisputed facts construed in the light most favorable to Plaintiffs. (Doc. Nos. 90 and 94).

[2] Metro engages in the security services market through Metro's Police Department ("MNPD") that will be referred to interchangeably in this Memorandum Opinion.

13-15.) Metro relies on a MNPD Captain who avers that MNPD has only offered free services for events determined to be potential terrorist targets or to have a major public safety impact on the public. (Doc. No. 90 at ¶¶ 23-24.)

D. Prohibiting MNPD Officers from Working at Special Events

Plaintiffs further allege that Metro restricts competition by prohibiting its officers from working for Plaintiffs at special events. Plaintiffs rely on the March 1, 2018 Memorandum of MNPD Chief that prohibits MNPD officers from being employed by private security companies at special events. (Doc. No. 73-4 at 46.) Metro suggests that this policy change ensures that MNPD "had proper oversight of all of [the] officers **[*6]** performing police duties." (Id. at 46-48; Doc. No. 90 at ¶ 26.) But Plaintiffs assert this is all a pretext. They offer contrary evidence that "98 or 99% of the time" private security companies were already required to hire a MNPD supervisor to supervise officers during private security events (Doc. Nos. 90 at ¶ 26; 92-3 at ¶ 7), and that all officers must undergo the same training with their own department. (Doc. Nos. 90 at ¶ 27; 92-3 at ¶¶ 9-10).

The Plaintiffs' claims regarding Form 150, requiring event coordinators to use MNPD and requiring MNPD at special events is again supported by Dr. Mathis. Dr. Mathis has opined on Metro's ability to increase its market power and reduce competition in the industry. Based on empirical data, there are 3,615 certified officers in Davidson County and the six adjacent counties. (Doc. No. 92-8 at ¶ 7.) The distribution of officers by county is:

Davidson — 1,488 officers (78 officers are other than MNPD)
Rutherford — 619 officers
Williamson — 456 officers
Sumner — 455 officers
Wilson — 318 officers
Robertson — 172 officers
Cheatham — 107 officers

(Id. at ¶ 8.) The distribution in terms of the market share is:

MNPD — 39%
Rutherford — 17%
Williamson — 13%

Sumner **[*7]** — 12%
Wilson - 9%
Robertson — 5%
Cheatham — 3%
Davidson County (other) — 2%

(Id. at ¶ 9.) Dr. Mathis concludes that "[w]ith 39% of the available pool of POST-certified officers, MNPD has considerable market power." (Id. at ¶ 10.) Dr. Mathis further explains that "if a firm reduces or limits the resources available and needed by rival firms in an industry, to produce a product or provide a service, it effectively makes the industry more concentrated, increases the market power of the dominant firm and reduces competition in the industry." (Id. at p. 10.) As a result, "when MNPD effectively reduced the pool of available officers" . . . it would make [Plaintiffs] less competitive because the officers they could employ would have to travel further which would be more costly and time consuming. (Doc. No. 92-8 at ¶ 11.) In Dr. Mathis's opinion, "MNPD's reduction or limitation of the resources available and needed by private security companies to provide a service — POST[-certified] police officers performing security — effectively makes the industry more concentrated, increases the market power of MNPD, which is the dominant firm, and reduces competition in the industry." (Id. at ¶ 13.) Mathis **[*8]** concludes that "MNPD's ban on allowing MNPD officers from working part time for private security effectively reduces the pool of available workers to private security firms by 39 percent and constitutes a partial barrier to entry for the private security firms resulting in lesser competition in the market." (Id. at ¶ 14.)

II. Analysis

Section 2 of the Sherman Act punishes any "person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize" commerce. *15 U.S.C. § 2*. "Under this statute, the defendant must 'use . . . monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" *Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 931 (6th Cir. 2005)* (alterations in original) (quoting *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 482-83 (1992)*. A Sherman Act monopolization claim has two elements: "(1) the possession of monopoly power in a relevant market; and (2) the willful acquisition, maintenance, or use of that power by anti-competitive or exclusionary means as opposed to 'growth or development resulting from a superior product, business acumen, or historic accident.'" *Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 782 (6th Cir. 2002)*(quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 595-96 (1985)*). "An attempted monopolization [under Section 2] occurs when a competitor, with a dangerous probability of success, engages in anti-competitive practices the specific design of which **[*9]** are to build a monopoly or exclude or destroy competition." Id. (internal quotations omitted).

Metro seeks summary judgment because (1) Plaintiffs lack evidence of monopolization based on theory of predatory pricing; (2) Plaintiffs do not have antitrust standing for a monopolization claim based upon Form 150; (3) Plaintiffs' monopolization claim based on Metro requiring the use of its own officers by special events coordinators fails on the law and evidence presented; and (4) Plaintiffs' monopolization claim based on Metro's refusal to allow officers to work for private security companies at special events must be dismissed as a matter of law.

1. Predatory Pricing

Plaintiffs' first avenue to Section 2 liability is monopolization or attempted monopolization by means of predatory pricing. They claim that MNPD attempts to "monopolize and eliminate competition from private security companies" by "undercut[ting] prices and operat[ing] at a loss." (Doc. No. 60 ¶¶ 18-25.) Metro contends that this claim is barred by the statute of limitations, and that Plaintiffs have not adduced any evidence of recoupment of losses, one of the two required elements of a predatory pricing claim. (Doc. No. 74 at 5-6.)

[*10] a. Statute of Limitations

Predatory pricing claims have a four-year statute of limitations. *Peck v. Gen. Motors Corp., 894 F.2d 844, 848-49 (6th Cir. 1990)*. "The cause of action accrues and the limitations period commences each time a defendant commits an act which injures the plaintiff's business." *Id. at 849* (citing *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971)*). This action was filed on April 16, 2018. There is a dispute of material facts over when MNPD lowered its rates—MNPD Captain Corman maintains it happened in 2013, but a July 2017 letter from Captain Corman states that it occurred in 2014. The jury will need to determine this disputed material fact.

The Court notes that Plaintiffs also assert that their predatory pricing claim is timely under a continuing violations theory. The Court need not resolve this question. However, the Court has substantial concerns about application of the continuing violations theory if the date of the price decrease is outside of the four-year limitations period. As this Court explained in *Hosp. Auth. of Metro Gov't of Nashville v. Momenta Pharm., Inc., 353 F. Supp. 3d 678 (M.D. Tenn. 2018)*:

> In an antitrust lawsuit, the cause of action accrues and the accompanying limitations period commences "each time a defendant commits an act that injures the plaintiff's business." *In re Se. Milk Antitrust Litig., 555 F. Supp. 2d 934, 946-47 (E.D. Tenn. 2008)* (citation omitted). "For statute of limitations purposes . . . the focus is on the timing **[*11]** of the causes of injury, i.e. the defendant's overt acts, as opposed to the effects of the overt acts." *DXS, Inc. v. Siemens Med. Sys. Inc., 100 F.3d 462, 467 (6th Cir. 1996)* (citing *Peck [], 894 F.2d [at] 849 []*). A continuing antitrust violation is one in which the plaintiff's interests are repeatedly invaded. *Peck, 894 F.2d at 849* (quoting *Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir.1987)*). When a plaintiff alleges a continuing antitrust violation, the cause of action "accrues each time a plaintiff is injured by an act of defendants." *Barnosky Oils, Inc. v. Union Oil Co. of Cal., 665 F.2d 74, 81 (6th Cir. 1981)*. However, even in the event of an alleged continuing violation, "an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act." *Peck, 894 F.2d at 849*. Such an overt act involves: (1) a

> new and independent act that is not merely a reaffirmation of a previous act; (2) that inflicts new and accumulating injury on the plaintiff. *In re Se. Milk Antitrust Litig., 555 F. Supp. 2d at 947*.

353 F. Supp. 3d at 693.

The Sixth Circuit has "repeatedly rejected invocations of the continuing-violations defense that are mere reaffirmations of a previous act." *Z Techs. Corp. v. Lubrizol Corp., 753 F.3d 594, 600 (6th Cir. 2014)* (in the context of a price increase following a merger). This authority suggests that competitors are injured immediately by predatory pricing, as opposed to being injured anew by ongoing use of a low price or later when prices are eventually raised. See *Berkley Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 295 (2d Cir. 1979)* ("As soon as the dominant firm commences [a predatory **[*12]** pricing] policy, other producers, who may be driven out of the market, are injured."); *In re Wholesale Grocery Prod., 722 F. Supp. 2d 1079, 1088 (D. Minn. 2010)* (in predatory pricing, distinguishing between immediate injury to competitors and later injury to customers) (quoting 2 PHILIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** ¶ 320 (3d ed. 2007) ("[C]ompetitors are injured immediately by predatory pricing, but customers would not be injured until much later, when the predation has done its work and the monopolist raises its price.")); Meijer, Inc. v. 3M, No. Civ. A. 04-5871, 2005 WL 1660188, *4 (E.D. Pa. July 13, 2005) ("As soon as the dominant firm commences [ ] a [predatory pricing] policy, other producers, who may be driven out of the market, are injured.")

b. Elements of Monopoly Claim

A monopolization claim can be based upon predatory pricing. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993)*. "It is not anticompetitive for a company to reduce prices to meet lower prices already being charged by competitors." *D.E. Rogers v. Gardner-Denver Co., 718 F.2d 1431, 1435 (6th Cir. 1983)* (citations omitted). Rather, the "essence" of predatory pricing is that "[a] business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market." *Brooke Grp., 509 U.S. at 222*. "What makes pricing a form of predation is not the downswing in prices but the gouging upswing in prices after **[*13]** the competition has been eliminated or disciplined." *Energy Conversion Devices Liquidation Tr. v. Trina Solar Ltd., 833 F.3d 680, 689 (6th Cir. 2016)* (en banc).

Accordingly, a predatory-pricing claim under Section 2 requires the plaintiff to plead and prove (1) that the defendants charged below-cost prices, and (2) that they "had a dangerous probability[] of recouping its investment in below-cost prices." *Brooke Grp., 509 U.S. at 222, 224*; see *Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 318-19 (2007)*; *Energy Conversion, 833 F.3d at 685*. The recoupment element requires two showings: first, "below-cost pricing must be capable . . . of producing the intended effects on the firm's rivals, whether driving them from the market, or . . . causing them to raise their prices to supracompetitive levels within a disciplined oligopoly," and, second, "[d]etermining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme . . . and the structure and conditions of the relevant market." *Superior Prod. P'ship v. Gordon Auto Body Parts Co., Ltd., 784 F.3d 311, 319 (6th Cir. 2015)* (alterations in original) (quoting *Brooke Grp., 509 U.S. at 225-26*).

Here, Plaintiffs have established that MNPD significantly lowered its rates for private security services. They have also presented evidence that MNPD's reduced rate adjustment is (1) at or below cost, (2) results in either no profit or a loss, and (3) makes MNPD more competitive. Metro debates whether MNPD's rates **[*14]** are "below any appropriate measure of its costs." (Doc. No. 93 at 1.) At minimum, there are clearly triable disputed issues of fact regarding the first prong—i.e., "charging below-cost prices"—of Plaintiffs' predatory pricing claim, making summary judgment inappropriate.

Plaintiffs have also raised a question of fact regarding the second prong—i.e., the dangerous probability of recoupment of MNPD's losses. Plaintiffs' expert, Dr. Mathis, believes that "MNPD's practice of providing a service below cost in the short run will, more likely than not, drive competitors out of business and discourage new entrants into the market and will enable MNPD to enjoy higher future prices and profits." (Doc. No. 92-8 ¶ 15.) Plaintiffs have also offered evidence that MNPD has systematically used below-cost pricing to garner additional private security services contracts (and thus market share) that will be profitable for MNPD in the future. Together, this evidence is sufficient to raise the question of fact regarding whether there is a dangerous probability MNPD will recoup its losses.

Plaintiffs are entitled to a trial on the Section 2 predatory pricing theory.

2. Form 150 Process

Plaintiffs also contend that Form **[*15]** 150 process is anti-competitive. Metro contends that Plaintiffs lack antitrust standing to rely upon Form 150. (Doc. No. 74 at 7-8.) The Court must, as a matter of law, "reject claims . . . when antitrust standing is missing." *NicSand, Inc. v. 3M Co., 507 F.3d 442, 449-50 (6th Cir. 2007)* (en banc). In short, antitrust injury requires more than "allegations of consequential harm" even when a complaint is "buttressed by an allegation of intent to harm the [plaintiff]." *Id. at 449* (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 545 (1983)*; see also *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338, 344 (1990)*. Even though a plaintiff may allege that an injury is "causally related to an antitrust violation," it "will not qualify as 'antitrust injury' unless it is attributable to an anticompetitive aspect of the practice under scrutiny." *NicSand, 507 F.3d at 450* (quoting *Atl. Richfield, 495 U.S. at 334*).

Plaintiffs have evidence raising a dispute question of material fact concerning whether MNPD's administration of the Form 150 process causes more than a tenuous or "consequential harm" to Plaintiffs. *Associated Gen. Contractors, 459 U.S. at 545*. The record is replete with disagreements about the Form 150 requirements and process, including why they were implemented and what competitive impact they have actually had on Plaintiffs. Plaintiffs offer evidence that the Form 150 process creates unnecessary hurdles for MNPD officers seeking secondary employment and for **[*16]** private security companies seeking special events contracts. Metro attempts to explain that its use of Form 150 is not anti-competitive because Plaintiffs concede they hire from officers available from neighboring counties and other police departments. But which version to believe is the role of the jury not the Court on Metro's summary judgment.

Plaintiffs' expert Dr. Mathis reinforces the factual dispute of the parties. He believes that "MNPD's reduction or limitation of the resources available and needed by private security companies to provide a service—POST[-certified] police officers performing security—effectively makes the industry more concentrated, increases the market power of MNPD, which is the dominant firm, and reduces competition in the industry." (Id. ¶ 13.) Viewing the summary judgment record as a whole, summary judgment must be denied.

3. Requiring the Use of MNPD Officers by Special Event Coordinators

Plaintiffs allege that MNPD is monopolizing or attempting to monopolize the private security services market by requiring special events coordinators to use MNPD officers. Metro argues this claim must be dismissed for several reasons.

Metro first contends Plaintiffs do **[*17]** not identify the "relevant market." (Doc. No. 74 at 9-12); see *NHL Players' Assoc. v. Plymouth Whalers Hockey Club, 325 F.3d 712, 719-20 (6th Cir. 2003)*. The relevant market consists of the product or service market and the geographic market. *Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 324 (1962)*. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." Id.; see *White & White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 500 (6th Cir. 1983)*. "A geographic market is defined as an area of effective competition" or "the locale in which consumers of a product or service can turn for alternative sources of supply." *Conwood Co., 290 F.3d at 782* (internal quotations omitted).

Metro argues that actual geographic market is too broad. (Doc. No. 74 at 11-12.) The Court does not agree. While the Complaint states that Plaintiffs operate in "Davidson County and surrounding areas" (Doc. No. 60 ¶ 4), it specifies that "[t]he acts and omissions of [Metro] complained of . . . arise from the MNPD's efforts to drive the Plaintiffs out of the relevant market for providing private security at venues *within Davidson County, Tennessee*" (Id. ¶ 6 (emphasis added)). In response to the motion, Plaintiffs have expressly limited their Section 2 claims to the private security services market in Davidson County. (Doc. Nos. 89 at 16; 90 ¶ 11.) **[*18]** This case is simply not analogous to *Blue Ribbon Properties, Inc. v. Hardin Cty. Fiscal Court, 50 F. App'x 671 (6th Cir. 2002)*, relied upon by Metro. (Doc. No. 93 at 4-5.) There, the plaintiff's presented varying explanations of the relevant market. Here, Plaintiffs are only concerned with the market for private security services in Davidson County, where MNPD operates.

Metro suggests that the service market is too broad or vague because Plaintiffs discuss three kinds of private security services—traffic control, static security, and mobile security.[3] (Doc. No. 74 at 10-11.) However, these merely "refer to the job duties of an officer and involve[] the same type of service." (Doc. No. 92-3 ¶ 31.) Indeed, the summary judgment record reflects that multiple security services are often called for and provided by officers for each vendor and at any given event. For example, MNPD Officer Kim Forsyth explained that MNPD has a "few hundred" private security services contracts that are "general in nature" under which the MNPD provides "different kinds of services" including security "manpower" and "traffic direction and control," depending on the needs of the vendor and the event. (Doc. No. 92-15 at 20-24.)

Second, Metro contends that MNPD, through its police powers, exercises control **[*19]** over public safety in Davidson County as a matter of historic development as opposed to a matter of willful acquisition and maintenance of monopolistic power. (Doc. No. 74 at 12-13.) This, however, is belied by Plaintiffs' evidence. Plaintiffs have evidence that MNPD's public safety reasons may be a pretext. Metro's witnesses, of course, disagree and maintain that MNPD acts with proper civic purpose. Monopolistic power attained through "historic accident" may not necessarily be improper, *Conwood, 290 F.3d at 782*, however, Metro has not established as a matter of *undisputed* fact that its actions in requiring use of its officers by special events coordinators are the result of historic development as opposed to intentional anticompetitive activity.

Third, Metro argues that there is no evidence that Metro requires event coordinators to hire MNPD officers. (Doc. No. 74 at 13-16.) All this argument does, however, is highlight the disputed factual issues in this record. Plaintiffs have evidence that MNPD requires special events coordinators to hire MNPD officers and selectively provide free services to "take over" special events based on the inconsistent pretext of terrorism threats or public safety. As just one **[*20]** example, Comprehensive Security owner Loyd Poteete has averred that his company has lost numerous contracts due to MNPD's requiring event coordinators to use the MNPD and to make events prohibitively expensive for private security companies.

The Court will deny Metro's motion on this basis.

4. Refusal to Deal

Plaintiffs' final path to Section 2 liability is that MNPD is illegally refusing to deal by prohibiting its officers from working for them at special events. Metro argues that, as a matter of law, the competitive relationship of the parties precludes this legal theory. (Doc. No. 74 at 17-19.) The Court agrees.

The Sherman Act generally "does not restrict the long recognized right" of a business enterprise "freely to exercise [its] own independent discretion as to parties with whom [it] will deal." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407-08 (2004)* (quoting *United States v. Colgate & Co., 250 U.S. 300, 307 (1919)*). In *Aspen Skiing*, the Supreme Court set a high standard for refusal to deal liability. There, a defendant owned three of four ski areas, and plaintiff owned the fourth. Each cooperated for years in the economic venture of a joint ski ticket for all four ski areas. After demanding increased proceeds, the defendant canceled the joint ticket. The plaintiff, concerned that skiers would bypass its mountain without **[*21]** the joint ticket, tried everything possible to recreate the cooperative effort, including offering to buy the defendant's tickets at retail price. The defendant refused. The Supreme Court affirmed a verdict for the plaintiff on a refusal to deal theory. *Aspen Skiing, 472 U.S. at 608*.

The Supreme Court affirmed *Aspen Skiing*'s "outer boundary" and further clarified the elements of a refusal to deal claim in Verizon v. Trinko. There, the court stressed the defendant's decision in *Aspen Skiing* "to cease participation

[3] Metro also attempts to differentiate between security services provided for public versus private vendors. However, it is not the identity of the vendor but services provided that are relevant for these purposes.

in a cooperative venture," and it highlighted that the "unilateral termination of a voluntary *(and thus presumably profitable)* course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Verizon Commc'ns, 540 U.S. at 409* (emphasis in original). In finding for the defendant, the Verizon Court found outcome determinative that the plaintiff had "not allege[d] that [the defendant had] voluntarily engaged in a course of dealing with its rivals." Id.

So too here. The record reflects that MNPD prevents its officers from working for private security companies at special events per the 2018 Memorandum. However, Plaintiffs do *not* claim, nor have they offered *any* evidence to support a claim that MNPD ceased participation in **[*22]** a cooperative venture with Plaintiffs, or terminated a voluntary and presumably profitable course of dealing with them. Plaintiffs have not offered any evidence that they had a cooperative economic venture with the MNPD for special event security services. Neither do Plaintiffs present evidence of an economic partnership with MNPD in a manner analogous to the parties in *Aspen Skiing*. To the contrary, Plaintiffs and Metro have been *competitors* in the security services market who have *never* been involved in a cooperative economic venture or course of dealing. This is illustrated by the testimony of MNPD Officer Kim Forsyth, who explained that Captain Corman had always viewed MNPD as *hypercompetitive* with Plaintiffs in the market for private security services. Specifically, Forsyth described Corman as "obsessed with the amount of money that was available out there to earn in police services, especially traffic control. He actually discussed it as pots of gold that people can just pluck, and that there were contract security companies basically taking these pots of gold but using Metro property." (Doc. No. 92-4 at 11.)

There is no evidence in the summary judgment record to support a refusal to deal **[*23]** under Section 2. MNPD retains its right to "freely to exercise [its] own independent discretion as to parties with whom [it] will deal." *Verizon Commc'ns, 540 U.S. at 407-08* (internal quotations omitted). Metro is entitled to summary judgment on Plaintiffs' refusal to deal claim.

III. Metro's Motion in Limine

Metro has separately filed a Motion in Limine seeking to exclude Plaintiffs evidence of the service market and geographic market. (Doc. No. 95 at 1-3.) Metro argues that Plaintiffs have not established the service market as security generally, as opposed to static security, mobile security, and traffic control individually; that Mr. Poteete should not be admitted to offer expert testimony about the service market; and that Plaintiffs have failed to define the relevant geographic market. (Id.) This resembles Metro's arguments on summary judgment. For the same reasons that the Court rejected Metro's arguments in the summary judgment motion, the arguments in limine will be denied as moot.

IV. Conclusion

Metro's Motion for Summary Judgment will be granted in part and denied in part. The motion will be granted on Plaintiffs' refusal to deal claim and denied in all other respects. Additionally, Metro's Motion in Limine will be denied. **[*24]**

An appropriate order will enter.

/s/ Waverly D. Crenshaw, Jr.

WAVERLY D. CRENSHAW, JR.

CHIEF UNITED STATES DISTRICT JUDGE

ORDER

For the reasons in the accompanying Memorandum Opinion, Defendant's Motion for Summary Judgment (Doc. No. 73) is **DENIED IN PART** and **GRANTED IN PART**. It is **GRANTED** on the refusal to deal claim, but **DENIED** in all other respects. Additionally, Defendant's Motion in Limine (Doc. No. 95) is **DENIED AS MOOT**.

This case is returned to the Magistrate Judge for case management including settlement of this case.

IT IS SO ORDERED.

/s/ Waverly D. Crenshaw, Jr.

WAVERLY D. CRENSHAW, JR.

CHIEF UNITED STATES DISTRICT JUDGE

Krommenhock v. Post Foods, LLC

United States District Court for the Northern District of California

March 9, 2020, Decided; March 9, 2020, Filed

Case No. 16-cv-04958-WHO

Reporter
334 F.R.D. 552 *; 2020 U.S. Dist. LEXIS 40463 **; 2020 WL 1164065

DEBBIE KROMMENHOCK, et al., Plaintiffs, v. POST FOODS, LLC, Defendant.

Prior History: *Krommenhock v. Post Foods, LLC, 255 F. Supp. 3d 938, 2017 U.S. Dist. LEXIS 84359, 2017 WL 2378029 (N.D. Cal., June 1, 2017)*

Core Terms

consumer, Products, plaintiffs', challenged statement, cereal, sugar, damages, healthy, Grains, nutrient, class member, class certification, Subclass, labels, seal, misleading, surveys, Oats, motion to exclude, summary judgment, predominance, packaging, argues, Bran, classwide, studies, Declaration, challenges, opine, restitution

Counsel: **[**1]** For Debbie Krommenhock, Stephen Hadley, on behalf of themselves, all others similarly situated, and the general public, Plaintiffs: Jack Fitzgerald, LEAD ATTORNEY, The Law Office of Jack Fitzgerald, PC, San Diego, CA; Melanie Rae Persinger, The Law Office of Jack Fitzgerald, San Diego, CA; Trevor Matthew Flynn, Law Office of Jack Fitzgerald, PC, San Diego, CA.

For Post Foods, LLC, Defendant: Tarifa B Laddon, LEAD ATTORNEY, Faegre Baker Daniels LLP, Los Angeles, CA; Aaron Van Oort, Courtney Anne Lawrence, PRO HAC VICE, Faegre Baker Daniels LLP, Minneapolis, MN; Howard David Ruddell, Faegre Baker Daniels LLP, Los Angeles, CA; Nicholas J. Nelson, Faegre Baker Daniels LLP, Minneapolis, MN; Sarah Lynn Brew, PRO HAC VICE, Faegre Baker Daniels, St. Minneapolis, MN.

Judges: William H. Orrick, United States District Judge.

Opinion by: William H. Orrick

Opinion

[*560] ORDER ON PENDING MOTIONS

Re: Dkt. Nos. 141, 151, 152, 153, 154, 155, 163, 164, 172, 173, 174, 175, 178, 184, 190, 191, 192, 207, 220, 224, 225

Plaintiffs Debbie Krommenhock and Stephen Hadley bring this class action case on behalf of a putative class of California consumers who purchased 31 varieties of Post Food, LLC's cereal (Products) whose boxes contained a mix of **[**2]** 45 statements that plaintiffs assert are rendered false and misleading given the amount of added sugar included in Post's Products. The essence of plaintiffs' claims under three California consumer protection statutes (the *Unfair Competition Law (UCL)*, *False Advertising Law (FAL)*, and *Consumers Legal Remedies Act (CLRA)*) is that it is false or misleading for Post to make health and wellness claims on their cereals (the 45 "Challenged Statements") given the high level of added sugar in each of those cereals.[1]

Currently before me is plaintiffs' motion for class certification, seeking to certify sub-classes of consumers who purchased the 31 identified varieties of cereals whose boxes contained one or more of the 45 Challenged Statements. Post opposes class certification and moves for summary judgment, arguing that plaintiffs' theory of liability is blocked by the *First Amendment*, that some of the Challenged Statements are preempted nutrient content or protected health claims, and that plaintiffs have no evidence supporting their claims for injunctive or monetary relief. Finally, both sides raise motions to exclude some or all of the opinions of experts offered by the other side.

As explained below, plaintiffs **[**3]** have met the requirements of *Rule 23(a)* and *(b)* and their motion to class certification is GRANTED. Post's motion for summary judgment is DENIED, except to the extent that certain of the Challenged Statements identified below are preempted and are not actionable in this case. The motions to exclude experts are DENIED, except to the limited extent that plaintiffs' Advantage Realized Model, as developed by Gaskin and Weir, cannot be used as a basis for damages under the California consumer protection statutes at issue.

A further Case Management Conference is set for April 28, 2020 at 2:00 p.m. At that Conference, the Court will resolve any disputes over the form or manner of class notice and set this matter for trial.

DISCUSSION

I. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

A. Legal Standard

"Before certifying a class, the trial court must conduct a rigorous analysis to **[*561]** determine whether the party seeking certification has met the prerequisites of *Rule 23*." *Mazza v. Am. Honda Motor Co., Inc., 666 F.3d 581, 588 (9th Cir. 2012)* (internal quotation marks omitted). The party seeking certification has the burden to show, by a preponderance of the evidence, that certain prerequisites have been met. *See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348-50, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*; *Conn. Ret. Plans & Trust Funds v. Amgen Inc., 660 F.3d 1170, 1175 (9th Cir. 2011)*.

Certification under *Rule 23* is a two-step process. The party seeking certification must **[**4]** first satisfy the four threshold requirements of *Rule 23(a)*. Specifically, *Rule 23(a)* requires a showing that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)*.

Next the party seeking certification must establish that one of the three grounds for certification applies. *See Fed. R. Civ. P. 23(b)*. Plaintiffs seek certification under *Rule 23(b)(3)*, which requires them to establish that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. They also seek certification under *Rule 23(b)(2)* for injunctive relief.

In the process of class-certification analysis, there "may entail some overlap with the merits of the plaintiff's underlying claim." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 568 U.S. 455, 465 - 66, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)* (internal quotation marks omitted). However, "*Rule 23* grants courts no license to engage

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[1] UCL, *Cal. Bus. & Prof. Code § 17200 et seq.*; FAL, *Cal. Bus. & Prof. Code § 17500 et seq.*; and CLRA, *Cal. Civ. Code § 1750 et seq.*

in free-ranging merits inquiries at the certification **[**5]** stage." *Id. at 466*. "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the *Rule 23* prerequisites for class certification are satisfied." *Id.*

B. Proposed Classes

Plaintiffs seek to certify the following subclasses:

> All persons who, on or after August 29, 2012 (the "Class Period"), purchased in California, for household use and not for resale or distribution, one or more of the following Post cereal varieties:
>
> **Great Grains Subclass**: Raisins, Dates, and Pecans (16 or 40.5 oz. package); Crunchy Pecan (16 oz.); Cranberry Almond Crunch (14 oz.); Blueberry Pomegranate (15.9 oz.); Banana Nut Crunch (15.5 oz.); Protein Blend: Honey, Oats, and Seeds (14.75 or 13.5 oz.); and Protein Blend: Cinnamon Hazelnut (14.75 or 13.5 oz.).
>
> **Honey Bunches of Oats Subclass**: Honey Roasted (14.5, 18, 23, 24.5, 27, 28, 36, or 48 oz.); Almonds (14.5, 18, 23, 24.5, 27, 28, 36, or 48 oz.); Raisin Medley (17 oz.); Pecan Bunches (14.5 oz.); Cinnamon Bunches (14.5 or 18 oz.); Vanilla Bunches (18 oz.) Apple & Cinnamon Bunches (14.5 oz.); Real Strawberries (13, 16.5, or 20 oz.); Fruit Blends: Banana Blueberry (14.5 or 18 oz.); Fruit Blends: Peach Raspberry (14.5 or 18 oz.); **[**6]** Tropical Blends: Mango Coconut (14.5 or 18 oz.); Greek Honey Crunch (12.5 or 15.5 oz.); and Greek Mixed Berry (12.5 or 15.5 oz.).
>
> **Honey Bunches of Oats Whole Grain Subclass**: Vanilla Bunches (18 oz.); Honey Crunch (18 oz).
>
> **Honey Bunches of Oats Granola Subclass**: Honey Roasted (11 or 20 oz.); Cinnamon (11 oz.); Raspberry (11 oz.).
>
> **Raisin Bran Subclass**: Raisin Bran (20 or 25 oz.).
>
> **Bran Flakes Subclass**: Bran Flakes (16 oz.).
>
> **Alpha-Bits Subclass**: Alpha-Bits (11.5 or 12 oz.).
>
> **Honeycomb Subclass**: Honeycomb (12.5, 16, 33, or 35 oz.).
>
> **[*562]** **Waffle Crisp Subclass**: Waffle Crisp (11.5 oz.).

Class Cert. Mot. at 1.

C. *Rule 23(a)* Requirements

Plaintiffs have made a showing satisfying *Rule 23(a)*'s requirements of numerosity, commonality, typicality, and adequacy.

1. Numerosity

Plaintiffs submit evidence of unit and dollar sales demonstrating that each of the proposed subclasses contain thousands of putative Class Members.[2] Declaration of Colin B. Weir [Dkt. No. 155-12] at 21-22, Table 1.[3] The proposed subclasses are numerous.

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[2] Courts generally find numerosity satisfied if the class includes forty or more members. *See Villalpando v. Exel Direct Inc., 303 F.R.D. 588, 605-06 (N.D. Cal. 2014)*; *In re Facebook, Inc., PPC Adver. Litig., 282 F.R.D. 446, 452 (N.D. Cal. 2012)*.

2. Typicality

Plaintiffs contend typicality exists across each subclass based on plaintiffs' alleged common injury; each class member paid a premium for the Products due to their "misleading health and wellness **[**7]** claims demanded in the market," and that they were "influenced to purchase and consume the products with greater frequency than they would have, had they known the true facts concerning the Products' added sugar content." Class Cert. Mot. at 19.[4] Post does not challenge that the named plaintiffs have claims that are typical of the class claims. Instead, as discussed below, Post challenges whether plaintiffs have admissible, classwide proof of their injury. Plaintiffs claims are typical of the class claims.

3. Adequacy

Plaintiffs argue they are adequate class representatives because they are purchasers with standing, have no conflicts, are aware of their obligations, will continue to vigorously prosecute the case for the Class, and have retained adequate counsel (The Law Office of Jack Fitzgerald, PC). Class Cert. Mot. at 19.[5] Post does not contest adequacy and I find Krommenhock and Hadley satisfy the adequacy requirement.[6]

4. Commonality

Plaintiffs identify the following facts supporting commonality: (i) the Product packaging within each subclass was consistent throughout the Class Period, exposing every purchaser to at least one of the Challenged Statements; (ii) the amounts of added **[**8]** sugar in the Products within each subclass were also similar throughout the Class Period; and (iii) across the subclasses, "the added sugar, comprising 13.33% to 40% of calories, falls well above the 5% and 10% daily limits endorsed by authoritative sources and supported in the scientific literature." Class Cert. Mot. at 18. Following from these common facts, plaintiffs identify common legal questions subject to common proof, including whether the Challenged Statements were material and misleading.[7] *Id.*

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[3] Post seeks to exclude various opinions of Weir, *see* below, but does not contest Weir's testimony regarding sales and does not contest that plaintiffs have satisfied numerosity.

[4] The test for typicality is "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Ellis v. Costco Wholesale Corp., 657 F.3d 970, 984 (9th Cir. 2011)* (internal quotation marks and citation omitted).

[5] Named plaintiffs will adequately represent a class where: (1) neither named plaintiffs nor their counsel have any conflicts of interest with other class members; and (2) the named plaintiffs and their counsel will prosecute the action vigorously on behalf of the class. *Ellis, 657 F.3d at 985*.

[6] After the close of briefing, plaintiffs filed a motion to support appointment of additional class counsel, Sidney W. Jackson, III, of Jackson & Foster, LLC. Dkt. No. 220. Post opposes that motion. Dkt. No. 221. The motion is DENIED without prejudice. If plaintiffs want to have counsel in addition to The Law Office of Jack Fitzgerald, PC formally appointed as class counsel they should refile their request as a motion for administrative relief and defendant may respond if it chooses to within four days. *See* Civ. *L.R. 7-11*. The matter will then be taken under submission.

[7] To satisfy the commonality element, plaintiffs must show that the class members have suffered "the same injury" — which means that the class members' claims must "depend upon a common contention" such that "determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke." *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)* (internal quotation marks and citation omitted). The plaintiff must demonstrate not merely the existence of a common question, but rather "the capacity of classwide proceedings to generate common answers apt to drive the resolution of the litigation." *Id.* (internal quotation marks and emphasis omitted). For purposes of *Rule 23(a)(2)*, "even a single common question will do." *Id. at 359* (internal quotation marks and modifications omitted).

[*563] Post does not challenge the common facts or legal issues identified by plaintiffs. Instead, Post argues that because there are 45 Challenged Statements that were made in varying combinations for 31 varieties of cereal, the *impact* of the Challenged Statements is highly individualized. Post's actual contention, therefore, is that the common issues identified by plaintiffs will not predominate over individualized issues. That predominance argument will be addressed below with respect to *Rule 23(b)(3)*. Plaintiffs have satisfied the commonality requirement.

In sum, plaintiffs have shown that each of the *Rule 23(a)* factors is satisfied.

D. *Rule 23(b)(3)* Requirements

1. Predominance

Plaintiffs rely on the following evidence, adduced **[**9]** through their experts, to show that common issues predominate.[8] First, they provide the opinions of their advertising expert Bruce G. Silverman (contested on its merits and countered by Post and its experts) of how Post used the Challenged Statements to drive sales and market shares and that consumer interest in "better-for-you" foods is extremely relevant in the cold cereal category. *See generally* Expert Report of Bruce G. Silverman [Dkt. No. 155-4]. Second, they submit evidence regarding the significant health impacts of sugar consumption through experts Dr. Robert Lustig and Dr. Michael Greger (similarly contested and countered by Post and its experts). *See generally* Expert Report & Declaration of Robert Lustig [Dkt. No. 155-6]; Expert Report & Declaration of Dr. Michael Greger [Dkt. No. 155-8].

Third, plaintiffs submit damages evidence through two economic models created and applied by Steven P. Gaskin and Colin B. Weir (also contested and countered by Post) meant to assess two things. They offer a "Consumer Impact/Price Premia Model" to establish the price premia class members paid as a result of the Challenged Statements based on conjoint studies designed by Gaskin with assistance **[**10]** from Weir and an "Advantage Realized/Consumer Demand Model" meant to measure the change in demand associated with Post's omission of material information about sugar. *See generally* Expert Report of Steven P. Gaskin [Dkt. No. 155-10]; Declaration of Colin G. Weir [Dkt. No. 155-12]. These models are Post's primary target in opposition to certification. Post contends that the models are faulty in numerous respects and do not sufficiently "fit" plaintiffs' liability theories. Absent those models, which Post asserts should be excluded from the case, Post claims that individualized causation and damage issues predominate over common ones and certification should be denied.

a. Objective Standards and Common Evidence

Post argues that plaintiffs have failed to show that any misleading representations were communicated classwide and that any particular Challenged Statement can be considered material for all class members. Accordingly, it contends that there are predominant individualized issues regarding class member injury and causation. It also asserts that consideration of each combination of labels and recipes with respect to each Challenged Statement likewise makes individual issues of liability **[**11]** predominate.

Post mischaracterizes the pertinent, predominant questions that arise under the California consumer protection statutes. The relevant analysis under California law does not consider whether each class member saw and **[*564]** relied on each of the Challenged Statements and in what combination, but instead whether the Challenged Statements were used consistently through the Class Period, supporting an inference of classwide exposure, and whether the Challenged Statements would be material to a reasonable consumer. *Hadley v. Kellogg Sales Co., 324 F. Supp. 3d 1084, 1095 (N.D. Cal. 2018)* (*Hadley I*) (the question is how an objective "reasonable consumer" would

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[8] In numerous, separate motions, Post objects and moves to exclude many of plaintiffs' experts' opinions and plaintiffs object and move to exclude many of Post's experts' opinions. Dkt. Nos. 164, 175-1, 175-3, 184, 190, 191, 192. These motions will be discussed below.

react to a statement, and not whether individual class members saw or were deceived by statements). Those are common questions, supported at this juncture by plaintiffs' experts and subject to attack at trial by defendant's experts.

As a fallback position, Post argues that I should consider whether certain of the Challenged Statements are prominent enough on the Products' packages to support classwide inferences as a matter of law. Oppo. to Class Cert. Mot. at 9-12. It points out that in the *Kellogg* class certification order, the Hon. Lucy Koh concluded that "an inference of class-wide exposure to an **[**12]** alleged misrepresentation affixed to a product's packaging might not be warranted if the alleged misrepresentation is not sufficiently prominently displayed on the packaging." *Hadley I, 324 F. Supp. 3d at 1099*. Judge Koh then determined as a matter of law that one statement ("wholesome goodness") was not prominent enough to be certified because it "only appeared (1) on the back panel of the Nutri-Grain packaging; (2) 'in small font'; and (3) in the middle of a block of text." *Id. at 1100*.

In reaching this issue on class certification, Judge Koh relied on *Zakaria v. Gerber Products Co., LACV1500200JAKEX, 2016 U.S. Dist. LEXIS 184861, 2016 WL 6662723 (C.D. Cal. Mar. 23, 2016)*. There, the challenged representations on the products were "accompanied by other information, in small font, and sometimes located on the back or inside cover" of the product. *2016 U.S. Dist. LEXIS 184861, [WL] at *8*. Based on that record, the court concluded as a matter of law that the "alleged misrepresentations were not prominently displayed. For this reason, it cannot be inferred that there is a 'high likelihood that in the process of buying the product, the consumer would have seen the misleading statement on the product and thus been exposed to it.'" *2016 U.S. Dist. LEXIS 184861, [WL] at *8* (quoting *Ehret v. Uber Techs., Inc., 148 F. Supp. 3d 884, 895 (N.D. Cal. 2015))*. The issue in *Ehret*, which was also relied on by Judge Koh and is not a labelling case, was "whether **[**13]** class-wide exposure can be inferred where Uber's alleged misrepresentations regarding the 20% gratuity were primarily on its website, blog, and e-mail messages, rather than on the Uber app itself." *Id. at 895-96*. In that case, the court denied class certification where "although there may have been a consistent misrepresentation, there is insufficient evidence that all customers during the class period were likely exposed to the misrepresentation" given that many customers only interacted with the app. *Id. at 900*.

In support of its argument that I should follow Judge Koh and determine prominence now (and conclude there can be no classwide inference of exposure for the Challenged Statements that are not prominent), Post also relies on *In re Clorox Consumer Litig., 301 F.R.D. 436 (N.D. Cal. 2014)*. In that case, the challenged statements were prominent in television advertisements, but only on a small subset of the products' labels. Accordingly, in light of "powerful evidence that most members of the proposed classes probably never saw the allegedly misleading statements" as the "television commercials ran for only a small part of the class period, and the superiority claims appeared in small print on the back of a minority of Fresh Step packages," there was no demonstration **[**14]** "that the proposed classes were uniformly exposed to the allegedly misleading messages." *Id., 301 F.R.D. at 445*.

The evidence and Post's defense in this case are starkly different than in *Clorox* and *Ehret*. Here, there is no dispute that the majority of Challenged Statements were made consistently (or consistently enough) throughout the relevant timeframes on the Products' packages.[9] As to the prominence of **[*565]** statements on the Products' packages, plaintiffs argue that Judge Koh's approach — deciding the issue as a matter of law on class certification — was unnecessary because under California law prominence goes only to the inapposite question of whether significant numbers of prospective class members saw or interacted with the statement. According to plaintiffs, California law does not ask whether class members actually saw or relied on representations, but simply whether the representations were consistently made and were material to a reasonable consumer.

I agree with plaintiffs. Where, as here, there is evidence that the representation was consistently made on a product's label, the only question is whether it was objectively material to a reasonable consumer. *Bradach v.*

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[9] Post argues — without citation to any evidence — that one Statement only appeared on a few packages for a brief time and that another Statement moved from the front to the side of the box during the relevant period. Oppo. to Class Cert. Mot. at 11 fns. 13, 14. Absent evidence, I will not follow the *Clorox* or *Ehret* courts in determining that an inference of classwide exposure to a particular Challenged Statement is unreasonable as a matter of law.

Pharmavite, LLC, 735 Fed. Appx. 251, 254 (9th Cir. 2018) (unpublished), *cert. denied*, *139 S. Ct. 491, 202 L. Ed. 2d 379 (2018)* ("Under **[**15]** California law, class members in CLRA and UCL actions are not required to prove their individual reliance on the allegedly misleading statements. Instead, the standard in actions under both the CLRA and UCL is whether 'members of the public are likely to be deceived.'"); *see also* Kumar v. Salov N.A. Corp., 14-CV-2411-YGR, 2016 U.S. Dist. LEXIS 92374, 2016 WL 3844334, at *4 (N.D. Cal. July 15, 2016) ("The statement appeared on the front of the bottle. Salov's arguments—that the font size and color were too small to make the statement stand out; that consumers would not misunderstand the language the way Kumar alleges; and the presence of a hang-tag on the bottle neck or a statement on the back of the bottle would have blocked consumers' view of the statement—all go to the proof of whether a reasonable consumer would have been misled, not to determining who meets the class definition."); *see* 2016 U.S. Dist. LEXIS 92374, [WL] at *7 ("To state a claim based on false labeling, "it is necessary only to show that 'members of the public are likely to be deceived.'" [] Thus the answer to the reasonable consumer question based on common facts, that is, identical statements on the labels of the products at issue."); Martin v. Monsanto Co., EDCV 162168-JFWSPX, 2017 U.S. Dist. LEXIS 135351, 2017 WL 1115167, at *7 (C.D. Cal. Mar. 24, 2017) ("Monsanto has 'failed to present any evidence that class members **[**16]** were able to purchase [the] products without being exposed to the alleged misrepresentations,' so predominance is satisfied."). When relevant, prominence goes to the materiality and misleading questions to be resolved by the jury.

Post's related arguments regarding materiality are also unpersuasive. First, Post faults plaintiffs for failing to conduct consumer surveys showing that each discrete Challenged Statement (*e.g.*, nutritious blueberries) conveyed that the Product was healthy as a whole. Oppo. Class Cert. Mot. at 13. Similarly, it complains that plaintiffs' evidentiary showing is fatally deficient because they have no stand-alone survey or expert evidence to show that the truthful and *unchallenged statements* (the ones I have found are preempted and not-actionable or otherwise unchallenged) are seen by class members as less material than the Challenged Statements.

Post's arguments rest on a mischaracterization of the operative questions at issue. As Judge Koh explained in Hadley I, "California courts have explicitly 'reject[ed] [the] view that a plaintiff must produce' extrinsic evidence 'such as expert testimony or consumer surveys' in order 'to prevail on a claim that the public **[**17]** is likely to be misled by a representation' under the FAL, CLRA, or UCL." Hadley I, 324 F. Supp. 3d at 1115 (internal citations omitted). Instead, testimony from plaintiffs' marketing expert Bruce G. Silverman — relying on his extensive experience in the industry, including marketing of cereal products, and Post's own documents — as well as the models developed by Gaskin and Weir, support that the Challenged Statements could have been material to the reasonable consumer. *See* Expert Report of Bruce G. Silverman [Dkt. No. 155-4] pgs. 45-124; *see also* Expert Report of Steven P. Gaskin [Dkt. No. 155-10]; Declaration of Colin G. Weir [Dkt. No. 155-12]. Post's experts Hanssens and Van Liere dispute Silverman's materiality **[*566]** conclusions, but those are issues to be ultimately resolved by the jury.

As to the unchallenged statements (preempted statements or otherwise unchallenged statements), their truthfulness and potential impact on the materiality of the Challenged Statements are questions to be resolved by the jury under the reasonable consumer standard. The jury will weigh the context of the Challenged Statements on the Products' labels, as well evidence of why Post decided to use the statements and how to place them on the **[**18]** Products, in order to determine whether "a reasonable consumer would attach importance to it or if 'the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action.'" Hinojos v. Kohl's Corp., 718 F.3d 1098, 1107 (9th Cir. 2013), *as amended on denial of reh'g and reh'g en banc* (July 8, 2013) (*quoting* Kwikset Corp. v. Super. Ct., 51 Cal. 4th 310, 333, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)). Despite Post's repeated arguments to the contrary, that a truthful or unchallenged statement might be material to a reasonable consumer (an issue which Post repeatedly chides plaintiffs and their experts for allegedly "ignoring") does not mean that a Challenged Statement cannot *also* be material and, therefore, actionable. A statement need not be the "'the sole or even the predominant or decisive factor influencing'" the class members' decisions to buy the challenged products. In re Tobacco II Cases, 46 Cal. 4th 298, 326, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009) (quoting Engalla v. Permanente Med. Grp., Inc., 15 Cal. 4th 951, 977, 64 Cal.Rptr.2d 843, 938 P.2d 903 (1997)).

Post's contention that some of the Challenged Statements may not actually be material to some putative class members because some of them may have healthier lifestyles and can afford to eat higher levels of sugar is not relevant under plaintiffs' theory and claims. *See Hadley I, 324 F. Supp. 3d at 1101* ("Kellogg's unpersuasive argument appears to stem from a mistaken assumption that the injury **[**19]** that Plaintiff is seeking to redress in the instant case is physical in nature.").

Finally, plaintiffs' challenge to so many Challenged Statements across so many Product lines *does* make litigation of this case — and plaintiffs' burden of proof at trial — complex. But that complexity does not mean predominance is undermined. The materiality of each set of claims, divided as necessary for each label used for each Product, can be determined on a classwide basis. Post points out that some of the labels for Products at issue were redesigned during the class period and that raises additional predominance issues. These arguments, however, show only that plaintiffs have a complex case to prove given its breadth and scope. They will need to prove that reasonable consumers would be misled by each particular label used for each Product during the class period (unless the parties can stipulate to a smaller subset of challenges to present to the jury). This reality, however, does not mean that individualized issues predominate over the complex but common ones.[10]

b. Damages Models and Consistency with Liability Theories

Post next contends that **[**20]** plaintiffs' damages models do not match their liability theory **[*567]** and, therefore, must be excluded. Without those models, Post notes, individualized damages issues would predominate. As discussed in depth below in connection with Post's motion to exclude the expert opinions (and damages models) proffered by Gaskin and Weir, plaintiffs' Consumer Impact/Price Premia Model "fits" plaintiffs' theory of liability and is reliable and admissible for purposes of proving classwide damages. Plaintiffs' second model, the Advantage Realized Model does not fit (as it does not accurately measure the restitution available to class members under the California consumer protection statutes at issue), but that does not undermine predominance because the first model is admissible.

Plaintiffs have satisfied the predominance requirement.

2. Superiority

Post contends that a class action is not superior to resolve the claims at issue here because of the impossibility of identifying class members. However, "plaintiffs' class definitions provide objective criteria that allow class members to determine whether they are included in the proposed class," and that is sufficient. *Farar v. Bayer AG, 14-CV-04601-WHO, 2017 U.S. Dist. LEXIS 193729, 2017 WL 5952876, at *14 (N.D. Cal. Nov. 15, 2017)*. Moreover, **[**21]** as affirmed by the Ninth Circuit in *Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1129 (9th Cir. 2017)*, *cert. denied sub nom. ConAgra Brands, Inc. v. Briseno, 138 S. Ct. 313, 199 L. Ed. 2d 206 (2017)*, it is not a barrier to class certification that consumers may be required to self-identify to attest to purchasing the Products at issue. *Id. at 1132*; *see also id. at 1129* ("The notion that an inability to identify all class members precludes class certification

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[10] In support of this argument, Post relies on *Reitman v. Champion Petfoods USA, Inc., CV181736DOCJPRX, 2019 U.S. Dist. LEXIS 221941, 2019 WL 7169792, at *9 (C.D. Cal. Oct. 30, 2019)*. There, the court determined that individualized issues predominated where plaintiffs sought certification of one class of purchasers of 23 different formulas of dog food whose packaging contained some of four sets of challenged statements. Specifically, the court found individualized issues predominated because whether the challenged phrases ("biologically appropriate," "fresh," "regional" or "local") were false or misleading would require individualized analysis of the ingredients and production location of each different variety of dog food sold with those statements. *Reitman* is not persuasive for a number of reasons. First, plaintiffs here propose subclasses for purchasers of each Product, as opposed to seeking one broadly defined class as in *Reitman*. Second, in this case plaintiffs have produced sufficient evidence of materiality each of the Challenged Statements. That plaintiffs will have to prove that materiality for each Challenged Statement on each different Product for each subclass means this case is complex. But those issues are common and predominate across each subclass. There are no truly "individualized" issues given the way these claims are assessed under California's consumer protection statutes. Defendant's motion and stipulation to address the *Reitman* case (Dkt. Nos. 224, 225) are GRANTED.

cannot be reconciled with our court's longstanding *cy pres* jurisprudence."). Plaintiffs have satisfied the superiority requirement.

For the foregoing reasons, plaintiffs' motion for class certification is GRANTED. The following subclasses are hereby certified:

> All persons who, on or after August 29, 2012 (the "Class Period"), purchased in California, for household use and not for resale or distribution, one or more of the following Post cereal varieties:
>
> **Great Grains Subclass**: Raisins, Dates, and Pecans (16 or 40.5 oz. package); Crunchy Pecan (16 oz.); Cranberry Almond Crunch (14 oz.); Blueberry Pomegranate (15.9 oz.); Banana Nut Crunch (15.5 oz.); Protein Blend: Honey, Oats, and Seeds (14.75 or 13.5 oz.); and Protein Blend: Cinnamon Hazelnut (14.75 or 13.5 oz.).
>
> **Honey Bunches of Oats Subclass**: Honey Roasted (14.5, 18, 23, 24.5, 27, 28, 36, or 48 oz.); Almonds (14.5, 18, 23, 24.5, 27, 28, **[**22]** 36, or 48 oz.); Raisin Medley (17 oz.); Pecan Bunches (14.5 oz.); Cinnamon Bunches (14.5 or 18 oz.); Vanilla Bunches (18 oz.) Apple & Cinnamon Bunches (14.5 oz.); Real Strawberries (13, 16.5, or 20 oz.); Fruit Blends: Banana Blueberry (14.5 or 18 oz.); Fruit Blends: Peach Raspberry (14.5 or 18 oz.); Tropical Blends: Mango Coconut (14.5 or 18 oz.); Greek Honey Crunch (12.5 or 15.5 oz.); and Greek Mixed Berry (12.5 or 15.5 oz.).
>
> **Honey Bunches of Oats Whole Grain Subclass**: Vanilla Bunches (18 oz.); Honey Crunch (18 oz).
>
> **Honey Bunches of Oats Granola Subclass**: Honey Roasted (11 or 20 oz.); Cinnamon (11 oz.); Raspberry (11 oz.).
>
> **Raisin Bran Subclass**: Raisin Bran (20 or 25 oz.).
>
> **Bran Flakes Subclass**: Bran Flakes (16 oz.).
>
> **Alpha-Bits Subclass**: Alpha-Bits (11.5 or 12 oz.).
>
> **Honeycomb Subclass**: Honeycomb (12.5, 16, 33, or 35 oz.).
>
> **Waffle Crisp Subclass**: Waffle Crisp (11.5 oz.).[11]

Plaintiffs Krommenhock and Hadley are appointed as Class Representatives and the Law Office of Jack Fitzgerald, PC is appointed as Class Counsel. Counsel shall meet and confer promptly with respect to the form and dissemination of Class Notice. Any disputes **[*568]** regarding the same shall be raised so that they can be addressed at the **[**23]** next Case Management Conference.

II. POST'S MOTION FOR SUMMARY JUDGMENT

Post moves for summary judgment against all of plaintiffs' claims. Its main argument is that because plaintiffs admit the Challenged Statements — standing alone — are true and because the health impacts of added sugar are subject to ongoing disputes in the scientific and public health communities, the Statements are immune from attack under the *First Amendment*. It also asserts that seven of the Challenged Statements are implied nutrient or health claims that are protected under the federal *Nutrition Labeling and Education Act (NELA)*, which preempts the state law claims. Finally, it contends that plaintiffs' request for injunctive relief and punitive damages should be rejected because they have not shown disputes of material fact potentially entitling them to any remedy.

A. Legal Standard

[11] To the extent the scope or definition of the certified Subclasses needs to be amended in light of my rulings below with respect to preemption, the parties shall meet and confer and submit an agreed-to revised definition of the certified Subclasses.

Summary judgment on a claim or defense is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. In order to prevail, a party moving for summary judgment must show the absence of a genuine issue of material fact with respect to an essential element of **[**24]** the non-moving party's claim, or to a defense on which the non-moving party will bear the burden of persuasion at trial. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Once the movant has made this showing, the burden then shifts to the party opposing summary judgment to identify "specific facts showing there is a genuine issue for trial." *Id.* The party opposing summary judgment must present affirmative evidence from which a jury could return a verdict in that party's favor. *Anderson v. Liberty Lobby, 477 U.S. 242, 257, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

On summary judgment, the court draws all reasonable factual inferences in favor of the non-movant. *Id. at 255*. In deciding the motion, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* However, conclusory and speculative testimony does not raise genuine issues of fact and is insufficient to defeat summary judgment. *See* *Thornhill Publ'g Co., Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979)*.

B. Truthful, Non-Misleading Speech

Post argues that it is undisputed that the majority of the Challenged Statements — standing alone and not considering the level of added sugar in the Products — are true because they disclose that "healthy ingredients" that are in the Products. Post next argues that the Challenged Statements "are not **[**25]** even arguably misleading because they cannot be read to convey any message about the healthiness of added sugar," but even "if the statements could be found to speak indirectly about the healthiness of added sugar by speaking indirectly about the healthiness of Post's cereals, they communicated a constitutionally protected viewpoint based on mainstream science—namely, that nutrient-dense cereal containing some added sugar can be part of a healthy diet." Post MSJ [Dkt. No. 163] at 11. Acknowledging both that the *First Amendment* does not protect misleading advertisements and that whether speech is misleading is generally a question of fact, Post nevertheless contends that whether the Challenged Statements "fall[] beyond the protection of the *First Amendment*" is a legal question I should address at this juncture. *Id.* at 12.

At base, Post contends that the Challenged Statements cannot be considered misleading and are constitutionally protected because they conveyed "important, truthful information about specific ingredients and nutritional attributes that consumers had a compelling interest in receiving and did not," standing alone, "make a claim about the healthiness of the cereal as a whole." *Id.* at 13. It argues that such truthful **[**26]** statements are protected even if they could be considered misleading by a jury when considered with other information disclosed or not disclosed about **[*569]** the Products. But its position rests only on inapposite, out-of-circuit authority addressing government restrictions on speech, *not* generally applicable consumer protection statutes.[12] In the Ninth Circuit, and as

[12] The focus of each of the cases is the application of the Supreme Court's *Central Hudson* test for regulations on commercial speech. In *Ocheesee Creamery LLC v. Putnam, 851 F.3d 1228 (11th Cir. 2017)*, the court addressed whether the state could prohibit a dairy from advertising its "skim milk products" because they did not contain vitamin A. Applying the *Central Hudson* test, the Eleventh Circuit rejected the idea that misleading speech, subject to regulation under *Central Hudson*, could be defined as anything "inconsistent with the state's preferred definition." *Id. at 1238*. The case here does not address any state action other than the general application of California's consumer protection statutes to allegedly misleading speech. Similarly, in *Dunagin v. City of Oxford, Miss., 718 F.2d 738 (5th Cir. 1983)*, the Fifth Circuit rejected the idea that a state can outright ban commercial speech that may not "tell the whole truth" about a product in light of the "policy" to generally "leave it to the public to cope for themselves with Madison Avenue panache and hard sells." *Id. at 750*. The Fifth Circuit, nonetheless, concluded that the state's ban on billboard's advertising alcohol satisfied the *Central Hudson* test and passed constitutional muster. *Id.*; *see also* *Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 637 (6th Cir. 2010)* (where science was unsettled, a proposed label statement could not be considered "inherently misleading" as a matter of law and, therefore, application of remaining *Central Hudson* factors was necessary). Post implicitly concedes that these cases are inapposite by never discussing the *Central Hudson* factors, so central to the cases discussed above, in the case at bar.

recognized by the California Supreme Court, California's consumer protection statutes "prohibit 'not only advertising which is false, but also advertising which [,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.'" *Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008)* (quoting *Kasky v. Nike, Inc., 27 Cal.4th 939, 951, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002))*.

Post also argues that its truthful statements cannot be challenged on the basis that the added sugar in the Products makes those statements misleading because "mainstream science supports" its view that Post's cereals are "healthy" despite the added sugar. Post MSJ at 17-18. However, plaintiffs have ample, albeit disputed, evidence that the Products are not "healthy" given the amounts of added sugar in them and considering consumer habits regarding **[**27]** serving size and frequency of consumption.[13]

Post's position that to survive summary judgment plaintiffs need to establish that Post's cereals are unhealthy due to their sugar content based on "undisputed and settled science" is without support. The Ninth Circuit has been quite clear that plaintiffs need not do more than what they have here in opposing summary judgment, creating a material issue of fact that the Products are unhealthy given the amount of added sugar. *Sonner v. Schwabe N.A., Inc., 911 F.3d 989, 992-93 (9th Cir. 2018)*. It reversed a district court that had required "not only producing affirmative expert evidence" but also evidence "foreclos[ing] any possibility" that defendant's products "provided the labeled benefits." *Id. at 992*. By doing so, the district court "elevated [plaintiffs'] burden well beyond what is usually required to defeat summary judgment." *Id.* The Ninth Circuit emphasized:

> [a]gain, a plaintiff need only show a triable issue of material fact to proceed to trial, [] not foreclose any possibility of the defendant's success on the claims. At trial, undoubtedly each party will seek to undermine the scientific bases underlying the opinion of the opposing party's expert. Those arguments, however, **[**28]** go to the weight that the fact-finder should give to the evidence, an inquiry that is not proper at the summary judgment stage.

[*570] *Id. at 992-93*. Neither the *First Amendment* nor *Article I of the California Constitution* require plaintiffs to do more at this juncture to survive summary judgment on their consumer protection claims. *See also* *Korolshteyn v. Costco Wholesale Corp., 755 Fed. Appx. 725, 726 (9th Cir. 2019)* (unpublished) (rejecting district court's "tougher, conclusive standard, holding that the existence of scientific studies supporting the alleged benefits of the product precluded the appellants from conclusively proving falsity in the appellees' product labeling").

C. Preemption

As both parties know, on extensive and highly contested briefing over two rounds of motions to dismiss, I accepted some of Post's preemption arguments agreeing that *some* of plaintiffs' claims as to specific Challenged Statements were preempted under the Nutrition Labeling and Education Act (NLEA), *21 U.S.C. § 343-1(a)(4)-(5)*. Dkt. 88 at 12-22; Dkt. 116 at 10-16. Re-raising a defense Post asserted and argued in both of its motions to dismiss, Post argues on summary judgment that seven of the Challenged Statements are preempted by federal law.

Plaintiffs note that I considered and rejected a preemption defense with respect to three of the re-challenged statements at the motion **[**29]** to dismiss stage and contend that holding should be considered law of the case. They also argue, with respect to each of the seven statements identified in Post's motion for summary judgment, that Post should not be able to re-raise the preemption defense because it has not shown that reconsideration is

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[13] Post's reliance on cases challenging FDA attempts to ban or rewrite labels is similarly unhelpful. Those cases apply the *Central Hudson* test and District of Columbia circuit authority balancing restrictions on commercial speech with compelled speech concerns. The analyses in those cases are not helpful to my resolution of the questions before me. *See, e.g.,* *All. for Nat. Health U.S. v. Sebelius, 786 F. Supp. 2d 1, 24 (D.D.C. 2011)* (applying *Central Hudson* and rejecting FDA's attempted rewrite of a label disclaimer, because "[w]here the evidence supporting a claim is inconclusive, the *First Amendment* permits the claim to be made; the FDA cannot require a disclaimer that simply swallows the claim."); *Whitaker v. Thompson, 248 F. Supp. 2d 1, 11 (D.D.C. 2002)* (addressing FDA prohibitions on label claims).

appropriate under Civil *Local Rule 7-9*. Oppo. MSJ at 16-17. Given plaintiffs' broad attack on 45 different Challenged Statements on 31 different varieties of Products, and recognizing that Post had limited space to raise and discuss every meritorious preemption challenge at the motion to dismiss stage, I will consider each of the preemption challenges raised in its motion for summary judgment.

1. Implied Nutrient Claims

Post argues that the following Challenged Statements are preempted, FDA-authorized implied nutrient content claims:

- **Bran Flakes**: "CONTAINS DIETARY FIBER to Help Maintain Digestive Health."

- **Bran Flakes**: "Whole grains provide fiber and other important ingredients to help keep you healthy. Diets rich in whole grain foods and other plant foods, and low in total fat, saturated fat and cholesterol, may help reduce the risk of heart disease and some cancers. Post Bran Flakes provides 21g whole grain per serving, **[**30]** that's 44% of your day's whole grains!"

- **Raisin Bran**: "Post Raisin Bran has 8g of natural fiber, making it an Excellent Source. Fiber is good for digestive health."

- **Honey Bunches of Oats Greek**: "WHOLESOME NUTRITION: 5g of protein and 33g of whole grain perserving, that's over 2/3 of your day's whole grain "

- **Honey Bunches of Oats Granola** (Honey Roasted, Cinnamon, and Raspberry varieties): "With 3g of fiber and 34g of whole grain per serving, it's the perfect combination of wholesome goodness and honey-sweet crunch that everyone in your entire family will love."

- **Alpha-Bits**: "ALPHA-BITS IS A GOOD SOURCE OF NUTRIENTS THAT ARE BUILDING BLOCKS FOR YOUR CHILD'S DEVELOPING BRAIN: -IRON helps deliver oxygen to the brain & body -ZINC helps brain & body cells grow and develop -B VITAMINS B1, B2, B6, & B12 help support a healthy nervous system"

MSJ at 19-20. Post points out that for each Challenged Statement, plaintiffs omitted the underlined language that demonstrates these statements are protected implied nutrient claims.

As explained in my June 2017 Order on the first motion to dismiss, an implied nutrient content claim "[d]escribes the food or an ingredient therein in a manner that suggests that a nutrient **[**31]** is absent or present in a certain amount (*e.g.*, 'high in oat bran')" and might also suggest that the food is compatible with a healthy or nutritional diet because of its nutrient content. Dkt. No. at 88 at 14-15; *see also* March 2018 Order [Dkt. No. 116] at 8; *21 C.F.R. § 101.13(b)(2)(i)-(ii)*. In my **[*571]** March 15, 2018 Order on the second motion to dismiss, I noted in determining whether an implied nutrient claim has been made, the court must consider the context of where the challenged claim is made; while the "magic words" that might create an implied nutrient claims do not "need to be directly adjacent to the discussion of a nutrient to create an implied nutrient content claim, [] there must be connection given the words, their placement, and their context," analyzing whether the nutrient statement is "connected by context to the other representations." March 2018 Order [Dkt. 116] at 12. For example, I rejected plaintiffs' attempt to excise "excellent source of fiber" from a paragraph that was wholly "focused on 'fiber' and that the product is an 'excellent source' of that fiber. Plaintiffs cannot excise the 'excellent source' of fiber, which is integral to the whole paragraph about fiber, to avoid preemption as an implied nutrient content **[**32]** statement." *Id.*

I rejected Post's argument that the two Bran Flakes statements above, as well as the Raisin Bran statement, were implied nutrient content claims because those statements did not (upon my initial review) appear to be connected to "statements about the contents of the products at issue, much less an implication that the products at issue contain specific levels (or healthful levels of specific nutrients)." *Id.* at 16. I was wrong because I failed to consider the underlined text excised by plaintiffs. Viewing the language above, including the underlined language that plaintiffs do not dispute appears as part of the same phrase or in the same clause as the Challenged Statements, each of the three statements implies something specific about the levels or healthfulness of the nutrients identified (fiber and whole grains). They are, therefore, protected implied nutrient claims and subject to preemption under NELA.

Turning to the phrases that I have not already considered on the Honey Bunches of Oats (HBO) and Alpha-Bits Products, plaintiffs do not dispute that the underlined language establishes implied nutrient claims because each of them discloses the actual content of nutrients in **[**33]** the Products. Instead, plaintiffs complain that Post originally challenged these statements as mere puffery and asked me not to consider the surrounding, factual context. Perhaps. But looking to the question before me now, "Wholesome Nutrition" on the HBO Products is clearly followed by relevant and connected text identifying the amounts of protein and whole grains per serving. Oppo. to MSJ at 19. Wholesome Nutrition, as used in this context, is an implied nutrient content claim.

Similarly, the phrase "[w]ith 3g of fiber and 34g of whole grain per serving, it's the perfect combination of wholesome goodness and honey-sweet crunch that everyone in your entire family will love" on the HBO Products is the explicit disclosure of specific amounts of nutrients that turns "wholesome goodness" into part of the implied nutrient content claim. The Alpha-Bits Challenged Statement, when read in full and in context, discloses the basis for the "good source" of nutrients claims because the iron, zinc, and B vitamins are identified immediately following the good source claim. *Id.*[14]

These six Challenged Statements are implied nutrient claims that are protected by NELA and its regulations and are not actionable as part of **[**34]** plaintiffs' false or misleading claims.

2. Health Claim

Post also argues that the claim on a number of Honey Bunches of Oats products is a preempted health claim: "Heart Healthy **-** Diets low in saturated fat and cholesterol, and as low as possible in trans fat, may reduce the risk of heart disease." Plaintiffs admit that the underlined language is a health claim, that was considered and approved by the FDA under the *FDA Modernization Act (FDAMA), 21 U.S.C. § 343(r)(3)(C)*. Oppo. at MSJ at 20. But they omitted the underlined text from the Challenged Statement and want to challenge *only* **[*572]** the use of "Heart Healthy" and the heart image on the Product's package.

Post contends that the Heart Healthy statement must be considered along with the remaining language and should be considered part of the authorized health claim. Plaintiffs counter that because the words "Heart Healthy" were not approved by the FDA, those words cannot be considered an authorized claim under FDAMA but instead is an unauthorized health claim under *21 C.F.R. § 101.14(e)*.

I agree with Post that simply leading with "heart healthy" as a summary but then directing the reader to the express language approved by the FDA for a permissible health claim is a preempted health claim. The same conclusion **[**35]** was reached where a court considered packaging that combined "'heart healthy' statements and images of hearts with the claim that 'diets rich in whole grain foods and other plant foods and low in saturated fat and cholesterol may help reduce the risk of heart disease.'" *In re Quaker Oats Labeling Litig., C 10-0502 RS, 2012 U.S. Dist. LEXIS 42777, 2012 WL 1034532, at *3 (N.D. Cal. Mar. 28, 2012)*. In *Quaker Oats*, the Hon. Richard Seeborg considered FDA approved language with the use of "heart healthy" or a heart graphic. He explained that the FDA regulation (*21 C.F.R. § 101.14(d)(2)(iv)*) expressly provides for a reference statement directing the consumer to further information located elsewhere on the packaging. Accordingly, he found that while "heart

[14] Plaintiffs' attempt to characterize this Challenged Statement as a structure function claim — a differently regulated claim that must be truthful and not misleading, Oppo. to MSJ at 19 — does not help them. Plaintiffs do not contest that "good source of nutrients that are building blocks for your child's developing brain," specifically identifying iron, zinc, and B vitamins, is itself or in conjunction with other unidentified statements false or misleading.

healthy" was not shown directly next to the FDA approved health claim language, that was not a problem and claims using all of the relevant language were preempted. *2012 U.S. Dist. LEXIS 42777, [WL] at *3*.[15]

The Challenged Statements identified by Post, when read in context with the language that directly surrounds them, are preempted and may not form the basis of plaintiffs' false and misleading claims in this case.

D. Lack of Evidence Supporting Any Remedy

Separately, Post argues that plaintiffs "lack evidence" **[**36]** that would entitle them to injunctive or monetary relief and, therefore, summary judgment should be granted in its favor.

1. Injunctive Relief

Post argues, first, that plaintiffs lack standing to seek injunctive relief because there is no likelihood that either plaintiff will be in danger of buying Post's Products in the future as a result of false or misleading statements that these plaintiffs now realize are allegedly false or misleading. The Ninth Circuit has identified two circumstances where plaintiffs in false or misleading labeling cases may seek injunctive relief: (i) where plaintiffs "would like to" buy the product again but "will not" because they "will be unable to rely on the product's advertising or labeling" without an injunction; or (ii) where the consumer "might purchase the product in the future" because they "may reasonably, but incorrectly, assume the product was improved." See *Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 970 (9th Cir. 2018)*.

Post characterizes the deposition testimony from plaintiffs Krommenhock and Hadley as falling outside *Davidson*, because both admitted that they would never buy Post cereal again given the Products' high added sugar content. MSJ at 22-23. Plaintiffs respond that while Hadley testified in his deposition **[**37]** in this case that he "didn't know" if he would purchase the cereals again given their high sugar content (MSJ Ex., 18 at 344), in the case he filed against Kellogg Hadley indicated it was "possible" he'd purchase high sugar content cereals again. Oppo. to MSJ, Ex. 17 at 217.[16] Plaintiffs also rely on the assertion in their Second Amended Complaint that if they could be assured the cereals were properly labelled, plaintiffs would consider purchasing Post cereals again. SAC **[*573]** ¶ 120. Given these two sources, plaintiffs argue that Hadley's intent to purchase Post's products in the future creates a question of fact and provides the minimal showing to demonstrate standing under *Davidson*.

Considering Hadley's ambiguous testimony, his future intent can be explored at trial. Post-trial, on a full record, I can determine what injunctive relief might be appropriate and whether Hadley has standing to seek that relief.[17]

2. Monetary Relief

Post also argues that plaintiffs "lack evidence to support money relief" and summary judgment should, therefore, be granted in their favor. This argument, however, hinges entirely on Post's challenges to plaintiffs' proposed classwide

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[15] In *Hadley v. Kellogg Sales Co., 16-CV-04955-LHK, 2019 U.S. Dist. LEXIS 136791, 2019 WL 3804661 (N.D. Cal. Aug. 13, 2019)*, the court declined to find health claims preempted as approved FDAMA claims where the language on the packing was missing significant, materials words from the exact language approved by the FDA. *2019 U.S. Dist. LEXIS 136791, [WL] at *21*. Plaintiffs do not argue that is the case here and admit the underlined language is an approved FDAMA claim.

[16] Plaintiffs do not rebut or otherwise address Post's characterizations regarding Krommenhock's deposition testimony that she does not intend to purchase Post cereals in the future.

[17] Post's argument that injunctive relief is unnecessary because it adequately discloses its added sugar content (or will disclose it adequately in the future) will not be considered at this juncture. Whether past or current disclosures suffice to negate what may otherwise be false or misleading statements regarding the healthiness of Post's cereals should be determined, if necessary, following the jury's verdict.

damages models and application of **[**38]** those models by plaintiffs' experts Steven Gaskin and Colin Weir. Dkt. No. 175-1. For the reasons discussed below, plaintiffs' Consumer Impact Model adequately fits their theory of the case and is an acceptable method of proving classwide damages or restitution. Therefore, Post's argument fails.

E. Punitive Damages

Finally, Post argues it is entitled to judgment on plaintiffs' claim for punitive damages under plaintiffs' CLRA claim. California allows punitive damages only for wrongdoing that is shown by clear and convincing evidence to be fraudulent or "despicable." *Cal. Civ. Code § 3294(a)*, *(c)*. Post contends that because of the debate in the scientific community concerning whether nutrient-rich but sugar-heavy products like Post's are nonetheless "healthy," plaintiffs will not be able to make their heightened showing that Post's conduct in marketing its Products was intentionally wrong or despicable. Post notes that in the case against Kellogg, Judge Koh reached this issue on summary judgment and concluded that plaintiffs in her case did not raise an issue of material fact on punitive damages under the CLRA where their expert (Dr. Robert Lustig, one of plaintiffs' experts here) admitted that: (1) he could not **[**39]** identify one study finding that cereal consumption increases the risk of coronary heart disease, diabetes, or obesity; (2) his view on the dangers of consuming added sugar to heart health (referring to heart disease) is a minority view; and (3) his opinion about the dangers of consuming added sugar to heart health "is not the majority view of researchers." *Hadley v. Kellogg Sales Co., 16-CV-04955-LHK, 2019 U.S. Dist. LEXIS 136791, 2019 WL 3804661, at *16 (N.D. Cal. Aug. 13, 2019)* (*Hadley II*).

I will not reach this issue now. Given the dispute between the experts about the state of the science, the question of Post's own knowledge of and reaction to the science at different points in time, and Post's reasons for using the amounts of sugar it does in its Products, I conclude that whether plaintiffs can satisfy the heightened fraud or malice standard for punitive damages under the CLRA should be determined by the jury.

Post's motion for summary judgment is GRANTED to the limited extent that the seven preempted implied nutrient and health claims identified above are not independently actionable as Challenged Statements. The motion is DENIED in all other respects.

III. POST'S MOTION TO EXCLUDE GASKIN AND WEIR

As noted above, a significant argument in support of Post's opposition **[**40]** to class certification as well as its motion for summary judgment is that the economic models proposed by two of plaintiffs' experts, Stephen P. Gaskin and Colin B. Weir, are inherently faulty, do not "fit" plaintiffs' theory of the case, and do not capture on a classwide basis plaintiffs' potentially recoverable damages or restitution. Post does not challenge the qualifications of either expert but attacks the design of the conjoint and demand surveys they utilized and argues that the results either are unreliable or measure unrecoverable damages/restitution.

[*574] A. Gaskin

Steven P. Gaskin is a principal with Applied Marketing Science, Inc. ("AMS"), a market research and consulting firm. Gaskin Expert Report (Dkt. No. 155-10) ¶ 1. He developed two survey-based models to assess classwide impact and damages/restitution.

Consumer Impact Model/Price Premia — Conjoint Analyses. Gaskin was asked by counsel for plaintiffs to design, conduct, and analyze market research surveys and analyses that would enable him to assess the price premia resulting from the Challenged Statements on specific boxes of Post cereals and granola. *Id.* ¶ 8. To do that, Gaskin conducted nine conjoint surveys to estimate **[**41]** "the price premia (measured in dollars and/or percentage terms) caused by the presence of the affirmative misrepresentations on boxes of Post Great Grains, Honey Bunches of Oats Regular, Whole Grain, and Granola, Raisin Bran, Bran Flakes, Honeycomb, Alpha-Bits, and Waffle Crisp, meaning the difference in the value of these cereals or granola with the affirmative misrepresentations compared to the value of these cereals or granola without the affirmative misrepresentations." *Id.* ¶ 50. The resulting price premia, for each alleged misrepresentation, on each of the Products tested by Gaskin, ranged from $0.00 to $0.51. *Id.* ¶ 48.

Advantage Realized Model/Change in Demand — Demand Modeling Surveys. Gaskin also designed, conducted, and analyzed two market research surveys to enable him to test the effect of omission of information regarding the dangers of added sugar consumption on the Great Grains and Honey Bunches of Oats Products, and, thereby, on consumers' purchases during the relevant period. He concludes, as to the Demand Modeling Surveys and omitted information, that:

> The survey results indicated that Great Grains customers would have consumed, on average, 26.3% less Great Grains and **[**42]** Honey Bunches of Oats customers would have consumed, on average, 28.1% less Honey Bunches of Oats had they been aware of the omitted information. The percentage I calculated is applicable across all varieties of Great Grains and Honey Bunches of Oats cereal at issue in the class. Moreover, given the similarity of the results, and their high statistical significance, I believe it is reasonable to assume that a similar change **[*575]** in demand would apply to the remaining Class products. To be conservative, I would estimate the demand change for the remaining products as the lower of the two survey results, i.e., the 26.3% observed with respect to Great Grains.

Gaskin Report ¶72.

B. Weir

Colin B. Weir is Vice President at Economics and Technology, Inc. ("ETI"), a research and consulting firm specializing in economics, statistics, regulation and public policy. Weir Expert Report (Dkt. No. 155-12) at 1. Weir was retained to "ascertain whether it would be possible to determine damages on a class-wide basis using evidence common to Class members, and, if so, to provide a framework for the calculation of damages suffered by the class as a result of the allegedly false and misleading Claims." *Id.* ¶ 5. **[**43]**

Weir worked with Gaskin to develop both sets of Gaskin's surveys. Relying on the survey results, he then calculated total price premium damages. He concluded:

> If Plaintiffs successfully establish liability for all claims and all products during the time periods shown above in Table 2, total price premium damages would be $69,316,353.92.

Weir Report ¶ 65.

Weir also estimated the reduction in demand if certain alleged misrepresentations had not been made:

> The Gaskin Declaration sets forth the results of the demand model performed by Gaskin. Gaskin has identified that consumers would have consumed at least 26.3% less Great Grains and 28.1% less Honey Bunches of Oats had a disclaimer been made.54,55 Gaskin has affirmed that these factors "appl[y] across all varieties of Great Grains and Honey Bunches of Oats cereal at issue in the class. Moreover, given the similarity of the results, and their high statistical significance, I believe it is reasonable to assume that a similar change in demand would apply to the remaining Class products. To be conservative, I would estimate the demand change for the remaining products as the lower of the two survey results, i.e., the 26.3% observed with respect **[**44]** to Great Grains."

Id., ¶ 69. Using the most conservative percentage figure, and Post's sales data, Weir determined that the Change in Demand Damages if plaintiffs are successful on their claims is $140,417,315.41. *Id.* ¶ 73.

C. Gaskin's Conjoint Survey and Weir's Calculations to Establish Price Premia and Classwide Damages/Restitution

Post moves to exclude the Gaskin conjoint study, price premia determinations, and Weir's resulting calculations because: (i) the conjoint surveys and model do not "fit" plaintiffs' theory of liability; (ii) the surveys make no attempt to prove classwide impact, they just assume it; (iii) Weir's damages calculations are unreliable; and (iv) the surveys measure consumers' willingness to pay, not market price which are distinct concepts.

1. Fit

Both sides recognize that, as part of the predominance inquiry under *Rule 23*, plaintiffs must demonstrate that "damages are capable of measurement on a classwide basis." *Comcast Corp. v. Behrend, 569 U.S. 27, 34, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*.[18] Plaintiffs must present a damages model consistent with their theory of liability — that is, a damages model measuring "only those damages attributable to that theory." *Id. at 35*. "Calculations, need not be exact," but "at the class-certification stage (as at trial), **[**45]** any model supporting a 'plaintiff's damages case must be consistent with its liability case.'" *Id.* (quoting ABA Section of ***Antitrust Law***, Proving Antitrust Damages: Legal and Economic Issues 57, 62 (2d ed. 2010)). Significant to the claims asserted here, "[r]estitution under the UCL and FAL 'must be of a measurable amount to restore to the plaintiff what has been acquired by violations of the statutes, and that measurable amount must be supported by evidence.'" *Pulaski & Middleman, LLC v. Google, Inc., 802 F.3d 979, 988 (9th Cir. 2015)*.

Post argues that there is no *Comcast* fit here. It contends that because plaintiffs challenge only the implication of healthiness from the Challenged Statements, plaintiffs cannot challenge the many other truthful or non-actionable statements on the Products. It also asserts that the model fails because plaintiffs' experts did not try and isolate and test the Challenged Statements separate and apart from the value of the unchallenged or truthful statements. But its argument overreaches. The question under California law is whether the Challenged Statements are false or misleading to an objective reasonable consumer. *See, e.g., Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008)*. Plaintiffs' Consumer Impact Model assumes that is true, **[**46]** which is an appropriate starting point for a damages model (especially one in support of class certification). *See, e.g., Hadley I., 324 F. Supp. 3d at 1106* (accepting Gaskin's similarly-designed conjoint analyses model as sufficiently fitting plaintiffs' theory).

2. Methodology Challenges

The design, structure, and methodology Gaskin used to conduct the analysis in support of the Consumer Impact Model also fits plaintiffs' theory of damages. Similar conjoint surveys and analyses have been accepted against *Comcast* and *Daubert* challenges by numerous courts in consumer protection cases challenging false or misleading labels. ***[*576]*** *See, e.g., Hadley I, 324 F. Supp. 3d at 1107* (collecting cases).[19]

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[18] The questions of whether there is the required fit under *Comcast* and whether an expert's opinion should be excluded under *Daubert* are distinct. *See Hadley I, 324 F. Supp. 3d at 1106* ("whether Gaskin's proposed conjoint analysis is sufficiently reliable from a methodological standpoint—and therefore admissible under *Daubert*—is a different issue from whether the conjoint analysis satisfies *Comcast*."). Post challenges the fit of Gaskin's model and Weir's calculations as part of its opposition to Class Certification and as a separate ground in support of its motion for summary judgment; I will consider both the *Comcast* challenge and the more typical *Daubert*/reliability challenges on Post's motion to exclude.

[19] Despite relying heavily on Judge Koh's opinion in *Hadley I* excluding Gaskin's "demand realized model," Post never addresses why Gaskin's consumer impact model/conjoint survey analysis here differs from the one accepted by Judge Koh in *Hadley I*. Instead, it relies on inapposite cases. *See, e.g., Townsend v. Monster Bev. Corp., 303 F. Supp. 3d 1010, 1049 (C.D. Cal. 2018)* (rejecting survey that did not suggest materiality for challenged statements and suffered from focalism bias among other defects); *In re 5-Hour Energy Mktg. and Sales Practices Litig., 2017 U.S. Dist. LEXIS 220969, 2017 WL 2559615, at *10 (C.D. Cal. June 7, 2017)* (rejecting damages model that used improper proxy for consumer value or restitution with respect to misrepresented feature and failed to account for value of other features); *In re ConAgra Foods, Inc., 90 F. Supp. 3d 919, 1031 (C.D. Cal. 2015)* (questioning design of conjoint analysis where survey did not adequately connect "100% Natural" claim to no-GMO theory, but nonetheless accepting the damages model that utilized the conjoint surveys plus a hedonic regression

Post's many arguments regarding Gaskin's methodology go to weight and not admissibility. For example, it alleges that Gaskin failed to account for the placement of the Challenged Statements surveyed on the actual labels and failed to account for or otherwise test unchallenged or truthful statements. It argues that the reasonable consumer would not have been misled by Challenged Statement X because the reasonable consumer would have relied on Unchallenged Statement Y instead and that the reasonable **[**47]** consumer would not have been influenced by the fact the Product contains a significant amount of sugar because the reasonable consumer values "whole grains". Its challenges go to the weight, not admissibility, of the Consumer Impact Model. Post can argue these points at trial as a method of defeating an award or reducing the amount of damages/restitution awarded. *See, e.g., Hadley I, 324 F. Supp. 3d at 1108* (rejecting challenge that conjoint analysis failed to use actual labels or adequately identify actual ingredients, as in the Ninth Circuit, such criticisms about methodology, including a survey's "fail[ure] to replicate real world conditions," "go to the weight of the survey rather than its admissibility."). Its arguments that Gaskin's conjoint surveys and Weir's analysis fail to prove classwide impact because they did not take into account changes in pricing or consumers' willingness to pay price premia over time or location similarly go to the weight not admissibility of the Consumer Impact Model.

Post separately challenges Weir's calculations as unreliable because Weir did not match "sales to labels," as he did not independently verify which labels were on which Products at which times.[20] That may provide a basis **[**48]** for Post to argue to the trier of fact that damages or restitution should be reduced or rejected, but it does not undermine the fit or admissibility of the damages model.

Finally, Post argues that Gaskin's analysis and Weir's dependent conclusions suffer from two significant defects related to market pricing. First, Gaskin's methodology was incapable of measuring a change in market price because he failed to account for how a drop in demand, once Challenged Statements were removed, would result in a drop in price and/or quantity of Product sold. Second, Gaskin and Weir made no attempt to account for competitors' actions in the market, which also impacts Product pricing. *But see Hadley I, 324 F. Supp. 3d at 1106* (concluding Gaskin's "conjoint analysis adequately accounts for supply-side factors and does not merely measure demand-side willingness-to-pay," because the model utilized prices that "mirror" those actually observed in the market and based on actual sales data, and also holds quantity constant). Post cites no cases rejecting conjoint analyses for failures to account for these particular issues. While these attacks might be fodder for cross-examination, they are not grounds for exclusion.

Post's motion to exclude **[**49]** Gaskin and Weir's price premia damages model is DENIED.

[*577] D. Gaskin's Demand Surveys and Weir's Calculations to Establish Advantage Realized

Plaintiffs propose a second damages model, the "Advantage Realized Model," to capture the impacts that flow from Post's failure to disclose the sugar levels and related unhealthiness of its Products. This omissions-based model rests on two "demand surveys" designed by Gaskin to measure the effect of a "disclosure" to consumers of the Products' high sugar content and, according to plaintiffs, unhealthiness, using a testing group and a control group. Gaskin Report ¶¶ 52-53 ("This analysis was designed to determine the effect of the omitted information regarding the dangers of sugar consumption on the demand for Post Great Grains and Honey Bunches of Oats.").

Post moves to exclude this second model, arguing that Gaskin's demand surveys and Weir's calculations based on the theoretical change in demand: (i) measure only impermissible non-restitutionary disgorgement; (ii) rely on a survey design that is unscientific and unreliable; and (iii) propose a "warning" that flagrantly violates the *First*

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analysis); *In re NJOY, Inc. Consumer Class Action Litig., 120 F. Supp. 3d 1050, 1122 (C.D. Cal. 2015)* (rejecting analysis that failed to account for market pricing); *Apple, Inc. v. Samsung Elecs. Co., Ltd., 11-CV-01846-LHK, 2014 U.S. Dist. LEXIS 29721, 2014 WL 976898, at *12 (N.D. Cal. Mar. 6, 2014)* (inadequate showing of price premia to support injunction in patent infringement case).

[20] Nor could he, according to Post, given the complex distribution chain and the number of different label variants over time.

Amendment (Gaskin attempted to measure how much less cereal Post would have **[**50]** sold if the cereal boxes had included a warning about added sugar's unhealthiness). My analysis of the first argument is dispositive.

Judge Koh rejected a similar survey designed by Gaskin in the *Kellogg's* case. She determined that it measured only non-restitutionary disgorgement, which is not recoverable under California's Unfair Competition Law (UCL) or False Advertising Law (FAL). She explained that the demand surveys attempted to calculate how much money defendant made from products that Gaskin determined class members would not have otherwise purchased if the healthiness representations had not been made or the unhealthiness of sugar had been affirmatively disclosed. The surveys, therefore, did not measure "restitution," meaning funds secured by Post from class members, but non-restitutionary and not-recoverable disgorgement, meaning profits of defendant that did not flow from plaintiffs' purchases. *Hadley I, 324 F. Supp. 3d at 1114* ("the advantage realized model appears to 'focus[ ]' solely on Kellogg's 'unjust enrichment'—*i.e.*, the additional sales Kellogg gained from its allegedly deceptive omissions—and therefore seems to be capable of providing only a measure for nonrestitutionary disgorgement.").

Plaintiffs **[**51]** argue that Judge Koh's reasoning about the Advantage Realized Model in *Hadley I* was erroneous. They claim that she neglected to consider that the model is connected to actual retail sales of products purchased by class members, even though it focuses on Post's sales. According to plaintiffs, because those sales would not have otherwise occurred if the omitted information had been disclosed, this model accurately captures money that is owed *back* to plaintiffs.

Plaintiffs miss the point. As recognized by Judge Koh in *Hadley I,* plaintiffs do "not argue that Gaskin's proposed advantage realized model can be used to measure the loss incurred by the class—as opposed to the benefit gained by Kellogg—due to Kellogg's allegedly deceptive omissions." *Id. at 1114*. Without some connection to the amount of *actual* loss to actual class members (*e.g.*, what Post gained from the class members that it would not have but for the omissions), the appropriate amount of restitution cannot be determined. *See* *Colgan v. Leatherman Tool Group, Inc., 135 Cal. App. 4th 663, 697, 38 Cal. Rptr. 3d 36 (Cal. App. 2d Dist. 2006)*, *as modified on denial of reh'g* (Jan. 31, 2006) ("the 'object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.'" (quoting *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1149, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003))*.

By focusing **[**52]** on sales Post made to consumers who would not have otherwise purchased the Products (had they known the omitted information tested by Gaskin), the Advantage Realized Model ignores that the Products provided some value to the consumers despite the omitted information. It, therefore, is a full refund model of damages; it seeks a refund of the full price of the Products for those misled and injured purchasers. That model has been rejected by numerous courts when proffered in consumer product cases **[*578]** where the product provided some value. *See, e.g.,* *Allen v. Conagra Foods, Inc., 331 F.R.D. 641, 673 (N.D. Cal. 2019)*; *see also* *Chowning v. Kohl's Department Stores, Inc., 735 Fed. Appx. 924, 925, 2018 WL 3016908, at *1 (9th Cir. 2018)* ("The proper calculation of restitution in this case is price paid versus value received. Under California law, where a plaintiff obtains value from the product, the proper measure of restitution is 'the difference between what the plaintiff paid and the value of what the plaintiff received.'" (citation omitted)). By failing to account for the value actually realized by the class members from their purchase of the product, the Advantage Realized Model overstates the amount of restitution that might be owed to class members if plaintiffs prevail. It cannot be relied on to support the motion for class certification or to oppose defendant's **[**53]** motion for summary judgment.

Post's motion to exclude is DENIED, except to the limited extent that the Advantage Realized Model is not appropriate for and does not capture damages/restitution available to plaintiffs if they prevail. Plaintiffs cannot rely on the Advantage Realized Model for purposes of class certification or to oppose summary judgment. That said, the Consumer Impact Model does fit and is otherwise admissible. That model supports plaintiffs' motion for class certification and their opposition to Post's motion for summary judgment.

IV. PLAINTIFFS' MOTION TO EXCLUDE STROMBOM

Turning to an expert Post relies on to dispute the work of Gaskin and Weir, plaintiffs move to exclude Bruce Strombom's opinions. Strombom is an economist who opines that Gaskin and Weir's Consumer Impact/Price Premia Model: (i) is based on the flawed assumption that supply is perfectly inelastic, causing Gaskin/Weir to overstate price premia; (ii) improperly fails to account for the addition or deletion of the Challenged Statements on the Products; and (iii) did not, but should have, accounted for price variation over time. He adds that Weir's damages calculations are based on errors **[**54]** and are inaccurate .[21]

Plaintiffs move to exclude these opinions, arguing that: (i) Strombom is unqualified to render opinions on conjoint surveys; (ii) his opinions are based on a "legally-erroneous understanding of the proper measure of damages in this case" and therefore his "supply-side opinion" is wrong as a matter of law and irrelevant; (iii) his opinion depends on unreliable "before and after sales data." In addition, plaintiffs move to strike Strombom's opinions on Weir's "calculation error" and on "ascertainability" generally. MTE Strombom (Dkt. No. 190).

I need not resolve at this juncture whether Strombom is qualified to opine on conjoint surveys generally and whether he is qualified to criticize Gaskin and Weir conclusions in particular. I similarly do not need to address whether Strombom made errors in his own analyses (which go to weight and not admissibility, as with the majority of Post's attacks against Gaskin and Weir). I have concluded that the Consumer Impact Model and damages calculations proposed by Gaskin and Weir are sufficient to support class certification and oppose the motion for summary judgment. Strombom was only mentioned twice in connection with Post's motion **[**55]** to exclude Gaskin and Weir's Consumer Impact Model (where Post decided to fully argue its challenge to that model) in connection with the rejected arguments about Gaskin's failure to consider price across time and geographic location. MTE Gaskin & Weir at 15, 16 n.11. These and the other opinions Strombom provides in his Report, if considered, do not change my opinions about the admissibility of Gaskin and Weir's Consumer Impact Model and are not otherwise relevant to my determinations of the class certification or summary judgment motions.

With respect to plaintiffs' objections to Strombom's criticism that neither Gaskin nor Weir address how class members would be ascertained or damages determined for individual class members, these issues were not argued by Post in opposing class certification **[*579]** . Strombom Report ¶¶ 79-83. They are irrelevant for purposes of resolving the pending substantive motions, as I have determined the class is ascertainable and recognize that there are numerous ways aggregate damages can be fairly apportioned among injured class members if plaintiffs are successful at trial.

Plaintiffs' motion to exclude is DENIED without prejudice. Plaintiffs may, if Strombom intends to testify at trial, make **[**56]** more targeted attacks on Strombom's qualifications or on the irrelevance of his opinions *in limine* or at trial.

V. POST'S MOTION TO EXCLUDE SILVERMAN

Bruce G. Silverman is an advertising expert retained by plaintiffs to opine on: (i) the impact that advertising has on consumer perceptions regarding the health and wellness benefits of consumer products generally; (ii) consumer behavior and decision-making as it relates to labeling claims on cereal packaging; (iii) whether the challenged claims convey a material health message; and (iv) the materiality of information plaintiffs allege was deceptively omitted. Expert Report of Bruce G. Silverman (Dkt. No. 155-4), ¶¶ 1,4.

Silverman opines:

> 28. Consumers are interested in healthy eating and make food purchasing decisions based on health and wellness claims made on food packaging.
> 29. The challenged claims conveyed a health message, which is frequently bolstered by the context in which it is presented.

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[21] Plaintiffs also move to exclude Strombom's opinions regarding deficiencies in the Advantage Realized Model and Weir's calculations based on that model. However, as that model is not admissible, I need not reach these arguments.

> 30. Consumers receive the health message in advertising, at the store, and over time, at their breakfast tables as they are exposed to the details on the box itself.
> 31. The health message is material to consumers.
>
> 32. Consumers rely on health messages **[**57]** when deciding which cereal to purchase. This is true specifically of the accused products and challenged claims.
> 33. Disclosure of material information Plaintiffs allege Post omitted, i.e., warning consumers of the potential dangers of consuming the accused products, would change consumer behavior.

He concludes:

> 352. . . It is evident to me that Post's advertising and packaging for these products focuses heavily on the alleged health benefits embodied in the claims listed in Plaintiffs' complaint, and it is equally evident from the Post and other marketing studies I reviewed that consumers respond positively to them. Thus, the claims have a material effect on consumer purchasing behavior.
>
> 353. Moreover, it is evident to me that Post's disclosure of information about the potential health risks and effects of consuming the added sugar in the cereals at issue in this matter would change consumer eating and purchasing behavior. It is likely that sales of these products would decline as consumers who currently hold to the belief that the products are healthy would cut back or eliminate the products altogether from their diets. In addition to adding a warning label, in my opinion it might also **[**58]** be appropriate for Post to fund a corrective advertising or public relations campaign to inform the public that the products at issue in this matter contain unhealthy levels of sugar.

Silverman Report.

Post moves to exclude Silverman's opinions on the meaning and materiality of the Challenged Statements, arguing that he failed to address the specific Challenged Statements at issue in the "particular combinations" that they were used on Post cereal boxes and has no methodology to achieve that specificity. It also complains that Silverman conducted no consumer surveys or other tests, and instead relied on his own experience in the industry and its own documents to support his opinions on meaning and materiality.[22]

[*580] Post's argument that Silverman's opinions must be excluded because he did not conduct any focus group or other consumer testing is misplaced. As Judge Koh explained in *Hadley I*, "California courts have explicitly 'reject[ed] [the] view that a plaintiff must produce' extrinsic evidence 'such as expert testimony or consumer surveys' in order 'to prevail on a claim that the public is likely to be misled by a representation' under the FAL, CLRA, or UCL." *Hadley I., 324 F. Supp. 3d at 1115* (internal citations omitted). **[**59]**

Also without merit is Post's assertion that Silverman needed to have but had no methodology to support his analysis of meaning and materiality. As Judge Koh explained in *Hadley II*, because "Silverman's opinions are based on his many years of marketing experience and his review of Kellogg's own internal consumer research and other documents," the motion to exclude was denied. *Hadley II, 2019 U.S. Dist. LEXIS 136791, 2019 WL 3804661, at *24 (N.D. Cal. Aug. 13, 2019)*.[23] Silverman's in-depth experience in this field, including attending numerous focus groups centered on marketing cereal and developing marketing plans for cereal products, qualify him to opine on

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[22] Defendant also move to exclude Silverman's opinions regarding the Advantage Realized Model, which has been excluded from this case.

[23] Post's cases rejecting advertising experts' opinions based on experience are inapposite and not persuasive given plaintiffs' theory of liability in this case and Silverman's particular experience. *See, e.g., Jones v. ConAgra Foods, Inc., C 12-01633 CRB, 2014 U.S. Dist. LEXIS 81292, 2014 WL 2702726, at *15 (N.D. Cal. June 13, 2014)* (noting expert multiple admissions of potential insignificance of "100% natural label" and noting that expert's "rather startling admission might have something to do with the fact that there is no single, controlling definition of the word 'natural.'"); *GPNE Corp. v. Apple, Inc., 12-CV-02885-LHK, 2014 U.S. Dist. LEXIS 53234, 2014 WL 1494247, at *5 (N.D. Cal. Apr. 16, 2014)* (rejecting expert's proposed royalty rate based only on "30 years of experience" as "classic ipse dixit" reasoning).

the matters addressed in his Report. Post's challenges to Silverman's methodology and failure to consider specific issues go to weight, not admissibility.

Finally, Post's objections that Silverman did not consider other phrases on the packaging, other "possible influences" on consumer behavior, or Post documents not provided to him by plaintiffs' counsel, similarly go to the weight and not the admissibility of Silverman's testimony. The jury will consider the context of the Challenged Statements on the Products' labels, as well as relevant Post documents that **[**60]** impacted Post's decisions to use certain statements or how to place them, in order to determine whether "a reasonable consumer would attach importance to it or if 'the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action.'" *Hinojos v. Kohl's Corp., 718 F.3d 1098, 1107 (9th Cir. 2013)*, *as amended on denial of reh'g and reh'g en banc* (July 8, 2013) (*quoting* *Kwikset Corp. v. Super. Ct., 51 Cal. 4th 310, 333, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011))*. Post repeatedly chides plaintiffs and their experts for allegedly ignoring that a truthful statement might have been material to a reasonable consumer. But that does not mean that a Challenged Statement cannot *also* be material and, therefore, actionable. Further, a statement need not be "'the sole or even the predominant or decisive factor influencing'" the class members' decisions to buy the challenged products. *In re Tobacco II Cases, 46 Cal. 4th 298, 326, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009)* (quoting *Engalla v. Permanente Med. Grp., Inc., 15 Cal. 4th 951, 977, 64 Cal.Rptr.2d 843, 938 P.2d 903 (1997))*.

Post's motion to exclude Silverman's opinions is DENIED.

VI. PLAINTIFFS' MOTION TO EXCLUDE HANSSENS

Dr. Domonique M. Hanssens is a marketing professor who was retained by Post to review and respond to Silverman (advertising and marketing), Gaskin (survey), and Weir (survey and damages models). Hanssens opined that Gaskin's failed to account for all supply factors. **[**61]** Plaintiffs move to strike that opinion because Hanssens makes only a general criticism of conjoint analyses that have been repeatedly accepted as valid to set price premia by courts in this District. They argue that Hanssens' supply-side opinion is entirely theoretical and unworkable. And they move to strike Hanssens' opinion that Gaskin's price premia are not validated by real-world market data because Hanssens uses Strombom's **[*581]** report and data that plaintiffs have also moved to exclude as unreliable.

I need not resolve plaintiffs' challenges to Hanssens' qualifications or analysis because I have already accepted — for purposes of granting class certification and denying Post's motion for summary judgment — the validity and admissibility of the Gaskin/Weir Consumer Impact Model. Hanssens' challenges, considered on their merits, do not alter those conclusions. As with Strombom, if Hanssens intends to testify at trial, plaintiffs may make more limited and specific requests to exclude identified parts of Hanssens testimony *in limine* or at trial.

Plaintiffs also move to strike four of Hanssens' opinions that attempt to undermine Silverman regarding messaging and materiality. Some of Hanssens' **[**62]** opinions are not relevant under the California consumer protection statutes at issue, while others raise questions to be resolved by the jury.[24] Hanssens opines that Silverman's opinions "lack evidence" that all or most consumers were exposed to the Challenged Statements, that all or most consumers relied on them, that all or most consumers perceived statements to communicate healthiness, and that healthiness is material or that consumers would be impacted by plaintiffs' tested disclosure statement. The "lack of

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[24] Whether "all or most consumers" were actually exposed to and relied on Challenged Statements are not relevant questions under the California consumer protection statutes at issue. Some of Hanssens' opinions might support Post's arguments that given the context and placement of the Challenged Statements on the labels, and in light of other unchallenged statements, some or all of the Challenged Statements would not be material to a reasonable consumer. That, however, is a merits question that does not defeat class certification or require summary judgment to Post. *See* supra at 9, discussing *Bradach v. Pharmavite, LLC, 735 Fed. Appx. 251, 254 (9th Cir. 2018)* (unpublished), cert. denied, ***139 S. Ct. 491, 202 L. Ed. 2d 379 (2018)*** & *Kumar v. Salov N.A. Corp., 14-CV-2411-YGR, 2016 U.S. Dist. LEXIS 92374, 2016 WL 3844334, at *4 (N.D. Cal. July 15, 2016)*.

evidence" arguments do not undermine my conclusions discussed above that Silverman's opinions are reliable and admissible at this juncture to support class certification on materiality. The disclosure statement is not relevant as I have excluded the Advantage Realized Model. If Hanssens intends to testify at trial, plaintiffs may raise specific **[*582]** arguments to exclude identified portions of that testimony *in limine* or at trial. For purposes of ruling on the class certification and summary judgment motions, the motion to exclude is DENIED without prejudice.

VII. PLAINTIFFS' MOTION TO EXCLUDE VAN LIERE

Dr. Van Liere is an expert in conducting research surveys, **[**63]** market analysis, and sampling analysis retained by Post to conduct a consumer survey on its behalf to test the impact of some of the Challenged Statements and consumers' perceptions of sugar as healthy or unhealthy. Plaintiffs move to exclude the survey results, arguing that the results are biased and not based on a reliable methodology because: (i) only shoppers in malls were surveyed and numerous courts have criticized attempted extrapolation of the results of similar "mall intercept" surveys to broader populations; (ii) Van Liere failed to measure impact of Challenged Statements on Great Grains and Honeycomb cereals; and (iii) his opinion about consumers' healthy perception of cereals prior to 2012 is speculative and irrelevant.

I have concluded that plaintiffs satisfy the basic materiality showing (with the limited assistance of Silverman) to support predominance on class certification and survive Post's motion for summary judgment. As with Strombom and Hanssens, none of Van Liere's opinions undermine those determinations. Moreover, plaintiffs' challenges go primarily to the methodology and, therefore, the weight of Van Liere's survey and its results, not its admissibility.[25] If Van **[**64]** Liere intends to testify at trial, plaintiffs may raise specific arguments to exclude identified portions of that testimony *in limine* or at trial. For purposes of ruling on the class certification and summary judgment motions, the motion to exclude is DENIED without prejudice.

VIII. POST'S MOTION TO EXCLUDE LUSTIG AND GREGER

A. Lustig

Robert Lustig is an Emeritus Professor of Pediatrics in the Division of Endocrinology and was the Director of the Weight Assessment for Teen and Child Health (WATCH) Program at the University of California, San Francisco for 14 years. Lustig Expert Report (Dkt. No. 155-6), ¶ 7. He was asked by plaintiffs "to summarize relevant scientific and medical literature regarding the physiological metabolism and effects of added sugar consumption on the human body, both generally and specifically in relation to the types and amounts in the challenged cereals" and to "opine on the veracity of Post's labeling statements challenged in this lawsuit in light of the scientific evidence" and "on the scientific validity of a disclosure statement used in a 'demand study' that plaintiffs propose for this litigation." *Id.* ¶ 2.

As particularly relevant to these motions, Lustig **[**65]** opines:

> 4. Added sugar is a primary driver of chronic metabolic disease, such as Type 2 diabetes, heart disease, fatty liver disease, and tooth decay. This is not based on correlation; the scientific literature supports causation for each of these disease entities.
>
> 5. Accordingly, it is my opinion that:
>
> > a. regularly and/or excessively consuming Post cereals that have been challenged by plaintiffs—namely Great Grains, Honey Bunches of Oats, Honey Bunches of Oats Whole Grain, Honey Bunches of Oats

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[25] Citing no cases where mall intercept surveys were excluded, and not relying on any expert opinion but only on a citation to the National Academy of Sciences 2011 Survey Reference Guide, plaintiffs complain that Van Liere's mall intercept study's problems are so severe they do not simply undermine its weight but make it inadmissible. MTE Van Liere [Dkt. No. 191] at 5-6. I will not exclude Van Liere's study on the basis of that very limited and unsupported argument.

Granola, Raisin Bran, Bran Flakes, Alpha Bits, Honey Comb, and Waffle Crisp—is not healthy, and the excess added sugar is more detrimental to health than the fiber and/or vitamins can be considered beneficial; and

b. the disclosure statement used Plaintiffs' Demand Study propose is scientifically valid

Id. ¶¶ 4-5.

B. Greger

Dr. Michael Greger, M.D. FACLM is a graduate of Cornell University School of Agriculture, and Tufts University School of Medicine, a physician (licensed as a general practitioner specializing in clinical nutrition), and a founding member and a Fellow of the American College of Lifestyle Medicine. Greger Expert Report (Dkt. No. 155-8) at 5. Greger has been asked to: (i) opine on **[**66]** the health effects of added sugar consumption generally; (ii) identify, analyze, and summarize relevant scientific and medical literature regarding the health effects of cereal consumption, including concerning the consumption behaviors of cereal eaters; (iii) analyze and summarize any additional sources Post indicates it relied on to substantiate any challenged claim; and (iv) opine on whether, in light of the scientific evidence and their added sugar content, the Post cereals challenged by plaintiffs are generally healthy. *Id.* at 4.

Greger concludes that the Products are not generally healthy because: (i) the Products have high energy densities; (ii) the Products have sub-optimal carbohydrate-to-fiber ratios; (iii) the Products have high glycemic and insulinemic loads; and (iv) the trans fats in waffle crisp render the product particularly unhealthy. He also states that the "Mary Poppins" argument (the argument that the sugar content is necessary for "taste appeal" to "encourage children to consume needed nutrients at breakfast time," implying children just will not eat cereals that are less sugary) is fallacious and the "better choice" argument (the argument that sugary cereal is better **[**67]** than a donut) presents a false dichotomy. *Id.* at 40-46.

C. Motion to Exclude or Strike

1. Analytical Gaps

Post moves to exclude Lustig and Greger's opinions as not based on reliable methods because "they depend on unsupported leaps across two analytical gaps." Dkt. No. 164 at 5-15. Post claims that these experts: (i) espouse **[*583]** "theories about the health effects of added sugar in the overall diet [that] are not generally accepted"; (ii) make an unsupported leap from their claim about the health effects of added sugar to contend that the healthiness of particular foods can be judged solely on the basis of added sugar; (iii) make a further unsupported leap to claim that added sugar in breakfast cereals causes health issues, and this leap directly contradicts the existing science on breakfast cereals; and (iv) cannot "bridge their analytical gaps" with an unsupported conclusion that consumers eat too much cereal on a regular basis.

Post's arguments go to the weight of the testimony, not its admissibility. Lustig's and Greger's opinions are generally based on their own medical training, experience in practice, and research. If Post believes their opinions are in the minority or ignored contrary evidence **[**68]** or opinions, those are matters for cross-examination, not exclusion. *See, e.g., Hadley II, 2019 U.S. Dist. LEXIS 136791, 2019 WL 3804661 at *24* (denying motion to exclude Lustig despite recognition that some of his opinions were in the "minority," because his "opinions are based on his medical training, his experience treating obese children, his academic research, and his review of the scientific record. Kellogg's arguments as to why Dr. Lustig should be excluded go to weight and not admissibility."). The science and research around the impacts of high sugar consumption is continuing to develop. Even if Post is correct that these experts' opinions are currently in the minority, there *is* evidence supporting them. Simply being in minority does not mean that their opinions are excludable as unreliable.[26]

Finally, that Lustig and Gregor cannot identify any studies on sugar in "a particular food" (much less particularly in cereals) to support their opinions does not preclude their testimony. The "analytical gaps" Post complains of are nothing more than applying general research to the specific issues in this case. Those gaps can be explored on cross-examination.

2. Flawed Methodologies

Next, Post argues that the methodologies used by these two experts **[**69]** to review scientific literature were "fundamentally flawed" because they were biased in their article selection (Lustig allegedly rejected "industry funded" articles and Greger failed to conduct a "meta-analysis" or "systematic review" of literature) and drew "incorrect" conclusions from that literature. But Lustig's testimony is based on his own research and analysis of others' research and is not simply a "literature review." That he did not rely on or was dismissive of certain studies does not make his opinions excludable; Post may test them on cross-examination.

As to Greger's literature review, Post contends that it was too haphazard — literature was collected from Boolean searches, as opposed to a more systematic method of collection — and this lack of methodology combined with his lack of expertise in studying sugar led him to a number of demonstrable errors in his opinions. Post identifies only one study that was not included in Greger's search results and review. Other than that one study, Post does not actually challenge the *results* of Greger's searches themselves, other than to argue Greger failed to identify his selection criteria.[27] On that point, Greger offered to provide **[**70]** those criteria, but Post did **[*584]** not follow up. While Post asserts that Greger "did not follow any recognized method" for his literature review, Post provides no caselaw or other citations in support of that specific point.[28] Nor does Post show that Greger utilized a rejected or discredited methodology of identifying literature. Post's complaints about Greger's conclusions from his literature study go to the weight, not the admissibility, of his opinions.

3. Opinions Outside their Expertise

Finally, Post moves to exclude opinions expressed by Lustig and Greger that are alleged to be outside their areas of expertise.

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[26] Where experts point to "an objective source demonstrating that his method and premises were generally accepted by or espoused by a recognized minority" of those in the fields, the opinions may be admissible. *Lust by & Through Lust v. Merrell Dow Pharms., 89 F.3d 594, 597 (9th Cir. 1996)*. The developing evidence around the effects of sugar in the diet, and the different views of practitioners in the field that are based on accepted sources and methodologies, make inapposite the concerns acknowledged by the Supreme Court in *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)* with respect to "conjecture" and "known techniques" with minimal support. *Id. at 594* (recognizing that in ruling particular evidence admissible or inadmissible "'a known technique which has been able to attract only minimal support within the community' . . . "may properly be viewed with skepticism." (internal citations omitted)).

[27] In Reply, Post argues — without citation — that Greger missed "numerous studies" cited by its expert, Clemens. Reply on MTE Lustig & Greger at 12-13. I will not address unsupported arguments raised in Reply.

[28] Post, instead, relies on "pick and choose" cases where courts have criticized experts who picked and chose sources when conducting literature reviews and otherwise did not explain the conclusions and bases of their selected sources. *See, e.g., Lust by & Through Lust v. Merrell Dow Pharms., 89 F.3d 594, 596 (9th Cir. 1996)* (excluding expert who selectively picked the literature reviewed); *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices and Products Liab. Litig., 174 F. Supp. 3d 911, 929 (D.S.C. 2016)* (rejecting expert's literature review resulting from "cherry—picking articles based on the authors' biases").

a. Dr. Lustig's Opinions

In paragraph 26 of his report, Dr. Lustig opines about the healthcare costs of "chronic metabolic disease, such as diabetes and heart disease" and that, based in part on research paper he co-authored, there would be "savings in healthcare of $31 billion per year if we could reduce our added sugar consumption by 50%." Post moves to exclude those opinions as irrelevant, potentially misleading, and outside of Lustig's area of expertise. The objections are OVERRULED, as these comments are tied to Lustig's own publication and research.

Post also moves **[**71]** to exclude Lustig's comments in paragraph 31, that added sugar causes disease and that "if this were not true, then sugar taxation in Mexico, the U.K., 26 other countries around the world, and six cities in the United States, would not have been enacted." Post argues that Lustig is not an expert on public choice theory or political science, so he has no basis for opining about why laws were passed. The objection is OVERRULED because Lustig's background in law and public policy and his writing on policies (including taxation) to achieve sugar reduction provide necessary background for these opinions.

Post objects to Lustig's claims, in paragraphs 32 and 34, about the alleged "obfuscation of science" and "pressure" applied by the food "industry." Post objects to these opinions as gratuitous swipes outside his purported medical expertise, inflammatory, and irrelevant as not tied to Post. The objections are OVERRULED because the opinions are based on his review of industry-sponsored studies, but the objections may be renewed *in limine* or at trial.

Finally, Post objects to Lustig's characterization of the purpose, intent, and clarity of Challenged Statements in paragraph 44, on the grounds **[**72]** that Lustig is not an expert in marketing, consumer decision-making or how consumers interpret label statements, and because he did no independent investigation into how consumers interpret the labels. These objections are OVERRULED because they are based on his research experience, but the objections may be renewed *in limine* or at trial.

b. Dr. Greger's Improper Opinions

Post objects to Greger's frequent "gratuitous statements" throughout his Report that characterized the industry as "sugar pushers" and conspiracists like the tobacco companies as inflammatory and irrelevant as unconnected to any conduct of Post. The objections are OVERRULED, as based on Greger's review of literature of studies regarding cereals and the history of food-industry sponsored studies and his background as a nutritionist, but may be renewed *in limine* or at trial.

For the foregoing reasons, Post's motion to exclude the testimony in whole or in part of Lustig and Greger is DENIED.

IX. PLAINTIFFS' MOTION TO EXCLUDE CLEMENS

For their part, plaintiffs move to exclude Post's expert, Roger Clemens, who **[*585]** seeks to challenge the opinions of Lustig and Greger. Dkt. No. 170. Clemens opines that: (i) added sugar is not a primary **[**73]** driver of metabolic disease; (ii) consumption of cereal that contains sugar is safe; (iii) consumption of nutrient fortified cereals is an important source of good nutrition; (iv) global guidelines on dietary sugar are not consistent or based on similar quality scientific evidence; and (v) consumption of the Post cereals at issue provides health benefits to consumers. Dkt. No. 170 at 3-5.

Plaintiffs' move to exclude Clemens' opinions in full, arguing that Clemens: (i) is not qualified, as he is only a nutritional expert and not a medical doctor; (ii) failed to consider numerous "ground breaking" studies conducted by Lustig; (iii) was evasive and did not answer questions directly in his deposition; and (iv) gave irrelevant testimony because he never directly disputed the points made by Lustig and Greger, but instead attempted to reformulate the critical issue in this case as not whether one item was "unhealthy" but instead whether a person's diet as a whole was healthy.

The problem with plaintiffs' "qualifications" challenge is that plaintiffs do not dispute that Clemens is qualified to opine on pharmacology, pharmaceutical science, and biological chemistry or that he was a member of **[**74]** the 2010 Dietary Guideline Advisory Committee ("2010 DGAC"), albeit to address nutrients other than sugar. That Clemens has only limited experience directly addressing "sugar" does not automatically undermine his ability to opine on areas that are within his expertise; it does provide a ground on which to attack his opinions on cross-examination.[29] *In limine* or at trial plaintiffs may make more targeted attacks on Clemens' qualifications with respect to specifically identified opinions or testimony.

Plaintiffs next challenge the reliability of Clemens' opinions, arguing they are based on insufficient facts and data. These challenges go to weight, not admissibility. Plaintiffs' primary insufficiency challenge is based on Clemens' admissions in his deposition that he could not recall or failed to review key studies that were authored by or heavily relied on by Lustig as a basis for Lustig's opinions. In opposition, Post and Clemens address that charge by "clarifying" through a declaration and Clemens' deposition errata sheet (Dkt. Nos. 196-13, 200) that Clemens had, in fact, reviewed the majority of those studies when writing his Report and prior to his deposition.[30]

Plaintiffs' move to **[**75]** strike this argument and declaration, arguing that it is a "sham" made to contradict Clemens' deposition testimony and argue that Clemens should not be allowed to opine on the now-remembered and not-seen-before studies outside of his prior deposition. Dkt. No. 210. Reading the deposition testimony and his new declaration (as well as in the errata sheet), I conclude that Clemens' refreshed testimony is not a sham but a clarification that is not directly contradictory to his deposition statements. However, in order to avoid any prejudice to plaintiffs, Post shall produce Clemens for a subsequent deposition for up to two hours so that plaintiffs may ask Clemens about his newly-remembered consideration of the Lustig **[*586]** studies and references, as well as Clemens' opinions expressed in his declaration regarding the articles that were introduced at his deposition.[31]

Relatedly, plaintiffs challenge Clemens' testimony as unreliable because Clemens is not credible, given what plaintiffs characterize as Clemens' evasive, non-responsive, and contradictory answers in his deposition. These challenges, however, go to weight and not admissibility. Finally, plaintiffs move to exclude Clemens' opinions as **[**76]** irrelevant and unhelpful. Again, these challenges go to weight, not admissibility.

Plaintiffs' motion to exclude is DENIED. Plaintiffs may, however, raise narrowly tailored and precisely supported challenges to specific portions of Clemens' opinions or expected testimony *in limine* or at trial.

X. MOTIONS TO SEAL

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[29] In a particularly unhelpful manner, plaintiffs argue Clemens is broadly unqualified and then point to numerous instances in his deposition where he, arguably, walked back assertions made either in his Report or in his deposition. But plaintiffs do not identify with any specificity the paragraphs, pages, or subject matters from Clemens' Report that they want excluded because he is unqualified. MTE Clements [Dkt. No. 184] at 6-8. This broad-brush approach is not helpful. Identifying the parts and specific opinions in a report that a party wants to exclude tied to the evidence supporting that specific exclusion request is required, especially in this sort of case where many of the experts are opining on very broad ranges of topics resulting in numerous opinions.

[30] Clemens declares: "I did not recall a number of these articles at the time and so said that I had not seen them previously. Following my deposition, and as part of preparing my errata sheet, I reviewed my files to confirm whether I had in fact previously reviewed those documents. I identified several articles that I had previously reviewed in preparation of my report in this matter, but that I did not specifically recall during my deposition." Dkt. No. 200 ¶ 2. In his Declaration, Clemens also addresses other articles — one by Lustig and others that were introduced as his deposition that he admits he had not considered at that time — and explains his view of them now. *Id.* ¶¶ 4-6.

[31] Plaintiffs' remaining insufficiency challenges — that Clemens failed to consider industry funding a source of bias and that he relied on "outdated" sources — likewise go to the weight not the admissibility of Clemens' testimony.

In support of both sides' motions, each side seeks to file information designated as confidential by Post under seal. Dkt. Nos. 151, 152, 153, 154, 155, 174, 175, 178, 207. The information sought to be sealed is characterized by Post as its own confidential and proprietary information, discussing Post's sales and pricing data; distribution, sales and marketing strategies; product performance and development information; and Post's internal and third-party-conducted consumer research. It also includes information produced by third-parties, including Decision Insight which conducted marketing on behalf of Post as well as marketing studies produced by other third-parties hired by Post, and "highly confidential" sales figures produced by a third-party, IRI pursuant to a subpoena issued by plaintiffs.

Parties seeking to seal judicial records relating to motions that are "more than tangentially **[**77]** related to the underlying cause of action," *Ctr. for Auto Safety v. Chrysler Grp., 809 F.3d 1092, 1099 (9th Cir. 2016)*, bear the burden of overcoming the presumption of public access to court records with "compelling reasons supported by specific factual findings" that outweigh the general history of access and the public policies favoring disclosure. *Kamakana v. City & County of Honolulu, 447 F.3d 1172, 1178-79 (9th Cir. 2006)*. Here, as the motions for class certification, summary judgment, and to exclude experts are all central to the merits of this case Post must meet the compelling justifications standard in order to seal information at issue.

Compelling reasons justifying the sealing of court records may exist "when such 'court files might have become a vehicle for improper purposes,' such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets." *Kamakana, 447 F.3d at 1179*. However, "[t]he mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records." *Id.*

Post supports its broad requests to seal with the declarations of Ananta Engineer, who is a Senior Director of Insights and Planning at Post Consumer Brands, LLC. Dkt. No. 207-1, 174-1, 158. Engineer declares, **[**78]** generally, that given the "market for ready-to-eat breakfast cereal is highly competitive" and the "three large cereal makers (General Mills, Kellogg's, and Post) are closely monitoring the dockets in the cases brought by Plaintiffs' counsel against their competitors, including this case," and that if "the exhibits filed under seal are unsealed, they will almost certainly be reviewed by Post's competitors. And if Post's competitors see the information that Post has gathered and Post's thought processes in analyzing that information, they can use it to engage in more effective branding, advertising, product development, sales, and pricing for their own products, to Post's competitive disadvantage." Engineer Decl. [Dkt. No. 174-1] ¶ 3.

I agree that sealing is merited for some of the very specific, detailed financial figures and undisclosed marketing plans included in the record as disclosure of that information would likely cause Post competitive harm. **[*587]** However, even a cursory review of the expansive amounts of material Post seeks to seal show the requested sealing is overbroad. Examples of information Post seeks to seal from plaintiffs' motion for class certification includes: (i) very **[**79]** general statements regarding consumption of cereal products (noting that it is the "Top Food[] Consumed at Breakfast"); (ii) general statements regarding consumers' interests in convenient and healthy food options (consumers eat cereal is because of its "convenience and nutritional benefits"); (iii) and the fact that "Cereal boxes are read with interest and in detail," and represent a quality "opportunity to engage with target consumers." Dkt. No. 155-2 at 2-5. It is likely that much of this information (and similar information repeated throughout the motion papers, expert reports, and exhibits) is well known in the industry, if not by the public at large. The simple fact that something is cited from a report produced by a third-party marketing consultant or by members of Post's in-house marketing team does not make it sealable. Information may be sealed from the public *only* if it is truly confidential, not generally known, *and* its disclosure would likely cause Post competitive harm.

One example from the Expert Reports concerns information produced for Post by Decision Insight. Post seeks to seal the following highlighted information regarding studies discussed in the Hanssens Report: **[**80]** those "studies include some analyses evaluating different cereal packaging options based on test and control study designs. However, these analyses are still inadequate for the purpose of evaluating the challenged claims in this case because they do not isolate the challenged claims separately, independent of other changes to the cereal packaging. *See* Decision Insight Report for Post, "Post Great Grains Cereal ShopperIQ Packaging Study," July 7, 2016, DI_0000047-87." Hanssens Report, Dkt. No. 174-10, at 5 n.13. It is hard to see how disclosure of this very general description of studies conducted by Decision Insight would not be generally known by Post's competitors and how disclosure could cause any harm whatsoever to Post.

Similar examples abound throughout the administrative motions to seal. These sorts of overbroad requests to seal will not be granted. *See, e.g.*, *Hadley v. Kellogg Sales Co., 16-CV-04955-LHK, 2018 U.S. Dist. LEXIS 224314, 2018 WL 7814785, at *3 (N.D. Cal. Sept. 5, 2018)* (rejecting overbroad sealing request of general consumer preference information). The very generalized declarations from Engineer explain why certain categories or types of information might be sealable, but those declarations do not (with some limited exceptions) address the filings **[**81]** on a line-by-line basis.

Therefore, the motions to seal are DENIED without prejudice. Within **twenty (20) days of the date of this Order** Post shall, after meeting and conferring with plaintiffs, file a chart identifying by document name, sealed Docket number, and page and line/paragraph number the precise information it maintains should remain under seal. That chart shall include citations to a declaration from Engineer (or another representative of Post with personal knowledge) attesting that the precise information at issue is confidential and not publicly known, and identifying the competitive harm that would likely flow from public disclosure of that precise information.

The filings currently conditionally under seal will remain conditionally under seal until I make a final ruling on sealing after reviewing the chart and declaration(s). At that juncture, the parties will be directed to e-file redacted documents that redact only the information I have determined may remain under seal.

CONCLUSION

Plaintiffs' motion for class certification is GRANTED. Post's motion for summary judgment is GRANTED in limited part with respect to identified preempted Statements and DENIED in all other respects. **[**82]** The motions to exclude are DENIED, except that the Advantage Realized Model cannot be used as a measure of classwide damages/restitution. The administrative motions to seal are DENIED without prejudice. Post shall submit the required sealing chart and supporting declarations within twenty days of the date of this Order.

[*588] A further Case Management Conference is set for April 28, 2020 at 2:00 p.m. If there are disagreements about the content or delivery of Class Notice, the parties shall identify them in the Joint Case Management Conference Statement, to be filed by April 21, 2020. The parties shall also propose a trial schedule. At that Conference, the Court will resolve any disputes and set this matter expeditiously for trial.

IT IS SO ORDERED.

Dated: March 9, 2020

/s/ William H. Orrick

William H. Orrick

United States District Judge

Biofrontera Inc. v. Dusa Pharms.

Superior Court of California, County of Orange

March 10, 2020, Decided

30-2018-01003843-CU-BT-CJC

Reporter

2020 Cal. Super. LEXIS 37309 *

Biofrontera Inc. v. DUSA Pharmaceuticals, Inc.

Core Terms

samples, cause of action, demurrer, subdivision, unfair, notice, alleges, unfair competition, leave to amend, dermatologist, practices, cognizable, grounds, lose money, Pleadings, Pricing, demurrer to amended complaint, original complaint, sustain a demurrer, written request, injury in fact, alleged facts, first cause, distributor, products, parties

Counsel: **[*1]** There are no appearances by any party.

Judges: Walter Schwarm.

Opinion by: Walter Schwarm

Opinion

MINUTE ORDER

The Court, having taken the above-entitled matter under submission on 02/18/2020 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Motion No. 1:

Defendant's (DUSA Pharmaceuticals, Inc.) Demurrer to Second Amended Complaint (Demurrer), filed on 10-22-19 under ROA No. 161, is SUSTAINED without leave to amend. The court GRANTS Defendant's Request for Judicial Notice in Support of Its Demurrer to, and Motion to Strike Portions of, Biofrontera Inc.'s Second Amended Complaint (filed on 10-22-19 under ROA No. 163), as to Exhibit Nos. 1, 2, 3, 4, 6, and 7. pursuant to Evidence Code section 452, subdivision (d). As to the remaining exhibits, the court DENIES the request for judicial notice as immaterial to the court's ruling. (See Zucchet v. Galardi (2014) 229 Cal.App.4th 1466, 1474, fn. 5, citing Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal.4th 739, 748, fn. 6).

The court GRANTS Defendant's Request for Judicial Notice in Support of Its Motion for Judgment on the Pleadings on the Second Amended Complaint's **[*2]** Alleged Fourth Cause of Action (filed on 10-22-19 under ROA No. 156) as to Exhibit Nos. 1-7 pursuant to Evidence Code section 452, subdivision (d). As to Exhibit No. 8, the court DENIES the request for judicial notice as immaterial to the court's ruling. (See Zucchet v. Galardi (2014) 229 Cal.App.4th 1466, 1474, fn. 5, citing Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal.4th 739, 748, fn. 6).

"A demurrer tests the pleading alone, and not the evidence or the facts alleged.... To the extent there are factual issues in dispute, however, this court must assume the truth not only of all facts properly pled, but also of those facts that may be implied or inferred from those expressly alleged in the complaint. [Citations.]" (City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1998) 68 Cal.App.4th 445, 459.) Code of Civil Procedure section 452, states, "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." Perez v. Golden Empire Transportation Transit District (2012) 209 Cal.App.4th 1228, 1238, provides, "This rule of liberal **[*3]** construction means that the reviewing court draws inferences favorable to the plaintiff, not the defendant. [Citations.]" William S. Hart Union High School District (C.A.) (2012) 53 Cal.4th 861, 872, provides, "To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged. [Citation.]" "Thus, the complaint ordinarily is sufficient if it alleges ultimate rather than evidentiary facts. [Citations.]" (Doe v. City of Los Angeles (Doe) (2007) 42 Cal.4th 531, 550.)

Bernardo v. Planned Parenthood Federation of America (2004) 115 Cal.App.4th 322, 351-352 (Bernardo), states, "An 'unlawful' business practice or act within the meaning of the UCL 'is an act or practice, committed pursuant to business activity, that is at the same time forbidden by law. [Citation.]' [Citation.] The California Supreme Court has explained that '[b]y proscribing "any unlawful" business practice, "[Business and Professions Code] section 17200 'borrows' violations of other laws and treats them as unlawful practices" that the unfair competition law makes independently actionable. [Citation.]' **[*4]** [Citation.]" (Italics in Bernardo.)

McKell v. Washington Mutual, Inc. (McKell) (2006) 142 Cal.App.4th 1457, 1473, provides, "A business practice is unfair within the meaning of the UCL if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits. [Citations.] The determination whether a business practice is unfair ' " 'involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim.... [Citations.]' [Citation.]"' [Citation.]" Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (Cel-Tech) (1999) 20 Cal.4th 163, 187, "We thus adopt the following test: When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable **[*5]** to or the same as a violation of the law, or otherwise significantly threatens or harms competition."

Business and Professions Code section 17204 provides, "Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or a district attorney... or by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." Peterson v. Cellco Partnership (Peterson) (2008) 164 Cal.App.4th 1583, 1590, explains, "Section 17204 of the UCL governs a plaintiff's standing to assert a UCL claim. [Citation.] Prior to the enactment of Proposition 64 in November 2004, the UCL 'did not predicate standing "on a showing of injury or damage"' and was thus 'subject to abuse by attorneys who used it as the basis for legal " 'shakedown' " schemes' and frivolous lawsuits. [Citations.] To address this problem, Proposition 64 amended section 17204 to accord standing only to certain specified public officials and to any person who ' " 'has suffered injury in fact and has lost money or property as a result of such unfair competition.' "' [Citations.] Thus, in the aftermath of Proposition 64, only **[*6]** plaintiffs who have suffered actual damage may pursue a private UCL actions. A private plaintiff must make a twofold showing: he or she must demonstrate injury in fact and a loss of money or property caused by unfair competition. [Citation.]" (Italics in original.)

"In addition to alleging facts sufficient to who violations of Regulation X and Regulation Z, plaintiffs who are not California residents must also allege facts to show that the alleged violations occurred in California because California's unfair competition law does not apply extraterritorially." (Aghaji v. Bank of America, N.A. (Aghaji) (2016) 247 Cal. App. 4th 1110, 1119; See also, Sullivan v. Oracle Corporation (2011) 51 Cal.4th 1191, 1207-1208.)

Defendant challenges the first (Unfair Competition), second (Unfair Competition□Unlawful Pricing) and third (Unfair Practices□Unfair Sampling) causes of action pursuant to Code of Civil Procedure section 430.10, subdivision (e).

First Cause of Action□Unfair Competition:

Defendant contends, "Despite acknowledging this Court's prior dismissal of its prior, identical First Cause of Action on the grounds that the 'allegations related to DUSA's sampling practices did not establish a **[*7]** connection to California[,] Biofrontera remarkably contends that its mere regurgitation of those same defective Sampling Allegations, verbatim, in the SAC now somehow places those allegations within the territorial ambit of the UCL." (Demurrer; 1:17-20, footnote 3 omitted; Emphasis and italics in original.) Defendant's Opposition to DUSA Pharmaceuticals, Inc.'s Demurrer to Second Amended Complaint (Opposition) filed on 2-3-20 under ROA No. 189 asserts, "This Court previously ruled that the FAC's allegations related to DUSA's unlawful sampling practices did not establish a connection to California.... Biorfrontera's SAC makes plain that DUSA's excessive sampling practices arose in California and harmed Biofrontera in California. (Opposition; 3:25-4:1.) Paragraph 41 of the Second Amended Complaint (SAC) alleges the conduct underlying the first cause of action. Paragraph 41 states, "Under the governing case law, Biofrontera need not plead that DUSA or physicians failed to comply with the specific requirements of a statute regulating medical product samples. DUSA's sampling practices qualify as 'unfair competition' under the UCL's 'unfair' prong because excessive free samples significantly **[*8]** threaten and harm competition, regardless of whether physicians submitted written requests for the samples or complied with other statutes and regulations. In other words, the unfairness of DUSA's sampling practices turns on their effect on competition, not compliance with particular statutes." Thus, Plaintiff bases the first cause of action on the alleged act of Defendant's sampling practices by providing excessive free samples to physicians. To support that Defendant provided excessive free samples to physicians, the SAC pleads, "Most recently, a dermatologist in El Cajon, California told Biofrontera that DUSA made him 'a deal that I couldn't refuse.' A DUSA representative offered this dermatologist approximately 36 product samples of Levulan® to offset the cost of replacing an old BLU-U® light lamp. The dermatologist accepted the excessive product samples. Biofrontera's sales representative observed a new DUSA lamp and excessive Levulan® samples the next time he visited this practice." (SAC, ¶ 18.) As to harm, the SAC pleads, "DUSA's sampling practices specifically harm, and continue to harm, Biofrontera in California by making it harder for Biofrontera to obtain revenue and market **[*9]** share in California. Biofrontera has lost sales in California because it cannot make sales to dermatologists who have received DUSA's unfair excessive samples. DUSA's conduct in California, in turn, directly harm's Biofrontera's competitive standing and revenue generation in Orange County California, specifically, and California generally." (SAC, ¶ 19; see also, SAC, ¶¶ 44, 45, 56, 57, 63, 64, and 65.) The SAC does not allege any other act of excessive sampling except for the act relating to the dermatologist in El Cajon. Plaintiff's original Complaint, filed on 7-6-18, referred the court to 21 U.S.C. § 353, subdivision (d)(3)(A) regarding the distribution of drug samples to physicians. (Defendant's RJN; Exhibit 1, ¶ 16.) Plaintiff does not cite to 21 U.S.C. § 353, subdivision (d)(3)(A) in the SAC. 21 U.S.C. § 353 describes the procedure that authorizes the distribution of drug samples by a drug manufacturer or distributor. 21 U.S.C. § 353, subdivision (d), states in part, "The manufacturer or authorized distributor of record of a drug subject to subsection (b) may, by means other than mail or common carrier, distribute drug samples only if the manufacturer or authorized distributor **[*10]** of record makes the distributions in accordance with subparagraph (A) and carries out the activities described in subparagraphs (B) through (F) as follows: [¶] (A) Drug samples may only be distributed□ [¶] (i) to practitioners licensed to prescribe such drugs if they make a written request for drug samples, or [¶] (ii) at the written request of such a licensed practitioner, to pharmacies of hospitals or other health care entities...." 21 U.S.C. § 353 is relevant because it reflects the public policy as to the procedure by which a drug manufacturer or authorized distributor may provide drug samples. Paragraph 18 of the SAC does not allege facts that the El Cajon dermatologist obtained the samples in violation of 21 U.S.C. § 353, subdivision (d)(3)(A). Paragraph 18 of the SAC does not allege facts that the El Cajon dermatologist obtained the samples without making a written request. The court finds that Plaintiff, through the SAC, still has not shown that wrongful conduct occurred in California based on the act of excessive sampling. The only alleged act of excessive sampling relates to the El Cajon dermatologist. (SAC, ¶ 18.) As discussed above, paragraph 18 is insufficient to allege **[*11]** a violation of 21 U.S.C. § 353, subdivision (d)(3)(A). The SAC does not allege how the El Cajon dermatologist received the 36 product samples without making a written request. The SAC does not sufficiently demonstrates a violation of public policy or an incipient violation of ***antitrust law***. Further, assuming that paragraph 18 of the SAC is sufficient to allege a wrongful act, a single act of excessive sampling is insufficient to demonstrate immoral, unethical, oppressive or unscrupulous conduct that causes injury to consumers, or otherwise significantly threatens or harms competition. The court finds that the SAC does not sufficiently demonstrate that Defendant committed a wrongful act regarding the act of excessive sampling. Thus, the court finds that the SAC does not demonstrate that an act of "unfair" competition occurred in California. As a result, the court SUSTAINS the Demurrer to the first cause of action without leave to amend. (See below.)

Second Cause of Action□Unfair Competition (Unlawful Pricing):

Paragraph 50 of the alleges the conduct underlying the second cause of action. Paragraph 50 states in part, "DUSA's unfair pricing scheme manipulates Levulan®'s ASP and allows DUSA **[*12]** to make more profit on each sale than it otherwise could. DUSA's manipulation of the ASP through FC means that DUSA charges physicians artificially low prices for the drug that do not reflect the market's actual willingness ot pay. DUSA can charge artificially low prices because it used the ASP reported through its distributor to recoup additional profit on each sale of Levulan®." (SAC, ¶ 50.) The SAC alleges that Defendant is a company organized under the laws of New Jersey and that it entered into a contract with its distributor, Foundation Care. (SAC, ¶¶ 12 and 22.) Paragraphs 20-27 of the FAC describe the alleged pricing scheme by manipulating the ASP. The SAC, however, does not show that the wrongful conduct, the alleged manipulation of 'creating a spread' (FAC, ¶ 24), occurred in California. Therefore, the court SUSTAINS the Demurrer to the second cause of action without leave to amend. (See below.)

Third Cause of Action□Unfair Sampling (Unfair Practices Under California Business & Professions Code § 17403):

Business and Professions Code section 17403 states, "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost **[*13]** thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition." Paragraph 62 of the SAC alleges the conduct underlying the third cause of action. Paragraph 62 states, "DUSA is engaged in business in California and has sold or offered to sell its products, including without limitation Levulan® free of charge. DUSA has given, and continues to give, away free product samples with the intent to injure Biofrontera and destroy fair competition in the PDT market. See supra ¶¶ 15-19, 33-46. In other words DUSA acted with the purpose of injuring competitors and destroying competition. See id." (SAC, ¶ 62.) It appears that this allegation pertains to the giving away of free products samples as alleged in paragraph 18 of the SAC. Paragraph 18 of the SAC, as to the El Cajon dermatologist, is the only alleged act regarding the distribution of excessive samples or the giving away of samples. The SAC does not allege any facts demonstrating that DUSA has sold its products in California for less than their cost. Further, 21 U.S.C. § 353, subdivision (d)(3)(A), authorizes the giving away of drug samples to practitioners as long as there **[*14]** is compliance with 21 U.S.C. § 353, subdivision (d)(3)(A). The SAC does not adequately allege the intent element of Business and Professions Code section 17403 because 21 U.S.C. § 353, subdivision (d)(3)(A), authorizes the distribution of drug samples, the. (Bay Guardian Co. v. New Times Media, LLC (2010) 187 Cal.App.4th 438, 456-457.) Since the SAC does not plead facts alleging that Defendant has sold its products for less than their cost with the required intent, the court SUSTAINS the Demurrer to the third cause of action without leave to amend. (SAC).

Virgina G. v. ABC Unified School Dist. (1993) 15 Cal.App.4th 1848, 1852 stated, "Where a demurrer is sustained or a motion for judgment on the pleadings is granted as to the original complaint, denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment." "The court abuses its discretion in sustaining the demurrer without leave to amend if the plaintiff can show a reasonable possibility of curing the defect in the complaint by amendment. [Citation.] Heritage has the burden of proving that an amendment would cure the defect. [Citation.]" (Heritage Pacific Financial, **[*15]** LLC v. Monroy (2013) 215 Cal.App.4th 972, 994.) As to this action, the court has previously granted leave to amend twice, and granted a motion for leave to amend. (See the court's 11-21-18, 5-21-19, and 9-17-19 Minute Orders (On 6-10-19, the parties filed a stipulation that extended the time for Plaintiff to file a SAC based on the Motion for Leave to Amend to File a Second Amended Complaint filed on 6-14-19.) Plaintiff's Opposition does not request leave to amend based upon a reasonable possibility of curing the defects. Therefore, the court SUSTAINS Defendant's (DUSA Pharmaceuticals, Inc.) Demurrer to Second Amended Complaint, filed on 10-22-19 under ROA No. 161, without leave to amend.

Defendant is to give notice.

Motion No. 2:

Defendant's (DUSA Pharmaceuticals, Inc.) Motion for Judgment on the Pleadings on the Second Amended Complaint's Alleged Fourth Cause of Action (Motion), filed on 10-22-19 under ROA No. 155, is DENIED. Defendant challenges the fourth cause of action (Unfair Competition□Groundless Threat) because it "... fails to state sufficient facts to constitute a cause of action by not seeking cognizable remedies under California Business and Professions Code section 17200...." **[*16]** (Notice to Demurrer; 1:8-10.) Initially, it does not appear that this Motion is procedurally proper. Code of Civil Procedure section 438, subdivision (f)(2), provides, "(f) The motion provided for in this section may be made only after one of the following conditions has occurred:... [¶] (2) If the moving party is a defendant, and the defendant has already filed his or her answer to the complaint and the time for the defendant to demur to the complaint has expired." Here, Defendant has not filed an answer to the Second Amended Complaint (SAC). Further, the time to demur has not expired because Defendant filed a demurrer to the SAC as addressed

Motion No. 1.

Assuming the Motion is procedurally proper, the court will address the merits because the parties did not discuss the applicability of Code of Civil Procedure section 438, subdivision (f)(2).

Code of Civil Procedure section 438, subdivision (g), states, "The motion provided for in this section may be made even though either of the following conditions exist: [¶] "(1) The moving party has already demurred to the complaint or answer, as the case may be, on the same grounds as is the basis for the motion provided for in this section and **[*17]** the demurrer has been overruled, provided that there has been a material change in applicable case law or statute since the ruling on the demurrer. [¶] (2) The moving party did not demur to the complaint or answer, as the case may be, on the same grounds as is the basis for the motion provided for in this section."

On 7-6-19, Plaintiff (Biofrontera Inc.) filed the original Complaint that contained the Unfair Competition□Groundless Threat cause of action as the third cause of action. On 8-10-18, Defendant filed a demurrer to the original Complaint. Defendant challenged the subject cause of action pursuant to Code of Civil Procedure section 430.10, subdivision (e), on the grounds that the original Complaint did not state facts sufficient to state a cause of action. (See Defendant's Notice of Demurrer filed on 8-10-18.) On 11-1-18, the court overruled the demurrer to this cause of action. (11-1-18 Minute Order.)

On 11-26-18, Plaintiff filed an Amended Complaint that contained the Unfair Competition□Groundless Threat cause of action as the fourth cause of action. On 1-15-19, Defendant filed a demurrer to the Amended Complaint. Defendant challenged the fourth cause of action in the Amended **[*18]** Complaint pursuant to Code of Civil Procedure section 430.10, subdivision (e), on the grounds that the Amended Complaint did not state facts sufficient to state a cause of action. (See Defendant's Notice of Demurrer filed on 1-15-19.) On 4-16-19, the court issued a tentative ruling and requested supplemental briefing. (4-16-19 Minute Order.) The court's 4-16-19 Minute specifically continued the hearing on the Demurrer to the Amended Complaint. On 5-21-19, the court overruled Defendant's demurrer to the fourth cause of action in the Amended Complaint (5-21-19 Minute Order).

As to the demurrer to the Amended Complaint pertaining to the fourth cause of action, this demurrer specifically explained that this cause of action lacked merit because it did not seek a cognizable remedy. For example, Page 15 at line 8 of Defendant's Demurrer to Amended Complaint (filed on 1-15-19 under ROA No. 15) states, "This claim cannot survive demurrer because it does not see a cognizable UCL remedy." The argument heading on Page 15 of the 1-15-19 demurrer states, "The Amended Complaint's Fourth Cause of Action Fails to State a Claim Because It Does Not Seek a Cognizable Remedy under the UCL." (Emphasis in **[*19]** original.)

This Motion, as discussed above, challenges the fourth cause of action because it "... fails to state sufficient facts to constitute a cause of action by not seeking cognizable remedies under California Business and Professions Code section 17200...." (Notice to Demurrer; 1:8-10.) The current Motion is based on the same grounds as that in Defendant's 1-15-19 Demurrer to the Amended Complaint. Under Code of Civil Procedure section 430.10, Defendant's 8-10-18 and 1-15-19 specified the grounds for the demurrers pursuant to Code of Civil Procedure section 430.10, subdivision (e). The current Motion again challenges the Unfair Competition□Groundless Threat for failing to state facts sufficient to state a cause of action. The court's 5-21-19 Minute Order overruling Defendant's

Demurrer to the fourth cause of action encompasses the same grounds as raised in this Motion. Thus, it appears that the Motion does not comply with Code of Civil Procedure section 438, subdivision (g)(1).

However, since both parties have briefed the merits of the Motion, the court will address the merits of the Motion. The court finds that the Motion adequately alleges a legally cognizable remedy. Kwikset **[*20]** Corporation v. Superior Court (Kwikset) (2011) 51 Cal.4th 310, 323-324, states, "Proposition 64 requires that a plaintiff have 'lost money or property' to have standing to sue. The plain import of this is that a plaintiff now must demonstrate some form of economic injury. [Citations.] [¶] There are innumerable ways in which economic injury from unfair competition may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary. [Citation.] Neither the text of Proposition 64 nor the ballot arguments in support of it purport to define or limit the concept of 'lost money or property,' nor can or need we supply an exhaustive list of the ways in which unfair competition may cause economic harm. It suffices to say that, in sharp contrast to the state of the law before passage of Proposition 64, a private plaintiff filing suit now must establish that he or she has **[*21]** personally suffered such harm. [¶] Notably, lost money or property□economic injury□is itself a classic form of injury in fact. [Citations.] However, because economic injury is but one among many types of injury in fact, the Proposition 64 requirement that injury be economic renders standing under section 17204 substantially narrower than federal standing under article III, section 2 of the United States Constitution, which may be predicated on a broader range of injuries. [Citation.] [¶] While the economic injury requirement is qualitatively more restrictive than federal injury in fact, embracing as it does fewer kinds of injuries, nothing in the text of Proposition 64 or its supporting arguments suggests the requirement was intended to be quantitatively more difficult to satisfy. Rather, we may infer from the text of Proposition 64 that the quantum of lost money or property necessary to show standing is only so much as would suffice to establish injury in fact; if more were needed, the drafters could and would have so specified. [Citation.] In turn, federal courts have reiterated that injury in fact is not a substantial or insurmountable hurdle; as then Judge Alito put it: 'Injury-in-fact **[*22]** is not Mount Everest.' [Citation.] Rather, it suffices for federal standing purposes to ' "allege] some specific, 'identifiable trifle' of injury."' [Citations.]" (Footnotes 6 and 7 omitted.)

Here, paragraph 71 alleges, "Biofrontera has also suffered injury in fact and has lost money or property as a result of DUSA's unfair competition. Because of DUSA's baseless threat to Kane and West, Biofrontera has been directly injured in its efforts to sell the BF-RhodoLED® lamp and Ameluz® to West. West has informed Biofrontera that it will no longer purchase certain Biofrontera products. DUSA's threat, in other words, directly causes Biofrontera to lose sales, market share, and goodwill." This allegation is sufficient to allege a legally cognizable injury from a pleading standpoint within the meaning of Kwikset.

Based on the above, the court DENIES Defendant's (DUSA Pharmaceuticals, Inc.) Motion for Judgment on the Pleadings on the Second Amended Complaint's Alleged Fourth Cause of Action filed on 10-22-19 under ROA No. 155. Defendant is to give notice.

Motion No. 3:

Based on the court's rulings as to Motion No. 1, the court DENIES Defendant's (DUSA Pharmaceuticals, Inc.) Motion to Strike Portions **[*23]** of the Second Amended Complaint (Motion), filed on 10-22-19 under ROA No. 165, without prejudice to Defendant re-filing this Motion.

First, the Motion does not comply with California Rules of Court, rule 3.1322. California Rules of Court, rule 3.1322 (a), states, "A notice of motion to strike a portion of a pleading must quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count, or defense. Specifications in a notice must be numbered consecutively." Here, the Notice of this Motion does not number the specifications in the notice consecutively.

Second, to the extent that some of the items Defendant seeks to strike pertain to the first three causes, the Motion is MOOT because the court has sustained the Demurrer to the first three causes of action without leave to amend, and has denied Motion No. 2.

Therefore, the court DENIES Defendant's (DUSA Pharmaceuticals, Inc.) Motion to Strike Portions of the Second Amended Complaint, filed on 10-22-19 under ROA No. 165, without prejudice to Defendant re-filing a Motion to Strike that complies with California Rules of Court, rule 3.1322, and pertains to items based on the current **[*24]** status of the Second Amended Complaint.

Defendant is to give notice.

End of Document

Am. Cricket Premier League, LLC v. USA Cricket

United States District Court for the District of Colorado

March 12, 2020, Decided; March 12, 2020, Filed

Civil Action No. 19-cv-1521-WJM-KMT

Reporter

445 F. Supp. 3d 1167 *; 2020 U.S. Dist. LEXIS 42924 **; 2020-1 Trade Cas. (CCH) P81,126; 2020 WL 1183361

AMERICAN CRICKET PREMIER LEAGUE, LLC, Plaintiff, v. USA CRICKET, a Colorado Non-Profit Corporation, INTERNATIONAL CRICKET COUNCIL, WILLOW TV INTERNATIONAL, INC., CRICKET ACQUISITION CORPORATION, AMERICAN CRICKET ENTERPRISES, INC., PARAAG MARATHE, AVINASH GAJE, VENU PISIKE, ATUL RAI, NADIA GRUNY, ERIC PARTHEN, and JOHN DOES 3-10, Defendants.

Prior History: *Am. Cricket Premier League, LLC v. USA Cricket, 2019 U.S. Dist. LEXIS 243114, 2019 WL 13195402 (D. Colo., Nov. 15, 2019)*

Core Terms

Cricket, bid, league, redressability, antitrust, allegations, partner, bidding process, anti trust law, subject matter jurisdiction, Counts, selection process, antitrust claim, diversity, quotation, marks, motion to dismiss, state-law, corrupt, bidder, rights, member of the board, affirmative action, prospective relief, bid-rigging, citizenship, injunction, Corrected, contracts, entities

Counsel: **[**1]** For American Cricket Premier League, LLC, Plaintiff: Adam Jeremy Biegel, Alston & Bird LLP-DC, Washington, DC; Christopher James Borchert, Karl Geercken, Alston & Bird LLP-New York, New York, NY; David Andrew Hatchett, Alston & Bird LLP-Atlanta, Atlanta, GA; Paul Douglas Swanson, Holland & Hart LLP-Denver, Denver, CO; James Edward Hartley, Holland & Hart LLP-Boulder, Boulder, CO.

For USA Cricket, a Colorado Non-Profit Corporation, Defendant: Daniel Savrin, Morgan Lewis & Bockius LLP - Boston, Boston, MA; Rishi Satia, Sujal J. Shah, Morgan Lewis & Bockius LLP-San Francisco, San Francisco, CA; Stephen Andrew Hess, Sherman & Howard LLC-Colorado Springs, Colorado Springs, CO.

For International Cricket Council, Defendant: Alan R. Glickman, Harry S. Davis, Taleah E. Jennings, Schulte Roth & Zabel LLP-New York, New York, NY; Timothy R. Beyer, Bryan Cave Leighton Paisner LLP-Denver, Denver, CO.

For Paraag Marathe, Avinash Gaje, Venu Pisike, Atul Rai, Nadia Gruny, Eric Parthen, and John Does 3-10, Defendants: Daniel Savrin, Morgan Lewis & Bockius LLP - Boston, Boston, MA; Boston, MA; Rishi Satia, Sujal J. Shah, Morgan Lewis & Bockius LLP-San Francisco, San Francisco, CA.

For Willow TV International, **[**2]** Inc., American Cricket Enterprises, Inc., Cricket Acquisition Corporation, Defendants: Caitlin C. McHugh, Lewis Roca Rothgerber Christie LLP-Denver, Denver, CO; Michael Ryan Fleming, Nitoj Paul Singh, Dhillon Law Group Inc., San Francisco, CA.

Judges: William J. Martínez, United States District Judge.

Opinion by: William J. Martínez

Opinion

[*1170] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Plaintiff American Cricket Premier League, LLC ("Plaintiff"), alleges that a corrupt bidding process prevented fair consideration of its bid to create an internationally recognized cricket league in the United States. Plaintiff brings claims under federal ***antitrust law*** and related state laws against the various entities and individuals (collectively, "Defendants") that Plaintiff believes are responsible for the alleged corruption.

Currently before the Court is Defendants' Joint Motion to Dismiss. (ECF No. 56.) For the reasons explained below, the Court grants the motion without prejudice for lack of subject matter jurisdiction. More specifically, the Court lacks jurisdiction under Article III of the U.S. Constitution to adjudicate Plaintiff's federal antitrust claims because there is no prospective relief this Court can grant that will remedy Plaintiff's claimed injury; **[**3]** the Court lacks Article III jurisdiction to adjudicate Plaintiff's state-law claims for the same reason; and the Court otherwise lacks statutory subject matter jurisdiction to adjudicate Plaintiff's state-law claims because Plaintiff has failed to plead diversity of citizenship.

I. LEGAL STANDARD

Defendants bring their motion to dismiss under *Federal Rule of Civil Procedure 12(b)(1)*, and alternatively under *Rule 12(b)(6)*. (*See* ECF No. 56 at 18-19.)[1] The Court finds that *Rule 12(b)(1)* controls under the circumstances of this case.

Rule 12(b)(1) permits a party to move to dismiss for "lack of subject-matter jurisdiction." "[Federal] [d]istrict courts have limited subject matter jurisdiction and may [only] hear cases when empowered to do so by the Constitution and by act of Congress." *Radil v. Sanborn W. Camps, Inc., 384 F.3d 1220, 1225 (10th Cir. 2004)* (internal quotation marks omitted). "A court lacking jurisdiction cannot render judgment but must dismiss the case at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co., 495 F.2d 906, 909 (10th Cir. 1974)*.

Rule 12(b)(1) motions generally take one of two forms: a facial attack or a factual attack. *Holt v. United States, 46 F.3d 1000, 1002 (10th Cir. 1995)*. A facial attack questions the sufficiency of the complaint as to its subject matter jurisdiction allegations. *Id.* In reviewing a facial attack, courts accept all well-pleaded allegations as true, as in **[**4]** a *Rule 12(b)(6)* setting. *Id.* A factual attack, by contrast, "may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends." *Id. at 1003*.

In this case, Defendants bring a facial attack, so the Court cannot stray from the allegations of the complaint (and any attachments, *see Fed. R. Civ. P. 10(c)*).[2]

[*1171] II. FACTS

The Court accepts the following as true for purposes of resolving Defendants' motion. All "¶" citations, without more, are to Plaintiff's Corrected Complaint and Jury Demand (ECF No. 51).

The international governing body for cricket is Defendant International Cricket Council ("ICC"). (¶¶ 32, 35.) "ICC recognition is crucial for any professional cricket league to be viable and internationally recognized." (¶ 32.) "Players that want to compete in ICC-sanctioned international events, or for any of the other ICC-sanctioned

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[1] All ECF page citations are to the page number in the CM/ECF header, which does not always match the document's internal pagination, particularly in briefs with separately paginated prefatory material such as a table of contents.

[2] There are exceptions to the face-of-the-complaint rule. *See, e.g., Toone v. Wells Fargo Bank, N.A., 716 F.3d 516, 521 (10th Cir. 2013)*. Nothing in this case requires the Court to examine whether those exceptions might apply.

events, will not participate in a league that is not sanctioned by the ICC because they risk losing their ability to play in future ICC matches." (¶ 34.) In 1965, the ICC approved the United States of America Cricket Association ("USACA") (not a party here) as the national-level governing body for cricket in the United States. (¶ 36.)

In 2016, **[**5]** USACA announced plans to launch a "T20 professional cricket league in the United States." (¶ 37.) T20 is short for "Twenty20," a cricket format "designed in the mid-2000s as a faster-paced, flashier version of the game." (¶ 27.) T20 "allows for a single contest to be played efficiently in about three hours," as compared to "Test matches (lasting 5 days) and One-Day Internationals (lasting on average more than 8 hours)." (¶ 28.)

Plaintiff is a Delaware LLC headquartered in Las Vegas, Nevada. (¶ 9.) One of its principals is Jay Pandya ("Pandya"). (¶ 9(a).) He is "an experienced businessperson and cricket executive," including through his ownership of a professional cricket team in St. Lucia. (*Id.*) Pandya is also chairman and founder of non-party Global Sports Ventures ("Global"). (*Id.* ¶¶ 9(a), 38.) USACA selected Global "as its partner to do the commercial development work necessary to establish and operate [a] professional U.S. T20 cricket league." (¶ 38.)

In September 2016, Global entered into the "License Agreement" with USACA. (¶ 39.) The License Agreement granted Global the "exclusive right" to establish "the only USACA sanctioned and ICC approved professional T20 league" in the United **[**6]** States. (¶ 41 (internal quotation marks omitted).) However, USACA was under ICC suspension at the time. (¶ 42.) The License Agreement accordingly "provide[d] that the Licensed Rights, among other rights, would not become effective 'unless and until the Suspension . . . is lifted, terminates or otherwise ends . . . and the ICC shall have approved USACA's grant of such rights to [Global].'" (*Id.*)

The ICC did not want Pandya involved in any ICC-sanctioned cricket league. (¶ 46.) "The ICC's desire to exclude Global and Mr. Pandya [was] based in large part on the fact that Mr. Pandya is not part of the incumbent and traditional Indian business and social circles that dominate Indian cricket and the ICC worldwide." (¶ 47.) But the ICC knew that reinstatement of USACA would lead to Global's recognition as the USACA-sanctioned (and therefore, apparently, the ICC-sanctioned) organizer of T20 cricket in the United States. (¶ 46.)[3] The ICC therefore "placed numerous new conditions on lifting USACA's suspension." (¶ 49.) "The new conditions imposed by the ICC were arbitrary, designed to be nearly impossible for USACA to comply with[,] and were intended solely to justify ICC expelling USACA and thereby **[**7]** excluding **[*1172]** Global from the T20 cricket market in the United States." (*Id.*)

The ICC formally expelled USACA in June 2017. (¶ 52.) This "prevent[ed] the License Agreement from going into effect." (¶ 53.) At some later (unspecified) time, Global "transferred all of the Licensed Rights granted under the USACA Licens[e] Agreement to [Plaintiff]." (*Id.* n.1.)[4]

The ICC soon assisted in creating Defendant USA Cricket, a new entity headquartered in Colorado Springs that was to replace USACA as the national-level governing body for cricket in the United States. (¶¶ 54-57.) USA Cricket officially launched in September 2017 and formally applied for ICC membership in December 2017. (¶¶ 58-59.)

USA Cricket then began the process of organizing its first board of directors. (¶¶ 65-67.) The board was to have ten members, with seven to be elected. (¶ 60.) Defendants Gaje, Pisike, Rai, and Gruny ran for board membership, and Defendants Willow TV International ("Willow") and Cricket Acquisition Corporation ("CAC") "paid for substantially all of [their] campaign expenses." (¶ 68; *see also* ECF No. 51 at 1.) Willow and CAC are "entities owned and run by

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[3] The Court says "apparently" because, as noted, the License Agreement contains a clause contemplating the need for ICC approval of the rights granted by USACA to Global—thus casting doubt on whether USACA's reinstatement would have automatically given ICC imprimatur to Global.

[4] Plaintiff does not explain what rights persist after USACA's expulsion from the ICC. The License Agreement contains a clause that contemplates "termination of USACA's membership with ICC" and requires USACA to "cause ICC or ICC's nominated body for the development of cricket in USA, to execute the necessary agreements which shall have the effect of providing or continuing, as the case may be, the Licensed Rights to [Global]." (¶ 44.) But it is unclear what right USACA has or had to cause the ICC or any successor governing body in the United States to enter into an agreement with Global.

affiliates of the influential Times Group of India (a key **[**8]** sponsor of ICC-sanctioned events in India and elsewhere)." (¶ 68.)

Gaje, Pisike, Rai, and Gruny each won a board seat (becoming what Plaintiff calls the "Conflicted Board Members"). (¶ 70.) It is not clear who won the other three elected positions. However, the remaining three members of the ten-member board were appointed by USA Cricket's "Nominating and Governance Committee," which was beholden to ICC interests. (¶¶ 65, 70.) Those three non-elected board members were therefore similar in their loyalties to the four Conflicted Board Members, meaning "there was now a clear majority of the Board beholden to ICC-friendly interests." (¶ 70.)

In November 2018,

> USA Cricket announced the United States Professional T20 League RFP (the "RFP"), which sets forth the parameters of USA Cricket's purported competitive bidding process for selection of a commercial partner (the "RFP Bid Process"). The RFP states that "USA Cricket is looking for a partner to help capitalize on [America's] interest levels in the sport and, specifically, to construct, fund, launch and operate the first professional T20 cricket league (the 'League') in the United States."

(¶ 71 (citations omitted).)

Plaintiff decided to bid **[**9]** for this opportunity, and therefore submitted a timely RFP response in January 2019. (¶ 79.) Plaintiff's RFP included, among other things, "$8 million in guaranteed compensation to USA Cricket for each of the first two years and a total of $516 million in guaranteed financial compensation over a period of 25 years." (¶ 80.)

Defendant American Cricket Enterprises ("ACE") also submitted a timely bid. (¶ 81.) ACE had "backing from . . . the founder and CEO of Willow and CAC, and [from] the principals of The Times Group of India." (*Id.*) "USA Cricket began negotiating **[*1173]** [secretly] with Willow-backed ACE almost immediately afterwards." (*Id.*) It strung Plaintiff along, however, by announcing that it would issue a "set of standard questions" to "all bidders" (which it never did), and by allowing Plaintiff to give a presentation "to a partial group of the USA Cricket Board." (¶¶ 81-82.) That took place sometime in February or early March 2019 and was, from Plaintiff's perspective, *pro forma.* (¶ 82.)

In mid-March 2019, USA Cricket informed Plaintiff that it "had selected another Proposer," which turned out to be ACE. (¶ 83.)

> Based on subsequent conversations with individual members of USA Cricket's **[**10]** Board of Directors and other USA Cricket officials that reached out to [Plaintiff] to express concerns about the integrity of the RFP process, [Plaintiff] learned that its RFP Response was superior to every other response on every objective metric and included a far more comprehensive infrastructure and economic development plan than any other Proposer.

(¶ 86.) In particular, Plaintiff learned that ACE had offered "a mere $2 million in financial contribution for each of the first two years (hundreds of millions of dollars less over the course of 25 years than [Plaintiff] guaranteed)." (¶ 87.)

> [Plaintiff] also learned from members of USA Cricket's Board of Directors that certain Board members preferred [Plaintiff's] proposal over that of any other Proposer and had wanted USA Cricket to conduct further discussions and negotiations with [Plaintiff] rather than make the rapid award to Willow-backed ACE. But those Board members were denied the opportunity to engage in such discussions . . . because they were told that the leadership of USA Cricket and the ICC had already decided who was going to win the RFP process.

(¶ 88.)

Given what Plaintiff had learned, Plaintiff contacted USA Cricket in **[**11]** late March 2019 to ask how ACE's proposal could have won out over Plaintiff's. (¶ 93.) USA Cricket responded by "challeng[ing] the veracity of [Plaintiff's] financial commitments contained in the RFP Response." (¶ 94.) In other words, it appears that USA Cricket did not believe (or at least *said* it did not believe) Plaintiff's representations with respect to guaranteed compensation. This led to further communication in which it became clear that Plaintiff's guarantee of certain compensation was a bank guarantee. (¶ 96.)

USA Cricket then offered Plaintiff "an opportunity to re-present to the RFP committee in more detail." (¶ 99 (internal quotation marks omitted).) However, USA Cricket demanded that Plaintiff sign what were called the "New Terms of Engagement." (¶ 100.) The New Terms of Engagement were, in essence, a prospective release of any claims the bidder might have against USA Cricket based on the bidding process. (¶¶ 101-06.)

Plaintiff refused to sign the New Terms of Engagement, "effectively ending its ability to be formally considered by USA Cricket." (¶ 111.) "On May 23, 2019, USA Cricket formally announced that it had selected ACE as its strategic partner." (*Id.*)

Plaintiff filed **[**12]** this lawsuit on May 28, 2019 (ECF No. 1) alleging eight claims for relief:

- *per se* violation (group boycott), or at least a rule-of-reason violation, of *section 1 of the Sherman Act, 15 U.S.C. § 1* ("Count 1");

[*1174] • monopolization in violation of *section 2 of the Sherman Act, 15 U.S.C. § 2* ("Count 2");

- violation of *Colorado Revised Statutes § 6-4-104*, which is Colorado's equivalent to *section 1 of the Sherman Act* ("Count 3");

- violation of California's antitrust proscriptions, *i.e.*, the *Cartwright Act*, *Cal. Bus. & Prof. Code § 16720* ("Count 4");[5]

- violation of *California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 et seq.* ("Count 5");
- tortious interference with prospective business advantage ("Count 6");
- tortious interference with contract, referring to the License Agreement between USACA and Global ("Count 7"); and
- civil conspiracy ("Count 8").

(*Id.* at 35-50.)

In July 2019, Plaintiff filed the currently operative complaint, *i.e.*, the Corrected Complaint and Jury Demand (ECF No. 51). It alleges the same eight causes of action. (*Id.* at 33-47.) The complaint is "corrected" in the sense that it substitutes the correct names for certain defendants. (*See* ECF No. 39.)

All Defendants have jointly moved to dismiss. (ECF No. 56.)

III. ANALYSIS

A. Federal Antitrust Claims (Counts 1 & 2)

Section 4 of the Clayton Act authorizes private plaintiffs to sue for violations **[**13]** of federal antitrust laws. *See 15 U.S.C. § 15(a)* ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor."). To pursue such claims, a plaintiff must have standing to sue under Article III of the U.S. Constitution (like all plaintiffs in federal court), and also have "antitrust standing." *Tal v. Hogan, 453 F.3d 1244, 1253 (10th Cir. 2006)*. These are separate inquiries, and "the standing requirements in the antitrust context [are] more rigorous than that of the Constitution." *Id.*

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[5] Several Defendants are domiciled in California (*see* ¶¶ 12-14, 18) and Plaintiff alleges that "Defendants' combination, trust, or conspiracy was substantially carried out and effectuated within the State of California" (¶ 153).

The principles of Article III standing, although less rigorous that antitrust standing, dispose of Plaintiff's federal antitrust claims. The principles of antitrust standing—particularly "antitrust injury"—are nonetheless helpful to understanding the Article III infirmity, so the Court partially addresses antitrust standing as well.

1. Article III Standing

Article III of the U.S. Constitution restricts federal courts to deciding "cases" and "controversies." *See U.S. Const. art. III, § 2, cl. 1*. These words have been interpreted to restrict federal courts from giving "advisory opinions," *Flast v. Cohen, 392 U.S. 83, 96, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968)*, meaning that a federal court may not resolve questions in the abstract, but instead may only resolve "disputes arising out of specific facts when the resolution of the dispute will have practical consequences to the **[**14]** conduct of the parties," *Columbian Fin. Corp. v. BancInsure, Inc., 650 F.3d 1372, 1376 (10th Cir. 2011)*.

To safeguard this restriction, the Supreme Court has articulated a three-element test for "Article III standing":

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally **[*1175]** protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (citations omitted; certain alterations incorporated). "Article III standing is jurisdictional . . . ." *In re Peeples, 880 F.3d 1207, 1212 (10th Cir. 2018)*.

Plaintiff's complaint raises serious questions as to injury-in-fact as it connects to redressability. Plaintiff pleads that

> [t]he rushed and conflicted bidding process robbed [it] of an opportunity to compete fairly for the right to make an ICC-sanctioned cricket league a reality in the United States.
>
> [Plaintiff] knows it was not guaranteed to be selected as a commercial business partner of USA Cricket and the ICC. But it was entitled to a fair bidding process.

(¶¶ 6-7.) In other words, Plaintiff asserts what is sometimes **[**15]** called "procedural injury." *Lujan, 504 U.S. at 573 n.7*.

In light of Plaintiff's concessions that it can only ask for a "fair bidding process," and not for an order that USA Cricket accept Plaintiff's bid instead of ACE's, Defendants' motion specifically challenges the viability of such a procedural injury in this context, and also whether this Court can enter any order redressing it. (ECF No. 56 at 20-21.) In response, Plaintiff asserts that its burden to plead standing at this phase is a "lightened" one, and Plaintiff then reiterates that it "has lost the opportunity to fairly compete for, and likely win if judged objectively, some or all of the rights to commercially develop an ICC-sanctioned U.S. cricket league." (ECF No. 64 at 22-23.)[6] As for redressability, Plaintiff says it "is not asking the Court to award the bid to [it] or force USA Cricket to partner with [it]. [It] is seeking an injunction to halt implementation of an RFP Process infected by anticompetitive conduct until it is cleansed of Defendants' misconduct." (*Id.* at 24.)

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[6] Plaintiff also asserts two other injuries, neither of which is relevant to the present analysis. First, Plaintiff alleges that it was injured by the ICC's interference with the License Agreement between USACA and Global. (*Id.* at 23.) That allegation, if true, would be relevant to Plaintiff's standing to pursue its contractual interference claim (Count 7). But the Supreme Court has rejected any "commutative" theory of standing, by which a plaintiff borrows the injury of one cause of action in an effort to sustain standing in another. *DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)*. "[A] plaintiff must demonstrate standing for each claim he seeks to press." *Id.* Second, Plaintiff alleges that its "investments of time and money (including the hiring of and payments to experts that were part of its RFP Response) were wasted by this rigged process." (ECF No. 64 at 23.) Plaintiff did not allege as much in its complaint, however, and "[p]laintiffs cannot rectify their pleading deficiencies by asserting new facts in an opposition to a motion to dismiss." *Smith v. Pizza Hut, Inc., 694 F. Supp. 2d 1227, 1230 (D. Colo. 2010)*. In any event, although damages are a classic Article III injury and usually redressable by a money judgment, these kinds of damages would not amount to an "antitrust injury," as explained below.

Plaintiff conspicuously cites no case in which its theory of injury and redressability has been accepted. Nor could the Court find any such case.

As far as the Court is aware, "procedural **[**16]** injury" is viable, if at all, only in unique circumstances that have no obvious application here. One is in the administrative law context, and specifically as it relates to **[*1176]** the *National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4231 et seq.*, which requires federal agencies to consider the environmental impacts of their actions. There, it is usually enough to argue that requiring the agency to redo its environmental analysis might lead to a better outcome for the plaintiff, even though it is not guaranteed to do so. *See Zeppelin v. Fed. Highway Admin., 305 F. Supp. 3d 1189, 1198-99 (D. Colo. 2018)*. This is considered "a special relaxation of the normal standards for redressability and immediacy." *Id. at 1198* (internal quotation marks omitted).

Another unique context in which something like "procedural injury" is a viable basis for standing is a challenge to affirmative action. In such a challenge, there is no guarantee that, *e.g.*, the bidder for a government contract would be selected, or the applicant to a state university would be admitted, even if consideration of minority status was eliminated from the process. Rather, "an allegation that some discriminatory classification prevented the plaintiff from competing on an equal footing" is enough. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 667, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993)*.

In both of these types of cases (NEPA and **[**17]** affirmative action), a major reason why redressability still exists is that the court can order the defendant to do something that will have a real-world effect. If a court finds that an agency failed to discharge its NEPA duties adequately, the court must "hold unlawful and set aside agency action." *5 U.S.C. § 706(2)*; *see also Morris v. U.S. Nuclear Regulatory Comm'n, 598 F.3d 677, 690 (10th Cir. 2010)* (NEPA enforced through the *Administrative Procedure Act*). At that point, if the agency still wants to go forward, it is statutorily *required* to redo the NEPA process. *See 42 U.S.C. § 4332(C)*; *see also 40 C.F.R. § 1501.4*.

The affirmative action context is slightly more complicated because, for example, it is not always a legal requirement that a government award contracts through competitive bidding. But if a court is satisfied that that the government will continue to award contracts through competitive bidding and that the plaintiff will continue to bid for those contracts, redressability is satisfied. *See, e.g., Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 212, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995)* (plurality op.) ("Because the evidence in this case indicates that the [government] is likely to let contracts involving guardrail work that contain a subcontractor compensation clause at least once per year in Colorado, that Adarand is very likely to bid on each such contract, and that Adarand often **[**18]** must compete for such contracts against small disadvantaged businesses, we are satisfied that Adarand has standing to bring this lawsuit.").

Finally, in the educational affirmative action setting, redressability is generally maintained by certifying a class of both present and future applicants to the educational institution. *See Gratz v. Bollinger, 539 U.S. 244, 260-68, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003)*. Because there is generally no question that the institution would, or even could, stop assembling its incoming class through a competitive application process, a class action preserves the possibility of meaningful prospective relief even if—as is likely—the original plaintiffs will enroll in a different school, and perhaps even graduate, while the lawsuit is pending. *Cf. Texas v. Lesage, 528 U.S. 18, 21, 120 S. Ct. 467, 145 L. Ed. 2d 347 (1999)* (in affirmative action cases, as elsewhere, there must be an "allegation of an ongoing or imminent constitutional violation to support a claim for forward-looking relief").

[*1177] The Court's research has revealed no similar form of relief in the antitrust context. The reason is simple, and it goes deeper than Plaintiff's concession that "it was not guaranteed to be selected as a commercial business partner of USA Cricket and the ICC." (¶ 7.) The fundamental problem, as stated in Plaintiff's own **[**19]** words, is that "Defendants could have awarded the exclusive rights to develop the cricket league without an RFP Process." (ECF No. 64 at 38; *see also id.* at 31 (asserting essentially the same).) If Defendants could have done so, then what is to stop Defendants from doing so even if this Court grants precisely the injunction Plaintiff requests? That proposed injunction is as follows:

> Preliminarily and permanently enjoin [Defendants] from (i) taking any further action to support or implement their selection of a winner in connection with the corrupted RFP Bid Process described herein; (ii) excluding [Plaintiff] from, or failing to give objective and unbiased consideration to [Plaintiff] in, any current or future selection process in connection with a professional T20 cricket league in the U.S.; and (iii) using unfair practices in any selection process or implementation of their programs in connection with a professional T20 cricket league in the U.S.

(ECF No. 51 at 47-48; *see also* ECF No. 64 at 24 (affirming that this is the relief that Plaintiff believes satisfies the Article III redressability requirement).)

This language is already notable for use of terms like "any current or future selection **[**20]** process"—seemingly an implicit admission that there might not be another selection process. But most notable is what Plaintiff does *not* ask for, namely, *an order that Defendants re-bid the contract*. Plaintiff does not ask for that relief likely because Plaintiff cannot find any authority supporting the Court's ability to enter such an order.

To be sure, Plaintiff says that "Defendants could have awarded rights to develop the cricket league without an RFP Process, *but USA Cricket chose to avail itself of the benefits of an apparently competitive process*." (ECF No. 64 at 31 (emphasis added).) The implication appears to be that there is some point-of-no-return, beyond which one is irrevocably committed to a bidding process that may be judicially evaluated after the fact for fairness. But Plaintiff never actually says as much, nor cites any authority supporting the implication.

Conceivably, Congress could "loosen the strictures of the redressability prong" by granting a procedural right in the antitrust context, as it has in the environmental context. *Summers v. Earth Island Inst., 555 U.S. 488, 497, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009)*. But Congress has not done so. Indeed, case law about "antitrust injury" makes fairly clear that the antitrust laws were not designed eliminate **[**21]** bidding processes where the party soliciting the bids predetermined the outcome. "[O]ther laws [besides the *Sherman Act*], for example, unfair competition laws, business tort laws, or regulatory laws, provide remedies for various competitive practices thought to be offensive to proper standards of business morality." *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 137, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)* (internal quotation marks omitted); *see also* *JetAway Aviation, LLC v. Bd. of Cnty. Comm'rs of Cnty. of Montrose, 754 F.3d 824, 828-31, 835-36 (10th Cir. 2014)* (Holmes, J., concurring); *id. at 858* (Tymkovich, J., concurring).

In the same vein, the purpose of federal antitrust laws is to remedy harm to "competition, not competitors." *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. "[A] plaintiff can recover [under the antitrust laws] **[*1178]** only if [its] loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (emphasis in original). Here, USA Cricket solicited bids for "*a partner* to help capitalize on [America's] interest levels in [cricket] and, specifically, to construct, fund, launch and operate *the first* professional T20 cricket league . . . in the United States." (¶ 71 (internal quotation marks omitted; emphasis added).) Combined with Plaintiff's allegation that "ICC recognition is crucial for any professional cricket league to be viable and internationally recognized" (¶ 32), it is clear that USA Cricket was **[**22]** offering a monopoly to whichever bidder prevailed during the RFP process. Thus, Plaintiff's ultimate goal is to hold the monopoly that USA Cricket granted to ACE. Being deprived of that monopoly is not something the antitrust laws were designed to remedy. *JetAway, 754 F.3d at 838* (Holmes, J., concurring) ("the mere fact that one monopolist is able to successfully replace another does not harm competition and, therefore, does not effect an antitrust injury"); *id. at 855-56* (Tymkovich, J., concurring) (agreeing that "merely substitut[ing] one monopoly for another" is not an injury redressable by antitrust laws).[7] Thus, Congress has not "loosen[ed] the strictures of the redressability prong," *Summers, 555 U.S. at 497*, in the antitrust context, and especially not under the circumstances presented here.

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[7] Plaintiff insists that it "has not claimed that [the] relevant market can sustain only a single [ICC-sanctioned T20 league], and, to the extent that Defendants make that claim, [Plaintiff] has not had an opportunity to engage in discovery to evaluate it." (ECF No. 64 at 38-39 (citations omitted).) This is beside the point. Whether or not the United States can sustain more than one cricket league (of any type, ICC-sanctioned or not), USA Cricket seeks only *one* partner, with the intent to develop *one* league. Plaintiff

The only prospective relief this Court might award that would certainly remedy Plaintiff's injury is to order USA Cricket to accept Plaintiff's bid instead of ACE's—but this Court has no power to make such an award, and Plaintiff does not request it anyway. And assuming the viability of a mere "procedural right" to a fair shot at winning the bidding war, the only prospective relief this Court might award that would guarantee that right **[**23]** is to order USA Cricket to redo the bidding—but this Court has no power to require that, and, again, Plaintiff does not request it in any event.

So the Court is left with Plaintiff's request to enjoin Defendants from "taking any further action to support or implement their selection of a winner in connection with the corrupted RFP Bid Process." (ECF No. 51 at 47-48.) If the Court were to enter such an injunction, effectively vacating the RFP award, USA Cricket would remain free to unilaterally invite ACE to develop the T20 league, and Plaintiff would be left just as empty-handed as before.

Perhaps Plaintiff means to head off this outcome through its requests that the Court enjoin Defendants from "excluding [Plaintiff] from, or failing to give objective and unbiased consideration to [Plaintiff] in, any current or future selection process," and "using unfair practices in any selection process or implementation of their programs in connection with a professional T20 cricket league in the U.S." (*Id.* at 48.) More specifically, perhaps Plaintiff chose the phrase "selection process" to cover all possible methods of selecting a partner to establish a T20 league, including a unilateral **[*1179]** invitation. But **[**24]** Plaintiff nowhere makes this explicit, nor cites any authority giving the Court power to enter an injunction to "give Plaintiff another look before making any final decision." Even if the Court had such power, redressability would still be lacking because "another look" is no more than that—and Plaintiff could still be left empty-handed in the end.

In sum, there is no prospective relief this Court has power to order that would remedy Plaintiff's alleged injury. Accordingly, Plaintiff lacks Article III standing to bring its federal antitrust claims.

2. Loose Ends

The Court must address two additional issues to ensure itself that Article III standing does not exist here.

a. *Article III Standing Through Retrospective Relief*

Late in the complaint, Plaintiff inserts an unelaborated allegation that the allegedly corrupt RFP process "allowed others to take business from [Plaintiff]—business that [Plaintiff] would have competed fairly for *and secured* if it were competing on a legitimate playing field." (¶ 134 (emphasis added).) Defendants' motion challenges this allegation as a "feint[]" that is "fatally" contradicted by Plaintiff's earlier concession that "'it was not guaranteed to be selected **[**25]** as a commercial business partner of USA Cricket and the ICC.'" (ECF No. 56 at 20 (quoting ¶ 7).) Plaintiff's 40-page response brief entirely ignores this attack. In fact, Plaintiff does not cite ¶ 134 for any purpose. (*See generally* ECF No. 64.) The Court thus deems Plaintiff to have forfeited any argument that a business opportunity which was certainly lost is a monetary injury traceable to Defendants' conduct and redressable through a money judgment—therefore creating Article III standing.[8]

b. *"Bid-Rigging"*

In reviewing Plaintiff's allegations, one passingly familiar with antitrust concepts might think of the term "bid-rigging." Bid-rigging, however, is the sort of antitrust claim that USA Cricket could have brought against bidders in the RFP process if those bidders (such as ACE and Plaintiff) had conspired amongst themselves regarding the bids each would submit, *e.g.*, to ensure that no one offered more than a certain amount of compensation to USA Cricket. *See* United States v. Mobile Materials, Inc., 881 F.2d 866, 869 (10th Cir. 1989) ("Any agreement between competitors pursuant to which contract offers are to be submitted or withheld from a third party constitutes bid rigging [and is] *per se* violative of 15 U.S.C. [§] 1.").

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wants to be that sole partner, just as Global wanted to be USACA's sole partner. (*See* ¶ 41 (Global negotiated with USACA to create "*the only* USACA sanctioned and ICC approved professional T20 league in the United States" (internal quotation marks omitted; emphasis added))).

[8] Even if Plaintiff had made such an argument, such damages do not state an antitrust injury, as explained above.

In a rhetorical passage, Plaintiff accuses Defendants **[**26]** of "rigging competition"—an allegation meant to create an ironic contrast between international cricket's commitment to fair play on the pitch and lack of fair play in business dealings. (¶¶ 1-3.) But Plaintiff never actually accuses Defendants of bid-rigging. Plaintiff instead describes Defendants' conduct as "sham bidding." (¶ 122; *see also* ¶ 156(b); ECF No. 64 at 19.) Plaintiff's choice of words is somewhat surprising. "Sham bidding" is the name used by one decision from this District to distinguish antitrust-prohibited bid-rigging from antitrust-neutral allegations that the party soliciting the bid did not conduct the bid process fairly. *See* *L-3 Commc'ns Corp. v. Jaxon Eng'g & Maint., Inc., 863 F. Supp. 2d 1066, 1089-90 (D. Colo. 2012)* (citing *Sitkin Smelting & Refining Co. v. FMC Corp., 575 F.2d 440* ***[*1180]*** *(3d Cir. 1978))*. By invoking the term "sham bidding," Plaintiff all but admits that the Court can provide no remedy for the injury Plaintiff alleges.

* * *

For the foregoing reasons, Counts 1-2 must be dismissed for lack of Article III subject matter jurisdiction.

B. State-Law Claims (Counts 3-8)

Plaintiff's state-law claims are grounded in the same theory underlying the federal antitrust claims, namely, that Plaintiff has been "procedurally" injured by the allegedly corrupt bidding process. Thus, these claims also fail for lack of Article III standing, **[**27]** unless the relevant state laws grant rights and remedial powers not available under federal ***antitrust law*** (Plaintiff has not established that they do). But even if Plaintiff has Article III standing under one or more of its state-law claims (such as a straightforward claim for damages under the contractual interference claim, Count 7), another jurisdictional problem prevents the Court from reaching the merits of those claims.

Due to the Article III infirmity in Counts 1 and 2, the Court has no original jurisdiction over the federal antitrust claims. Yet they are the only claims Plaintiff pleads that arise under federal law. *See* *28 U.S.C. § 1331*. Accordingly, the Court can exercise jurisdiction over the state-law claims only if Plaintiff shows that diversity jurisdiction exists under *28 U.S.C. § 1332*. *See* *Penteco Corp. v. Union Gas Sys., Inc., 929 F.2d 1519, 1521 (10th Cir. 1991)* ("The party seeking the exercise of jurisdiction in his favor must allege in his pleading the facts essential to show jurisdiction." (internal quotation marks omitted)); *see also* *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 829, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* ("When a plaintiff sues more than one defendant in a diversity action, the plaintiff must meet the requirements of the diversity statute for *each* defendant or face dismissal." (emphasis in original)).[9]

As relevant here, *§ 1332* requires that the parties be "citizens **[**28]** of different States." *28 U.S.C. § 1332(a)(1)*. When one of the parties is an LLC—as Plaintiff is—then the plaintiff fails to plead facts sufficient to show diversity unless the plaintiff pleads the citizenship of all the LLC members and shows that no member is a citizen of the same state as any defendant. *See* *Siloam Springs Hotel, L.L.C. v. Century Sur. Co., 781 F.3d 1233, 1237-1238 (10th Cir. 2015)* (an LLC takes the citizenship of all its members; "only those state-created entities that are corporations, in the traditional understanding of that word, will be treated as a person for purposes of diversity jurisdiction"). If the LLC members are themselves non-corporate business entities (other LLCs, LLPs, etc.), then the plaintiff must examine the members' members until the plaintiff "bottoms out" at a natural person or a corporation. The citizenship of those natural persons and corporations is what counts in the diversity analysis.

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[9] To be clear, the federal antitrust claims did not open the door to supplemental jurisdiction over the state-law claims. Supplemental jurisdiction embraces "all other claims that are so related to claims in the action within [the Court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." *28 U.S.C. § 1367(a)*. *If* Plaintiff's federal antitrust claims had stated an Article III case or controversy, *then* the Court would have had original jurisdiction over them (through Article III and *28 U.S.C. § 1331*). But, as to those claims, it turns out that this Court has only ever had "jurisdiction to determine its own jurisdiction." *United States v. Ruiz, 536 U.S. 622, 628, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002)*. It has never had original jurisdiction, and so it cannot exercise supplemental jurisdiction.

[*1181] Plaintiff does not plead the necessary allegations. As to itself, Plaintiff alleges only that it is a Delaware LLC with its principal place of business in Las Vegas, Nevada. (¶ 9.) Those facts would be relevant if Plaintiff was a corporation, but it is not. More importantly, Plaintiff entirely fails to plead the citizenship of its LLC membership, and so Plaintiff cannot **[**29]** establish that it is *not* a citizen of a state in which a defendant is organized or domiciled. For this reason, Counts 3-8 must be dismissed without prejudice for lack of subject matter jurisdiction.

IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. Defendants' Joint Motion to Dismiss (ECF No. 56) is GRANTED;

2. Counts 1-2 of the Corrected Complaint and Jury Demand (ECF No. 51) are DISMISSED WITHOUT PREJUDICE for lack of Article III jurisdiction; and

3. Counts 3-8 of the Corrected Complaint and Jury Demand (ECF No. 51) are DISMISSED WITHOUT PREJUDICE for lack of Article III jurisdiction and for lack of statutory subject matter jurisdiction.

Dated this 12th day of March, 2020.

BY THE COURT:

/s/ William J. Martínez

William J. Martínez

United States District Judge

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Ellison v. Am. Bd. of Orthopaedic Surgery, Inc.

United States District Court for the District of New Jersey

March 12, 2020, Decided; March 12, 2020, Filed

Civ. No. 16-8441 (KM) (JBC)

Reporter
2020 U.S. Dist. LEXIS 43993 *; 2020-1 Trade Cas. (CCH) P81,132; 2020 WL 1183345

BRUCE E. ELLISON, M.D., Plaintiff, v. AMERICAN BOARD OF ORTHOPAEDIC SURGERY, INC., Defendant.

Subsequent History: Vacated by, Remanded by *Ellison v. Am. Bd. of Orthopaedic Surgery, 2021 U.S. App. LEXIS 26091, 2021 WL 3853041 (3d Cir. N.J., Aug. 30, 2021)*

Appeal terminated, 08/30/2021

Prior History: *Ellison v. Am. Bd. of Orthopaedic Surgery, Inc., 2017 U.S. Dist. LEXIS 113463 (D.N.J., July 10, 2017)*

Core Terms

board certification, privileges, medical staff, allegations, certification, patients, tying arrangement, rule of reason, conspiracy, northern, Sherman Act, anticompetitive, asserts, practices, surgeons, exam, motion to dismiss, conspired, consumers, surgery, staff, failure to state a claim, orthopedic surgeon, restraint of trade, organizations, competitor, quotations, specialty, programs, seller

Counsel: **[*1]** For BRUCE E ELLISON, Plaintiff: ANDREW LAYTON SCHLAFLY, LEAD ATTORNEY, FAR HILLS, NJ.

For AMERICAN BOARD OF ORTHOPAEDIC SURGERY, INC., Defendant: DANIEL C. GREEN, VEDDER PRICE, P.C., NEW YORK, NY.

Judges: HON. KEVIN MCNULTY, UNITED STATES DISTRICT JUDGE.

Opinion by: KEVIN MCNULTY

Opinion

KEVIN MCNULTY, U.S.D.J.:

Pending before the Court is the motion of defendant American Board of Orthopaedic Surgery, Inc. ("ABOS"), to dismiss the Second Amended Complaint filed by plaintiff Bruce E. Ellison, M.D. ("Dr. Ellison") (DE 48). Two predecessor complaints have already been dismissed on motion of ABOS.

Dr. Ellison's Second Amended Complaint[1] asserts one count based on alleged violations of federal ***antitrust law*** in relation to the certifications ABOS provides to certain qualifying physicians ("Board Certification"). Dr. Ellison

[1] The following abbreviations are used herein:

asserts that ABOS improperly restrains trade by colluding with hospitals in requiring orthopedic surgeons to obtain Board Certification as a condition of practicing at those hospitals. ABOS allegedly prevents Dr. Ellison from obtaining Board Certification unless he first has hospital medical staff privileges, thereby reducing competition at hospitals by excluding surgeons who, like Dr. Ellison, practice **[*2]** exclusively at ambulatory surgery centers or other places that do not offer those medical staff privileges. Dr. Ellison primarily seeks declaratory and injunctive relief, but also damages, costs, and fees. ABOS has moved to dismiss the Second Amended Complaint, asserting grounds similar to those in its prior motion to dismiss the First Amended Complaint (*see* DE 29).

For the reasons stated in this opinion, I will dismiss the Second Amended Complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

I. Summary

a. Factual background

I recap the factual background from my prior opinion, supplementing as necessary with facts newly asserted in the Second Amended Complaint.

Dr. Ellison holds a medical license in California, where he currently treats patients as an orthopedic surgeon. (2AC ¶¶ 11, 32) For "personal and professional reasons, Dr. Ellison would like to obtain medical staff privileges" at a hospital in northern New Jersey. (*Id.* ¶ 11) The hospitals to which he says he *would* apply for privileges—but has not actually applied—require that he possess Board Certification provided by ABOS. **[*3]** (*Id.* ¶ 29)

Defendant ABOS—the only defendant in this action—oversees the Board Certification program for physicians specializing in orthopedic surgery. (*Id.* ¶ 3) Defendant ABOS is incorporated in Delaware. (*Id.* ¶ 12) It has directors and officers who reside in many different states, although the 2AC does not specify where these members reside. (*Id.* ¶ 12) ABOS arranges for the administration of the written portion of its Board Certification exam through a third-party subcontractor at testing locations throughout the United States, including in New Jersey, collects "up to a million dollars or more annually" from physicians located in New Jersey, and communicates with hospitals and patients in New Jersey about which physicians hold Board Certifications. (*Id.* ¶11 36-39) Defendant ABOS does not maintain any offices, records, property, or staff in New Jersey. (DE 49-3 ¶ 4)

ABOS is a member of the American Board of Medical Specialties ("ABMS"). (*Id.* ¶ 2) ABMS is *not* a defendant here, nevertheless, the Second Amended Complaint provides additional color with respect to this entity. According to one article cited in the Second Amended Complaint, ABMS

> continues to be the leading not-for-profit organization **[*4]** overseeing physician certification in the United States. ABMS establishes the standards its 24 Member Boards use to develop and implement educational and professional evaluation, assessment, and certification of physician specialists. More than 860,000 physicians are certified in one or more of the approved 37 specialties and 86 subspecialties offered by the ABMS Member Boards.

(*Id.* ¶ 6, n.2 (citing https://www.prnewswire.com/news-releases/the-american-hospital-association-ioins-abms-multi-specialtv-portfolio-program-300435665.html))

The Second Amended Complaint includes additional details about another entity, the American Hospital Association ("AHA"), which is also *not* a defendant. Nearly 90% of all hospitals are members of AHA (*Id.* ¶ 4) AHA

"DE __" = Docket Entry in this case

"2AC" = Second Amended Complaint (DE 48) is a non-profit that provides "education for health care leaders and is a source of information on health care issues and trends." (*Id.* ¶ 6, n.2) AHA and ABMS have interlocking memberships. (*Id.* ¶ 5).

The 2AC asserts that AHA and ABMS (again, not defendants here) entered into an agreement in April 2017 to "provide money-making programs in connection with board certification by [defendant] ABOS and other specialty groups." (*Id.* ¶ 6) The Second Amended **[*5]** Complaint adds that AHA announced in 2017 that it had joined the ABMS Multi-Specialty Portfolio Program. This program allows

> Hospitals and health systems participating in the AHA's Health Research & Educational Trust (HRET) Hospital Improvement Innovation Network (HIIN) [to] facilitate Maintenance of Certification (MOC) Improvement in Medical Practice (Part IV) credit for physicians who are Board Certified by one of the 21 of 24 ABMS Member Boards participating in the Portfolio Program.
>
> The HRET HIIN is the first HIIN in the country to offer this service to its more than 1,600 participating hospitals. Through ABMS MOC Part IV credit, physicians can meet the requirements for maintaining their certification while meaningfully participating in quality improvement programs in their organizations. Partnering on ABMS MOC Part IV also will reduce duplication of quality improvement efforts; HRET HIIN hospitals currently are engaged in improvement efforts across 11 hospital-acquired condition topics. Physicians' roles in these projects may vary from team member to physician champion. Projects will be data-driven, focused on patient safety, and designed to implement evidence-based best practices. **[*6]** AHA hopes this program will encourage the development of long-lasting improvements, while strengthening physicians' connection to the improvement efforts of their broader organizations.
>
> "We are very pleased to be the first HIIN to provide this valuable service," said Jay Bhatt, DO, HRET President and AHA Chief Medical Officer. "Aligning physicians' pursuit of their Board Certification with hospitals' quality improvement efforts will accelerate our collective efforts to improve patient safety by promoting team-based care delivery."

(*See Id.* n.2 (citing https://www.prnewswire.corn/news-releases/the-american-hospital-association-joins-abms-multi-specialty-portfolio-program-300435665.html))[2] Dr. Ellison does not contend that this recent agreement to provide continuing certification impacts him. Rather, Dr. Ellison alleges that ABMS and AHA have previously entered into "similar agreements" to promote ABOS and other specialty groups. As part of this "arrangement," "ABOS excludes Plaintiff from obtaining board certification by ABOS unless he first has hospital medical staff privileges, and AHA member hospitals exclude physicians unless they have board certification." (2AC ¶¶ 6, 7) To achieve **[*7]** this agreement, "ABMS and its members put pressure on hospitals through AHA, to require ABMS specialty board certification, which includes ABOS." (*Id.* ¶ 18; *see also id.* ¶¶ 19, 20)

According to the Second Amended Complaint, the largest hospital systems in northern New Jersey, like RWJBarnabas, have joined into a conspiracy to make money since they are members of the AHA and require the hospitals under their purview to provide medical staff privileges only to doctors who have obtained Board Certification. (*Id.* ¶¶ 4, 23-26) St. Peter's University Hospital, located in New Brunswick, New Jersey, also requires Board Certification as a condition of obtaining medical staff privileges. (*Id.* ¶ 27) Similarly, Rutgers University Hospital requires Board Certification in order to obtain medical staff privileges and will not process the applications for employment of prospective doctors unless the applicant has acquired Board Certification within seven years after completing residency training. (*Id.* ¶ 26) The Board Certification process is controlled by ABMS and, for Dr. Ellison, ABOS such that other equally rigorous board certification programs offered by other organizations are not recognized. **[*8]** (*Id.* ¶¶ 28, 48) Thus, says Ellison, ABMS and its members ABOS, AHA, and member hospitals all have an arrangement to exclude Dr. Ellison from obtaining board certification. (*Id.* ¶ 7)

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[2] Dr. Ellison cites to a number of other articles in the 2AC. Many of these articles are from the early 2000s, and they do not specifically refer to ABOS. (*See* 2AC ¶¶ 15 (citing a CMS Director Survey and Certification Group article from 2004 concerning the requirements for hospital medical staff privileging); ¶ 16 (citing two studies from 2007 and 2009 regarding hospital privileging as it relates to board certification); ¶ 18 (citing a 2005 article titled "Board Certification as Prerequisite for Hospital Staff Privileges"))

Dr. Ellison alleges that the requirement for Board Certification precludes him from obtaining medical staff privileges "at the major hospitals in the regions of northern New Jersey." (*Id.* ¶ 29; *see also* ¶ 9) Dr. Ellison successfully passed the written portion of ABOS's exam ("Part I") in Chicago, Illinois. (*Id* ¶ 53; DE 49-3 ¶ 6) This qualified him to take the oral portion of the exam ("Part II"), which is only administered in Chicago. (2AC ¶¶ 53-55; DE 49-3 ¶ 7) However, ABOS subsequently refused to allow him to take Part II of the exam because he did not have medical staff privileges. (*Id.* ¶¶ 44, 56)

This, says Dr. Ellison, confronted him with the proverbial catch-22: without medical staff privileges he cannot take Part II of the certification exam, but without certification he cannot acquire medical staff privileges. This practice, Dr. Ellison alleges, reduces competition to hospitals by shutting out surgeons, like himself, who practice exclusively at ambulatory surgery centers (which do not provide medical **[*9]** staff privileges), thereby reducing the number of orthopedic surgeons available to patients. (*Id.* ¶ 43) There is an exception to the staff-privileges prerequisite for physicians who have completed their residency within the last seven years, but that exception is unavailable to Dr. Ellison at this later stage of his career. (*Id.* ¶ 7)

Dr. Ellison has not applied for medical staff privileges at these New Jersey hospitals because, he says, without board certification, rejection is likely. He is therefore unwilling to apply, because a rejection of an application for medical staff privileges allegedly "results in an automatic adverse entry in the National Practitioner Data Bank, which severely damages the reputation of a physician." (*Id.* ¶ 30)

Dr. Ellison asserts that ABOS has unlawfully acted in concert with hospitals to require Board Certification as a precondition for employment, thus interfering with the market for orthopedic surgery services at hospitals in northern New Jersey. (*Id.* ¶¶ 41, 57) He also claims that ABOS has engaged in an anticompetitive tying arrangement in violation of *Section 1 of the Sherman Act*. (*Id.* ¶ 60) In this respect, ABOS and the hospitals are allegedly acting in concert **[*10]** for ABOS's pecuniary benefit. (*Id.* ¶ 58) This pecuniary benefit for these organizations is the only justification suggested by Dr. Ellison for the Board Certification precondition for obtaining medical staff privileges. He suggests that this must be the case because, from 2007-2017, the use of board certification in hospital privileging significantly increased, but that increase was not accompanied by improved physician competence or better outcomes for patients. (*Id.* ¶¶ 15-22) Instead, the only reason for the increase in Board Certification is ABOS's and ABMS's continued pressure on hospitals to require Board Certification as a condition of medical staff privileges. (*Id.*)

This restraint, Dr. Ellison asserts, reduces "the availability of physicians in the relevant market, which reduces patient choice and increases health care costs." (*Id.* ¶ 61) He seeks damages, a declaratory judgment that ABOS has violated the Sherman Act, injunctive relief allowing Dr. Ellison to take Part II of the exam, and an order requiring ABOS to cease requiring surgical privileges as a precondition for taking Part II of the exam. (*Id.* ¶¶ 56-61)

b. Procedural history

This case, or some version of it, has been **[*11]** pending for over four years. In December 2015, Ellison first brought suit against ABOS in the district where it is located, *i.e.*, the United States District Court for the Northern District of Illinois (the "Illinois Complaint"), seeking the same relief he seeks in this action. *See Ellison v. American Board of Orthopaedic Surgery, Inc.*, No. 15-cv-11848, Docket Entry 1, Illinois Complaint ¶¶ 3, 28-32. However, Dr. Ellison voluntarily dismissed the Illinois Complaint in April 2016. *Id.*

That same month, Dr. Ellison filed a factually similar complaint in the Superior Court of New Jersey, Law Division, Union County, alleging that ABOS violated the *New Jersey Consumer Fraud Act ("NJCFA"), N.J. Stat. Ann. § 56:8-1, et seq.*, and the *New Jersey Antitrust Act, N.J. Stat. Ann. § 56:9-1, et seq.* (*See* DE 1) Dr. Ellison sought treble damages, attorneys' fees, and declaratory and injunctive relief requiring ABOS to allow him to take the Part II exam.

In November 2016, ABOS removed the case to federal court ("Removed Complaint") on the basis of diversity of citizenship. *See* [28 U.S.C. § 1332(a)](). The notice of removal stated that Dr. Ellison is domiciled in California, and that ABOS is a Delaware corporation with its principal place of business in North Carolina. (DE 1 ¶¶ 11-15)[3]

In February **[*12]** 2017, ABOS moved to dismiss the Removed Complaint on a variety of grounds. (DE 4) I granted that motion and dismissed the Removed Complaint pursuant to *Rule 12(b)(6)* for failure to meet the minimal pleading standards of *Rule 8*. (DE 17) In that opinion I noted, *inter alia*, that "[t]he vagueness of the Complaint makes it difficult to discern what, if anything, connects Dr. Ellison, ABOS, and any wrongful acts to the State of New Jersey." (*Id.* at p. 5.) Additionally, without any allegation of a concrete injury in fact, I could not "accept that Dr. Ellison possesse[d] a cause of action in any jurisdiction where he theoretically could have sought, and been refused, admitting privileges." (*Id.*) Finding that Dr. Ellison had failed to state a claim, I did "not reach, or prejudge" the issues related to personal jurisdiction, venue, or standing raised by ABOS and entered the dismissal of the Removed Complaint without prejudice to the filing of a motion to amend. (*Id.*) However, I flagged numerous challenges facing plaintiff, including the issues of personal jurisdiction and venue, as follows: "the plaintiff may wish to consider whether it make more sense to file this lawsuit in a district where the defendant is incorporated **[*13]** and has its principal place of business, or in the alternative in a district where the acts complained of actually took place." (*Id.* at p.5.)

Dr. Ellison subsequently moved for leave to amend, which was granted, and filed an Amended Complaint. (DE 21, 27, 28) *See* *Ellison v. Am. Bd. of Orthopaedic Surgery, Inc., No. 16-8441, 2018 U.S. Dist. LEXIS 68549, 2018 WL 1919953, at *1 (D.N.J. Apr. 24, 2018)*. The Amended Complaint dropped the counts alleging violations of New Jersey state law and instead alleged a single count of restraint of trade in violation of *Section I of the Sherman Act, 15 U.S.C. § 1*. (*See* DE 28)

ABOS again moved to dismiss the Amended Complaint for lack of personal jurisdiction, improper venue, lack of standing, and failure to state a claim, pursuant to *Fed. R. Civ. P. 12(b)(2)*, *(3)*, and *(6)*. (DE 29) In October 2018, I issued a second opinion, again dismissing the complaint for failure to meet the pleading standards of *Rule 8*. (DE 34) Like the Removed Complaint, the Amended Complaint still stated "only in a conclusory manner that northern New Jersey hospitals conspired and knew about the alleged plan to bolster ABOS's market position." (*Id.* p. 8.) I found that the "Amended Complaint does not assert any plausible basis for a conspiracy between ABOS and the vast network of New Jersey hospitals, nor does the Amended Complaint include any plausible allegations that place the **[*14]** hospitals' conduct in a context that raises a suggestion of a preceding agreement." (*Id.* p. 9.)

Dr. Ellison then filed for leave to file a Second Amended Complaint (DE 41), which was granted (DE 47). On June 13, 2019, Dr. Ellison filed the Second Amended Complaint. (DE 48) Eight days later, on June 21, 2019, ABOS again moved to dismiss on the basis that the Second Amended Complaint still suffered from the same deficiencies as the Removed Complaint and the Amended Complaint, namely that the

> Second Amended Complaint does not cure the standing and jurisdictional flaws identified by the Court when it granted ABOS' first motion to dismiss. Nor does it adequately allege 1) an anticompetitive conspiracy between ABOS and any specified New Jersey hospitals or 2) an illegal tying arrangement, as the Court, in granting ABOS' most recent motion to dismiss, advised Plaintiff he would be required to do.

(DE 49). Plaintiff opposed the motion (DE 51), and defendant filed a reply (DE 54).

II. ANALYSIS

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, if it fails to state a claim upon which relief can be granted. The defendant, as the moving party, bears the burden of showing that no claim has been **[*15]** stated. *Animal Science Products, Inc. v. China Minmetals Corp., 654 F.3d 462, 469 n. 9 (3d Cir. 2011)*. For the purposes of a motion to dismiss, the facts alleged in the complaint are accepted as true

[3] The Removed Complaint alleged, less specifically, that Dr. Ellison is located in California and that ABOS is headquartered in North Carolina. (DE no 1-1 ¶¶ 2, 3; DE 1-3, Civil Cover Sheet)

and all reasonable inferences are drawn in favor of the plaintiff. *New Jersey Carpenters & the Trustees Thereof v. Tishman Const. Corp. of New Jersey, 760 F.3d 297, 302 (3d Cir. 2014)*.

Federal Rule of Civil Procedure 8(a) does not require that a complaint contain detailed factual allegations. Nevertheless, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Thus, the complaint's factual allegations must be sufficient to raise a plaintiff's right to relief above a speculative level, so that a claim is "plausible on its face." *Id. at 570*; *see also* *West Run Student Housing Assocs., LLC v. Huntington Nat. Bank, 712 F.3d 165, 169 (3d Cir. 2013)*. That facial-plausibility standard is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 556*). While "[t]he plausibility standard is not akin to a 'probability requirement' . . . it asks for more than a sheer possibility." *Iqbal, 556 U.S. at 678*.

A. Sherman Act claim

The *Sherman Anti-Trust Act* declares "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States ... to be illegal." **[*16]** *15 U.S.C. § 1*. "Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition." *Animal Sci. Prods., Inc., 34 F. Supp. 3d at 480* (quoting *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 4-5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958))*.

"In order to sustain a cause of action under *§ 1 of the Sherman Act*, the plaintiff must prove: (1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy." *Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72, 81-82 (3d Cir. 1977)*. *Accord* *Howard Hess Dental Laboratories Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 253 (3d Cir. 2010)*; *cf.* *Franco v. Connecticut Gen. Life Ins. Co., 818 F. Supp. 2d 792, 829 (D.N.J. 2011)* ("Pleading a colorable Sherman Act *section 1* claim requires a plaintiff to allege (1) an agreement (2) imposing an unreasonable restraint of trade within a relevant product market and (3) resulting in antitrust injury, that is 'injury of the type the antitrust laws were intended to prevent and ... that flows from that which make defendants' acts unlawful.'").

"The existence of an agreement is the hallmark of a *Section 1* claim. Liability is necessarily based on some form of concerted action.... The agreement, of course, must pertain **[*17]** to some unlawful conduct within the meaning of the antitrust laws. To establish liability under *section 1*, a plaintiff must demonstrate that the challenged practice imposed an unreasonable restraint on trade. The illegality of the restraint may be demonstrated in one of two ways: under the per se standard or under a rule of reason analysis." *Franco, 818 F. Supp. 2d at 829-30 (D.N.J. 2011)* (internal citations and quotations omitted).

"The rule of reason requires courts to conduct a fact-specific assessment of 'market power and market structure ... to assess the [restraint]'s actual effect' on competition." *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284, 201 L. Ed. 2d 678 (2018)* (citation omitted). "While the rule of reason typically mandates an elaborate inquiry into the reasonableness of a challenged business practice, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable. Such plainly anticompetitive agreements or practices are deemed to be illegal per se." *United States v. Brown Univ. in Providence in State of R.I., 5 F.3d 658, 669 (3d Cir. 1993)* (internal quotations and citations omitted). The types of "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal **[*18]** without elaborate inquiry as to the precise harm they have caused or the business excuse for their use ... are price fixing, division of markets, group boycotts, and tying arrangements." *N. Pac. Ry. Co., 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. *Accord*

Arizona v. Maricopa County Med. Soc., 457 U.S. 332, 345, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982); *Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830 (3d Cir. 2010)* ("Some categories of restraints, such as horizontal price-fixing and market allocation agreements among competitors, 'because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable.") (quoting *Brown Univ. in Providence in State of R.I., 5 F.3d at 669*); *In re Ins. Brokerage, 618 F.3d at 316* ("Paradigmatic examples [of per se illegal restraints] are 'horizontal agreements among competitors to fix prices or to divide markets.'" (quoting *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)))*.

1. Agreement

"To allege such an agreement between two or more persons or entities, a plaintiff must allege facts plausibly suggesting 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" *Howard Hess Dental Labs. Inc., 602 F.3d at 254* (quoting *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 755, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*. With respect to the alleged conspiracy between ABOS and northern New Jersey hospitals, Dr. Ellison has failed to allege facts that plausibly suggest such an unlawful arrangement.

Dr. Ellison has alleged no facts supporting a *per se* restraint of trade. The Second Amended Complaint, like the complaints that preceded it, states only in a **[*19]** conclusory manner that northern New Jersey hospitals "conspired" with ABOS to require certification. But "[r]esort to per se rules is confined to restraints. . . that would always or almost always tend to restrict competition and decrease output." *Leegin, 551 U.S. at 886*. There are no facts alleging any type of agreement suggestive of plainly anticompetitive conduct that amounts to a *per se* unlawful restraint.

The claim is tantamount to one that hospitals cannot require physician qualifications unless they run their certification programs themselves, lest they "conspire." But there is nothing inherently harmful or unlawful about a hospital requiring physicians to be certified. It cannot be said that such a practice has no legitimate purpose, and can only be aimed at restraining trade. It has an obvious medical rationale. For this reason, a hospital's requirement that physicians meet certain qualifications will rarely if ever found to be *per se* unreasonable. *See, e.g., Weiss v. York Hosp., 745 F.2d 786, 820 (3d Cir. 1984)* ("The Medical Staff is, however, entitled to exclude individual doctors, including osteopaths, on the basis of their lack of professional competence or unprofessional conduct . . . We recognize, therefore, that in many cases involving exclusion **[*20]** from staff privilege, courts will, more or less openly, have to utilize a rule of reason balancing approach."); *Miller v. Indiana Hosp., 843 F.2d 139, 144 (3d Cir. 1988)* ("We recognized that in a hospital staff privilege case in which the hospital defends on lack of professional ability, the rule of reason test would apply."); *see also BCB Anesthesia Care Ltd. v. Passavant Mem. Area Hosp. Ass'n, 36 F.3d 664, 667 (7th Cir. 1994)* (noting that courts "invariably analyze" antitrust claims based on hospital credentialing decisions under the rule of reason because "there is nothing obviously anticompetitive about a hospital choosing one staffing pattern over another or in restricting the staffing to some rather than many or all").

The allegations in the 2AC also fail under the Rule of Reason analysis. The Second Amended Complaint reiterates, for instance, that "Defendant ABOS has undertaken its actions with a common design and understanding with hospitals to exclude some competent orthopedic surgeons from the relevant market, including Dr. Ellison." (2AC ¶ 62) This type of conclusory allegation is found throughout the 2AC. (*E.g., id.* ¶11 6, 9, 14, 41, 44, 57, 58, 60, 61, 62, 63). "But to survive dismissal it does not suffice to simply say that the defendants had knowledge; there must be factual allegations to plausibly suggest as much." **[*21]** *Howard Hess Dental Labs. Inc., 602 F.3d at 255* (citing *Twombly, 550 U.S. at 564*).

There are no such allegations here. Without more, the mere fact that certain hospitals require Board Certification for admitting privileges combined with a bare assertion that hospitals conspired with ABOS is not a sufficient allegation of an unlawful agreement. *See Twombly, 550 U.S. at 556-57* ("[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.

Hence, when allegations of parallel conduct are set out in order to make a [Sherman Act] § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.").

Nothing in this complaint goes beyond an allegation that the hospitals chose to require certification by an outside organization, ABOS. These entities do not conspire any more than the hospitals "conspire" with medical schools by virtue of requiring their doctors to possess a medical degree. The facts to support a conspiratorial agreement or a coercive arrangement are lacking.

Dr. Ellison attempts **[*22]** to bridge that gap with public statements made by ABMS (to which Defendant ABOS is alleged to belong). According to the complaint, ABMS stated that it "encourages hospitals and insurers to consider it when granting or delineating clinical privileges." (2AC ¶ 64; *see also* ¶ 18). To begin with, these statements are attributable to ABMS and AHA—not defendant ABOS. In any event, they continue to miss the mark. There is nothing inherently unlawful about ABMS "encouraging" certain hospitals to accept its certification program. These vague allegations that ABMS influenced or pressured hospitals into requiring board certification actually suggest just the opposite. *Lacking* any actual agreement with hospitals, ABMS engaged in public marketing efforts in an attempt to expand the reach of its programs. The statements cited by Dr. Ellison confirm as much:

> We all know that the hospital business is a competitive one, and the more we can do to ensure patients, our insurers, and patient advocacy groups that we deliver the highest quality care, the better off we are. There has also been pressure from specialty boards encouraging us to restrict staff privileges to those physicians who have board certification. **[*23]** Our Board of Trustees has been struggling with the issue for more than a year, and, after many rounds of talks, they have decided that we will begin to require board certification for all physicians who have staff privileges.

(2AC ¶ 18). Implicit in this statement is the recognition by that hospital that it must compete for patients by offering high quality services. While this particular hospital struggled with the decision, its trustees ultimately agreed that one way to compete and ensure quality care was to require board certification for its physicians. There is no allegation, by the way, that this article refers to any of the hospitals mentioned in the complaint. (*See* 2AC ¶ 25)

In any event, the 2AC asserts nothing to suggest that this large collection of New Jersey hospitals decided to require board certification as a prerequisite to medical staff privileges based on an illicit agreement, rather than as the result of their own independent calculation that this requirement would improve the quality of care or make them more competitive in attracting patients. The time, place, or manner of the alleged "agreement" is not specified. The Second Amended Complaint does not assert any **[*24]** facts directly suggesting such an between ABOS and the New Jersey hospitals; nor does it indirectly state a factual context that implies a preexisting agreement with ABOS. Dr. Ellison has not pled "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly, 550 U.S. at 556*.

Nor has Dr. Ellison alleged facts sufficient to suggest that ABOS has sufficient market power to affect a restraint of trade. Dr. Ellison in one sense frames the allegations in the 2AC as restricting trade because ABOS prevents him from getting certified by other equally rigorous board certification programs offered by other organizations. (2AC ¶¶ 28, 48) Of course, "exclusionary practices in themselves are not sufficient. There must be proof that competition, not merely competitors, has been harmed" *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005)*. To overcome this hurdle, Dr. Ellison must allege that there are somehow fewer surgeons available to treat patients because of ABOS's restrictions. But all the 2AC can manage is a conclusory assertion that "ABOS's actions significantly reduce the availability of orthopedic surgeons in the relevant market, which reduces patient choice and increases health care costs." (2AC ¶ 61) There **[*25]** are no well-pled factual allegations to support this sweeping conclusion. For example, Dr. Ellison does not point to any reduction of the number of surgeons available to treat patients, or resulting inflation of prices to consumers. Indeed, it is far from evident that the purported agreement between ABOS and northern New Jersey hospitals would operate in that manner. Failure to be certified, for example, does not render a surgeon unable to practice. *See Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994)*, *as amended on denial of reh'g* (Jan. 11, 1995) (explaining that it is "hard to see how the [defendant psychiatric board's] activities could amount to an exercise of market power, which entails cutting back output in the market and thus driving up prices to consumers" where "plaintiffs already are sellers in the market for psychiatric services [and] turning down their applications for certification does not remove their output from the market and therefore does not raise prices to consumers") (internal citation omitted).

Even if the relevant market is considered to consist only of surgeons admitted to practice at these New Jersey hospitals—an unsupported contention—the necessary facts are lacking. The complaint alleges that Dr. Ellison, **[*26]** a *competitor*, has been excluded from a market segment, but gives no reason to think that *competition* has been harmed—for example, that the total number of such surgeons admitted to practice at New Jersey hospitals has been reduced. That prices for surgical services are indirectly affected cannot simply be assumed, given the complex manner in which the (highly insurance-driven) market for surgical services functions.

"[I]t is commonplace, and often very useful, for organizations to recommend quality standards . . . or adopt them as part of a certification process. . . Merely to say that the standards are disputable or have some market effects has not generally been enough to condemn them as 'unreasonable' under the Sherman Act." *DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 57 (1st Cir. 1999)*. Dr. Ellison fails to sufficiently state a claim for an improper agreement under *Section 1* of the Sherman Act. The failure to allege an unlawful agreement alone warrants dismissal for failure to state a claim.

2. Tying Allegations

Dr. Ellison simultaneously asserts that defendant ABOS engaged in an improper tying arrangement. He alleges both a *per se* and a "rule of reason" tying violation. (2AC ¶P 64-65) "Tying is defined as selling one good (the tying product) on the condition **[*27]** that the buyer also purchase another, separate good (the tied product)." *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 475 (3d Cir. 1992)*. "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits for the tied item is restrained and the Sherman Act is violated." *Id. at 476* (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984))*.

"[W]here (1) a defendant seller ties two distinct products; (2) the seller possesses market power in the tying product market; and (3) a substantial amount of interstate commerce is affected, then the defendant's tying practices are automatically illegal without further proof of anticompetitive effect." *Id. at 477*. That is, under these circumstances, a defendant's acts amount to a "per se" violation.

While the "per se illegality rule applies when a business practice on its face has no purpose except stifling competition," conduct that does not trigger a *per se* analysis is analyzed under a "rule of reason" test, which focuses on the particular facts disclosed by the record to determine whether **[*28]** the probable effect of the tying arrangement is to substantially lessen *competition*, rather than merely disadvantage some particular *competitor. Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 402-03 (3d Cir. 2016)* (citations and quotations omitted).

Under the rule of reason test, a plaintiff must show a substantial foreclosure of the market for the relevant product. *Id.* (citations and quotations omitted). Although the test does not require total foreclosure, the challenged practices must bar a substantial number of rivals or severely restrict the market's ambit. *Id.* The "concern is not about which products a consumer chooses to purchase, but about which products are reasonably available to that consumer. For example, if customers are free to switch to a different product in the marketplace but choose not to do so, competition has not been thwarted—even if a competitor remains unable to increase its market share." *Id.* (citations and quotations omitted). However, even in cases where consumers have a choice between products, the market is foreclosed if the defendant's anticompetitive conduct renders that choice meaningless. *Id.* (citations and quotations omitted).

Here, Dr. Ellison conclusorily asserts that ABOS's board certification requirements amount **[*29]** to an anticompetitive tying arrangement and defines the "tying market" as "board certification for orthopedic surgeons holding an 'M.D.' degree as required by hospitals in northern New Jersey as a condition of practicing medicine there." (2AC ¶ 45) The 2AC fails to describe the operation of the alleged tying arrangement very clearly. Presumably the "tying product" is ABOS's board certification, and the the "tied product" would be hospital medical staff privileges, or the other way around.

The relevant analysis fails at the first phase of either a *per se* analysis or rule of reason analysis. This purported tying arrangement makes little sense. A tying arrangement must be viewed in light of the power wielded by the purported seller to force a consumer to buy other products it did not want, or did not want on those terms. ABOS is not plausibly alleged to possess that power. It would be ABOS's alleged "exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms" that drives the inquiry. *Town Sound and Custom Tops, Inc., 959 F.2d at 476*.[4] "[T]he essence of illegality in tying agreements **[*30]** is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next." *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 611, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*. There are no allegations that ABOS has influence over who is granted staffing privileges or that staffing privileges can be provided or sold by ABOS. (I set aside the difficulties in treating hospital staff status as a tied "product" sold in a market.) There are no well-pled allegations that ABOS is provided any direct monetary or other benefits as a result of a hospital issuing a surgeon staffing privileges. There are no facts tending to demonstrate that *ABOS*—the defendant here—is conditioning staff privileges on participation in its certification program, or profiting therefrom. The theory, then, must be some highly attenuated one, for which the necessary facts are not pled.

Because the 2AC fails to assert a tying arrangement or illicit agreement, the Court need not opine on whether the other elements of a *Section 1* Sherman Act violation are sufficiently pled; the failure to allege an unlawful agreement alone warrants dismissal for failure to state a claim. *See* *Howard Hess Dental Labs. Inc., 602 F.3d at 254* ("*Section 1* claims are limited to combinations, contracts, and conspiracies, and thus always **[*31]** require the existence of an agreement.").[5]

III. CONCLUSION

ABOS's motion to dismiss the Second Amended Complaint is granted on *Rule 12(b)(6)* grounds, for failure to state a claim under *Section 1* of the Sherman Act. Because this complaint is in its third iteration (in this district), it appears that further amendment would be futile. This dismissal of the Second Amended Complaint as against ABOS is therefore entered with prejudice. An appropriate Order follows.

Dated: March 12, 2020

/s/ Kevin Mcnulty

HON. KEVIN MCNULTY, U.S.D.J.

ORDER

THIS MATTER having come before the Court on the motion of defendant American Board of Orthopaedic Surgery, Inc. ("ABOS"), to dismiss the Second Amended Complaint (DE 49); and the plaintiff, Bruce E. Ellison, M.D., having

[4] To be clear, there is no allegation that Dr. Ellison is being forced to buy two products, when he only wanted one. Instead, he alleges that he wants both products: (1) to sit for phase II of the ABOS board certification test so that he can obtain board certification (2AC ¶ 70), and thereby obtain (2) staffing privileges from a northern New Jersey hospital. (*See, e.g., id.* ¶ 67)

[5] I therefore express no further opinion on other issues raised by ABOS. These include questions of venue, jurisdiction and standing raised by a speculative allegation that a California physician theoretically would apply for, but is likely to be denied, staff privileges at any one of a number of New Jersey hospitals.

opposed the motion (DE 51); and the defendant ABOS having filed a reply (DE 54); and the Court having considered the papers before it without oral argument pursuant to *Fed. R. Civ. P. 78(b)*; for the reasons stated in the Opinion filed on this date, and for good cause shown:

IT IS this 12th day of March, 2020,

ORDERED that the motion (DE 49) of defendant ABOS to dismiss the Second Amended Complaint for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)*, is **GRANTED** with prejudice.

/s/ Kevin Mcnulty

HON. **[*32]** KEVIN MCNULTY, U.S.D.J.

In re SSA Bonds Antitrust Litig.

United States District Court for the Southern District of New York

March 18, 2020, Decided; March 25, 2020, Filed

16 Civ. 3711 (ER)

Reporter
2020 U.S. Dist. LEXIS 54000 *; 2020-1 Trade Cas. (CCH) P81,144; 2020 WL 1445783

IN RE SSA BONDS ANTITRUST LITIGATION

Prior History: *In re SSA Bonds Antitrust Litig., 2016 U.S. Dist. LEXIS 178048, 2016 WL 7439365 (S.D.N.Y., Dec. 22, 2016)*

Core Terms

antitrust, Dealer, bonds, investors, conspiracy, allegations, Domestic, Defendants', traded, motion to dismiss, prices, failure to state a claim, bond market, alleged conspiracy, anti trust law, class period, transactions, conspired, entities

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For Credit Suisse Group AG, Consolidated Defendant: Elai E. Katz, Jason Michael Hall, Cahill Gordon & Reindel LLP, New York, NY.

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Judges: Edgardo Ramos, United States District Judge.

Opinion by: Edgardo Ramos

Opinion

OPINION AND ORDER

Ramos, D.J.:

This class action arises from twenty-five consolidated complaints filed against a number of banks and certain of their employees who allegedly conspired to fix the price of supranational, sovereign, and agency ("SSA") bonds. These actions were **[*9]** consolidated under the caption *In re SSA Bonds Antitrust Litigation, No. 16 Civ. 3711, 2018 U.S. Dist. LEXIS 147022*. *See* Docs. 36, 314. On August 28, 2018, the Court issued an Order dismissing the consolidated amended class action complaint ("CAC") for failure to state a claim and failure to plausibly allege an injury-in-fact sufficient to establish antitrust standing. Doc, 495, Specifically, the Court dismissed the Plaintiffs' CAC because Plaintiffs had not plausibly alleged any harm to them. *Id.* at 18.

The Court gave Plaintiffs leave to amend and Plaintiffs filed a second consolidated class action complaint ("SAC") on November 13, 2018. Doc, 506, The SAC included two new Plaintiffs, new factual allegations including chatroom messages (*e.g.* messages sent through social media apps like WhatsApp) and additional economic analyses. Pending before the Court is the domestic dealer defendants' motion to dismiss the SAC for failure to state a claim. Doc. 520. For the reasons set forth below, the motion is GRANTED.

I. Background

A. The SSA Bond Market

As set forth in the Court's October 4, 2019 Order, SSA bonds are debt securities issued by governmental and quasi-governmental entities to fund a range of public-policy mandates. Doc. **[*10]** 627. SSA bonds are generally regarded as secure investments because they often enjoy special legal status or government backing. Doc. 506 ¶¶ 2, 49. SSA bonds can be U.S. dollar denominated ("USD") and sold in the U.S. bond market. *Id.* 122. SSA bonds are typically issued through syndication. *Id.* ¶ 125, If an institution were seeking to issue SSA bonds, it would retain a bank or group of banks to underwrite the bond issue and then sell those bonds to investors. *Id.* The syndicate banks would serve as lead managers on the deal and be responsible for finding investors to purchase the issued bonds and for pricing the bonds. *Id*

After being issued, SSA bonds can be resold and traded by dealers and investors. *Id.* ¶ 129. Investors trade SSA bonds in an over-the-counter market, meaning that rather than using an open, anonymous exchange that matches buyers and sellers, investors transact individually and privately with dealers, *Id.* ¶¶ 129, 553, An investor typically contacts one or more dealers by telephone, electronic chat messaging, or electronic trading platform to request a quote, which the dealer relays to the investor, who can then place the order. *Id.* ¶¶ 130-31, Because it is time-consuming to **[*11]** contact dealers and because their quotes usually expire in a short amount of time, investors generally do not "shop around" with more than a few dealers at a time. *Id.* ¶ 133. Investors also do not have access to real-time market data and have limited ability to purchase secondary market trading information, so they rely on dealers for pricing information for the bonds. *Id.* ¶ 132.

Dealers typically quote prices for SSA bonds in basis points (one basis point is 1/100th of a percentage point) as a spread above the yield of the relevant benchmark U.S. Treasury bonds with a similar maturity.[1] *Id.* ¶ 139. SSA bond yields are inversely related to bond prices, thus, investors seek to buy SSA bonds at the highest available offer in basis points (i.e., the highest yield, and thus the cheapest price) and to sell them at the lowest available bid in basis points (i.e., the lowest yield, and thus the most expensive price). *Id.* ¶ 141.

B. The Alleged Conspiracy

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[1] The Court will simply refer to "basis points" as a shorthand for this method of pricing.

Plaintiffs'[2] theory is that "Defendants agreed that they would not compete against each other for the sale of USD SSA bonds to customers." *Id.* ¶ 159. Purportedly, Defendants' overarching objective was to ensure that cartel members could transact **[*12]** with investor clients at prices that were more favorable for the conspiring dealers than would have been achieved absent collusion. *Id.* ¶ 143. Specifically, that when an investor contacted one or more dealers to purchase a bond, the Defendants would communicate with each other via chat rooms and phone calls to achieve more favorable prices and terms for themselves. *Id.* ¶ 130.

C. Procedural History

On December 21, 2018, twenty-two Dealer Defendants—including nine Domestic Dealer Defendants[3] and thirteen Foreign Dealer Defendants[4] —and four Individual Defendants,[5] filed motions to dismiss the SAC for failure to state a claim, lack, of personal jurisdiction, and improper venue. Doc. 520.

Given the complex and fact-intensive nature of the claims, the Court addressed the Foreign Dealer Defendants' and Individual Defendants' arguments in a separate opinion filed on October 4, 2019. Doc. 627. The Court analyzed the Plaintiffs' factual allegations against the Individual Defendants and the Foreign Dealer Defendants and found them insufficient to establish an antitrust conspiracy claim, an antitrust injury claim, personal jurisdiction, or venue. *Id.* at 23-27. The Court presumes familiarity with the remaining **[*13]** facts and legal analyses set out in the October 4, 2019 Order and incorporates them in this Order. The Court now addresses the Domestic Dealer Defendants' motion to dismiss for failure to state a claim.

II. Legal Standard

A. Failure to State a Claim

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 570*). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly, 550 U.S. at 556*). The plaintiff must allege sufficient facts to show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly, 550 U.S. at 556*). However, this "flexible 'plausibility standard'" is not a heightened pleading standard, *In re Elevator Antitrust Litig., 502 F.3d 47, 50, 50 n.3 (2d Cir. 2007)* (quoting *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 n.2 (2d Cir. 2007))*, and "a complaint . . . does not need detailed factual allegations" to survive a motion to dismiss, *Twombly, 550 U.S. at 555*.

The question on a motion to dismiss "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Sikhs for Justice v. Nath, 893 F. Supp. 2d 598, 615 (S.D.N.Y.*

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[2] The named plaintiffs are the Alaska Department of Revenue, Treasury Division, the Alaska Permanent Fund Corporation, and Iron Workers Pension Plan of Western Pennsylvania ("Iron Workers") (collectively, "Plaintiffs"). Doc. 506.

[3] Barclays Capital Inc., BNP Paribas Securities Corp., Citigroup Inc., Citibank N.A., Citigroup Global Markets Inc., Credit Suisse Securities (USA) LLC, Nomura Securities International, Inc., RBC Capital Markets, LLC, and TD Securities (USA) LLC (together, the "Domestic Dealer Defendants"). *Id.*

[4] Barclays Bank PLC, Barclays Services Limited, Barclays Capital Securities Limited, BNP Paribas, Citigroup Global Markets Limited, Credit Agricole Corporate & Investment Bank, Credit Suisse AG, Credit Suisse International, Credit Suisse Securities (Europe) Ltd., Nomura International pic, Royal Bank of Canada, RBC Europe Limited, and The Toronto Dominion Bank (together, the "Foreign Dealer Defendants"). Doc. 521, 1 n. 1, 5.

[5] Gary McDonald (Doc. 533), Amandeep Singh Manku (Doc. 537), Shailen Pau (Doc. 540), and Bhardeep Singh Heer (Doc. 542) (together, the "Individual Defendants").

2012) (quoting Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Or. 1995)). "[T]he purpose of Federal Rule of Civil Procedure 12(b)(6) 'is to test, in a streamlined fashion, the **[*14]** formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits'" or "weigh[ing] the evidence that might be offered to support it." Halebian v. Berv, 644 F.3d 122, 130 (2d Cir. 2011) (quoting Global Network Commc'ns, Inc. v. City of New York, 458 F.3d 150, 155 (2d Cir. 2006)). The Court therefore must ordinarily confine itself to the four comers of the complaint and look only to the allegations contained therein. *Id.* When ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court accepts all factual allegations in the complaint as true and draws all reasonable inferences in the plaintiff's favor, Nielsen v. Rabin, 746 F.3d 58, 62 (2d Cir. 2014); *see also* Twombly, 550 U.S. at 556 ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable . . . .").

Likewise, "[t]here is no heightened pleading requirement in antitrust cases." In re Crude Oil Commodity Futures Litig., 913 F. Supp. 2d 41, 54 (S.D.N.Y. 2012). However, "a plaintiff must do more than cite relevant antitrust language to state a claim for relief." Wolf Concept S.A.R.L. v. Eber Bros. Wine & Liquor Corp., 736 F. Supp. 2d 661, 667 (W.D.N.Y. 2010) (citing Todd v. Exxon Corp,, 275 F.3d 191, 198 (2d Cir. 2001)). "A plaintiff must allege sufficient facts to support a cause of action under the antitrust laws. Conclusory allegations that the defendant violated those laws are insufficient." Id. at 667-68 (quoting Kasada, Inc. v. Access Capital, Inc., No. 01 Civ. 8893 (GBD), 2004 U.S. Dist. LEXIS 25257, 2004 WL 2903776, at *3 (S.D.N.Y. Dec. 14, 2004)). "[A] bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal." Id. at 668 (quoting Heart Disease Research Found, v. Gen. Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972)).

B. [*15] Antitrust Standing

"Section 4 of the Clayton Act establishes a private right of action for violations of the federal antitrust laws," such as section 1 of the Sherman Act, and grants that right to "[a]ny person who [is] injured in his business or property by reason of anything forbidden in the antitrust laws." Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 75 (2d Cir. 2013) (alterations in original) (quoting 15 U.S.C, § 15). The right to pursue private actions is limited by the concept of "antitrust standing." *Id.* "[A]ntitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement [the Court] must dismiss it as a matter of law." *Id.* (first alteration in original) (quoting NicSand, Inc. v. 3M Co., 507 F.3d 442, 450 (6th Cir. 2007) (en banc)). "In determining antitrust standing, [the Court] 'assume[s] the existence' of an antitrust violation." Total Gas, 889 F.3d at 115 (quoting Gelboim v. Bankof Am. Corp., 823 F.3d 759, 770 (2d Cir. 2016)).

"To satisfy the antitrust standing requirement, a private antitrust plaintiff must plausibly allege that (i) it suffered an antitrust injury and (ii) it is an acceptable plaintiff to pursue the alleged antitrust violations."[6] In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 157 (2d Cir. 2016). "To demonstrate antitrust injury, 'a plaintiff must show (1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the **[*16]** statute.'"[7] Arista Records LLC v. Lime Grp. LLC, 532 F. Supp. 2d 556, 568 (S.D.N.Y. 2007) (quoting Blue Tree Hotels Inv. (Can.), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 220 (2d Cir. 2004)), "[T]o suffer antitrust injury, the putative plaintiff must be a participant in the very market that is directly restrained." Aluminum, 833 F.3d at 161. "[U]nlike [government] agencies, [private] [p]laintiffs do not have the right to bring suit against any person they reasonably suspect has committed a certain sort of wrong. . . . Plaintiffs can only recover in a civil action if they can establish that *they themselves* have been harmed by [d]efendants' activities," Total Gas, 889 F.3d at 109-10 (emphasis added).

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[6] The suitability of the plaintiff is often described as whether the plaintiff is an "efficient enforcer" of the antitrust laws. Aluminum, 833 F.3d at 157-58.

[7] "While some courts speak of 'antitrust injury' comprehensively to include" all three of these elements, the third element specifically is sometimes referred to as "antitrust injury." 2A Phillip E. Areeda, Herbert Hovenkamp, et al., ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* ¶ 337a, at 99-100 (4th ed. 2014),

III. Discussion

A. Plaintiffs Lack Antitrust Standing

Defendants brought this motion to dismiss for failure to state a claim, which in antitrust actions, involves an inquiry into whether plaintiffs have the right to pursue this private action. Doc. 520; *see also* *Gatt Commc'ns, 711 F.3d at 75* (holding antitrust standing is threshold inquiry and if complaint fails to establish this requirement, courts must di smiss it as matter of law). The law is clear that in antitrust conspiracy cases, plaintiffs must show that they have antitrust standing by plausibly alleging that they were a participant in the market defendants sought to restrain and suffered an antitrust injury **[*17]** as a result of the defendants' alleged violations. *See* *15 U.S.C. § 12*; *Aluminum, 833 F.3d at 157*.

Here, Plaintiffs allege that they bought and sold USD SSA bonds from the Dealer Defendants, however they do not plausibly plead that they suffered antitrust harm. Doc. 506 ¶¶ 36-41. Fatally, Plaintiffs have not plead to a single transaction that leads to a plausible inference that they suffered antitrust harm. Rather they make conclusory allegations that Defendants, like Barclays Capital Inc., "executed collusive USD SSA bond trades with Plaintiffs Alaska Department of Revenue, Alaska Department Fund Corporation, and Iron Workers during the Class Period." *See, e.g., id.* ¶¶ 54, 68 77, 88, 99. Plaintiffs can only bring a civil action for injuries that they establish they themselves suffered and Plaintiffs have not met that burden here. *See* *Total Gas, 889 F.3d at 109-10*.

The closest that Plaintiffs come to making such an allegation is when they highlight [TEXT REDACTED BY THE COURT][8]

Plaintiffs identify the harm suffered as the fact that the transaction was priced at an artificially high level because of the reduced market competition among dealers. [TEXT REDACTED BY THE COURT]

While the exchange of price information among competitors is not a *Sherman Act* violation **[*18]** *per se*—a number of factors are involved in determining whether the exchange had anticompetitive effects, i.e. the industry structure and nature of the information exchanged—exchanges of *current* price information have the greatest potential of creating anticompetitive effects and have consistently been held to violate the *Sherman Act*. *See, e.g.,* *United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)* (citations omitted).

Generally, when a consumer, because of a conspiracy, pays prices that do not reflect ordinary market conditions, they suffer injury of the type the antitrust laws intended to prevent and that flows from that which makes defendants' acts unlawful. *Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG, 277 F. Supp. 3d 521, 557-58 (S.D.N.Y. 2017)* (citing *Gelboim v. Bank of Am. Corp., 823 F.3d 759, 772 (2d Cir. 2016))*. In one case, plaintiffs were found to have sufficiently alleged a legally cognizable injury where several department stores agreed among themselves to price products, as opposed to letting market competition determine prices, resulting in excessive pricing of the product. *In re Nine W. Shoes Antitrust Litig., 80 F. Supp. 2d 181, 190 (S.D.N.Y. 2000)*.

The Court accepts as true the allegation that [TEXT REDACTED BY THE COURT]

The Court does not have sufficient facts to plausibly infer that any of the Domestic Dealer Defendants involved [TEXT REDACTED BY THE COURT] were conspiring to fix prices and distort the USD SSA bond market. It is "harder to infer **[*19]** a conspiracy from individual acts of trader-based manipulation because large financial institutions are both buyers and sellers of derivative products, and thus any changes may well offset each other." *Sonterra, 277 F. Supp. 3d at 555*. Furthermore, the pleading is insufficient because Plaintiffs do not identify which of the [TEXT REDACTED BY THE COURT] entities was involved in the trade—[TEXT REDACTED BY THE COURT] Allegations in the form of group pleadings are insufficient, even for affiliated corporate entities. *See* *In re Zinc*

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[8] [TEXT REDACTED BY THE COURT]

Antitrust Litig., 155 F. Supp. 3d 337, 384 (S.D.N.Y. 2016). In sum, Plaintiffs have not sufficiently plead they have antitrust standing.

i. Supplemental Authority

On October 18, 2019, Plaintiffs urged the Court to consider a supplemental authority in further opposition to the remaining Domestic Defendants' motion to dismiss for failure to state a claim: *In re GSE Bonds Antitrust Litigation, No. 1:19-cv-01704, Doc. 288, 2019 U.S. Dist. LEXIS 181012 (S.D.N.Y. Oct. 15, 2019)* ("*GSE II*"). Doc. 629, 1. Plaintiffs asked the Court to consider the plausibility of the overarching conspiracy they allege in connection to Defendants' argument that Plaintiffs lack antitrust standing. *Id.* at 3. However, as the ruling in *GSE II* had nothing to do with antitrust standing, the Court is unable to do so. The Court notes **[*20]** that the first *GSE* case does discuss antitrust standing. *See In re GSE Bonds Antitrust Litigation, 396 F. Supp. 3d 354, 366 (S.D.N.Y. Aug. 29, 2019)* ("*GSE I*") (holding plaintiffs proved antitrust standing after they plausibly alleged conspiracy and traded bonds directly with several defendants during class period). But as will be discussed in more detail *infra* in Part III(B), Plaintiffs have not plausibly alleged a conspiracy as to the Domestic Dealer Defendants.

The *GSE II* Court's ruling is also inapposite because it was based on distinctive features of the alleged market for government-sponsored entity ("GSE") bonds that are easily distinguishable from the SSA bonds market that Plaintiffs allege here. Doc. 632, 1. First, GSE bonds have a benchmark rate that the defendants allegedly manipulated but SSA bonds do not. *See GSE I, 396 F. Supp. 3d at 359*. Here, the pleadings do not point to a mechanism by which traders could control the SSA bond price benchmark: U.S. Treasury bonds. Doc. 506 ¶ 125. In a prior briefing, Plaintiffs explicitly stated that they "do not allege that Defendants specifically manipulated the price of every USD SSA bond traded in the market, whether through a financial benchmark or otherwise," but rather that there was an agreement among Defendants to not compete against each **[*21]** other in the market for USD SSA bonds. Doc. 407, 37-38.

Also, as the Court noted in its October 4, 2019 Order, "[t]he nature of the SSA bond market differs from that of the GSE bond market in one crucial way: SSA bonds are quoted on an individual and not systemic basis." Doc. 627, 25. SSA bond quotes were exchanged over-the-counter based on highly customized market information about specific investors, such as which bonds the investors held and in what quantity, whether the investor was an ongoing seller or buyer of certain bonds, and price levels at which the investor had traded or was seeking to trade. Doc. 506 ¶ 135.

Lastly, the extent to which the *GSE* defendants were alleged to have controlled the relevant market is markedly different than in this ease. Doc. 632, 2. The *GSE* defendants were alleged to have traded about 77% of all GSE bonds issued during the class period, pointing to a market-wide conspiracy. *GSE I, 396 F. Supp. 3d at 357-58, 362*. Here, Plaintiffs estimated that the Dealer Defendants controlled as much as 60% of the SSA bond market, but this percentage only relates to the Defendants' underwriting of SSA bonds in the primary market, Doc. 506 ¶ 505. Without supporting facts, the Court cannot assess what **[*22]** percentage of the secondary USD SSA bond market the Dealer Defendants traded. Accordingly, the supplemental authority is not persuasive in this case.

B. The Alleged Conspiracy Is Not Plausible

Plaintiffs have not adequately plead sufficient facts in the SAC to plausibly allege a conspiracy that includes any of the Domestic Dealer Defendants. Where an antitrust complaint names multiple defendants, plaintiffs must "make allegations that plausibly suggest that each defendant participated in the alleged conspiracy." *Hinds Cty., Miss. v Wachovia Bank N.A., 620 F. Supp. 2d 499, 513 (S.D.N.Y. 2009)* (quotation marks and citation omitted); *see also Concord Assocs., L.P. v. Entm't Props. Tr., No. 12 Civ. 1667 (ER), 2013 U.S. Dist. LEXIS 186964, 2014 WL 1396524, at *23 (S.D.N.Y. Apr. 9, 2014)*, *aff'd*, *817 F.3d 46 (2d Cir. 2016)* (same). In antitrust conspiracy cases, defendants are entitled to know how they are alleged to have conspired, with whom, and for what purpose. *Id.* (citing *Zinc, 155 F. Supp. 3d at 384*). Plaintiffs have not met that burden here.

As the Domestic Dealer Defendants allege, Plaintiffs failed to cure their improper group pleading when they amended the CAC—they continue to make undifferentiated allegations against all defendants and tie together corporate affiliates without justification. Doc, 525. *See* Zinc Antitrust Litig., 155 F. Supp. 3d at 384 (holding allegations in form of a group pleading are insufficient, even for affiliated corporate entities), For example, Plaintiffs allege that Barclays **[*23]** Capital Inc. was the "Barclays Defendants' U.S.-based broker-dealer" and took directions from its overseas counterparts, served as their counterparty in most transactions, and knowingly executed collusive USD SSA bond transactions with Plaintiffs during the Class Period, Doc. 578, 80 (citing Doc. 506 ¶ 54). Allegedly, Barclays Capital Inc. also employed U.S.-based salespeople and traders who engaged in collusive trades with U.S, customers. *Id.* However, Plaintiffs do not allege any facts that show a single instance of Barclays Capital Inc. coordinating bidding, engaging in price-fixing, agreeing not to compete, etc. Doc. 603, 1.

Plaintiffs make nearly identical conclusory allegations of taking directions from their overseas counterparts to manipulate SSA bond trades with U.S. counterparties against all of the Domestic Dealer Defendants: BNP Paribas Securities Corp., Doc. 578, 84-85 (citing SAC); Citigroup, Inc., *id.* at 87; Citibank N.A., *id.*; Citigroup Global Markets Inc., *id*; RBC Capital Markets, LLC, *id.* at 98; Credit Suisse Securities (USA) LLC, *id.* at 99; Nomura Securities International, Inc., *id.* at 103; and TD Securities (USA) LLC, *id.* at 117. Plaintiffs argue that they need not show that a particular Defendant knew all of **[*24]** the details of the conspiracy or even prove that they knew the identities of all the other conspirators. *Id.* at 78. Rather, a single act may be sufficient for an inference of a Defendant's involvement in a conspiracy. *Id.* (citing United States v. Huezo, 546 F.3d 174, 180 (2d Cir. 2008)).

However, the closest Plaintiffs come to making specific allegations against any Domestic Dealer Defendant is when they allege that Citigroup, Inc. and Citibank N.A. participated in the conspiracy through the same Individual Defendant, Gary McDonald ("McDonald"), within the Class Period. Doc. 578, 86. Plaintiffs assert that McDonald [TEXT REDACTED BY THE COURT] *Id.* at 86-87. *See, e.g.*, [TEXT REDACTED BY THE COURT][9]

While these transactions hint at anticompetitive conduct between [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY THE COURT], they do not involve any specific Plaintiff, which is required in antitrust cases, or point to a wider conspiracy that extends beyond these traders to the Domestic Dealer Defendants. A barebones statement of conspiracy without supporting facts is not enough to survive a motion to dismiss. *See* Wolf Concept, 736 F. Supp. 2d at 668. Accordingly, the Court finds that Plaintiffs have not sufficiently plead that they have antitrust standing or facts that support a plausible conspiracy. **[*25]**

IV. Conclusion

The Domestic Dealer Defendants' motion to dismiss for failure to state a claim is GRANTED with prejudice. For the reasons set forth in the October 4, 2019 Order, Doe. 627, and the instant Order, the Clerk of Court is respectfully directed to terminate the Domestic Dealer Defendants, Foreign Dealer Defendants, and Individual Defendants as parties.[10] *See supra* notes 3-5.

It is SO ORDERED.

Dated: March 18, 2020

New York, New York

/s/ Edgardo Ramos

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[9] [TEXT REDACTED BY THE COURT]

[10] The Court notes that some Defendants, such as Bank of America, Deutsche Bank, and HSBC Defendants, are currently in settlement negotiations with Plaintiffs and thus the case remains active. *See, e.g.*, Doc. 636 (letter from Plaintiffs advising Court that settlement negotiations are ongoing).

Edgardo Ramos, U.S.D.J.

Conklin v. Univ. of Wash. Med.

United States Court of Appeals for the Ninth Circuit

March 4, 2020, Argued and Submitted, Seattle, Washington; March 20, 2020, Filed

No. 19-35181

Reporter
798 Fed. Appx. 180 *; 2020 U.S. App. LEXIS 8827 **; 2020 WL 1320918

JEREMY CONKLIN, D.O., an individual, Plaintiff-Appellant, v. UNIVERSITY OF WASHINGTON MEDICINE, a Washington public health system; UW MEDICINE NW, a Washington public benefit corporation; UNIVERSITY OF WASHINGTON MEDICAL CENTER, a Washington public hospital; UNIVERSITY OF WASHINGTON SCHOOL OF MEDICINE, a Washington public educational institution; SEATTLE CHILDREN'S HOSPITAL, a Washington non-profit corporation; CHILDREN'S UNIVERSITY MEDICAL GROUP, a Washington pediatric group, Defendants-Appellees, and PAUL RAMSEY, M.D.; LESTER PERMUT, M.D.; MARY BRIDGE CHILDREN'S FOUNDATION, a Washington public benefit corporation; AMERICAN BOARD OF THORACIC SURGERY, INC.; THORACIC SURGERY DIRECTORS ASSOCIATION, INC.; ACCREDITATION COUNCIL FOR GRADUATE MEDICAL EDUCATION, Defendants.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: Rehearing denied by, En banc *Conklin v. Univ. of Wash. Med., 2020 U.S. App. LEXIS 16014 (9th Cir. Wash., May 19, 2020)*

Prior History: [1]** Appeal from the United States District Court for the Western District of Washington. D.C. No. 2:18-cv-00090-RSL. Robert S. Lasnik, District Judge, Presiding.

Conklin v. Univ. of Wash. Med., 2018 U.S. Dist. LEXIS 192380 (W.D. Wash., Nov. 9, 2018)

Disposition: AFFIRMED.

Core Terms

pediatric, cardiothoracic, surgery, fellowship, antitrust, consumer, osteopathic physician, thoracic surgery, antitrust claim, cause of action, district court, certification, discriminates, osteopathic, affirming

Counsel: For JEREMY CONKLIN, D.O., an individual, Plaintiff - Appellant: Philip A. Talmadge, Esquire, Aaron Orheim, Talmadge/Fitzpatrick/Tribe, Seattle, WA.

For UNIVERSITY OF WASHINGTON MEDICINE, a Washington public health system, UW MEDICINE NW, a Washington public benefit corporation, UNIVERSITY OF WASHINGTON MEDICAL CENTER, a Washington public hospital, UNIVERSITY OF WASHINGTON SCHOOL OF MEDICINE, a Washington public educational institution, SEATTLE CHILDREN'S HOSPITAL, a Washington non-profit corporation, CHILDREN'S UNIVERSITY MEDICAL GROUP, a Washington pediatric group, Defendants - Appellees: Douglas C. Ross, David A. Maas, Stephen M. Rummage, Davis Wright Tremaine LLP, Seattle, WA.

Judges: Before: IKUTA, R. NELSON, and HUNSAKER, Circuit Judges.

Opinion

[*181] MEMORANDUM*

Appellant Dr. Jeremy Conklin alleges that Appellee-Defendants conspired to exclude him from a pediatric cardiothoracic surgery fellowship because he is an osteopathic, rather than allopathic, physician. Conklin brought federal and state ***antitrust law*** claims, along with a claim under **[**2]** Revised Code of Washington ("RCW") *§ 70.41.235*, which bars hospitals from discriminating against osteopathic physicians. The district court dismissed Conklin's complaint, holding that he failed to allege antitrust injury and did not have a cause of action under *RCW § 70.41.235*. We review dismissal of Conklin's complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)* de novo. *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1046 (9th Cir. 2008)*. We affirm.

We begin with Conklin's federal and state antitrust claims. We express no opinion whether the district court correctly dismissed for failure to adequately plead antitrust injury. But we affirm the dismissal on the alternative ground that Conklin has not plausibly alleged an overlapping element of his antitrust claims: harm to competition. *See Syed v. M-I, LLC, 853 F.3d 492, 506 (9th Cir. 2017)* (allowing a court to affirm a motion to dismiss "on any basis fairly supported by the record"). Conklin concedes in his complaint that at least one osteopathic physician has obtained certification and may perform pediatric cardiothoracic surgery. Additionally, Conklin acknowledges in his complaint that someone else was chosen to fill the pediatric cardiothoracic surgery fellowship that he lost out on. Thus, there has been no increase in price or decrease in the quality of care for patients seeking pediatric cardiothoracic **[**3]** surgery. Moreover, even if the agreement to grant these fellowships only to persons who satisfy the ACGME certification requirement discriminates against doctors of osteopathy and thus lessens consumer choice between such osteopathic doctors and medical doctors in the market for pediatric thoracic surgery, the complaint does not allege any resulting difference in thoracic surgery services, quality, or availability, so this reduced choice does not give rise to an injury to competition. *See Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1202 (9th Cir. 2012)* ("[A]llegations that an agreement has the effect of reducing consumers' choices or increasing prices to consumers does not sufficiently allege an injury to competition."). Accordingly, Conklin has failed to plausibly allege harm to competition. *See Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 736 (9th Cir. 1987)* (affirming dismissal of *Sherman Act Section 1* claim for failure to plead harm to competition); *cf. Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1414 (9th Cir. 1991)* (affirming grant of summary judgment where a hospital's policy, which favored physician over non-physician anesthetists, did not harm competition).

We also affirm the dismissal of Conklin's *RCW § 70.41.235* claim. Notwithstanding Conklin's correspondence with the Washington **[*182]** Department of Health, enforcement of the statute is expressly vested in the Washington Department of Health. **[**4]** *RCW § 70.41.010*. We will not read a cause of action into the statute where the Washington legislature did not provide one. *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n, 140 Wn.2d 615, 999 P.2d 602, 611 (Wash. 2000)* (en banc) ("When words in a statute are plain and unambiguous, this Court is required to assume the Legislature meant what it said and apply the statute as written.").

AFFIRMED.

End of Document

* This disposition is not appropriate for publication and is not precedent except as provided by *Ninth Circuit Rule 36-3*.

TCS John Huxley Am. v. Sci. Games Corp.

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

March 20, 2020, Decided; March 20, 2020, Filed

Case No. 19 C 1846

Reporter

2020 U.S. Dist. LEXIS 62315 *; 2020-1 Trade Cas. (CCH) P81,139; 2020 WL 1678258

TCS JOHN HUXLEY AMERICA, INC., et al., Plaintiffs, v. SCIENTIFIC GAMES CORP., et al., Defendants.

Prior History: *Shuffle Tech Int'l, LLC v. Sci. Games Corp., 2015 U.S. Dist. LEXIS 138741, 2015 WL 5934834 (N.D. Ill., Oct. 12, 2015)*

Core Terms

shuffler, patents, antitrust, lawsuit, Defendants', accrued, card, sham, patent infringement, casino, statute of limitations, anti trust law, allegations, infringement, automatic, Shuffle, invalid, motion to dismiss, antitrust claim, unenforceable, procured, restrictive covenant, prior art, Sherman Act, competitors, initiation, monopoly, damages, games

Counsel: **[*1]** For TCS John Huxley America, Inc., a Nevada corporation, TCS John Huxley Europe Limited, a United Kingdom corporation, TCS John Huxley Asia Limited, a Macau corporation, Taiwan Fulgent Enterprise Co., Ltd., a Taiwan corporation, Plaintiffs: Jeffery Moore Cross, LEAD ATTORNEY, Freeborn & Peters LLP, Chicago, IL USA; Joseph Scott Presta, PRO HAC VICE, Nixon & Vanderhye P.c., Arlington, VA USA; Robert A. Rowan, PRO HAC VICE, Nixon & Vanderhye, Arlington, VA USA.

For Scientific Games Corporation, a Nevada corporation, formerly a Delaware corporation, Bally Technologies, Inc., a Nevada corporation, doing business as SHFL Entertainment doing business as Shuffle Master, Bally Gaming, Inc., a Nevada corporation, formerly known as Bally Gaming and Systems, formerly known as SHFL Entertainment, Inc., formerly known as Shuffle Master, Inc., doing business as Bally Technologies, Defendants: Craig Christopher Martin, LEAD ATTORNEY, David Eric Jimenez-Ekman, Timothy Joseph Barron, Jenner & Block LLP, Chicago, IL USA; Ian Heath Gershengorn, Ishan K. BhaBha, PRO HAC VICE, Jenner & Block, LLP, Washington, DC USA.

Judges: John Robert Blakey, United States District Judge.

Opinion by: John Robert Blakey

Opinion

ORDER

Plaintiffs claim **[*2]** Defendants filed sham litigation against them to maintain their monopoly in the casino automatic card shuffler market, in violation of *§ 2* of the Sherman Act. *See* [32]. Defendants moved to dismiss, arguing that Plaintiffs filed their claim too late and lack standing to bring an antitrust claim. *See* [35]. For the reasons explained below, the Court denies Defendants' motion [35].

Subject to further developments regarding the COVID-19 crisis and Amended General Order 20-0012, this case is tentatively set for a status hearing on April 14, 2020 at 9:45 a.m. in Courtroom 1203. The parties may appear by telephone by contacting this Court's Courtroom Deputy 72-hours prior to the hearing and should be prepared at the hearing to set all remaining case management dates, including a trial date.

STATEMENT[1]

Plaintiff Taiwan Fulgent Enterprise Co. Ltd. (TF) has been producing innovative automated products for the gaming industry for over 30 years. [32], ¶ 7. TF holds numerous patents (or pending patent applications) and manufactures the A Plus series automatic card shufflers, which produce reliably random shuffles, thereby ensuring fairness and increasing game speed, profitability, and security. *Id.* at **[*3]** ¶ 9. The A Plus shuffler can handle up to eight decks of cards at once (whether plastic, paper, plastic coated, or embossed) and can be used for virtually every card game on the casino floor, from public domain games such as blackjack and baccarat, to popular proprietary games such as Texas Hold 'Em, Caribbean Stud, Three Card Poker, Three Card Baccarat, and Pai Gow Poker. *Id.* at ¶ 8. TF's A Plus shufflers are distributed exclusively by TCS John Huxley America, Inc., TCS John Huxley Europe Limited, and TCS John Huxley Asia Limited (together, the TCS Plaintiffs). *Id.* at ¶ 9.

Defendants Scientific Games Corporation (SGC), Bally Technologies, Inc., and Bally Gaming, Inc. sell fully automated card shufflers under the Shuffle Master and Bally names and have established a monopoly in the casino market.[2] *Id.* at ¶¶ 9, 16-18. Plaintiffs allege that their A Plus shufflers are less expensive and more reliable than those offered by Defendants, and, as a result, constitute a substantial threat to Defendants' monopoly and business interests. *Id.* at ¶ 9. Defendants responded to this threat by initiating sham litigation against TF and the TCS Plaintiffs. *Id.*

Plaintiffs sued SGC and the Bally entities **[*4]** on March 15, 2019, alleging that these Defendants monopolized the U.S. market for automatic card shufflers in regulated casinos, in violation of *§ 2* of the Sherman Act. *See* [1]. Thereafter, Plaintiffs filed an amended complaint, [9], and then a second amended complaint, [32]. The latter, which is the operative complaint, alleges that Defendants filed sham litigation against Plaintiffs and other competitors, alleging infringement of fraudulently procured patents, to drive out competition and monopolize the U.S. and world markets for automatic card shufflers designed for casino use. *Id.* at ¶ 1. Plaintiffs allege that entry into the casino shuffling machine market is extremely expensive, time consuming, and risky because of regulation, standards, and testing mandates. *Id.* at ¶ 27. According to Plaintiffs, Defendants have achieved a 100% market share in the relevant U.S. market, not because they invented a superior product, but because they purposefully abused the patent system and judicial process: they procured patents by fraud and then asserted those patents in lawsuits designed to drive competitors out of the market. *Id.* at ¶ 28. Among other sham lawsuits, Defendants sued John Huxley **[*5]** Casino Equipment Ltd. and John Huxley USA, Inc. in 2002; TF in 2009; and TCS Africa and TCS America in 2012. *Id.* at ¶ 30.

Plaintiffs allege that, in November 2009, Defendants' predecessor, SHFL, sued TF, alleging infringement of patents SHFL knew were invalid and unenforceable. *Id.* at ¶ 33. Rather than incur millions of dollars in legal fees to defend the case, TF agreed to refrain from selling the A Plus shuffler or any similar shuffler in the U.S. for three years, and the parties settled the matter in 2010. *Id.* at ¶ 34. As a result, TF was unable to negotiate a worldwide distribution agreement, and, when TF negotiated its international distribution agreement with TCS Asia in June 2010, it had to exclude the United States until April 2013. *Id.* at ¶ 35. Because it was afraid of being sued, TF also excluded the United Kingdom, Austria, Southern Africa, and South Korea, though it added Southern Africa in the licensed sales territory on August 1, 2011. *Id.*

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[1] This Court draws the facts (accepted as true for purposes of the present motion) from Plaintiffs' second amended complaint [32].

[2] Plaintiffs allege that Bally acquired SHFL Entertainment, Inc. on November 25, 2013, and SGC acquired Bally on November 21, 2014. Thereafter, SGC and Bally began using "Shuffle Master" or "SHFL" as trade names and selling or leasing card shufflers based upon the patents at issue in this case under the Shuffle Master or SHFL names. [32] at ¶ 17.

Plaintiffs allege that Defendants also sued TCS America on September 14, 2012 to keep TCS from showing the A Plus shuffler at the 2012 G2E show in Las Vegas. *Id.* at ¶ 37. And, shortly thereafter, on October 12, 2012, Defendants sued another **[*6]** shuffler manufacturer, DigiDeal, alleging that DigiDeal's DigiShuffle infringed Defendants' patents. *Id.* at ¶¶ 41, 43. On April 28, 2015, while the patent infringement remained pending, DigiDeal sued SGC and Bally, alleging that Defendants violated *§ 2* of the Sherman Act, *see Shuffle Tech, et al. v. Scientific Games Corp.*, No. 15 C 3702 (N.D. Ill.). DigiDeal and Defendants ultimately settled that case, but not before a jury found for DigiDeal and ordered Defendants to pay $315 million in damages. *See id.* at [288].

Plaintiffs allege that TF has been attempting to enter the U.S. market with its A Plus shuffler since at least 2009 and has made substantial preparations to do so. [32] at ¶ 46. They further allege that the TCS Plaintiffs have been attempting to enter the U.S. shuffler market with TF's A Plus shuffler since at least 2010. *Id.* Plaintiffs allege that their plans to enter the market were thwarted by Defendants' anticompetitive conduct — specifically, their initiation of sham litigation to drive competitors out of the market. *Id.* Plaintiffs allege that, as a result of Defendants' anticompetitive activities, they have been damaged in their business and property by being excluded from **[*7]** the U.S. market for automatic card shufflers. *Id.* at ¶ 168. Plaintiffs allege that, because of Defendants' conduct, they have lost shuffler sales and profits on the A Plus, as well as lost sales and profits on other products Plaintiffs would have sold had they been allowed to sell their A Plus shuffler in the United States and elsewhere. *Id.* at ¶ 47. Plaintiffs allege that their lost profits exceed $100 million to date. *Id.*

Defendants moved to dismiss Plaintiffs' complaint under *Fed. R. Civ. P. 12(b)(6)*, arguing that Plaintiffs' claim is barred by both the Sherman Act's four-year statute of limitations and the release TF executed as part of a 2010 settlement agreement. Defendants also argue that the TCS Plaintiffs lack standing to bring an antitrust claim. *See* [35]. The Court considers each argument below.

A. Legal Standard

A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* "challenges the sufficiency of the complaint for failure to state a claim upon which relief may be granted"; such motions do not generally reach questions of fact. *Gen. Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080 (7th Cir. 1997)*; *Int'l Mktg., Ltd. v. Archer-Daniels-Midland Co., Inc., 192 F.3d 724, 729-30 (7th Cir. 1999)*. To survive a motion to dismiss, a complaint must provide a "short and plain statement of the claim showing that the pleader is entitled to relief," *Fed. R. Civ. P. 8(a)(2)*, giving the defendant "fair notice" of the claim **[*8]** "and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A complaint must allege "sufficient factual matter" to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*). A claim has facial plausibility "when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 556*). In evaluating a complaint, this Court draws all reasonable inferences in the plaintiff's favor and accepts all well-pleaded allegations as true. *Id.* The Court need not, however, accept legal conclusions or conclusory allegations. *McCauley v. City of Chicago, 671 F.3d 611, 616 (7th Cir. 2011)*.

B. Timeliness

Defendants first argue that Plaintiffs' claim must be dismissed as time barred. A defendant may appropriately raise timeliness in a *Rule 12(b)(6)* motion if "the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense." *United States v. Lewis, 411 F.3d 838, 842 (7th Cir. 2005)*.

Plaintiffs' antitrust claim is subject to a four-year statute of limitations. *15 U.S.C. § 15b*; *see also* *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)* (The basic rule is that damages are recoverable under the federal antitrust acts only if suit therefor is "commenced" within four years after the cause of action accrued) (quoting *15 U.S.C. § 15b*). Generally, an antitrust cause of action "accrues" — and the statute of limitations **[*9]** begins to run — "when a defendant commits an act that injures a plaintiff's business." *In re Copper Antitrust Litig., 436 F.3d 782, 789 (7th Cir. 2006)*. As in other areas of the law, however, absent "a contrary directive from Congress this rule is qualified by the discovery rule, which postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured." *Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990)*. Accrual occurs under the discovery rule "when the plaintiff discovers that 'he has been injured and who caused the injury.'" *In re Copper Antitrust Litig., 436 F.3d at 789* (quoting *Barry Aviation, Inc. v. Land O'Lakes Mun. Airport Comm'n, 377 F.3d 682, 688 (7th Cir. 2004))*.

Plaintiffs allege that Defendants filed a series of sham patent infringement lawsuits, even though they knew their patents were invalid and unenforceable, and that they abused the patent and judicial systems to wrongfully maintain their monopoly in the casino automatic card shuffler market. More specifically, Plaintiffs allege that SHFL filed sham patent infringement lawsuits including, but not limited to: a November 17, 2009 lawsuit against TF; a September 14, 2012 lawsuit against TCS America; and an October 10, 2012 lawsuit against DigiDeal Corporation. [32] at ¶¶ 104, 120, 107, 139, 141.

Plaintiffs filed this lawsuit on March 15, 2019. Thus, none of the "sham" cases were filed within **[*10]** the 4-year statute of limitations look back period. *See id.* at ¶ 30. But Plaintiffs allege that they did not discover their injury — i.e., they did not realize the lawsuits were "shams" and their cause of action did not accrue — until at least April of 2015, and possibly as late as March 8, 2019.

Indeed, Plaintiffs allege that, about a year into the SHFL/DigiDeal patent infringement litigation (ostensibly in 2013), DigiDeal and its business partner Shuffle Tech "began to realize that SHFL was improperly withholding critical prior art relating to another shuffler, the Luciano shuffler. *Id.* at ¶ 141. During the DigiDeal litigation, Shuffle Tech's CEO, Richard Schultz, conducted an in-depth investigation into the history of SHFL's patents and the prior art and discovered that the disks SHFL filed in certain patent applications had been mislabeled; Schultz ordered the disks from the PTO and, in late 2014, after reviewing the disks, realized SHFL had been hiding prior art from the PTO, and therefore, had been engaging in sham litigation against its competitors for years. *Id.* at ¶¶ 142-43. Armed with this new information, DigiDeal filed an antitrust complaint against SHFL on April 28, 2015. **[*11]** *Id.* at ¶ 143. Judgment entered in that case on August 7, 2018 and the case thereafter settled on December 24, 2018. *Id.* at ¶ 143.

The Plaintiffs allege that the DigiDeal verdict and subsequent settlement "caught the attention of TCS John Huxley and resulted in TCS reaching out to DigiDeal's counsel to ask whether TCS may have suffered a similar kind of antitrust injury based on the infringement cases SHFL had filed against TF and TCS." *Id.* at ¶ 144. Plaintiffs spoke to DigiDeal's attorneys (Nixon & Vanderhye P.C. in Arlington, Virginia) on January 29, 2019, February 22, 2019, and March 8, 2019; and they allege that they learned for the first time on March 8, 2019 that the 2009 and 2012 lawsuits against TF and TCS were based on patents Defendants knew had been fraudulently procured and were invalid and unenforceable. *Id.* at ¶ 119. Thus, Plaintiffs allege, they "did not discover" their antitrust injury, i.e., the facts establishing that Defendants' 2009 and 2012 lawsuits against TF and TCS were sham litigations intended to unlawfully exclude Plaintiffs from the relevant market or that those litigations were based on patents known by Defendants to have been fraudulently procured, until **[*12]** March 8, 2019, when their representatives first met with counsel at N&V. *Id.* Prior to that meeting, Plaintiffs contend, TF and TCS were unaware that they had suffered any antitrust injury. Plaintiffs filed this lawsuit a week later, on March 15, 2019. *Id.* at ¶ 144.

On the record before it, the Court finds that dismissal under *Rule 12(b)(6)* based upon the applicable statute of limitations is improper. As a factual matter, the Court cannot say Plaintiffs' antitrust claim necessarily falls outside the limitations period.

In support of their motion, Defendants rely on *Pace Industries, Incorporated v. Three Phoenix Company, 813 F.2d 234 (9th Cir. 1987)*. *See* [36] at 4, 6. Though not binding, *Pace* is instructive. There, two companies (Pace and Wabash) entered into a contract that included a restrictive covenant precluding Pace from competing with a third party (Three Phoenix) in the manufacture and sale of a product (single disc testing equipment). *813 F.2d at 235-36*. Despite the restrictive covenant, Pace prepared to market the covered product, and Three Phoenix sued to enforce the contract. *Id. at 236*. When Three Phoenix filed that initial lawsuit, Pace moved to dismiss the complaint, arguing that the asserted contractual provision violated the antitrust laws. *Id.* Pace won its motion in the trial court, lost on **[*13]** appeal, and then won in the Arizona Supreme Court, which ruled that the asserted contractual provision (the restrictive covenant) constituted a per se violation of the Sherman Act. *Id.* Four months after the Arizona

Supreme Court ruled — and 5 years after Three Phoenix filed the original suit to enforce the restrictive covenant — Pace sued for treble damages under *15 U.S.C. § 15*, alleging that the restrictive covenant violated the Sherman Act. *Id.* Three Phoenix moved for summary judgment based upon the expired statute of limitations, and the trial court agreed that the case was time barred. *Id. at 236*. The Ninth Circuit affirmed, holding that "where the alleged antitrust violation is the attempted enforcement of an illegal contract through judicial process, the initiation of judicial proceedings is the last overt act for purposes of the statute of limitations." *Id. at 237*.

Here, Defendants argue that, consistent with *Pace*, the statute of limitations on TF's antitrust claim began to run when Defendants (really their predecessor SHFL) sued TF in 2009; similarly, the statute of limitations began to run on the TCS Plaintiffs' claim when SHFL sued TCS America in 2012. As a result, Defendants argue, the Plaintiffs' claim is **[*14]** barred.

But this case is not *Pace*. That case involved an underlying lawsuit to enforce a contract that necessarily and obviously violated the antitrust laws on its face. Here, Defendants sued Plaintiffs for patent infringement, and asserting patent rights — though anticompetitive — does not by itself constitute an antitrust violation causing antitrust injury. Rather, the assertion of patent rights implicates the antitrust laws only if the patent holder knows the patent is invalid or otherwise unenforceable and nonetheless uses it to gain or maintain a monopoly. *E.g., C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1371 (Fed. Cir. 1998)* ("to violate the ***antitrust law*** there must be an *improper* use of the patent right, 'coupled with violations of *§ 2*.'") (emphasis added) (quoting *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177-78, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965))*. Although *Pace* instructs that the antitrust injury stemming from a *Walker Process* claim occurs when the lawsuit is filed (and that no further antitrust injury occurs after the fact), that can be true only if the alleged infringer knows (or has reason to know) the asserted patents were procured by fraud or otherwise invalid and unenforceable — that is, only if, with due diligence, the alleged infringer knew or should have known that the claim was not just a patent **[*15]** infringement claim, but also a *Walker Process* claim.[3]

Despite Defendants' argument, the law does not mandate the absurd result in which Plaintiffs' injury occurred before they even knew their adversary had violated the antitrust laws; and thus this Court rejects Defendants' assertion that Plaintiffs' claim necessarily accrued when SHFL filed the underlying patent infringement lawsuits in 2009 and 2012. To hold otherwise would gut the discovery rule.

So when did Plaintiffs' claim accrue? On the record before it, the Court cannot make definitive findings on the issue. Although Plaintiffs contend that their cause of action accrued on March 8, 2019, their complaint includes allegations suggesting that they may have known something was amiss long before this date. For example, Plaintiffs allege that, in 2009, after reviewing SHFL's complaint, TF's counsel advised SHFL's counsel (on December 12, 2009), that he believed SHFL had failed to conduct a proper pre-filing investigation to confirm that the infringement allegations were valid. [32] at ¶ 120. Although SHFL responded that, in its view, its pre-filing investigation satisfied *Rule 11*, *id.* at ¶ 121, the fact remains that, as early **[*16]** as December 2009, TF may have had a factual and legal basis to conclude that the asserted patents were invalid and unenforceable, and thus TF knew or should have known that the infringement suit was groundless. The complaint, however, fails to explain the basis for counsel's assertion that SHFL failed to conduct a proper pre-filing investigation. Did counsel have reason to know when he challenged the complaint that the patents were procured by fraud or that the patents were invalid as anticipated by prior art, which SHFL had withheld? If so, Plaintiffs' cause of action may have accrued by that date. If, on the other hand, counsel's

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[3] *See* *Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 264-66 (7th Cir. 1984)* ("Getting a patent by means of a fraud on the Patent Office can, but does not always, violate *section 2* of the Sherman Act. A patent entitles the patentee to prevent others from making or selling the patented product..., and he may be able to use this legal right to restrict competition. But 'may' is not 'does'; and for a patent fraud actually to create or threaten to create monopoly power, and hence violate *section 2*, three conditions must be satisfied besides proof that the defendant obtained a patent by fraud"— "the patent must dominate a real market"; "the invention sought to be patented must not be patentable"; and "the patent must have some colorable validity, conferred for example by the patentee's efforts to enforce it by bringing patent-infringement suits. Indeed, some formulations of the antitrust offense of patent fraud make it seem that the offense is not the fraudulent procuring of a patent in circumstances that create monopoly power but the bringing of ***groundless*** suits for patent infringement.") (emphasis added).

assertion stemmed from simple adversarial posturing, which would only seem prescient in hindsight, it may not have triggered the running of the statute of limitations.

TF's initiation of reexamination proceedings on the asserted '751 patent may also be significant to the timeliness analysis. For example, if TF initiated reexamination because it knew or had reason to know at that time that the patentee had fraudulently withheld prior art, its discovery rule arguments would fail. But the complaint's allegations do not explain why TF requested reexamination. As such, they **[*17]** allegations do not definitively show that Plaintiffs' claim had expired when they filed this case on March 15, 2019.

Having said that, the current record also undermines Plaintiffs' claim that its cause of action accrued on March 8, 2019. Given DigiDeal's antitrust lawsuit, in the exercise of due diligence, Plaintiffs should have been wondering about their antitrust injury long before they had a post-verdict conversation with DigiDeal's lawyers. Plaintiff's assertion of a March 8, 2019 accrual date appears to be as unreasonable as Defendants' assertion that the cause of action necessarily accrued when SHFL filed the underlying patent infringement lawsuits. For present purposes, the Court finds that it cannot say that Plaintiffs' claim definitively accrued before March 15, 2015. Accordingly, this Court will not to dismiss Plaintiffs' complaint as untimely.

C. The Effect of the 2010 Release

As noted above, Defendants' predecessor, SHFL, sued TF for patent infringement in 2009. The parties quickly settled, executing a settlement agreement in February 2010. *See* [32] at ¶ 105. The settlement agreement included a release, which Defendants say precludes the current claim. The release provides: **[*18]**

> Except for each party's undertakings and obligations under this Agreement, each party hereby generally releases the other for all claims, liabilities and damages of any kind that either has or may have against the other, as of the date of this Agreement, whether known or unknown, asserted or unasserted, or accrued or unaccrued.

[36-1] at 2, 4.[4] Although the release, by its plain language, broadly covers unknown and unaccrued claims, it nonetheless releases only claims TF *had* as of February 22, 2010. And it is not clear on the current record that TF had an antitrust claim as of that date. Additionally, such a broadly worded release is valid only if it is knowing and voluntary, *see* *Wagner v. NutraSweet Co., 95 F.3d 527, 533 (7th Cir. 1996)*, and, taking Plaintiffs' allegations as true, this release was neither. *See* [32] at ¶¶ 105, 150. Thus, dismissal on this basis is not appropriate.

D. Antitrust Standing

Finally, Defendants argue that, because they are neither consumers nor competitors in the relevant market, the TCS Plaintiffs lack standing to assert an antitrust action against Defendants.[5] Defendants made this same argument before Judge Kennelly in *Shuffle Tech Int'l v. Scientific Games Corp., No. 15 C 3702, 2015 WL 5934834, at *8-12 (N.D. Ill Oct. 12, 2015)*. Judge Kennelly rejected the argument, and this Court does as well.

To have standing, an **[*19]** antitrust plaintiff must show "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487-88, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (cited in *Shuffle Tech, 2015 WL 5934834, at *9)*. *See also* *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 395-96 (7th Cir. 1993)* (To sue under the antitrust laws, a plaintiff must show both "antitrust injury and standing"; the

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[4] This Court may consider the release because it is part of the settlement agreement referenced in Plaintiffs' complaint. *See* *Hecker v. Deere & Co., 556 F.3d 575, 582-83 (7th Cir. 2009)*(A court normally may not consider extrinsic evidence without converting a motion to dismiss into one for summary judgment; but where a document is referenced in the complaint and central to plaintiff's claims, the court may consider it in ruling on the motion to dismiss.).

[5] Antitrust standing, unlike Article III standing, is not a jurisdictional requirement; rather, antitrust standing asks which plaintiffs may bring the cause of action. *See* *McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., Inc., 937 F.3d 1056, 1063 (7th Cir. 2019)* (noting the distinction—and potential for confusion—between the two).

former involves a causation requirement in order to define the class of potential plaintiffs eligible to bring suit—those 'injured ... by anything forbidden in the antitrust laws"; the latter examines the connection between the asserted wrongdoing and the claimed injury to limit the class of potential plaintiffs to those who are in the best position to vindicate the antitrust infraction."). "Antitrust standing . . . is primarily a matter of legal policy" and ultimately "involves a case-by-case analysis of 'the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.' " *Greater Rockford Energy & Tech. Corp., 998 F.2d at 396* (quoting *Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*.

Based upon the allegations of the complaint, assumed true for present purposes, Plaintiffs here, like Plaintiffs in *Shuffle Tech*, allege that Defendants' fraud on the USPTO and subsequent patent enforcement actions constituted acts **[*20]** of monopolization intended to prevent them from participating in the casino shuffler market. That is enough to confer standing, not only on the inventor or the targeted invention, but on the licensed manufacturers as well. *See id.* at *10-11. Plaintiffs here, like Plaintiffs in *Shuffle Tech*, have alleged that they intended to enter the casino automatic shuffler market and were prepared to do so, but were snuffed out by Defendants' anticompetitive behavior. *Id.* at *12.

CONCLUSION

For the reasons explained above, the Court denies Defendants' motion to dismiss [35].

Dated: March 20, 2020

Entered:

/s/ John Robert Blakey

John Robert Blakey

United States District Judge

End of Document

MSP Recovery Claims, Series, LLC v. Mallinckrodt ARD Inc.

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

March 23, 2020, Decided; March 23, 2020, Filed

Case No. 3:20 C 50056

Reporter

2020 U.S. Dist. LEXIS 51200 *; 2020-1 Trade Cas. (CCH) P81,138; 2020 WL 1330373

MSP Recovery Claims, Series LLC, et al., Plaintiffs, v. Mallinckrodt ARD Inc., et al., Defendants.

Subsequent History: Motion denied by, in part *City of Rockford v. Mallinckrodt ARD, Inc., 2020 U.S. Dist. LEXIS 59810, 2020 WL 1675593 (N.D. Ill., Apr. 6, 2020)*

Motion granted by *MSP Recovery Claims, Series LLC v. Mallinckrodt ARD, Inc., 2022 U.S. Dist. LEXIS 146211 (N.D. Ill., Aug. 16, 2022)*

Prior History: *City of Rockford v. Mallinckrodt Ard, Inc., 2018 U.S. Dist. LEXIS 41085 (N.D. Ill., Feb. 2, 2018)*

Core Terms

Plaintiffs', antitrust, Entities, rights, amended complaint, injunctive relief, damages, motion to dismiss, anti trust law, consumer-protection, proximate, Plans

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Judges: John Z. Lee, United States District Judge.

Opinion by: John Z. Lee

Opinion

MEMORANDUM OPINION AND ORDER

Plaintiffs, consisting of MSP Recovery Claims, Series LLC ("MRCS"), MAO-MSO Recovery, II, LLC, Series PMPI, and MSP Claims 1, LLC, filed an amended class action complaint against Defendants Mallinckrodt plc and Mallinckrodt ARD, Inc. (together, "Mallinckrodt"), as well as Express Scripts Holding Company, Express Scripts, Inc., Curascript, Inc., and United Biosource LLC (together, "the Express Scripts Entities"), alleging that Defendants have violated various federal and state antitrust statutes and consumer-protection laws by artificially inflating the price of the drug Acthar. Defendants have filed two motions to dismiss. For the reasons set forth below, those motions are granted.

Background[1]

The specialty drug Acthar is an adrenocorticoptropic hormone currently approved by the FDA for various uses, including the treatment of certain rare illnesses such as infantile spasms and nephrotic syndrome. First Am. Compl. ("FAC") ¶¶ 106-109, ECF No. 165.

Medicare Advantage plans ("MA Plans") are third-party payers that provide Medicare benefits to **[*5]** their beneficiaries. *Id.* ¶ 1. Plaintiffs allege the Defendants took actions to force these MA Plans to pay supra-competitive prices for Acthar. Certain of these MA Plans have assigned to Plaintiffs their rights to recover for the alleged overpayment. By way of example, MRSC asserts that it has obtained assignments from (1) SummaCare, Inc., (2) EmblemHealth Services Company, (3) ConnectiCare, Inc.,[2] (4) University Health Care MSO, Inc. ("UNHC"), and (5)

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[1] The following facts are taken from Plaintiffs' amended complaint and are accepted as true at this stage. *See Tamayo v. Blagojevich, 526 F.3d 1074, 1081 (7th Cir. 2008)* (stating that, at the motion-to-dismiss stage, the court "accept[s] as true all well-pleaded facts alleged").

[2] The Defendants, noting that the EmblemHealth and ConnectiCare assignments took effect after Plaintiffs filed their original complaint (but before they filed their amended complaint), contend that those assignments "are insufficient to convey

Alianza Profesional de Cuidado Meidco ("APCM"), *id.* ¶¶ 16-20. MAO-MSO Recovery II claims that it has an assignment from Preferred Medical Plan, Inc. ("PMPI"), *id.* ¶¶ 65-67; and MSPA Claims 1 asserts an assignment from Professional Health Choice ("PHC"), *id.* ¶¶ 69-73. Between 2013 and 2017, the MA Plans that assigned their rights to Plaintiffs paid $125,550,620.09 for Acthar prescriptions on behalf of their beneficiaries. *Id.* ¶ 6.

Plaintiffs claim that the Defendants have engaged in certain monopolistic and anti-competitive behavior to artificially inflate the price of Acthar. *Id.* ¶ 7. Specifically, Plaintiffs assert that Mallinckrodt (formerly, Questcor Pharmaceuticals), which manufactures and sells Acthar, acquired the rights to Acthar's **[*6]** only viable alternative, Synacthen, and then chose to withhold it from the market in order to maintain its monopoly pricing. *Id.* ¶¶ 163-183. Mallinckrodt agreed to pay $100 million to the Federal Trade Commission to settle claims that it violated antitrust laws by purchasing the rights to Synacthen. *Id.* ¶ 179.

According to Plaintiffs, Mallinckrodt also entered into two exclusive agreements relating to Acthar distribution, one that made CuraScript the exclusive distributor of Acthar, and one that made United Biosource the exclusive operator of the "Acthar Support & Access Program," through which all Acthar prescriptions must be obtained, *id.* ¶¶ 131-33. Plaintiffs assert that these agreements effectively eliminated any incentive for Express Scripts Holding Company and Express Scripts, Inc. (collectively, "ESI")—one of the largest pharmacy benefit managers in the United States and an affiliate of CuraScript and United Biosource—to negotiate lower prices for Acthar on behalf of its clients. *Id.* ¶¶ 31, 153. Since 2001, Acthar's end-payer price has grown by 107,400%. *Id.* ¶ 146.

Based on this conduct, Plaintiffs allege that Mallinckrodt and the Express Scripts Entities violated multiple sections **[*7]** of the Sherman Act, *see* *15 U.S.C. §§ 1-3* (Counts I and II), various state antitrust laws (Count III), and various state consumer-protection laws (Count IV). FAC at 42-121. Plaintiffs seek injunctive relief as to their federal claims and damages and injunctive relief as to their state claims. *Id.* ¶¶ 203, 212, 220, 446.

Mallinckrodt and the Express Scripts Entities have each filed motions to dismiss Plaintiffs' amended complaint. *See* Mallinckrodt's Mot. to Dismiss, ECF No. 187; Mem. in Supp. of Mallinckrodt's Mot. to Dismiss, ECF No. 188; Express Scripts Entities' Mot. to Dismiss, ECF No. 190; Mem. in Supp. of Express Scripts Entities' Mot. to Dismiss, ECF No. 191.

Legal Standard

To survive a motion to dismiss pursuant to *Rule 12(b)(6)*, a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. In this way, the complaint must put the defendants on "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly, 550 U.S. at 555* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*.

In addition, when considering motions to dismiss, the Court accepts "all well-pleaded factual allegations **[*8]** as true and view[s] them in the light most favorable to the plaintiff." *Lavalais v. Vill. of Melrose Park, 734 F.3d 629, 632 (7th Cir. 2013)*. At the same time, "allegations in the form of legal conclusions are insufficient to survive a *Rule 12(b)(6)* motion." *McReynolds v. Merrill Lynch & Co., Inc., 694 F.3d 873, 885 (7th Cir. 2012)* (citing *Iqbal, 556 U.S. at 678*).

Analysis

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constitutional standing to Plaintiffs." Mem. in Supp. of Mallinckrodt's Mot. to Dismiss at 4, ECF No. 188; *see* Mem. in Supp. of Express Scripts Entities' Mot. to Dismiss at 13-14, ECF No. 191. But, for reasons discussed below, the Court is not persuaded that Plaintiffs' constitutional (or prudential) standing depends on the EmblemHealth and ConnectiCare assignments.

I. Prudential Standing

A. MSP Recovery Claims, Series LLC

As Mallinckrodt points out, several of the exemplar assignments were ultimately assigned to designated subseries of MRSC that are not named plaintiffs, as opposed to MRSC itself. *See, e.g.*, FAC ¶ 63 (explaining that all rights from the assignment with SummaCare were later assigned to "Series 16-11-509, a series of MSP Recovery Claims, Series LLC"); *see generally* *MSP Recovery Claims, Series LLC v. Farmers Ins. Exch., No. 2:17-cv-02522-CAS, 2018 U.S. Dist. LEXIS 221653, 2018 WL 5086623, at *13 (C.D. Cal. Aug. 13, 2018)* ("Under Delaware law, an LLC may establish one or more 'series of members, managers or [LLC] interests' which 'may have separate rights, powers or duties with respect to specified property or obligations of the [LLC] or profits and losses associated with specified property or obligations' as well as a 'separate business purpose or investment objective.'" (quoting *Del. Code Ann. tit. 6, § 18-215(a)*)).

But Mallinckrodt's argument that MRCS lacks standing to sue on behalf of its series is unpersuasive.[3] *See* Mem. in Supp. of Mallinckrodt's Mot. **[*9]** to Dismiss at 3-4. Delaware law "permit[s] an LLC to sue on behalf of its series if provided for in the operating agreement." *Farmers Ins. Exch., 2018 U.S. Dist. LEXIS 221653, 2018 WL 5086623, at *13*. And, in response to Mallinckrodt's motion to dismiss, MRSC has attached its operating agreement, which states that "the Company is authorized to pursue or assert any claim or suit capable of being asserted by any designated series arising from, or by virtue of an assignment to a designated series." ECF No. 197-1 at 1. "[T]he Court construes . . . [the] filing of . . . MSP Recovery Claims, Series LLC's operating agreement as a *Rule 15(d)* supplemental pleading and finds it sufficient to demonstrate plaintiff's standing to assert claims on behalf of its series assignees." *Farmers Ins. Exch., 2018 U.S. Dist. LEXIS 221653, 2018 WL 5086623, at *14*.

B. Standing to pursue injunctive relief.

The Court also rejects Defendants' argument that Plaintiffs have not plausibly alleged prudential standing to seek injunctive relief.[4] *Cf.* *Biomed Pharms., Inc. v. Oxford Health Plans (N.Y.), Inc., 775 F. Supp. 2d 730, 736 (S.D.N.Y. 2011)* (where assignment "limit[ed] Biomed's right to sue . . . to actions for money damages[,] . . . the assignment provision d[id] not grant Biomed the right to seek 'declatory and/or injunctive relief'").

It is true that the assignments appear to focus on claims for damages. *See, e.g.*, FAC Ex. D, PMPI Recovery **[*10]** Agreement at 2, ECF No. 165-4 (stating that "MSP Recovery's services *focus* on the analysis, identification and recovery of conditional payments that have already been made by [PMPI]." (emphasis added)); FAC Ex. M, APCM Assignment at 1, ECF No. 165-13 (stating in the preamble that "MSP Recovery desires to provide certain services to prosecute and recover *amounts owed* on the Assigned Claims." (emphasis added)).

But the Court is persuaded that language in the assignments is sufficiently broad to encompasses the injunctive relief Plaintiffs seek. For instance, the SummaCare assignment transfers "*all rights and claims* against . . . third

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[3] Although Mallinckrodt frames this issue as one of Article III standing, Mem. in Supp. of Mallinckrodt's Mot. to Dismiss at 3-4, the Court deems it more properly a matter of prudential standing. *See* *G&S Holdings LLC v. Continental Cas. Co., 697 F.3d 534, 540 (7th Cir. 2012)* (stating that the "prudential limitations on the exercise of federal jurisdiction" include that, "in general, the plaintiffs must assert their own legal rights and interests, and cannot rest their claims to relief on the legal rights or interests of third parties").

[4] Defendants again present this issue as one of Article III standing, *see* Mem. in Supp. of. Mallinckrodt's Mot. to Dismiss at 5; Mem. in Supp. of Express Scripts Entities' Mot. to Dismiss at 11-13. But the question here is whether claims for injunctive relief were assigned to the Plaintiffs or instead retained by the assigners, a matter of prudential standing. *See* *RK Co. v. See, 622 F.3d 846, 851 (7th Cir. 2010)* ("[P]rudential limitations include concerns about a claim's rightful owner.").

parties . . . including claims under consumer protection statutes and laws." FAC Ex. A, SummaCare Recovery Agreement at 4, ECF No. 165-1 (emphasis added); *see also* PMPI Recovery Agreement at 3 (containing nearly identical language); FAC Ex. G, EmblemHealth Assignment Agreement at 2, ECF No. 165-7 (containing nearly identical language); FAC Ex. K, UNHC Recovery Agreement at 3, ECF No. 165-11 (containing similar language); FAC Ex. M, APCM Recovery Agreement at 2-3, ECF No. 165-13 (containing similar language).

Furthermore, the ConnectiCare assignment contains **[*11]** the same language, while also emphasizing that "[t]his Assignment includes *all of* Assignor's right, title and interest in and to the Assignor's any legal or *equitable* actions, rights, causes of action or lawsuits *of any nature whatsoever*, arising out of or in connection with [the Assignor's right to seek reimbursement and recover payments]." FAC Ex. I, ConnectiCare Assignment at 2, ECF No. 165-9 (emphases added).[5]

Furthermore, while Defendants contend that the scope of Plaintiffs' assignments are limited in time and, therefore, cannot include claims for prospective injunctive relief, Plaintiffs have plausibly alleged that their rights under the assignments are ongoing. *See, e.g.*, SummaCare Recovery Agreement at 6 (explaining that the assignment, which was effective as of May 12, 2017, "shall have an initial term of one . . . year" and "shall automatically renew for successive terms of one . . . year unless terminated as set forth below"); UNHC Recovery Agreement at 6 (containing similar language); APCM Recovery Agreement at 5 (containing similar language). This is enough at the pleading stage.

Accordingly, the Court is satisfied that Plaintiffs have "allege[d] sufficient factual matter, accepted as true, to nudge [their] claim **[*12]** that they are assignees of the rights at issue 'across the line from conceivable to plausible.'" *MSPA Claims 1, LLC v. Allstate Ins. Co., No. 17 C 1340, 2019 WL 4305519, at *2 (N.D. Ill. Sept. 11, 2019)* (quoting *Twombly, 550 U.S. at 570*).[6]

II. Antitrust Standing

Where Plaintiffs' claims flounder are on the shores of antitrust standing. "'Antitrust standing' refers to 'doctrines that have arisen to clarify the circumstances under which a particular [entity] may recover from an antitrust violator.'" *In re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 810 (N.D. Ill. 2017)* (quoting *Loeb Indust., Inc. v. Sumitomo Corp., 306 F.3d 469, 480 (7th Cir. 2002))*. "The two most prominent doctrines were set forth by the Supreme Court in *Illinois Brick Co. v. Illinois[, 431 U.S. 720, 737, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)]*, which held that indirect purchasers are prohibited from seeking damages under federal ***antitrust law***, and *Associated General Contractors of California, Inc. v. California State Council of Carpenters[, 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)]*, which imposed a version of proximate causation on antitrust claims." *In re Broiler Chicken, 290 F. Supp. 3d at 810-11*.

Although states generally interpret their antitrust laws consistent with federal case law, the Supreme Court held in *California v. ARC America Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*, that state legislatures could "repeal" *Illinois Brick* and thus provide for damages under state ***antitrust law*** for indirect purchasers. *See In*

[5] As Defendants note, the PHC assignment Plaintiffs have attached to the amended complaint does not identify the claims that were assigned. Specifically, the agreement states that PHC "assign[s] and transfer[s] . . . the rights and causes of action set forth" in a specific exhibit, yet Plaintiffs have not provided the Court with that exhibit. FAC Ex. F, PHC Agreement at 1, ECF No. 165-6.

[6] Mallinckrodt's assertion that the exemplar assignments are limited to claims under the Medicare Secondary Payer Provision also is unavailing. *See* Mem. in Supp. of Mallinckrodt's Mot. to Dismiss at 5-8. To support this contention, Mallinckrodt cites a portion of the PMPI Assignment that in fact defeats its argument. *See id.* at 7 ("[A]ll claims that have been or can be identified by MSP Recovery as being recoverable by the Client pursuant to the Medicare Secondary Payer Act *or any other contractual, statutory, equitable or legal basis, whether state or federal*, . . . and/or as a result of payments made for or on behalf of a Medicaid beneficiary or as a result of any payment(s) made through any health plan, shall be deemed Assigned Claims." (emphasis added) (quoting PMPI Recovery Agreement at 2)).

re Broiler Chicken, 290 F. Supp. 3d at 811. Furthermore, in deciding whether to apply *Associated General Contractors* to state-law antitrust claims—as opposed to a different, and potentially more permissive proximate-cause test—courts look to whether the relevant **[*13]** states' highest courts have ruled on the issue. *See City of Rockford v. Mallinckrodt ARD, Inc., 360 F. Supp. 3d 730, 759 (N.D. Ill. 2019)*.

Here, despite its length, Plaintiffs' amended complaint lacks sufficient facts from which the Court can assess whether Plaintiffs meet the standard laid out in *Associated General Contractors* or "even the least stringent state's 'proximate cause' test." *Id. at 760*. As Plaintiffs acknowledge, five of the seven assigners purchased Acthar from entities that have no affiliation with Defendants, including Caremark, LLC; Walgreens Specialty Pharmacy, LLC; Procare Pharmacy, LLC; and OptumRx, Inc. *See* FAC ¶¶ 241, 265, 281, 568, 670; Resp. to Mots. to Dismiss at 12 n.16, ECF No. 197. And this is difficult to square with Plaintiffs' claim that "Defendants control 100% of the [Acthar] market in . . . price," and that they "own and operate the supply chain." Resp. to Mots. to Dismiss at 12 & n.16; *see, e.g.*, *Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 144 (4th Cir. 2019)* (describing supply chains as including "manufacturers," "distributors," and "retailers."). Because it is not clear what role these intermediary entities are playing or how that role is consistent with Plaintiffs' theory of antitrust standing, the Court cannot determine whether Plaintiffs' have satisfied the proximate causation requirement under *Associated* ***[*14]*** *General Contractors* or some relevant lesser state standard. *See City of Rockford, 360 F. Supp. 3d at 753* ("Until [the Court] knows the contours of [intermediary] CVS' role in supplying Acthar to [plaintiff's] employee's spouse, the Court is not able to engage in a complete application of the *AGC* factors to [plaintiff].").

To be sure, two of Plaintiffs' assigners—EmblemHealth and ConnectiCare—purchased Acthar from Accredo Health Group Inc. ("Accredo"), which Plaintiffs contend is an "ESI-affiliated entity." Resp. to Mots. to Dismiss at 12 n.15. But the amended complaint only makes a few brief references to Accredo, which is not a Defendant in this action. FAC ¶¶ 27, 128, 132. This is not enough to plausibly establish that Accredo was a co-conspirator in the alleged conspiracy, and thus not enough to plausibly argue that EmblemHealth and ConnectiCare were entitled to sue the named Defendants for damages notwithstanding the applicability of *Illinois Brick*. *Cf. City of Rockford, 360 F. Supp. 3d at 748-751* (discussing the "co-conspirator" exception to *Illinois Brick*). And, even setting aside *Illinois Brick*, Plaintiffs must provide more information as to Accredo's role in supplying Acthar to EmblemHealth and ConnectiCare's beneficiaries, as well as Accredo's role vis-à-vis **[*15]** the named Defendants, before the Court can determine whether standing plausibly exists under *AGC* or any other proximate-cause test. As such, Plaintiffs' federal and state antitrust claims (Counts I, II, and III) are dismissed.

Finally, the Court concludes that Plaintiffs' state consumer-protection claims suffer from the same shortcomings. As in *City of Rockford*, "[t]he parties put forth no argument that [*Associated General Contractors*] is irrelevant to state-law consumer protection claims." *360 F. Supp. 3d at 759 n.18*; *see also In re Aluminum Warehousing Antitrust Litig., No. 13-md-2481 (KBF), 2014 WL 4277510, at *38 (S.D.N.Y. Aug. 29, 2014)* (dismissing indirect-purchaser plaintiffs' state consumer-protection claims because plaintiffs "failed to include any specific allegations of proximate cause," and "every state statute requires a direct or indirect allegation supporting proximate cause"). Thus, for purposes of this order, "the Court considers all of the state laws invoked by the [amended complaint] as state laws that implicate Plaintiffs' antitrust standing." *City of Rockford, 360 F. Supp. 3d at 759 n.18*. And because, as noted above, Plaintiffs have not pleaded sufficient facts to meet even the least stringent state's proximate-cause test, the Court dismisses Plaintiffs' consumer-protection claims (Count **[*16]** IV).

Finally, Defendants argue that the Court should not provide Plaintiffs with another opportunity to amend their complaints. But, discovery remains ongoing, and the Court finds that Defendants would suffer no undue prejudice if Plaintiffs are permitted to file a second amended complaint to address the deficiencies outlined here. Therefore, the Court grants Plaintiffs leave to file a second amended complaint. Any such complaint must be filed within 45 days of this order.[7]

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[7] Because standing is a threshold issue and any amendment likely will impact the nature and scope of Plaintiffs' claims, the Court declines to address Defendants' arguments under *Rule 12(b)(6)* at this time.

Conclusion

For the foregoing reasons, Defendants' motions to dismiss are granted. Plaintiffs' amended complaint is dismissed without prejudice. Plaintiffs may file a second amended complaint within 45 days of this order.

ENTERED: 3/23/20

/s/ John Z. Lee

John Z. Lee

United States District Court Judge

Unicorn Global v. Hillo Am.

United States District Court for the Central District of California

March 23, 2020, Decided; March 23, 2020, Filed

LA CV19-03028 JAK (AFMx)

Reporter
2020 U.S. Dist. LEXIS 138251 *; 2020 WL 4355301

Unicorn Global, Inc. et al v. Hillo America, Inc.

Core Terms

Counterclaims, patent, allegations, inequitable conduct, inventorship, antitrust, intent to deceive, hoverboard, prototype, inventor, antitrust violation, Sherman Act, unenforceability, infringement, includes

Counsel: **[*1]** Attorneys Present for Plaintiffs: Not Present.

Attorneys Present for Defendants: Not Present.

Judges: JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE.

Opinion by: JOHN A. KRONSTADT

Opinion

CIVIL MINUTES — GENERAL

Proceedings: (IN CHAMBERS) ORDER RE PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS (DKT. 36)

I. <u>Introduction</u>

Unicorn Global, Inc., Hangzhou Chic Intelligent Technology Co., Ltd., and Shenzhen Uni-Sun Electronic Co., Ltd. ("Plaintiffs") brought this action against Hillo America, Inc. ("Defendant") for infringement of two United States utility patents and two United States design patents. Dkt. 1 ¶ 2. The Complaint alleges that: "[t]he Asserted Patents are directed to electric balance vehicles commonly referred to as 'hoverboards.'" *Id.* ¶ 16.

Defendant filed an Answer and Counterclaims. Dkts. 32, 33. Counterclaims Nine through Twelve are for Declaratory Judgment of Unenforceability of the asserted patents. Dkt. 33 at 24-36. Counterclaim Thirteen is for Intentional Interference with Prospective Economic Relations (*id.* at 36-38), Counterclaim Fourteen is for Negligent Interference with Prospective Economic Relations (*id.* at 39-41), and Counterclaim Fifteen is for Antitrust and Unfair Competition (*id.* at 41-44).

Pursuant to *Fed. R. Civ. P. 12(b)(6)*, Plaintiffs moved to dismiss **[*2]** the counterclaims regarding the alleged inequitable conduct, tortious interference, and antitrust violations ("Motion" (Dkt. 36)). Dkt. 36.[1]

For the reasons stated in this Order, the Motion is **GRANTED** without prejudice, with any amended counterclaims to be filed within 14 days of the issuance of this Order, and in conformance with its limitations.

II. Factual Background

Plaintiffs allege that Defendant infringes U.S. Patent Nos. 9,376,155 ("the '155 Patent"), 9,452,802 ("the '802 Patent"), D737,723 ("the '723 Patent"), and D784,196 ("the '196 Patent") (collectively, "asserted patents"). Dkt. 1 ¶ 2. For each of the asserted patents, the Counterclaims allege that Jiawei Ying, who is Plaintiff Hangzhou Chic's Chair and General Manager as well as the named inventor on the asserted patents, engaged in inequitable conduct. *See, se.g.* Dkt. 33 at 8-12.[2] The Introduction section of the Counterclaims alleges three theories of inequitable conduct as to the '155 Patent:

1) "Mr. Ying failed to disclose . . . that another individual, Shane Chen, and Mr. Chen's company Inventist, Inc., had publicly disclosed a prototype of a hoverboard called 'Hovertrax' in the United States more than one year before the effective filing date of the '155 patent." *Id.* at 8. The Counterclaims further state: "the prototype **[*3]** appears to contain all of the claim limitations of claim 1 of the '155 patent." *Id.* at 9 (the "prototype non-disclosure theory").

2) The '155 Patent claims priority to a Chinese patent application that the Counterclaims refer to as "the CN '353 App." *Id.* at 8. The Counterclaims state, "Mr. Ying failed to disclose . . . that Mr. Ying and Hangzhou Chic had withdrawn and abandoned the CN '353 App . . . after the Chinese Patent Office rejected the claims of the CN '353 App as being obvious over prior art Chinese patent application nos. CN 203158157U and CN203381739U . . . . Although Mr. Ying disclosed CN 203158157U and CN203381739U to the USPTO, Mr. Ying intentionally withheld the Chinese Patent Office's claim rejections with the intent to deceive the USPTO." *Id.* at 9-10 (the "Chinese office action non-disclosure theory").

3) In an interview with Sino US Times, Mr. Ying "analogized his team members as pearls and himself as the string that holds the pearls together, essentially noting that his role [is] merely managerial . . . . The inventorship of the '155 Patent is inconsistent with his statement." *Id.* at 10. "Upon information and belief, Mr. Ying is not an inventor of the '155 patent and at least some of the real inventors were not named in the '155 patent. Mr. Ying, however, **[*4]** failed to disclose the improper inventorship to the USPTO during the prosecution of the '155 patent with the intent to deceive the USPTO." *Id.* at 10 (the "improper inventorship theory").

The Introduction of the Counterclaims, state as to the '723 Patent that it claims priority to a Chinese patent referred to as "the CN '556 App." *Id.* at 11. The Counterclaims allege that Mr. Ying and Shaojun Cao filed declarations

[1] The title of the Motion and its introduction imply that it is directed to all of the Counterclaims, *see e.g.* Dkt. 36 at 2 (Notice of Motion, stating "[t]he counterclaims should be dismissed"), but the memorandum in support of the Motion only addresses the counterclaims for inequitable conduct, tortious interference, and antitrust violations. *See id.* The Motion does not address Counterclaims One through Eight for noninfringement and invalidity of the asserted patents. Counterclaims Five through Eight, which allege invalidity, include allegations that the asserted patents are invalid for improper inventorship. *See, e.g.* Dkt. 33 ¶ 69 ("As yet another example, all claims of the '155 patent are invalid for improper inventorship."). However, the memorandum in support of the Motion only addresses Defendant's alleged improper inventorship in the context of the inequitable conduct claims. *See* Dkt. 36 at 15 (addressing "allegations of inequitable conduct based on inventorship"). Nor does the memorandum in support of the Motion address the Answer, including its Fourth Affirmative Defense of inequitable conduct as to each of the four asserted patents. *See* Dkt. 32 at 11-16. Because the Answer and Counterclaims One through Eight are not addressed by the Motion, they are not discussed in this Order.

[2] Citations are to page numbers in the pleadings rather than paragraph numbers because not all paragraphs are numbered.

during prosecution of the '723 Patent stating "that each is 'an original joint inventor of a claimed invention in the application.'" *Id.* The Counterclaims also allege that, "Mr. Ying failed to disclose that he was listed as the sole inventor on the CN '556 App . . . . Mr. Ying's and Mr. Cao's declarations are contradicted by the listed inventorship on the CN '556 App, which describes the same invention." *Id.* The Counterclaims then allege, "[t]he same improper inventorship issues also happened to the '802 and '196 Patents." *Id.*

Counterclaims Nine and Ten allege the unenforceability of the '155 and '802 Patents. Each counterclaim includes the same verbatim statements that are included in the Introduction of the Counterclaims for the '155 Patent. *See id.* at 24-31. Counterclaim Eleven for unenforceability of the '723 Patent includes the same verbatim statements that are in the Introduction of **[*5]** the Counterclaims for the '723 Patent. *Id.* at 32-33. Counterclaim Twelve for unenforceability of the '196 Patent includes some of the same inventorship theory allegations that are in the Introduction of the Counterclaims for the '155 Patent. *Id.* at 34-36.

The Counterclaims also allege antitrust violations. In the Introduction section, it is alleged that Hangzhou Chic previously permitted Defendant "to use the special authorization and/or permission stickers of Hangzhou Chic covering any of its industrial designs and technologies . . . from or about 2015 to present." *Id.* at 5. The Counterclaims then allege:

> From [about 2015 to present] plaintiff/counterdefendant Hangzhou Chic has been the controlling monopoly power of approximately 90% of the total market share in the *Amazon.com* online 6.5" Hoverboard electric self-balancing scooter market . . . . In order to illegally control and keep the monopoly power and further manipulate the predatory pricing scheme in the Relevant Market . . . . , plaintiffs/counterdefendants started by demanding that [Defendant] grant[ ] plaintiffs immediate and continuous access to [Defendant's] computer system and [sales data] with pricing information, and then using the access to collect sales data and manipulate the pricing **[*6]** system in the Relevant Market. Upon defendant's rejection and refusal to collaborate, plaintiffs . . . pressed Amazon.com to *terminate defendant's listings* on hoverboard products . . . , and filed this retaliatory lawsuit . . . , suing defendant for *alleged patent infringement* so as to be able to perpetrate and carry on plaintiffs' illegal scheme . . . to stop and kill the competition in the Relevant Market, which already had an anticompetitive effect violating U.S. ***antitrust law***.
>
> All the "Asserted Patents" have been abused and misused by plaintiff Hangzhou Chic's *illegal exclusive dealing scheme* with anticompetitive effect.

Id. at 5-6 (emphasis in original); *see also id.* at 36-38 (substantially similar factual allegations in Counterclaim Thirteen), *id.* at 39-41 (substantially similar factual allegations in Counterclaim Fourteen), *id.* at 41-44 (substantially similar factual allegations in Counterclaim Fifteen). The Introduction and Counterclaims Thirteen through Fifteen each refers to § 2 of the Sherman Act. *Id.* at 7, 38, 40, 43.

III. Analysis

A. Legal Standards

1. Inequitable Conduct

Inequitable conduct is a defense to patent infringement. *Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276, 1285 (Fed. Cir. 2011)* (en banc). An alleged infringer can seek to establish such inequitable conduct "by clear and **[*7]** convincing evidence that the patent applicant (1) misrepresented or omitted information material to patentability, and (2) did so with specific intent to mislead or deceive the PTO." *Ohio Willow Wood Co. v. Alps S., LLC, 735 F.3d 1333, 1344 (Fed. Cir. 2013)* (citations omitted). Intent and materiality must be separately established. *Therasense, 649 F.3d at 1290*. The standard for "the materiality required to establish inequitable conduct is but-for materiality." *Id. at 1291*. Thus, the undisclosed prior art is "but-for material if the PTO would not have allowed a claim had it been aware of [it]." *Id.*

Intent to deceive the USPTO can be shown by direct or circumstantial evidence. *Id. at 1290*. Under the clear and convincing evidence standard, the party alleging inequitable conduct must show that the specific intent to deceive is "the single most reasonable inference able to be drawn from the evidence." *Id.* Therefore, "when there are multiple reasonable inferences that may be drawn, intent to deceive cannot be found." *Id. at 1290-91*.

Inequitable conduct is a claim based in fraud that must be stated with particularity. *Fed. R. Civ. P. 9(b)*. "[I]n pleading inequitable conduct in patent cases, *Rule 9(b)* requires identification of the specific who, what, when, where, and how of the material misrepresentation or omission committed before the PTO." *Exergen Corp. v. Wal-Mart Stores, Inc., 575 F.3d 1312, 1327 (Fed. Cir. 2009)*. "A pleading **[*8]** that simply avers the substantive elements of inequitable conduct, without setting forth the particularized factual bases for the allegation, does not satisfy *Rule 9(b)*." *Id. at 1326-27*.

2. *Walker Process* Sherman Act Violations

In *Walker Process*, "the Supreme Court held that a plaintiff could bring an action under § 2 of the Sherman Act based on the alleged maintenance and enforcement of a fraudulently-obtained patent." *TransWeb, LLC v. 3M Innovative Properties Co., 812 F.3d 1295, 1306 (Fed. Cir. 2016)* (citing *Walker Process Equip. v. Food Mach. & Chem. Corp., 382 U.S. 172, 173-74, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965))*. To prevail on a *Walker Process* counterclaim, a party must show: "first, that the antitrust-defendant obtained the patent by knowing and willful fraud on the patent office and maintained and enforced the patent with knowledge of the fraudulent procurement; and second, all the other elements necessary to establish a Sherman Act monopolization claim." *Id.* (citing *Ritz Camera & Image v. SanDisk Corp., 700 F.3d 503, 506 (Fed. Cir. 2012))*. "*Walker Process* liability requires a higher, more specific showing of 'knowing and willful fraud' than the more inclusive inequitable conduct doctrine." *Id. at 1307* (citing *Nobelpharma AB v. Implant Innovations, 141 F.3d 1059, 1069 (Fed. Cir. 1998)*; *Dippin' Dots, Inc. v. Mosey, 476 F.3d 1337, 1346-48 (Fed.Cir.2007))*.

If the first requirement is met, to establish a Sherman Act monopolization claim a plaintiff must then show "(1) that the [other party] has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous **[*9]** probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*.

B. Application

In support of the Motion, Plaintiffs argue that the inequitable conduct counterclaims fail to meet the heightened pleading standard of *Rule 9(b)*. *See, e.g.* Dkt. 44 at 1. In the alternative, they argue that, with respect to both the economic interference and antitrust counterclaims, they have immunity under federal patent law and the *Noerr-Pennington* doctrine. *Id.*

Defendant responds by presenting several declarations and exhibits. The opposition includes a 22-page section titled "Factual Background and Evidence." *See* Dkt. 42. This section includes 20 pages of verbatim block quotes from Defendant's attached declarations. Proffering evidence in response to a motion to dismiss is usually inappropriate:

> Generally, district courts may not consider material outside the pleadings when assessing the sufficiency of a complaint under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. *Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)*. When "matters outside the pleading are presented to and not excluded by the court," the 12(b)(6) motion converts into a motion for summary judgment under *Rule 56*. *Fed. R. Civ. P. 12(d)*. Then, both parties must have the opportunity "to present all the material that is pertinent to the motion." *Id.*
>
> There are two exceptions to this rule: the incorporation-by-reference **[*10]** doctrine, and judicial notice under *Federal Rule of Evidence 201*.

Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 998 (9th Cir. 2018). Defendant has not demonstrated that the materials cited in the opposition to the Motion fit within either of the exceptions to the rule that limit the consideration of materials that are outside the pleadings. Therefore, the material that has been quoted in the opposition to the Motion is not considered in this Order.

Pages 24 and 25 of the opposition to the Motion repeats the following assertion six times:

> Defendant's counterclaim of [noninfringement, invalidity, unenforceability, intentional or negligent interference with prospective economic advantage, or ***antitrust law*** and unfair competition] has "give[n] plaintiffs a fair notice of what the claim is." [*See* cited paragraphs of Counterclaims]. The counterclaim pleading already gave "fair notice" of the claim being asserted and the "grounds upon which it rests." [*Bell Atlantic v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)*; *Oliver v. Ralphs Grocery Co., 654 F.3d 903, 908. (9th Cir. 2011)*.]

Dkt. 42 at 24-25.

As noted, *Rule 9(b)* applies to the inequitable conduct counterclaims. *Exergen, 575 F.3d at 1327*. Defendant does not address this pleading standard or why it is satisfied by the relevant Counterclaims. A review of the allegations in the inequitable conduct counterclaims shows that they lack particularity as required by *Rule 9(b)*.

As to the prototype non-disclosure **[*11]** theory, Plaintiff correctly contends that the Counterclaims do not allege facts sufficient to show, if established, that: the hoverboard prototype was but-for material; Mr. Ying had knowledge of the hoverboard prototype; or that Mr. Ying had intent to deceive the USPTO. Dkt. 44 at 1-3. There are some conclusory legal assertions as to the last issue, but they are insufficient. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* ("the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

The allegations about the Chinese office action non-disclosure are also insufficient. The allegations concede that Mr. Ying disclosed to the USPTO the underlying prior art that was cited in the Chinese office action. In light of that, the allegations do not have sufficient bases for the required but-for materiality or intent to deceive the USPTO with respect to the Chinese office action. Dkt. 44 at 3-4. Even if the allegations were established, there would be no basis to conclude that the Chinese office action is non-cumulative over the cited prior art itself.

With respect **[*12]** to the alleged, improper inventorship theory, as Plaintiffs observe, "[e]ven if [Defendant] could show a mistake in the identification of inventors . . . [Defendant] has not alleged facts supporting a reasonable inference that such a mistake was intentional or fraudulent." Dkt. 44 at 4.

Plaintiffs argue that the economic interference and antitrust counterclaims are also subject to the heightened pleading standards of *Rule 9(b)*. Thus, they contend that, "these claims are premised on allegations of inequitable conduct." Dkt. 44 at 5. Defendants' economic interference and antitrust counterclaims appear to be premised, at least in part, on the inequitable conduct allegations. Therefore, they include *Walker Process* claims. Consequently, they lack specificity for the same reasons identified as to the inequitable conduct counterclaims *TransWeb*, 812 F.3d at 1306.

The allegations in the Counterclaims could be interpreted as a claim of antitrust violations based on the contractual relationship between Defendant and Hangzhou Chic. However, the allegations are ambiguous as to whether Defendant is asserting such a separate antitrust violation and the legal basis within the recognized doctrines that apply under Section 2 of the Sherman Act. **[*13]** Moreover, the ambiguity in the allegations in the counterclaims as to the economic interference and antitrust violations confirms that they are not adequately stated.[3]

[3] Antitrust allegations that are not premised on *Walker Process* patent misuse are not subject to the heightened pleading requirements of *Rule 9(b)*. However, "the Supreme Court has cautioned against permitting antitrust cases to proceed to discovery without a plaintiff demonstrating 'plausibility' because of the high cost of discovery in antitrust cases in particular." *Pro Search Plus, LLC v. VFM Leonardo, Inc., No. SACV 12-2102 JST (ANx), 2013 U.S. Dist. LEXIS 107895, 2013 WL 3936394, at *1 (C.D. Cal. July 30, 2013)*; *see also* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*

"Leave to amend should be granted unless the district court 'determines that the pleading could not possibly be cured by the allegation of other facts.'" *Knappenberger v. City of Phoenix, 566 F.3d 936, 942 (9th Cir. 2009)* (quoting *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)* (en banc)). Defendant's opposition reflects that it is prepared to present allegations as to facts not mentioned in the Counterclaims that could support them. Therefore, it is appropriate to grant the Motion without prejudice to the filing of an amended version of Counterclaims Nine through Fifteen. However, if Defendant elects to do so, it must present allegations that conform to the standards stated in this Order. This would include a clear statement of the allegations of those facts sufficient to support the legal claims that are advanced, e.g., whether the antitrust counterclaims are based on a claimed *Walker Process* violation or another legal doctrine.

IV. Conclusion

For the reasons stated in this Order, the Motion is **GRANTED** without prejudice. Any amended counterclaims shall be filed within **[*14]** 14 days of the issuance of this Order, and shall be stated in a manner that is sufficient to satisfy the pleading standards that have been stated.

IT IS SO ORDERED.

("Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.") (citation omitted).

U.S. Futures Exch., L.L.C. v. Bd. of Trade

United States Court of Appeals for the Seventh Circuit

December 13, 2019, Argued; March 23, 2020, Decided

No. 18-3558

Reporter

953 F.3d 955 *; 2020 U.S. App. LEXIS 9031 **; 2020-1 Trade Cas. (CCH) P81,134; 2020 WL 1426596

U.S. FUTURES EXCHANGE, L.L.C., et al., Plaintiffs-Appellants, v. BOARD OF TRADE OF THE CITY OF CHICAGO, INC., et al., Defendants-Appellees.

Subsequent History: Rehearing denied by, Rehearing denied by, En banc *United States Futures Exch. v. Bd. of Trade of Chi., 2020 U.S. App. LEXIS 13164 (7th Cir. Ill., Apr. 23, 2020)*

Prior History: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:04-cv-06756 — Thomas M. Durkin **[**1]** , Judge.

U.S. Futures Exch., LLC v. Bd. of Trade, 346 F. Supp. 3d 1230, 2018 U.S. Dist. LEXIS 186813 (N.D. Ill., Oct. 31, 2018)

Disposition: AFFIRMED.

Core Terms

immunity, sham, petitioning, lawsuit, antitrust, anti trust law, district court, letters, regulations, designated, approve, anticompetitive, fraudulent misrepresentation, antitrust immunity, review process, commodities, competitor, liquidity, baseless, clearing, lobbying, deprive, trading, staff

LexisNexis® Headnotes

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

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

Appellate courts review summary judgment de novo, asking whether a genuine dispute exists over any material fact.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN2[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington doctrine extends absolute immunity under the antitrust laws to businesses and other associations when they join together to petition legislative bodies, administrative agencies, or courts for action that may have anticompetitive effects. The doctrine flows from *First Amendment* origins: antitrust laws do not supersede the people's right to petition their government in favor of a desired monopoly. Exceptions exist for petitioners who present fraudulent misrepresentations or bring sham lawsuits.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN3[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Fraudulent misrepresentations made in an adjudicative proceeding before an administrative agency are not protected from antitrust liability. Those made in a legislative, political setting, however, enjoy immunity. Mercatus identifies five considerations to weigh when drawing the line between legislative and adjudicative proceedings for Noerr-Pennington purposes: (1) the general nature of the authority exercised by the agency; (2) the formality of the agency's fact-finding process; (3) the extent to which fact gathering is subject to political influence; (4) whether the agency received any testimony made under oath, affirmation, or penalty of perjury; and (5) whether the agency acted ultimately as a matter of discretionary authority or instead acted in accordance with more definite standards subject to judicial re-view. This is a threshold inquiry; the fraud exception does not apply at all outside of adjudicative proceedings. Should an antitrust plaintiff overcome this threshold, it still must demonstrate the alleged misrepresentation (1) was intentionally made, with knowledge of its falsity; and (2) was material, in the sense that it actually altered the outcome of the proceeding.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

HN4[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

The absence of definite standards subject to judicial review is more characteristic of purely political or legislative activity than of adjudication for purposes of applying the Noerr-Pennington protection.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN5[] **Noerr-Pennington Doctrine, Sham Exception**

Noerr-Pennington's sham lawsuits or abuse-of-process exception holds liable objectively baseless lawsuits brought in an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process—as opposed to the outcome of that process—as an anti-competitive weapon.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN6[] **Noerr-Pennington Doctrine, Sham Exception**

The Noerr-Pennington's sham lawsuits or abuse-of-process exception requires a two-step inquiry: (1) only if challenged litigation is objectively meritless may a court (2) examine the litigant's subjective motivation. In other words, an antitrust plaintiff must disprove the challenged lawsuit's legal viability before proceeding to the second, subjective step.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN7[] **Noerr-Pennington Doctrine, Sham Exception**

As to the Noerr-Pennington's sham lawsuits or abuse-of-process exception, an objectively reasonable lawsuit is one reasonably calculated to elicit a favorable outcome. Baseless, frivolous efforts, as distinct from colorable suits brought in bad faith, receive no protection. Notably, a successful action self-proves its reasonableness and certainly cannot be characterized as a sham. A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN8[] **Noerr-Pennington Doctrine, Sham Exception**

The Noerr-Pennington sham exception has never hinged on the petitioner's subjective intent alone. This aligns with the teachings of both Noerr and Pennington: Noerr rejected the contention that an attempt to influence the passage and enforcement of laws' might lose immunity merely because the lobbyists' sole pur-pose was to destroy their competitors. Valid efforts to influence government action, for exam-ple, do not qualify as a sham, while insubstantial claims might evidence one.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN9[] **Noerr-Pennington Doctrine, Sham Exception**

The Noerr-Pennington sham exception's objective component is indispensable and California Motor does not suggest otherwise.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

HN10[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

Regulatory statutes sometimes preclude application of the antitrust laws in explicit terms. If not, courts must determine whether the regulations implicitly preclude those laws' application. Implied immunity arises when a regulatory regime clashes with the antitrust laws to create a clear repugnancy or clear incompatibility between the two. Only a clear showing will do; findings of implied immunity are not favored otherwise. Once the conflict has been demonstrated, the antitrust laws are ousted or repealed in favor of the regulatory scheme.

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For BOARD OF TRADE OF THE CITY OF CHICAGO, CHICAGO MERCANTILE EXCHANGE, Defendants - Appellees: Albert L. Hogan, III, Attorney, Jonathan Lee Marcus, Esq., Attorney, William E. Ridgway, Attorney, Lindsey Sieling, Attorney, Gretchen M. Wolf, Attorney, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Chicago, IL.

Judges: Before MANION, KANNE, and BRENNAN, Circuit Judges.

Opinion by: MANION

Opinion

[*958] MANION, *Circuit Judge*. This antitrust case comes to us from the commodities and futures marketplace. As USFE tells it, Defendants torpedoed its new futures exchange by delay-ing the regulatory approval process and enacting an internal rule that deprived the new exchange of liquidity. The real question is whether Defendants violated the antitrust laws in doing so. We hold they did not.

I. Background

In the early 2000s, U.S. Exchange Holdings, Inc., and its subsidiary **[**2]** U.S. Futures Exchange, L.L.C. (together, "USFE"), set out to offer a then-novel electronic-based futures trading platform. Electronic trading posed a direct competitive threat to entrenched exchanges that utilized the more traditional but less efficient floor-trading model, like the Board of Trade of the City of Chicago, Inc. ("CBOT.")

USFE targeted February 1, 2004, as its launch date. That would have given USFE about a month to establish itself be-fore a number of futures and options contracts were set to ex-pire, at which time traders could transfer their business from CBOT and elsewhere to USFE. Before it could begin opera-tions, however, USFE needed to be approved as a designated contract market ("DCM") by the Commodity Futures Trading Commission. USFE filed its DCM application in July 2003 and hoped for fast-track approval by mid-November.

The Commission solicited public comment as part of the application review. CBOT and another futures exchange, Chi-cago Mercantile Exchange Inc. ("CME"), raised fifty-four ob-jections to USFE's application. Many other members of the public submitted critical letters and raised objections, too. At the close of the comment period, the Commission **[**3]** set a public hearing on USFE's application for December 17, 2003. But be-fore the hearing could convene, Defendants CBOT and CME requested the matter be postponed due to scheduling con-flicts. The Commission obliged.

In the background, USFE approached the Board of Trade Clearing Corporation ("BOTCC") to negotiate an agreement for clearing services.[1] This would have provided **[*959]** USFE with access to essential startup liquidity in the form of open inter-est created by market participants and held at BOTCC.[2] The problem for USFE was that CBOT also used this clearing-house. Once it caught wind that USFE intended to contract with BOTCC, CBOT proposed a new exchange rule—Rule 701.01—to the Commission for approval. The Commission approved the rule after more than a month of deliberation. Rule 701.01 compelled the transfer of CBOT's open interest from BOTCC to its new, exclusive clearing partner: CME.[3] By draining its open contracts from BOTCC, CBOT deprived USFE of access to a significant amount of liquidity.

The Commission finally approved USFE as a DCM on February 4, 2004, and USFE launched on February 8. According to USFE, the delay—attributable to Defendants—caused such uncertainty that market **[**4]** participants were unable and/or un-willing to trade on the new exchange. The exchange flopped.

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[1] Every futures exchange must either provide its own clearing services or otherwise contract with a clearinghouse like BOTCC. A clearinghouse is an intermediary between buyers and sellers; it acts as the buyer for every seller and the seller for every buyer. The clearinghouse thus as-sumes counterparty risk; if a trade falls through on one end, the clearing-house shields the other side.

[2] "Open interest" refers to trades or contracts that remain outstanding at the clearinghouse and is used as a predictor of liquidity.

[3] CME offers both clearing and trading services. It agreed to provide clearing services exclusively for CBOT in April 2003.

USFE sued Defendants for violating the Sherman Anti-trust Act and related state common law prohibitions against tortious interference. The case spent *fifteen years* in federal district court before reaching us. After multiple amended complaints and motions to dismiss, a venue change, on-and-off discovery, three rounds of summary judgment briefing, and reassignment to a new district judge, the matter culmi-nated in summary judgment for Defendants. USFE appeals.

II. Discussion

HN1[] We review summary judgment *de novo*, asking whether a genuine dispute exists over any material fact. *Kopplin v. Wis. Cent. Ltd., 914 F.3d 1099, 1102 (7th Cir. 2019)*.

USFE's antitrust claims can be divided into two theories. The first is the "delay theory," whereby Defendants flooded the Commission with frivolous objections in order to stall DCM approval and harm USFE. Second, in the "open interest theory," Defendants conspired to deprive USFE of liquidity by transferring CBOT's open interest from BOTCC to CME.[4] We address each theory in turn.

A. Delay Theory: *Noerr-Pennington* and its Exceptions

In connection with USFE's DCM application, Defendants filed fifty-four objections (most, considered **[**5]** but rejected by the Commission) and submitted letters requesting the December 2003 hearing on USFE's application be postponed. Defend-ants engaged in this petitioning despite their apparent belief that USFE's application would be approved eventually.

The district court held this petitioning immune from anti-trust liability under the *Noerr-Pennington* doctrine.[5] ***HN2***[] The **[*960]** doctrine "extends absolute immunity under the antitrust laws to businesses and other associations when they join together to petition legislative bodies, administrative agencies, or courts for action that may have anticompetitive effects." *Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 841 (7th Cir. 2011)* (internal quotation and citations omitted). The doctrine flows from *First Amendment* origins: antitrust laws do not su-persede the people's right to petition their government in favor of a desired monopoly. *See id. at 841-42* (citing *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc., 814 F.2d 358, 371 (7th Cir. 1987))*. *Noerr-Pennington* immunity is not ab-solute, however. Exceptions exist for petitioners who present fraudulent misrepresentations or bring sham lawsuits.[6] USFE invokes both.

i. *The "Fraudulent Misrepresentations" Exception*

HN3[] Fraudulent misrepresentations made in an adjudicative proceeding before an administrative agency are not protected from antitrust liability. *Mercatus, 641 F.3d at 842*. Those made in a legislative, political setting, however, enjoy immunity. *Mercatus* identifies five considerations to weigh when draw-ing the line between legislative and adjudicative proceedings for *Noerr-Pennington* purposes: (1) the general nature of the authority exercised by the agency; (2) the formality of the agency's fact-finding process; (3) the extent to which fact gath-ering is subject to political influence; (4) whether the agency received any testimony made under oath, affirmation,

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[4] The parties also debate whether USFE's open interest claims are actionable at all. The district court did not rule on this issue so neither will we.

[5] The doctrine takes its name from two Supreme Court decisions: *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)* (holding railroads' publicity campaign to promote legislation and law en-forcement practices that harmed trucking industry did not violate the *Sherman Act*); and *United Mine Workers of America v. Pennington, 381 U.S. 657, 670, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)* ("Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.").

[6] *Mercatus* describes these exceptions as "two specific kinds of con-duct" that trigger a single exception to immunity: the "sham exception," first mentioned in *Noerr* itself. *See Mercatus, 641 F.3d at 842*. We discuss them as separate exceptions to **[**6]** avoid confusing the distinction between "sham lawsuits" and the broader "sham exception" *Noerr* contemplates.

or pen-alty of perjury; and (5) whether the agency acted ultimately as a matter of discretionary authority or instead acted in ac-cordance with more definite standards subject to judicial re-view. *Id. at 845-46*. This is a threshold inquiry; the fraud ex-ception "does not apply at all outside of adjudicative proceed-ings." *Id. at 844*.[7]

Applying *Mercatus*'s factors here, we conclude the district court classified the Commission's DCM application **[**7]** review process properly as legislative instead of adjudicative. *First*, we consider the nature of the Commission's authority when it reviewed USFE's application. The Commission's DCM re-view process mirrors its public rulemaking function, which includes entertaining *ex parte* meetings on proposed rules, providing notice to the public, and seeking comment before promulgating, amending, or repealing a rule.

In certain circumstances not present here, like when re-viewing a decision to deny a DCM application, the Commis-sion adjudicates. Blurring this line, USFE interprets the Commission's review of a denied application and the Commission's *initial* assessment of a DCM application as "different phases of the same proceeding." (Reply Br. at 4.) The regulations reflect the opposite. The procedures governing initial designation are found at subpart 38.3. And as encompassed by part 38, the designation procedures apply only to "every board of trade that *has been* designated or *is applying* to become designated as a contract market . . . ." *17 C.F.R. § 38.1* (emphasis added). They do not apply to boards that *have applied* but were *denied* designation. Instead, when the Commis-sion **[*961]** denies a DCM application, the aggrieved **[**8]** party may initiate review of the denial through a new, distinct proceeding subject to the Commission's Rules of Practice, which govern "adjudicatory proceedings." *17 C.F.R. §§ 10.1*, *10.1(a)*.[8] These Rules contemplate filing a complaint and notice of hearing, *see §§ 10.21*, *10.22*, filing an answer, *§ 10.23*, discovery, *§§ 10.42*, *10.44*, and motions practice, *§ 10.26*. An administrative law judge presides over all proceedings covered by the Rules, *§ 10.8*, evidence must meet admissibility standards, *§ 10.67*, and in stark contrast to the DCM application review process, *ex parte* communications are prohibited and even sanctionable, *§ 10.10*.

The Rules of Practice employ many signature adjudicative features, yet none applied to the Commission's review of USFE's application. The regulations illustrate a clear dichotomy between the process for reviewing DCM applications and that for reviewing denials. We reject USFE's attempt to bring the two under the same roof.

Second, the Commission utilized an informal fact-finding process. Although the Commission compiled a "record," the contents of that record were not bound by any "strict rules of relevance and admissibility" as if before a court or other adjudicative body. *Mercatus, 641 F.3d at 845*. The Commission was "free to base its actions on information and arguments **[**9]** that [came] to it from any source," including information, opinion, and argument submitted by the public. *Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 228 (7th Cir. 1975)*.

Third, the weight afforded to *ex parte* communications and public comment subjected the Commission's fact-finding efforts to political influence—a hallmark of the legislative pro-cess. In *Mercatus*, a local hospital successfully petitioned the village board to deny development of plaintiff's interloping physician center. We held this petitioning immune from anti-trust scrutiny based in large part on the parties' and the public's lobbying efforts:

> Both Mercatus and the Hospital engaged in *ex parte* lobbying of individual Board members prior to the hearings. Mercatus executives contacted or met personally with individual Board members, and at least one Board member even took a tour of Mercatus' facilities. A number of Lake Bluff residents also contacted the Board members to voice their views on the Mercatus project. . . . In fact, the lobbying was encouraged by the village president ... .
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> . . .

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[7] Should an antitrust plaintiff overcome this threshold, it still must demonstrate the alleged misrepresentation "(1) was intentionally made, with knowledge of its falsity; and (2) was material, in the sense that it ac-tually altered the outcome of the proceeding." *Mercatus, 641 F.3d at 843*. We do not address this second stage given the outcome here.

[8] The regulations define "adjudicatory proceeding" as "a judicial-type proceeding leading to the formulation of a final order." *17 C.F.R. § 10.2(b)*.

> At least one Board member, on his own initiative, contacted independent think tanks for guidance. Members of the general public were allowed to voice their opinions regarding Mercatus' proposed **[**10]** site plan.

641 F.3d at 848. These facts led us to label the board's review "decidedly legislative or political in nature." *Id.*

Much of the same occurred here. USFE's representatives, including outside counsel and at least one lobbyist, met with the Commission, its staff, and its attorneys on several occa-sions to discuss the DCM application. These meetings occurred over the phone and in person, *ex parte*. Commission staff visited USFE's facilities for a demonstration of its pro-posed trading platform. The Commission twice sought public comment on USFE's application and received letters from trading firms, individual traders, newsletter and magazine publishers, academics, and other government **[*962]** agencies. It reviewed and considered every one of these submissions before approving USFE's application. All of this activity was "per-fectly legitimate" in the context of the Commission's DCM application review process, "as would not be the case in an ad-judicative proceeding." *Id.*

Fourth, the Commission received no testimony under oath, affirmation, or penalty of perjury from the petitioning De-fendants as part of the application review. A witness or other source of information in an adjudicative proceeding "is **[**11]** not 'at liberty to exaggerate or color his version of an event,' as might be possible in a more political or legislative setting." *Id. at 845* (quoting *United States ex rel. Haywood v. Wolff, 658 F.2d 455, 463 (7th Cir. 1981))*. Requiring a perjury-backed oath or affirmation drives this home by "impress[ing] upon a witness the solemnity of the occasion and the importance of telling the truth." *Mercatus, 641 F.3d at 845*. But the Commission gave no such impression to Defendants or any other public commentators here. It did not require their written opinions and concerns to be made under penalty of perjury.

USFE points to the warning contained in "Form DCM": "Intentional misstatements or omissions of material fact may constitute federal criminal violations (*7 U.S.C. § 13* and *18 U.S.C. § 1001*) or grounds for disqualification from designa-tion." 17 C.F.R. pt. 38, App'x A.[9] Form DCM—used to compile the usual information and exhibits all applicants must submit—and its warning do not apply to the challenged petition-ing here, however. The Commission no doubt relied on the facts presented in USFE's application materials, submitted with the understanding that intentional misrepresentations could subject USFE to federal prosecution. But the Commis-sion also devoted significant consideration to unsworn public opinions, diluting the importance of truthful and **[**12]** accurate in-formation inherent in adjudicative settings. Each commentator other than USFE was free and welcome to present its views in any color. This factor leans legislative.

HN4[] Consideration of the *fifth* and final factor is less one-sided. "The absence of definite standards" subject to judicial review "is more characteristic of purely political or legislative activity than of adjudication." *Mercatus, 641 F.3d at 846*; *see also* *Kottle v. Nw. Kidney Ctrs., 146 F.3d 1056, 1061 (9th Cir. 1998)* (observing petitions to influence agency decisions that are "virtually unguided by enforceable standards" and appealable only to a legislative body receive *Noerr-Pennington* protection).

Here, USFE had to demonstrate it met and would continue to comply with more than twenty statutory requirements **[**13]** in order to be designated. The parties debate the limits of the Commission's reviewing discretion and whether the require-ments themselves qualify as "definite standards." We need not engage in these side disputes. At the very least, designation requires compliance with far more definite prerequisites than in *Mercatus*, where the local ordinance "provided *no* standards governing the grant or denial" of plaintiff's zoning application. *641 F.3d at 848* (emphasis added); *cf. Boone v. Redevelopment Agency* ***[*963]*** *of City of San Jose, 841 F.2d 886, 896 (9th Cir. 1988)* (immunizing petitioning of city council to approve a zoning plan that harmed

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[9] The statutes cited by Form DCM—*7 U.S.C. § 13* and *18 U.S.C. § 1001*—criminalize knowingly submitting materially false or misleading information to the Commission in connection with a DCM application. Although they do not touch on "perjury," citation to these statutes similarly impresses upon the submitter that designation review and approval depends on accurate information. *See* *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1261-62 (9th Cir. 1982)* (likening *18 U.S.C. § 1001* to perjury penalty in discussing the prohibitions against submitting false information to adjudicative bodies for anticompetitive purposes).

plaintiffs; council's review held legislative based on broad discretion to approve or deny new projects whenever deemed "'necessary or desirable' to carry out the ends of redevelopment"). In addition, while "matters of discretionary authority" fall into the legislative basket, the Commission has no discretion to deny an application that meets the statutory requirements. And again, the Commission's assessment of USFE's application was subject to judicial review, albeit through a distinct proceeding as discussed above. These details illustrate several adjudicative aspects of the DCM application review process.

We emphasized in *Mercatus*, however, that "it may **[**14]** often not be clear whether, in a given circumstance, an agency is acting legislatively, adjudicatively, or perhaps somehow even in both capacities simultaneously." *641 F.3d at 844* (citation omitted). The agency process in this case involves a combination of legislative and adjudicative features. Nevertheless, the Commission's exercise of rulemaking-like authority, the encouragement of lobbying and *ex parte* influence, a tolerance for petitions made outside perjury's confines, and informal fact gathering render the DCM application review process a legislative one. Thus, USFE cannot rely on alleged fraudulent misrepresentations to circumvent *Noerr-Pennington*.

ii. *The "Sham Lawsuits" Exception*

HN5[] *Noerr-Pennington*'s "sham lawsuits" or "abuse-of-process" exception holds liable objectively baseless lawsuits brought in "an attempt to interfere *directly* with the business relationships of a competitor through the use of the governmental *process*—as opposed to the *outcome* of that process—as an anti-competitive weapon." *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* ("*PRE*") (in-ternal quotation marks and citations omitted). The sham ex-ception is "extraordinarily narrow." *Kottle, 146 F.3d at 1061*; *see also* 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW***: AN ANALYSIS OF ANTITRUST **[**15]** PRINCIPLES AND THEIR APPLICATION 262 (4th ed. 2013) (The exception is "most difficult" to apply in legislative contexts, "where it is virtually impossible to identify the sham."). The Ninth Circuit has even doubted whether the exception applies at all where, as here, plaintiffs allege a "pattern" of petitions in the legislative arena: "[S]ubjecting the same defendant to antitrust liability because it engaged in numerous unsuccessful attempts" to petition a legislative body "would eviscerate the *Petition Clause*." *Kottle, 146 F.3d at 1061*.

HN6[] The exception requires a two-step inquiry: (1) only if chal-lenged litigation is objectively meritless may a court (2) exam-ine the litigant's subjective motivation. *PRE, 508 U.S. at 60*. In other words, an antitrust plaintiff must "disprove the challenged lawsuit's *legal* viability" before proceeding to the second, subjective step. *Id. at 61*. Objectively reasonable suits therefore enjoy *Noerr-Pennington* immunity regardless of the reasons for their filing.

HN7[] An objectively reasonable lawsuit is one "reasonably cal-culated to elicit a favorable outcome." *Id. at 60*. Baseless, frivolous efforts, "as distinct from colorable suits brought in bad faith," receive no protection. *Creek v. Vill. of Westhaven, 80 F.3d 186, 192 (7th Cir. 1996)*. Notably, a *successful* action self-proves its reasonableness **[**16]** and "certainly cannot be characterized as a sham." *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 502, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)*; *PRE, 508 U.S. at 60 n.5* ***[*964]*** ("A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham."); *see also, e.g.*, *New West, L.P. v. City of Joliet, 491 F.3d 717, 722 (7th Cir. 2007)* (rejecting plaintiff's argument that defendant filed sham lawsuits when none had been adjudicated in plaintiff's favor).

USFE insists the district court employed the wrong stand-ard by relying on *PRE*. It argues Defendants' various com-ments, letters, etc., comprise a "pattern" of sham petitioning that triggers a more generous examination than what *PRE* calls for. This approach stems from the Supreme Court's lan-guage in *California Motor Transport Co. v. Trucking Unlimited*: "[A] pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes" have been used improperly "to deprive the competitors of meaningful access to the agencies and courts." *404 U.S. 508, 512, 92 S. Ct. 609, 30 L. Ed. 2d 642 and 513 (1972)*. Filing petitions with "such a purpose or intent," the Court stated, would "fall within the exception to *Noerr*." *Id. at 512*.

The district court applied the correct standard. We do not agree *California Motor* provides a separate rubric to use when-ever a "pattern" of sham filings is alleged. The First Circuit **[**17]** rejected this same reading of *California*

Motor recently in *Puerto Rico Telephone Co. v. San Juan Cable LLC, 874 F.3d 767 (2017)*, splitting from the four circuit opinions cited by USFE, all of which adopt some version of the view that *PRE* applies only to single-lawsuit cases while *California Motor* applies to all others.[10] The *Puerto Rico Telephone* panel reasoned persua-sively:

> [There is no] pragmatic reason to presume that [*PRE*'s] protections for nonfrivolous petitioning activity disappear merely because the defend-ant exercises its right to engage in such activity on multiple occasions. One large lawsuit or in-tervention in an agency proceeding can impose much more of a burden on a competitor than might a series of smaller claims.

874 F.3d at 772.

Relying on *California Motor* and the just-mentioned four circuit opinions, USFE invites us to discard the first question of the two-part sham inquiry whenever more than a single pe-tition has been made and to proceed only with the second step's evaluation of subjective motive. This position misconstrues *California Motor* and ignores *PRE*'s thorough ex-planation of that opinion's role in the sham exception land-scape. The Court in *PRE* described *California* ***[**18]*** *Motor* as requir-ing courts to draw the "difficult line" that *separates out* objec-tively reasonable claims from patterns of "*baseless*, repetitive claims" before finding a sham. *508 U.S. at 58* (emphasis added). In that sense, *California Motor*—issued more than twenty years before *PRE*—contains the very origins of the sham exception inquiry's first step: an objective reasonable-ness assessment.

HN8[] *PRE* further confirmed the sham exception has never hinged on the petitioner's subjective intent alone. *508 U.S. at 59* (collecting cases). This aligns with the teachings of both *Noerr* and *Pennington*: "*Noerr* rejected the contention that an attempt 'to influence the passage and enforcement of laws' might lose immunity **[*965]** merely because the lobbyists' 'sole pur-pose . . . was to destroy [their] competitors.'" *Id. at 57* (quoting *Noerr, 365 U.S. at 138*); the right of the people to petition for desired outcomes "cannot properly be made to depend upon their intent in doing so." *Id. at 58* (quoting *Noerr, 365 U.S. at 139*); "'*Noerr* shields from the *Sherman Act* a concerted effort to influence public officials regardless of intent or purpose.'" *Id.* (quoting *Pennington, 381 U.S. at 670*). Accepting USFE's position would subvert these core principles.

Moreover, the Supreme Court has acknowledged the objective reasonableness inquiry with regularity since *California* ***[**19]*** *Motor*. Valid efforts to influence government action, for example, do not qualify as a sham, while insubstantial claims might evidence one. *PRE, 508 U.S. at 58* (citing *Allied Tube, 486 U.S. at 500 n.4*; *Otter Tail Power Co. v. United States, 410 U.S. 366, 380, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973))*. And in *City of Columbia v. Omni Outdoor Advertising, Inc.*, the Court "dispelled the notion that an antitrust plaintiff could prove a sham merely by showing that its competitor's 'purposes were to delay [the plaintiff's] entry into the market and even to deny it a meaningful access to the appropriate . . . administrative and legislative fora.'" *PRE, 508 U.S. at 59-60* (discussing and quoting *499 U.S. 365, 381, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991))*. That same "notion" describes USFE's argument precisely.

We stand with the First Circuit. Faced with only one alleged sham lawsuit, at no point did the *PRE* Court link its ruling to the number of suits or suggest the outcome would be different if it encountered multiple actions. We, too, find "little logic" in concluding a petitioner loses the right to file an objectively reasonable petition merely because it chooses to exercise that right more than once in the course of pursuing its desired outcome. *See Puerto Rico Tel., 874 F.3d at 772*. Trac-ing the Ninth Circuit's lead in *USS—POSCO*, the Second, Third, and Fourth Circuits all reconciled *California Motor* and *PRE* "by reading them as applying to different **[**20]** situations." *USS—POSCO, 31 F.3d at 810*. Nothing in either opinion indicates as much. ***HN9***[] As the Court made clear in *PRE*, the sham exception's objective component is "indispensable" and *California Motor* does not suggest otherwise. *508 U.S. at 58*.

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[10] *See Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc., 806 F.3d 162, 178-81 (3d Cir. 2015)*; *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27, 728 F.3d 354, 363-64 (4th Cir. 2013)*; *Primetime 24 Joint Venture v. Nat'l Broad. Co., 219 F.3d 92, 101 (2d Cir. 2000)*; and *USS—POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, AFL—CIO, 31 F.3d 800, 810-11 (9th Cir. 1994)*.

Even if *PRE* and *California Motor* provided two different standards for non-pattern and pattern cases, respectively, the district court still did not err by applying *PRE*. Unlike the four circuit opinions endorsing this divide, Defendants here did not bring multiple lawsuits or petition across various legislative and administrative fronts.[11] This case is not characterized by a wide-ranging "pattern." It involves a *single* legislative proceeding within which Defendants made multiple efforts to influence the Commission's decision regarding one overarch-ing issue: whether to approve USFE's application. Just as motions within a lawsuit support the lawsuit's objective, **[*966]** individual lobbying efforts play a part in obtaining the ultimate desired legislative action. But in neither scenario do multiple filings, submissions, or other efforts transform one lawsuit or proceeding into many. *See, e.g.*, *Hanover 3201, 806 F.3d at 169 and 181* (applying "pattern" standard where defendants initi-ated four distinct legal proceedings, but counting **[**21]** multiple letters submitted to a state agency as *one proceeding*).

With *PRE* in hand, the district court correctly determined Defendants' efforts did not "constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief." *PRE, 508 U.S. at 62*. USFE counters by focusing on the fact that the Commission eventually *approved* USFE's application. According to USFE, its success in obtaining approval undermines the reasonableness of Defendants' fifty-four objections submitted in response to the application. This is especially so, USFE argues, because Defendants themselves knew the application would be approved in the end.

We reject USFE's position. Although a successful, winning petition proves its own reasonableness, it does not follow that a petition lacks merit simply because it did not prevail. Be-sides, the petitioning here was colorable. Defendants' December 2003 scheduling letters persuaded the Commission to postpone the public hearing on USFE's application in light of legitimate and well-documented conflicts. The letters were not frivolous. Neither were Defendants' objections to USFE's application. Before granting USFE's application, the Commission **[**22]** held USFE to several remedial efforts it undertook in response to Defendants' objections regarding USFE's proposed one-member board, cross-border clearing link, and incentive programs. Furthermore, while Commission staff elected not to acknowledge many of the objections raised by other commentators, it addressed *each* of Defendants' fifty-four con-cerns. This speaks to the substantiality of Defendants' submis-sions, even those rejected by the Commission. Finally, whether Defendants believed or "knew" USFE's application would succeed does not change our analysis. Even if petitioners believe a regulator may ultimately approve an application, that does not eliminate their right to encourage the governing body to consider shortcomings in the application. Proving sham petitioning in a legislative context like this one is virtu-ally impossible, and the record does not meet that high bar.

As with fraudulent misrepresentations, the "sham law-suits" exception cannot save USFE's delay theory claims. *Noerr*-*Pennington* therefore immunizes Defendants' petitioning, even if that conduct delayed the Commission's approval of USFE's application and created market uncertainty that harmed USFE.

B. Open Interest Theory: **[**23]** Implied Antitrust Immunity

USFE claims CBOT, conspiring with CME, enacted Rule 701.01 to transfer open interest away from USFE's preferred clearinghouse and thus deprive USFE of much-needed liquidity. Defendants advocate for implied antitrust immunity be-cause the Commission itself ordained the rule.

HN10[] Regulatory statutes sometimes preclude application of the antitrust laws in explicit terms. If not, courts must determine whether the regulations *implicitly* preclude those laws' application. *Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264, 270-71, 127 S. Ct. 2383, 168 L. Ed. 2d 145 (2007)*. Implied immunity arises when a regula-tory regime clashes with the antitrust laws to create a "clear repugnancy" or "clear incompatibility" between

[11] *See* *Hanover 3201, 806 F.3d at 167-70* (defendants alleged to have pursued one state court lawsuit and three challenges before two state administrative bodies); *Waugh Chapel, 728 F.3d at 357-58* (union defendants orchestrated a "barrage of legal challenges" that included multiple state court lawsuits and challenges to at least eleven separate zoning permits); *Primetime 24, 219 F.3d at 101* (plaintiff alleged defendants abused provisions of the Satellite Home Viewers Act by conducting prelitigation challenges of thousands of individual subscribers); *USS—POSCO, 31 F.3d at 811* (defendants filed twenty-nine separate lawsuits).

the two. *Id. at 275*. **[*967]** Only a clear showing will do; findings of implied immunity are not favored otherwise. *Am. Agric. Movement, Inc. v. Bd. of Trade of the City of Chicago, 977 F.2d 1147, 1158 (7th Cir. 1992)* (citations omitted). Once the conflict has been demonstrated, the antitrust laws are "ousted" or "repealed" in favor of the regulatory scheme. *See* *Credit Suisse, 551 U.S. at 271-72* (discussing *Silver v. N.Y. Stock Exch., 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963)*, and *Gordon v. N.Y. Stock Exch., 422 U.S. 659, 95 S. Ct. 2598, 45 L. Ed. 2d 463 (1975))*.

Implied antitrust immunity has its roots in securities caselaw. In its most recent discussion of the doctrine, the Supreme Court in *Credit Suisse* identified a four-part test for implied immunity: (1) the existence of clear and adequate regulatory authority to supervise the activity in question; **[**24]** (2) evidence that the responsible regulatory entities exercise that au-thority in an active and ongoing manner; (3) a resulting risk that the antitrust laws and those governing the challenged activity, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct; and (4) whether the questioned activity lies squarely within the heartland of the regulated area. *551 U.S. at 275-77*. Assessing these four factors, the district court held Defendants' role in the open interest theory immune from antitrust scrutiny. USFE challenges the district court's findings on all but the final factor.

The facts here satisfy *Credit Suisse*'s criteria easily. *First*, the Commission has clear and adequate regulatory authority to approve exchange rules. *See* *7 U.S.C. § 7a-2(c)*; *17 C.F.R. § 40.5*. It also has clear and adequate authority over clearinghouses and the clearing of futures transactions. *See* *7 U.S.C. § 7a-1(a)*-*(c)*.[12] *Second*, the Commission indeed exercised this regulatory authority by approving CBOT's proposed rule. The Commission's overall regulation in this area, moreover, was both active (Commission staff reviewed the proposal for over a month, soliciting and considering more than a dozen com-ment letters) and ongoing (the **[**25]** same competition concerns raised by Rule 701.01 had been studied during the previous year through a Commission roundtable and report). *Third*, the Commission approved Rule 701.01 *in spite of* potential anti-competitive effects, creating conflict with the antitrust laws. Per statute, the Commission must "take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means" when approving exchange rules. *7 U.S.C. § 19(b)*. Keeping with this mandate, the Commission considered and acknowledged comment letters raising anticompetitive concerns but nonetheless deemed those concerns outweighed by the innovative gains to be had in the futures industry. With this and the other *Credit Suisse* factors met, the district court rightly concluded the Commission's approval of Rule 701.01 was "clearly incompatible" with the antitrust laws and their objectives.

Granted, the Supreme Court has not addressed implied antitrust immunity in the futures and commodities context, but this Circuit did so in *American Agriculture*—a decision pre-dating *Credit Suisse* by twenty-five years. Seizing on this, USFE contends the district court erred **[**26]** by applying the four-part test from *Credit* ***[*968]*** *Suisse*—a securities case—instead of our instruction in *American Agriculture* that immunity may be implied so long as the challenged action receives "active, intrusive, and appropriately deliberative" scrutiny and approval from the relevant agency. *977 F.2d at 1167*.

We disagree. USFE relies on the Court's statement in *Credit Suisse* that implied immunity determinations "may vary from statute to statute," *551 U.S. at 271*, but that language does not make *Credit Suisse*'s factors irrelevant beyond the securities context. While the ultimate *determination* might depend on the regulations in play, the analysis does not. *Credit Suisse*'s test applies across regulatory boundaries and nothing in that opinion points to the contrary. Furthermore, that the Commission regulates exchanges and clearinghouses through a "principles-based approach"—as opposed to the "rules-based approach" of its securities counterpart—does not require us to apply wholly distinct standards to each regulatory scheme. Nowhere does *American Agriculture* indicate these inherent differences warrant separate standards.[13] Indeed, *American Agriculture* derives its own "test" from the same

[12] Even though exchange and clearing rules can be self-certified with-out the Commission's input, that is not what happened here. Defendants voluntarily submitted Rule 701.01 for the Commission's *prior approval*. Because of this, the Commission was required to exercise its authority to review and approve. *7 U.S.C. § 7a-2(c)(4)(C)* ("If prior approval is requested . . . the Commission *shall* take final action on the request . . . .") (emphasis added).

securities cases that provide the foundation **[**27]** for *Credit Suisse*'s four fac-tors—*Silver* and *Gordon*—and relies significantly on decisions from other regulatory contexts as well. *See Am. Agriculture, 977 F.2d at 1164* (discussing *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983)* (holding no implied antitrust immunity for alleged predatory pricing in telecommu-nications markets)). At most, *American Agriculture*'s emphasis on "active, intrusive, and appropriately deliberative" scrutiny is just another way to measure *Credit Suisse*'s second factor: active and ongoing exercise of regulatory authority.

Implied immunity is neither a securities doctrine nor a commodities doctrine. It is an antitrust doctrine. And the question of whether it applies in a given case is answered ably by *Credit Suisse*. The regulatory setting—securities, commodities, or something else—simply provides the backdrop against which the template is applied.

In any event, were we to accept USFE's argument, implied immunity would still attach under the "standard" it pushes. Given the Commission's focus on market competition in the year leading up to Defendants' proposed rule change, the Commission's solicitation and consideration of public comment and anticompetitive concerns, and its express, affirmative approval of Rule **[**28]** 701.01, this is not at all like the situation presented in *American Agriculture*. That case involved a challenge to an emergency resolution passed by CBOT to combat market manipulation. Unlike here, however, the Commission took no official action in response to that resolution; Commission staff conducted an informal, nonpublic investigation only. The Commission's "casual and modest" supervision and its "halfhearted and nonpublic review of the challenged practice" compelled us to reverse the district court's finding of implied immunity. *977 F.2d at 1165 and 1167*. The unavailability of judicial review in *American Agriculture*—a factor considered "extremely important" to the implied immunity calculus—further directed our decision in that case. *Id. at 1167*. But here, USFE could have sought judicial review of the Commission's approval under the *Administrative Procedure Act*—it apparently elected not to. *See 5 U.S.C. §§ 702*, *706*. All told, the Commission's approval of Rule 701.01 **[*969]** creates a "clear repugnancy" between the regulatory scheme and the antitrust laws. Implied immunity precludes USFE's open interest claims.

III. Conclusion

Based on Defendants' petitioning before the Commission and their forced transfer of open interest, USFE brought this antitrust action to hold Defendants accountable **[**29]** for its failed exchange. But the *Noerr-Pennington* doctrine shields Defend-ants' petitioning from antitrust scrutiny. And since neither exception to the doctrine applies, USFE's delay theory fails. Moreover, the Commission's explicit approval of Rule 701.01 impliedly repeals the antitrust laws here, immunizing Defendants against USFE's open interest claims. The district court got it right for both theories, so summary judgment for Defendants is

AFFIRMED.

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13 Following USFE's argument to its logical conclusion would compel a unique implied immunity test for every regulated industry. We do not glean that intention from either *Credit Suisse* or *American Agriculture*.

Reserve Realty, LLC v. Windemere Reserve, LLC

Supreme Court of Connecticut

September 18, 2018, Argued; March 24, 2020*, Decided

SC 19979, SC 19982, SC 19981

Reporter

335 Conn. 174 *; 229 A.3d 708 **; 2020 Conn. LEXIS 164 ***

THE RESERVE REALTY, LLC, ET AL. v. WINDEMERE RESERVE, LLC, ET AL.;THE RESERVE REALTY, LLC, ET AL. v. BLT RESERVE, LLC, ET AL.

Subsequent History: On remand at *Reserve Realty v. Windemere Reserve, 2021 Conn. App. LEXIS 208 (Conn. App. Ct., June 1, 2021)*

Prior History: **[***1]** Action, in the first case, to recover damages for, inter alia, breach of contract, and for other relief, and actions in the second and third cases to foreclose broker's liens on certain of the defendants' real property, brought to the Superior Court in the judicial district of Danbury, where, in the first case, the court, Doherty, J., granted the plaintiffs' motion to add Century 21 Scalzo Realty, Inc., as a defendant; thereafter, in the first case, the plaintiffs withdrew the action as to the defendant Century 21 Scalzo Realty, Inc., and, in the second case, the plaintiffs withdrew the action as to the defendant The Reserve Master Association, Inc.; subsequently, the first case was tried to the court, Truglia, J.; judgment for the named defendant et al., from which the plaintiffs appealed to the Appellate Court; thereafter, in the second and third cases, the court, Truglia, J., rendered judgments discharging the broker's liens in accordance with the parties' stipulations, and separate appeals were filed with the Appellate Court; subsequently, the Appellate Court, Alvord, Sheldon and Schaller, Js., affirmed the judgments of the trial court, and the plaintiffs, on the granting of certification, **[***2]** filed separate appeals with this court.

Reserve Realty, LLC v. Windemere Reserve, LLC, 174 Conn. App. 130, 165 A.3d 162, 2017 Conn. App. LEXIS 246, 2017 WL 2557962 (June 20, 2017)

Disposition: Reversed; further proceedings.

Core Terms

antitrust, market power, tying arrangement, tying product, economic power, anti trust law, list-back, broker, patent, seller, geographic, buyers, parcel, tied product, trial court, quotation, purposes, marks, appellate court, real estate, anticompetitive, cases, lease, prong, plaintiffs', confers, courts, judgments, special defense, parcel of land

LexisNexis® Headnotes

* March 24, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Antitrust & Trade Law > Sherman Act > Scope

HN1[] **Antitrust & Trade Law, Sherman Act**

Although *15 U.S.C.S. § 1*, on its face, prohibits any contract in restraint of trade, the United States Supreme Court has added a judicial gloss requiring a contractual restraint to be unreasonable before it will be deemed illegal under the Sherman Act.

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

HN2[] **Regulated Practices, Price Fixing & Restraints of Trade**

Every commercial contract, by definition, constitutes a restraint of trade. If a dog breeder contracts to sell three puppies to a family, commerce in those three puppies is restrained, insofar as no other customer may purchase them. The antitrust laws proscribe only those contracts that unreasonably restrain trade.

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

Governments > Legislation > Interpretation

HN3[] **Regulated Practices, Price Fixing & Restraints of Trade**

The state antitrust act was patterned after federal ***antitrust law***. Indeed, *Conn. Gen. Stat. § 35-44b* provides that, in construing the antitrust act, the courts of Connecticut shall be guided by interpretations given by the federal courts to federal antitrust statutes. For this reason, the Connecticut Supreme Court follows federal precedent when it interprets the Connecticut Antitrust Act unless the text of Connecticut's antitrust statutes, or other pertinent state law, requires the court to interpret it differently.

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

HN4[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement is an agreement by a party to sell one product (the tying product) but only on the condition that the buyer also purchase a different (tied) product, or at least agree that he will not purchase that product from any other supplier.

Antitrust & Trade Law > Procedural Matters

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

Civil Procedure > Appeals > Standards of Review

HN5[] **Antitrust & Trade Law, Procedural Matters**

Although the appellate court must defer to the trial court's factual findings, interpretation of federal and state antitrust laws is plenary.

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

HN6[] Price Fixing & Restraints of Trade, Tying Arrangements

Many tying arrangements, the United States Supreme Court has written in Illinois Tool Works, Inc., even those involving patents and requirements ties, are fully consistent with a free, competitive market. Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. The Court reaches the same conclusion, and therefore holds that, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.

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

HN7[] Price Fixing & Restraints of Trade, Tying Arrangements

Most of the lower federal courts and the state courts that have considered the question have adopted the broader reading of Illinois Tool Works, Inc., and interpreted the decision to mean that the uniqueness of a tying product no longer gives rise to a presumption of economic power. Market power in a defined product and geographic market must be established to satisfy the first prong of Northern Pacific, even with respect to unique, nonpatented tying products such as land.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

HN8[] Tying Arrangements, Per Se Rule

In light of what the Connecticut Supreme Court perceives to be the clear trajectory of federal tying law, as informed by modern antitrust scholarship, the court overrules *State v. Hossan-Maxwell, Inc., 181 Conn. 655 (1980)*, to the extent that it held that real estate list-back agreements affecting a not insubstantial volume of commerce are per se illegal.

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

HN9[] Price Fixing & Restraints of Trade, Tying Arrangements

Challenges to list-back agreements, like most other forms of tying agreements, are subject to the five-element test adopted by the United States Court of Appeals for the Second Circuit in applying Northern Pacific and its progeny: To state a valid tying claim a party must allege facts plausibly showing that: (1) the sale of one product (the tying product) is conditioned on the purchase of a separate product (the tied product); (2) the seller uses actual coercion to force buyers to purchase the tied product; (3) the seller has sufficient economic power in the tying product market to coerce purchasers into buying the tied product; (4) the tie-in has anticompetitive effects in the tied market; and (5) a not insubstantial amount of commerce is involved in the tied market. The third element of the test, economic power, typically must be established by proving that the defendant wields market power in a defined product and geographic market. The best way to plead market power is to allege facts that, if proven, establish directly that the price of the tied package is higher than the price of components sold in competitive markets.

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

HN10[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Competition policy generally is not offended when only minor foreclosure of competition in the tied market is possible.

Counsel: Daniel E. Casagrande, with whom was Lisa M. Rivas, for the appellants (plaintiffs).

Christopher Rooney, with whom was Brian A. Daley, for the appellees (named defendant et al.).

Judges: Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js. ROBINSON, C. J. In this opinion the other justices concurred.

Opinion by: ROBINSON

Opinion

[*178] [709]** ROBINSON, C. J. These certified appeals invite us to revisit *State v. Hossan-Maxwell, Inc., 181 Conn. 655, 662-63, 436 A.2d 284 (1980)*, in which this court held that real estate "list-back" agreements—tying arrangements that commit the purchaser of a parcel of real property to use the services of a particular broker when leasing or reselling the property[1]—are per se illegal under state ***antitrust law***. Specifically, we must decide whether, in light of recent antitrust scholarship and developments in federal tying law, *Hossan-Maxwell, Inc.*, should be overruled. We answer that question in the affirmative. Accordingly, we reverse **[**710]** the judgments of the Appellate Court, which, like the trial court, correctly determined that it was required to apply *Hossan-Maxwell, Inc.*, to the present case.

These appeals arise out of a breach of contract action involving the sale and development **[***3]** of 546 acres of the former Union Carbide Corporation (Union Carbide) corporate campus in Danbury (the Reserve). The primary brokers involved in the transactions were Jeanette Haddad (Haddad), a prominent local real estate agent who died in 2013, and Paul P. Scalzo.[2] The plaintiffs are Haddad's husband, Theodore Haddad, Sr., as executor of his wife's estate, and The Reserve Realty, LLC (Reserve Realty), a limited liability company organized by Haddad and Scalzo to market and sell the Reserve **[*179]** as it became subdivided. The defendants, BLT Reserve, LLC (BLT), and Windemere Reserve, LLC (Windemere), are limited liability companies, the principals and owners of which include Carl R. Kuehner, Jr., and Paul J. Kuehner, whose family is longtime friends and business associates of the Haddad family. In this action, the plaintiffs sought to recover real estate brokerage fees in connection with the sale and/or lease of units in an apartment complex constructed on the Reserve and leased by BLT, and of commercial office space to be constructed on the Reserve by Windemere. After a trial to the court, judgments were rendered in favor of the defendants. The Appellate Court affirmed, agreeing with the **[***4]** trial court that the defendants' antitrust special defense barred the plaintiffs' claims. *Reserve Realty, LLC v. Windemere Reserve, LLC, 174 Conn. App. 130, 132, 165 A.3d 162 (2017)*.

I

The relevant facts, as found by the trial court or that are undisputed, and complete procedural history are set forth in detail in the opinion of the Appellate Court. See *id., 132-38*. In brief, following its acquisition by the Dow Chemical

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[1] Such agreements may apply only to the initial sale/lease of the property, to all subsequent sales/leases that occur within a specified time frame, or in perpetuity.

[2] Haddad operated under the business name "Jeanette Haddad, Broker," and Scalzo operated through his real estate franchise, Century 21 Scalzo Realty, Inc. (Scalzo Realty). For simplicity, we do not distinguish between those individuals and their corporate entities in this opinion, referring to them, respectively, as "Haddad" and "Scalzo." We note that, subsequent to the filing of their action, Scalzo Realty was added as a necessary party but thereafter was defaulted for failure to plead. Subsequently, the plaintiffs withdrew their action as to Scalzo Realty.

Company (Dow Chemical) in 1999, Union Carbide made known that it would entertain offers to sell the Reserve to interested buyers. Garland Warren, then a Union Carbide employee, initially was responsible for overseeing the sale of the parcel.

In early 2002, a group of real estate developers, later known as Woodland Group II, LLC (Woodland), engaged the services of Haddad and Scalzo to represent them in negotiations to purchase the Reserve. Woodland appears to have chosen Haddad and Scalzo in part because Warren had since left Dow Chemical and been employed by Scalzo.

As part of the broker-client relationship, Haddad, Scalzo, and Woodland executed an "Exclusive Right to **[*180]** Sell—Listing Agreement" (Woodland agreement). The Woodland agreement gave Haddad and Scalzo the exclusive right to sell and/or lease property in the Reserve. The agreement also contained the following provision: **[***5]** "[Woodland] shall make aware to the new purchaser of any part, or of individual lots, or of land, that this [a]greement shall apply to that new purchaser and [Haddad and Scalzo]."

[711]** Woodland succeeded in purchasing the Reserve, and the plaintiffs received a commission for facilitating that sale. Woodland subsequently proposed a master plan for the entire 546 acre parcel, which the Danbury Zoning Commission approved in November, 2002. Woodland then continued to use the services of Haddad and Scalzo to market the property to potential buyers.

Efforts to develop the property foundered, however, when Windemere, which was in the process of developing a neighboring parcel of land, appealed Woodland's zoning approval for the Reserve, effectively blocking development of the land. To resolve the zoning dispute, Woodland agreed to sell one portion of the Reserve (parcel 13) to BLT for residential development (a luxury apartment complex, Abbey Woods, had been built at the time of trial), and another portion (parcel 15) to Windemere for commercial development (which had yet to be built at the time of trial).

Consistent with the requirements of the Woodland agreement, and after several rounds of negotiations **[***6]** with Woodland, the defendants reluctantly agreed to include list-back provisions in their purchase and sale agreements for parcels 13 and 15. Specifically, BLT agreed to enter into a listing agreement with Haddad and Scalzo, pursuant to which the brokers would receive a 3 percent commission on the subsequent sale or lease of parcel 13, either as a whole or as individual units. For its part, Windemere agreed to pay Haddad **[*181]** and Scalzo $1 million for their efforts in leasing the office space that Windemere planned to build on parcel 15. That fee was to be paid in ten annual increments of $100,000, beginning when the first certificate of occupancy was issued.[3] After months of additional negotiations, Woodland and the defendants finalized and memorialized those list-back agreements in July, 2003.[4]

Although Haddad and Scalzo made good faith efforts to market parcels 13 and 15, the real estate market softened in the wake of the 2007-2008 financial crisis, and those efforts were unsuccessful. BLT ultimately proceeded to

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[3] It is not entirely clear that the agreements governing parcel 15 are true list-back agreements. Although they include a reference to exclusive listing of that property, those agreements could plausibly be read to mean that the plaintiffs earned the $1 million commission on the completion of the sale of that parcel by Woodland to Windemere, on the basis of the plaintiffs' role in facilitating that sale, and that payment was simply to be delayed until Windemere was able to develop the property. The trial court, for example, having found the parties' various purchase and listing agreements to be ambiguous, concluded that one possible interpretation of the agreements was that the plaintiffs had earned a commission with respect to parcel 15 prior to having performed any services for Windemere. Should these cases ultimately return to the trial court, it will fall to that court to determine whether those agreements are list-back agreements, the enforcement of which potentially implicates antitrust considerations or, rather, merely consideration for the plaintiffs' prior services. Compare, e.g., *Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 81-82, 102 S. Ct. 851, 70 L. Ed. 2d 833 (1982)* (illegality defense should be entertained in those circumstances in which its rejection would be to enforce conduct forbidden by ***antitrust law***), with *Kelly v. Kosuga, 358 U.S. 516, 521, 79 S. Ct. 429, 3 L. Ed. 2d 475 (1959)* (rejecting illegality defense when judgment would not have enforced allegedly illegal aspect of contract).

[4] The precise terms of the various contract documents vary, and are ambiguous, in ways that are not directly relevant to the legal issues now before us but that likely will need to be addressed on remand.

build a luxury apartment complex on its parcel, units of which it marketed through its own onsite leasing agent instead of through the services of Haddad and Scalzo.

The plaintiffs **[***7]** responded by filing the present action, alleging breach of contract **[**712]** and anticipatory breach, and **[*182]** seeking, inter alia, specific performance of the listing agreements. In response, the defendants raised a number of special defenses, three of which were at issue in the plaintiffs' appeal to the Appellate Court. Specifically, the defendants argued that the list-back provisions in their purchase and sale agreements were not enforceable by the plaintiffs because those provisions (1) were illegal tying arrangements, (2) did not satisfy the requirements of *General Statutes § 20-325a*,[5] and (3) were personal and specific to Haddad, who died prior to the trial. *Reserve Realty, LLC v. Windemere Reserve, LLC, supra, 174 Conn. App. 138*. Following a bench trial, the trial court ruled for the defendants on all three of these special defenses and rendered judgments accordingly. The Appellate Court affirmed the judgments on the basis of the antitrust defense and, therefore, declined to address the plaintiffs' claims that the trial court reached the incorrect conclusion on the remaining special defenses.[6] Id.

II

The dispositive question in these appeals is whether we should reconsider our tying jurisprudence and overrule *Hossan-Maxwell, Inc.* In part II A of this opinion, we set forth certain well established **[***8]** background principles on which we understand the parties to be in agreement. In part II B and C, we address the legal questions that remain the subject of dispute between the parties.

A

The defendants' first special defense alleges that the list-back provisions in the parties' purchase and sale agreements violate the *Sherman Act, 15 U.S.C. § 1 et seq.*, **[*183]** and are, therefore, unenforceable. See *Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 76, 102 S. Ct. 851, 70 L. Ed. 2d 833 (1982)* (claim that agreement "was void and unenforceable as violative of *§§ 1* and *2 of the Sherman Act*"); see also *Hanks v. Powder Ridge Restaurant Corp., 276 Conn. 314, 326, 885 A.2d 734 (2005)* ("contracts that violate public policy are unenforceable" (internal quotation marks omitted)). The section of the *Sherman Act* at issue provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several [s]tates, or with foreign nations, is declared to be illegal. . . ." *15 U.S.C. § 1 (2018)*. ***HN1***[] Although this provision, on its face, prohibits *any* contract in restraint of trade, the United States Supreme Court has added a judicial gloss requiring a contractual restraint to be unreasonable before it will be deemed illegal under the *Sherman Act*.[7] See, e.g., *Board of Trade v.* ***[**713]*** *United States, 246 U.S. 231, 238-41, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*; **[*184]** *Elida, Inc. v. Harmor Realty Corp., 177 Conn. 218, 225, 413 A.2d 1226 (1979)*; see also *Bridgeport Harbour Place I,*

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[5] Among other things, ***§ 20-325a*** places certain restrictions on the ability of a real estate broker to bring an action to recover commissions arising out of a real estate transaction.

[6] In order for the plaintiffs to prevail, all three of these defenses must fail on appeal.

[7] More broadly, this provision of the *Sherman Act*, which is only a few sentences long, is understood effectively to delegate to the courts the authority to determine what constitutes an unreasonable restraint of trade and, therefore, an antitrust violation. See *In re Cox Enters., 871 F.3d 1093, 1097 (10th Cir. 2017)*. As a result, although antitrust actions and defenses technically are statutory, judicial decisions interpreting and applying the *Sherman Act* tend to analyze antitrust issues more like common-law questions, with public policy and economic concerns at the forefront, rather than according to traditional methods of statutory construction. See R. Posner, "The Meaning of Judicial Self-Restraint," *59 Ind. L.J. 1, 5-6 (1983)*; see also 2 P. Areeda & H. Hovenkamp, ***Antitrust Law*** (3d Ed. 2007) ¶ 301a, pp. 6-7.

We further note that, to the extent that the trial court read *General Statutes § 35-26* literally to prohibit any "contract, combination, or conspiracy in restraint of any part of trade or commerce"; see footnote 8 of this opinion; that court's reading was incorrect. ***HN2***[] Every commercial contract, by definition, constitutes a restraint of trade. *Procaps S.A. v. Patheon, Inc., 845 F.3d 1072, 1081 (11th Cir. 2016)*. If a dog breeder contracts to sell three puppies to a family, commerce in those three puppies is restrained, insofar as no other customer may purchase them. The antitrust laws proscribe only those contracts that *unreasonably* restrain trade. See, e.g., id.; *Tremont Public Advisors, LLC v. Connecticut Resources Recovery Authority, 333 Conn. 672, 695, 217 A.3d 953 (2019)*.

LLC v. Ganim, 303 Conn. 205, 214, 32 A.3d 296 (2011) ("an act is deemed anticompetitive under the *Sherman Act* only when it harms **[***9]** both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality" (emphasis omitted; internal quotation marks omitted)).

The United States Supreme Court generally has reviewed alleged *Sherman Act* violations under one of two standards. "If a restraint alleged is among that small class of actions that courts have deemed to have . . . predictable and pernicious anticompetitive effect, and . . . limited potential for procompetitive benefit, it will be unreasonable per se . . . . Most antitrust claims, however . . . are analyzed under a rule of reason analysis [that] seeks to determine if the alleged restraint is unreasonable because its anticompetitive effects outweigh its procompetitive effects." (Internal quotation marks omitted.) *Bridgeport Harbour Place I, LLC v. Ganim, supra, 303 Conn. 214-15*.

Treating some practices as illegal per se allows courts to recognize and efficiently resolve disputes concerning practices that have little or no positive economic value and are highly likely to be anticompetitive, without the need for parties to engage in costly and complex litigation centering around competing expert testimony. See 9 P. Areeda & H. Hovenkamp, ***Antitrust Law*** (3d Ed. 2011) ¶ 1720a, pp. **[***10]** 260-61. On the other hand, presumptively applying a rule of reason to most alleged antitrust violations (1) respects the freedom of competitors and consumers to structure their economic relations as they see fit, (2) recognizes that courts generally are ill-equipped to identify those business practices that deviate from the procompetitive norm and may be too quick to choose economic winners and losers rather than allowing the marketplace to sort things out, and (3) requires proof that a challenged business practice actually **[*185]** imposes an unreasonable restraint on trade before exposing a defendant to potential antitrust liability. See 7 P. Areeda & H. Hovenkamp, ***Antitrust Law*** (3d Ed. 2010) ¶ 1500, pp. 379-82; 9 P. Areeda & H. Hovenkamp, supra, ¶ 1710c, pp. 110-13.

In addition to the *Sherman Act*, the defendants allege that the list-back provisions in their agreements also violate the *Connecticut Antitrust Act, General Statutes § 35-24 et seq.* The primary allegation is that the list-back provisions violate *General Statutes § 35-26*,[8] the state analogue of *15 U.S.C. § 1*.[9] It is well established that ***HN3***[] **[**714]** the state antitrust act was patterned after federal ***antitrust law***. *Bridgeport Harbour Place I, LLC v. Ganim, supra, 303 Conn. 213 n.6*. Indeed, *General Statutes § 35-44b* provides that, in construing the antitrust act, "the courts of this state shall be guided by interpretations given by **[***11]** the federal courts to federal antitrust statutes." For this reason, "we follow federal precedent when we interpret the [*Connecticut Antitrust Act*] unless the text of our antitrust statutes, or other pertinent state law, requires us to interpret it differently . . . ." (Internal quotation marks omitted.) *Bridgeport Harbour Place I, LLC v. Ganim, supra, 213 n.6*; see also *Westport Taxi Service, Inc. v. Westport Transit District, 235 Conn. 1, 15-16, 664 A.2d 719 (1995)*. Insofar **[*186]** as neither party contends that *§ 35-26* should be interpreted differently from its federal counterpart, we limit our analysis herein to the issue of whether the listing agreements violate *15 U.S.C. § 1*.

The defendants allege that the agreements at issue in the present case are illegal tying arrangements. ***HN4***[] "A tying arrangement is an agreement by a party to sell one product [the tying product] but only on the condition that the buyer also purchase a different (tied) product, or at least agree that he will not purchase that product from any other supplier." *State v. Hossan-Maxwell, Inc., supra, 181 Conn. 659*. In its early antitrust cases, the United States Supreme Court took a dim view of tying arrangements because it assumed that (1) tying confers little, if any,

[8] *General Statutes § 35-26* provides: "Every contract, combination, or conspiracy in restraint of any part of trade or commerce is unlawful."

[9] The parties disagree as to whether the defendants' antitrust special defense also can be understood to allege a violation of *General Statutes § 35-29*, the state analogue of *§ 3 of the Clayton Act, 15 U.S.C. § 14*. Because we conclude that tying arrangements are evaluated under the same legal standard under both the *Sherman Act* and the *Clayton Act*, we need not resolve this dispute. See part III C of this opinion. Moreover, although the defendants correctly note that *§ 35-29* is broader in scope than *§ 3 of the Clayton Act*—insofar as the former statute, unlike the latter, (1) applies to anticompetitive conduct in the provision of services as well as commodities, and (2) is not limited to interstate commerce—the defendants do not contend that anything in the text or history of *§ 35-29* warrants the application of a different legal *standard*.

economic benefit or value, and (2) tying allows a monopolist in the tying product to improperly extend or leverage its monopoly position so as to monopolize or obtain an **[***12]** unfair advantage in the market for the complementary, tied product (the dual monopoly profit theory). See *Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28, 35, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. Because tying was viewed as being almost invariably anticompetitive, the Supreme Court initially classified tying among those trade practices deemed per se unlawful. See, e.g., *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 609, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*.

The issue of the legality of broker list-back agreements under federal and state ***antitrust law*** first arose in the late 1970s and early 1980s. Consistent with the United States Supreme Court's then prevailing views on tying arrangements, both this court and our sister courts[10] held such arrangements to be per se illegal **[*187]** and, therefore, generally refused to enforce contracts predicated on such an agreement.

We addressed this issue in *Hossan-Maxwell, Inc.* A brief review of the facts of that case is instructive. In 1966, James F. Hartnett recorded a declaration of covenants and restrictions on certain parcels of residential **[**715]** land in New Milford. *State v. Hossan-Maxwell, Inc., supra, 181 Conn. 657*. That declaration required that a grantee of any of the sixty-four building lots who decided to sell or lease the property through any commissioned broker give exclusive sales and leasing rights to Hartnett for a period of three months. *Id., 658*. These exclusive rights were **[***13]** intended to run with the land and to bind not only the immediate grantee but all subsequent purchasers. Id. Apparently, Hartnett intended to charge a 6 percent commission for his services, which was consistent with the prevailing market rate. *Id., 663, 665 n.7*.

In affirming the trial court's judgment declaring the restrictive covenants unenforceable, this court applied not a true per se rule but, rather, the "quasi-per se" rule that the United States Supreme Court articulated in *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)* (*Northern Pacific*). See *State v. Hossan-Maxwell, Inc., supra, 181 Conn. 660-67*. Under the *Northern Pacific* rule, a tying arrangement violates *15 U.S.C. § 1*, without the need to demonstrate any anticompetitive effects—that is, without the need for a full rule of reason analysis—if the following conditions are met: (1) the seller has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product, and (2) a "not insubstantial amount of interstate commerce is affected," meaning that more than a de minimis volume of business is foreclosed to competitors by the tie. See *id., 661-63*.

[*188] With respect to the first prong of the *Northern Pacific* rule, economic power for antitrust purposes ordinarily must be demonstrated by proving that a seller **[***14]** has a substantial or dominant position (market power) in a defined product and geographic market. See, e.g., *Smugglers Notch Homeowners' Assn., Inc. v. Smugglers' Notch Management Co., Ltd., 414 Fed. Appx. 372, 375 (2d Cir. 2011)*; see also footnote 14 of this opinion. Several United States Supreme Court cases decided prior to *Hossan-Maxwell, Inc.*, however, held that economic power also can be established merely by demonstrating that the tying product at issue is protected as intellectual property or is a unique or especially desirable item, the assumption being that that uniqueness of the tying product can be leveraged to compel an eager buyer to accept the tied product.[11] See, e.g., *International Salt Co. v. United States, 332 U.S. 392, 395-96, 68 S. Ct. 12, 92 L. Ed. 20 (1947)*; *International Business Machines Corp. v. United States, 298 U.S. 131, 135-37, 56 S. Ct. 701, 80 L. Ed. 1085 (1936)*; see also *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 17, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* ("when the seller offers a unique product that competitors are not able to offer . . . [this] [c]ourt has held that the likelihood that market power exists and is being

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[10] See, e.g., *Miller v. Granados, 529 F.2d 393, 396-97 (5th Cir. 1976)*; *MacManus v. A. E. Realty Partners, 146 Cal. App. 3d 275, 288, 194 Cal. Rptr. 567 (1983)*; *King City Realty, Inc. v. Sunpace Corp., 291 Or. 573, 581, 633 P.2d 784 (1981)*; see also *In re Real Estate Litigation, 95 Wn. 2d 297, 301-304, 622 P.2d 1185 (1980)* (addressing jurisdictional issues).

[11] Although courts sometimes use the terms "economic power" and "market power" interchangeably, in this opinion, for clarity, we use the term "economic power" in the more general sense to encompass all of the various factors that courts have indicated may satisfy the first prong of *Northern Pacific*. **[***15]** These include not only market power (a substantial or dominant share of a defined, distinct market), but also uniqueness, special desirability, a legal monopoly such as a patent, and anything else that might permit a seller to force a buyer to agree to acquire an unwanted tied product.

used to restrain competition in a separate market is sufficient to make per se condemnation appropriate" (citation omitted)). In State v. Hossan-Maxwell, Inc., supra, 181 Conn. 665, this court read Northern **[**716]** Pacific to mean that land—or at least residential land—also is **[*189]** always unique. Accordingly, a landowner who ties the sale of their land to the purchase of another product or service necessarily has market power for purposes of a court's evaluation of an antitrust challenge. See id.

This court also concluded in Hossan-Maxwell, Inc., that the second prong of the Northern Pacific rule was satisfied because, under what the court described as its "very liberal interpretation" of Northern Pacific, the estimated $21,000 in annual real estate commissions implicated by the declaration constituted a not insubstantial volume of business that was foreclosed to other brokers. (Internal quotation marks omitted.) Id., 664.

In the four decades since this court held in Hossan-Maxwell, Inc., that any real estate list-back agreement affecting more than a de minimis volume of commerce is per se illegal, neither this court nor, to our knowledge, any federal appellate court has had the opportunity to consider the ongoing vitality of that rule. **HN5**[] Although, in addressing this question, we must defer to the trial court's factual findings, our interpretation of federal and state antitrust laws is plenary. See, e.g., Miller's Pond Co., LLC v. New London, 273 Conn. 786, 798, 873 A.2d 965 (2005); Westport Taxi Service, Inc. v. Westport Transit District, supra, 235 Conn. 14-15.

B

We turn now to the primary issue presented by the present appeals, namely, whether the reasoning and result of this court's decision in Hossan-Maxwell, Inc., remain consistent with the current views of the United States Supreme Court and the lower federal courts with respect **[***16]** to tying arrangements. The plaintiffs posit that Hossan-Maxwell, Inc., has been vitiated by modern antitrust case law or, at the very least, that we should adopt a more nuanced approach to tying arrangements such as that espoused by Justice O'Connor in her concurring opinion in Jefferson Parish Hospital District **[*190]** No. 2 v. Hyde, supra, 466 U.S. at 33-42. The defendants respond that Hossan-Maxwell, Inc., remains fully consistent with controlling United States Supreme Court precedent and, therefore, should not be overruled. Because we conclude that the trajectory of federal ***antitrust law***, as informed by recent antitrust scholarship, clearly is diverging from the traditional per se treatment of tying arrangements, we agree with the plaintiffs that the trial court should not have found the list-back agreements at issue in this case unenforceable without first engaging in a full market analysis.

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Before we review the evolution of the United States Supreme Court's tying jurisprudence, it will be instructive briefly to review some of the developments in antitrust scholarship that precipitated that evolution. Tying was among the first areas in which modern antitrust theory—often associated with the so-called "law and economics" **[***17]** or "Chicago school" of thought—diverged from courts' traditional approach to competition problems. Beginning in the 1970s, antitrust scholars began to challenge the two pillars that had supported courts' per se treatment of tying arrangements, namely, the dual monopoly profit theory and the axiom that tying typically confers no economic benefit or value. Scholars theorized—and purported to demonstrate—that, far from being inherently anticompetitive, most tying agreements **[**717]** are actually procompetitive.[12] See, e.g., D. Carlton & M. Waldman, "Robert Bork's Contributions **[*191]** to Antitrust Perspectives on Tying Behavior," 57 J.L. & Econ. S121, S121-22 (2014); R. Posner, "The Chicago School of Antitrust Analysis," 127 U. Pa. L. Rev. 925, 925-26 (1979). They also established that, in most instances, control over a tying product does not allow a monopolist to garner additional profits by cornering the market for a tied product. See, e.g., Scheiber v. Dolby Laboratories, Inc., 293 F.3d 1014, 1020 (7th Cir. 2002) ("as [modern] cases and a tidal wave of legal and economic scholarship point out, the idea that you can

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[12] A tying arrangement, such as requiring that consumers purchase laces in tandem with a new pair of shoes or commit to buying a vendor's paper when purchasing its photocopy machines, might, for example, result in increased efficiencies, satisfy consumer preferences for bundled sales, protect a seller's good will, or facilitate economically desirable forms of price discrimination. See, e.g., 9 P. Areeda & H. Hovenkamp, supra, ¶ 1703g, pp. 51-54; 9 P. Areeda & H. Hovenkamp, supra, ¶ 1720, pp. 259-61; D. Carlton & M. Waldman, "Robert Bork's Contributions to Antitrust Perspectives on Tying Behavior," 57 J.L. & Econ. at S121-26 (2014).

use tying to lever your way to a second . . . monopoly is economic nonsense"), cert. denied, *537 U.S. 1109, 123 S. Ct. 853, 154 L. Ed. 2d 781 (2003)*.

At a more fundamental level, recent scholarship has highlighted the difficulty in distinguishing between **[***18]** a packaged sale that is a tie—and, thus, presumptively illegal under traditional antitrust jurisprudence—and a product or service *bundle*, which is presumptively legal and consumer friendly. As one author has explained, "[t]he most robust statement one can make about tying is that it is ubiquitous. Consider the following examples: shoes are sold in pairs; hotels sometimes offer breakfast, lunch or dinner tied with the room; there is no such a thing as an unbundled car; and no self-respecting French restaurant would allow its patrons to drink a bottle of wine not coming from its cellar." C. Ahlborn et al., "The Antitrust Economics of Tying: A Farewell to Per Se Illegality," 49 Antitrust Bull. 287, 287 (2004); see also K. Hylton &M. Salinger, "Tying Law and Policy: A Decision-Theoretic Approach," 69 Antitrust L.J. 469, 526 (2001) ("tying is so pervasive even in competitive markets that there is ample evidence that procompetitive tying is a common occurrence").

Finally, antitrust scholars have cautioned against the use of tying law to resolve "contract dispute[s] in which one side got the benefit of the bargain and then sought to have the contract declared a violation of the *Sherman Act*." **[*192]** K. Hylton &M. Salinger, "Reply to Grimes: Illusory Distinctions **[***19]** and Schisms in Tying Law," 70 Antitrust L.J. 231, 239 (2002); see also *Hemlock Semiconductor Operations, LLC v. SolarWorld Industries Sachsen GmbH, 867 F.3d 692, 701 (6th Cir. 2017)* ("illegality defenses based on ***antitrust law*** are disfavored, especially when allowing the defense would let the buyer escape from its side of a bargain after having received a benefit" (internal quotation marks omitted)). See footnote 3 of this opinion.

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In the four decades since this court decided *Hossan-Maxwell, Inc.*, the foregoing scholarship has prompted the United States Supreme Court to rethink its approach to tying claims. In *Jefferson Parish Hospital District No. 2 v. Hyde, supra, 466 U.S. at 32-33*, Justice O'Connor authored a concurring opinion, joined by three other members of the court, in which she argued that the tying arrangements at issue—patients obtaining surgery at the defendant hospital were **[**718]** required to use a designated anesthesiology practice—should be evaluated under the rule of reason. More generally, the concurrence, citing to recent antitrust scholarship, argued that "[t]he time has . . . come to abandon the 'per se' label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have."[13] *Id., 35* (O'Connor, J., concurring in the judgment). Although a majority of the court continued to apply the *Northern Pacific* ***[***20]*** quasi-per se rule to tying **[*193]** claims in its next tying case; see *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 462, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*; the dissent, penned by Justice Scalia and joined by Justices O'Connor and Thomas, again recognized the "intense criticism of the [court's] tying doctrine in academic circles . . . ." *Id., 487*.

Finally, in *Illinois Tool Works, Inc.*, a majority of the Supreme Court for the first time expressly repudiated the court's traditional disapproval of tying agreements. Justice Stevens, writing for a unanimous court, undertook "a fresh examination of the history of both the judicial and legislative appraisals of tying arrangements . . . informed by extensive scholarly comment and a change in position by the administrative agencies charged with enforcement of the antitrust laws." (Citation omitted.) *Illinois Tool Works Inc. v. Independent Ink, Inc., supra, 547 U.S. 33*. The court observed that, "[o]ver the years . . . [its] strong disapproval of tying arrangements has substantially diminished. Rather than relying on assumptions, in its more recent opinions the [c]ourt has required a showing of market power in the tying product." *Id., 35*. Justice Stevens further explained that, whereas the court traditionally had been of the view that "[t]ying arrangements serve hardly **[***21]** any purpose beyond the suppression of competition," that view

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[13] Justice O'Connor's concurring opinion went so far as to argue that tying arrangements should be deemed presumptively *legal*, unless (1) the seller has market power in the tying product market, (2) there is "a substantial threat that the tying seller will acquire market power in the [tied product] market," and (3) the tied product is one that some consumers might wish to purchase separately without also purchasing the tying product. *Jefferson Parish Hospital District No. 2 v. Hyde, supra, 466 U.S. at 37-39*. If all three conditions are met, then the antitrust claims would be evaluated under a rule of reason analysis. Id.

had evolved with the recognition that "tying arrangements may well be procompetitive . . . ." (Internal quotation marks omitted.) Id., 35-36.

Having thus framed the issue, the court in Illinois Tool Works, Inc., proceeded to expressly overrule one "vestige of [its] historical distrust of tying arrangements . . . ." Id., 38. As we discussed, in previous decisions, the United States Supreme Court had indicated that the first prong of the Northern Pacific rule—possession of economic power in the tying product—can be established not only by proving that a seller holds a dominant **[*194]** position in a defined market for the tying product, but also by demonstrating that the tying product is presumed to be uniquely desirable. In Northern Pacific itself, the court suggested that the unique configuration and choice location of the defendant's land was sufficient to confer economic power. Northern Pacific Railway Co. v. United States, supra, 356 U.S. 7; see also id., 16-20 (Harlan, J., dissenting). In prior decisions, the court had likewise held that the monopoly conferred by a patent presumptively confers market power for purposes **[**719]** of a tying claim. See, e.g., International Salt Co. v. United States, supra, 332 U.S. 395-96; International Business Machines Corp. v. United States, supra, 298 U.S. 136-37. Indeed, it was in the context of intellectual property that the Supreme **[***22]** Court initially held that tying arrangements are per se illegal. See Illinois Tool Works, Inc. v. Independent Ink, Inc., supra, 547 U.S. 33.

In Illinois Tool Works, Inc., the issue was whether the court should depart from its long established rule that a patent holder presumptively exerts market power over the patented product for purposes of a tying allegation. Id., 31. Overruling several of its prior tying decisions; see id., 38-40; the court held that "the mere fact that a tying product is patented does not support . . . a presumption [of market power]." Id., 31. The court emphasized that its new approach, which requires proof that the seller holds market power in the relevant market, is consistent with "the vast majority of academic literature on the subject." Id., 43-44 and n.4.

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The parties to the present case disagree as to the scope of the Supreme Court's decision in Illinois Tool Works, Inc. The defendants contend that its holding was limited to patented products, whereas the plaintiffs contend that the court intended to depart more fundamentally from its prior view that the uniqueness of a **[*195]** tying product can presumptively establish economic power for purposes of Northern Pacific. The narrow reading advocated by the defendants is consistent with the fact that only the question **[***23]** of patents was before the court in Illinois Tool Works, Inc., and that the court, in overruling its prior patent tying cases, relied on various factors that are specific to the patent context: recent congressional amendments to the patent misuse statutes, new guidance from the federal agencies charged with the enforcement of the antitrust laws, and the views of antitrust scholars regarding the overlap of intellectual property and ***antitrust law***. Id., 41-45.

The plaintiffs' broader reading of Illinois Tool Works, Inc., however, finds support in the manner in which the Supreme Court framed its holding, which appeared to extend beyond the patent context. ***HN6***[] "Many tying arrangements," the court wrote, "even those involving patents and requirements ties, are fully consistent with a free, competitive market. . . . Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion, and therefore hold that, *in all cases involving a tying arrangement*, the plaintiff must prove that the defendant has market power in the tying product." (Citations omitted; emphasis added.) **[***24]** Id., 45-46. The fact that the Supreme Court's restrictive tying jurisprudence originated in the patent context also suggests that that court's recent change of direction with respect to the tying of patented products evinces a broader rethinking of tying generally. Indeed, it would be odd if the Supreme Court were to conclude that holding a patent—a legal monopoly—over a product is not sufficient to confer economic power but that mere ownership of a parcel of land, without more, is sufficient.

[*196] Our impression that the plaintiffs have the better of this argument is reinforced by the fact that***HN7***[] most of the lower federal courts and our sister state courts that have considered the question have **[**720]** adopted the broader reading of Illinois Tool Works, Inc., and interpreted the decision to mean that the uniqueness of a tying product no longer gives rise to a presumption of economic power. Market power in a defined product and geographic market must be established to satisfy the first prong of *Northern Pacific*, even with respect to unique, nonpatented tying products such as land.[14]

In *Michigan Division-Monument Builders of North America v. Michigan Cemetery Assn., 458 F. Supp. 2d 474, 476-77 (E.D. Mich. 2006)*, aff'd, *524 F.3d 726 (6th Cir. 2008)*, the plaintiffs, a class of independent monument dealers, **[***25]** alleged that the defendant cemeteries violated the *Sherman Act* by requiring that consumers who wished to buy a burial plot also to purchase monuments and related services from the cemetery. They alleged that this tying scheme was per se illegal because the uniqueness of burial land meant that each cemetery constituted a distinct product and geographic market. *Id., 477*. The federal District Court, granting the defendants' **[*197]** motion to dismiss the tying claims, concluded that the alleged relevant geographic market—each individual cemetery—failed as a matter of law. *Id., 480-85*. The court reached that conclusion because, in its view, "the reasoning in [*Illinois Tool Works, Inc.*] makes it clear that presumptions, whether based on the uniqueness of a patent or the uniqueness of land, cannot support a valid antitrust claim." *Id., 484*.

The United States Court of Appeals for the Sixth Circuit affirmed, opining that, under *Illinois Tool Works, Inc.*, "[t]he idea that all land is unique . . . is insufficient to support a finding of market power." *Michigan Division-Monument Builders of North America v. Michigan Cemetery Assn., supra, 524 F.3d at 732*. The Court of Appeals distinguished the holding of *Northern Pacific*, concluding that, in that case, the Supreme Court had affirmed a finding of economic power not because commercial **[***26]** land in general is unique but, rather, because there was other evidence showing that the specific location of the land lent the seller a competitive advantage that others could not achieve. *Id., 733*. Specifically, the land at issue in *Northern Pacific* was strategically located in checkerboard fashion within economic distance of key transportation facilities and, therefore, was essential to the business activities of those who purchased or leased it. *Id., 732-33*; see *Northern Pacific Railway Co. v. United States, supra, 356 U.S. 7*.

In so holding, the Sixth Circuit joined several other appellate courts to have rejected—even prior to *Illinois Tool Works, Inc.*—the theory that the uniqueness of land, standing alone, is sufficient to create economic power for purposes of the first prong of the *Northern Pacific* rule. See, **[**721]** e.g., *Smugglers Notch Homeowners' Assn., Inc. v. Smugglers' Notch Management Co., Ltd., supra, 414 Fed. Appx. 376* (rejecting "unique geographic qualities of ski areas" as basis for finding of market **[*198]** power (internal quotation marks omitted)); *Baxley-DeLamar Monuments, Inc. v. American Cemetery Assn., 938 F.2d 846, 851 (8th Cir. 1991)* ("[A]ll land is unique, but the mere fact that the tying product is real estate does not convey market power. . . . In numerous other tying cases involving real estate as the tying product, courts have held that the real estate must have some particular strategic or competitive importance in order to carry market power." **[***27]** (Citations omitted.)); *McCormick v. Bradley, 870 P.2d 599, 604-605 (Colo. App. 1993)* (criticizing and declining to follow *Hossan-Maxwell, Inc.*), cert. denied, *Colorado Supreme Court, Docket No. 93SC773, 1994 Colo. LEXIS 331 (April 11, 1994)*; *Vande Guchte v. Kort, 13 Neb. App. 875, 887, 703 N.W.2d 611 (2005)* ("we do not accept the notion that the 'uniqueness' of land by itself establishes economic power").

More generally, other federal courts have read *Illinois Tool Works, Inc.*, to broadly hold that market power in a defined product and geographic market *always* must be established to proceed under the quasiper se rule in *Northern Pacific*. See, e.g., *Auraria Student Housing at the Regency, LLC v. Campus Village Apartments, LLC, 843 F.3d 1225, 1246 (10th Cir. 2016)*; *Batson v. Live Nation Entertainment, Inc., 746 F.3d 827, 831-32 (7th Cir. 2014)*;

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[14] We note that defining a relevant product and geographic market for purposes of the federal antitrust laws is a highly technical process that typically requires expert testimony. See, e.g., *McWane, Inc. v. Federal Trade Commission, 783 F.3d 814, 829 (11th Cir. 2015)*, cert. denied, ___ ***U.S. ___, 136 S. Ct. 1452, 194 L. Ed. 2d 550 (2016)***; *Hynix Semiconductor, Inc. v. Rambus, Inc., Docket No. CV-00-20905 RMW, 2008 U.S. Dist. LEXIS 123822, 2008 WL 73689, *10 n.13 (N.D. Cal. January 5, 2008)*. The most common test of a proposed market definition asks whether there is sufficient cross-elasticity of demand that a small but significant and nontransitory price increase will lead customers to look elsewhere—both productwise and geographically—for substitutes. See, e.g., *DSM Desotech, Inc. v. 3D Systems Corp., 749 F.3d 1332, 1339-40 (2014)*; ***Theme Promotions, Inc. v. News America Marketing FSI, 546 F.3d 991, 1002 (2008)***. Only once the relevant product and geographic markets have been carefully defined can the trier of fact assess the relevant antitrust variables, whether it be market share, economic power, market concentration, barriers to entry, or the like.

Sheridan v. Marathon Petroleum Co., LLC, 530 F.3d 590, 593-94 (7th Cir. 2008); *Compliance Mktg. v. Drugtest, Inc., Docket No. 09-CV-01241-JLK, 2010 U.S. Dist. LEXIS 34315, 2010 WL 1416823, *7 (D. Colo. April 7, 2010)*; *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc., 460 F. Supp. 2d 1012, 1027 (S.D. Iowa 2006)*. It seems clear, then, that a per se ban on list-back agreements, as applied in *Hossan-Maxwell, Inc.*, is inconsistent with federal ***antitrust law*** as it has evolved over the past several decades.[15]

[*199] C

We next consider three arguments offered by the defendants that have not been fully addressed by the preceding discussion. First, the defendants contend that their antitrust special defense invokes not only the *Sherman Act* and its state analogues but also *General Statutes § 35-29*, the Connecticut analogue of *§ 3 of the Clayton Act, 15 U.S.C. § 14*. The point matters, they contend, because, in *Hossan-Maxwell, Inc.*, this court, following what appeared **[***28]** at that time to be the guidance of the United States Supreme Court in *Times-Picayune Publishing Co. v. United* ***[**722]*** *States, supra, 345 U.S. 594*, concluded that tying claims brought under the *Clayton Act* or its state analogue need to satisfy only one prong of the rule set forth in *Northern Pacific*. See *State v. Hossan-Maxwell, Inc., supra, 181 Conn. 662*. That is, a tie could be deemed illegal per se merely on the basis of the fact that it foreclosed a not insubstantial volume of trade in the tied product, even if the seller lacked economic power in the tying product market. If that were the case, then the analysis in part II B of this opinion, which addresses only the first prong of the *Northern Pacific* rule, would likely be moot, insofar as the plaintiffs do not dispute that a substantial volume of trade is at issue.

[*200] Although that reading of *Times-Picayune Publishing Co.* was still considered plausible at the time that *Hossan-Maxwell, Inc.*, was decided, since then, the federal courts and antitrust scholars almost universally have concluded that the standard for tying claims brought under the *Clayton Act* is no different from the standard for those brought under the *Sherman Act*. See, e.g., *Sheridan v. Marathon Petroleum Co., LLC, supra, 530 F.3d 592* ("[t]hough some old cases say otherwise, the standards for adjudicating tying under the two statutes are now recognized **[***29]** to be the same"); *De Jesus v. Sears, Roebuck & Co., 87 F.3d 65, 70 (2d Cir.)* ("[W]e have required allegations and proof of five specific elements before finding a tie illegal . . . . These elements are common to claims asserted under either the *Sherman or Clayton Act*s." (Citation omitted; internal quotation marks omitted.)), cert. denied, *519 U.S. 1007, 117 S. Ct. 509, 136 L. Ed. 2d 399 (1996)*; *In re Data General Corp. Antitrust Litigation, 490 F. Supp. 1089, 1100 (N.D. Cal. 1980)* ("It was traditionally understood that a tying arrangement would run afoul of [the] *Clayton [Act]* if it satisfied . . . either . . . of the elements required under the *Sherman Act*. . . . Recently, however, the neat distinction between tying arrangements that violate [the] *Sherman [Act]* and those that violate [the] *Clayton [Act]* has faded beyond recognition." (Citation omitted.)); 2 P. Areeda & H. Hovenkamp, ***Antitrust Law***, (3d Ed. 2007) ¶ 301c, pp. 9-11 and n.28 (referring to *Times-Picayune Publishing Co.* as "one obsolete exception" to prevailing view); H. Hovenkamp, "Tying Arrangements in the Real Estate Market: Federal ***Antitrust Law*** and Local Land Development Policy," 33 Hastings L.J. 325, 334 (1981) ("[s]ince *Times-Picayune [Publishing Co.]* was decided, [the] distinction between the [*Sherman Act* and the *Clayton Act*] has increasingly been disregarded"). Accordingly, we need not resolve the parties' dispute as to whether the defendants **[***30]**

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[15] Indeed, given the recent evolution of the tying doctrine in the federal courts, it is fair to ask whether the *Northern Pacific* rule, in its present form, should continue to be considered a per se prohibition on tying in any sense. See, e.g., 9 P. Areeda & H. Hovenkamp, ***Antitrust Law***, supra, ¶ 1728c, pp. 375-76 (explaining that most lower courts now allow defendants to raise defense that tying arrangement is affirmatively justified by fact that it confers benefits not available by alternative means); E. Elhauge, "Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory," *123 Harv. L. Rev. 397, 425-26 (2009)* ("It . . . now seems likely that a tie can be justified by evidence that the tie is the least restrictive way to achieve efficiencies large enough to offset the anticompetitive effects. Accordingly, today it is more accurate to read Supreme Court precedent on tying as embracing a rule of reason, where anticompetitive effects must be shown or inferred and procompetitive justifications are admissible."); see also *United States v. Microsoft Corp., 253 F.3d 34, 84, 346 U.S. App. D.C. 330 (D.C. Cir.)* (rule of reason, rather than per se analysis, governs legality of tying arrangements involving platform software products), cert. denied, ***534 U.S. 952, 122 S. Ct. 350, 151 L. Ed. 2d 264 (2001)***.

adequately **[*201]** pleaded a violation of *§ 35-29*, insofar as the same legal standard applies to tying claims under both federal acts and their state counterparts.

Second, the defendants contend that other courts that have considered the issue have agreed with *Hossan-Maxwell, Inc.*, that any list-back agreement that forecloses a not insubstantial volume of broker commissions is per se illegal. That appears to have been the consensus view in the late 1970s and early 1980s. See footnote 10 of this opinion and accompanying text. Although we have identified some contrary authority even from that time period,[16] the **[**723]** important point is that all of the cases on which the defendants rely were decided more or less contemporaneously with *Hossan-Maxwell, Inc.*, and well before the evolution in federal tying law that we discussed in part II B of this opinion. The fact that those cases were decided consistently with *Hossan-Maxwell, Inc.*, is, therefore, of little moment.

Third, the defendants emphasize that, regardless of whether *federal* ***antitrust law*** treats land as conferring economic power for purposes of the *Northern Pacific* rule, this court concluded in *Hossan-Maxwell, Inc.*, that land is inherently unique as a matter **[***31]** of Connecticut common law. They contend, therefore, that the logic of that decision remains sound regardless of whether federal law has taken a different direction.

[*202] It is true that, in *Hossan-Maxwell, Inc.*, our conclusion that the first prong of the *Northern Pacific* rule was satisfied rested in part on the fact that, "[i]n Connecticut, the uniqueness and special characteristics of a particular plot of land have long been recognized. *Anderson v. Yaworski, 120 Conn. 390, 395, 399, 181 A. 205 [1935]*." *State v. Hossan-Maxwell, Inc., supra, 181 Conn. 665*. We agree with the plaintiffs, however, that this court's reliance on that principle, and on *Anderson*, was misplaced.

In *Anderson*, this court simply reiterated the well established principle that contracts for the sale of real estate usually may be specifically enforced because each parcel of land has its own particular characteristics such that a buyer may not consider an equivalently priced parcel to be an adequate substitute. *Anderson v. Yaworski, supra, 120 Conn. 395*. But the fact that a parcel of land is deemed to be unique for purposes of property and contract law has little, if anything, to do with whether it is unique for purposes of ***antitrust law***. ***Antitrust law*** is concerned with whether a seller has economic power—the ability to sell a product at a supracompetitive price—which usually **[***32]** is possible only when a seller controls a substantial share of a defined market for a product for which there are no adequate substitutes. See, e.g., *Sheridan v. Marathon Petroleum Co., LLC, supra, 530 F.3d 594*; *American Council of Certified Podiatric Physicians & Surgeons v. American Board of Podiatric Surgery, Inc., 185 F.3d 606, 622 (6th Cir. 1999)*; *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436-37 (3d Cir. 1997)*, cert. denied sub nom. *Baughans, Inc. v. Domino's Pizza, Inc., 523 U.S. 1059, 118 S. Ct. 1385, 140 L. Ed. 2d 645 (1998)*.

In theory, a parcel of land could be sufficiently unique to allow the owner to charge a supracompetitive price. This appears to have been the case in *Northern Pacific*, **[*203]** in which the land at issue afforded unique access to essential transportation facilities.[17] *Northern Pacific Railway Co. v. United States, supra, 356 U.S. 7*. But the fact that each house, for example, is unique in various **[**724]** ways does not permit the owner to charge a

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[16] See, e.g., *Fran Welch Real Estate Sales, Inc. v. Seabrook Island Co., 621 F. Supp. 128, 137-38 (D.S.C. 1985)* (summary judgment on real estate listback claim deemed inappropriate when (1) relevant market had not been defined, and (2) six month exclusive listing agreement was likely too short to unreasonably restrain competition), aff'd, *809 F.2d 1030 (4th Cir. 1987)*; *Outdoor Resorts of America, Inc. v. Outdoor Resorts at Nettles Island, Inc., 379 So. 2d 471, 471-72 (Fla. App.)* (rule of reason governed claim that purchase of recreational vehicle lot was tied to developer's exclusive right to rent lots at 50 percent commission when not in use), cert. denied, ***388 So. 2d 1116 (Fla. 1980)***; see also *Vande Guchte v. Kort, supra, 13 Neb. App. 887* (holding that builder tie-in contract, which conditioned sale of lot on use of specific builder, was not per se illegal).

[17] In some sense, then, *Northern Pacific* can be understood as an application of the essential facilities doctrine, which applies in antitrust cases in which a monopolist controls access to uniquely necessary infrastructure, such as a railroad or a port. See, e.g., *MCI Communications Corp. v. American Telephone & Telegraph Co., 708 F.2d 1081, 1132 (7th Cir.)*, cert. denied, ***464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)***.

supracompetitive price when it comes time to sell. Indeed, *Anderson* itself implicitly recognized this concept by noting that the *market value* of a parcel of land may not reflect its *emotional value* in the mind of the purchaser. *Anderson v. Yaworski, supra, 120 Conn. 395-96*. At no point does *Anderson* suggest that a property's "peculiar and special" emotional value; (internal quotation marks omitted) *id., 396*; somehow translates into an above market economic value.

Indeed, many products and services are unique. Land, used cars, purebred dogs, and private piano lessons are examples. But the fact that these things are not wholly fungible does not mean that every seller wields economic power **[***33]** for antitrust purposes. In a sense, the breeder has a tiny monopoly on Fido. There is no other dog in the world quite like him, and his eventual owner may come to think of him as priceless. Still, if the market price for a purebred German shepherd puppy in Hartford is $1200, and if other breeders have other German shepherd puppies for sale at that price, then there is no reason to expect that Fido's breeder will be able to exercise economic power and charge significantly more for him simply because of his inherent uniqueness. By extension, if Fido's breeder began requiring that each puppy buyer also purchase a leash from him, there would be little concern that the sale of Fido might unreasonably restrain competition in the leash market. **[*204]** For similar reasons, we repudiate *Hossan-Maxwell, Inc.*, to the extent that it stands for the proposition that the uniqueness of a parcel of land, standing alone, confers market power for purposes of *Northern Pacific*.

D

To reiterate, ***HN8***[] in light of what we perceive to be the clear trajectory of federal tying law, as informed by modern antitrust scholarship, we overrule *Hossan-Maxwell, Inc.*, to the extent that it held that real estate list-back agreements **[***34]** affecting a not insubstantial volume of commerce are per se illegal. ***HN9***[] We hold instead that challenges to list-back agreements, like most other forms of tying agreements, are subject to the five element test adopted by the United States Court of Appeals for the Second Circuit in applying *Northern Pacific* and its progeny: "To state a valid tying claim . . . a [party] must allege facts plausibly showing that: [1] the sale of one product (the tying product) is conditioned on the purchase of a separate product (the tied product); [2] the seller uses actual coercion to force buyers to purchase the tied product; [3] the seller has sufficient economic power in the tying product market to coerce purchasers into buying the tied product; [4] the tie-in has anticompetitive effects in the tied market; and [5] a not insubstantial amount of . . . commerce is involved in the tied market." *Kaufman v. Time Warner, 836 F.3d 137, 141 (2d Cir. 2016)*; accord *Yentsch v. Texaco, Inc., 630 F.2d 46, 56-57 (2d Cir. 1980)*. The leading treatise on the subject recognizes this as the prevailing test for tying claims. See 9 P. Areeda & H. Hovenkamp, supra, ¶ 1702, pp. 33-34 and n.1. We further emphasize that the third element of the test, economic power, typically must be established by proving that the defendant wields market power in a defined product and **[***35]** geographic market. *Kaufman v. Time Warner, supra, 143*. "[T]he best way to plead market power is to allege facts that, if proven, establish directly that **[*205]** the price of the tied package is higher than the price of components sold in competitive markets." (Internal quotation marks omitted.) Id.

[725]** III

Finally, having clarified the standards that govern antitrust challenges to real estate list-back agreements, we consider whether the trial court's judgments can be affirmed, under the proper legal standard, on the basis of the trial court's express and implicit factual findings. For the reasons that follow, we conclude that they cannot.

A

First, and most important, the defendants did not plead the existence of any particular product or geographic market with respect to either the tying product (land of some sort) or the tied product (real estate broker services of some sort). Nor was any expert testimony introduced that would allow the trial court (1) to define those markets with any sort of precision for purposes of assessing economic power, (2) to quantify Woodland's power over the relevant property market, or (3) to assess the plaintiffs' share or foreclosure of the relevant broker service market.

The trial court did not make **[***36]** any relevant findings in this respect. It simply stated that, under *Hossan-Maxwell, Inc.*, the uniqueness of residential property is sufficient evidence of economic power to satisfy the first prong of Northern Pacific and, thus, that Woodland, as the sole owner of the Reserve parcels, had sufficient economic power to restrain competition in the market for the tied product, which it identified as real estate listing broker's services in the greater Danbury area. The trial court did not explain how it reached the conclusion that the relevant tied product market was limited to the greater Danbury area rather than **[*206]** some larger geographic area, or explain why the relevant market was taken to be listing broker's services rather than a broader market, such as broker's services writ large, or a narrower one, such as the services of listing brokers specializing in large commercial and multifamily residential projects. The court also did not make any findings to support its apparent determination that the Reserve constituted the entire tying product market, such as that the Reserve was uniquely desirable and economically necessary because of its flexible zoning or other distinct characteristics. **[***37]** [18]

The Appellate Court, in affirming the trial court's judgments, implied that, in its view, the relevant tying product market consisted of "large area[s] of undeveloped land . . . in the densely populated Northeast"; the court opined that the Reserve was a rare example thereof. Reserve Realty, LLC v. Windemere Reserve, LLC, supra, 174 Conn. App. 145. It is unclear on what basis the Appellate Court reached these conclusions. Although there was some evidence in the record suggesting that there were few locations in Fairfield County suitable for building a 450,000 to 1.5 million square foot project, and also that flexible space with the sort of **[**726]** zoning approvals that the Reserve had obtained was very desirable, there is no indication that either (1) the trial court credited that evidence, or (2) the evidence bore **[*207]** out the Appellate Court's apparent belief that large tracts of undeveloped land represent the relevant product market or that the northeastern United States (however that term might be defined) represents the relevant geographic area. Specifically, there is no evidence in the record by which the Appellate Court could have applied the governing test and determined whether a small but significant and nontransitory increase in price with respect to the **[***38]** Reserve, or portions thereof, could be sustained or would lead customers to look elsewhere for substitute property. See footnote 14 of this opinion.

For their part, the defendants have taken the seemingly contradictory positions that either (1) the Reserve constitutes its own unique, singular product and geographic market, or (2) the relevant property market is national in scope. The fact that the defendants and the courts below were able to articulate four different, facially plausible but incommensurate geographic market definitions—the Reserve itself, the greater Danbury area, the Northeast, and the entire United States—highlights why expert economic testimony is necessary to resolve the issue of whether Woodland held sufficient power in a defined geographic market for land of some particular sort that it could foreclose competition and coerce buyers into accepting supracompetitive prices in some particular product market.

B

The second reason that the judgments cannot be sustained is that, to establish the third and fourth elements of a tying claim—economic power and anticompetitive effect—a buyer typically must be able to establish that the combined price for the tying product plus **[***39]** the tied product exceeded the market price. Kaufman v. Time Warner, supra, 836 F.3d 143; 9 P. Areeda & H. Hovenkamp, supra, ¶ 1702, p. 36. The trial court made no findings to that effect, and we doubt that the current **[*208]** record would support such findings. At trial, a representative of Woodland offered undisputed testimony that, as a result of the need to resolve the plaintiffs' administrative appeal, Woodland agreed to a purchase price for parcels 13 and 15 that was significantly lower than what the parties ordinarily would have negotiated at arm's length. He further testified that, following a series of significant price reductions, the land sold for a mere fraction of the appraised value. There is no reason to believe, then, that the list-back agreements, on balance, had an anticompetitive effect on pricing.

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[18] For these same reasons, the trial court's conclusions that the listing agreements violated General Statutes § 35-27, which prohibits attempted monopolization, and General Statutes § 35-28, which prohibits price fixing arrangements, also cannot be sustained. At the same time, the fact that the necessary market analyses were not performed means that we need not address the plaintiffs' other claims, such as that the Appellate Court incorrectly concluded that the defendants were coerced into agreeing to the list-back provisions and that the Reserve market was foreclosed to other commercial brokers.

We note that there was testimony at trial that three such "floating zone" properties were available in Danbury alone, which would seem to militate against the plaintiffs' theory that the Reserve was uniquely desirable. The trial court neither credited nor declined to credit that testimony.

Wenote in this regard that the fact that the defendants may have felt "forced" to accept the plaintiffs' broker services in order to acquire portions of the Reserve, while relevant to the second (coercion) prong of the Second Circuit test, says little to nothing about whether Woodland and the plaintiffs were able to exert market power or suppress competition. There are at least two reasons for this. First, the fact that a few individual buyers were sufficiently **[***40]** interested in a purchase to be willing to accept unwanted strings attached does not imply that, as a general matter, the sellers held market power. See, e.g., *McCormick v. Bradley, supra, 870 P.2d 604-605*; see also *Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 796-97 (1st Cir. 1988)* ("'[M]arket power' . . . means significant market power—more than the mere ability to raise price only slightly, or only on occasion, or only to a few of a seller's many customers. . . . Of course, virtually every seller . . . has some **[**727]** customers who especially prefer its product. But to permit that fact alone to show market power is to condemn ties that are bound to be harmless, including some that may serve some useful social purpose." (Citations omitted; emphasis omitted.)); 9 P. Arreeda & H. Hovenkamp, ***Antitrust Law***, supra, ¶ 1718a, p. 244 (fact that tying arrangement interferes with customer **[*209]** choice generally is irrelevant to antitrust analysis).

Second, the record in the present case supports various, possible explanations as to why the defendants were reluctantly willing to accept Woodland's condition that they agree to use the plaintiffs' broker services. It may be, as the defendants contend, that obtaining flexible zoning permits for the Reserve gave Woodland market power because the property became uniquely desirable and, in essence, a market of one. It also **[***41]** may be the case, though, that Woodland offered the defendants a very favorable, below market price for the land, either because Woodland was desperate to terminate the defendants' zoning appeal that was blocking development of the Reserve or because the brokerage requirement itself lowered the value of the property. If the defendants were only "forced" to accept the brokerage provision insofar as that was necessary for them to get a sweetheart deal on the land, and they could have secured comparable land elsewhere at a higher, market price, then competition policy need not be overly concerned that two sophisticated parties, engaged in a unique negotiation, ultimately agreed to include the tie as one of many negotiated provisions.[19] At the very least, expert testimony was necessary to shed light on the **[*210]** fair market value of the property and the availability of any comparable properties. See *Grappone, Inc. v. Subaru of New England, Inc., supra, 858 F.2d 798* (citing *United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 618 n.10, 620 n.13, 97 S. Ct. 861, 51 L. Ed. 2d 80 (1977)*, for proposition that, "to show market power, [the] plaintiff must show that an appreciable number of buyers accepted the tie *in the absence of other explanations for* [*their*] *willingness . . . to purchase the package*" (emphasis altered; internal quotation marks omitted)).

C

Third, **[***42]** ***HN10***[] competition policy generally is not offended when only minor foreclosure of competition in the tied market is possible. See 9 P. Areeda & H. Hovenkamp, supra, ¶ 1704a pp. 54-55; id., Æ 1709a, pp. 88-89. In the present case, even if the tied product market at issue were to be defined narrowly, such as to include only listing broker services for large commercial and multifamily residential properties in Danbury, it seems unlikely on this record either that the listing agreements could have permitted the plaintiffs to monopolize that **[**728]** market or that prevailing brokerage fees would rise as a result.[20]

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[19] Although the trial court rejected the latter theory in its memorandum of decision, it did so not as the result of any contrary factual findings but, rather, because the court was of the view that, because any leverage that the defendants were able to assert by virtue of their administrative appeal was legal, it was irrelevant to the antitrust analysis. As we have explained, the court was mistaken in that regard.

Notably, the defendants conceded at trial that they proceeded to purchase the land, despite the list-back requirements, because it made good economic sense to do so and they believed that the deal was likely to be profitable. For their part, representatives of Woodland testified that they had procompetitive reasons for agreeing to adopt the list-back provisions in the first place, notably, the enhanced efficiency and quality control stemming from having a single team of brokers coordinate marketing for the Reserve, as well as the ability to negotiate *below market* commission rates.

[20] Of course, should a retrial ultimately be necessary, the parties will have the opportunity to make a record, and the trial court to make findings, about all of these factual issues. In this part of the opinion, we merely explain why, on the present record, we cannot impute to the trial court the findings necessary to sustain the judgment.

The land at issue accounts for a very small share—approximately 2 percent—of the total acreage of Danbury, which the trial court assumed to be the relevant geographic market.[21] Common experience suggests that **[*211]** the broker market features relatively low barriers to entry (new brokers easily can enter the market) and limited economies of scale (smaller brokerage companies and even individuals can effectively compete with larger firms because there is limited overhead, etc.). The listing agreements locked in a relatively low commission rate that may even have been below the market rate. Moreover, the agreements appear to apply only **[***43]** to the initial sale of each portion of the property, which represents a new addition to the town's building stock, so there is no long-term foreclosure (unlike in *Hossan-Maxwell, Inc.*) and no foreclosure of the existing building stock. Finally, the defendants testified that it was their ordinary practice to use their own in-house sales personnel, rather than other independent brokers, to market developments of this sort, and, in any event, prospective buyers were not precluded from using their own buyers' brokers, who could obtain a share of the commissions. In short, it seems highly unlikely that these agreements could permit the plaintiffs to corner the market for commercial broker services in Danbury, to the extent that that is the relevant market, or increase the average cost of broker commissions in that market. For all of these reasons, we conclude that, in light of our clarification of the legal standard governing antitrust challenges to tying arrangements, the trial court incorrectly determined that the defendants prevailed on their antitrust special defense.

The judgments of the Appellate Court are reversed and the cases are remanded to that court with direction to consider **[***44]** the plaintiffs' remaining claims.

In this opinion the other justices concurred.

End of Document

[21] The Reserve, taken as a whole, spans 546 acres. We may take judicial notice of the fact that this represents two percent of the 42 square mile area of the city of Danbury. See Connecticut Economic Resource Center, Danbury, Connecticut: CERC Town Profile 2019, (January 16, 2020), p. 1, available at http://s3-us-west-2.amazonaws.com/cerc-pdfs/2019/danbury-2019.pdf (last visited March 23, 2020).

Miami Prods. & Chem. Co. v. Olin Corp.

United States District Court for the Western District of New York

March 27, 2020, Decided; March 27, 2020, Filed

1:19-CV-00385 EAW; 1:19-CV-00386 EAW; 1:19-CV-00392 EAW; 1:19-CV-00393 EAW; 1:19-CV-00403 EAW; 1:19-CV-00480 EAW

Reporter
449 F. Supp. 3d 136 *; 2020 U.S. Dist. LEXIS 53869 **; 2020-1 Trade Cas. (CCH) P81,171; 2020 WL 1482139

MIAMI PRODUCTS & CHEMICAL CO., On Behalf of Itself and All Others Similarly Situated, et al., Plaintiffs, v. OLIN CORPORATION, et al., Defendants.AMREX CHEMICAL CO., INC., On Behalf of Itself and All Others Similarly Situated, Plaintiff, v. OLIN CORPORATION, et al., Defendants.MIDWEST RENEWABLE ENERGY, LLC, On Behalf of Itself and All Others Similarly Situated, Plaintiff, v. OLIN CORPORATION, et al., Defendants.MAIN POOL AND CHEMICAL CO., INC., On Behalf of Itself and All Others Similarly Situated, Plaintiff, v. OLIN CORPORATION, et al., Defendants.PERRY'S ICE CREAM COMPANY, INC., On Behalf of Itself and All Others Similarly Situated, Plaintiff, v. OLIN CORPORATION, et al., Defendants.FINCH PAPER, LLC, On Behalf of Itself and All Others Similarly Situated, Plaintiff, v. OLIN CORPORATION, et al., Defendants.

Subsequent History: Dismissed by, in part, Without prejudice *Miami Prods. & Chem. Co. v. Olin Corp., 545 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 118137, 2021 WL 2587214 (W.D.N.Y., June 24, 2021)*

Motion denied by, in part, Dismissed by, in part *Miami Prods. & Chem. Co. v. Olin Corp., 2022 U.S. Dist. LEXIS 154213, 2022 WL 3701159 (W.D.N.Y., Aug. 26, 2022)*

Motion denied by, Without prejudice *Miami Prods. v. Olin Corp., 2022 U.S. Dist. LEXIS 216975, 2022 WL 17361235 (W.D.N.Y., Dec. 1, 2022)*

Motion denied by, in part, Motion granted by, in part *Miami Prods. v. Olin Corp., 2023 U.S. Dist. LEXIS 72008 (W.D.N.Y., Apr. 25, 2023)*

Core Terms

caustic soda, allegations, announcements, increased price, prices, subsidiary, conspiracy, motion to dismiss, Plaintiffs', customers, personal jurisdiction, amended complaint, quotation, dst, Additionally, discovery, meetings, Defendants', trade association, courts, factors, minimum contact, general jurisdiction, alleged conspiracy, contacts, corporate veil, same time, producers, cases, Chemical

LexisNexis® Headnotes

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

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

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

In considering a motion to dismiss for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)*, a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint. A court should consider the motion by accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff. To withstand dismissal, a claimant must set forth enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

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

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

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

While a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. To state a plausible claim, the complaint's factual allegations must be enough to raise a right to relief above the speculative level.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

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

HN3[] **Cartels & Horizontal Restraints, Sherman Act**

Liability under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, requires a contract, combination, or conspiracy, in restraint of trade or commerce. Because *§ 1* of the Sherman Act does not prohibit all unreasonable restraints of trade but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express. Stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. This standard simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints

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

Antitrust & Trade Law > Sherman Act > Claims

HN4[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

The ultimate existence of an agreement under ***antitrust law*** is a legal conclusion, not a factual allegation. A plaintiff may assert direct evidence that the defendants entered into an agreement in violation of the antitrust laws. However, plaintiffs are not required to mention a specific time, place or person involved in each conspiracy allegation. A complaint may, alternatively, present circumstantial facts supporting the inference that a conspiracy existed. A horizontal agreement may be inferred on the basis of conscious parallelism, when such interdependent conduct is accompanied by circumstantial evidence and plus factors. These plus factors may include: a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN5[] **Sherman Act, Claims**

Generally, without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. The allegations must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. Without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. Examples of parallel conduct allegations that might be sufficient under Twombly's standard include parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties, and complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

HN6[] **Sherman Act, Claims**

In the context of a claim under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, at the motion-to-dismiss stage appellants must only put forth sufficient factual matter to plausibly suggest an inference of conspiracy, even if the facts are susceptible to an equally likely interpretation. Skepticism of a conspiracy's existence is insufficient to warrant dismissal; a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.

Civil Procedure > Pleading & Practice > Motion Practice > Content & Form

HN7[] **Motion Practice, Content & Form**

In the context of motions, courts routinely decline to consider arguments mentioned only in a footnote on the grounds that those arguments are inadequately raised.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule

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

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

HN8[] Per Se Rule & Rule of Reason, Practices Governed by Per Se Rule

Generally speaking, the possibility of anticompetitive collusive practices is most realistic in concentrated industries. In an oligopolistic market, however, conscious parallelism or tacit collusion to raise or maintain prices is not per se unlawful because it could be the result of permissible, independent parallel conduct. Even conscious parallelism, a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful. At the motion to dismiss stage, however, plaintiffs need not offer evidence that tends to rule out the possibility that the defendants were acting independently. Instead, plaintiffs need only allege enough factual matter (taken as true) to suggest that an agreement was made.

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

HN9[] Regulated Practices, Price Fixing & Restraints of Trade

In a case alleging price fixing, pretextual explanations for price increases can support an inference that defendants were not acting independently. Evidence of pretext, if believed by a jury, would disprove the likelihood of independent action.

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

HN10[] Regulated Practices, Price Fixing & Restraints of Trade

Price increases which occur in times of surplus or when the natural expectation would be a general market decline, must be viewed with suspicion.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN11[] Sherman Act, Claims

It is adequate at the motion to dismiss stage to plead parallelism through a pattern of frequent price increases in similar intervals and amounts.

Antitrust & Trade Law > Sherman Act > Claims

HN12[] Sherman Act, Claims

In the context of a claim under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, plaintiffs are not required to allege that defendants acted uniformly, only that they acted similarly, and the presence of some divergent conduct does not negate the allegations of other, parallel conduct.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints

HN13[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

When examined on its own, a defendant's membership in a trade association hardly renders plausible the conclusion that entity and certain other members are functioning as an ongoing, organized, structured enterprise in conducting their business. However, courts have also held that participation in a trade association, where defendants had opportunities to exchange information or make agreements, coupled with allegations of parallel conduct (i.e., imposing the same inflated surcharges), are sufficient to tie the defendants to the conspiracies.

Antitrust & Trade Law > Sherman Act > Claims

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

HN14[] **Sherman Act, Claims**

In the context of a claim under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, plaintiffs must allege a factual connection between each defendant and the alleged conspiracy. Group pleading, by which allegations are made against families of affiliated entities is simply insufficient to withstand review on a motion to dismiss. To provide reasonable notice to defendant of the claims against it, a complaint must plausibly suggest that the individual defendant actually joined and participated in the conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

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

HN15[] **Sherman Act, Claims**

In the context of a claim under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, courts have found pretextual statements to be a viable plus factor.

Antitrust & Trade Law > Sherman Act > Scope

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Corporate Formalities

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

HN16[] **Antitrust & Trade Law, Sherman Act**

In the antitrust context, courts have held that absent allegations of anticompetitive conduct by the parent, there is no basis for holding a parent liable for the alleged antitrust violation of its subsidiary.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Corporate Formalities

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > Illegal Purposes & Interests of Justice

HN17[] Alter Ego, Corporate Formalities

As a general matter, a corporate relationship alone is not sufficient to bind a parent corporation for the actions of its subsidiary. But there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes.

Business & Corporate Law > ... > Shareholders > Shareholder Duties & Liabilities > Piercing the Corporate Veil

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Choice of Law

HN18[] Shareholder Duties & Liabilities, Piercing the Corporate Veil

Under New York choice-of-law principles, the issue of whether the corporate veil may be pierced is determined under the law of the state of incorporation.

Business & Corporate Law > ... > Shareholders > Shareholder Duties & Liabilities > Piercing the Corporate Veil

HN19[] Shareholder Duties & Liabilities, Piercing the Corporate Veil

In New York, piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury.

Business & Corporate Law > ... > Shareholders > Shareholder Duties & Liabilities > Piercing the Corporate Veil

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Choice of Law

HN20[] Shareholder Duties & Liabilities, Piercing the Corporate Veil

In the context of piercing the corporate veil, courts have found that New York's choice-of-law rule applies the law of the subsidiary's state of incorporation.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > Alter Ego

Evidence > Burdens of Proof > Allocation

HN21[] Piercing the Corporate Veil, Alter Ego

The Second Circuit has identified the following factors as useful for determining whether one company has dominated another under New York law:(1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own. The corporation's separate identity is generally respected, and the proponent of disregarding a corporation's separate identity bears a heavy burden.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Corporate Formalities

Evidence > Burdens of Proof > Allocation

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Fraud & Misrepresentation

HN22[] **Alter Ego, Corporate Formalities**

Those seeking to pierce a corporate veil bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Corporate Formalities

Business & Corporate Law > ... > Shareholders > Shareholder Duties & Liabilities > Piercing the Corporate Veil

HN23[] **Alter Ego, Corporate Formalities**

It is clear that simply owning, even wholly owning, a subsidiary is insufficient to pierce the corporate veil. Courts routinely refuse to pierce the corporate veil based on allegations limited to the existence of shared office space or overlapping management, allegations that one company is the wholly-owned subsidiary of another, or that companies are to be considered as a whole.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Corporate Formalities

HN24[] **Alter Ego, Corporate Formalities**

Announcements made to the general public regarding increased profits due to present market conditions on their own are insufficient to infer direction of a subsidiary by a parent. In determining whether complete control exists, courts have considered such factors as whether the corporations are treated as independent profit centers. No one factor is decisive.

Business & Corporate Law > Agency Relationships > Authority to Act > Actual Authority

Business & Corporate Law > Agency Relationships > Establishment > Consent

Business & Corporate Law > ... > Establishment > Elements > Right to Control by Principal

Business & Corporate Law > ... > Establishment > Proof of Agency > Burdens of Proof

HN25[] **Authority to Act, Actual Authority**

Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. Essential to the agency relationship is the notion that the agent acts subject to the principal's direction and control. The agent is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority. A full showing of agency supported by an accepted theory of agency or contract law is required, and generalized allegations of affiliation are insufficient. Anything short of requiring a full showing of some accepted theory under agency or contract law imperils a vast number of parent corporations.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

Evidence > Burdens of Proof > Allocation

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

HN26[] **In Rem & Personal Jurisdiction, In Personam Actions**

On a *Fed. R. Civ. P. 12(b)(2)* motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of showing that the court has jurisdiction over the defendant. A plaintiff may meet this burden by pleading in good faith legally sufficient allegations of jurisdiction, i.e., by making a prima facie showing of jurisdiction. A plaintiff can make such a prima facie showing through affidavits and supporting material containing sufficient facts which, if credited, would establish personal jurisdiction over the defendant. Where the issue is addressed on affidavits, all allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor, notwithstanding a controverting presentation by the moving party.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Constitutional Sources

Governments > Courts > Authority to Adjudicate

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

HN27[] **Jurisdictional Sources, Constitutional Sources**

The requirement that a court have personal jurisdiction flows not from U.S. Const. art. III, but from the Due Process Clause. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. Federal courts must satisfy three requirements in order to exercise personal jurisdiction over an entity: (1) the entity must have been properly served, (2) the court must have a statutory basis for exercising personal jurisdiction, and (3) the exercise of personal jurisdiction must comport with constitutional due process.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

HN28[] In Personam Actions, Due Process

Due process permits a court to exercise personal jurisdiction over a non-resident where the maintenance of the suit would not offend traditional notions of fair play and substantial justice. To determine whether exercising personal jurisdiction comports with due process, the court asks whether the defendant has sufficient minimum contacts with the forum to justify the court's exercise of personal jurisdiction. The constitutional minimum contacts inquiry for personal jurisdiction requires the court to distinguish between two forms of jurisdiction. Specific jurisdiction is available when the cause of action sued upon arises out of the defendant's activities in a state. General jurisdiction, in contrast, permits a court to adjudicate any cause of action against the defendant, wherever arising, and whoever the plaintiff. If the defendant has sufficient minimum contacts, the court proceeds to the second stage of the due process inquiry, and considers whether the assertion of personal jurisdiction is reasonable under the circumstances of the particular case.

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > Preliminary Considerations > Venue

HN29[] Clayton Act, Jurisdiction

Section *§ 12* of the Clayton Act, *15 U.S.C.S. § 22*, provides for nationwide service of process of a corporation for any action under the antitrust laws. However, the service of process provision can properly confer personal jurisdiction over a defendant only when the action is brought in the district where the defendant resides, is found, or transacts business, that is, the district where *Section 12* venue lies.

Antitrust & Trade Law > Clayton Act > Jurisdiction

HN30[] Clayton Act, Jurisdiction

Second Circuit precedent clearly establishes that the Clayton Act only confers personal jurisdiction over a defendant when the action is brought in the district where the defendant resides, is found, or transacts business.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

Governments > Courts > Authority to Adjudicate

Governments > Courts > Rule Application & Interpretation

Civil Procedure > ... > Pleadings > Service of Process > Service of Summons

HN31[] In Rem & Personal Jurisdiction, In Personam Actions

Fed. R. Civ. P. 4(k)(2) allows the exercise of personal jurisdiction by a federal district court when three requirements are met: (1) the claim must arise under federal law; (2) the defendant must not be subject to jurisdiction in any state's courts of general jurisdiction; and (3) the exercise of jurisdiction must be consistent with the United States Constitution and laws. *Rule 4(k)(2)* was specifically designed to correct a gap in the enforcement of federal law in international cases. The gap arose from the general rule that a federal district court's personal jurisdiction extends only as far as that of a state court in the state where the federal court sits.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

Governments > Courts > Rule Application & Interpretation

Civil Procedure > ... > Pleadings > Service of Process > Service of Summons

HN32[] **In Rem & Personal Jurisdiction, In Personam Actions**

In the Second Circuit, plaintiffs need to certify that the foreign defendants are not subject to jurisdiction in any other state to meet the second requirement of *Fed. R. Civ. P. 4(k)(2)*.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Jurisdiction

HN33[] **Jurisdiction Over Actions, General Jurisdiction**

To assert general jurisdiction over a foreign corporation, it must be found that the corporation's affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > Pleadings > Service of Process > Service of Summons

HN34[] **In Personam Actions, Minimum Contacts**

The certification requirement of *Fed. R. Civ. P. 4(k)(2)* is a blanket requirement that is not applied on a case-by-case basis, and not requiring a certification would encourage similarly-situated plaintiffs—those suing foreign corporations under federal law—to omit any allegations tying defendants to a specific state, in hopes of engaging the broader minimum contacts analysis of *Rule 4(k)(2)*, which only requires contacts with the United States as a whole.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Constitutional Sources

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

HN35[] **In Rem & Personal Jurisdiction, Constitutional Limits**

Due process permits a court to exercise personal jurisdiction over a non-resident where the maintenance of the suit would not offend traditional notions of fair play and substantial justice. Courts in the Second Circuit apply a two-step analysis when determining whether a court's exercise of personal jurisdiction comports with due process: First, the court asks whether the defendant has sufficient minimum contacts with the forum to justify the court's exercise of personal jurisdiction. If the defendant has sufficient minimum contacts, the court proceeds to the second stage of the due process inquiry, and considers whether the assertion of personal jurisdiction is reasonable under the circumstances of the particular case.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Civil Procedure > ... > Pleadings > Service of Process > Service of Summons

HN36[] **In Rem & Personal Jurisdiction, Constitutional Limits**

The requirement under *Fed. R. Civ. P. 4(k)(2)* that the exercise of jurisdiction be consistent with the United States Constitution and laws, necessarily overlaps with the requirement that a court may only exercise personal jurisdiction if it comports with constitutional due process.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN37[] **In Personam Actions, Minimum Contacts**

Minimum contacts necessary to support specific jurisdiction exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Doing Business

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

HN38[] **In Personam Actions, Doing Business**

In the context of jurisdiction, single acts of commercial activity, when forming the basis of a plaintiff's claims, can satisfy the constitutional requirements of Due Process.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

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

HN39[] **In Rem & Personal Jurisdiction, In Personam Actions**

While it is proper for a court to rely on affidavits to establish jurisdictional facts, hearsay evidence submitted by a plaintiff is not sufficient to defeat a motion to dismiss for lack of personal jurisdiction.

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

HN40[] **Defenses, Demurrers & Objections, Motions to Dismiss**

In the context of a motion to dismiss, prior to an evidentiary hearing or trial, where the issue is addressed on affidavits, all allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor, notwithstanding a controverting presentation by the moving party.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > Alter Ego

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Business & Corporate Law > Agency Relationships > Establishment > Elements

HN41[] **Piercing the Corporate Veil, Alter Ego**

For purposes of alleging presence within the judicial district sufficient to satisfy the Due Process Clause, a parent-subsidiary relationship does not itself create jurisdiction over the person unless the subsidiary is the alter ego of the parent or a mere agent acting at the parent's directions. Agency is a legal concept that depends on the existence of three elements: (1) the manifestation by the principal that the agent shall act for him; (2) the agent's acceptance of the undertaking; and (3) the understanding of the parties that the principal is to be in control of the undertaking. Agency relationships may be relevant to the existence of specific jurisdiction. As such, a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Corporate Formalities

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

Business & Corporate Law > Agency Relationships > Establishment

HN42[] **Alter Ego, Corporate Formalities**

A parent corporation may be sued in a venue when the relationship between the foreign parent and the local subsidiary validly suggests the existence of an agency relationship or the parent controls the subsidiary so completely that the subsidiary may be said to be simply a department of the parent. There is jurisdiction over a principal based on the acts of an agent where the alleged agent acted in the venue for the benefit of, with the knowledge and consent of, and under some control by, the nonresident principal. A plaintiff attempting to establish personal jurisdiction over a defendant who has never been present in the venue and only acted through subsidiaries or agents need only show that the subsidiary engaged in purposeful activities in this venue, that those activities were for the benefit of and with the knowledge and consent of the defendant, and that the defendant exercised some control over the subsidiary in the matter that is the subject of the lawsuit.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

HN43[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Specific jurisdiction cases are limited to those involving issues deriving from, or connected with, the very controversy that establishes jurisdiction.

Business & Corporate Law > Agency Relationships > Establishment

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > Single Business Enterprise

HN44[] **Agency Relationships, Establishment**

Agency law does provide that where the parent is not involved in the day-to-day operations of its subsidiary, or, where the entities observe corporate formalities, the subsidiary and parent can nonetheless have an agency relationship because they are engaged in a common business enterprise.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

HN45[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction, and when there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Corporate Formalities

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Fraud & Misrepresentation

HN46[] **Alter Ego, Corporate Formalities**

Under New York law, a court may pierce the corporate veil where 1) the owner exercised complete domination over the corporation with respect to the transaction at issue, and 2) such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil. This standard is relaxed where the alter ego theory is used not to impose liability, but merely to establish jurisdiction. In the jurisdictional context, a plaintiff need only show that the allegedly controlled entity was a shell for the allegedly controlling party.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > Alter Ego

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > Illegal Purposes & Interests of Justice

HN47[] **Piercing the Corporate Veil, Alter Ego**

Where the alter ego theory is used not to impose liability, but merely to establish jurisdiction, the factors to be considered in determining whether a corporation is a shell are: the failure to observe corporate formality; inadequate capitalization; intermingling of personal and corporate funds; the sharing of common office space, address and telephone numbers of the alleged dominating entity and the subject corporation; an overlap of ownership, directors, officers or personnel; the use of the corporation as a means to perpetrate the wrongful act against the plaintiff; as well as any other evidence tending to show that the company is being used as a mere shell. These factors are not exhaustive, nor is proof of any one factor or a combination of factors necessarily determinative. Rather, a finding that a corporation is an alter ego of another entity is warranted when doing so will achieve an equitable result.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > Alter Ego

HN48[] **Piercing the Corporate Veil, Alter Ego**

It is not sufficient to establish one company is the alter ego of another for jurisdictional purposes by alleging that their corporate leadership overlaps.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > Alter Ego

HN49[] **Piercing the Corporate Veil, Alter Ego**

An advertising strategy deciding not to present to its consumers the existence of a parent-subsidiary relationship is not equivalent to a showing that the parent corporation exercises any control over its subsidiary's operational or marketing activities.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > Alter Ego

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

HN50[] **Piercing the Corporate Veil, Alter Ego**

Common business enterprise allegations showing that the reason for the subsidiary's existence is to perform services in furtherance of its parent's business that would otherwise have to be performed by the parent can be sufficient to establish specific jurisdiction.

Civil Procedure > Discovery & Disclosure > Discovery

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN51[] **Discovery & Disclosure, Discovery**

It is well settled under Second Circuit law that, even where plaintiff has not made a prima facie showing of personal jurisdiction, a court may still order discovery, in its discretion, when it concludes that the plaintiff may be able to establish jurisdiction if given the opportunity to develop a full factual record. In the Second Circuit, jurisdictional discovery is permitted where a plaintiff has made a sufficient start toward establishing personal jurisdiction, such that it appears there may be a colorable jurisdictional claim.

Civil Procedure > Pleading & Practice > Pleadings > Complaints

Civil Procedure > Discovery & Disclosure > Discovery

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

HN52[] **Pleadings, Complaints**

The Second Circuit distinguishes between allegations that are insufficiently developed warranting discovery and those that are sparse and conclusory requiring dismissal.

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For Formosa Plastics Corporation U.S.A., Defendant (1:19cv480): Alan M. Unger, John Joseph Lavelle, Tom A. Paskowitz, LEAD ATTORNEYS, Sidley Austin LLP, New York, NY USA.

Judges: ELIZABETH A. WOLFORD, United States District Judge.

Opinion by: ELIZABETH A. WOLFORD

Opinion

[*150] DECISION AND ORDER

INTRODUCTION

Plaintiffs Miami Products & Chemical Co., Amrex Chemical Co., Inc., Finch Paper, LLC, Main Pool and Chemical Co., Inc., Midwest Renewable Energy, LLC, Perry's Ice Cream Company, Inc., and VanDeMark **[**12]** Chemical, Inc. (collectively "Plaintiffs") bring these putative class actions against defendants Olin Corporation ("Olin"), K.A. Steel Chemicals, Inc. ("K.A. Steel"), Occidental Petroleum Corporation ("Oxy"), Occidental Chemical Corporation ("OxyChem"), Westlake Chemical Corporation ("Westlake"), Shin-Etsu Chemical Co. Ltd. ("Shin-Etsu"), Shintech Incorporated ("Shintech"), Formosa Plastics Corporation ("Formosa"), and Formosa Plastics Corporation, U.S.A. ("Formosa USA") (collectively, "Defendants"), alleging violations of *Section 1 of the Sherman Act, 15 U.S.C. § 1*. (Dkt. 51).

Presently before the Court are: (1) a joint motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim by Olin, K.A. Steel, Oxy, OxyChem, Westlake, Shintech, and Formosa USA (Dkt. 79); (2) a motion to dismiss pursuant to *Rule 12(b)(6)* for failure to state a claim by Westlake (Dkt. 81); (3) a motion to dismiss pursuant to *Rule 12(b)(6)* for failure to state a claim by Shintech (Dkt. 82); (4) a motion to dismiss pursuant to *Rule 12(b)(6)* for failure to state a claim by Formosa USA (Dkt. 84); (5) a motion to dismiss pursuant to *Rule 12(b)(6)* for failure to state a claim by Oxy (Dkt. 80); (6) a motion to dismiss for lack of personal jurisdiction pursuant to *Federal Rule of Civil Procedure 12(b)(2)*, or in the alternative pursuant **[**13]** to *Rule 12(b)(6)* for failure to state a claim, by Formosa (Dkt. 86); and (7) a motion to dismiss pursuant to *Rule 12(b)(2)* for lack of personal jurisdiction by Shin-Etsu (Dkt. 103).

While by no means opining as to the likelihood of Plaintiffs' ultimate success in this action, the Court finds that the allegations in the Amended Complaint, at this stage of the proceedings, are sufficient to withstand most of the pending motions to dismiss. For the following reasons, the Court denies the joint motion to dismiss (Dkt. 79), Westlake's motion to dismiss (Dkt. 81), Shintech's motion to dismiss (Dkt. 82), and Formosa USA's motion to dismiss (Dkt. 84); grants in part the motion to dismiss by Oxy (Dkt. 80); denies without prejudice and with leave to renew after the completion of jurisdictional discovery, the motions to dismiss by Formosa (Dkt. 86) and Shin-Etsu (Dkt. 103), although Plaintiffs must provide the necessary certification regarding Formosa as discussed herein on or before April 17, 2020, or their claims against Formosa will be dismissed with prejudice.

BACKGROUND

I. Factual Background

The following facts are taken from the allegations in Plaintiffs' Amended Complaint (Dkt. 51), the operative pleading in this matter. **[**14]** As is required at this stage of the proceedings, the Court treats Plaintiffs' well-pleaded allegations as true.

[*151] Caustic soda, also known as sodium hydroxide or lye, is a commodity chemical sold in solid and liquid forms and is a co-product of chlorine produced from the electrolysis of brine or salt water. (*Id.* at ¶¶ 2, 42). It is used by customers in a variety of industries, including paper, pulp, and cellulose; chemical production; soaps and detergents; aluminum; food processing; water treatment; textiles; mineral oils; recycling; and pharmaceuticals. (*Id.*). Defendants are estimated to collectively control at least 90% of the domestic caustic soda supply (*Id.*), and Plaintiffs are all direct purchasers or assignees of direct purchasers of caustic soda (*id.* at ¶¶ 18-24). K.A. Steel is a wholly owned subsidiary of Olin that was acquired by Olin in August 2012. (*Id.* at ¶ 26). OxyChem is a wholly-owned subsidiary of Oxy (*id.* at ¶ 29), and Formosa USA is wholly owned by the Taiwanese corporation Formosa (*id.* at ¶ 34). The caustic soda industry has become more concentrated in the past few years, with Olin acquiring Dow's gulf coast chloralkali business in 2015 and Westlake acquiring the caustic **[**15]** soda business of Axiall Corporation of Atlanta ("Axiall") in 2016, lowering the number of U.S. producers of caustic soda from seven to five. (*Id.* at ¶¶ 30, 44).

Demand for caustic soda tends to track the demand for industrial production. (*Id.* at ¶ 46). The United States industrial production index saw slow growth from mid-2009 until a peak in November 2014 before declining through March 2016, flattening until November 2016, and then gradually increasing, reaching its November 2014 level in April 2018. (*Id.*). Plaintiffs allege that "[a]lthough Defendants' actual cost data is proprietary and uncertain, it is believed that their costs have been relatively stable since 2015, " referring to the steady power costs from 2015 to 2017 as an example. (*Id.* at ¶ 43).

From 2011 through 2014, Defendants made price increase announcements that were largely unsuccessful, and average caustic soda prices over this time period tended to be flat or declining. (*Id.* at ¶¶ 3, 54). In 2014 and early 2015, before Olin announced it intended to acquire Dow's chloralkali assets, Westlake and OxyChem added new chloralkali production capacity, adding to the overcapacity of the caustic soda industry. (*Id.* at ¶ 47). **[**16]** Even though the domestic caustic soda supply was relatively stable or declining, in August 2015, an industry article stated that several Defendants were trying privately to increase contract customers' prices by $40 per dry standard ton ("dst"). (*Id.* at ¶ 57). At around the same time, Axiall's CEO told analysts that caustic soda markets were oversupplied and that he "openly hoped that Olin would cut production once the proposed acquisition [of Dow's choralkali business] was completed." (*Id.* at ¶ 47 (alteration in original)). Olin acquired Dow's business in October 2015, and on November 2, 2015, Olin announced it would idle or shutdown between 250, 000 and 450, 000 tons of caustic soda production capacity in 2016. (*Id.* at ¶ 48). Sometime in November 2015, the Vinyl Institute, whose only full members are Formosa USA, Shintech, Westlake, and Oxy subsidiary OxyVinyls, held a meeting. (*Id.* at ¶ 93). On November 19, 2015, a chemical industry news service and consultant reported that there was a new industry price increase initiative by Olin, and that U.S. producers had managed to increase prices by $40 per dst across October and November, despite the "ample supply" of caustic soda. (*Id.* **[**17]** at ¶ 57). Within days, OxyChem, Westlake, Formosa USA, and Shintech announced increased prices in the same amount to all customers nationwide. (*Id.* at ¶ 58).

Olin idled or shut down at least 433, 000 tons of annual capacity beginning in the first quarter of 2016, and around the same **[*152]** time, Axiall—which had started acquisition discussions with Westlake—cut production by 78, 000 dst per year. (*Id.* at ¶ 48). In March 2016, American Fuel & Petrochemical Manufacturers ("AFPM"), in which Olin, OxyChem, Westlake, and Formosa USA are members, had an annual meeting that those Defendants' representatives attended. (*Id.* at ¶ 91). Additionally, The Chlorine Institute had a spring meeting in April 2016, which Olin, Oxy, Westlake, and Formosa USA attended. (*Id.* at ¶ 92). In April 2016, Olin, OxyChem, Westlake, Shintech, and Formosa USA each announced $30-$40 per dst price increases, and additional increases during the quarter that totaled approximately $85 per dst. (*Id.* at ¶ 59). A May 20, 2016, article referred to the increase by producers as "the most significant increase of the past three years." (*Id.*).

The annual ICIS and Tecnon OrbiChem World Chlor-alkali Conferences took place on June 16-17, **[**18]** 2016, at which an Olin representative spoke. (*Id.* at ¶ 93). Later in 2016, OxyChem reduced its caustic soda output by 150, 000 dst per year. (*Id.* at ¶ 48). Defendants announced increases of $40-$50 per dst in July and August 2016, and after the September 2016 meeting of the Vinyl Institute with Formosa USA, Shintech, Westlake, and Oxy subsidiary OxyVinyl (*id.* at ¶ 93), Defendants announced price increases of $60-$80 per dst (*id.* at ¶ 59). In the third quarter of 2016, Westlake completed its acquisition of Axiall. (*id.* at ¶ 30). OxyChem, Formosa USA, and Westlake also had temporary shutdowns for plant maintenance and outages throughout 2016, reducing capacity by as much as 10% in the fourth quarter of 2016 alone. (*Id.* at ¶ 48). Also in 2016, the market was informed that a refinery of a large caustic soda purchaser would close due to bankruptcy, and that the 150, 000 dst per year it had purchased was destined for the export market. (*Id.*). Defendants increased prices by $40-$65 in the fourth quarter of 2016. (*Id.* at ¶ 59). Between April 2016 and January 2017, the price of caustic soda had increased by 45% from $430 per dst to

$625. (*Id.*). Additionally, the average North American undiscounted **[**19]** quarterly contract price per short ton increased 22% from $595.80 in the fourth quarter of 2015 to $725 in the fourth quarter of 2016. (*Id.*).

Defendants led their customers to believe that caustic soda supply was "tight" and product "scarce" or otherwise limited. (*Id.* at ¶ 53). Many customers were on "allocation" and not permitted to purchase more volume from their defendant-supplier than they had annually in the past. (*Id.*). However, Olin told investors in its 2016 Form 10-K that supply had increased, even though customers had been told just the opposite throughout 2016. (*Id.* at ¶ 62).

In February 2017, Olin, OxyChem, Westlake, Formosa USA, and Shintech announced caustic soda increases of $60-$85 per dst depending on the grade—$60 for diaphragm or $85 for membrane. (*Id.* at ¶ 63). The grade differential was justified as due to "restrained" membrane-grade production. (*Id.*). In 2017, AFPM's Annual Meeting was again in March, with Olin, OxyChem, Westlake, and Formosa USA representatives in attendance. (*Id.* at ¶ 91). An employee of a distributor of caustic soda stated in a report about the AFPM conference that "Chlor-Alkali producers seemed to all be on the same page and the general consensus **[**20]** was caustic was extremely tight and pricing was moving up across the board, without exception." (*Id.* at ¶ 124). In May 2017, Olin, OxyChem, Westlake, Formosa USA, and Shintech announced increases of up to $75 per dst. (*Id.* at ¶ 63). A $75-$100 increase depending on grade was announced in August and September 2017 by Olin, OxyChem, Westlake, and Shintech. (*Id.* at ¶ 64). In November **[*153]** 2017, the Vinyl Institute again met (*id.* at ¶ 93), and Defendants announced caustic soda price increases ranging from $70 to $115 per dst depending on grade (*id.* at ¶ 65). Defendants made calls to customers and others regarding the price increase, and OxyChem and Westlake mailed letters to customers announcing a price increase of $80-$100 and $85-$115 respectively; just days before Olin, Formosa USA, and Shintech sent similar price increase letters. (*Id.*). The November 2017 announcements increased customers' contract prices an average of $30 per dst by January 2018. (*Id.* at ¶ 67).

After years of annual decline from 2012 to 2015, Olin's income before taxes increased 250% from 2015 to 2017. (*Id.* at ¶ 51). Additionally, export prices increased in 2016 and 2017, disrupting India's market and triggering an investigation **[**21]** by India's Directorate General of Anti-dumping and Allied Duties into the dumping of U.S.-manufactured and exported caustic soda in India. (*Id.*).

Defendants justified their price increases based on "strong" gross domestic product ("GDP") growth; however, the national GDP averaged 2.2% growth annually between 2011 and 2015 when caustic soda prices were flat or declining, whereas from 2016 to 2017, when caustic soda prices skyrocketed, GDP increased an average of 1.9%. (*Id.* at ¶ 52). Despite capacity shutdowns, domestic supply of caustic soda was largely flat between 2016 and 2017, and significant industry excess capacity persists. (*Id.* at ¶ 50). For example, Defendants' operating rates appear to have averaged only 80 to 85% in the 2015-2018 time period. (*Id.*). Additionally, after Hurricane Harvey hit Houston in August 2017, over one-third of domestic capacity of caustic soda was disrupted but customers could still easily buy caustic soda, albeit at higher prices. (*Id.*).

On February 13, 2018, Westlake announced a $40 per dst price increase for all grades of liquid caustic soda, and the next day Olin sent letters to customers announcing an $85 per dst increase. (*Id.* at ¶ 69). By February **[**22]** 26, 2018, OxyChem, Shintech, and Formosa USA also had announced increases of $85 per dst. (*Id.*). AFPM had its annual meeting in March 2018 (*id.* at ¶ 91), and Westlake announced an additional $50 per dst increase on March 16, 2018, matching the price increase of the other companies (*id.* at ¶ 69). Additionally, Olin, OxyChem, and Westlake at the same time stopped announcing different price increase amounts for diaphragm and membrane grades. (*Id.*). In May 2018, Westlake's CEO told an investor conference that Westlake did not see a cap on caustic soda prices because demand was growing while U.S. capacity was not. (*Id.* at ¶ 70). On May 21, 2018, Olin and OxyChem sent letters to customers announcing a $40 per dst caustic soda price increase, with Formosa USA and Shintech announcing a $40 per dst increase within days and Westlake announcing a $45 per dst increase. (*Id.*). Olin announced a $50 per dst increase on August 28, 2018, and the other Defendants non-publicly implemented the same price increase. (*Id.* at ¶ 71). On November 27, 2018, Olin announced a $40 per dst increase by letters to customers. (*Id.* at ¶ 72). OxyChem, Formosa USA, and Shintech announced and implemented identical increases **[**23]** within days through direct, private contacts with customers. (*Id.*). Within a week of Olin's announcement, Westlake announced a $45 per dst increase. (*Id.*).

In late January 2019, the industry analyst IHS Markit, which is in routine contact with Defendants, forecasted non-publicly to clients that 2019 caustic soda prices would increase by the second quarter. (*Id.* at ¶ 75). Olin informed investors on February **[*154]** 5, 2019, and February 12, 2019, that prices would increase in 2019 given strong demand and "industry maintenance turnaround" by Defendants in North America. (*Id.*). On February 19, 2019, Westlake's CEO told investors that prices would increase in 2019. (*Id.*). On February 20, 2019, Olin announced a $50 per dst increase of its caustic soda by letters to customers. (*Id.* at ¶ 74). Almost immediately thereafter, OxyChem announced an $80 per dst increase and Formosa USA announced a $70 per dst increase non-publicly through direct, private contacts with customers. (*Id.*). Shortly thereafter, Westlake announced a $75 per dst increase, and Shintech announced an $80 per dst increase. (*Id.*). Defendants' costs are believed to still be stable, industry excess capacity still exists, and demand continues **[**24]** to be flat. (*Id.* at ¶ 75).

From 2016 to 2019, Defendants have had temporary planned and unplanned outages of production, including shutdowns for maintenance at around the same times, and those production outages were used in part to explain tightening supply and justify frequent price increases. (*Id.* at ¶ 49). For example, Westlake's and Formosa USA's plants experienced both planned and unplanned outages, and Olin and OxyChem stated they reduced their operating rates for various reasons. (*Id.*). In February 2018, Olin informed investors during a presentation that in addition to the capacity reductions in North America, no capacity additions were expected within the next two to three years. (*Id.*). Although this presentation was made three months after Shintech had filed a permit to say it was considering expanding its capacity, and Shintech announced in July 2018 that it was developing a new production facility, any new caustic soda production capacity would not be operational for years, and it is not clear if the new production will be sold in the United States' market. (*Id.*).

Since the beginning of the Class Period, October 2015, Defendants have earned billions of dollars in net income **[**25]** from sales of caustic soda, and their profit margins have increased dramatically. (*Id.* at ¶ 80). Prices of Olin's other products, including chlorine, have not increased nearly as much as caustic soda prices since 2015, and Olin's EBITDA (full year adjusted earnings before interest, tax, depreciation, and amortization) more than doubled between 2015 ($479 million) and 2018 ($1.27 billion), as compared to between 2012 and 2015 when it only increased 28%. (*Id.*). Oxy's chemical segment earnings, which include OxyChem's earnings, increased 44% from 2016 ($571 million) to 2017 ($822 million), and over 40% from 2017 ($822 million) to 2018 ($1.16 billion) in part due to "higher realized pricing for caustic soda." (*Id.* at ¶ 81). Westlake's Vinyls segment, which includes its caustic soda business, increased over 270% from 2016 ($174 million) to 2017 ($647 million). (*Id.* at ¶ 82). Formosa and Formosa USA also experienced significant increases in net income, with Formosa experiencing a consolidated operating profit that was "a record high level for the Company in the past 6 years." (*Id.* at ¶ 83). Shin-Etsu informed shareholders that a main factor in achieving its highest profit ever in fiscal **[**26]** year 2018 was price improvement in its PVC/Chlor-Alkali business. (*Id.* at ¶ 84).

From October 2015 to the present, Defendants entered into sales agreements and swap agreements with each other. (*Id.* at ¶ 94). For example, when Hurricane Harvey temporarily idled facilities owned by OxyChem and Formosa USA, those defendants were assisted with caustic soda supply by other producers. (*Id.*). Additionally, Olin, Oxy, and OxyChem have extensive secret co-producer supply agreements and contact with each other. (*Id.*). These swaps reward exchanges of commercially **[*155]** sensitive information among Defendants, and keep caustic soda market shares stable and increasing. (*Id.*).

Many of Defendants' customers purchase caustic soda under contracts, and the price of the product agreed to in those contracts is at times determined by a pricing index managed by the industry analyst IHS Markit (the "Index"). (*Id.* at ¶ 95). Before 2016, prices in the Index varied up and down, sometimes significantly, but after Olin's purchase of Dow's chloralkali business in 2015, caustic soda prices have tended to consistently increase. (*Id.*). Plaintiffs contend Defendants selectively provide information to IHS Markit or provide **[**27]** false information to ensure that the Index reflects the highest average contract price level practicable. (*Id.* at ¶ 96). Defendants also provide false or misleading information to try to maintain a trend of increasing market pricing. (*Id.*). At least one IHS Markit employee left sometime in 2016-2017 in part because of the Index's lack of integrity. (*Id.* at ¶ 97).

Customers have noticed differences with Defendants since October 2015. (*Id.* at ¶ 99). Customer turnover is lower, Defendants' market shares have been relatively stable, Defendants refrain from bidding competitively for business, and Defendants exercise "market disciple, " *i.e.*, refusing to agree to lower prices, raising prices in accord with each other's price increases, and not taking business from each other at a lower price. (*Id.*). Plaintiffs contend "that Defendants have formed a cartel and reached an understanding or agreement to concertedly fix prices and limit the supply of Caustic Soda." (*Id.* at ¶ 101).

II. Procedural Background

The instant action and related cases were filed in the Western District of New York on March 22, 2019 (Dkt. 1), and reassigned to the undersigned on May 8, 2019 (Dkt. 40). The cases were referred **[**28]** for the handling of non-dispositive pretrial matters to United States Magistrate Judge Michael J. Roemer (Dkt. 42), who entered a scheduling and case management order on May 17, 2019, consolidating the cases for pretrial purposes (Dkt. 49). Plaintiffs filed an Amended Complaint on May 22, 2019. (Dkt. 51).

On July 8, 2019, the joint motion to dismiss for failure to state a claim was filed (Dkt. 79), along with motions to dismiss by Oxy (Dkt. 80), Westlake (Dkt. 81), Shintech (Dkt. 82), and Formosa USA (Dkt. 84). Plaintiffs filed a memorandum in opposition to all of the July 8, 2019, motions to dismiss on August 7, 2019. (Dkt. 91). Replies were filed on August 27, 2019. (Dkt. 94; Dkt. 95; Dkt. 96; Dkt. 97; Dkt. 98).

On July 22, 2019, Formosa filed its motion to dismiss. (Dkt. 86). Plaintiffs responded on August 21, 2019 (Dkt. 93), and Formosa filed its reply on September 10, 2019 (Dkt. 101).

On October 28, 2019, Shin-Etsu filed its motion to dismiss for lack of jurisdiction. (Dkt. 103). Plaintiffs responded on November 1, 2019 (Dkt. 109), and Shin-Etsu replied on November 21, 2019 (Dkt. 110). Oral argument took place before the undersigned on December 6, 2019, and decision was reserved. **[**29]** (Dkt. 116; Dkt. 117).

DISCUSSION

I. Motions to Dismiss for Failure to State a Claim

A. Legal Standard

HN1[] "In considering a motion to dismiss for failure to state a claim pursuant to *Rule 12(b)(6)*, a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and **[*156]** documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010)*. A court should consider the motion by "accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff." *Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt., 843 F.3d 561, 566 (2d Cir. 2016)*, *cert. denied*, *137 S. Ct. 2279, 198 L. Ed. 2d 703 (2017)*. To withstand dismissal, a claimant must set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Turkmen v. Ashcroft, 589 F.3d 542, 546 (2d Cir. 2009)* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009))*.

HN2[] "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (internal quotations and citations omitted). "To state a plausible **[**30]** claim, the complaint's '[f]actual allegations must be enough to raise a right to relief above the speculative level.'" *Nielsen v. AECOM Tech. Corp., 762 F.3d 214, 218 (2d Cir. 2014)* (quoting *Twombly, 550 U.S. at 555*).

B. Sherman Act § 1

HN3[] Plaintiffs' claims arise out of *§ 1 of the Sherman Act*. "Liability under *§ 1 of the Sherman Act*, *15 U.S.C. § 1*, requires a 'contract, combination . . ., or conspiracy, in restraint of trade or commerce.'" *Twombly, 550 U.S. at 548* (quoting *15 U.S.C. § 1*). "Because *§ 1* of the Sherman Act does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy, [t]he crucial question is whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement, tacit or express." *Id. at 553* (alterations in original) (quotations and citation omitted). "[S]tating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id. at 556*. This standard "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* (footnote omitted).

HN4[] "The ultimate existence of an 'agreement' under ***antitrust law***, however, is a legal conclusion, not a factual allegation." *Mayor and City Council of Balt., Md. v. Citigroup, Inc., 709 F.3d 129, 135-36 (2d Cir. 2013)*. "[A] plaintiff may . . . assert direct evidence that the defendants **[**31]** entered into an agreement in violation of the antitrust laws." *Id. at 136*. However, "plaintiffs [are] not required to mention a specific time, place or person involved in each conspiracy allegation." *Starr v. Sony BMG Music Entm't, 592 F.3d 314, 325 (2d Cir. 2010)*. "[A] complaint may, alternatively, present circumstantial facts supporting the *inference* that a conspiracy existed." *Citigroup, 709 F.3d at 136* (emphasis in original). "[A] horizontal agreement, such as the one alleged in the case before us, may be inferred on the basis of conscious parallelism, when such interdependent conduct is accompanied by circumstantial evidence and plus factors." *Id.* (quotation omitted). "These 'plus factors' may include: a common motive to conspire, evidence that shows that the parallel acts were **[*157]** against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Id.* (quotation and footnote omitted).

HN5[] Generally, "[w]ithout more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Twombly, 550 U.S. at 556-57*. The allegations "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could **[**32]** just as well be independent action." *Id. at 557*. "[W]ithout that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory." *Id.* The Second Circuit has stated:

> Examples of parallel conduct allegations that might be sufficient under *Twombly*'s standard include "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties, " and "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason."

Citigroup, 709 F.3d at 137 (quoting *Twombly, 550 U.S. at 556 n.4* (quotation omitted)). **HN6**[] "[A]t the motion-to-dismiss stage, appellants must only put forth sufficient factual matter to plausibly suggest an inference of conspiracy, *even if* the facts are susceptible to an equally likely interpretation." *Gelboim v. Bank of Am. Corp., 823 F.3d 759, 782 (2d Cir. 2016)*. "Skepticism of a conspiracy's existence is insufficient to warrant dismissal; 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.'" *Id. at 781* (quoting *Twombly, 550 U.S. at 556* (internal **[**33]** quotation omitted)).

In the Joint Motion to Dismiss, Defendants collectively argue that Plaintiffs have failed to allege parallel conduct, and that even if parallel conduct is sufficiently alleged, Plaintiffs have also failed to include allegations of the plus factors necessary to implicate a conspiracy. Additionally, Defendants Oxy, Westlake, Shintech, and Formosa USA argue that Plaintiffs' Amended Complaint does not adequately implicate them individually in the alleged conspiracy.[1] The Court addresses each argument in turn.

C. Joint Motion

Defendants contend that Plaintiffs allege no direct evidence of a conspiracy and that the circumstantial evidence alleged by Plaintiffs is not sufficient to rise to the level of a conspiracy under *§ 1 of the Sherman Act*. (Dkt. 79-1 at 11-35). Plaintiffs do not contend to be able to allege direct evidence of a conspiracy[2] (*see* **[*158]** Dkt. 51 at ¶¶ 55, 89, 100), and instead argue that the circumstantial evidence they have alleged supports the inference of a conspiracy (Dkt. 91 at 18-40).

Plaintiffs allege that Defendants Olin, OxyChem, Formosa USA, Westlake, and Shintech announced approximately 13 times over a three-year period similar price increases of **[**34]** caustic soda at around the same time. (*See, e.g.*, Dkt. 51 at ¶ 76). The announcements were made within days of each other, sometimes through private means such as letters or phone calls to customers. (Dkt. 51 at ¶ 65). Additionally, defendants Olin, OxyChem, Formosa USA, Westlake, and Shintech allegedly began announcing grade-differentiated price increases instead of a single price increase at approximately the same time, and they stopped differentiating between grades for their price increase announcements on a similar date. (*Id.* at ¶ 63).

Plaintiffs have also alleged that these announced price increases were unprecedented—prior to the end of 2015, caustic soda prices had been stable if not declining, and there was an oversaturated supply of the product. (*Id.* at ¶ 77). Further, Plaintiffs allege that after Axiall's CEO told market analysts that he "openly hoped that Olin would cut production" (*Id.* at ¶ 47), Olin—the largest producer of caustic soda at that time—cut its production amounts, and that OxyChem, another large caustic soda producer, also cut its production amounts (*Id.* at ¶ 48). Plaintiffs allege that although these production cuts were made, the supply of caustic soda remained **[**35]** oversaturated. (*Id.* at ¶ 50). However, the production cuts gave Defendants a ruse under which they could collectively raise prices, and that despite the oversaturated supply, Defendants led their customers to believe that caustic soda was scarce or otherwise limited. (*Id.* at ¶¶ 53, 62). The Amended Complaint alleges that Defendants also justified the price increases based on "strong" GDP growth but the GDP was lower the year that caustic soda prices skyrocketed than the average GDP for the previous five years. (*Id.* at ¶ 52).

Plaintiffs further allege that Defendants were all members of various trade associations and had the opportunity to discuss the alleged scheme at trade association meetings. (*Id.* at ¶¶ 90-93). In particular, the meetings of the Vinyl Institute trade association—in which Formosa USA, Shintech, Westlake, and Oxy subsidiary OxyVinyls are the sole members—coincided with the price increase announcements in November 2015, September 2016, and November 2017. (*Id.* at ¶¶ 57-59, 65 93).

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[1] The Joint Motion to Dismiss and Joint Reply each include a short footnote contending that Plaintiffs' allegations are "plainly insufficient to state a claim against K.A. Steel." (Dkt. 79-1 at 7 n.2; Dkt. 95 at 7 n.2). ***HN7***[] "[C]ourts 'routinely decline[ ] to consider arguments mentioned only in a footnote on the grounds that those arguments are inadequately raised.'" *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC, No. 12 CIV. 7372(AT), 2020 U.S. Dist. LEXIS 9088, 2020 WL 264146, at *2 (S.D.N.Y. Jan. 17, 2020)*(alterations in original) (quoting *Phoenix Light SF Ltd. v. Bank of N.Y. Mellon, No. 14 Civ. 10104, 2017 U.S. Dist. LEXIS 145044, 2017 WL 3973951, at*20 n.36 (S.D.N.Y. Sept. 7, 2017))*.Accordingly, the Court does not separately address the sufficiency of the claims against K.A. Steel.

[2] To the extent that allegations of a direct conspiracy are included in the Amended Complaint, the Court agrees with Defendants that they are insufficiently conclusory. (Dkt.79-1 at 11-12; *see, e.g.*, Dkt. 51 at ¶ 103 ("Defendants intended to restrain trade, and did restrain trade, in Caustic Soda by reaching an agreement or understanding to end genuine price competition among themselves by supporting industry price increases and customer allocations; by manipulating a price index; by assisting each other with supply; by limiting domestic supply and exporting and selling Caustic Soda abroad (to keep it off the domestic market); and by concertedly fixing, raising, maintaining, or stabilizing the prices for Caustic Soda by other secret means and methods.")).

Defendants argue that Plaintiffs' allegations do not show parallel behavior, and even if they do, Defendants' actions are explainable as normal responses to market forces. Defendants also contend **[**36]** that the Court should not consider various aspects of Plaintiffs' allegations when determining whether the conspiracy claim is plausible.

The Court is not persuaded by Defendants' arguments, and instead finds that taken together, Plaintiffs' allegations "plausibly suggest an inference" that Defendants conspired to artificially raise the prices of caustic soda. *Gelboim, 823 F.3d at 782*. **[*159]** The Court addresses each of Defendants' arguments below.

1. Parallel Conduct

Defendants argue that Plaintiffs have not properly alleged parallel conduct through price announcements. (Dkt. 79-1 at 15-24). For the following reasons, the Court finds that Plaintiffs have sufficiently alleged that Defendants engaged in parallel conduct.

Defendants argue that in concentrated commodity industries with a small number of firms like caustic soda (oligopolies), follow-the-leader conduct is expected. (Dkt. 79-1 at 13). ***HN8***[] "Generally speaking, the possibility of anticompetitive collusive practices is most realistic in concentrated industries." *Todd v. Exxon Corp., 275 F.3d 191, 208 (2d Cir. 2001)*. "In an oligopolistic market, however, 'conscious parallelism' or 'tacit collusion' to raise or maintain prices is not *per se* unlawful because it could be the result of permissible, independent parallel **[**37]** conduct." *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 681 F. Supp. 2d 141, 166 (D. Conn. 2009)* (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993))*; *see* *Twombly, 550 U.S. at 553-54* ("Even 'conscious parallelism,' a common reaction of firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful." (alterations in original) (quotation omitted)). "At the motion to dismiss stage, however, plaintiffs need not 'offer evidence that tend[s] to rule out the possibility that the defendants were acting independently.' Instead, plaintiffs 'need only allege enough factual matter (taken as true) to suggest that an agreement was made.'" *In re Propranolol Antitrust Litig., 249 F. Supp. 3d 712, 721 (S.D.N.Y. 2017)* (citation omitted) (quoting *Starr, 592 F.3d at 320*).

Plaintiffs have alleged facts that support more than "conscious parallelism" and "follow-the-leader pricing." Defendants argue that the alleged circumstances surrounding the price announcements show that Defendants were reacting to public information, not pursuant to a conspiracy, pointing to the fact that Olin first announced a price increase which was followed by OxyChem, Westlake, Formosa USA, and Shintech. (Dkt. 79-1 at 21-24). However, Plaintiffs allege that on at least three occasions Defendants made their price increase announcements privately through letters and phone **[**38]** calls to customers (Dkt. 51 at ¶¶ 65, 72, 74), meaning that at least in those instances, there was no public announcement of a "leader" price to follow. Moreover, the Amended Complaint alleges Defendants cut production to no effect on the surplus supply of caustic soda, which allowed Defendants to make misrepresentations about the supply of caustic soda as an explanation for the drastic and unprecedented price increases of the product. (*Id.* at ¶¶ 53, 62). In other words, Plaintiffs allege Defendants took concerted action to work against what the market would otherwise dictate.

The Court does not find the cases cited by Defendants to be dispositive. The cases involve situations where the defendants made rational and lawful decisions with a natural explanation. *See* *Citigroup, 709 F.3d at 138* (holding plaintiffs failed to allege a conspiracy because "*en masse* flight from a collapsing market in which [defendants] had significant downside exposure—made perfect business sense"); *see also* *Burtch v. Milberg Factors, Inc., 662 F.3d 212, 226-28 (3d Cir. 2011)* (noting a conspiracy is not properly pleaded when "defendants' parallel conduct 'was not only compatible with, but indeed was more likely **[*160]** explained by, lawful, unchoreographed free-market behavior'" (quoting *Iqbal, 556 U.S. at 680*)); *In re Late Fee & Over-Limit Fee Litig., 528 F. Supp. 2d 953, 965 (N.D. Cal. 2007)* ("Given these 'natural **[**39]** explanations' for the increases in late fees, those increases do not support any inference of conspiracy."), *aff'd*, *741 F.3d 1022 (9th Cir. 2014)*; *Superior Offshore Int'l, Inc. v. Bristow Grp. Inc., 738 F. Supp. 2d 505, 515 (D. Del. 2010)* ("The reported facts are consistent with lawful, interdependent business behavior among oligopolists."), *order amended on reconsideration*, *No. 1:09-CV-00438-LDD, 2010 U.S. Dist. LEXIS 147376, 2010 WL 11470613 (D. Del. Dec. 1, 2010)*; *In re LTL Shipping Servs. Antitrust Litig., No. 1:08-MD-01895-*

WSD, 2009 U.S. Dist. LEXIS 14276, 2009 WL 323219, at *18 (N.D. Ga. Jan. 28, 2009) ("What the allegations show instead is that all LTL service providers had the same incentives to charge the same shipping rates, and that over time they eventually each did so."). Additionally, some of the cases relied on by Defendants involve pressure by one of the alleged conspirators to *lower* prices. *See* Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co., 917 F.3d 1249, 1263-66 (11th Cir. 2019) (finding no conspiracy where plaintiffs were auto body shops claiming that insurance companies were pressuring them to lower their prices and alleging that non-State Farm insurance companies would not pay rates higher than State Farm's publicly available rates); In re Musical Instruments and Equipment Antitrust Litig., 798 F.3d 1186, 1189-90, 1198 (9th Cir. 2015) (finding no conspiracy where plaintiffs were purchasers from Guitar Center who claimed Guitar Center conspired with guitar manufacturers by pressuring the manufacturers to implement and enforce a minimum price because "[s]uch conduct may be anticompetitive—and perhaps even violate the **[**40]** antitrust laws—but it does not suggest the manufacturers illegally agreed among themselves to restrain competition").

Here, on the other hand, Plaintiffs have not alleged that the increased prices announced and set by Defendants are a result of a "natural explanation" such as outside market forces, entities, or customers; instead, they have alleged that after years of market stability, Defendants increased the price of caustic soda in similar amounts without always publicly communicating what those price hikes would be, and made misrepresentations about why the prices were increasing. *See* In re Propranolol, 249 F. Supp. 3d at 720-21 (distinguishing *In re Musical Instruments*, finding that the "pleadings here allege a pattern of price fixing spanning several years and no clear mechanism through which the defendants could legitimately and consistently monitor each other's pricing activity"). ***HN9***[] Courts have recognized that pretextual explanations for price increases can support an inference that defendants were not acting independently. *See* DeLong Equip. Co. v. Wash. Mills Abrasive Co., 887 F.2d 1499, 1514 (11th Cir. 1989) ("[E]vidence of pretext, if believed by a jury, would disprove the likelihood of independent action[.]" (quotation omitted)); Dimidowich v. Bell & Howell, 803 F.2d 1473, 1480 (9th Cir. 1986) ("A jury reasonably could conclude that [the defendant]'s stated reason **[**41]** for refusing to sell to [the plaintiff] was a mere pretext. Thus, [the plaintiff] has presented evidence that tends to support an inference of concerted action by [the defendants] and tends to exclude the possibility of independent action."), *opinion modified on other grounds on denial of reh'g*, 810 F.2d 1517 (9th Cir. 1987); In re Linerboard Antitrust Litig., 504 F. Supp. 2d 38, 53 (E.D. Pa. 2007) ("The Third Circuit has long recognized that evidence of pretextual explanations for price increases or output restrictions, 'if believed by a jury, would disprove the **[*161]** likelihood of independent action' by an alleged conspirator." (quoting Fragale & Sons Beverage Co. v. Dill, 760 F.2d 469, 474 (3d Cir. 1985))). ***HN10***[] Additionally, courts have recognized that "price increases which occur in times of surplus or when the natural expectation would be a general market decline, must be viewed with suspicion." City of Moundridge v. Exxon Mobil Corp., 429 F. Supp. 2d 117, 133 (D.D.C. 2006) (quoting C-O-Two Fire Equipment Co. v. United States, 197 F.2d 489, 497 (9th Cir. 1952)). While Plaintiffs' allegations may not rule out the possibility that Defendants acted independently, they do at least plausibly suggest that Defendants made an agreement. *See id.* ("Defendants' additional explanations for their price increases, albeit more grounded in the pleadings, do not render plaintiffs' allegations implausible.").

Defendants also contend that Plaintiffs' allegations regarding price increase announcements are collapsed into general allegations **[**42]** that price increases were announced within a given quarter, which is not sufficient to show that the price increase announcements were parallel. (Dkt. 79-1 at 20). However, Plaintiffs make several allegations that Defendants made their announcements within days of each other. (Dkt. 51 at ¶¶ 58, 65, 70-72, 74). ***HN11***[] Moreover, it is adequate at the motion to dismiss stage to plead parallelism through a pattern of frequent price increases in similar intervals and amounts. In re Propranolol, 249 F. Supp. 3d at 721 ("Furthermore, while it is true that defendants' price increases did not always align on a monthly basis, defendants consistently raised prices on a *bi-monthly* and *quarterly* basis, which is consistent with an illegal agreement.").

Defendants further argue that the price announcement allegations are insufficient because the announcement amounts "varied widely from Defendant to Defendant." (Dkt. 79-1 at 20). First, Defendants mischaracterize Plaintiffs' allegations—the price increase announcements were substantially similar, as is demonstrated by the chart of price increase announcements in Plaintiffs' Amended Complaint. (Dkt. 51 at ¶ 76). For the 13 quarters where price increase announcements are listed, the price announcements **[**43]** for Olin, OxyChem, Westlake, Formosa USA, and Shintech were almost always within $5 to $10 per dst of each other for a product that costs hundreds of dollars. (*Id.* at ¶¶ 59, 76). **HN12**[] Additionally, Plaintiffs are not required to allege that Defendants acted uniformly, only that they acted similarly, *see* North Am. Soccer League, LLC v. U.S. Soccer Fed., Inc., 296 F. Supp. 3d 442, 460 n.26 (E.D.N.Y. 2017) ("'Parallel conduct' refers to the same or substantially similar actions taken by actors on the same level."), *aff'd*, 883 F.3d 32 (2d Cir. 2018); *see also* SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 427 (4th Cir. 2015) ("A plaintiff establishes parallel conduct when it pleads facts indicating that the defendants acted 'similarly.'"), *as amended on reh'g in part*, 801 F.3d 412, Dkt. 100 (4th Cir. 2015); In re Baby Food Antitrust Litig., 166 F.3d 112, 132 (3d Cir. 1999) ("[P]arallel pricing does not require 'uniform prices,' and permits prices within an agreed upon range.") (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)), and "the presence of some divergent conduct does not negate the allegations of other, parallel conduct," Iowa Pub. Emps.' Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc., 340 F. Supp. 3d 285, 320 (S.D.N.Y. 2018).

Defendants cite LaFlamme v. Societe Air France, 702 F. Supp. 2d 136 (E.D.N.Y. 2010), to support their position that Plaintiffs have not sufficiently alleged parallel conduct due to variability in the price and **[*162]** timing of the announcements. However, the *LaFlamme* court did not reach the issue of whether the plaintiffs alleged parallel conduct, *see* id. at 152 ("[T]he court need not decide whether plaintiffs have sufficiently **[**44]** alleged parallel conduct[.]"), and even agreed "that illegal price fixing need not be exactly simultaneous and identical in order to give rise to an inference of agreement," id. at 151. In any event, the facts in *LaFlamme* are distinguishable. The *LaFlamme* court noted that "the surcharges alleged in the Complaint are divergent (in some instances varying by a factor of three), not parallel and were not imposed in tandem, but in some instances weeks apart." *Id.* In the instant matter, no announcement of a price increase among Defendants varied by even close to a factor of three, in most instances the announced prices were the same, and were often announced days apart. At this stage of the proceedings, the allegations sufficiently allege parallel behavior.

Defendants also submit additional data, which purportedly comes from the same publication Plaintiffs used to compose their price announcement table, and represents how the prices of contracts actually changed in response to the price announcements. (Dkt. 79-1 at 22). Defendants argue the data shows the price increases that were announced were not fully realized and that prices even decreased at some times, undercutting Plaintiffs' conspiracy allegations. **[**45]** (*Id.*). However, even if the Court could consider this data at this stage of the proceedings, Defendants' argument does not undercut Plaintiffs' allegations. The data is the average quarterly price per dst in contracts for caustic soda. (Dkt. 79-3). It does not break down what the contract prices were among the different Defendants, and is certainly not a number that the Court could use to determine "whether there is consciously parallel pricing in the final price consumers pay," as Defendants suggest. Lum v. Bank of Am., 361 F.3d 217, 232 (3d Cir. 2004), *abrogated on other grounds,* Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929. Additionally, whether the price announcements consistently resulted in price increases in the same amount as the announcements is not dispositive of parallel conduct, *see* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980) ("[W]e have held agreements to be unlawful *per se* that had substantially less direct impact on price than the agreement alleged in this case."); In re Flat Glass Antitrust Litig., 385 F.3d 350, 362 (3d Cir. 2004) ("An agreement to fix prices is . . . a per se violation of the Sherman Act even if most or for that matter all transactions occurred at lower prices." (quoting In re High Fructose Corn Syrup Litig., 295 F.3d 651, 656 (7th Cir. 2002)); *see also* In re High Fructose Corn Syrup Litig., 295 F.3d at 655 ("[P]rice-fixing agreements are illegal even if the parties were completely unrealistic in supposing they could influence the market price."), especially in light of Plaintiffs' **[**46]** allegations that the overall price of caustic soda increased dramatically from 2015 to 2019 (Dkt. 51 at ¶ 85).[3]

[3] Defendants also argue that Plaintiffs included misleading information in their Amended Complaint because they excluded the 2018 and 2019 average price information, which reflects decreased prices, from their price announcement graph. (Dkt. 79-1 at 24; *see* Dkt. 79-3). Even if Plaintiffs had included those data points, as discussed above, it does not undercut their allegations that Defendants *attempted* to increase the prices by making announcements of price increases. Additionally, the pricing figures still show an overall increase of 73% between the first quarter of 2016 and the first quarter of 2019. (Dkt. 79-3; *see* Dkt. 91 at 34 n.22).

2. Supply Restrictions

Defendants argue Plaintiffs' allegations regarding supply reductions are **[*163]** not sufficient to demonstrate parallel conduct. (Dkt. 79-1 at 15-18). Plaintiffs allege that two Defendants cut production capacity during the damages period, Olin and OxyChem, as well as Axiall, which was later acquired by defendant Westlake. (Dkt. 51 at ¶¶ 48-49). Additionally, Plaintiffs contend that temporary shutdowns by Olin, OxyChem, Formosa USA, and Westlake reduced their capacity in late 2016 by an additional 10% (*id.* at ¶¶ 50-51), and that in July 2018 Shintech formally announced the development of a new production facility (*id.* at ¶ 49). Defendants contend that because the Amended Complaint alleges "that Defendants engaged in varied, non-uniform, and unilateral action with respect to the capacity and supply of caustic soda," Plaintiffs have failed to allege parallel conduct. (Dkt. 79-1 at 15).

However, the parallel conduct element of Plaintiffs' conspiracy does not rely on all Defendants having cut production at the same time; rather, as discussed above, it **[**47]** relies on Defendants allegedly coordinating price increases. The production cuts alleged in the Amended Complaint are a "plus factor": the cuts allegedly allowed Defendants to fabricate an excuse for their parallel price increases. In other words, the conspiracy alleged by Plaintiffs does not rely on how many Defendants actually cut production—just that production was cut, Defendants knew supply was still oversaturated after the production cuts, Defendants still raised their prices, and Defendants misrepresented to their customers why the prices were increasing. Similarly, it does not matter that the timing of the production cuts was staggered or that some production losses were due to temporary plant shutdowns, only that the supply *appeared* to become increasingly more constrained over time, giving Defendants an excuse to simultaneously raise their prices. (*See, e.g.*, Dkt. 51 at ¶ 100 ("[I]n both 2016 and 2017, Defendants conducted 'plant maintenance' and (in effect) limited supply to customers more or less at the same times . . . and these circumstances were used as a pretext to show market 'tightness' to justify their price increases."); *id.* at ¶ 101 ("Defendants continue to increase **[**48]** prices successfully in concert as an industry, despite sluggish demand, stable or declining costs, and excess capacity (even after accounting for Defendants' limiting of domestic supply and capacity during the Class Period)."). In this context, Shintech's announcement about building a new production facility could contribute to the illusion of constrained supply—*i.e.*, the supply is so constricted that Shintech must build a new facility to keep up with demand, even though Shintech and the other Defendants allegedly knew that supply was actually in excess. Additionally, as Plaintiffs allege, "it is unclear to what extent the new Shintech Caustic Soda production [from the new facility] will be used captively by Shintech or sold to U.S. customers." (*Id.* at ¶ 49).

Defendants also argue that the allegations regarding their facilities' less-than-full-capacity operating rates reflect an average of all their operating rates, not their individual operating rates, and that an average operating rate cannot show parallel behavior.[4] (Dkt. 79-1 at 18). Once again, the parallel behavior the conspiracy is concerned with is price hiking, not the production capacity of each Defendant. The lower average **[**49]** operating rate supports the conspiracy by creating the illusion of decreased caustic soda supply and giving the suppliers an excuse for their price increases. Additionally, because caustic soda operating capacity rate data does not exist **[*164]** publicly, alleging the individual operating rate for each Defendant would be pure speculation. (Dkt. 91 at 40 n.24).

Defendants also contend Plaintiffs' allegations that Defendants, particularly Olin, began exporting caustic soda in an attempt to further reduce the supply are undercut by other allegations in the Amended Complaint, namely that "export prices soared in 2016 and 2017 in particular." (Dkt. 79-1; *see* Dkt. 51 at ¶ 51). However, the export allegations can support Plaintiffs' conspiracy claim because even though Defendants represented to domestic customers that supply was constrained, there were apparently sufficient amounts of caustic soda for Olin to export abroad and to still have a surplus large enough to further cut its production. An increase in export prices may explain why Defendants began exporting caustic soda, but it does not render implausible Plaintiffs' allegations that the supply of caustic soda was restrained.[5] The Court finds **[**50]** Plaintiffs' version of events is plausible, and that

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[4] Defendants also argue that Plaintiffs point to no authority for the alleged operating rate data; but Plaintiffs are not required to do so at this stage of the proceedings.

is all that is required at this stage of the proceedings. *See* Gelboim, 823 F.3d at 782 ("[A]t the motion-to-dismiss stage, [plaintiffs] must only put forth sufficient factual matter to plausibly suggest an inference of conspiracy, *even if* the facts are susceptible to an equally likely interpretation.").

3. Trade Association Meetings

Defendants contend Plaintiffs' allegations that price increases generally followed trade association meetings are not sufficient to allege conspiracy. (Dkt. 79-1 at 25-26). ***HN13***[] Courts have held that, when examined on its own, a "defendant's membership in a trade association hardly renders plausible the conclusion that entity and certain other members are functioning as an ongoing, organized, structured enterprise in conducting their business." *Moss v. BMO Harris Bank, N.A., 258 F. Supp. 3d 289, 301 n.4 (E.D.N.Y. 2017)*; *see* *In re Musical Instruments, 798 F.3d at 1196* ("[M]ere participation in trade-organization meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement."); *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 349 (3d Cir. 2010)* (same). However, courts have also held that "participation in a trade association, where Defendants had opportunities to exchange information or make agreements, coupled with allegations of parallel conduct (*i.e.*, imposing the same **[**51]** inflated surcharges), are sufficient to tie these defendants to the conspiracies." *Precision Assocs., Inc. v. Panalpina World Transp., (Holding) Ltd., No. CV-08-42 JG VVP, 2013 U.S. Dist. LEXIS 177023, 2013 WL 6481195, at *33 (E.D.N.Y. Sept. 20, 2013)* (quotation and citation omitted), *report and recommendation adopted*, *No. 08-CV-00042 JG VVP, 2014 U.S. Dist. LEXIS 10345, 2014 WL 298594 (E.D.N.Y. Jan. 28, 2014)*.

In the instant matter, Plaintiffs' allegations tie the trade association meetings into the conspiracy as a whole. The Amended Complaint does not merely allege that Defendants were part of a conspiracy because they were members of trade associations, but rather alleges that the timing of the trade association meetings often coincided with the announcement of price increases by Defendants, thus suggesting a plausible inference that the trade association meetings allowed Defendants to coordinate the price increases. (*See, e.g.*, Dkt. 51 at ¶¶ 59, 91-92 (trade association meetings in March and April 2016 followed by price increase announcements in April 2016)). In particular, Plaintiffs' allegations illustrate that the meetings of the Vinyl Institute, in which the **[*165]** only full members are defendants Formosa USA, Shintech, and Westlake, as well as Oxy's subsidiary OxyVinyls, coincided with the **[**52]** price increase announcements in November 2015, September 2016, and November 2017, and additionally that the price increase announcements made by Defendants in November 2017 were done via private contact. (*Id.* at ¶¶ 57-59, 65, 93). In other words, Plaintiffs do not just allege that Defendants' membership in trade associations *could* have been a means for them to make an agreement; they allege facts sufficient to infer that Defendants *did* use trade association meetings to make an agreement. (*See id.* at ¶ 92 ("Defendants have been increasing U.S. prices during most of the months in which each of [The Chlorine Institute's] meetings occurred.")); *see also* *In re Propranolol, 249 F. Supp. 3d at 722-23* (finding trade association meetings contributed to conspiracy claim because plaintiffs "have alleged far more than the 'mere opportunity to conspire,' and so have shown a high level of interfirm communications"). Moreover, Plaintiffs' trade association allegations are just one among several "plus factors" that the Court has considered to evaluate the plausibility of the conspiracy as pleaded in the Amended Complaint as a whole.

4. Producer Supply Agreements

The Amended Complaint alleges that the relationship between Defendants was fostered **[**53]** by confidential swap and sales agreements. (Dkt. 51 at ¶¶ 94, 122). Defendants contend these allegations are conclusory and should not be credited at the motion to dismiss stage, and at most amount to opportunities to conspire not sufficient to give rise to a plausible inference of an anticompetitive agreement. (Dkt. 79-1 at 27-28). The Court recognizes that Plaintiffs' allegations about swap and sale agreements in general would not be sufficient in the absence of other

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[5] Plaintiffs further contend that it does not make economic sense that export prices soared even though Olin had entered the export market for the first time because economic theory predicts decreased export prices with new market entrants. (Dkt. 91 at 40).

"plus factors." *See* *In re Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 911 (6th Cir. 2009)* ("[A] mere opportunity to conspire does not, standing alone, plausibly suggest an illegal agreement[.]"); *Hinds Cty., Miss. v. Wachovia Bank N.A., 620 F. Supp. 2d 499, 513 (S.D.N.Y. 2009)* ("An allegation that Joint Defendants had the opportunity to interact and make an agreement does not nudge [Named Plaintiffs' claims across the line from conceivable to plausible[.]" (quotation and alterations omitted)). Accordingly, on their own, the swap and sale agreement allegations do not influence the result here.

5. Public Investor Statements

Defendants argue the public statements that they allegedly made lack the characteristics necessary to support a conspiracy claim. (Dkt. 79-1 at 28-32). Defendants assert that the following types of public statements may be considered: statements that **[**54]** reflect a back and forth dialogue leading to an agreed-upon position or an exchange of assurances preceding the conduct at issue; statements with a level of specificity regarding Defendants' planned conduct as opposed to general statements regarding industry conditions; and statements that lack a public purpose. (*Id.* at 29). The Court finds that Plaintiffs' allegations address specific statements by Defendants about planned conduct, as well as statements that allegedly lack a public purpose.

Plaintiffs allege Olin announced on November 2, 2015, that it would idle between 250,000 and 450,000 tons of caustic soda capacity (Dkt. 51 at ¶ 48), and later in November, an industry consultant publicly reported Olin was leading a new industry price increase (*id.* at ¶ 57). These statements, particularly the first statement, allege with specificity future actions Olin planned on taking, and Plaintiffs use the **[*166]** statements to support the inference that Defendants used the production cuts as a pretext to raise prices. *See* *In re Delta/AirTran Baggage Fee Antitrust Litig., 733 F. Supp. 2d 1348, 1362 (N.D. Ga. 2010)* ("Plaintiffs do not allege mere price announcements; they allege that each Defendant signaled its willingness to cut capacity and increase prices if the other Defendant acted in concert."). **[**55]**

Defendants argue the public statements included in Plaintiffs' allegations reflect limited knowledge of other Defendants' plans, referring specifically to Olin's statement that no capacity additions were expected within the next two to three years, even though Shintech by that time had planned a capacity expansion without announcing it. (Dkt. 79-1 at 30). However, as previously discussed, coordination with respect to supply cuts is not the key parallel conduct for the alleged conspiracy, the price increase announcements are; and Shintech's planned expansion could contribute to Plaintiffs' conspiracy allegations in that it adds to the alleged illusion that there was an oversupply of caustic soda.

Defendants also argue that the statement by Axiall's CEO telling analysts that caustic soda markets were oversupplied and that he "openly hoped that Olin would cut production once the proposed acquisition [of Dow's choralkali business] was completed" (*id.* at ¶ 47 (alteration in original)), does not support the conspiracy allegations in the Amended Complaint. (Dkt. 79-1 at 31-32). They contend Plaintiffs cite to an article written about a phone call with Axiall's CEO, not the transcript of the **[**56]** call itself. (*Id.* at 31). However, the Court cannot consider the transcript at this stage of the litigation—Defendants provide no explanation as to how Plaintiffs would have had a copy of that transcript to rely on when drafting the Amended Compliant in lieu of a publicly available article. Defendants further argue that Plaintiffs do not and could not allege that Olin made supply restriction decisions in response to the statement by Axiall's CEO because Olin was already evaluating the closure of some of its capacity after its acquisition of Dow's business. (*Id.*). However, the statement by the CEO of Axiall was allegedly made in August 2015, and Olin's acquisition of Dow was not completed until October 2015. (Dkt. 51 at ¶¶ 25, 47-48). In other words, even if Olin was considering production cuts right after its Dow acquisition as Defendants contend, that would still have been after the statements by Axiall's CEO.

6. Manipulation of IHS Markit

Defendants argue Plaintiffs' allegations regarding IHS Markit and the Index should not be considered because they are conclusory assertions of an agreement. (Dkt. 79-1 at 32-34). Plaintiffs allege that IHS Markit relies heavily on confidential input from Defendants, **[**57]** and that Defendants "gamed" the index to support their price increases using the loyal and friendly relationships IHS Markit's executives have with Defendants. (Dkt. 51 at ¶¶ 95-98). Plaintiffs further allege that "[o]ne or more IHS Markit employees left IHS Markit in approximately 2016-2017 at least in part because of the index's lack of integrity." (*Id.* at ¶ 97). While on their own these allegations would be insufficient to establish a conspiracy claim, Plaintiffs allege them in combination with other "plus factors," and the Court finds that although this factor in particular may be entitled to little weight, the totality of Plaintiffs' allegations make the conspiracy claim plausible.

7. Chlorine By-Product

Defendants argue that in the Complaint, "Plaintiffs choose to be willfully blind to [a] fundamental aspect of the chlor-alkali process"—how much chlorine can be produced, **[*167]** sold, stored, or otherwise utilized. (Dkt. 79-1 at 34-35). Defendants cite no authority supporting that the Court can consider this argument on a motion to dismiss pursuant to *Rule 12(b)(6)*, and, as stated several times previously in this Decision and Order, the Second Circuit has held that "at the motion-to-dismiss stage, **[**58]** appellants must only put forth sufficient factual matter to plausibly suggest an inference of conspiracy, *even if* the facts are susceptible to an equally likely interpretation." *Gelboim, 823 F.3d at 782*; *see* *In re Foreign Exch. Benchmark Rates Antitrust Litig., 74 F. Supp. 3d 581, 591 (S.D.N.Y. 2015)* ("'[A] well-pleaded complaint may proceed even if . . . actual proof of those facts is improbable, and . . . a recovery is very remote and unlikely' as long as the complaint presents *a* plausible interpretation of wrongdoing." (alterations in original) (quoting *Twombly, 550 U.S. at 556*)).

In any event, the Amended Complaint alleges that at various times throughout the Class Period, Defendants made announcements as to why the prices of caustic soda were increasing and noted, misleadingly, that the supply of caustic soda was restricted, and the allegations do not indicate that Defendants referred to chlorine production in their remarks (*see, e.g.*, Dkt. 51 at ¶¶ 52, 70, 75, 124), nor do Defendants contend that they did so. That *Defendants* did not acknowledge the market relationship between chlorine and caustic soda when discussing the price increases or supply cuts undercuts their characterization of Plaintiffs as "willfully blind to this fundamental aspect of the chlor-alkali process." (Dkt. 79-1 at 35).

D. Westlake's Motion

Westlake **[**59]** separately argues the claims against it should be dismissed because Plaintiffs have failed to allege sufficient specific facts demonstrating that Westlake was involved in the conspiracy. The Court finds the allegations against Westlake are sufficient at this stage of the proceedings.

HN14[] "Plaintiffs must allege a factual connection between each Defendant and the alleged conspiracy[.]" *Iowa Pub. Emps.' Ret. Sys., 340 F. Supp. 3d at 316*; *see* *Hinds County, 620 F. Supp. 2d at 513* ("To state a claim against each Defendant, Named Plaintiffs must make allegations that plausibly suggest that each Defendant participated in the alleged conspiracy." (quotation omitted)). "Group pleading, by which allegations are made against families of affiliated entities is simply insufficient to withstand review on a motion to dismiss." *Concord Assocs., L.P. v. Entm't Prop. Tr., No. 12 Civ. 1667 (ER), 2013 U.S. Dist. LEXIS 186964, 2014 WL 1396524, at *24 (S.D.N.Y. Apr. 9, 2014)*, *aff'd*, *817 F.3d 46 (2d Cir. 2016)*. "To provide reasonable notice to defendant of the claims against it, a complaint must plausibly suggest that the individual defendant 'actually joined and participated in the conspiracy.'" *2013 U.S. Dist. LEXIS 186964, [WL] at *23* (quoting *In re Processed Egg Prods. Antitrust Litig., 821 F. Supp. 2d 709, 719 (E.D. Pa. 2011))*.

The Amended Complaint alleges the following as to Westlake: Westlake made a series of price increase announcements in 2017 at or around the same time as the other Defendants and in similar amounts (Dkt. 51 at ¶¶ 63-65, 69-70, 72, 74, 76); Westlake decided **[**60]** at the same time as Olin and OxyChem to stop announcing different price increase amounts for different grades of caustic soda (*id.* at ¶ 69); Westlake mailed letters to customers announcing a price increase when other Defendants also privately announced a price increase to their customers (*id.* at ¶ 65); Westlake's CEO told investors that Westlake did not see any cap on caustic soda prices because demand was growing but **[*168]** no industry capacity additions were planned and U.S. capacity was not growing (*id.* at ¶¶ 70, 100); Westlake was a member of The Chlorine Institute (*id.* at ¶ 92), the Vinyl Institute (*id.* at ¶ 93), and of AFPM, which represented that "caustic was extremely tight and pricing was moving up across the board, without exception" (*id.* at ¶ 124); and Westlake temporarily shut down its plant for maintenance and outages throughout 2016 (*id.* at ¶¶ 48-49). These allegations, taken as true, illustrate that Westlake engaged or participated in most if not all of the conduct that makes the conspiracy plausible—Westlake made price increase announcements in similar amounts, at similar times, and with the same breakdown in grade as the other Defendants; Westlake sometimes made its announcements **[**61]** about price increases privately when other Defendants made announcements privately; Westlake misrepresented that the supply of caustic soda was tight; and Westlake was a member of a trade group in which the only members were other Defendants and a related affiliate, and which allegedly held three meetings during the Class Period that always coincided with price increase announcements.

Westlake argues[6] that Plaintiffs do not allege it reduced its caustic soda capacity during the Class Period, and that Plaintiffs did not include specific allegations about Westlake's operating rates, Westlake's exports, statements made by Westlake containing conflicting representations, Westlake's influence on the IHS Markit Index, or Westlake's communications with the other Defendants. (Dkt. 81-1 at 8-14). The Court is not persuaded by these arguments.

As discussed above, Plaintiffs' conspiracy does not rely on all Defendants having cut production but on Defendants announcing similar price increases and misrepresenting that those price increases were a result of reduced supply in general. The absence of allegations regarding Westlake's caustic soda capacity, operating rates, and exports does not **[**62]** render Westlake's alleged involvement in the conspiracy merely conceivable as opposed to plausible because the Amended Complaint alleges other Defendants, such as Olin and OxyChem, cut their production capacity (Dkt. 51 at ¶ 48), giving Westlake a scapegoat for the "supply restrictions." Additionally, Axiall, which Westlake later acquired, allegedly cut production capacity (*id.*), and Westlake temporarily shut down its plants for maintenance (*id.* at ¶ 49), creating more excuses to increase prices even though the supply of caustic soda was allegedly still in surplus. Moreover, the Amended Complaint contends that Westlake's statements are misrepresentations, not just statements about industry conditions, which undercuts Westlake's argument that "generic statements . . . do not make allegations of a conspiracy more plausible." (Dkt. 81-1 at 13 (quotation omitted)). The cases cited by Westlake finding generic statements to be insufficient to state a claim do not address situations where the statements are pretextual, **[*169]** *see* *Holiday Wholesale Grocery Co. v. Philip Morris Inc., 231 F. Supp. 2d 1253, 1276 (N.D. Ga. 2002)*; *In re Plasma-Derivative Protein Therapies Antitrust Litig., 764 F. Supp. 2d 991, 1001 (N.D. Ill. 2011)*, and as discussed above,***HN15***[] courts have found pretextual statements to be a viable plus factor, *DeLong Equip. Co., 887 F.2d at 1514*; *Dimidowich, 803 F.2d at 1480*; *Dill, 760 F.2d at 474*.

As far as Plaintiffs' allegations regarding IHS Markit and co-producer **[**63]** agreements, *no* Defendant was singled out as having personally influenced the IHS Markit (*id.* at ¶¶ 95-98) or having provided supply assistance to other producers (*id.* at ¶¶ 87-94). As previously discussed, the Court does not accord the IHS Markit or co-producer allegations much weight as plus factors for any Defendant due to their general nature, but instead finds the other alleged plus factors push the conspiracy from the realm of conceivability to plausibility.

Moreover, the allegations regarding Westlake's communications with other Defendants, combined with the other plus factors, are sufficient to plausibly allege that Westlake was involved in a price-fixing conspiracy. Although Plaintiffs do not identify specific communications by Westlake in their allegations, that is not necessary at this stage of the litigation. *See* *FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A., No. 16 CIV. 5263 (AKH), 2017 U.S.*

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[6] As for the arguments made by Westlake, Shintech, and Formosa USA that the Court already addressed in the discussion of the joint motion to dismiss (*see, e.g.*, Dkt. 81-1 at 8-14 (arguing that Plaintiffs do not allege the price increase announcements resulted in the prices actually increasing for Westlake's contracts, that Westlake was engaging in follow-the-leader pricing behavior, that Plaintiffs fail to acknowledge exporting caustic soda made "perfect business sense" during the Class Period, and that the article regarding statements made by Axiall's CEO does not reflect the transcript of the phone call itself)), the Court will not repeat its discussion of those arguments in its discussion of the individual motions.

*Dist. LEXIS 132759, 2017 WL 3600425, at *10 (S.D.N.Y. Aug. 18, 2017)* ("It is true that plaintiffs have failed to identify any specific interbank communications between or among defendants regarding the alleged manipulation. However, plaintiffs need not allege this type of 'smoking gun' evidence to survive a motion to dismiss."). Westlake argues that its membership in industry organizations alone does not plausibly suggest a conspiracy. **[**64]** However, as previously discussed, Plaintiffs' allegations do not merely allege Westlake's membership in trade associations, but tie the timing of the trade association meetings with the announcement of price increases by Defendants, including Westlake. Additionally, Westlake is a member of the Vinyl Institute, in which the only other members are defendants Formosa USA and Shintech, as well as Oxy subsidiary OxyVinyls, and which allegedly held three meetings during the Class Period that always coincided with price increase announcements. In particular, the Amended Complaint alleges that the Vinyl Institute met in November 2017, the same month Westlake and the other Defendants allegedly issued price increase announcements to customers privately. (Dkt. 51 at ¶¶ 65, 93).

The Court does not find Westlake's citation to *Gelboim, 823 F.3d 759*, to be dispositive. In *Gelboim*, the Second Circuit found allegations based on emails from a defendant that it had advance knowledge of the other defendants' confidential individual communications sufficiently demonstrated a high level of interfirm communications sufficient to make a conspiracy plausible, specifically noting that "[c]lose cases abound on this issue, but this **[**65]** is not one of them." *Id. at 781-82*. While the instant matter may present a closer case than that in *Gelboim* due to the absence of a "smoking gun" showing interfirm communications, like an email from Westlake to the other Defendants, the Amended Complaint's allegations that Westlake privately announced unprecedented similar price increases to those of the private announcements of other Defendants after attending trade association meetings with those Defendants are still sufficient to make Plaintiffs' conspiracy allegations plausible, particularly in light of the other "plus factors" presented by the Amended Complaint.

[*170] Accordingly, the Court denies Westlake's motion to dismiss.

E. <u>Motions by Formosa USA and Shintech</u>

Formosa USA and Shintech each separately also contend that Plaintiffs have failed to allege sufficient facts to personally implicate them in the conspiracy. (Dkt. 82-1; Dkt. 84-1). The Amended Complaint contains the following allegations specific to Formosa USA: Formosa USA made a series of price increase announcements at or around the same time as the other Defendants and in similar amounts (Dkt. 51 at ¶¶ 58-59, 63, 65, 69-70, 72, 74); Formosa USA mailed price increase letters to customers **[**66]** at or around the same time as other Defendants were privately contacting their customers about price increase announcements (*id.* at ¶¶ 65, 72); Formosa USA's sales and net income increased significantly from 2015 to 2017 (*id.* at ¶ 83); Formosa USA is a member of AFPM, The Chlorine Institute, and the Vinyl Institute, whose meetings coincided with price increase announcements (*id.* at ¶¶ 91-93, 124); Formosa USA temporarily shut down its plants for maintenance and outages throughout 2016 (*id.* at ¶¶ 48-49); and when Formosa USA's capacity at some facilities was temporarily idled by Hurricane Harvey, Formosa USA's caustic soda supply was assisted by other producers believed to be other Defendants (*id.* at ¶ 94).

The Amended Complaint contains the following allegations specific to Shintech: Shintech made a series of price increase announcements at or around the same time as the other Defendants and in similar amounts (*id.* at ¶¶ 58-59, 63-65, 69-70, 72, 74); Shintech mailed price increase letters to customers at or around the same time as other Defendants were privately contacting their customers about price increase announcements (*id.* at ¶¶ 65, 72); Shintech's profits increased in fiscal year **[**67]** 2017 despite the decline of its sales from 2016 to 2017 (*id.* at ¶ 84); Shintech is a member of the Vinyl Institute, whose meetings coincided with price increase announcements, which sometimes were private price increase announcements (*id.* at ¶¶ 91-93, 124); and Shintech announced in July 2018 that it is developing a new production facility (*id.* at ¶ 49).

The Court finds that Plaintiffs' allegations plausibly implicate Formosa USA and Shintech as part of the conspiracy. Like the allegations against Westlake, Plaintiffs allege that the price increases announced by Formosa USA and Shintech were similar to the price increase announcements made by the other Defendants. The Amended Complaint also alleges that on at least one occasion, Formosa USA and Shintech privately announced similar price increases to those of the private announcements made by other Defendants, and that at least one private announcement was made after a meeting of the Vinyl Institute, in which only Formosa USA, Shintech, Westlake, and Oxy subsidiary OxyVinyls are members. As previously discussed, the timing of the trade association meeting combined with the close timing and private means of communicating the price announcements **[**68]** make Plaintiffs' allegations more than an "averment of [an] agreement made at some unidentified place and time." *In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007)*; *see* *Precision Assocs., Inc., 2013 U.S. Dist. LEXIS 177023, 2013 WL 6481195, at *33* ("[P]articipation in a trade association, where 'Defendants had opportunities to exchange information or make agreements,' coupled with allegations of parallel conduct (*i.e.*, imposing the same inflated surcharges), are sufficient to tie these defendants to the conspiracies." (citation omitted)). Additionally, the plant shutdowns by Formosa USA and the announcement **[*171]** by Shintech that it planned on building another facility to increase production capacity contribute to the alleged illusion that supply of caustic soda was scarce.

That the Amended Complaint does not specifically allege that Formosa USA and Shintech made misrepresentations is not dispositive; the allegations discussed above are sufficient to plausibly allege that Formosa USA and Shintech knew about the conspiracy and participated in it. *See* *Iowa Pub. Emps.' Ret. Sys., 340 F. Supp. 3d at 285* ("Not every member of a conspiracy needs to issue the same threats for the conspiracy to exist. Plaintiffs have adequately pleaded that these Defendants' failures to invest in or support new market entrants was part of a conspiracy to reduce competition in the market."); **[**69]** *In re Elec. Books Antitrust Litig., No. 11 MD 2293 DLC, 2014 U.S. Dist. LEXIS 77431, 2014 WL 2535112, at *9 (S.D.N.Y. June 5, 2014)* ("Through its participation in an illegal conspiracy to fix the prices of ebooks Apple violated . . . the Sherman Act[.]").

F. Oxy's Motion

In a separate motion to dismiss, Oxy, the parent corporation of OxyChem, contends the claims against it should be dismissed with prejudice because Plaintiffs have not sufficiently alleged that Oxy personally participated in the conspiracy, that the corporate veil was pierced, or that OxyChem was acting as the agent of Oxy. (Dkt. 80-1). For the following reasons, the Court dismisses the claims against Oxy, but without prejudice.

The Court finds the Amended Complaint does not adequately allege that Oxy personally participated in the conspiracy. Plaintiffs allege that Oxy was a member of the Chlorine Institute, had increased earnings during the Class Period, and entered into secret co-producer supply agreements with Olin. (*See* Dkt. 91 at 55). However, these allegations do not plausibly allege that Oxy participated in the conspiracy—they do not suggest that Oxy helped execute the conspiracy by manipulating prices or supply because Oxy itself does not manufacture, sell, or distribute caustic soda. (Dkt. **[**70]** 51 at ¶ 29). ***HN16***[] Unlike the allegations of price hikes, misrepresentations, and communications against other Defendants, the only allegations against Oxy are general claims without specific facts as to how Oxy specifically contributed to the conspiracy. *See* *Arnold Chevrolet LLC v. Tribune Co., 418 F. Supp. 2d 172, 178 (E.D.N.Y. 2006)* ("[I]n the antitrust context, courts have held that absent allegations of anticompetitive conduct by the parent, there is no basis for holding a parent liable for the alleged antitrust violation of its subsidiary.").

Additionally, Plaintiffs have failed to adequately allege that the corporate veil should be pierced. ***HN17***[] "As a general matter . . ., a corporate relationship alone is not sufficient to bind a parent corporation for the actions of its subsidiary." *De Jesus v. Sears, Roebuck & Co., 87 F.3d 65, 69 (2d Cir. 1996)* (alteration and quotation omitted); *United States v. Bestfoods, 524 U.S. 51, 61, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998)* ("It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries." (quotation omitted)). "But there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter* ***[**71]*** *alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes[.]" *Id. at 62*.

[*172] ***HN18***[] "Under New York choice-of-law principles, the issue of whether the corporate veil may be pierced is determined under the law of the state of incorporation." *In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390,* 418 (S.D.N.Y. 2011). Because Oxy's subsidiary OxyChem is alleged to be a New York corporation, New York law applies.[7] ***HN19***[] In New York, "piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Morris v. N.Y. State Dep't of Taxation & Fin., 82 N.Y.2d 135, 141, 623 N.E.2d 1157, 603 N.Y.S.2d 807 (1993)*.

HN21[] The Second Circuit has identified the following factors as useful for determining whether one company has dominated another under New York law:

> (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, *i.e.*, issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) **[**72]** common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own.

Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 933 F.2d 131, 139 (2d Cir. 1991). "[T]he corporation's separate identity is generally respected, and the proponent of disregarding a corporation's separate identity bears a heavy burden." *In re Digital Music, 812 F. Supp. 2d at 418* (citing *TNS Holdings, Inc. v. MKI Sec. Corp., 92 N.Y.2d 335, 339, 703 N.E.2d 749, 680 N.Y.S.2d 891 (1998)* (***HN22***[] "Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences.")).

[*173] In the instant matter, the only factual allegations Plaintiffs make regarding Oxy's "domination" over OxyChem are that "Oxy manufactures, sells, and distributes Caustic Soda through its wholly-owned and controlled subsidiary **[**73]** and chemicals business, defendant Occidental Chemical Corporation" (Dkt. 51 at ¶ 28), and that "OxyChem is a wholly-owned subsidiary of defendant Oxy" that "manufactures, sells, and distributes Caustic Soda to customers throughout the United States" (*id.* at ¶ 29). ***HN23***[] These allegations are insufficient to allege a basis to pierce the corporate veil. *See In re Digital Music, 812 F. Supp. 2d at 419* ("It is clear that simply owning, even wholly owning, a subsidiary is insufficient to pierce the corporate veil."); *Spagnola v. Chubb Corp., 264 F.R.D. 76, 87 (S.D.N.Y. 2010)* ("[C]ourts routinely refuse to pierce the corporate veil based on allegations limited to the existence of shared office space or overlapping management, allegations that one company is the wholly-owned subsidiary of another, or that companies are to be considered as a whole." (quotation omitted)).

Plaintiffs contend the allegations that Oxy "proudly noted in a February 2017 investor presentation that 'Caustic soda prices [had] reversed their multi-year trend of steady decline in mid-2016,'" and Oxy's increased profits

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[7] The parties dispute whether New York's choice-of-law rule applies the veil-piercing standard from the state of incorporation of the subsidiary or the parent corporation. (Dkt. 91 at 56; Dkt. 94 at 9). ***HN20***[] Courts have found that New York's choice-of-law rule applies the law of the subsidiary's state of incorporation. *See Fletcher v. Atex, Inc., 68 F.3d 1451, 1456 (2d Cir. 1995)* ("Because [subsidiary] was a Delaware corporation, Delaware law determines whether the corporate veil can be pierced in this instance."); *Nat'l Gear & Piston, Inc. v. Cummins Power Sys., LLC, 975 F. Supp. 2d 392, 401 (S.D.N.Y. 2013)* ("CPS, the subsidiary, is a Delaware-based corporation, and Cummins, the parent, is an Indiana-based corporation. Because Plaintiff seeks to disregard the subsidiary's (CPS's) corporate form and hold the parent (Cummins) liable, Delaware law governs Plaintiff's veil-piercing attack."). The case cited by Plaintiffs is not dispositive—the court did not reach the issue of which state's law governs because it determined that the corporate veil was not pierced under either New York or Delaware law. *See In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 418 (S.D.N.Y. 2011)* ("In determining whether to pierce the corporate veil in either state, courts consider allegations of disregarding corporate formalities, siphoning or intermingling of funds, inadequate capitalization, or that the corporation is a mere sham acting for the shareholder, among others.").

demonstrate domination. (Dkt. 91 at 57-58; *see* Dkt. 51 at ¶ 61). The Court disagrees. ***HN24***[] Announcements made to the general public regarding increased profits due to present market conditions on their own are insufficient **[**74]** to infer direction of a subsidiary by a parent. *See* *Freeman v. Complex Computing Co., 119 F.3d 1044, 1053 (2d Cir. 1997)* ("[I]n determining whether 'complete control' exists, we have considered such factors as . . . whether the corporations are treated as independent profit centers. . . . No one factor is decisive."); *see also* *Anderson News, L.L.C. v. Am. Media, Inc., 899 F.3d 87, 110 (2d Cir. 2018)*, *cert. denied*, *139 S. Ct. 1375, 203 L. Ed. 2d 609 (2019)* ("These statements are as consistent with legitimate assessment of industry conditions . . . as with an illegal antitrust conspiracy[.]").

Plaintiffs also argue they sufficiently allege that OxyChem acted as the agent of Oxy. (Dkt. 91 at 59-63). ***HN25***[] "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Merrill Lynch Inv. Managers v. Optibase, Ltd., 337 F.3d 125, 130 (2d Cir. 2003)* (quotations and citation omitted); *Faith Assembly v. Titledge of N.Y. Abstract, LLC, 106 A.D.3d 47, 58, 961 N.Y.S.2d 542 (2d Dep't 2013)*. "Essential to the agency relationship is the notion that the agent acts subject to the principal's direction and control." *Lumbermens Mut. Cas. Co. v. Franey Muha Alliant Ins. Servs., 388 F. Supp. 2d 292, 301 (S.D.N.Y. 2005)*; *see* *Maurillo v. Park Slope U-Haul, 194 A.D.2d 142, 146, 606 N.Y.S.2d 243 (2d Dep't 1993)* ("The agent is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority."). "A *full showing* of agency supported by an accepted theory of agency or contract law is required, and generalized allegations of affiliation are insufficient." *Masefield AG v. Colonial Oil Indus., Inc., No. 05 Civ 2231 (PKL), 2005 U.S. Dist. LEXIS 6737, 2005 WL 911770, at *5 (S.D.N.Y. Apr. 18, 2005)* (emphasis added). **[**75]** "Anything short of requiring a *full* showing of some accepted theory under agency or contract law imperils a vast number of parent corporations." *Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 780 (2d Cir. 1995)*.

As discussed above, Plaintiffs have failed to adequately allege OxyChem was subject to the direction or control of Oxy. *See, e.g.,* **[*174]** *Cortlandt St. Recovery Corp. v. Deutsche Bank AG, London Branch, No. 14-CV-01568 JPO, 2015 U.S. Dist. LEXIS 114533, 2015 WL 5091170, at *6 (S.D.N.Y. Aug. 28, 2015)* ("Cortlandt's allegation that DBSI is a wholly owned subsidiary is insufficient to show that DBSI does all the business DBAG could do."). In addition to the allegations discussed in the veil-piercing section, Plaintiffs rely on their allegation that "[t]he anticompetitive and unlawful acts alleged against the Defendants in this class action complaint were authorized, ordered, or performed by Defendants' respective officers, agents, employees, or representatives, which actively engaged in the management, direction, or control of Defendants' businesses or affairs." (Dkt. 91 at 61). This generalized and conclusory allegation is not sufficient to plausibly allege an agency relationship so as to withstand a motion to dismiss. *See* *AICO Int'l, E.C. v. Merrill Lynch & Co., 98 Fed. Appx. 44, 46-47 (2d Cir. 2004)* ("[C]onclusory allegations of a general agency relationship between a signatory and non-signatory do not suffice **[**76]** to compel . . . unwilling non-signatories to arbitrate under that theory." (citing *Merrill Lynch, 337 F.3d at 130-31*)).

Accordingly, the Court finds it appropriate to dismiss the claims as to Oxy; however, the Court also finds it is conceivable that Plaintiffs could obtain the facts necessary through discovery to allege a claim against Oxy under a veil-piercing or agency theory. *See* *Parfitt Way Mgmt. Corp. v. GSM by Nomad, LLC, No. 817CV0299GTSCFH, 2018 U.S. Dist. LEXIS 105285, 2018 WL 3118264, at *9 (N.D.N.Y. June 25, 2018)* ("[B]ecause it is conceivable to the Court that Plaintiff already possesses (or can obtain through discovery) the facts necessary to allege grounds to pierce the corporate veil, the Court will dismiss Plaintiff's Third Claim only without prejudice."). One of Oxy's subsidiaries, OxyVinyl, was a member of the Vinyl Institute, in which the only other members are Westlake, Formosa USA, and Shintech, and the meetings of which corresponded to three price increase announcements by Westlake, Formosa USA, Shintech, and OxyChem. Additionally, Oxy allegedly acknowledged that "Caustic soda prices [had] reversed their multi-year trend of steady decline in mid-2016" (Dkt. 51 at ¶ 61) and Oxy's increased profits (Dkt. 91 at 57-58). Although these allegations do not sufficiently establish **[**77]** Oxy's involvement in the alleged conspiracy to withstand a motion to dismiss, the Court is not prepared to conclude that discovery could not reveal information that would allow Plaintiffs to successfully implicate Oxy in a conspiracy. Accordingly, the dismissal of the claims against Oxy is without prejudice.

II. Motions to Dismiss for Lack of Personal Jurisdiction

Formosa and Shin-Etsu, foreign parent corporations to Formosa USA and Shintech, respectively, both move to dismiss the allegations against them pursuant to *Federal Rule of Civil Procedure 12(b)(2)* for lack of personal jurisdiction. (Dkt. 86; Dkt. 103). The Court addresses each motion in turn.

A. Legal Standard

HN26[] "On a *Fed. R. Civ. P. 12(b)(2)* motion to dismiss for lack of personal jurisdiction, [the] plaintiff bears the burden of showing that the court has jurisdiction over the defendant." *In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 206 (2d Cir. 2003)*. "A plaintiff may meet this burden 'by pleading in good faith . . . legally sufficient allegations of jurisdiction, *i.e.*, by making a 'prima facie showing' of jurisdiction.'" *Gaymar Indus., Inc. v. FirstMerit Bank, N.A., No. 06-CV-70S, 2007 U.S. Dist. LEXIS 98974, 2007 WL 894217, at *3 (W.D.N.Y. Mar. 21, 2007)* (quoting *Jazini v. Nissan Motor Co.,* ***[*175]*** *Ltd., 148 F.3d 181, 184 (2d Cir. 1998))*. "A plaintiff can make such a prima facie showing through affidavits and supporting material containing sufficient facts which, if credited, would establish personal jurisdiction over the defendant." *Id.* (citing *Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996))*. "[W]here **[**78]** the issue is addressed on affidavits, all allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor, notwithstanding a controverting presentation by the moving party." *A.I. Trade Fin., Inc. v. Petra Bank, 989 F.2d 76, 79-80 (2d Cir. 1993)*.

HN27[] "The requirement that a court have personal jurisdiction flows not from Art. III, but from the *Due Process Clause*. . . . It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)*. "Federal courts must satisfy three requirements in order to exercise personal jurisdiction over an entity: (1) the entity must have been properly served, (2) the court must have a statutory basis for exercising personal jurisdiction, and (3) the exercise of personal jurisdiction must comport with constitutional due process." *FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A., No. 16 CIV. 5263 (AKH), 2018 U.S. Dist. LEXIS 171999, 2018 WL 4830087, at *6 (S.D.N.Y. Oct. 4, 2018)*.

HN28[] "Due process permits a court to exercise personal jurisdiction over a non-resident where the maintenance of the suit would not 'offend traditional notions of fair play and substantial justice.'" *Porina v. Marward Shipping Co., 521 F.3d 122, 127 (2d Cir. 2008)* (quoting *Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)* (internal quotation omitted)). To determine whether exercising personal jurisdiction comports with due process, "we ask whether the defendant has sufficient minimum contacts with the forum to justify the court's **[**79]** exercise of personal jurisdiction." *Id.* "The constitutional minimum contacts inquiry for personal jurisdiction requires us to distinguish between two forms of jurisdiction." *Id.* "Specific jurisdiction is available when the cause of action sued upon arises out of the defendant's activities in a state. General jurisdiction, in contrast, permits a court to adjudicate any cause of action against the . . . defendant, wherever arising, and whoever the plaintiff." *Brown v. Lockheed Martin Corp., 814 F.3d 619, 624 (2d Cir. 2016)*. "If the defendant has sufficient minimum contacts, we proceed to the second stage of the due process inquiry, and consider whether the assertion of personal jurisdiction is reasonable under the circumstances of the particular case." *Porina, 521 F.3d at 127* (quotation omitted).

B. Formosa

Formosa is a Taiwanese company that moves to dismiss Plaintiffs' Amended Complaint for lack of personal jurisdiction. (Dkt. 86). The parties do not dispute that service was properly effectuated, and Plaintiffs concede that the Court does not have general jurisdiction over their claims. Thus, the disputes before the Court are whether there is a statutory basis for personal jurisdiction and whether the Court's exercise of personal jurisdiction would comport with due process. **[**80]** Plaintiffs contend there are two statutes that render its service of process effective: (1) *Section 12 of the Clayton Act, 15 U.S.C. § 22*, and (2) *Federal Rule of Civil Procedure 4(k)(2)*.

1. Clayton Act

HN29[] Plaintiffs contend that *§ 12 of the Clayton Act* provides a statutory basis for jurisdiction. (Dkt. 93 at 20). "The *Clayton Act* **[*176]** provides for nationwide service of process of a corporation for any action under the antitrust laws." *FrontPoint, 2018 U.S. Dist. LEXIS 171999, 2018 WL 4830087, at *6*; *see* *15 U.S.C. § 22*. However, the "service of process provision can properly confer personal jurisdiction over a defendant only when the action is brought in the district where the defendant resides, is found, or transacts business, that is, the district where *Section 12* venue lies." *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 427 (2d Cir. 2005)* (quotation omitted). In the instant matter, Plaintiffs do not dispute that Formosa does not reside or transact business in the Western District of New York. (Dkt. 93 at 19). Accordingly, *Section 12* does not provide a basis for personal jurisdiction over Formosa.

Plaintiffs argue the relevant geographic area for assessing minimum contacts under *§ 12 of the Clayton Act* is the United States, not New York. (Dkt. 93 at 20); *see* *FrontPoint, 2018 U.S. Dist. LEXIS 171999, 2018 WL 4830087, at *6* ("Where a civil action arises under a federal law that provides for nationwide service of process, the relevant geographic area for assessing minimum contacts is the **[**81]** United States as a whole, not just New York."); *In re Magnetic Audiotape, 334 F.3d at 207-08* (overruling dismissal of defendant where district court denied motion for limited discovery regarding whether defendant had "sufficient minimum contacts with the United States to satisfy due process"). *HN30*[] However, the cases Plaintiffs cite speak to the third part of the personal jurisdiction analysis—whether exercising personal jurisdiction under *§ 12* would comport with constitutional due process—not whether there is a statutory basis for jurisdiction, and Second Circuit precedent clearly establishes that the Clayton Act only confers personal jurisdiction over a defendant when the action is brought in the district where the defendant resides, is found, or transacts business. *Daniel, 428 F.3d at 427*.

2. *Federal Rule of Civil Procedure 4(k)(2)*

HN31[] *Rule 4(k)(2)* provides that for claims arising under federal law, "serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject **[*177]** to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws." *Fed. R. Civ. P. 4(k)(2)*. "*Rule 4(k)(2)* . . . allows the exercise of personal jurisdiction by a federal district court when three requirements are met: (1) the **[**82]** claim must arise under federal law; (2) the defendant must not be subject to jurisdiction in any state's courts of general jurisdiction; and (3) the exercise of jurisdiction must be consistent with the United States Constitution and laws." *Porina, 521 F.3d at 127* (quotations omitted). "*Rule 4(k)(2)* was specifically designed to 'correct[] a gap' in the enforcement of federal law in international cases. The gap arose from the general rule that a federal district court's personal jurisdiction extends only as far as that of a state court in the state where the federal court sits." *Porina, 521 F.3d at 126* (citation omitted) (quoting *Fed. R. Civ. P. 4* advisory committee's note, 1993 Amendments).

It is undisputed that Plaintiffs' claims arise under federal law: *Sherman Act § 1*. Accordingly, the Court addresses whether Plaintiffs have shown that Formosa is not subject to jurisdiction in any state's courts of general jurisdiction, and whether the Court's exercise of jurisdiction is consistent with the Constitution.

a. "Subject to Jurisdiction"

There is some question as to whether Plaintiffs have met their burden of establishing that Formosa is not subject to jurisdiction in any state's courts of general jurisdiction. *HN32*[] "In this Circuit, plaintiffs need to certify that the **[**83]** foreign defendants are not subject to jurisdiction in any other state to meet the second requirement of *Fed. R. Civ. P. 4(k)(2)*." *In re SSA Bonds Antitrust Litig., F. Supp. 3d , No. 16 CIV. 3711 (ER), 2019 U.S. Dist. LEXIS 172939, 2019 WL 4917608, at *12 (S.D.N.Y. Oct. 4, 2019)*. At oral argument, counsel for Plaintiffs argued that the Supreme Court's holding in *Daimler AG v. Bauman, 571 U.S. 117, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014)*, moots the certification's necessity. (Dkt. 117 at 83-85). In *Daimler*, the Supreme Court found it was improper for a California court to assert general personal jurisdiction over a German corporation after determining that the German corporation's "slim contacts" with California did not render it at home in the state. *Id. at 136-37*. In *Daimler*'s wake, Plaintiffs have not alleged here that Formosa is at home in any U.S. state, but instead allege Formosa is at home in Taiwan. (Dkt. 51 at ¶ 34). Plaintiffs argue that no U.S. state can assert general jurisdiction over Formosa because Formosa is not at home in any U.S. state, and as a result requiring Plaintiffs to submit a certification would be superfluous.

The Court is not persuaded by Plaintiffs' argument. Plaintiffs cite no case law to support their contentions, and the Court notes that several courts in this Circuit have required a certification post-*Daimler. See In re SSA Bonds Antitrust Litig., 2019 U.S. Dist. LEXIS 172939, 2019 WL 4917608, at *12*; *7 W. 57th St. Realty Co., LLC v. Citigroup, Inc., No. 13 CIV. 981 PGG, 2015 U.S. Dist. LEXIS 44031, 2015 WL 1514539, at *13 (S.D.N.Y. Mar. 31, 2015)*, **[**84]** *aff'd*, *771 F. App'x 498 (2d Cir. 2019)*. Plaintiffs' position assumes that *Daimler* eviscerated the possibility of a court finding general jurisdiction with regards to foreign parent corporations. This contention misreads *Daimler*'s holding. While *Daimler* significantly limited the factual scenarios where general jurisdiction could be asserted over a foreign parent corporation, it did not eliminate the possibility. *571 U.S. at 138-39* ***HN33***[] (holding that to assert general jurisdiction over a foreign corporation, it must be found that the "corporation's affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State." (alteration in original) (quotations omitted)).

Stated differently, if a state court could find that Formosa had affiliations with the forum state that were so continuous and systematic that it was rendered essentially at home in the state, *Rule 4(k)(2)* would not apply. That Plaintiffs allege Formosa is at home in Taiwan does not mean that Formosa is not at home in any state; the certification requires Plaintiffs to go a step further and state that, to the best of their knowledge, Formosa would not be subject to suit in courts of general jurisdiction of any **[**85]** state. ***HN34***[] Moreover, the certification requirement is a blanket requirement that is not applied on a case-by-case basis, and the Court agrees with other courts in this Circuit that not requiring a certification "would encourage similarly-situated plaintiffs—those suing foreign corporations under federal law—to omit any allegations tying defendants to a specific state, in hopes of engaging the broader minimum contacts analysis of *Rule 4(k)(2)*, which only requires contacts with the United States as a whole." *7 W. 57th St. Realty Co., LLC v. Citigroup, Inc., No. 13 CIV. 981 PGG, 2015 U.S. Dist. LEXIS 44031, 2015 WL 1514539, at *13 (S.D.N.Y. Mar. 31, 2015)*, *aff'd*, *771 F. App'x 498 (2d Cir. 2019)*.

However, as discussed below, the Court finds it appropriate to allow for limited jurisdictional discovery to establish whether Formosa had sufficient minimum contacts with the United States. Accordingly, the Court will give Plaintiffs an opportunity to submit a certification before jurisdictional discovery commences.

[*178] b. "Consistent with the United States Constitution and Laws"

At this stage, Plaintiffs have not met their burden of establishing that the Court's exercise of personal jurisdiction would comport with the requirements of the Constitution.[8] ***HN35***[] "Due process permits **[**86]** a court to exercise personal jurisdiction over a non-resident where the maintenance of the suit would not 'offend traditional notions of fair play and substantial justice.'" *Porina, 521 F.3d at 127* (quoting *Int'l Shoe Co., 326 U.S. at 316* (internal quotation omitted)). As previously discussed, courts in this Circuit apply a two-step analysis when determining whether a court's exercise of personal jurisdiction comports with due process:

> First, we ask whether the defendant has sufficient minimum contacts with the forum to justify the court's exercise of personal jurisdiction. . . . If the defendant has sufficient minimum contacts, we proceed to the second stage of the due process inquiry, and consider whether the assertion of personal jurisdiction is reasonable under the circumstances of the particular case.

[8] ***HN36***[] This requirement under *Rule 4(k)(2)* that the exercise of jurisdiction be consistent with the United States Constitution and laws, necessarily overlaps with the requirement that a Court may only exercise personal jurisdiction if it comports with constitutional due process.

Id. (citations and quotation omitted).

HN37[] "[M]inimum contacts necessary to support [specific] jurisdiction exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 732 F.3d 161, 170 (2d Cir. 2013)* (quotation and original alteration omitted). The parties do not dispute that Plaintiffs must establish minimum contacts with the United States as whole, not New York in particular. *See* ***[**87]*** *Dardana Ltd. v. Yuganskneftegaz, 317 F.3d 202, 207 (2d Cir. 2003)* ("Under [*Rule 4(k)(2)*], a defendant sued under federal law may be subject to jurisdiction based on its contacts with the United States as a whole[.]"); *S.E.C. v. Softpoint, Inc., No. 95 CIV. 2951 GEL, 2001 U.S. Dist. LEXIS 286, 2001 WL 43611, at *3 (S.D.N.Y. Jan. 18, 2001)* ("[W]here, as here, the United States, and not the State of New York, is the only sovereign whose power to adjudicate is in question, it logically follows that the relevant 'minimum contacts' . . . should be the defendant's contacts with the United States, and not his contacts with the State of New York.").

Plaintiffs argue that their allegations as to Formosa's direct participation in the conspiracy are sufficient to establish specific jurisdiction. However, Plaintiffs' allegations against Formosa are general and conclusory. Plaintiffs do not allege specifics as to how Formosa assisted with either raising prices or contributing to the appearance of a constrained supply, but instead allege that Formosa was a member of various trade organizations and that its profits increased as a result of the pricing increases. (Dkt. 51 at ¶¶ 34, 124). These general allegations do not establish contacts sufficient for specific jurisdiction. *See* *In re S. African Apartheid Litig., 643 F. Supp. 2d 423, 435 (S.D.N.Y. 2009)* ("Periodic appearances **[**88]** at trade shows or investors' conferences do not constitute continuous and systematic business contacts necessary to establish general jurisdiction."); *see also* *In re Musical Instruments, 798 F.3d at 1196* ("[M]ere participation in trade-organization meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement.").

Plaintiffs also submit an affidavit and data from a third-party website **[*179]** suggesting that Formosa exported caustic soda to the United States to three different customers during the class period.[9] (*See* Dkt. 93-7). ***HN38***[] "Single acts of commercial activity, when forming the basis of a plaintiff's claims, can satisfy the constitutional requirements of Due Process." *FrontPoint, 2018 U.S. Dist. LEXIS 171999, 2018 WL 4830087, at *7* (citing *Chloe v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 171 (2d Cir. 2010)*). Defendants contend that the information is hearsay and should not be considered by the Court for purposes of this motion, and that even if the Court did consider the documents, Formosa's export of caustic soda is "diametrically opposed to one of the central theories of Plaintiffs' case," and as a result such allegations are not "suit-related" and cannot support specific jurisdiction over Formosa. (Dkt. 101 at 8). ***HN39***[] "While it is proper for a court to rely on affidavits to establish jurisdictional facts, hearsay evidence **[**89]** submitted by a plaintiff is not sufficient to defeat a motion to dismiss for lack of personal jurisdiction." *Gosain v. State Bank of India, 689 F. Supp. 2d 571, 582 (S.D.N.Y. 2010)*, *vacated in part on other grounds*, *414 F. App'x 311 (2d Cir. 2011)*; *see also* *J.S. v. Attica Central Schools, 386 F.3d 107, 110 (2d Cir. 2004)* ("We may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but we may not rely on conclusory or hearsay statements contained in the affidavits."). The Court agrees that the documents from the third-party website submitted by Plaintiffs are inadmissible hearsay, and does not consider them for purposes of the personal jurisdiction analysis. *See* *DeLorenzo v. Ricketts & Assocs., Ltd., No. 15-CV-2506 (VSB), 2017 U.S. Dist. LEXIS 156415, 2017 WL 4277177, at *7 n.13 (S.D.N.Y. Sept. 25, 2017)* ("Plaintiff may not

[9] In its reply, Formosa provided documentation illustrating that those shipments were caustic soda that Formosa USA purchased from Formosa and then subsequently sold to Formosa USA's customers, and that Formosa shipped the caustic soda to those customers at Formosa USA's behest. (Dkt. 101-2 at ¶¶ 4-9; Dkt. 101-3; Dkt. 101-4; Dkt. 101-5). ***HN40***[] However, prior to an evidentiary hearing or trial, "where the issue is addressed on affidavits, all allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor, notwithstanding a controverting presentation by the moving party." *A.I. Trade Fin., Inc., 989 F.2d at 79-80*.

rely on a LinkedIn profile to establish jurisdiction, as such an online profile is hearsay and does not qualify as admissible evidence."), *aff'd sub nom.* DeLorenzo v. Viceroy Hotel Grp., LLC, 757 F. App'x 6 (2d Cir. 2018).[10]

Plaintiffs further argue they have established minimum contacts by demonstrating that Formosa USA was an agent of Formosa. **HN41**[] "For purposes of alleging presence within the judicial district sufficient to satisfy the Due Process Clause, a parent-subsidiary relationship does not itself create jurisdiction over the person unless the subsidiary is the alter ego of the parent or a mere agent acting at the parent's directions." Alki Partners, L.P. v. Vatas Holding GmbH, 769 F. Supp. 2d 478, 489 (S.D.N.Y. 2011) (quotation omitted), **[**90]** *aff'd sub nom.* Alki Partners, L.P. v. Windhorst, 472 F. App'x 7 (2d Cir. 2012). "Agency is a legal concept that depends on the existence of three elements: **[*180]** (1) the manifestation by the principal that the agent shall act for him; (2) the agent's acceptance of the undertaking; *and* (3) the understanding of the parties that the principal is to be in control of the undertaking." Cleveland v. Caplaw Enters., 448 F.3d 518, 522 (2d Cir. 2006) (quotations omitted). Although *Daimler* prevents Plaintiffs from asserting an agency relationship as the basis for general jurisdiction over Formosa, the Supreme Court also recognized that "[a]gency relationships . . . may be relevant to the existence of *specific* jurisdiction." 571 U.S. at 135 n.13. "As such, a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there." *Id.*

The parties do not raise the issue of what body of agency law should apply when the minimum contacts analysis pertains to the United States as a whole and not just New York, but instead base their arguments on New York agency law. "As 'there is no discernable difference between federal common law principles of agency and New York agency law,'" the Court need not address whether the application of New York law is inappropriate here. Young-Wolff v. John Wiley & Sons, Inc., No. 12-CV-5230 (JPO), 2016 U.S. Dist. LEXIS 3614, 2016 WL 154115, at *6 n.5 (S.D.N.Y. Jan. 12, 2016) (quoting Meisel v. Grunberg, 651 F. Supp. 2d 98, 122 (S.D.N.Y. 2009)); *see* Charles Schwab Corp. v. Bank of Am. Corp., 883 F.3d 68, 85 (2d Cir. 2018) ("[W]here we have found **[**91]** personal jurisdiction based on an agent's contacts, we have never suggested that due process requires something more than New York law."); Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633, 687 (S.D.N.Y. 2006) ("The plaintiffs seek to apply New York or federal common law principles of agency law, observing that they are identical."), *judgment entered sub nom*. Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 01 CIV.9882(DLC), 2006 U.S. Dist. LEXIS 86609, 2006 WL 3469542 (S.D.N.Y. Dec. 1, 2006), and *aff'd*, 582 F.3d 244 (2d Cir. 2009); *see also*Int'l Bus. Mach. Corp., v. Liberty Mut. Ins. Co., 363 F.3d 137, 143 (2d Cir. 2004) ("Choice of law does not matter, however, unless the laws of the competing jurisdictions are actually in conflict.").

HN42[] "A parent corporation may be sued in [the venue] when the relationship between the foreign parent and the local subsidiary validly suggests the existence of an agency relationship or the parent controls the subsidiary so completely that the subsidiary may be said to be simply a department of the parent." Koehler v. Bank of Bermuda Ltd., 101 F.3d 863, 865 (2d Cir. 1996). "[T]here is jurisdiction over a principal based on the acts of an agent where the alleged agent acted in [the venue] for the benefit of, with the knowledge and consent of, and under some control by, the nonresident principal." Charles Schwab, 883 F.3d at 85 (quotation omitted). "A plaintiff attempting to establish personal jurisdiction over a defendant who has never been present in the [venue] and only acted through subsidiaries or agents need only show that the subsidiary 'engaged in **[**92]** purposeful activities in this [venue],' that those activities were 'for the benefit of and with the knowledge and consent of' the defendant, and that the defendant 'exercised some control over' the subsidiary in the matter that is the subject of the lawsuit." Ingenito v. Riri USA, Inc., 89 F. Supp. 3d 462, 476 (E.D.N.Y. 2015) (quoting Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460, 467, 522 N.E.2d 40, 527 N.Y.S.2d 195 (1988)).

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[10] Plaintiffs also to refer to "over thirty U.S. patents" held by Formosa and Formosa USA. (Dkt. 93 at 15). However, holding patents is insufficient to establish specific jurisdiction because the allegations in the Amended Complaint bear no relation to patents. *See* Am. Wave Machs., Inc. v. Surf Lagoons, Inc., No. 13-cv-3204-CAB (NLS), 2014 U.S. Dist. LEXIS 184831, 2014 WL 10475281, at *8 (S.D. Cal. Nov. 12, 2014) ("[A]lthough the patent does constitute purposeful direction of activities at the United States, AWM's infringement claims do not arise out of or relate to the Klimaschewski/ATV patent.").

Plaintiffs allege that Formosa USA's ownership is shared among Formosa and members of the Wang family (Dkt. 51 at ¶ 34), and that Formosa treats Formosa USA's Livingston, New Jersey offices as **[*181]** its headquarters[11] (Dkt. 93-2 at 27; Dkt. 93-3 at 3; Dkt. 93-7 at 44-49). Plaintiffs also submitted Formosa's audited financial statements which, translated, characterize Formosa as the "main sale target" for Formosa USA's raw material production. (Dkt. 93-4 at 30). Further, the Amended Complaint alleges that Formosa USA's activities increased Formosa's operating profit by 68.5% from 2016 to 2017. (Dkt. 51 at ¶ 34). Plaintiffs also contend that Formosa produces caustic soda in Asia (Dkt. 93 at 24), which counsel for Formosa confirmed at oral argument (Dkt. 117 at 49).

The allegations and supplemental materials submitted by Plaintiffs are not sufficient to demonstrate an agency relationship for purposes of specific jurisdiction because **[**93]** they do not sufficiently tie Formosa into the caustic soda conspiracy. ***HN43***[] "[S]pecific jurisdiction cases are limited to those involving issues deriving from, or connected with, the very controversy that establishes jurisdiction." *In re Hoosick Falls PFOA Cases, 431 F. Supp. 3d 69, 2020 U.S. Dist. LEXIS 90, 2020 WL 33409, at *5 (N.D.N.Y. 2020))*; *see* *Daimler, 571 U.S. at 138* ("[J]urisdiction can be asserted where a corporation's in-state activities are not only continuous and systematic but also give rise to the liabilities sued on." (quotation omitted)).

HN44[] Agency law does provide that "[w]here the parent is not involved in the day-to-day operations of its subsidiary, or, where the entities observe corporate formalities, the subsidiary and parent can nonetheless have an agency relationship because they are engaged in a 'common business enterprise.'" *Yousef v. Al Jazeera Media Network, No. 16-CV-6416 (CM), 2018 U.S. Dist. LEXIS 49614, 2018 WL 1665239, at *9 (S.D.N.Y. Mar. 22, 2018)* (citing *Dorfman v. Marriott Int'l Hotels, Inc., No. 99 Civ. 10496 (CSH), 2002 U.S. Dist. LEXIS 72, 2002 WL 14363, at *10 (S.D.N.Y. Jan. 3, 2002))*. However, while the documents produced by Plaintiffs may be indicative of an agency relationship, *see* *Palmieri v. Estefan, 793 F. Supp. 1182, 1194 (S.D.N.Y. 1992)* ("[W]hen two corporations have common ownership and their activities are interrelated as here, they may have an agency relationship for jurisdictional purposes, even if the resident corporation is not controlled by the nonresident entity."), they are not indicative of an agency relationship specifically related to caustic soda.

Plaintiffs also point to **[**94]** another "indicator of agency," which "is whether the parent would be obliged to enter the market directly if the subsidiary was absent because the market is too important to the parent's welfare." *Gurvey v. Cowan, Liebowitz & Latman, PC, No. 06CIV.1202, 2009 U.S. Dist. LEXIS 21183, 2009 WL 691056, at *3-4 (S.D.N.Y. Mar. 17, 2009)* (citing *Ginsberg v. Gov't Props Trust, Inc., No. 07 Civ. 365, 2007 U.S. Dist. LEXIS 75771, 2007 WL 2981683, at *7 (S.D.N.Y. Oct. 10, 2007))*; *see* *Dorfman, 2002 U.S. Dist. LEXIS 72, 2002 WL 14363, at *8* ("Where a subsidiary's business is dependent on the parent's business, or vice versa, an inference may often be drawn that the parent controls the subsidiary as it would a department."). Again, while Plaintiffs have provided documents showing that Formosa also produces caustic soda and that Formosa USA contributed to 68.5% of Formosa's overall profits, Plaintiffs have failed to provide support for the proposition that the profits are a result of caustic soda sales and not one of the other industries in which Formosa USA participates. Accordingly, Plaintiffs' allegations and documents do not sufficiently establish **[*182]** specific jurisdiction on the basis of an agency theory.

For the forgoing reasons, the Court finds Plaintiffs have not made a *prima facie* showing of personal jurisdiction as to Formosa.

C. Shin-Etsu

Shin-Etsu also moves for the Court to dismiss the claims against it for lack of personal jurisdiction. (Dkt. 103). Shin-Etsu is a Japanese corporation with a principal place **[**95]** of business in Tokyo, and U.S-based Shintech is one of its wholly-owned subsidiaries. (Dkt. 103 at 6). Plaintiffs argue the Court has jurisdiction over Shin-Etsu pursuant to *Rule 4(k)(2)*,[12] and contend that they have alleged sufficient minimum contacts regarding Shin-Etsu to establish

[11] Formosa contests the characterization of the New Jersey offices as its headquarters. (Dkt. 101 at 11 n.10).

specific jurisdiction through direct contact, an alter ego theory, and an agency theory. (Dkt. 109). Shin-Etsu contends that Plaintiffs have failed to demonstrate Shin-Etsu had sufficient minimum contacts with the United States (Dkt. 110 at 7-10).

The Court finds that Plaintiffs have sufficiently established that their claims arise under federal law. Additionally, Plaintiffs also certify that "they are unaware of any U.S. district court where Shin-Etsu would be subject to general jurisdiction." (Dkt. 109 at 16-17). Accordingly, the Court must address whether Plaintiffs have alleged sufficient minimum contacts with the United States.

1. Direct Contact

Plaintiffs point to the following as evidence of Shin-Etsu's minimum contacts with the United States: Shin-Etsu has imported millions of pounds of products to Shintech and U.S.-based customers; earned billions of dollars from sales to U.S. customers; holds thousands of U.S. **[**96]** patents; benefitted in the hundreds of millions of dollars from recent changes to U.S. tax laws; brought unrelated suits in federal courts; and has its proprietary information protected by a federal court's order. (Dkt. 109 at 20).

HN45[] However, "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction," and "[w]hen there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Bristol-Myers Squibb Co. v. Superior Court of Cal., S.F. Cty., 137 S. Ct. 1773, 1780-81, 198 L. Ed. 2d 395 (2017)*. None of these "contacts" connects Shin-Etsu to the alleged price-fixing scheme, nor do Plaintiffs argue that they do; they merely demonstrate that Shin-Etsu generally engages in business in the United States. *See Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 931, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011)* ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.").

Similarly, Shin-Etsu's prior federal court litigation does not provide a basis for this Court to find jurisdiction in this case. The cases Plaintiffs cite regarding prior litigation are not dispositive. *Gucci Am., Inc. v. Weixing Li, 135 F. Supp. 3d 87 (S.D.N.Y. 2015)*, was decided two years before the Supreme Court's decision in *Bristol-Myers*. Additionally, the **[**97]** *Gucci* court noted that the contacts had to be at least a "but-for" cause of the plaintiff's injury, *id. at 98*, which Plaintiffs have not established here. Similarly, the Ninth Circuit **[*183]** in *Mattel, Inc. v. Greiner and Hausser GmbH, 354 F.3d 857 (9th Cir. 2003)*, found there was a "clear relationship" between the 1961 lawsuit and the "current" lawsuit because of the similarity in claims between the two lawsuits. Plaintiffs have made no such showing here regarding the prior lawsuits brought by Shin-Etsu.

Plaintiffs also argue that Shin-Etsu participated directly in the price-fixing conspiracy through manipulation of the caustic soda price index. (Dkt. 109 at 21). However, nowhere does the Amended Complaint or the opposition to the motion to dismiss point to a specific instance where Shin-Etsu announced that Shintech would be increasing prices, or any other specific acts committed by Shin-Etsu. Instead, Plaintiffs make generalizations that Shin-Etsu engaged in such behavior. These generalizations, along with the generalized allegations that Shin-Etsu engaged in co-producer transactions and exchanges of competitively sensitive information, are not sufficient to establish personal jurisdiction, and the cases cited by Plaintiffs support that more specific allegations are **[**98]** necessary. *See Iowa Pub. Emps.' Ret. Sys., 340 F. Supp. 3d at 339* ("[T]he Amended Complaint alleges not merely that Defendants used EquiLend meetings as a forum to plot the conspiracy, but also that EquiLend engaged in active conduct in furtherance of the conspiracy, namely purchasing SL-x's intellectual property to shelve its enabling technology and launching DataLend to underprice and block the development of Data Explorers."); *FrontPoint, 2018 U.S. Dist. LEXIS 171999, 2018 WL 4830087, at *8* ("FrontPoint has adequately alleged "suit-related conduct" in the United States, namely the trading of SIBOR-based derivatives in the U.S. between FrontPoint and certain Panel

[12] Plaintiffs also argue the Court has jurisdiction under the Clayton Act (Dkt. 109 at 16-19), but for the same reasons that it does not provide a basis for jurisdiction over Formosa, the Clayton Act does not provide a basis to assert personal jurisdiction over Shin-Etsu.

Members."); *Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG, 277 F. Supp. 3d 521, 597 (S.D.N.Y. 2017)* ("[D]ocuments produced by JPMorgan as part of its settlement with plaintiffs now make clear that RBS colluded with a JPMorgan trader in New York to manipulate CHF LIBOR.").

2. Alter Ego

Plaintiffs argue that Shin-Etsu and Shintech are alter egos so that the corporate veil was pierced. For purposes of asserting personal jurisdiction with regards to piercing the corporate veil, the Second Circuit has yet to address whether to apply the law of the subsidiary's state of incorporation, federal common law, or the law of the forum. *See* *In re Lyondell Chem. Co., 543 B.R. 127, 139 n.38 (S.D.N.Y. 2016)* ("Some federal courts have engaged in a choice of law analysis to decide which law to apply **[**99]** to an alter ego theory of *jurisdiction*, usually finding that the law of the corporation's state of incorporation governs. Other courts have disagreed, distinguishing the analysis for 'alter ego' *liability* and for 'alter ego' *jurisdiction*, and finding that because 'alter ego' jurisdiction is either a construction of the statute providing jurisdiction or is part of due process (or both), for a *jurisdictional* veil piercing analysis, courts should apply either the law governing the interpretation of the jurisdictional statute or federal due process jurisprudence, or both." (collecting cases)). In the instant matter, Shin-Etsu's subsidiary Shintech is incorporated under the laws of Delaware (Dkt. 51 at ¶ 32), and the law of the forum is that of New York. Both New York and federal common law apply a substantially similar "relaxed" standard when assessing an alter ego theory for jurisdictional purposes as opposed to liability. *See* *In re Platinum & Palladium Antitrust Litig., No. 1:14-CV-9391-GHW, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *47 (S.D.N.Y. Mar. 28, 2017)* (collecting cases holding that federal common law applies a "relaxed" standard "where the *alter ego* theory **[*184]** is used not to impose liability, but merely to establish jurisdiction"); *In re Lyondell Chem. Co., 543 B.R. at 143* ("Under New York law, **[**100]** '[e]stablishing the exercise of personal jurisdiction over an alleged alter ego requires application of a less stringent standard than that necessary to pierce the corporate veil for purposes of liability.'" (quoting *GEM Advisors, Inc. v. Corporacion Sidenor, S.A., 667 F. Supp. 2d 308, 319 (S.D.N.Y. 2009))*. Because Plaintiffs have failed to establish the corporate veil was pierced even pursuant to this more relaxed standard utilized for jurisdictional purposes under New York and federal common law, at this time the Court need not reach the issue of whether New York, Delaware, or federal common law applies, and instead will analyze the issue using New York law.

HN46[] "[U]nder New York law, a court may pierce the corporate veil where '1) the owner exercised complete domination over the corporation with respect to the transaction at issue, *and* 2) such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil.'" *Lakah v. UBS AG, 996 F. Supp. 2d 250, 260 (S.D.N.Y. 2014)* (quoting *MAG Portfolio Consult, GMBH v. Merlin Biomed Grp. LLC, 268 F.3d 58, 63 (2d Cir. 2001))*. As previously discussed, "[t]his standard is relaxed where the alter ego theory is used not to impose liability, but merely to establish jurisdiction. In the jurisdictional context, a plaintiff need only show that the allegedly controlled entity was a shell for the allegedly controlling party." *In re Commodity Exch., Inc., 213 F. Supp. 3d 631, 681 (S.D.N.Y. 2016)* (citation and quotations omitted). **[**101]**

HN47[] When applying this less onerous standard, "the factors to be considered in determining whether a corporation is a 'shell' are: the failure to observe corporate formality; inadequate capitalization; intermingling of personal and corporate funds; the sharing of common office space, address and telephone numbers of the alleged dominating entity and the subject corporation; an overlap of ownership, directors, officers or personnel; the use of the corporation as a means to perpetrate the wrongful act against the plaintiff; as well as any other evidence tending to show that the company is being used as a mere shell." *Miramax Film Corp. v. Abraham, No. 01 CV 5202 (GBD), 2003 U.S. Dist. LEXIS 21346, 2003 WL 22832384, at *8 (S.D.N.Y. Nov. 25, 2003)*; *see* *In re Platinum & Palladium Antitrust Litig., 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *48* (using same factors when applying federal common law); *see also* *Jazini, 148 F.3d at 184-85* ("In determining whether the subsidiary is a mere department of the parent . . . the court must consider four factors . . . first, common ownership—which is essential—; second, financial dependency of the subsidiary on the parent corporation; third, the degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities; and fourth, the degree of control over the marketing and operational policies of the subsidiary **[**102]** exercised by the parent." (quotations omitted)). "These factors are not exhaustive, nor is proof of any one factor or a combination of factors necessarily determinative. Rather, a finding that a corporation is an alter ego of another entity is warranted when doing so will achieve an equitable result." *Miramax Film Corp., 2003 U.S. Dist. LEXIS 21346, 2003 WL 22832384, at *8*.

Plaintiffs have alleged and submitted documents in support of the following: (1) Shintech is a wholly-owned subsidiary of Shin-Etsu; (2) Shin-Etsu's president and board chairman are also the president and board chairmen of Shintech; (3) the president of Shin-Etsu and Shintech has been assigned to work at Shintech since 1983 **[*185]** and owns a home in Houston; (4) Shin-Etsu and Shintech share the same vision and mission; (5) the "Headquarters" portion of Shintech's website only refers by name to Shin-Etsu's President and Chairman; (6) Shin-Etsu's Chairman routinely highlights Shintech in his messages to shareholders in annual reports; (7) Shin-Etsu lists Shintech first among its subsidiary corporations; (8) Shin-Etsu considered whether and by how much Shintech should expand its caustic soda production capacity in the United States, and implemented the plan; (9) Shin-Etsu has exported millions **[**103]** of pounds of products to New York and other U.S. ports, including to Shintech and another Shin-Etsu subsidiary, Shintech Louisiana LLC; and (10) the Shintech website Headquarters page states, "When Shintech became a wholly owned subsidiary of Shin-Etsu, Chairman Kanagawa took full authority for the management of the subsidiary." (Dkt. 109 at 26-27).

Plaintiffs cannot establish that Shintech is the alter ego of Shin-Etsu by showing Shintech is wholly owned by Shin-Etsu. *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000, 342 F. Supp. 2d 207, 214-15 (S.D.N.Y. 2004)* ("[E]ven a wholly owned subsidiary is presumed to be a separate entity in the absence of 'clear evidence' that it is controlled by the parent."); *Cali v. E. Coast Aviation Servs., Ltd., 178 F. Supp. 2d 276, 287 (E.D.N.Y. 2001)* ("[C]ourts have found that ownership of a subsidiary's stock is not determinative of an alter-ego relationship[.]"). ***HN48***[] In that same vein, it is not sufficient to establish one company is the alter ego of another for jurisdictional purposes by alleging that their corporate leadership overlaps. *See* *Jazini, 148 F.3d at 185* ("The Jazinis asserted that one of Nissan Japan's four 'managing executive directors' is the chairman of Nissan U.S.A.. That fact does not establish that the American subsidiary is a 'mere department' of the Japanese parent."). **[**104]** Moreover, regarding the submissions from Shintech's website, "the Court is not persuaded that a failure to distinguish between parent and subsidiary on a web page is sufficient to show that the parent controls the subsidiary's marketing and operational policies. ***HN49***[] An advertising strategy deciding not to present to its consumers the existence of a parent-subsidiary relationship is not equivalent to a showing that the parent corporation exercises any control over its subsidiary's operational or marketing activities." *J.L.B. Equities, Inc. v. Ocwen Fin. Corp., 131 F. Supp. 2d 544, 550 (S.D.N.Y. 2001)*.

Additionally, Plaintiffs do not address whether Shintech's funds were intermingled with Shin-Etsu's or if Shintech observed corporate formalities. *See* *In re Platinum, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *48* (holding plaintiffs failed to make a *prima facie* showing that the court could exercise personal jurisdiction under the alter ego theory where the complaint did not address whether the subsidiary observed corporate formalities, if funds were intermingled, or whether office space and addresses were shared). Moreover, Plaintiffs do not plead or present any fact suggesting that Shintech is financially dependent on Shin-Etsu. *See* *In re Commodity Exchange, Inc., 213 F. Supp. 3d at 681* (finding alter ego relationship where plaintiffs plausibly alleged the parent corporation engaged **[**105]** in the conspiracy, subsidiary corporation had no corporate headquarters or separate mailing address, and subsidiary corporation was financially dependent on parent corporation). Quite the opposite—Plaintiffs' allegations indicate Shintech generates significant income on its own. (*See* Dkt. 51 at ¶¶ 32, 49); *see also* *J.L.B. Equities, Inc., 131 F. Supp. 2d at 549* (holding all the factors aside from common ownership "counsel against the exercise of personal jurisdiction" where "the plaintiff cannot, **[*186]** and does not, adequately demonstrate that the [subsidiary] is dependent upon [the parent corporation] for funds. To the contrary, the facts alleged suggest that the [subsidiary] generates the bulk of [the parent corporation]'s income").

3. Agency

The Court also finds that while the law allows for Plaintiffs to establish specific jurisdiction under an agency theory, Plaintiffs have failed to do so here. Shin-Etsu accuses Plaintiffs of "grossly" misstating the agency theory in *Daimler* (Dkt. 110 at 12); however, it is Shin-Etsu that misapplies *Daimler*'s holding. *Daimler* largely rejected the use of an agency theory to establish *general* jurisdiction.[13] The Supreme Court included an extensive discussion of how *International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)*, resulted in the "rapid expansion **[**106]** of tribunals' ability to hear claims against out-of-state defendants" through the use of specific jurisdiction, as well as the "reduced role" of general jurisdiction. *Daimler, 571 U.S. at 125-28*. ***HN50***[] *Daimler* specifically stated that *International Shoe* used the words "continuous and systematic" to "describe instances in which the exercise of *specific* jurisdiction would be appropriate," *id. at 128*, and that "[a]gency relationships . . . may be relevant to the existence of *specific* jurisdiction, *id. at 135 n.13*; *see Yousef, 2018 U.S. Dist. LEXIS 49614, 2018 WL 1665239, at *14* ("Specific jurisdiction was not the subject of *Daimler*, so there is no reason to believe that *Daimler* changed pre-existing law on that subject."). Additionally, at least one post-*Daimler* case has recognized "common business enterprise" allegations showing that the "reason for the subsidiary's existence is to perform services in furtherance of its parent's business that would otherwise have to be performed by the parent" can be sufficient to establish specific jurisdiction. *See 2018 U.S. Dist. LEXIS 49614, [WL] at *9-11, *13*.

However, Plaintiffs have failed to make the showing necessary to establish specific jurisdiction pursuant to an agency theory. Although agency for jurisdictional purposes may be demonstrated "[w]here a subsidiary's business is dependent **[**107]** on the parent's business, or vice versa," *Dorfman, 2002 U.S. Dist. LEXIS 72, 2002 WL 14363, at *8*, Plaintiffs have not demonstrated that Shin-Etsu is dependent on Shintech's caustic soda business. Plaintiffs have submitted documents purporting to show that Shintech is a wholly-owned subsidiary of Shin-Etsu, Shintech is the primary U.S. importer and distributor of Shin-Etsu's products, Shin-Etsu's president and board chairman are also the president and board chairmen of Shintech, and the president of Shin-Etsu and Shintech has been assigned to work at Shintech since 1983 and owns a home in Houston where Shintech is located. (Dkt. 109 at 26-27). Additionally, Shin-Etsu is a producer of caustic soda. (Dkt. 117 at 50). However, the documents submitted by Plaintiff, which include Shin-Etsu's annual reports, repeatedly highlight the contributions Shintech has made to Shin-Etsu's profits **[*187]** through PVC production, not from caustic soda. (*See, e.g.*, Dkt. 109-2 ("Shintech . . . forms the core of our PVC operations[.]"); Dkt. 109-3 at 7 (noting PVC as a "core business," not caustic soda); *id.* at 8 ("Shintech has achieved remarkable profitability in the PVC industry and stable profit growth."); Dkt. 109-4 at 13 ("Shintech has grown into the world's largest **[**108]** manufacturer of PVC[.]")). In other words, Plaintiffs may have demonstrated that Shin-Etsu would step into the American PVC market if Shintech stopped producing PVC, but they have not made the same showing with regards to caustic soda. Because it is caustic soda, not PVC, that is at issue in this lawsuit, Plaintiffs' allegations are not sufficient for specific jurisdictional purposes. *See Daimler, 571 U.S. at 138*; *In re Hoosick Falls PFOA Cases, 2020 U.S. Dist. LEXIS 90, 2020 WL 33409, at *5*.

For the reasons stated above, the Court finds Plaintiffs have failed to make a *prima facie* showing of personal jurisdiction as to Shin-Etsu.

D. Jurisdictional Discovery

Plaintiffs request that, in the event the Court finds they did not make a *prima facie* showing of personal jurisdiction as to either Formosa or Shin-Etsu, they be allowed to pursue jurisdictional discovery. (Dkt. 93 at 27-28; Dkt. 109 at 29-31). ***HN51***[] "It is well settled under Second Circuit law that, even where plaintiff has not made a *prima facie* showing of personal jurisdiction, a court may still order discovery, in its discretion, when it concludes that the

[13] The quotation from *Daimler* that Shin-Etsu includes in its reply papers is an excerpt from the Court's discussion of agency as it pertains to general jurisdiction. (Dkt. 110 at 12); *see Daimler, 571 U.S. at 135-36* ("The Ninth Circuit's agency finding rested primarily on its observation that [the subsidiary]'s services were 'important' to Daimler, as gauged by Daimler's hypothetical readiness to perform those services itself if MBUSA did not exist. . . . The Ninth Circuit's agency theory thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the "sprawling view of general jurisdiction" we rejected in *Goodyear*.").

plaintiff may be able to establish jurisdiction if given the opportunity to develop a full factual record." *Leon v. Shmukler, 992 F. Supp. 2d 179, 194 (E.D.N.Y. 2014)*. In this Circuit, jurisdictional discovery is permitted where a plaintiff **[**109]** has "made a sufficient start toward establishing personal jurisdiction," such that it appears there may be a colorable jurisdictional claim. *Hollins v. U.S. Tennis Ass'n, 469 F. Supp. 2d 67, 70 (E.D.N.Y. 2006)* (quotation omitted). The Court finds jurisdictional discovery is warranted here as to both Formosa and Shin-Etsu.

Plaintiffs have submitted documents that support Formosa's dependence on Formosa USA and that Formosa may have some involvement with the caustic soda sales by Formosa USA. Plaintiffs have shown significant overlap in ownership between Formosa and Formosa USA, that Formosa is the "main sale target" for Formosa USA's raw material production, and that Formosa USA increased Formosa's operating profit by 68.5%. (Dkt. 51 at ¶ 34; Dkt. 93-4 at 30). In addition, Plaintiffs have submitted documents purporting to show that both Formosa and Formosa USA produce significant amounts of caustic soda, and that Formosa USA's caustic soda capacity is a selling point for Formosa to its investors. (Dkt. 93-2 at 21 (listing Formosa's caustic soda capacity); *id.* at 16 ("[Formosa] USA is now a major U.S. supplier of . . . caustic soda."); *id.* at 23 (listing caustic soda as major product of Formosa USA)).

Plaintiffs have also produced some evidence that Shin-Etsu is dependent **[**110]** on Shintech and that Shin-Etsu may be involved with Shintech's caustic soda business. The overlap in corporate leadership between Shintech and Shin-Etsu, Shintech's status as the "core" of Shin-Etsu's Chor-Alkali business, and Shintech's status as the only subsidiary corporation repeatedly touted by Shin-Etsu in its annual reports, all are indicators of Shin-Etsu's dependence on Shintech. Additionally, Shin-Etsu is a caustic soda producer and Shin-Etsu's annual reports from the Class Period submitted by Plaintiffs refer to **[*188]** Shintech's caustic soda business as having undergone significant growth. (*See* Dkt. 109-3 at 13 (Shin-Etsu 2018 Annual Report noting "the supply and demand relationship with respect to caustic soda improved, resulting in significant growth," as well as a 21.8% increase in net sales and 75.3% increase in operating income for the PVC/Chlor-Alkali Business); Dkt. 109-2 at 13 (Shin-Etsu 2019 Annual Report noting "Shintech Inc. in the U.S. continued its shipments of both PVC and caustic soda at a high level, backed by advantageous raw material procurement in the country, which resulted in its business performance growing")). Additionally, taking Plaintiffs' allegations **[**111]** in the Amended Complaint as true, the explanations for the caustic soda price increases could be construed as an attempt to cover up the alleged conspiracy. Moreover, Plaintiffs have submitted evidence that Shin-Etsu was heavily involved in the decision to build a new manufacturing plant for Shintech, which could also be a way of misleading customers into thinking supply of caustic soda is tight.

It is not clear from the submissions how much of Formosa USA's and Shintech's success in increasing the caustic soda prices is attributable to Formosa and Shin-Etsu or how involved Formosa and Shin-Etsu were, if at all, with the decisions surrounding the increased prices. ***HN52***[] However, "the Second Circuit distinguishes between allegations that are 'insufficiently developed' warranting discovery and those that are 'sparse' and 'conclusory' requiring dismissal," *Hollins, 469 F. Supp. 2d at 71-72*; *see* *Texas Int'l Magnetics, Inc. v. BASF Aktiengesellschaft, 31 F. App'x 738, 739 (2d Cir. 2002)* ("[P]laintiffs' jurisdictional allegations are neither sparse nor insufficiently specific; they are simply insufficiently developed at this time to permit judgment as to whether personal jurisdiction is appropriate."), and the allegations and submissions discussed above are neither sparse nor conclusory. "Based upon these and the other **[**112]** allegations in the [Amended C]omplaint, the Court concludes, in its discretion, that [P]laintiffs' contentions of personal jurisdiction are colorable and that they should have the opportunity to engage in limited discovery as to the jurisdictional questions." *Leon, 992 F. Supp. 2d at 195*.

Formosa and Shin-Etsu cite to *Jazini, 148 F.3d 181*, to support their position that the Court should deny jurisdictional discovery. (Dkt. 110 at 14).[14] However, the *Jazini* court emphasized that the plaintiffs had not made

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[14] Formosa cited two other cases that stand for the same proposition as *Jazini* with regards to conclusory and general allegations. *See* *In re LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 MDL 2262 (NRB), 2019 U.S. Dist. LEXIS 49700, 2019 WL 1331830, at *9 (S.D.N.Y. Mar. 25, 2019)* ("TCEH's conclusory allegations of corporate ownership, combined marketing, [and] shared board membership were insufficient to establish a principal-agent relationship between corporate entities." (alteration in original) (quotations and footnote omitted)); *Gurvey, 2009 U.S. Dist. LEXIS 21183, 2009 WL 691056, at *4* (finding

any showing that the subsidiary company was an agent of the parent corporation because their allegations were conclusory. 148 F.3d at 185 ("The conclusory statements—without any supporting facts—that Nissan U.S.A. is "wholly controlled" by Nissan Japan and "wholly dependent" on Nissan Japan "for its business plan and financing," are but a restatement of two of the factors to be considered[.]"). The *Jazini* court also noted the statements submitted by plaintiffs from the parent corporation's president that he wanted "each part of our global operations . . . to focus on contributing to the company as a **[*189]** whole" were not material for purposes of showing pervasive control. *Id.* Here, as previously discussed, Plaintiffs have submitted multiple pieces of **[**113]** evidence that support their allegations. Even though that evidence is not sufficient for a *prima facie* showing of personal jurisdiction as to Formosa or Shin-Etsu, the Court finds it is a sufficient enough start to make jurisdictional discovery appropriate. *See* World Vision, Inc., No. 2:08-CV-221, 2009 U.S. Dist. LEXIS 133923, 2009 WL 2230919, at *16 (D. Vt. July 24, 2009) ("[T]he Circuit has . . . suggested that district courts may be obligated to order jurisdictional discovery based on a lesser showing [than a *prima facie* case], in particular when the plaintiff fails to allege legally sufficient facts to establish jurisdiction, but nonetheless asserts specific, non-conclusory facts that, if further developed, could demonstrate substantial state contacts." (citing Texas Int'l Magnetics, Inc., 31 F. App'x at 739)); Hollins, 469 F. Supp. 2d at 71 ("[T]he Second Circuit has ordered jurisdictional discovery where plaintiffs allege more than conclusory statements but without supporting facts.").

Accordingly, the Court denies Shin-Etsu's motion to dismiss pursuant to 12(b)(2), and denies Formosa's motion to dismiss pursuant to 12(b)(2) conditional on Plaintiffs submitting a certification as set forth above. If Plaintiffs do not submit the certification on or before April 17, 2020, **[**114]** the claims against Formosa will be dismissed with prejudice without further order of the Court. The motions to dismiss are denied without prejudice and with leave to renew after the completion of jurisdictional discovery. Consistent with the Court's referral of this matter to Judge Roemer for the supervision of all non-dispositive pretrial matters, the Court will not set forth specific parameters regarding the conduct of jurisdictional discovery; instead, Judge Roemer will manage that aspect of the case.

Formosa has also moved in the alternative for the Court to dismiss the claims against it pursuant to Rule 12(b)(6). Because the grounds for moving for Rule 12(b)(6) dismissal overlap with the issues raised by Formosa's Rule 12(b)(2) motion, and because any dismissal of the claims against Formosa under Rule 12(b)(6) would be without prejudice for the same reasons that the claims against Oxy are dismissed without prejudice, the Court also denies Formosa's motion under Rule 12(b)(6) without prejudice and with leave to renew after the completion of jurisdictional discovery. New York v. Mountain Tobacco Co., 55 F. Supp. 3d 301, 315 (E.D.N.Y. 2014) ("[T]he Court is of the view that jurisdictional discovery as to [the defendant] may shed light on the State's substantive allegations against him. In that event, the State may seek **[**115]** leave to amend the amended complaint to cure the admitted deficiencies. Therefore, the Court denies [the defendant]'s motion to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(6) without prejudice with leave to renew after the conclusion of jurisdictional discovery[.]"); *see also* Seema Gems, Inc. v. Shelgem, Ltd., No. 93 CIV. 4473 (KMW), 1994 U.S. Dist. LEXIS 2983, 1994 WL 86381, at *3 (S.D.N.Y. Mar. 16, 1994) (denying Rule 12(b)(6) motion without prejudice to renewal after close of jurisdictional discovery regarding alter ego theory because "[t]he adequacy of plaintiff's complaint" is "bound up" with "the same issue on which the court grants jurisdictional discovery").

CONCLUSION

For the reasons set forth above, the Court denies the joint motion to dismiss (Dkt. 79), Westlake's motion to dismiss (Dkt. 81), Shintech's motion to dismiss (Dkt. 82), and Formosa USA's motion to dismiss (Dkt. 84); grants in part the motion to dismiss by Oxy dismissing those **[*190]** claims without prejudice (Dkt. 80); denies without prejudice the motion to dismiss by Formosa (Dkt. 86) conditional on Plaintiffs submitting a certification on or before April 17, 2020; denies without prejudice Shin-Etsu's motion to dismiss (Dkt. 103); and finds limited jurisdictional discovery as to Formosa and Shin-Etsu is appropriate, after which Formosa and Shin-Etsu may, if appropriate, **[**116]** renew

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plaintiff failed to establish personal jurisdiction on an agency theory where plaintiff only cited "statements made in Defendants' Form 10-Ks describing the business activities of various subsidiaries").

their motions to dismiss. If Plaintiffs do not submit the certification on or before April 17, 2020, the claims against Formosa will be dismissed with prejudice without further order of the Court.

SO ORDERED.

/s/ Elizabeth A. Wolford

ELIZABETH A. WOLFORD

United States District Judge

Dated: March 27, 2020

Rochester, New York

In re Platinum & Palladium Antitrust Litig.

United States District Court for the Southern District of New York

March 29, 2020, Decided; March 29, 2020, Filed

Lead Case 1:14-cv-9391-GHW

Reporter

449 F. Supp. 3d 290 *; 2020 U.S. Dist. LEXIS 55506 **; 2020-1 Trade Cas. (CCH) P81,136; 2020 WL 1503538

IN RE PLATINUM AND PALLADIUM ANTITRUST LITIGATION

Subsequent History: Vacated by, in part, Reversed by, in part, Remanded by, Affirmed by, in part *Peters v. BASF Metals Ltd. (In re Platinum & Palladium Antitrust Litig.), 2023 U.S. App. LEXIS 4619 (2d Cir., Feb. 27, 2023)*

Prior History: *In re Platinum & Palladium Antitrust Litig., 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626 (S.D.N.Y., Mar. 28, 2017)*

Core Terms

platinum, palladium, manipulation, Plaintiffs', Metals, transactions, enforcer, Defendants', alleges, benchmark, Trading, Fixing, damages, domestic, personal jurisdiction, traders, prices, extraterritorial, motion to dismiss, dominated, conspiracy, markets, antitrust, factors, anti trust law, cases, impermissibly, derivatives, options, precious metals

LexisNexis® Headnotes

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

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

The tenet that a court must accept as true all of the allegations contained in a complaint for purposes of a *Fed. R. Civ. P. 12(b)(6)* motion is inapplicable to legal conclusions.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

HN2[] **In Rem & Personal Jurisdiction, In Personam Actions**

Although a court should traditionally treat personal jurisdiction as a threshold question to be addressed prior to consideration of the merits of a claim, that practice is prudential and does not reflect a restriction on the power of the courts to address legal issues. In cases with multiple defendants, over some of whom the court indisputably has personal jurisdiction, in which all defendants collectively challenge the legal sufficiency of the plaintiffs' cause of action, a court may address first the facial challenge to the underlying cause of action.

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

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

HN3[] **Motions to Dismiss, Failure to State Claim**

Under *Fed. R. Civ. P. 8*, a complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. A defendant may nonetheless move to dismiss a plaintiff's complaint for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. To survive a motion to dismiss pursuant to *Rule 12(b)(6)*, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient to raise a right to relief above the speculative level.

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

HN4[] **Motions to Dismiss, Failure to State Claim**

Determining whether a complaint states a plausible claim is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. The court must accept all facts alleged in the complaint as true and draw all reasonable inferences in the plaintiff's favor. However, a complaint that offers labels and conclusions or naked assertions without further factual enhancement will not survive a motion to dismiss.

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

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN5[] **Private Actions, Private Attorneys General**

While it is a well-established principle that the United States is authorized to sue anyone violating the federal antitrust laws, a private plaintiff must demonstrate standing. Antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement, the court must dismiss it as a matter of law.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN6[] **Private Actions, Private Attorneys General**

To satisfy the antitrust standing requirement, a private antitrust plaintiff must plausibly allege that (i) it suffered an antitrust injury and (ii) it is an acceptable plaintiff to pursue the alleged antitrust violations, i.e., that plaintiff is an efficient enforcer of the antitrust laws.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN7[] Private Actions, Private Attorneys General

For purposes of antitrust standing, the efficient enforcer inquiry focuses on four factors: (1) the directness or indirectness of the asserted injury; (2) the existence of more direct victims of the alleged conspiracy; (3) the extent to which plaintiffs' damages claim is highly speculative; and (4) the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN8[] Private Actions, Private Attorneys General

For purposes of antitrust standing, the efficient enforcer inquiry is a general balancing test in which the importance assigned to each factor will necessarily vary with the circumstances of particular cases. The factors are meant to determine whether the putative plaintiff is a proper party to perform the office of a private attorney general and thereby vindicate the public interest in antitrust enforcement.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN9[] Private Actions, Private Attorneys General

In the context of antitrust standing, the first efficient enforcer factor is the directness or indirectness of the asserted injury. This factor requires evaluation of the chain of causation linking plaintiff's asserted injury and the defendants' alleged price-fixing.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN10[] Private Actions, Private Attorneys General

In the context of antitrust standing, where a plaintiff does not purchase directly from defendant, there are significant intervening causative factors, which may attenuate the causal connection between the violation and the injury. When a plaintiff and a third party choose to incorporate a benchmark into a financial transaction without any action by defendants whatsoever, the independent decision to do so may attenuate the chain of causation between defendants' actions and a plaintiff's injury.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN11[] Private Actions, Private Attorneys General

In the context of antitrust standing, the second efficient enforcer factor is the existence of more direct victims of the alleged conspiracy. Generally, whether there is a more direct victim of an alleged antitrust violation turns chiefly on whether the plaintiff is a consumer or a competitor. However, a plaintiff's status is not the end of the inquiry; the efficient enforcer criteria must be established irrespective of whether the plaintiff is a consumer or a competitor. Inferiority to other potential plaintiffs can be relevant, but it is not dispositive. Implicit in the inquiry is recognition that not every victim of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN12[] **Private Actions, Private Attorneys General**

In the context of antitrust standing, case law holds that the second efficient enforcer factor may have diminished weight in benchmark manipulation cases.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN13[] **Private Actions, Private Attorneys General**

In the context of antitrust standing, the third efficient enforcer factor is whether the damages would necessarily be highly speculative. Some degree of uncertainty stems from the nature of ***antitrust law*** and the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. At the same time, highly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement. Damages claims may be too speculative where: (1) the damages claim is conclusory; (2) the injury is so far down the chain of causation from defendants' actions that it would be impossible to untangle the impact of the fixed price from the impact of intervening market decisions; or (3) due to external market factors, there is no relationship between the fixed price and the price that the plaintiffs ultimately paid.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN14[] **Private Actions, Private Attorneys General**

In the context of antitrust standing, the fourth efficient enforcer factor is either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other. This factor reflects a strong interest in keeping the scope of complex antitrust trials within judicially manageable limits. It is arguably the most important factor in the efficient enforcer analysis.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN15[] **Private Actions, Private Attorneys General**

Benchmark manipulation cases present unique challenges for application of the efficient enforcer factors when determining antitrust standing. Case law notes that one difficult issue arises with respect to so-called umbrella standing. Umbrella standing concerns are most often evident when a cartel controls only part of a market, but a consumer who dealt with a non-cartel member alleges that he sustained injury by virtue of the cartel's raising of prices in the market as a whole.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN16[] **Private Actions, Private Attorneys General**

Benchmark manipulation cases present particularly difficult questions regarding umbrella standing because alleged manipulators can affect prices without dominating the market. In a standard (i.e., non-benchmark) manipulation case, alleged manipulators must have at least a substantial market share, if not outright market dominance, to maintain a non-competitive price. That is because a cartel must have a large enough fraction of the market to exert control over the market price. In other words, if a would-be cartel is only a tiny fraction of the market, it cannot exert market power and thus is no cartel at all. This premise has led to a scholarly consensus that is skeptical about whether it is possible for private actors to manipulate large commodity markets.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN17[] **Private Actions, Private Attorneys General**

A critical mass of judges within the Southern District of New York addressing concerns in benchmark manipulation cases conclude that plaintiffs who are not direct purchasers are not efficient enforcers in a benchmark manipulation case.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN18[] **Private Actions, Private Attorneys General**

For purposes of antitrust standing, where a plaintiff's counter-party is reasonably ascertainable and is not a defendant a plaintiff is not an efficient enforcer.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN19[] **Private Actions, Private Attorneys General**

Recognizing that counter-parties to exchange plaintiffs are not reasonably ascertainable for purposes of antitrust standing, judges in the Southern District of New York have adopted a test that depends primarily on the extent of defendants' control of the market for the product traded on the exchange.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN20[] **Private Actions, Private Attorneys General**

The United States District Court for the Southern District of New York adopts the market domination test as one method by which plaintiffs can allege that an exchange plaintiff is an efficient enforcer. The market domination test helps to resolve identified causation and complex apportionment issues. Indeed, the market domination test may be thought to serve as a proxy for whether a plaintiff transacted directly with a defendant; in a market in which defendants dominate, it is far more likely that a plaintiff who bought on an exchange will have transacted directly with a defendant.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN21[] **Private Actions, Private Attorneys General**

Under the market domination theory of antitrust standing, the court's inquiry into whether a defendant has dominated the exchange market consists of three steps. First, the court must define the relevant market. Second, the court must examine what share of that market the defendant is alleged to have controlled. Finally, the court must determine whether the defendant controlled a sufficiently large percentage of the relevant market that it dominated it.

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN22[] **Private Actions, Private Attorneys General**

While the court is bound by the factual allegations in the complaint on a motion to dismiss, the definition of the relevant market is a legal conclusion, not a factual one. Therefore, in determining antitrust standing under the market domination theory, the court must examine the facts alleged in the complaint to determine what market or markets allegedly were restrained based on the plaintiff's theory of the case.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN23[] **Vertical Restraints, Price Fixing**

With respect to derivatives that directly incorporate the fix price, the antitrust injury inquiry is straightforward because courts in the Second Circuit consider manipulation of a price benchmark to constitute restraint of the market which that benchmark guides.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN24[] Private Actions, Private Attorneys General

It is true that courts have generally addressed whether physical and futures transactions represent one market or two on the antitrust injury prong of the antitrust standing analysis. But it is also relevant to the application of the efficient enforcer factors, including whether there are more direct victims of the alleged conspiracy under the second efficient enforcer factor. Furthermore, a definition of the relevant market is a prerequisite to the inquiry into whether defendants dominated a market.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN25[] Private Actions, Private Attorneys General

For purposes of antitrust standing, the United States District Court for the Southern District of New York does not adopt a bright line rule for the market share that a defendant or group of defendants must control to meet the market domination standard.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

Evidence > Burdens of Proof > Allocation

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

HN26[] In Rem & Personal Jurisdiction, In Personam Actions

A defendant may move to dismiss a plaintiff's claims against it for lack of personal jurisdiction. *Fed. R. Civ. P. 12(b)(2)*. On a motion to dismiss pursuant to *Rule 12(b)(2)*, the plaintiff bears the burden of demonstrating personal jurisdiction over a person or entity against whom it seeks to bring suit. To defeat a jurisdiction-testing motion, the plaintiff's burden of proof varies depending on the procedural posture of the litigation. At the pleading stage, and prior to discovery, a plaintiff need only make a prima facie showing that jurisdiction exists.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

Evidence > Burdens of Proof > Allocation

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

HN27[] In Rem & Personal Jurisdiction, In Personam Actions

If the court considers only pleadings and affidavits, the plaintiff's prima facie showing must include an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant. Courts may rely on materials outside the pleading in considering a motion to dismiss for lack of personal jurisdiction. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, however, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

HN28[] **In Personam Actions, Due Process**

Among other requirements, the exercise of personal jurisdiction must comport with constitutional due process. The due process analysis proceeds in two steps. First, courts evaluate the quality and nature of the defendant's contacts with the forum state under a totality of the circumstances test. Where the claim arises out of, or relates to, the defendant's contacts with the forum, i.e., specific jurisdiction is asserted, minimum contacts necessary to support such jurisdiction exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there. Second, once minimum contacts are established, a court considers those contacts in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN29[] **In Personam Actions, Minimum Contacts**

There are two independent, if conceptually overlapping, methods of demonstrating minimum contacts. The first is through purposeful availment, in which the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there. The second is through purposeful direction, in which the defendant took intentional, and allegedly tortious, actions expressly aimed at the forum. The purposeful direction test is also referred to as the effects test, which is a theory of personal jurisdiction typically invoked where the conduct that forms the basis for the controversy occurs entirely out-of-forum, and the only relevant jurisdictional contacts with the forum are therefore in-forum effects harmful to the plaintiff. In such circumstances, the exercise of personal jurisdiction may be constitutionally permissible if the defendant expressly aimed its conduct at the forum.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN30[] **In Personam Actions, Minimum Contacts**

Both the Sherman Act and the Commodities Exchange Act provide for nationwide service of process. *15 U.S.C.S. § 22*; *7 U.S.C.S. § 25(c)*. District courts in the Second Circuit, and courts of appeals other than the United States Court of Appeals for the Second Circuit, have concluded that when a civil case arises under federal law and a federal statute authorizes nationwide service of process, the relevant contacts for determining personal jurisdiction are contacts with the United States as a whole.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

HN31[] **In Personam Actions, Due Process**

The United States Court of Appeals for the Second Circuit recently observed that it has not clearly delineated the showing necessary before an agent's contacts will be imputed to its principal for purposes of personal jurisdiction under the Due Process Clause. However, the Circuit's case law concerning the New York long-arm statute is instructive because although the long-arm statute and the Due Process Clause are not technically coextensive, the

New York requirements (benefit, knowledge, some control) are consonant with the due process principle that a defendant must have purposefully availed itself of the privilege of doing business in the forum.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Long Arm Jurisdiction

HN32[] **In Personam Actions, Long Arm Jurisdiction**

To establish that a subsidiary is an agent of the parent under New York's long-arm statute, the plaintiff must show that the subsidiary does all the business which the parent corporation could do were it here by its own officials.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN33[] **In Personam Actions, Due Process**

United States Court of Appeals for the Second Circuit case law established a four-factor test for evaluating whether a court's exercise of personal jurisdiction over a defendant is proper based on the conduct of a subsidiary: (1) common ownership, (2) financial dependency, (3) the degree to which the parent interferes with the selection and assignment of executive personnel and fails to observe corporate formalities, and (4) the parent's degree of control over the marketing and operational policies of the subsidiary.

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

HN34[] **Existence, Distinct & Separate Legal Entity**

It is a general principle of corporate law deeply ingrained in the economic and legal systems that a parent corporation is not liable for the acts of its subsidiaries.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN35[] **In Personam Actions, Due Process**

Under the effects test, the exercise of personal jurisdiction may be constitutionally permissible if the defendant expressly aimed its conduct at the forum. The fact that harm in the forum is foreseeable is insufficient for the purpose of establishing specific personal jurisdiction over a defendant.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Foreseeability

HN36[] In Personam Actions, Due Process

Mere foreseeability is insufficient under the effects test for personal jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN37[] In Personam Actions, Due Process

The United States Court of Appeals for the Second Circuit has recently clarified that to allege a conspiracy theory of jurisdiction, the plaintiff must allege that: (1) a conspiracy existed; (2) the defendant participated in the conspiracy; and (3) a co-conspirator's overt acts in furtherance of the conspiracy had sufficient contacts with a state to subject that co-conspirator to jurisdiction in that state.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN38[] In Personam Actions, Due Process

The teaching of case law is that the mere sale of financial instruments by a co-conspirator in a forum is insufficient to confer conspiracy jurisdiction in that forum, at least on the facts presented in that case.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN39[] In Personam Actions, Due Process

The Schwab standard for conspiracy jurisdiction is extraordinarily broad. Indeed, under the Schwab standard, a court can exercise personal jurisdiction over a defendant based on the actions of a co-conspirator who is entirely unknown to that defendant. In addition, this standard may be in tension with judicial precedent that the relationship between the defendant and the litigation must arise out of the contacts that the defendant himself creates with the forum State.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

HN40[] In Personam Actions, Due Process

The exercise of jurisdiction comports with due process only if the defendant's conduct and connection with the forum is such that the defendant should reasonably anticipate being haled into court there.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

HN41[] In Personam Actions, Due Process

When the court concludes that plaintiffs have adequately alleged that defendants have satisfied the first step of the personal jurisdiction analysis, it must determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice. Judicial precedent sets forth five factors in considering the reasonableness of the forum. A court must consider (1) the burden on the defendant, (2) the interests of the forum State, and (3) the plaintiff's interest in obtaining relief. It must also weigh in its determination (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several States in furthering fundamental substantive social policies. The primary concern is the burden on the defendant. Where a defendant has purposefully directed its activities at the forum state, it may still defeat jurisdiction on due process grounds. To do so, however, it must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

HN42[] **Relief From Judgments, Altering & Amending Judgments**

Motions for reconsideration are governed by S.D.N.Y. & E.D.N.Y. Civ. R. 6.3, which provides that the moving party shall set forth the matters or controlling decisions which counsel believes the court has overlooked. Motions for reconsideration are committed to the sound discretion of the district court. Reconsideration of a previous order by the court is an extraordinary remedy to be employed sparingly. As such, reconsideration should be granted only when the moving party identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.

International Law > Authority to Regulate

HN43[] **International Law, Authority to Regulate**

Under the Morrison framework, first, unless Congress's intention to give a statute extraterritorial effect is clearly expressed, courts must presume it is primarily concerned with domestic conditions. In other words, when a statute gives no clear indication of an extraterritorial application, it has none. Second, if a statute applies only domestically, a court must determine which domestic conduct it regulates.

Securities Law > Commodities Futures Trading

HN44[] **Securities Law, Commodities Futures Trading**

At the first step of the Morrison framework, since *7 U.S.C.S. § 22* of the Commodities Exchange Act is silent as to extraterritorial reach, suits funneled through this private right of action must be based on transactions occurring in the territory of the United States. At Morrison's second step, in order for plaintiffs to state a proper domestic application of *§ 22*, the suit must be based on transactions occurring in the territory of the United States.

Securities Law > Commodities Futures Trading

HN45[] **Securities Law, Commodities Futures Trading**

While a domestic transaction as defined by the Absolute Activist analysis is necessary to invoke the private remedy afforded by *7 U.S.C.S. § 22*, it is not sufficient.

Securities Law > Commodities Futures Trading

HN46[] Securities Law, Commodities Futures Trading

In order to close the gap between necessary and sufficient, plaintiffs' *7 U.S.C.S. § 22* claims must not be so predominately foreign as to be impermissibly extraterritorial. To state a proper claim under *§ 22*, plaintiffs must allege not only a domestic transaction, but also domestic, not extraterritorial, conduct by defendants that is violative of a substantive provision of the Commodities Exchange Act, such as *7 U.S.C.S. §§ 6(c)(1)* or *9(a)(2)*.

Securities Law > Commodities Futures Trading

HN47[] Securities Law, Commodities Futures Trading

Case law teaches that to assess whether plaintiffs have pleaded an appropriately domestic application of the Commodities Exchange Act (CEA), the court must assess whether plaintiffs' CEA claims are predominately foreign.

Securities Law > Commodities Futures Trading

HN48[] Securities Law, Commodities Futures Trading

Plaintiffs' suit must satisfy the threshold requirement of *7 U.S.C.S. § 22*, which gives plaintiffs a private right of action under the Commodities Exchange Act (CEA), *7 U.S.C.S. § 25*, before the court can reach the merits of their substantive CEA claims. Consequently, the court starts by assessing whether plaintiffs have pleaded a proper domestic application of *§ 22*.

Securities Law > Commodities Futures Trading

HN49[] Securities Law, Commodities Futures Trading

Both principal-agent liability and aiding and abetting claims under the Commodities Exchange Act (CEA) are viable only where an underlying primary violation of the CEA can survive a motion to dismiss.

International Law > Authority to Regulate

HN50[] International Law, Authority to Regulate

An allegation that a foreign course of conduct has caused malign effects in the United States is not enough to salvage an otherwise extraterritorial claim.

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

HN51[] Amendment of Pleadings, Leave of Court

In the Second Circuit, it is the usual practice upon granting a motion to dismiss to allow leave to replead. Leave may be denied for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party.

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Judges: GREGORY H. WOODS, United States District Judge.

Opinion by: GREGORY H. WOODS

Opinion

[*297] MEMORANDUM OPINION AND ORDER

GREGORY H. WOODS, United States District Judge:

Platinum and palladium are precious metals. Plaintiffs in this case allege that Defendants conspired to manipulate the price of these metals by "fixing the Fix." *In re Platinum and Palladium Antitrust Litig. ("Platinum I"), 1:14-CV-9391-GHW, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *5 (S.D.N.Y. Mar. 28, 2017)*. The Fix was supposed to be a process by which Defendants determined the worldwide benchmark price of platinum and palladium according to the laws of supply and demand. But Plaintiffs allege that Defendants colluded to push the benchmark price below the price that would have prevailed in a competitive market, which allegedly caused Plaintiffs **[**5]** to **[*298]** receive lower prices for their platinum and palladium investments than they otherwise would have.

The Court reaffirms the conclusion it reached in *Platinum I* that Plaintiffs are not efficient enforcers of the antitrust laws because Plaintiffs have not adequately alleged that they traded directly with any Defendant or that Defendants dominated the market for platinum and palladium derivatives. However, the Court has personal jurisdiction over the foreign defendants because Plaintiffs have amended their complaint to plausibly allege conduct by their co-conspirators in the United States in furtherance of the conspiracy to manipulate the Fix price. Finally, because Plaintiffs' Commodities Exchange Act ("CEA") claims are predominately foreign, those claims are impermissibly extraterritorial. Accordingly, Defendants' motion to dismiss Plaintiffs' Sherman Act claim is GRANTED, the foreign defendants' motion to dismiss for lack of personal jurisdiction is DENIED, and Defendants' motion for reconsideration is GRANTED.

I. BACKGROUND[1]

A. Facts[2]

Platinum and palladium are "closely related precious metals." TAC ¶ 104. "While platinum and palladium—like gold and silver—have industrial **[**6]** uses, all four have traditionally been traded internationally . . . [and] held primarily for their exchange value rather than industrial use." *Id.* ¶ 54 (citation omitted). The allegations in this case center on the "London Platinum and Palladium Price Fixing (the 'Fixing' or 'Fix')." *Id.* ¶ 3. The Fix was a "private conference call twice each London business day" that "set global benchmark prices for platinum and palladium." *Id.* The Fix set this benchmark by establishing the price for physical platinum and palladium; the physical platinum and palladium was housed in London or Zurich. *Id.* ¶ 59.

The London Platinum and Palladium Fixing Company Ltd. ("LPPFC") operated as the "vehicle" for the Fix from 2004 to 2014. *Id.* ¶ 3. Throughout the period between January 1, 2008 and November 30, 2014 (the "Proposed Class Period"), there were four "members" of LPPFC that participated in the Fix. *Id.* Those members are the

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[1] The Court has issued a prior opinion in this case that provides further background. *See* *Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *2-9*.

[2] These facts are drawn from the Third Consolidated Amended Class Action Complaint ("TAC"), Dkt No. 183, and are accepted as true for the purposes of the *Rule 12(b)(6)* motion. *See, e.g.,* *Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002)*. ***HN1***[] However, "[t]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

defendants in this case: BASF Metals Limited ("BASF Metals"), Goldman Sachs International ("Goldman Sachs"), HSBC Bank USA, N.A. ("HSBC"), and ICBC Standard Bank Plc ("ICBC Standard"). *Id.*

In theory, the Fix price was determined through a bona fide Walrasian auction among Defendants. **[**7]** *Id.* ¶ 58. One Fixing member, known as the Chair, would announce an opening price. *Id.* ¶ 59. Then, each Defendant would announce whether they were interested in buying or selling platinum and palladium at that price. *Id.* The Chair would then adjust the Fix price until the market reached an equilibrium at which supply equaled demand for platinum and palladium at the Fix price. *Id.* ¶ 62; *see Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *3*.

Platinum and palladium trade in at least two markets. First, "[t]he market for **[*299]** physical platinum and palladium operates on an over-the-counter ('OTC,' *i.e.*, between private parties) basis." TAC ¶ 74; *see Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *4-5*. Second, platinum and palladium futures and options contracts trade either OTC or on an "exchange." TAC ¶ 79; *see Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *4-5* (defining the terms "futures contract" and "options contract"). The New York Mercantile Exchange ("NYMEX") is the "leading centralized exchange for platinum and palladium futures and options worldwide." TAC ¶ 79. Plaintiffs also allege that "NYMEX Platinum and Palladium prices move virtually in tandem with Fix prices." *Id.* ¶ 82; *see id.* ¶ 94 (alleging a correlation coefficient of 1.00 for physical platinum prices to futures prices and 0.99 for physical palladium prices to futures prices). **[**8]**

Plaintiffs Norman Bailey, Thomas Galligher, and Larry Hollin are individuals who "sold NYMEX platinum and palladium futures contracts at artificial[ly low] prices." *Id.* ¶ 28-30. Plaintiff White Oak Fund is a "private placement fund" also alleged to have transacted in NYMEX platinum futures contracts. *Id.* ¶ 32. Collectively, this opinion refers to these plaintiffs as the "Exchange Plaintiffs." The TAC alleges that Plaintiff KPFF Investment, Inc. "sold physical platinum and palladium" at artificially low prices. *Id.* ¶ 31. This opinion refers to KPFF as the "OTC Plaintiff."

The crux of Plaintiffs' allegations giving rise to this action is that Defendants took advantage of the Fixing Calls to set the Fix Price at lower levels than competitive market forces would otherwise have dictated. *Id.* ¶ 102; *see Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *5*. Plaintiffs allege that Defendants manipulated the Fix Price in two ways. First, Plaintiffs allege that Defendants "conspired to manipulate the Opening Price announced by the Chair at the beginning of the Fixing Calls." TAC ¶ 247; *see Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *5*. Second, Plaintiffs allege that "Defendants misrepresented actual market supply and demand in order to move the AM and PM Fix Price to the level at which it **[**9]** was ultimately fixed." TAC ¶ 247; *see Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *5*.

Plaintiffs allege that Defendants employed different strategies to profit from this manipulation. First, Plaintiffs generally allege that Defendants exploited their foreknowledge of downward swings in the platinum and palladium Fix Price to make advantageous transactions in a variety of Platinum and Palladium Investments. TAC ¶¶ 15-16; *see Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *8*. Relatedly, Defendants also benefited from reducing their risk in digital options and other contracts with market-based triggers, such as "stop loss" orders and "margin calls." TAC ¶ 208; *see Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *8*. Second, the TAC alleges that Defendants were particularly motivated to suppress the Fix Price in order to profit from large net "short" positions that they allegedly held in the platinum and palladium futures market, including NYMEX, throughout the Proposed Class Period. TAC ¶ 174; *see Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *8*. In addition to these methods of profiting directly from manipulating the Fix, Plaintiffs allege that the Fixing calls enabled Defendants to employ other price manipulation tactics, including "front running," "spoofing," "wash sales," "painting the screen," and "jamming." TAC ¶¶ 10, 179 & n.4; *see Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *6* (defining these terms).

Plaintiffs present **[**10]** economic data in support of their claims that there were "artificial downward spikes around the time of the Fixing" for which "there is no innocent explanation." TAC at 49, 91 (capitalization altered). Plaintiffs also highlight government **[*300]** investigations into Defendants, which they claim "corroborate" their allegations. *Id.* at 128 (capitalization altered).

B. Procedural History

Plaintiffs commenced this action on November 25, 2014. Dkt No. 1. The parties filed a joint motion to consolidate five substantively similar complaints and to appoint Labaton Sucharow LLP and Berger & Montague, P.C. as interim co-lead counsel for the proposed class, which the Court granted. Dkt No. 32. Plaintiffs subsequently filed a consolidated amended complaint, and Defendants moved to dismiss. Dkt Nos. 45, 76, 79. Plaintiffs then filed a second consolidated amended class action complaint ("SAC"), and Defendants again moved to dismiss for failure to state a claim and for lack of personal jurisdiction over certain foreign defendants. Dkt Nos. 102, 115, 117, 119-20.

The Court granted those motions in part and denied them in part. *Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *53*. The Court held that Plaintiffs had plausibly alleged a conspiracy among Defendants to violate the **[**11]** *Sherman Act* based on Plaintiffs' allegations of Defendants' "parallel conduct" and other circumstantial evidence including that "the Fixing coincided with Defendants' alleged price manipulation[,]" that Defendants allegedly acted against their own economic self-interest, and that Defendants had a "common motive" to "profit from their foreknowledge of the Fix Price[.]" *2017 U.S. Dist. LEXIS 46624, [WL] at *10-16*. The Court also concluded that Plaintiffs had Article III standing. *2017 U.S. Dist. LEXIS 46624, [WL] at *16-17*. The Court then considered whether Plaintiffs had antitrust standing. *See* *2017 U.S. Dist. LEXIS 46624, [WL] at *18-25*. The Court held that Plaintiffs had adequately alleged an antitrust injury. *2017 U.S. Dist. LEXIS 46624, [WL] at *19-20*.

However, the Court concluded that Plaintiffs were not "efficient enforcers" of the antitrust laws. *2017 U.S. Dist. LEXIS 46624, [WL] at *20-25*. Examining all four efficient enforcer factors, the Court determined that "it is appropriate to draw a line between persons who transacted directly with Defendants and those who did not." *2017 U.S. Dist. LEXIS 46624, [WL] at *22*. Because Plaintiffs did not allege that they transacted directly with Defendants, the Court held that Plaintiffs were not efficient enforcers of the antitrust laws.

The Court also concluded that Plaintiffs had plausibly alleged Commodities Exchange Act ("CEA") violations. *2017 U.S. Dist. LEXIS 46624, [WL] at *25-37*.[3] The Court held that Plaintiffs' CEA claims were not **[**12]** impermissibly extraterritorial. *2017 U.S. Dist. LEXIS 46624, [WL] at *26-28*. Those claims are the subject of Defendants' motion for reconsideration. In addition, the Court held that it did not have personal jurisdiction over Foreign Defendants BASF Metals, ICBC Standard, and LPPFC and denied Plaintiffs' request for jurisdictional discovery.[4] *2017 U.S. Dist. LEXIS 46624, [WL] at *39-49*. Finally, the Court granted Plaintiffs leave to amend. *2017 U.S. Dist. LEXIS 46624, [WL] at *53*.

C. New Allegations in the TAC

In response to the Court's decision in *Platinum I*, Plaintiffs have added new allegations to the TAC. With respect to Plaintiffs' claim that they are "efficient enforcers" of the antitrust laws, Plaintiffs' new allegations can be grouped into four buckets. *See* TAC at 2-3. First, Plaintiffs present new allegations related to exchange trading on NYMEX. Plaintiffs allege **[*301]** that NYMEX is "owned and operated by CME [Chicago Mercantile Exchange] Group." *Id.* ¶ 4 n.3. The TAC alleges that "NYMEX—through its clearinghouse, CME Clearing—is the counterparty to all transactions on the exchange (*i.e.*, the buyer or seller to a NYMEX contract does not have any identified counterparty other than NYMEX)." *Id.* ¶ 80 (emphasis omitted); *see also id.* ¶ 81. Second, Plaintiffs allege that there is a close relationship between the **[**13]** Fix and NYMEX futures prices. *See id.* ¶¶ 5, 14, 79-103, 134, 143. Third, Plaintiffs allege that Defendants have substantial market share in both the OTC and NYMEX platinum and

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[3] The Court also dismissed Plaintiffs' unjust enrichment claim. *2017 U.S. Dist. LEXIS 46624, [WL] at *38*. Plaintiffs have chosen not to replead this claim. *See* TAC ¶ 1.

[4] Plaintiffs have chosen not to replead their claim against LPPFC. *See* TAC ¶ 1. The Court also granted motions to dismiss filed by UBS and BASF Corporation ("BASF Corp.") for failure to state a claim. *Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *50-52*. Plaintiffs have chosen not to replead these claims. *See* TAC ¶ 1.

palladium markets. *See id.* ¶¶ 6, 38, 40, 42, 44, 64, 71, 73, 77, 191, 194, 199. Fourth, Plaintiffs allege that NYMEX is the leading centralized exchange for trading platinum and palladium derivatives. *See id.* ¶¶ 4, 79, 89.

Plaintiffs have also substantially narrowed the scope of the Class and the scope of the transactions covered by the Class definition. Plaintiffs "bring this action on behalf of themselves and as a class action under *Rule 23(a)*, *(b)(2)* and *(b)(3) of the Federal Rules of Civil Procedure*, seeking relief on behalf of" a class including "[a]ll persons or entities who during the period from January 1, 2008 through November 30, 2014 . . . : (i) sold physical platinum or palladium (99.95% or greater purity, or otherwise good delivery); (ii) sold platinum or palladium futures contracts traded on NYMEX; (iii) sold platinum or palladium call options traded on NYMEX; or (iv) bought platinum or palladium put options traded on NYMEX." TAC ¶ 265; *cf.* SAC ¶ 271 (including in the proposed class those who "sold shares in platinum or palladium [exchange traded funds,]" those **[**14]** who "sold over-the-counter platinum or palladium spot or forward contracts or platinum or palladium call options[,]" and those who "bought over-the-counter platinum or palladium put options.").

Additionally, Plaintiffs have added new allegations to the TAC with respect to BASF Metals and ICBC Standard's alleged continuous presence in the United States and their allegedly suit-related conduct in this country. *See* TAC ¶¶ 14, 34-38, 43-46, 64, 68, 72, 190-191, 194, 202. Plaintiffs allege that both BASF Metals and ICBC Standard engaged in conduct directed at the NYMEX and that information from the Fixing was disseminated to and traded on by traders in New York and New Jersey, including on the NYMEX. *See id.* Specifically, Plaintiffs allege that United States-based "precious metals traders" employed by a BASF Metals' affiliate "would update order information during the Fixing and provide this updated order information to BASF [Metals'] participant in the Fixing as the Fixing was conducted." *Id.* ¶ 38. Similarly, the TAC alleges that "New York-based precious metals traders [employed by a United States affiliate of ICBC Standard] would update order information during the Fixing and provide this **[**15]** updated order information to [ICBC Standard]'s participant in the Fixing as the Fixing was conducted." *Id.* ¶ 44. Furthermore, the TAC alleges that the participants in the Fixing on behalf of Defendants BASF Metals and ICBC Standard were in "constant communication" with traders employed by United States-based affiliates. *Id.* ¶ 38 (BASF Metals); *id.* ¶ 44 (ICBC Standard).

The TAC asserts five claims for relief. First, the TAC alleges that Defendants made an agreement to restrain trade in violation of *section 1 of the Sherman Act*, *15 U.S.C. §§ 1 et seq.* TAC ¶¶ 273-79. Second, the TAC alleges a claim for manipulation in violation of the *CEA*, *7 U.S.C. §§ 1 et seq.*, including Commodity Futures Trading Commission ("CFTC") Rule 180.2. TAC ¶¶ 280-84. Third, the TAC asserts that Defendants employed a manipulative **[*302]** device in violation of the CEA including CFTC Rule 180.1. *Id.* ¶¶ 285-89. Fourth, the TAC asserts a claim for principal agent liability in violation of the CEA. *Id.* ¶¶ 290-92. Finally, the TAC asserts a claim for aiding and abetting liability in violation of the CEA. *Id.* ¶¶ 293-95.

Defendants have again moved to dismiss for failure to state a claim under *Federal Rule of Civil Procedure 12(b)(6)* as to all Defendants and for lack of personal jurisdiction as to the foreign defendants BASF Metals and **[**16]** ICBC Standard under *Federal Rule of Civil Procedure 12(b)(2)*. Dkt Nos. 207-11.[5] Plaintiffs filed an opposition to both motions, Dkt Nos. 214-16, and Defendants filed their replies. Dkt Nos. 218-21. After those motions were fully briefed, Defendants also filed a motion for reconsideration of the Court's prior holding that Plaintiffs' CEA claims were not impermissibly extraterritorial. Dkt Nos. 235-36. Plaintiffs filed an additional opposition to that motion, Dkt No. 237, and Defendants filed an additional reply. Dkt No. 238.

II. DISCUSSION

[5] Defendants also ask the Court to take a "fresh look at the lack of particularity" in Plaintiffs' allegations. Joint Memorandum of Law in Support of Defendants' Motion To Dismiss Plaintiffs' Third Amended Complaint ("Mem."), Dkt No. 208, at 20. Having considered this argument, the Court declines to disturb its prior rulings holding that Plaintiffs have sufficiently alleged a conspiracy among Defendants.

A. *Rule 12(b)(6)* Motion[6]

1. Legal Standard

HN3[] Under *Federal Rule of Civil Procedure 8*, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. A defendant may nonetheless move to dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. To survive a motion to dismiss pursuant to *Rule 12(b)(6)*, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing **[**17]** *Twombly, 550 U.S. at 556*). "To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007)* (quoting *Twombly, 550 U.S. at 544*).

HN4[] Determining whether a complaint states a plausible claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common **[*303]** sense." *Iqbal, 556 U.S. at 679*. The court must accept all facts alleged in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Burch v. Pioneer Credit Recovery, Inc., 551 F.3d 122, 124 (2d Cir. 2008)* (per curiam). However, a complaint that offers "labels and conclusions" or "naked assertion[s]" without "further factual enhancement" will not survive a motion to dismiss. *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 555, 557)*.

2. Application

Plaintiffs have not adequately alleged that they are efficient enforcers of the antitrust laws. *HN5*[] As discussed in *Platinum I*, "[w]hile 'it is a well-established principle that the United States is authorized to sue anyone violating the federal antitrust laws, a private plaintiff must demonstrate standing.'" *2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *18* (quoting *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 436 (2d Cir. 2005))* (alterations and some quotation marks omitted). "Antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement, the **[**18]** court must dismiss it as a matter of law." *Id.* (quoting *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 75-76 (2d Cir. 2013))* (brackets omitted).

HN6[] "To satisfy the antitrust standing requirement, 'a private antitrust plaintiff must plausibly allege that (i) it suffered an antitrust injury and (ii) it is an acceptable plaintiff to pursue the alleged antitrust violations,' *i.e.*, that plaintiff is 'an "efficient enforcer" of the antitrust laws." *Id.* (quoting *In re Aluminum Warehousing Antitrust Litig. ("Aluminum II"), 833 F.3d 151, 157-58 (2d Cir. 2016))*. The Court concluded in *Platinum I* that Plaintiffs have adequately alleged an antitrust injury, *2017 U.S. Dist. LEXIS 46624, [WL] at *19-20*, and it does not disturb that conclusion here.

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[6] *HN2*[] "Although a court should 'traditionally treat personal jurisdiction as a threshold question to be addressed prior to consideration of the merits of a claim, that practice is prudential and does not reflect a restriction on the power of the courts to address legal issues.'" *Sullivan v. Barclays PLC, 13-CV-2811 (PKC), 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at *11 (S.D.N.Y. Feb. 21, 2017)* (quoting *ONY, Inc. v. Cornerstone Therapeutics, Inc., 720 F.3d 490, 498 n.6 (2d Cir. 2013))*. "[I]n cases such as this one with multiple defendants—over some of whom the court indisputably has personal jurisdiction—in which all defendants collectively challenge the legal sufficiency of the plaintiffs['] cause of action, [a court] may address first the facial challenge to the underlying cause of action[.]" *Id.* (quoting *Chevron Corp. v. Naranjo, 667 F.3d 232, 247 n.17 (2d Cir. 2012))*. Accordingly, the Court considers Defendants' *Rule 12(b)(6)* motion first.

Thus, the question before the Court is whether Plaintiffs are "efficient enforcers of the antitrust laws." Gelboim v. Bank of Am. Corp., 823 F.3d 759, 777-78 (2d Cir. 2016) (citation omitted). **HN7**[] The efficient enforcer inquiry focuses on four factors: "(1) the 'directness or indirectness of the asserted injury' . . . ; (2) the 'existence of more direct victims of the alleged conspiracy'; (3) the extent to which [plaintiffs'] damages claim is 'highly speculative;' and (4) the importance of avoiding 'either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.'" *Id. at 778* (quoting **[**19]** *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters ("AGC"), 459 U.S. 519, 540-44, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*.

HN8[] "The efficient enforcer inquiry is a general balancing test in which the importance assigned to each factor 'will necessarily vary with the circumstances of particular cases.'" *Iowa Pub. Employees' Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc., 340 F. Supp. 3d 285, 332 (S.D.N.Y. 2018)* (quoting *Gatt, 711 F.3d at 78*). The factors are meant to determine "whether the putative plaintiff is a proper party to 'perform the office of a private attorney general' and thereby 'vindicate the public interest in antitrust enforcement[.]'" *Gatt, 711 F.3d at 80* (quoting *AGC, 459 U.S. at 542*). Because the efficient enforcer inquiry presents somewhat different considerations for the OTC Plaintiff and the Exchange Plaintiff, the Court conducts the inquiry for each in turn.

a. OTC Plaintiff

The OTC Plaintiff is not an efficient enforcer of the antitrust laws because **[*304]** Plaintiffs have not alleged that it transacted directly with any Defendant. The TAC alleges that the OTC Plaintiff "sold physical platinum and palladium[.]" TAC ¶ 31. Plaintiffs also allege that "[d]uring the [Proposed] Class Period," each Defendant "entered directly into platinum and palladium transactions with members of the Class." *Id.* ¶ 38 (BASF Metals); *id.* ¶ 40 (Goldman Sachs); *id.* ¶ 42 (HSBC); *id.* ¶ 44 (ICBC Standard). In addition, the TAC alleges a number **[**20]** of "dates on which one or more of Plaintiffs['] sales coincided with Defendants['] manipulation of the PM Platinum fixing" and makes similar allegations for the PM Palladium Fixing. *Id.*, apps. C & D (capitalization altered).[7] However, Plaintiffs do not allege that the OTC Plaintiff transacted directly with any Defendant.

Accordingly, the analysis of the four efficient enforcer factors as applied to the OTC Plaintiff focuses on whether it qualifies as an efficient enforcer, even though it did not transact directly with Defendants. Plaintiffs allege that the Fix "set global benchmark prices for platinum and palladium," *id.* ¶ 3, and that Defendants conspired to rig the Fix. *See, e.g., id.* ¶ 102. Thus, Plaintiffs allege that Defendants manipulated the global benchmark price of platinum and palladium. As discussed below, the application of the efficient enforcer factors where plaintiffs allege manipulation of a benchmark is not straightforward. Ultimately, with respect to the OTC Plaintiff, the Court adheres to its decision in *Platinum I* to "dr[a]w a line between plaintiffs who transacted directly with defendants and those who did not." *2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *22* (quoting **[**21]** *In re LIBOR-Based Fin. Instruments Antitrust Litig. ("LIBOR VI"), 11 MDL 2262 (NRB), 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *16 (S.D.N.Y. Dec. 20, 2016))* (brackets omitted). Because the TAC does not allege that the OTC Plaintiff transacted directly with any defendant, it is not an efficient enforcer.

i. Directness of Injury

HN9[] The first efficient enforcer factor is "the 'directness or indirectness of the asserted injury.'" *Gelboim, 823 F.3d at 778* (quoting *AGC, 459 U.S. at 540*). This factor "requires evaluation of the 'chain of causation' linking [plaintiff's] asserted injury and the [defendants'] alleged price-fixing." *Id.* (quoting *AGC, 459 U.S. at 540*); *see also In re Commodity Exch., Inc. ("Gold"), 213 F. Supp. 3d 631, 653 (S.D.N.Y. 2016)* (holding that this factor "requir[es] proximate causation" between the antitrust injury alleged by plaintiff and defendants' allegedly anticompetitive

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[7] Plaintiffs made similar allegations in the SAC, *see, e.g.*, SAC ¶ 34; apps. C & D, which the Court found to be insufficient to plausibly alleged that OTC plaintiffs were efficient enforcers. *Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *21-25*.

conduct) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 135, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)*; *DNAML PTY, Ltd. v. Apple Inc., 25 F.Supp.3d 422, 430 (S.D.N.Y. 2014)*; *In re London Silver Fixing, Ltd., Antitrust Litig. ("Silver I"), 213 F. Supp. 3d 530, 552 (S.D.N.Y. 2016))* (capitalization altered).

The first factor is problematic for Plaintiffs' argument that the OTC Plaintiff is an efficient enforcer in this case. Plaintiffs allege that the Fixing set the "globally accepted benchmark prices" for platinum and palladium. TAC ¶ 4. In similar circumstances, some courts have held that plaintiffs alleging injury via manipulation of a benchmark price satisfy the proximate causation requirement **[**22]** because their allegation is that they are directly injured by defendants' manipulation of the benchmark, regardless of whether they **[*305]** have transacted directly with defendants. *See* *Dennis v. JPMorgan Chase & Co., 345 F. Supp. 3d 122, 165 (S.D.N.Y. 2018)* (describing the first efficient enforcer factor as requiring plaintiffs to "demonstrate[] a sufficiently direct injury" and concluding that the plaintiffs had met that standard because they "allege[d] that they engaged in transactions for" derivatives linked to a financial benchmark "and that their returns were lower because of defendants' anticompetitive conduct"); *Gold, 213 F. Supp. 3d at 653-54* (concluding that the plaintiffs "ha[d] demonstrated a sufficiently direct injury" in similar factual circumstances).[8] On this view, Plaintiffs have sufficiently alleged that Defendants proximately caused the OTC Plaintiff to receive lower prices than it otherwise would have when it sold its platinum and palladium.

HN10[] On the other hand, where a plaintiff does not purchase directly from defendant, there are "significant intervening causative factors," which may "attenuate the causal connection between the violation and **[**23]** the injury." *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980 at *15*. When "[a] plaintiff and a third party" choose to "incorporate [a benchmark] into a financial transaction without any action by defendants whatsoever," the "independent decision to do so" may attenuate "the chain of causation between defendants' actions and a plaintiff's injury." *2016 U.S. Dist. LEXIS 175929, [WL] at *16*.[9] Thus, although the causation analysis does not itself preclude Plaintiffs' argument that the OTC Plaintiff is an efficient enforcer, the problems of proving causation in this case is a significant factor in the efficient enforcer analysis.

ii. Existence of More Direct Victims

HN11[] The second efficient enforcer factor is "the 'existence of more direct victims of the alleged conspiracy[.]" *Gelboim, 823 F.3d at 779* (quoting *AGC, 459 U.S. at 542*). Generally, "[w]hether there is a more direct victim of Defendants' alleged antitrust violation turns 'chiefly on whether the plaintiff is a consumer or a competitor.'" *Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *23* (quoting *Gelboim, 823 F.3d at 779*). However, a plaintiff's status "is not the end of the inquiry; the efficient enforcer criteria must be established irrespective of whether the plaintiff is a consumer or a competitor." *Id.* (quoting *Gelboim, 823 F.3d at 779*). "'Inferiority' **[*306]** to other potential plaintiffs **[**24]** can be relevant, but it is not dispositive." *In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d*

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[8] *See also* Sharon E. Foster, *Antitrust Efficient Enforcer and the Financial Products Benchmark Manipulation Litigation* ("*Benchmark Manipulation Litigation*"), *13 Ohio St. Bus. L.J. 99, 137 (2019)* (opining "that there is no intervening cause or persons between plaintiffs' damages and defendants' conduct" in benchmark manipulation cases); *cf.* *Gelboim, 823 F.3d at 779* ("At first glance, here there appears to be no difference in the injury alleged by those who dealt in LIBOR-denominated instruments, whether their transactions were conducted directly or indirectly with [the defendants].").

[9] *See also* *Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at *17* ("A defendant may have had no knowledge of the existence of a particular transaction, and the plaintiff may have had no dealings with the defendant, but, provided the derivative product incorporated [the benchmark] as a price term, it would fall within the scope of plaintiffs' claims."); *Sonterra Capital Master Fund Ltd. v. Credit Suisse Group AG ("CHF LIBOR"), 277 F. Supp. 3d 521, 560-61 (S.D.N.Y. 2017))*. *But see* Foster, *Benchmark Manipulation Litigation at 138-39* (challenging this analysis because "it assumes, incorrectly, that plaintiffs had a choice, and the bargaining power to affect that choice, regarding what benchmark to select as part of the price equation. . . . The economic reality was that LIBOR benchmarks controlled approximately 75% of the global market for interest rate financial products during the relevant time period. Further, as a practical matter, some benchmark had to be used to estimate price. . . . Leading benchmarks, such as LIBOR, were used as a matter of course[,] not as a matter of choice.") (footnote and citations omitted).

677, 689 (2d Cir. 2009). "Implicit in the inquiry is recognition that not every victim of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced." *Gelboim, 823 F.3d at 779*.

The existence of more direct victims of Defendants' alleged conspiracy does not weigh clearly in favor of or against the conclusion that Plaintiffs have sufficiently pleaded that the OTC Plaintiff is an efficient enforcer. On the one hand, those who transacted directly with Defendants may be conceived of as more direct victims of Defendants' alleged conspiracy than those who did not.

On the other hand, ***HN12***[] *Gelboim* held that this factor may have "diminished weight" in benchmark manipulation cases. *823 F.3d at 779*. "In *Gelboim*, the Second Circuit recognized that 'one peculiar feature of that case was that remote victims (who acquired LIBOR-based instruments from any of thousands of non-defendant banks) would be injured to the same extent and in the same way as direct customers of the Banks.'" *Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *23* (quoting *Gelboim, 823 F.3d at 779*) (other citations and brackets omitted). What *Gelboim* labeled a "peculiar feature" is present in any benchmark manipulation case, and *Platinum I* concluded that it **[**25]** is "also present here. Those who transacted in [p]latinum and [p]alladium [i]nvestments with other market participants would be injured to the same extent and in the same way as Defendants' direct customers." *Id.* (quoting *Gelboim, 823 F.3d at 779*) (other citations omitted); *see also* Foster, *Benchmark Manipulation Litigation at 140-41* (arguing that so long as the price a purchaser paid was tied to the relevant benchmark, it does not matter whether a plaintiff transacted directly with a defendant). It was for this reason that *Gelboim* held that whether there were more direct victims of the alleged conspiracy should receive "diminished weight" in cases like this one. *823 F.3d at 779*. Consequently, both because *Gelboim* indicated that this factor carries diminished weight in benchmark manipulation cases and because it does not clearly cut for or against the OTC Plaintiff's efficient enforcer status, the second factor does not carry much weight in the Court's analysis.

iii. Speculative Damages

HN13[] The third efficient enforcer factor is "whether the damages would necessarily be 'highly speculative[.]'" *Gelboim, 823 F.3d at 780* (quoting *AGC, 459 U.S. at 542*). "'Some degree of uncertainty stems from the nature of* ***antitrust law***' and 'the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.' At **[**26]** the same time, 'highly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement.'" *CHF LIBOR, 277 F. Supp. 3d at 563* (first quoting *Gelboim, 823 F.3d at 780*; then quoting *DDAVP, 585 F.3d at 689*; and then quoting *Gelboim, 823 F.3d at 779*). "Damages claims may . . . be too speculative where: (1) 'the damages claim is conclusory'; (2) 'the injury is so far down the chain of causation from defendants' actions that it would be impossible to untangle the impact of the fixed price from the impact of intervening market decisions'; or (3) 'due to external market factors, there is no relationship between the fixed price and the price that the plaintiffs ultimately paid.'" *Id.* (quoting *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *17-18)*.

This factor also does not cut clearly in favor of or against Plaintiffs' argument that the OTC Plaintiff is an efficient enforcer. On the one hand, the OTC Plaintiff's damages claim is not conclusory; if, as **[*307]** Plaintiffs allege, Defendants suppressed the price of platinum and palladium, the OTC Plaintiff's theory of damages flows directly from that suppression. Moreover, Plaintiffs have alleged that the OTC Plaintiff suffered a direct injury as a result of Defendants' manipulation of the benchmark price for platinum and palladium, so the OTC Plaintiff's injury is arguably not causally **[**27]** attenuated from Defendants' alleged manipulation. And, although the price of platinum and palladium is undoubtedly influenced by market forces independent of Defendants' alleged manipulation, the same is true to some extent in any Sherman Act case. *Cf.* *Gelboim, 823 F.3d at 780* ("Some degree of uncertainty stems from the nature of ***antitrust law***.").

On the other hand, as in *Gelboim*, damages calculations in this case "present[] some unusual challenges." *Id. at 781*. In *Platinum I*, the Court expressed concern about Plaintiffs' ability to "untangle the impact" of Defendants' alleged conspiracy "from the impact of intervening market decisions." *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *17*; *see* *Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *23-25* (discussing the difficulties calculating damages would present in this case). Those concerns have not entirely abated. Accordingly, this factor also does not carry much weight in the Court's analysis of whether the OTC Plaintiff is an efficient enforcer of the antitrust laws.[10]

iv. Duplicative Recovery & Complex Damages Apportionment

HN14[] The fourth efficient enforcer factor is "either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Gelboim, 823 F.3d at 778* (quoting *AGC, 459 U.S. at 544*). This factor "reflects a 'strong interest in keeping the scope of complex **[**28]** antitrust trials within judicially manageable limits.'" *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980* (quoting *AGC, 459 U.S. at 543*) (ellipsis omitted). It is arguably the most important factor in the efficient enforcer analysis. *See* Foster, *Benchmark Rate Manipulation at 140* ("Efficient enforcer factors focus on duplicative recovery and complex apportionment.") (citations omitted).

Like the first efficient enforcer factor, this factor does not preclude Plaintiffs' argument that the OTC Plaintiff is an efficient enforcer, but it does present significant challenges. On the one hand, if every seller of platinum and palladium collects damages from Defendants, it would not present a risk of duplicative recoveries. That is because every seller can only recover from Defendants once. *See* *ISDAFix, 175 F. Supp. 3d at 61* ("[T]he damages at issue are tied to particular transactions and contracts, obviating the danger of duplicative recovery."). And, at first blush, the apportionment of damages may not seem complex. If Plaintiffs prove that Defendants manipulated the price of platinum and palladium by $X, then each seller should be able to recover $X. On this view, there is nothing more complex about damages apportionment in this case than in any price-fixing case.

Damages apportionment may not be so simple in this case, **[**29]** however. As noted above with respect to factor one, decisions by non-defendant buyers to incorporate the Fix into transactions over which Defendants have no control may create difficult questions of causation that bear on the **[*308]** damages analysis. In other words, where non-defendant parties decided to incorporate the Fix price into transactions without Defendants' knowledge, those decisions may make apportioning damages particularly complex. The complexity of damages apportionment is a significant factor in the Court's analysis of whether plaintiffs who are not alleged to have transacted directly with Defendants are efficient enforcers in this case.[11]

v. Conclusion

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[10] The Court observes that the third efficient enforcer factor may be in tension with traditional principles of notice pleading. In most areas of law, concerns about damage calculations are deferred until after the pleading stage. *See* Foster, *Benchmark Manipulation Litigation at 142* (opining that the concern about speculative damages "is not an efficient enforcer issue; rather, it is a problem of proof").

[11] The allegation that there are government investigations into Defendants' manipulation of the Fix price does not carry significant weight in the Court's analysis. *Gelboim* noted that there were government investigations related to the transactions at issue in that case "ongoing in at least several countries." *823 F.3d at 780*. The Second Circuit observed that "[s]ome of those government initiatives may seek damages on behalf of victims, and for apportionment among them" but did not elaborate on how this should factor into its analysis beyond stating that it was "wholly unclear on this record how issues of duplicate recovery and damage apportionment can be assessed." *Id.* Plaintiffs have made similar allegations of government investigations into Defendants' conduct in this case. TAC ¶¶ 229-40. The importance of related government investigations in similar cases is unsettled in this district. *Compare* *Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at *20* ("[A]ctions of government regulators lessen the need for plaintiffs to function as private attorneys general and vindicators of the public interest.") *with* *In re For. Exch. Benchmark Rates Antitrust Litig. ("FOREX"), 13 CIV. 7789 (LGS), 2016 U.S. Dist. LEXIS 128237, 2016 WL 5108131, at *8 (S.D.N.Y. Sept. 20, 2016)* ("Because public enforcement does not provide redress to victims of the conspiracy, the OTC Class is an efficient and necessary enforcer."). In this case, the allegations that there are government investigations into the alleged manipulation of the Fix is not a significant factor in the Court's analysis.

The Court concludes that plaintiffs who sold physical platinum and palladium and did not transact directly with Defendants are not efficient enforcers of the antitrust laws. As discussed above, the first and fourth factors raise serious concerns about the OTC Plaintiff's efficient enforcer status. Thus, after balancing the efficient enforcer factors with a focus on determining whether the OTC Plaintiff "is a proper party to 'perform the office of a private **[**30]** attorney general' and thereby 'vindicate the public interest in antitrust enforcement'" *Gatt, 711 F.3d at 80* (quoting *AGC, 459 U.S. at 542*), the Court has concluded that plaintiffs who did not transact directly with defendants are not efficient enforcers.

This conclusion is reinforced by the possibility of disproportionate damages in benchmark manipulation cases. ***HN15***[] As noted above, benchmark manipulation cases present unique challenges for application of the efficient enforcer factors. *Gelboim* noted that one difficult issue arises with respect to so-called "umbrella" standing. "Umbrella standing concerns are most often evident when a cartel controls only part of a market, but a consumer who dealt with a non-cartel member alleges that he sustained injury by virtue of the cartel's raising of prices in the market as a whole." *Gelboim, 823 F.3d at 778*; *see also* *Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469, 484 n.4 (7th Cir. 2002)* ("If . . . cartel members A and B sell to customers X and Y, and then non-cartel member firm C makes sales at or near the enhanced cartel price to customer Z, the question arises whether A and B are liable to Z for the overcharges it paid."). Here, plaintiffs who did not transact directly with defendants are "umbrella" purchasers.

HN16[] Benchmark manipulation cases present particularly difficult questions **[**31]** regarding umbrella standing because alleged manipulators can affect prices without dominating the market. In a standard (*i.e.*, non-benchmark) manipulation case, alleged manipulators **[*309]** must have at least a substantial market share—if not outright market dominance—to maintain a non-competitive price. That is because a cartel must have a large enough fraction of the market to exert control over the market price. In other words, if a would-be cartel is only a tiny fraction of the market, it cannot exert market power and thus is no cartel at all. This premise has led to a "scholarly consensus" that is "skeptical" about whether it is possible for private actors to manipulate large commodity markets. *See* Andrew Verstein, *Benchmark Manipulation*, *56 B.C. L. Rev. 215, 216 (2015)*.[12]

Benchmark manipulation cases are different. All that a would-be cartel must do is manipulate a benchmark. Where, as here, the benchmark is calculated based on a tiny fraction of market activity, a manipulator need only manipulate that tiny fraction of market activity.[13] And "[o]nce the benchmark is hardwired into legal relationships, manipulating the proxy pays off just as much as manipulating the underlying reality." *Id. at 217*; *see also id.* ("If the **[**32]** manipulator has agreed to sell oil at the benchmark price, tampering with the benchmark has the same effect as moving the worldwide supply of oil.") (citation omitted). As noted above, because the benchmark is then widely disseminated, any party that transacted based on the benchmark can reasonably complain that their damages were caused by defendants' manipulation. But allowing parties who did not transact directly with defendants to recover also leads to the causal attenuation and complex damages apportionment noted in the Court's discussion of the first and fourth efficient enforcer factors.

Thus, benchmark manipulation cases generate the *Gelboim* court's concern that "if the [defendants] control only a small percentage of the ultimate identified market," the defendants may be liable for "damages disproportionate to wrongdoing[.]" *823 F.3d at 779* (citation omitted); *see also id.* ("Requiring the Banks to pay treble damages to every plaintiff who ended up on the wrong side of an independent LIBOR-denominated derivative swap would, if

[12] *See also* *id. at 216-17* ("To drive up the global price of an asset—such as silver—you have to buy a truly enormous amount. But you haven't gotten rich unless you can sell at the inflated price, and whatever forces raised the price while you bought will reverse when you try to sell. In theory, the plummeting price should precisely evaporate your profits. And in the meantime, you had to pay to transport and store a quarter of the world's silver.").

[13] *See also* *id. at 218* ("By their nature, benchmarks describe a market based on some small slice of it. Careful manipulators can bias that slice. It is daunting to corner the world currency market, but it is less daunting to comer the two percent of the market whose price is considered by the leading benchmark. By shrinking the domain over which the manipulator must exercise influence, benchmarks directly circumvent the principal challenges to manipulation identified by scholars.") (footnote omitted).

appellants' allegations were proved at trial, not only bankrupt 16 of the world's most important financial institutions, but also vastly extend the potential **[**33]** scope of antitrust liability in myriad markets where derivative instruments have proliferated."). As noted above, absent a benchmark, it would be difficult—if not impossible—for defendants who "control[led] only a small percentage of the ultimate identified market" to exert meaningful control over the market price. *Id.* Thus, although the concern about disproportionate damages may arise where a plaintiff alleges market manipulation by means other than the manipulation of a benchmark, it generally will not do so as forcefully as in a benchmark manipulation case—at least where, as here, the benchmark **[*310]** is calculated based on a small slice of market activity or information submitted by a small number of market participants. Either the would-be cartel is too small (and fails in its attempt to manipulate the market) or the cartel has substantial market share (and market-wide damages are more proportional to the harm caused by defendants). Hence, *Gelboim*'s concern about disproportionate damages is particularly relevant in benchmark manipulation cases.

There is another distinct, though conceptually overlapping, issue that results from the problems identified in the Court's discussion of the first **[**34]** and fourth efficient enforcer factors. This concern is that, taking the facts as alleged in the TAC as true, every non-defendant buyer received a benefit from the lower prices that prevailed in the market as a result of Defendants' illegal conduct. That is, assuming that Defendants successfully downwardly manipulated the prices of platinum and palladium, non-defendant buyers received a windfall as a result of Defendants' manipulation. But there is no mechanism for non-defendant buyers to compensate Plaintiffs for this windfall.

This is another way of characterizing *Gelboim*'s concern about disproportionate damages. Plaintiffs' damages may be disproportionate to defendants' wrongdoing because Plaintiffs' damages are not proportional to defendants' ill-gotten gains. Some (even most) of plaintiffs' damages—the difference between the lower price that allegedly prevailed because of Defendants' manipulation and the price that allegedly would have prevailed absent Defendants' manipulation—flowed to non-defendants. Although this concern applies to "umbrella" plaintiffs generally and not only in benchmark manipulation cases, it is particularly vexing where defendants control only a small percentage **[**35]** of the identified market, as is more likely to be the case in benchmark manipulation cases.[14]

These concerns, which flow from the problems inherent in the application of the first and fourth efficient enforcer factors in benchmark manipulation cases, reinforce the Court's conclusion that it should adhere to its decision in *Platinum I* to "dr[a]w a line between platinum and palladium purchasers who transacted directly with Defendants and those who did not." *2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *22* (quoting *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *16)*. In addition to addressing the problems associated with the first and fourth efficient enforcer factors identified above, this approach has the further advantage of rendering Plaintiffs' recovery essentially proportional to Defendants' allegedly ill-gotten gains. ***HN17***[] For similar reasons, "a critical mass of judges within this district" addressing similar concerns in benchmark manipulation cases "have concluded that plaintiffs who are not direct purchasers are not efficient enforcers in a benchmark manipulation case." *In re London Silver Fixing, Ltd., Antitrust Litig. ("Silver II"), 332 F. Supp. 3d 885, 905* ***[*311]*** *(S.D.N.Y. 2018)* (citing *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *16*; *Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at *15*; *Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *22*; *CHF LIBOR, 277 F. Supp. 3d at 558*). Hence, the Court reaffirms its conclusion in *Platinum I* that the OTC Plaintiff is not an efficient enforcer because **[**36]** Plaintiffs have not alleged that the OTC Plaintiff transacted directly with Defendants.

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[14] The question is not, as one commentator has argued, whether defendants are subject to "ruinous liability" or whether particular defendants are systemically important financial institutions. Foster, *Benchmark Manipulation Litigation at 139-40*. The Court agrees that there would be a "serious rule of law problem" if the efficient enforcer inquiry turned on whether a particular defendant was "too big to fail." *Id. at 140*; *cf.* Sharon E. Foster, *Too Big to Prosecute: Collateral Consequences, Systemic Institutions and the Rule of Law, 34 Rev. Banking & Fin. L. 655, 674-85 (2015)*. Rather, the problem is whether defendants—no matter their size—are subject to liability that is *disproportionate* to their allegedly ill-gotten gains. This problem arises because of the structure of benchmark manipulation litigation and, more specifically, the problems of causal attenuation and complex damages apportionment noted above.

b. Exchange Plaintiffs

The Exchange Plaintiffs are not efficient enforcers of the antitrust laws because Plaintiffs have not adequately alleged that Defendants dominated the market for platinum and palladium derivatives. As an initial matter, the same concerns noted above with respect to causation and complex damages apportionment also apply to the Exchange Plaintiffs. Exchange Plaintiffs' choice to incorporate the Fix price into their platinum and palladium derivative transactions arguably attenuates the causal connection between Defendants' actions and their injury. And damage apportionment may be complex given Plaintiffs' choice to incorporate the Fix price independently of any action by Defendants. Hence, the same problems that flow from the application of the efficient enforcer factors to the OTC Plaintiff's claim also arise in the exchange context.

The solution to those problems that the Court has adopted with respect to the OTC Plaintiff is not readily transferable to the exchange market, however. As explained above, parties transact directly in the OTC market. Therefore, an OTC plaintiff's **[**37]** counterparty is reasonably ascertainable. But "[t]he framework of dividing plaintiffs between those who transacted with defendants and those who did not in OTC transactions 'is not readily transferable to the futures market,' because a clearinghouse such as the CME, rather than any identifiable third party, serves essentially as the counterparty." *CHF LIBOR, 277 F. Supp 3d at 561* (quoting *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *16)*; *see also* *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *16* (***HN18***[] "[W]here a plaintiff's counterparty is *reasonably ascertainable* and is not a defendant . . . a plaintiff is not an efficient enforcer.") (emphasis added). For plaintiffs who sold on an exchange, "there is simply no way to tailor the standing analysis to those who dealt directly with defendants." *CHF LIBOR, 277 F. Supp. 3d at 561*. In this case, the Plaintiffs have amended their complaint to allege that CME Clearing "is the counterparty to *all* transactions on the exchange (*i.e.*, the buyer or seller to a NYMEX contract does not have any identified counterparty other than NYMEX)." TAC ¶ 80. In light of the Plaintiffs' amendments, the Court is persuaded that it cannot draw a line between those who transacted directly with defendants and those who did not in the exchange context.

Because the Exchange Plaintiffs' counterparties are not reasonably ascertainable, **[**38]** the Court is caught on the horns of a dilemma. Defendants argue that a necessary corollary of the Exchange Plaintiffs' argument that all NYMEX sellers should be able to collect damages is that "all sellers of NYMEX futures are equally positioned to enforce the antitrust laws" and that accepting their arguments would "effectively eliminate[] the efficient enforcer requirement altogether" in this case. Mem. at 17. On the other hand, Plaintiffs argue that "to allow only those who directly contracted with Defendants to state a claim would leave wide swaths of their victims—including the *entirety* of the futures and options traders—without a remedy." Plaintiffs' Letter to Court, Dkt No. 195, at 2 n.3. Both Plaintiffs and Defendants are correct. Because the Court cannot enforce the line between those who transacted directly with Defendants and those who did **[*312]** not on an exchange, either *no* seller or *every* seller will be an efficient enforcer. As Judge Stein observed with respect to exchange plaintiffs, "there is simply no way to tailor the standing analysis to those who dealt directly with defendants." *CHF LIBOR, 277 F. Supp. 3d at 561*. Therefore, it is difficult to "render[] plaintiffs' recovery essentially proportional to **[**39]** defendants' ill-gotten gains" and "the choice is between under-enforcement and over-enforcement[.]" *Id.*

One way to resolve this dilemma is for plaintiffs to allege that defendants dominated the relevant exchange market. ***HN19***[] Recognizing that counterparties to exchange plaintiffs are not reasonably ascertainable, judges in this district have adopted a test that "depends primarily on the extent of defendants' control of the market for the product traded on the exchange." *CHF LIBOR, 277 F. Supp. 3d at 561* (citations omitted).

FOREX was the first case to adopt this standard. *2016 U.S. Dist. LEXIS 128237, 2016 WL 5108131, at *10*. In that case, Judge Schofield noted the *Gelboim* court's observation that "'at first glance there appears to be no difference in the injury alleged by those who dealt in LIBOR-denominated instruments, whether their transactions were conducted directly or indirectly with the Banks'" but also observed that *Gelboim* "expressed concern . . . with the possibility of damages disproportionate to wrongdoing 'if the Banks control only a small percentage of the ultimate identified market.'" *Id.* (quoting *Gelboim, 823 F.3d at 779*) (ellipsis omitted). She then concluded that this concern was inapplicable because the plaintiffs alleged that the defendants in that case "dominated the FX market **[**40]** with a combined market share of over 90% as significant participants in both OTC and exchange transactions." *Id.* In other words, *Gelboim*'s concern about damages disproportionate to wrongdoing applied much less forcefully on the facts of *FOREX* because where defendants had over 90% market share, they would also be responsible for over 90% of the damages. Three other judges in this district have followed Judge Schofield's lead, reasoning that "control of an exchange-based market 'may be viewed as a . . . way of ensuring that damages would not be greatly disproportionate to wrongdoing." *CHF LIBOR, 277 F.Supp.3d at 561* (quoting *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *16)*; *see also* *Silver II, 332 F. Supp. 3d at 909*.

HN20[] The Court likewise adopts this test as one method by which plaintiffs can allege that an exchange plaintiff is an efficient enforcer.[15] The market domination test helps to resolve the causation and complex apportionment issues described above. Indeed, the market domination test may be thought to serve as a proxy for whether a plaintiff transacted directly with a defendant; in a market in which defendants dominate, it is far more likely that a plaintiff who bought on an exchange will have transacted directly with a defendant.

The question presented by the Exchange Plaintiffs on **[**41]** this motion is thus whether the Plaintiffs have adequately alleged that Defendants have dominated the platinum and palladium exchange market. ***HN21***[] The Court's inquiry consists of three steps. First, the Court must define the relevant market. Second, the Court must examine **[*313]** what share of that market Defendants are alleged to have controlled. Finally, the Court must determine whether Defendants controlled a sufficiently large percentage of the relevant market that they "dominated" it.

i. Market Definition

The first step of the Court's inquiry is to define the relevant market. The "guiding precedent leaves room for debate as to how the 'market' should be defined" in cases like this one. *Gold, 213 F. Supp. 3d at 653*. Plaintiffs argue that they have alleged "a single market for platinum and palladium physical, futures and options transactions[.]" Opposition to Joint Motion to Dismiss for Failure to State a Claim ("Opp."), Dkt No. 216, at 15 n.4; *see, e.g.*, TAC ¶ 254 ("Plaintiffs were sellers in the market for Physical and NYMEX Platinum and Palladium[.]"). ***HN22***[] However, "[w]hile the Court is bound by the factual allegations in the Complaint[]," the "definition of the relevant market is a legal conclusion, not a factual one." **[**42]** *In re N. Sea Brent Crude Oil Futures Litig. ("Oil"), 256 F. Supp. 3d 298, 312 (S.D.N.Y. 2017)*, *aff'd sub nom.*, *Prime Int'l Trading, Ltd. v. BP P.L.C., 784 F. App'x 4 (2d Cir. 2019)*. Therefore, "[t]he Court must examine the facts alleged in the [TAC] to determine what market or markets allegedly were restrained based on Plaintiffs' theory of the case." *Id.*

The TAC alleges harm in two different markets: The physical platinum and palladium market and the NYMEX platinum and palladium market. The markets for physical commodities and derivatives based on the price of those commodities are distinct.[16] *See* *Prime Int'l Trading, 784 F. App'x at 7* (holding that the "physical market for Brent

[15] The Court does not hold that an allegation of market domination is the only method by which an exchange plaintiff can adequately plead antitrust standing in this context. For example, Defendants correctly note that the Exchange Plaintiffs have not "allege[d] that they traded *through* a clearing member affiliated with any Defendant." Mem. at 12. The Court does not take a position on whether allegations of this type plausibly plead that a plaintiff is an efficient enforcer.

[16] The TAC is inconsistent with respect to whether platinum and palladium derivatives traded on NYMEX are directly pegged to, or merely strongly correlated with, the price of physical platinum and palladium. *Compare* TAC ¶ 207 ("The Defendants were also large participants in NYMEX futures and options. These contracts, like those for physical sales of platinum and palladium, *directly incorporate or reference* the Fix price in order to determine the cash flows between the parties.") *with id.* ¶ 91 ("The Fixing also directly impacts the price of NYMEX Platinum and Palladium. This is because exchange prices *closely track* the price of spot platinum or palladium.") (emphases added). Therefore, the Court interprets the TAC as alleging that some NYMEX derivatives directly reference the Fix price while others do not. ***HN23***[] With respect to derivatives that directly incorporate the Fix price, the antitrust injury inquiry is straightforward because "[c]ourts in this Circuit consider manipulation of a price benchmark to constitute restraint of the market which that benchmark guides." *Oil, 256 F. Supp. 3d at 313* (citing *Gelboim, 823*

crude oil" and the market for "derivatives that were linked to, or otherwise tracked" a benchmark oil price were two separate markets); Oil, 256 F. Supp. 3d at 313.[17] **[*314]** This conclusion is consistent with other decisions in this district that have concluded that OTC and exchange plaintiffs are "victims in . . . different markets." Nypl v. JPMorgan Chase & Co., 15 CIV. 9300 (LGS), 2017 U.S. Dist. LEXIS 122468, 2017 WL 3309759, at *6 (S.D.N.Y. Aug. 3, 2017) (citations omitted); *see also* FOREX, 2016 U.S. Dist. LEXIS 128237, 2016 WL 5108131, at *11 (holding that OTC plaintiffs and exchange plaintiffs suffered injury in two different markets); *cf.* CHF LIBOR, 277 F. Supp. 3d at 562 (observing that both OTC and exchange plaintiffs could be efficient enforcers if the OTC plaintiffs pleaded that they transacted directly with the defendants and the exchange plaintiffs **[**43]** pleaded that the defendants dominated the market, implying that the OTC and exchange markets are distinct).[18]

F.3d at 776-77; FOREX, 2016 U.S. Dist. LEXIS 128237, 2016 WL 5108131, at *6; Alaska Elec. Pension Fund v. Bank of Am. Corp. ("ISDAFix"), 175 F. Supp. 3d 44, 59 (S.D.N.Y. 2016)). With respect to derivatives that do not directly incorporate—but closely track—the Fix price, Plaintiffs have adequately alleged that Defendants' manipulation of the NYMEX market is "inextricably intertwined" with their manipulation of the price for physical platinum and palladium. Aluminum II, 833 F.3d at 161. Plaintiffs have adequately alleged that Defendants profited by trading in the NYMEX market and that the manipulation of the physical prices of platinum and palladium—*i.e.*, the prevailing price in the OTC market—was "the very means" by which Defendants profited in the NYMEX market. Id. at 162. Hence, the Exchange Plaintiffs have pleaded antitrust injury regardless of whether the derivatives they traded were directly linked to the Fix price. *Gold* reached a similar conclusion. 213 F. Supp. 3d at 653 (holding that allegations that exchange plaintiffs suffered antitrust injury were "inextricably intertwined" with the Defendants' alleged manipulation of the Fix Price for antitrust standing purposes).

[17] The Prime International Trading and Oil courts conducted their analyses of the markets in which the plaintiffs had alleged injury in the context of the antitrust injury prong of the antitrust standing analysis, rather than (as here) in the context of the efficient enforcer factors. But because the analysis of which market or markets in which the plaintiffs have alleged injury must be consistent across both prongs of the antitrust standing inquiry, both are persuasive for the Court's analysis.

[18] This analysis shows why Defendants' argument that the OTC Plaintiffs are "more direct victim[s] of any alleged conspiracy to manipulate the" Fixing than are the Exchange Plaintiffs is unconvincing. Mem. at 15. Plaintiffs have sufficiently pleaded antitrust injury in two different markets, so the OTC Plaintiffs are not more direct victims than the Exchange Plaintiffs; they are victims in a different market. Other judges in this district have also rejected the argument that participants in an OTC market are more direct victims of an alleged conspiracy than participants in an exchange market. *See* Nypl, 2017 U.S. Dist. LEXIS 122468, 2017 WL 3309759, at *6 ("Contrary to Defendants' argument, FX spot market participants who transacted directly at spot trading prices are not more direct victims, but rather victims in a different market.") (citations omitted); FOREX, 2016 U.S. Dist. LEXIS 128237, 2016 WL 5108131, at *11; *cf.* CHF LIBOR, 277 F. Supp. 3d at 561-62 (noting that "[o]ne could . . . conceive of the Direct Transaction Plaintiffs as a 'more direct' victim than" an exchange plaintiff but also observing that exchange plaintiffs' claim could proceed if they plausibly alleged market domination by defendants). Consequently, this argument is unconvincing.

The Court observes a tension in both parties' arguments with respect to this issue. Plaintiffs assert that they have alleged "a single market for platinum and palladium physical, futures and options transactions[.]" Opp. at 15. This seems surprising because it supports Defendants' argument that the OTC plaintiff is a victim in the same market as the Exchange Plaintiffs. For their part, Defendants argue that Plaintiffs are "asking the Court to hold Defendants trebly liable for transactions in '*two* extraordinarily large' markets (futures and physical)[.]" Mem. at 6 (quoting Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *21) (emphasis added). This also seems surprising because it supports Plaintiffs' arguments that OTC plaintiffs are not efficient enforcers with respect to the NYMEX market. Hence, Plaintiffs and Defendants both appear to be arguing on the wrong side of the one-vs.-two markets question.

This odd configuration likely arises because both Plaintiffs and Defendants had incentives to argue the opposite side of this question on the antitrust injury prong of the antitrust standing analysis. It is easier for Plaintiffs to show antitrust injury if they need only show such injury in one market; thus, Plaintiffs argued that physical and NYMEX platinum and palladium were traded in one market and Defendants argued that each set of Plaintiffs must demonstrate a distinct antitrust injury. Plaintiffs now argue that "[w]hether physical and futures transactions represent one market or two markets is of no moment at this stage because the Court already ruled that Plaintiffs suffered antitrust injury." Opp. at 15 (citing Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *19-20). ***HN24***[] It is true that courts have generally addressed this issue on the antitrust injury prong of the antitrust standing analysis. *See, e.g.,* Prime Int'l Trading, 784 F. App'x at 7. But as the above demonstrates, it is also relevant to the application of the efficient enforcer factors, including whether there are more direct victims of the alleged conspiracy under

[*315] Moreover, Plaintiffs allege different theories of competitive harm in the OTC and exchange markets. For example, the TAC alleges that BASF Metals was "motivated by its desire to keep prices of platinum and palladium low because both metals are used as raw materials in products manufactured by BASF (and its related corporate entities) . . . in addition to its motive as a proprietary trader in platinum and palladium[.]" TAC ¶ 202. This is distinct from the TAC's allegations that all Defendants profited from manipulating the Fix downward by virtue of their short positions in NYMEX platinum and palladium. *See, e.g., id.* ¶ 207.

These are distinct theories of anticompetitive harm, which reinforces the conclusion that Plaintiffs have alleged antitrust injury in two separate markets *See* *Oil, 256 F. Supp. 3d at 312-13* (concluding that where "Plaintiffs posit that Defendants engaged in . . . anticompetitive behavior for two, potentially conflicting, **[**44]** reasons[,]" one of which was to drive the price of Brent crude oil "downward where related entities are both producers and refiners, so as to increase the margin, making the refining business more profitable" and the second of which was to make increased profits on "futures and derivatives products traded on NYMEX" linked to a Brent oil benchmark, the plaintiffs had alleged harm in two markets). Thus, Plaintiffs have alleged harms in both the OTC and NYMEX markets. Accordingly, the relevant market for purposes of the Court's inquiry into whether the Exchange Plaintiffs have plausibly alleged efficient enforcer status is the NYMEX market.

ii. Defendants' Market Share

The second step of the Court's inquiry is to ascertain what share of the market Defendants allegedly controlled. Plaintiffs allege that Defendants each "h[eld] substantial market share in Physical and NYMEX Platinum and Palladium." TAC ¶ 38 (BASF Metals); *id.* ¶ 40 (Goldman Sachs); *id.* ¶ 42 (HSBC); *id.* ¶ 44 (ICBC Standard); *see also id.* ¶ 191 ("BASF[Metals] engages in a large amount of Physical and NYMEX Platinum and Palladium trading."); *id.* ¶ 192 ("Defendant Goldman Sachs has a precious metals trading desk and engages in **[**45]** millions of dollars of platinum and palladium physical and derivatives trades each year."); *id.* ¶ 193 ("HSBC engages in millions of dollars of platinum and palladium physical and derivatives trades each year."); *id.* ¶ 207 ("The Defendants were also large participants in NYMEX futures and options."). Standing alone, these allegations might have been sufficient to allege that Defendants dominated the exchange market, requiring further factual development to resolve that question. *Cf.* *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *17* (denying motion to dismiss because further factual development was necessary to determine if defendants dominated the market); *CHF LIBOR, 277 F. Supp. 3d at 562*. However, as explained below, the Court does not decide whether the above allegations would have been sufficient to plausibly allege that Defendants dominated the market.

The TAC contains additional allegations that are relevant to the market-domination inquiry. The TAC alleges that all banks held between 20 and 50 percent of the "overall open interest" in platinum and palladium over the class period. TAC at 113, Charts 81 & 82. The TAC does not allege that the three Defendant Banks[19] were the only banks trading in the platinum and palladium futures market. In fact, the TAC also alleges that **[**46]** UBS, which is no **[*316]** longer a defendant and was not a member of the Fixing, "engages in millions of dollars of platinum and palladium trades each year." *Id.* ¶ 195. Therefore, the Defendant Banks' market share must represent some fraction of this overall open interest. The TAC also notes that "BASF is not included in" the 20 to 50 percent figure "because it is not a bank." *Id.* ¶ 197 n.60. However, the TAC alleges that BASF Metals had very small holdings in the platinum and palladium derivatives market. *Id.* at 112, Chart 79. Therefore, it is implausible that adding BASF Metals' market share to the other Defendants would have a meaningful impact on the inquiry into whether Defendants dominated the exchange market.

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the second efficient enforcer factor. Furthermore, a definition of the relevant market is a prerequisite to the inquiry into whether defendants dominated a market.

[19] This opinion refers to Goldman Sachs, HSBC, and ICBC Standard collectively as the "Defendant Banks" because BASF Metals "is not a bank." TAC ¶ 197 n.60.

The TAC further alleges that "data obtained from the CFTC . . . shows that NYMEX short positions were heavily concentrated among the top 4 and top 8 traders. Despite the presence of other traders in the market, the top 4 and top 8 traders accounted for approximately 30 to 45% and 45 to 65%, respectively, of platinum and palladium short positions during the Class Period." *Id.* ¶ 199; *see also id.* ¶ 114-15, charts 83 & 85.[20] Plaintiffs' theory is that Defendants "were holders of massive short positions **[**47]** in NYMEX platinum and palladium futures and options" during the Proposed Class Period. *Id.* ¶ 14. Consequently, on Plaintiffs' theory, the four Defendants would have been among the largest NYMEX short traders. As the Court must draw all inferences in favor of the plaintiffs on a motion to dismiss, the Court assumes that the four Defendants were the largest NYMEX short traders in the market. But even granting that assumption, Defendants' combined market share would have been "approximately 30[%]" of the platinum NYMEX market and "approximately 45[%]" of the palladium NYMEX market. *Id.* ¶ 199.[21]

iii. Market Domination

The final step in the Court's inquiry is whether Defendants controlled a sufficiently large share of the market to "dominate" it. As noted above, *Gelboim* expressed concern that "if the [defendants] control only a small percentage of the ultimate identified market," they may be held liable for "damages disproportionate to wrongdoing." *823 F.3d at 779*. Here, Plaintiffs have alleged that Defendants control more than a small percentage of the relevant market. On the other hand, *FOREX* concluded that an allegation that defendants had "a combined market share of over 90%" was sufficient to allege **[**48]** market domination. *2016 U.S. Dist. LEXIS 128237, 2016 WL 5108131, at *9*. Plaintiffs have not alleged that Defendants controlled 90% of the NYMEX platinum or palladium markets.

LIBOR VI presented a closer question. There, the plaintiffs alleged that the sixteen defendant banks or their affiliates were "large traders" and that "large traders comprised 70 to 90 percent of [the exchange] market." *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *17*. However, the *LIBOR VI* court noted that the sixteen defendants were "dwarfed by the total population of over 2,900 large traders in that market during the same time period." *Id.* Pronouncing **[*317]** itself "skeptical that the Exchange-Based plaintiffs can ultimately show that the defendants controlled the market," the court nonetheless allowed the plaintiffs to proceed because "it remains possible that the panel banks, which included some of the world's largest financial institutions, together controlled a large percentage of the market, measured by number of trades or by dollar amount." *Id.* There was "simply not a sufficient record on the issue of market control" for Judge Buchwald to conclude as a matter of law that the plaintiffs had failed to state a claim. *Id.*

Likewise, the *CHF LIBOR* court concluded that "[i]f plaintiffs had adequately alleged an antitrust **[**49]** conspiracy involving all or nearly all of defendants" in that case, "the extent of defendants' control of the exchange markets for Swiss franc currency futures would require factual development and would not be a basis for dismissal." *277 F. Supp. 3d at 562*. But because the plaintiffs had failed to plausibly allege a conspiracy, Judge Stein dismissed the claims brought by exchange plaintiffs. *Id.*; *see also* *Silver II, 332 F. Supp. 3d at 908-09* (concluding that plaintiffs lacked antitrust standing because they had not plausibly alleged domination of the relevant exchange market by certain defendants).

The Court concludes that on the facts alleged in the TAC, Plaintiffs have not adequately pleaded that Defendants dominated the NYMEX market for platinum and palladium derivatives. Plaintiffs have alleged that Defendants' market share was at most 45% of the relevant market, and Plaintiffs' allegations suggest that Defendants' market share was likely far less than that. ***HN25***[] The Court need not and does not adopt a bright line rule for the market

[20] The TAC alleges that there were approximately 40 to 100 traders with short positions on the exchange market that reported data to the CFTC during the Proposed Class Period. *See id.* at 114-15, Charts 82 & 84.

[21] Defendants point to the TAC's allegation that "'the autocatalyst and jewelry segments of the platinum market' are 'the two largest sources of demand'" as further undercutting any suggestion that Defendants dominated the platinum and palladium market. Mem. at 13-14 (quoting TAC ¶ 78). However, as noted above, the Court has concluded that the OTC market and the exchange market are distinct, and this allegation pertains to the OTC market.

share that a defendant or group of defendants must control to meet the "market domination" standard. Rather, the Court holds only that Plaintiffs have not adequately pleaded market domination in the TAC.

c. Conclusion [**50]

As in *Platinum I*, the Court concludes that Plaintiffs are not efficient enforcers of the antitrust laws and, therefore, are not the "proper party 'to perform the office of a private attorney general' and . . . 'vindicate the public interest in antitrust enforcement.'" *Gelboim, 823 F.3d at 780* (quoting *Gatt, 711 F.3d at 80*). Accordingly, Plaintiffs' Sherman Act claim is dismissed without prejudice.

B. *Rule 12(b)(2)* Motion

1. Legal Standard

HN26[] A defendant may move to dismiss a plaintiff's claims against it for "lack of personal jurisdiction." *Fed. R. Civ. P. 12(b)(2)*. On a motion to dismiss pursuant to *Rule 12(b)(2)*, the "plaintiff bears the burden of demonstrating personal jurisdiction over a person or entity against whom it seeks to bring suit." *Penguin Grp. (USA) Inc. v. Am. Buddha, 609 F.3d 30, 34 (2d Cir. 2010)* (citing *In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 206 (2d Cir. 2003)* (per curiam)); *see also* *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 784 (2d Cir. 1999)* ("When responding to a *Rule 12(b)(2)* motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant." (citations omitted)). To defeat a jurisdiction-testing motion, the plaintiff's burden of proof "varies depending on the procedural posture of the litigation." *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A., 722 F.3d 81, 84 (2d Cir. 2013)* (quoting *Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990))*. At the pleading stage—and prior to discovery—a plaintiff need only make a prima facie showing that jurisdiction **[*318]** exists. *Id. at 84-85*; *see also* *Eades v. Kennedy, PC Law Offices, 799 F.3d 161, 167-68 (2d Cir. 2015)* ("In order to survive a motion **[**51]** to dismiss for lack of personal jurisdiction, a plaintiff must make a prima facie showing that jurisdiction exists.") (quoting *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 732 F.3d 161, 167 (2d Cir. 2013))*.

HN27[] If the court considers only pleadings and affidavits, the plaintiff's prima facie showing "must include an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant." *In re Terrorist Attacks on September 11, 2001, 714 F.3d 659, 673 (2d Cir. 2013)* (quoting *Chloe v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 163 (2d Cir. 2010)* (quotation marks omitted)). Courts may rely on materials outside the pleading in considering a motion to dismiss for lack of personal jurisdiction. *See* *DiStefano v. Carozzi N. Am., Inc., 286 F.3d 81, 84 (2d Cir. 2001)*. "The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits." *MacDermid, Inc. v. Deiter, 702 F.3d 725, 727 (2d Cir. 2012)* (quoting *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 989 F.2d 572, 580 (2d Cir. 1993))*. If the parties present conflicting affidavits, however, "all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party." *Seetransport Wiking, 989 F.2d at 580* (citations omitted).

2. Application

Plaintiffs have adequately pleaded that BASF Metals and ICBC Standard are subject to personal jurisdiction in the United States under a conspiracy theory. In its prior opinion, the Court explained at length the requirements **[**52]** for a federal court to exercise personal jurisdiction. *See* *Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *39-44*. The Court does not rehash that analysis here and provides only a summary of the law necessary for the disposition of the motions currently before the Court.

As in *Platinum I*, Plaintiffs have "disclaimed that the Foreign Defendants are subject to general personal jurisdiction." *2017 U.S. Dist. LEXIS 46624, [WL] at *43*; *see* Plaintiffs' Letter to the Court, Dkt No. 196, at 1 ("Plaintiffs do not assert that Defendants are subject to general jurisdiction[.]"). Therefore, the Court will confine its analysis to specific jurisdiction. ***HN28***[] Among other requirements, "the exercise of personal jurisdiction must comport with constitutional due process." *Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *39* (citing *Licci ex rel Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 59-60 (2d Cir. 2012))*. The

> due process analysis proceeds in two steps. First, courts evaluate the quality and nature of the defendant's contacts with the forum state under a totality of the circumstances test. Where the claim arises out of, or relates to, the defendant's contacts with the forum—*i.e.*, specific jurisdiction is asserted—minimum contacts necessary to support such jurisdiction exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there. Second, **[**53]** once minimum contacts are established, a court considers those contacts in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice.

Charles Schwab Corp. v. Bank of Am. Corp., 883 F.3d 68, 82 (2d Cir. 2018) (quotations omitted).

[*319] ***HN29***[] There are two "independent, if conceptually overlapping, methods of demonstrating minimum contacts." *Best Van Lines, Inc. v. Walker, 490 F.3d 239, 243 (2d Cir. 2007)*. "The first is through purposeful availment,' in which 'the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there.'" *CHF LIBOR, 277 F. Supp. 3d at 589* (quoting *Licci ex rel Licci v. Lebanese Canadian Bank, SAL, 732 F.3d 161, 170 (2d Cir. 2013))*. "The second is through 'purposeful direction,' in which 'the defendant took intentional, and allegedly tortious, actions expressly aimed at the forum.'" *Id.* (quoting *In re Terrorist Attacks, 714 F.3d at 674*). "The 'purposeful direction' test is also referred to as the 'effects test,' which is a 'theory of personal jurisdiction typically invoked where . . . the conduct that forms the basis for the controversy occurs entirely out-of-forum, and the only relevant jurisdictional contacts with the forum are therefore in-forum effects harmful to the plaintiff.'" *Id.* (quoting *Licci, 732 F.3d at 173*). "In such circumstances, the exercise of personal jurisdiction may be constitutionally permissible if the defendant expressly **[**54]** aimed its conduct at the forum." *Id.* (quoting *Licci, 732 F.3d at 173*).

Plaintiffs have alleged Sherman Act and CEA claims against all Defendants in this case, including the Foreign Defendants. *See* TAC ¶¶ 273-95; *see also* *Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *43*. ***HN30***[] Both of these statutes provide for nationwide service of process. *See* *CHF LIBOR, 277 F. Supp. 3d at 589* (citing *15 U.S.C. § 22* (Sherman Act); *7 U.S.C. § 25(c)* (*CEA*)). District courts in this circuit, and courts of appeals other than the Second Circuit, have concluded that "when a civil case arises under federal law and a federal statute authorizes nationwide service of process, the relevant contacts for determining personal jurisdiction are contacts with the United States as a whole." *Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *40* (quoting *Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 142 n.21 (2d Cir. 2014)* (collecting cases)); *see, e.g.*, *CHF LIBOR, 277 F. Supp. 3d at 589-90* (concluding the relevant forum is the United States as a whole).[22] Therefore, the Court analyzes whether Plaintiffs have made a prima facie showing of minimum contacts with the United States with respect to BASF Metals and ICBC Standard.[23]

a. BASF Metals

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[22] "[T]he Second Circuit 'has not yet decided' whether to adopt this approach[.]" *Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *40* (quoting *Gucci, 768 F.3d at 142 n.21*).

[23] Because the Court concludes that Plaintiffs have made such a showing, it does not reach the question of whether personal jurisdiction is proper under New York law or *Federal Rule of Civil Procedure 4(k)(2)*. *See* *Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *40-41*.

i. Purposeful Availment

Plaintiffs have not made a prima facie showing that BASF Metals purposefully availed itself of the privilege of doing business in the United States. The TAC alleges that BASF Metals "is a company organized and existing under the laws of the United Kingdom with **[**55]** its principal place of business in London, England." TAC ¶ 34. The TAC alleges that

> [i]n 2006, BASF [Metals]'s ultimate parent company, BASF Societas Europaea ('BASF SE') . . . acquired Engelhard Corporation of New Jersey. . . . As part of the acquisition of Engelhard Corporation, BASF SE also acquired Engelhard Metals Limited, which was a Fixing member[.] . . . Through its acquisition of **[*320]** Engelhard Metals Limited, BASF became a Fixing member[.] . . . In 2012, BASF SE changed the name of Engelhard Metals Limited to BASF Metals Limited.

Id. Plaintiffs also allege that BASF Corporation ("BASF Corp.") is a subsidiary of BASF SE and "is based in New Jersey (and a Delaware-registered company)." *Id.* ¶ 36. Thus, the TAC alleges that BASF SE is the parent corporation of both BASF Metals and BASF Corp. *See id.* ¶¶ 34-36. BASF Metals "does not have offices, operations, or employees in New York, New Jersey, or anywhere else in the United States." Declaration of Dr. Vasileios Vergopouls in Support of BASF Metals Limited's Motion to Dismiss Pursuant to *Fed R. Civ. P. 12(b)(2)* and *12(b)(6)* ("Vergopouls Decl."), Dkt No. 209-1, ¶ 2.

Plaintiffs' fundamental difficulty can be summarized as follows. They have alleged that employees of **[**56]** BASF *Metals* manipulated the Fix as part of a conspiracy. And they have alleged that United States-based traders employed by BASF *Corp.* executed platinum and palladium trades, allegedly to profit from the conspiracy. However, for the Court to exercise personal jurisdiction over Defendant BASF Metals, Plaintiffs' allegations must somehow connect BASF Metals to the United States, such that BASF Metals can be said to have "purposefully availed itself of the privilege of doing business in the [United States] and could foresee being haled into court there." *Licci, 732 F.3d at 173*

Plaintiffs attempt to bridge this gap by arguing that employees of BASF Metals were agents of BASF Corp. or, perhaps, of BASF SE. *See, e.g.*, Plaintiffs' Consolidated Opposition to Motions To Dismiss Pursuant To *Fed. R. Civ. P. 12(b)(2)* ("*Rule 12(b)(2)* Opp."), Dkt No. 215, at 10 ("Regardless of whether or not these individuals were employees of BASF Metals . . . a timehonored principle of agency law is *qui facit per alium facit per se*—he who acts through another acts himself."). In support of this argument, Plaintiffs argue that yet a fourth BASF entity, BASF Precious Metals Services, holds BASF out as "global and vertically integrated" and as providing "24/7 access to world **[**57]** metals exchanges & key bullion centres via trading offices in among other places Iselin, New Jersey." *Rule 12(b)(2)* Opp. at 12 (quoting TAC ¶ 36). In addition, the TAC alleges "BASF Corporation has shared employees and directors with BASF Metals Limited." TAC ¶ 37.

HN31[] The Second Circuit recently observed that it "ha[s] not clearly delineated the showing necessary before an agent's contacts will be imputed to its principal for purposes of personal jurisdiction under the *Due Process Clause*[.]" *Schwab, 883 F.3d at 84*. However, the Circuit's "caselaw concerning the New York long-arm statute is . . . instructive" because "[a]lthough the longarm statute and the *Due Process Clause* are not technically coextensive, the New York requirements (benefit, knowledge, some control) are consonant with the due process principle that a defendant must have purposefully availed itself of the privilege of doing business in the forum." *Id.*

Thus, the Court takes guidance from *Jazini v. Nissan Motor Co., Ltd., 148 F.3d 181 (2d Cir. 1998)*, which applied the New York long-arm statute. ***HN32***[] The *Jazini* court held that "[t]o establish that a subsidiary is an agent of the parent, the plaintiff must show that the subsidiary 'does all the business which the parent corporation could do were it here by its own officials.'" *Id. at 184* (quoting *Frummer v. Hilton Hotels Int'l, Inc., 19 N.Y.2d 533, 537, 227 N.E.2d 851, 281 N.Y.S.2d 41 (N.Y. 1967))*. Prior to *Jazini*, "the key Second **[**58]** Circuit case regarding the propriety **[*321]** of a court's exercise of personal jurisdiction over a foreign parent company based on the conduct of its subsidiary was" *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp., 751 F.2d 117 (2d Cir. 1984)*. *In re Aluminum Warehousing Antitrust Litigation ("Aluminum I"), 90 F. Supp. 3d 219, 228 (S.D.N.Y. 2015)*. "***HN33***[]

Beech Aircraft established a four-factor test for evaluating whether [a court's exercise of] personal jurisdiction [over a defendant is proper] in such a scenario: (1) common ownership, (2) financial dependency, (3) the degree to which the parent interferes with the selection and assignment of executive personnel and fails to observe corporate formalities, and (4) the parent's degree of control over the marketing and operational policies of the subsidiary." *Id.* (citing *Jazini, 148 F.3d at 184*).

Plaintiffs have failed to make a prima facie showing as to any of these factors. ***HN34***[] In addition, the Supreme Court has observed that "[i]t is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods, 524 U.S. 51, 61, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998)* (quotation omitted). Plaintiffs' attempt to circumvent this well-entrenched principle via an appeal to agency law is unconvincing. *See* *Schwab, 883 F.3d at 84* (finding that the requirements for personal jurisdiction **[**59]** were not met where a complaint impermissibly "collapses . . . two distinct Defendants—a parent and a wholly owned subsidiary—. . . into one"); *Aluminum I, 90 F. Supp. 3d at 238* ("It is commonplace for executives to hold several roles at several affiliated companies. But so long as separate corporate formalities are maintained, the mere fact that some employees of a parent are also officers of a subsidiary does not imply that the subsidiary is an agent of the parent."); *id. at 232* (website touting "global reach of a family of companies" insufficient where corporate formalities observed).

Plaintiffs also argue in support of their agency theory that "BASF Metals . . . advertised for precious metals trading positions in New Jersey." *Rule 12(b)(2)* Opp. at 9 (citing Ex. 1 to Declaration of Jay L. Himes in Support of Plaintiffs' Consolidated Opposition to Motions to Dismiss Pursuant to *Fed. R. Civ. P. 12(b)(2)* ("Himes Decl."), Dkt No. 214). This allegation is also insufficient to establish purposeful availment. Even assuming that BASF Metals' employment of a United-States-based trader would be sufficient to make a prima facie showing of purposeful availment with the United States (which the Court does not decide), the reference to BASF Metals in the job posting was "inadvertent" **[**60]** and the posting "was not filled." Declaration of Rachel Crowley, Dkt No. 221; *see also id.* ("If an individual had been hired to fill the position described in the Job Posting, the individual would have been an employee of BASF Corporation, not BASF Metals Ltd."). Similarly, Plaintiffs' attempt to point to LinkedIn profiles for "individuals who traded precious metals for BASF's U.S.-based affiliates during the class period" is unavailing. *Rule 12(b)(2)* Opp. at 9 (citing Exs. 2-3 to Himes Decl.). These traders did not work for BASF Metals because BASF Metals "does not have . . . employees in . . . the United States." Vergopouls Decl. ¶ 2. Hence, neither the job advertisement nor the LinkedIn profiles provide support for Plaintiffs' agency theory.

Accordingly, Plaintiffs have failed to make a prima facie showing that employees of Defendant BASF Metals were agents of BASF Corp. or BASF SE, and they have therefore failed to show that Defendant BASF Metals "purposefully availed itself of the privilege of doing business **[*322]** in the [United States] and could foresee being haled into court there." *Licci, 732 F.3d at 173*.

ii. Effects Test

Plaintiffs arguments that BASF Metals should be subject to personal jurisdiction under the effects test is **[**61]** similarly flawed. ***HN35***[] Under the effects test, "the exercise of personal jurisdiction may be constitutionally permissible if the defendant expressly aimed its conduct at the forum." *Id. at 173* (citing *Calder v. Jones, 465 U.S. 783, 789, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1983))*. "The fact that harm in the forum is foreseeable is insufficient for the purpose of establishing specific personal jurisdiction over a defendant." *Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *42* (quoting *Waldman v. Palestine Liberation Org., 835 F.3d 317, 339 (2d Cir. 2016))* (alterations and quotation marks omitted).

Plaintiffs are unable to show any conduct by BASF Metals that was expressly aimed at the United States. Again, Plaintiffs have pleaded that BASF Metals conspired to manipulate the Fix and that BASF Corp. engaged in trading to profit from that illegal conduct in the United States. But Plaintiffs have not alleged that BASF Metals took any action that was expressly aimed at the United States. Plaintiffs argue that BASF Metals' "conduct was aimed directly *at* the U.S." because the conspiracy allegedly targeted NYMEX. *Rule 12(b)(2)* Opp. at 15. But that characterization is inaccurate: BASF Metals' conduct allegedly targeted the Fix, which occurred in London. ***HN36***[] Although it may have been foreseeable that this conduct would cause harm in the United States, "[m]ere foreseeability" is insufficient under the effects test. *Schwab, 883 F.3d at 87*. Hence, Plaintiffs **[**62]** have failed to make a prima facie showing of personal jurisdiction as to BASF Metals under the effects test.

b. ICBC Standard

The TAC fails to make a prima facie showing of personal jurisdiction as to ICBC Standard under the purposeful availment or effects test for much the same reasons as it failed to do so with respect to BASF Metals. The TAC alleges that ICBC Standard "is a banking and financial services company organized and existing under the laws of the United Kingdom." TAC ¶ 43. Plaintiffs allege that a different corporate entity, Standard Bank Group Limited, is "licensed by the New York Department of Financial Services with" headquarters located in New York City. *Id.* The TAC further alleges that a third entity, "ICBC"—which is the "corporate majority owner" of ICBC Standard, Declaration of Karen Florencio in Support of ICBC Standard Bank Plc's Motion to Dismiss the Third Consolidated Amended Class Action Complaint ("Florencio Decl."), Dkt No. 211, ¶ 11—"is also licensed by the New York Department of Financial Services" with headquarters located in New York City. TAC ¶ 43. However, much like BASF Metals, ICBC Standard has no employees in the United States. Florencio Decl. ¶ 9. **[**63]** The Court construes the TAC to allege that there were New-York-based platinum and palladium traders in both the physical and derivatives markets for affiliates or subsidiaries of ICBC Standard, although the TAC is not clear on this point.

Plaintiffs raise the same agency argument with respect to employees of ICBC Standard's affiliates and subsidiaries as they do with BASF Metals, and the result is the same. Plaintiffs have not alleged sufficient reason for the Court to disregard distinctions between distinct corporate entities. The Court need not repeat its analysis here. One allegation Plaintiffs raise that is specific to ICBC Standard is that Ludmila Fabianova, a "Senior Vice President" **[*323]** of "Precious Metals Sales" at ICBC Standard was listed as a "'USA'-based delegate" for a conference in Rome. *Rule 12(b)(2)* Opp. at 10 (citing Exs. 4 & 5 to Himes Decl.). But this listing is insufficient to support the inference that Ms. Fabianova did anything to contribute to the alleged conspiracy to manipulate the Fix price while in the United States. Accordingly, Plaintiffs have failed to make a prima facie showing of personal jurisdiction with respect to ICBC under the minimum contacts or effects test.

c. Conspiracy Jurisdiction [64]**

Plaintiffs have plausibly alleged that BASF Metals and ICBC Standard are subject to conspiracy jurisdiction. ***HN37***[] The Second Circuit has recently clarified that to "alleg[e] a conspiracy theory of jurisdiction: the plaintiff must allege that (1) a conspiracy existed; (2) the defendant participated in the conspiracy; and (3) a co-conspirator's overt acts in furtherance of the conspiracy had sufficient contacts with a state to subject that co-conspirator to jurisdiction in that state." *Schwab, 883 F.3d at 87* (citing *Unspam Techs., Inc. v. Chernuk, 716 F.3d 322, 329 (4th Cir. 2013))*.[24]

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[24] Because Plaintiffs argued that conspiracy jurisdiction was proper under the New York long-arm statute, the Court offers an observation about the relationship between the requirements for conspiracy jurisdiction under that statute and the standard announced in *Schwab*. In its prior opinion, the Court held that "[t]he elements of conspiracy jurisdiction [under the New York long-arm statute] are that '(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted at the direction or under the control or at the request of or on behalf of the out-of-state defendant.'" *Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *48* (quoting *Tarsavage v. Citic Trust Co., 3 F. Supp. 3d 137, 147 (S.D.N.Y. 2014))*. Although a defendant need not demonstrate a "formal agency relationship . . . between coconspirators," the third prong of this test is designed to capture "the traditional indicia of an agency relationship." ***Contant v. Bank of Am. Corp., 385 F. Supp. 3d 284, 292 n.2, 293 (S.D.N.Y. 2019)***. However, the Court recognizes that the requirements of conspiracy jurisdiction under New York law are unsettled. *See* ***id. at 292 n.2*** (noting that "an out-of-state defendant can be subject to personal jurisdiction in New York even without the traditional indicia of an agency relationship when that defendant 'has knowledge of the New York acts of

The Court concluded in its earlier opinion that Plaintiffs had plausibly alleged a conspiracy among Defendants. *See* Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *10-16. There is also no question that BASF Metals and ICBC Standard participated in the conspiracy as alleged. Thus, the contested issue is whether any United-States-based **[*324]** co-conspirators acted "in furtherance of the conspiracy[.]" Schwab, 883 F.3d at 87.

Schwab guides the Court's analysis of conspiracy jurisdiction. The *Schwab* court considered whether the court had personal jurisdiction over three categories of defendants. Most relevant here, *Schwab* considered claims of "non-seller defendants." Id. at 86 (capitalization altered). **[**65]** The only forum-related contact in which these defendants had engaged was the sale of securities in California. Id. at 86-87.[25] The *Schwab* court concluded that it could not exercise personal jurisdiction because the plaintiff's "pleading does not permit an inference that certain Defendants' sales in California were in furtherance of the conspiracy." Id. at 87. Although the plaintiff argued that "Defendants conspired not only to manipulate LIBOR, but also to earn profits from that manipulation," the Second Circuit held that "financial self-interest is not the same as furthering a conspiracy through California-directed sales, and nowhere in Schwab's complaint are there allegations that Defendants undertook such sales as part of the alleged conspiracy." *Id.* (quotation omitted). ***HN38***[] Thus, the teaching of *Schwab* is that the mere sale of financial instruments by a co-conspirator in a forum is insufficient to confer conspiracy jurisdiction in that forum, at least on the facts presented in that case.[26]

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his co-conspirators.'" (quoting CPLR § 302 Practice Commentary C302:4 (2013) and citing Lawati v. Montague Morgan Slade Ltd., 102 A.D.3d 427, 961 N.Y.S.2d 5, 8 (1st Dep't 2013)). Still, the requirements for conspiracy jurisdiction announced in *Schwab* appear to be less demanding than those established under the New York long-arm statute. See In re LIBOR-Based Fin. Instruments Antitrust Litig. ("LIBOR VIII"), 11 MDL 2262 (NRB), 2019 U.S. Dist. LEXIS 49700, 2019 WL 1331830 (S.D.N.Y. Mar. 25, 2019), at *11 (observing that "any discussion of conspiracy jurisdiction must be approached with caution" because "the state[] in which . . . the FDIC bring[s its] state law claim[] [*i.e.*, New York] . . . impose[s] more stringent requirements than the ones adopted by *Schwab*"). Conspiracy jurisdiction may thus be the rare issue where "the jurisdictional analysis under the New York long-arm statute" does not "closely resemble the analysis under the Due Process Clause of the Fourteenth Amendment." Licci, 673 F.3d at 61 n.11 (citation omitted). As noted above, because the Court concludes that Plaintiffs have adequately alleged the prerequisites for conspiracy jurisdiction with respect to the United States as a whole, it need not decide the relationship between the due process requirements for conspiracy jurisdiction and the requirements for conspiracy jurisdiction under the New York long-arm statute.

[25] California was "the relevant forum for jurisdictional purposes" in *Schwab*. 883 F.3d at 82 n.4.

[26] There is disagreement among district courts in this circuit over the precise holding of *Schwab*. The root of the disagreement centers on the motive of the conspiracy alleged in *Schwab*. In *Gelboim*—which involved the same conspiracy—the Second Circuit held that the allegations in that case "evince[d] a common motive to conspire" consisting of "increased profits and the projection of financial soundness[.]" 823 F.3d at 781-82 (quotation omitted). On remand, Judge Buchwald concluded that "[i]t is far from clear that *Gelboim* should be read to mean that plaintiffs have sufficiently alleged 'increased profits' as a goal independent of a conspiracy to 'project[] . . . financial soundness." LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *2 (citation omitted). Therefore, the *LIBOR VI* court concluded that United States-based trading was not within the scope of the "reputation-motivated," as opposed to a "profit-motivated," conspiracy. 2016 U.S. Dist. LEXIS 175929, [WL] at *8-9. This conclusion rested on the court's reasoning that a profit-motivated conspiracy was implausible because the *LIBOR VI* plaintiffs had alleged that the panel banks had colluded to suppress the LIBOR rate, but banks act as both borrowers and lenders. *See* 2016 U.S. Dist. LEXIS 175929, [WL] at *2-6. *Gelboim* itself noted that "common sense dictates that the Banks operated not just as borrowers but also as lenders in transactions that referenced LIBOR . . . It seems strange that this or that bank (or any bank) would conspire to gain, as a borrower, profits that would be offset by a parity of losses it would suffer as a lender" before concluding that it could not come to a firm conclusion on the question because "the record is undeveloped." 823 F.3d at 783. Judge Buchwald found the record sufficiently developed to dismiss the claims of a profit-motivated conspiracy as implausible. LIBOR VI, 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *3. Thus, Judge Buchwald concluded in *LIBOR VIII* that the allegation that Defendants had sold LIBOR-influenced securities in a forum was not an act "in furtherance of the conspiracy" because the sale of securities in the forum did not advance a reputation-motivated conspiracy. *See* 2019 U.S. Dist. LEXIS 49700, 2019 WL 1331830, at *4 ("[T]he conspiracy to manipulate LIBOR had nothing to do with' defendants' transactions with plaintiffs, because the sale of LIBOR-based instruments motivated by defendants' 'financial self-interest' could not have furthered their conspiracy to manipulate LIBOR." (quotation omitted)). The upshot of this reasoning is that *if* plaintiffs plausibly allege a profit-motivated conspiracy, then the mere sale of securities in a forum *can* constitute an act in furtherance of the conspiracy sufficient to confer jurisdiction. *See* FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A., No. 16 Civ. 5263, 2018 U.S. Dist.

[*325] Here, however, Plaintiffs have alleged more than that co-conspirators **[**66]** sold platinum and palladium or platinum and palladium derivatives on an exchange. Plaintiffs allege that BASF Corp.'s "precious metals traders would update order information during the Fixing and provide this updated order information to BASF [Metals'] participant in the Fixing as the Fixing was conducted." TAC ¶ 38. Similarly, the TAC alleges that "New York-based precious metals traders [employed by a United States affiliate of ICBC Standard] would update order information during the Fixing and provide this updated order information to [ICBC Standard]'s participant in the Fixing as the Fixing was conducted." *Id.* ¶ 44.[27] Furthermore, the TAC alleges that the participants in the Fixing on behalf of Defendants BASF Metals and ICBC Standard were in "constant communication" with traders employed by United-States-based affiliates. *Id.* ¶ 38 (BASF Metals); *id.* ¶ 44 (ICBC Standard).

Hence, Plaintiffs plausibly plead actions by co-conspirators in the United States in furtherance of the conspiracy to manipulate the Fix price. The TAC alleges United-States based traders for affiliates of BASF Metals and ICBC Standard provided non-public client order information directly to Fixing participants. ***[**67]*** *Id.* ¶ 38. While the TAC does not precisely allege what BASF Metals' and ICBC Standard's participants in the Fixing did with this information, it is plausible to infer that they used the information provided by United-States-based traders to decide on the price at which they ultimately wanted the Fixing to settle. Thus, the TAC plausibly alleges that United-States-based co- **[*326]** conspirators acted in furtherance of the conspiracy to manipulate the Fix, and the Court has personal jurisdiction over both BASF Metals and ICBC Standard.

HN39[] The Court observes that the *Schwab* standard for conspiracy jurisdiction is extraordinarily broad. Indeed, under the *Schwab* standard, a court can exercise personal jurisdiction over a defendant based on the actions of a co-conspirator who is entirely unknown to that defendant.[28] *Cf. Contant, 385 F. Supp. 3d at 292 n.2* (observing that

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*LEXIS 171999, 2018 WL 4830087, at *8 (S.D.N.Y. Oct. 4, 2018)* (concluding that "where the complaint plausibly alleges a profit-motive, as here, the U.S.-based trading is properly alleged to have been a part of the conspiracy and to be related to the overseas . . . jurisdiction").

At least one court disagrees with this interpretation of *Schwab*, however. In *Dennis*, the plaintiffs argued that certain "defendants marketed and sold BBSW-Based Derivatives in the United States." *343 F. Supp. 3d at 203* (cleaned up). The plaintiffs contended that "[t]hese transactions are sufficiently related to [their] claims . . . because they are the machinery through which Defendants committed a domestic per se antitrust violation by reaching into the forum to contract for price-fixed BBSW-Based Derivatives with U.S. investors." *Id.* (cleaned up). The plaintiffs argued that "the 'reputation-based' conspiracy alleged in *Charles Schwab* should be distinguished from the 'profit-motivated' conspiracy alleged here." *Id. at 205*. However, Judge Kaplan noted that in *Schwab* "the alleged conspiracy was undertaken both because 'by understating their true borrowing costs, Defendants were able to project an image of financial stability to investors who were sensitive to risks associated with major banks following the financial crisis that began in 2007' *and* because 'suppressing LIBOR . . . had the immediate effect of lowering Defendants' interest payment obligations on financial instruments tied to LIBOR." *Id.* (quoting *Schwab, 883 F.3d at 78*) (emphasis in *Dennis*) (alterations omitted). "Accordingly," the *Dennis* Court held, "the conspiracy to manipulate LIBOR alleged in *Charles Schwab* was indeed motivated in part by financial incentives." *Id.* And thus, Judge Kaplan held that *Schwab* "controls here and precludes a finding of personal jurisdiction—whether through the Foreign Defendants' direct transactions in BBSW-Based Derivatives with plaintiffs or through a conspiracy theory of jurisdiction—over plaintiffs' federal claims on the basis of the Foreign Defendants' transactions in BBSW-Based Derivatives in the United States." *Id. at 205-06*. Ultimately, as described at greater length below, the Court need not reach the issue of the precise holding of *Schwab* because the Court concludes that even if it defines Plaintiffs' alleged conspiracy narrowly—*i.e.*, as a conspiracy to manipulate the Fix price—Plaintiffs have sufficiently alleged in-forum conduct in furtherance of the conspiracy.

[27] The TAC names BASF Corporation as a co-conspirator but not as a defendant. It does not name ICBC's U.S. based affiliate as a co-conspirator. However, because the complaint alleges that Defendant ICBC has "New York-based precious metals traders," TAC ¶ 44, but ICBC has "[n]o employees . . . permanently located in the United States," Florencio Decl. ¶ 9, the Court construes the TAC to allege that employees of a United-States-based affiliate of ICBC Standard employed precious metals traders.

[28] Consider the following hypothetical. Imagine that, hoping to earn profits by trading abroad, Bank A conspired to manipulate the Fix price in London with Bank B. Imagine also that, entirely unbeknownst to Bank A, Bank B received information about platinum trading from a United States branch of Bank C. Under the *Schwab* standard, a United States court may have personal jurisdiction over Bank A based on the transmission of information from Bank C to Bank B— even though Bank A is not alleged to

under the New York long-arm statute, "an out-of-state defendant can be subject to conspiracy jurisdiction in New York" only if there are "traditional indicia of an agency relationship" or if the defendant "has knowledge of the New York acts of his co-conspirators") (quotation omitted). In addition, this standard may be in tension with the Supreme Court's holding in *Walden* ***[**68]*** *v. Fiore* that "the relationship [between the defendant and the litigation] must arise out of the contacts that the 'defendant *himself*' creates with the forum State." *571 U.S. 277, 284, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014)* (quoting *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985))*; *see also id.* (noting that the Supreme Court has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between . . . third parties . . . and the forum State") (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984))*. *But see Contant, 385 F. Supp. 3d at 293* (rejecting foreign defendants' argument that "an agency relationship between co-conspirators is necessary because personal jurisdiction cannot be based on the unilateral activity of a third party" because "a co-conspirator is no mere third party" and "conspiracy jurisdiction is best conceived of as an example of the well-established principle that 'a defendant's contacts with the forum State may be intertwined with his transactions or interactions with other parties'") (quoting *Walden, 571 U.S. at 286* (ellipsis omitted)).

It was in part because of the concerns outlined above that the Court observed in *Platinum I* that "[c]ourts have been increasingly reluctant to extend this theory of [conspiracy] jurisdiction beyond the context of New York's long-arm statute." *2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *49* (quoting **[**69]** *Laydon v. Mizuho Bank, Ltd., 12 CIV. 3419 GBD, 2015 U.S. Dist. LEXIS 44007, 2015 WL 1515358, at *3 (S.D.N.Y. Mar. 31,* ***[*327]*** *2015)* and citing *Aluminum I, 90 F. Supp. 3d at 227* ("The rules and doctrines applicable to personal jurisdiction are sufficient without the extension of the law to a separate and certainly nebulous 'conspiracy jurisdiction' doctrine."); *Tymoshenko v. Firtash, 11-CV-2794 (KMW), 2013 U.S. Dist. LEXIS 43543, 013 WL 1234943, at *3-4 (S.D.N.Y. Mar. 27, 2013)* (recognizing that conspiracy jurisdiction "has been widely criticized by courts and scholars" and declining to consider co-conspirators' contacts for the purpose of establishing personal jurisdiction over a foreign defendant). However, any doubts about the continued viability of conspiracy jurisdiction in the Second Circuit were resolved by *Schwab*. Therefore, the TAC has plausibly alleged that BASF Metals and ICBC Standard purposefully availed themselves of doing business in the United States as required by the minimum contacts prong of the due process analysis.

HN41[] Because the Court has concluded that Plaintiffs have adequately alleged that the Foreign Defendants have satisfied the first step of the personal jurisdiction analysis, it must "determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Schwab, 883 F.3d at 82* (citation and quotation marks omitted). "The Supreme Court has set forth five factors in considering **[**70]** the reasonableness of the forum[:] 'A court must consider [1] the burden on the defendant, [2] the interests of the forum State, and [3] the plaintiff's interest in obtaining relief. It must also weigh in its determination [4] the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and [5] the shared interest of the several States in furthering fundamental substantive social policies.'" *FrontPoint, 2018 U.S. Dist. LEXIS 171999, 2018 WL 4830087, at *7* (quoting *Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cty., 480 U.S. 102, 113, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987))*. "[T]he 'primary concern' is 'the burden on the defendant.'" *U.S. Bank Nat'l Ass'n v. Bank of Am. N.A., 916 F.3d 143, 151 n.5 (2d Cir. 2019)* (quoting *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., San Francisco Cty., 137 S. Ct. 1773, 1780, 198 L. Ed. 2d 395 (2017))*. "Where a defendant has purposefully directed its activities

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have had any control over, or even to have known about, Bank C's communication. ***HN40***[] This hypothetical must be reconciled with the Supreme Court's admonition that the "exercise of jurisdiction comports with due process only if the defendant's conduct and connection with the forum is 'such that the defendant should reasonably anticipate being haled into court there.'" ***Contant, 385 F. Supp. 3d at 292*** (quoting *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980))*. Judge Schofield has reasoned that the *Schwab* standard can be reconciled with the Supreme Court's case law on specific jurisdiction by noting that "in any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit." *Id. at 293* (quoting *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))* (brackets omitted). In other words, two co-conspirators—even co-conspirators who were unaware of the existence of the other—may be viewed as a single entity for purposes of conspiracy jurisdiction.

at the forum state, it may still defeat jurisdiction on due process grounds. To do so, however, it 'must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" *Licci, 732 F.3d at 173* (quoting *Burger King, 471 U.S. at 477*).

Plaintiffs' allegations satisfy the reasonableness requirement in this case. The Foreign Defendants "are some of the world's largest financial institutions" and their affiliates "are alleged to have substantial presence in the U.S." *FrontPoint, 2018 U.S. Dist. LEXIS 171999, 2018 WL 4830087, at *9*. "There is little burden in requiring them to answer the allegations that they entered into collusive transactions in the U.S." *Id.* Accordingly, the Court's **[**71]** exercise of personal jurisdiction over the Foreign Defendants would not be unreasonable. Thus, Plaintiffs have made a prima facie showing that the Court has personal jurisdiction over the Foreign Defendants, and the Foreign Defendants' motion to dismiss for lack of personal jurisdiction is denied.

C. Motion for Reconsideration

Plaintiffs' CEA claims are predominately foreign and are thus impermissibly extraterritorial. In *Platinum I*, the Court held that Plaintiffs' CEA claims were not extraterritorial. *See* *2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *26-28*. Defendants move for reconsideration of that holding based on the Second Circuit's decision in *Prime Int'l Trading, Ltd. v. BP P.L.C., 937 F.3d 94 (2d Cir.* ***[*328]*** *2019)*. For the reasons that follow, the Court agrees that *Prime International Trading* compels the conclusion that Plaintiffs' CEA claims are impermissibly extraterritorial.

1. Legal Standard

HN42[] Motions for reconsideration are governed by *Local Rule 6.3*, which provides that the moving party shall set forth "the matters or controlling decisions which counsel believes the Court has overlooked." "Motions for reconsideration are . . . committed to the sound discretion of the district court." *Immigrant Def. Project v. U.S. Immigration and Customs Enf't, No. 14-cv-6117 (JPO), 2017 U.S. Dist. LEXIS 74745, 2017 WL 2126839, at *1 (S.D.N.Y. May 16, 2017)* (citing cases). "Reconsideration of a previous order **[**72]** by the Court is an extraordinary remedy to be employed sparingly." *Ortega v. Mutt, No. 14-cv-9703 (JGK), 2017 U.S. Dist. LEXIS 72158, 2017 WL 1968296, at *1 (S.D.N.Y. May 11, 2017)* (quoting *Anwar v. Fairfield Greenwich Ltd., 800 F. Supp. 2d 571, 572 (S.D.N.Y. 2011))*. As such, reconsideration should be granted only when the moving party "identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Robinson v. Disney Online, 152 F. Supp. 3d 176, 185 (S.D.N.Y. 2016)* (quoting *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr., 729 F.3d 99, 104 (2d Cir. 2013))* (quotation marks omitted). Here, Defendants argue that the Second Circuit's decision in *Prime International Trading* is an intervening change of controlling law.

2. Application

Prime International Trading requires the Court reconsider its holding in *Platinum I* that Plaintiffs' CEA claims, as alleged, are not impermissibly extraterritorial. In *Platinum I*, the Court applied the two-step framework established by the Supreme Court in *Morrison v. National Australia Bank, Ltd., 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010)*, to the question of whether Plaintiffs' CEA claims are extraterritorial. ***HN43***[] Under this framework, "[f]irst, unless Congress's intention to give a statute extraterritorial effect is 'clearly expressed,' courts 'must presume it is primarily concerned with domestic conditions.' In other words, 'when a statute gives no clear indication of an extraterritorial application, it has none.' Second, if a statute applies only domestically, **[**73]** a court must determine which domestic conduct it regulates." *Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *26* (quoting *Morrison, 561 U.S. at 265-67*) (brackets omitted).

In *Morrison*, the Supreme Court applied that two-step framework and "held that *§ 10(b) [of the Exchange Act*] only applies to 'transactions in securities listed on domestic exchanges and domestic transactions in other securities.

With regard to securities *not* registered on domestic exchanges, the exclusive focus is on *domestic* purchases and sales.'" *Id.* (quoting Morrison, 561 U.S. at 268) (other citation and alterations omitted). "Although *Morrison* did not further define a domestic transaction, the Second Circuit addressed that issue in Absolute Activist [Value Master Fund Ltd. v. Ficeto, 677 F.3d 60 (2d Cir. 2012)]. There, the Second Circuit held that 'transactions involving securities that are not traded on a domestic exchange are domestic if irrevocable liability is incurred or title passes within the United States.'" Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *26 (quoting Absolute Activist, 677 F.3d at 67).

The Second Circuit extended the *Absolute Activist* framework to the CEA in Loginovskaya v. Batratchenko, 764 F.3d 266 (2d Cir. 2014), such that "plaintiffs asserting CEA claims must 'demonstrate that the transfer of title or the point of **[*329]** irrevocable liability for such an interest occurred in the United States.'" Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *26 (quoting Loginovskaya, 764 F.3d at 274). Hence, in *Platinum I*, the Court concluded that the issue before it was whether "the transactions **[**74]** at issue here are 'domestic' within the meaning of *Morrison* and *Absolute Activist*." *Id.*

The Court also held that the Second Circuit's decision in Parkcentral Global Hub, Ltd. v. Porsche Automobile Holdings SE, 763 F.3d 198 (2d Cir. 2014) (per curiam), was not relevant to Plaintiffs' CEA claims. In *Parkcentral*, the Circuit held that "while a domestic transaction or listing is *necessary* to state a claim under § 10(b), a finding that these transactions were domestic would not *suffice* to compel the conclusion that the plaintiffs' invocation of § 10(b) was appropriately domestic." Id. at 216. Rather, the *Parkcentral* court held that even if the plaintiffs in that case had alleged a domestic transaction within the meaning of *Absolute Activist*, their claims were "so predominantly foreign as to be impermissibly extraterritorial." *Id.*

In considering whether *Parkcentral*'s requirement that a plaintiff's claims not be "predominately foreign" applied to CEA claims in *Platinum I*, the Court held that

> Defendants' reliance on *Parkcentral Global Hub, Ltd. v. Porsche Automobile Holdings SE* is unavailing. In *Parkcentral*, the Second Circuit applied the *Morrison* and *Absolute Activist* tests to claims under § 10(b) against foreign defendants for securities transactions relating to securities-based swap agreements pegged to the foreign **[**75]** defendants' stock value. The court held that allowing the claims to proceed "would constitute an impermissibly extraterritorial application of the statute." In so holding, the court expressly stated that its "ultimate conclusion that this suit seeks impermissibly to extend § 10(b) extraterritorially *depends in some part on the particular character of the unusual security at issue*." The court "expressed no view whether it would have reached the same result if the suit were based on different transactions." Courts in this district have declined to extend the *Parkcentral* analysis on that basis. For those reasons, the Court similarly declines to extend the *Parkcentral* holding to the transactions at issue in this action.

Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *27 n.13 (quoting Parkcentral, 763 F.3d at 201-02 and citing In re Poseidon Concepts Sec. Litig., No. 13-CV-1213 (DLC), 2016 U.S. Dist. LEXIS 68127, 2016 WL 3017395, at *12-13 (S.D.N.Y. May 24, 2016); Atlantica Holdings, Inc. v. BTA Bank JSC, No. 13-CV-5790 JMF, 2015 U.S. Dist. LEXIS 3209, 2015 WL 144165, at *8 (S.D.N.Y. Jan. 12, 2015)). Because it concluded that *Parkcentral*'s holding did not apply and that the transactions at issue were domestic, the Court held that "Plaintiffs' CEA claims d[id] not implicate an impermissible extraterritorial application of the statute." 2017 U.S. Dist. LEXIS 46624, [WL] at *28 (citation omitted).

The Court's holding in *Platinum I* that *Parkcentral* does not apply to Plaintiffs' CEA claims in this case is untenable after Prime International Trading ***[**76]*** . In *Prime International Trading*, the Second Circuit evaluated whether the plaintiffs' CEA claims were extraterritorial by applying *Morrison*'s two-step framework to section 22 of the CEA and two other CEA provisions. *See* Prime Int'l Trading, 937 F.3d at 104 ("Importantly, we must discern the 'focus' of each provision individually, for even if Plaintiffs satisfactorily pleaded a domestic application for one of the conduct-regulating provisions—i.e., Sections 6(c)(1) and 9(a)(2)—they must also do the same for the CEA's private right of action provision, Section 22." (citation omitted)). ***HN44***[] At the first step of the *Morrison* framework, **[*330]** the Second Circuit held that "since Section 22 of the CEA 'is silent as to extraterritorial reach,' suits funneled through this private right of action 'must be based on transactions occurring in the territory of the United States.'" Prime Int'l

Trading, 937 F.3d at 102-03 (quoting Loginovskaya, 764 F.3d at 272). At *Morrison*'s second step, the Circuit held that "in order for Plaintiffs to state a proper domestic application of Section 22, the suit 'must be based on transactions occurring in the territory of the United States.'" Id. at 104 (quoting Loginovskaya, 764 F.3d at 272). The *Prime International Trading* court noted that "[t]o assess whether Plaintiffs pleaded permissibly domestic transactions under Section 22[,] . . . typically we would apply a test first announced in *Absolute Activist*," **[**77]** as the Court did with the transactions at issue in this case in *Platinum I*. Id. at 104-05.

Rather than apply the *Absolute Activist* test, however, the Circuit applied *Parkcentral*'s holding to the CEA—effectively overruling the Court's decision not to do so in *Platinum I*. The Circuit held that it "need not decide definitively whether Plaintiffs' transactions satisfy *Absolute Activist*, for (as discussed below) their claims are impermissibly extraterritorial even if the transactions are domestic." Id. at 105 (citing Parkcentral, 763 F.3d at 216). It then noted that the *Parkcentral* court "assumed without deciding that the equity swaps at issue there were 'domestic transactions' under Section 10(b), but nonetheless dismissed the claims because the facts in that case rendered the suit 'predominately foreign.'" *Id.* (quoting Parkcentral, 763 F.3d at 216). The *Prime International Trading* court observed that "[t]he predicate to our conclusion in *Parkcentral* was the maxim that 'a domestic transaction or listing is *necessary*' but 'not alone sufficient' to state a claim under Section 10(b)." *Id.* (quoting Parkcentral, 763 F.3d at 215-16). The Second Circuit then held that this "rule carrie[d] over to the CEA." *Id.* **HN45**[] In other words, "while a domestic transaction as defined by *Absolute Activist* is 'necessary' to invoke the private remedy afforded **[**78]** by Section 22, it is not 'sufficient.'" Id. at 106.

HN46[] The *Prime International Trading* court explained that "[i]n order to close the gap between 'necessary' and 'sufficient,' Plaintiffs' claims must not be 'so predominately foreign as to be impermissibly extraterritorial.'" Id. at 106 (quoting Parkcentral, 763 F.3d at 216); *see also* id. at 105 ("To state a proper claim under Section 22, Plaintiffs must allege not only a domestic transaction, but also domestic—not extraterritorial—*conduct* by Defendants that is violative of a substantive provision of the CEA, such as Section 6(c)(1) or Section 9(a)(2).") (citation omitted).

On the facts presented in *Prime International Trading*, the Second Circuit concluded that the plaintiffs' CEA claims were "predominately foreign," and thus impermissibly extraterritorial, because the plaintiffs relied on an "attenuated 'ripple effects' theory whereby (1) the alleged manipulative trading activity taking place in the North Sea (2) affected Brent crude prices—a foreign commodity—which (3) affected a foreign benchmark, the Dated Brent Assessment, which (4) was then disseminated by a foreign price-reporting agency, which (5) was then allegedly used (in part) to price futures contracts traded on exchanges around the world." Id. at 106-07. The Circuit noted that "[n]early every **[**79]** link in Plaintiffs' chain of wrongdoing is entirely foreign." Id. at 107. Furthermore, the plaintiffs in *Prime International Trading* "ma[de] no claim that any manipulative oil trading occurred in the United States." Id. at 106.

[*331] **HN47**[] *Prime International Trading* teaches that to assess whether Plaintiffs have pleaded an appropriately domestic application of the CEA, the Court must assess whether Plaintiffs' CEA claims are predominately foreign. Plaintiffs assert multiple substantive CEA violations. *See* TAC ¶¶ 281, 286, 291, 294. **HN48**[] However, "Plaintiffs' suit must satisfy the threshold requirement of CEA § 22" ("Section 22"), which "gives Plaintiffs a private right of action" under the CEA,[29] before the Court can "reach[] the merits of their" substantive CEA claims. Prime Int'l Trading, 937 F.3d at 101 n.4, 104 (quotation and brackets omitted). Consequently, the Court "start[s] by assessing whether Plaintiffs have pleaded a proper domestic application of Section 22." Id. at 104.[30]

[29] *See* 7 U.S.C. § 25.

[30] **HN49**[] Although Plaintiffs' claim for principal-agent liability under the CEA does not expressly cite Section 22, both "principal-agent liability and aiding and abetting claims under the CEA . . . are viable only where an underlying primary violation of the CEA can survive a motion to dismiss." Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC, 366 F. Supp. 3d 516, 554 (S.D.N.Y. 2018) (citations omitted). Accordingly, the viability principal-agent liability claim also depends on whether Plaintiffs have pleaded an appropriately domestic application of Section 22.

Plaintiffs' Section 22 claims are predominately foreign.[31] Plaintiffs allege that Defendants manipulated the Fix, which occurred in London and set the price of physical platinum located in London or Zurich. TAC ¶¶ 51-53, 59. Moreover, as the Court noted in *Platinum I*, "[t]he alleged unlawful conduct in this case is the manipulation **[**80]** of the Fix Price that took place during the Fixing Calls" in London, "not manipulations of particular transactions on NYMEX." Platinum I, 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *45. Because *Prime International Trading* directs that the Court should direct its focus to where the allegedly unlawful manipulation occurred, *see* Prime Int'l Trading, 937 F.3d at 106, this weighs heavily in favor of the conclusion that Plaintiffs' claims are predominately foreign. **HN50**[] Furthermore, although Plaintiffs allege that they have suffered losses in the United States as a result of Defendants' manipulation, it has been clear since *Morrison* that an allegation that a foreign course of conduct has caused malign effects in the United States is not enough to salvage an otherwise extraterritorial claim. *See* Morrison, 561 U.S. at 259 (rejecting an "effects" test for extraterritoriality); *see also* Prime Int'l Trading, 937 F.3d at 106-07. Consequently, Plaintiffs' CEA claims are so predominately foreign as to be impermissibly extraterritorial.

This conclusion is bolstered by the attenuated causal linkage between Defendants' alleged conduct and Plaintiffs' alleged injury. The crux of Plaintiffs' theory is that Defendants caused them to suffer losses by manipulating the Fix because the Fix price is a global benchmark. *See* TAC ¶ 5 ("Because of the Fixing's importance **[**81]** as a benchmark, as the Fix prices move, so too do the prices for physical platinum and palladium and NYMEX platinum and palladium futures and options[.]"); *id.* ¶ 91 ("Defendants seized upon the Fixing as a means to manipulate . . . NYMEX Platinum and Palladium prices because Fix prices are used as benchmarks."). The plaintiffs in *Prime International Trading* made virtually the same argument. *See* Prime Int'l Trading, 937 F.3d at 100 (noting that the plaintiffs in that case argued **[*332]** that there was a "'direct link' between Brent Futures settlement prices and the Dated Brent Assessment. Specifically, they contend that the 'ICE Brent Futures Contracts prices rarely deviate from the Dated Brent Assessment by more than 1% at expiration,' and that 'changes in the Dated Brent Assessment directly impact Brent Futures prices'") (brackets omitted). Yet the *Prime International Trading* court rejected those plaintiffs' claims as an "attenuated 'ripple effects' theory[.]" Id. at 106. There is no meaningful distinction between the theory of harm rejected in *Prime International Trading* and Plaintiffs' theory of harm in this case. Thus, this is an independent reason that the Circuit's decision in *Prime International Trading* case compels the conclusion **[**82]** that Plaintiffs' CEA claims are impermissibly extraterritorial.

Plaintiffs' arguments to the contrary are unavailing. Plaintiffs first argue that the TAC alleges that "Defendants' precious metals traders in" the United States "were in 'constant communication' with Defendants' precious metals desk employees in London," who were directly involved in the twice-a-day Fixings. Opposition to Motion for Reconsideration ("MR Opp."), Dkt No. 237, at 4 (citing TAC ¶¶ 10, 13, 26 38, 49). This is, to be sure, an allegation of domestic activity, but "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." Morrison, 561 U.S. at 266. The allegation that United-States-based traders communicated with the Fixing participants to further the scheme to manipulate the Fix price only serves to highlight that the locus of the manipulative scheme was the Fixing itself, which was located in London. Moreover, the Fixing directly set prices in the spot markets for physical platinum and palladium, which are located in London and Zurich. *See, e.g.*, TAC ¶ 59. At bottom, the inquiry called for in *Parkcentral* and applied to **[**83]** the CEA in *Prime International Trading* is whether a plaintiff's claims are "predominately"—not exclusively—"foreign," and Plaintiffs' allegations regarding communications from United-States-based traders do not predominate over their allegations of foreign misconduct. Prime Int'l Trading, 937 F.3d at 106. Therefore, these allegations are insufficient to render Plaintiffs' claims not predominately foreign.

Plaintiffs also seek to recharacterize the allegations in the TAC to argue that United States-based trading in the physical platinum and palladium market and on the NYMEX was part of Defendants' manipulative scheme itself, not simply a means by which Defendants profited from the manipulation. *See* MR Opp. at 9 n.5. This argument is implausible. Plaintiffs' theory is that Defendants manipulated the price of platinum and palladium to profit from their

[31] Because the Court concludes that Plaintiffs' Section 22 claims are predominately foreign, it does not decide whether Plaintiffs have pleaded an appropriately domestic application of other CEA provisions.

short positions. *See, e.g.*, TAC ¶ 14 ("The Defendants profited because they were holders of massive short positions in NYMEX platinum and palladium futures and options."). The suggestion that Defendants (and, perhaps, their non-defendant co-conspirators) traded to further depress the price of platinum and palladium when they had—according to Plaintiffs' allegations—a tailor-made opportunity **[**84]** to manipulate that price via the Fixing does not make sense and is inconsistent with the allegations in the TAC. Hence, to the extent that the TAC can be read to support Plaintiffs' novel theory, the Court rejects it as implausible. Accordingly, Defendants' motion for reconsideration is granted as to Plaintiffs' CEA claims; those claims are dismissed without prejudice.

D. Leave to Amend

Because the Court has dismissed Plaintiffs' Sherman Act and CEA claims, there **[*333]** are no remaining claims in this case. ***HN51***[] However, although Plaintiffs have twice amended their complaint in response to Defendants' motions to dismiss, in this circuit, "[i]t is the usual practice upon granting a motion to dismiss to allow leave to replead." *Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991)* (citation omitted); *see also* *Fed. R. Civ. P. 15(a)(2)* ("The court should freely give leave [to amend] when justice so requires."). Leave may be denied "for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *TechnoMarine SA v. Giftports, Inc., 758 F.3d 493, 505 (2d Cir. 2014)* (citation omitted). Thus, the Court will grant Plaintiffs leave to amend once again. However, Plaintiffs should not expect any additional opportunities to amend their complaint. *See In re Initial Pub. Offering Sec. Litig., 241 F. Supp. 2d 281, 397 (S.D.N.Y. 2003)* ("[W]here pleading deficiencies have been identified a number **[**85]** of times and not cured, there comes a point where enough is enough."(citations omitted)). Any amended complaint must be filed no later than **May 1, 2020**.

Discovery in this action is stayed pursuant to the Court's April 21, 2015, order. Dkt. No. 48. Discovery in this action will remain stayed until the deadline for Defendants to answer or otherwise respond to an amended complaint. If Plaintiffs amend the TAC, and Defendants move to dismiss Plaintiffs' amended complaint, the parties may file a new motion for a stay of discovery no later than **June 1, 2020**. If Plaintiffs do not amend the TAC, or if Defendants do not file a motion to stay by the deadlines specified above, the Court will schedule a *Rule 16* conference promptly thereafter.

III. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss for failure to state a claim under *Federal Rule of Civil Procedure 12(b)(6)* is GRANTED, the Foreign Defendants' motion to dismiss for lack of personal jurisdiction under *Federal Rule of Civil Procedure 12(b)(2)* is DENIED, and Defendants' motion for reconsideration is GRANTED. Plaintiffs are granted leave to replead their Sherman Act and CEA claims.

The Clerk of Court is directed to terminate the motions pending at Dkt Nos. 207 and 235.

SO ORDERED.

Dated: March 29, 2020

New York, **[**86]** New York

/s/ Gregory H. Woods

GREGORY H. WOODS

United States District Judge

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ESI/Employee Sols., L.P. v. City of Dallas

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

March 30, 2020, Decided; March 30, 2020, Filed

CIVIL ACTION NO. 4:19-CV-570-SDJ

Reporter

450 F. Supp. 3d 700 *; 2020 U.S. Dist. LEXIS 55099 **; 2020 WL 1532373

ESI/EMPLOYEE SOLUTIONS, L.P.; HAGAN LAW GROUP L.L.C.; and STATE OF TEXAS v. CITY OF DALLAS; T.C. BROADNAX, in his official capacity as City Manager of the City of Dallas; and BEVERLY DAVIS, in her official capacity as Director of the City of Dallas Office of Equity and Human Rights

Prior History: *ESI/Employee Sols., L.P. v. City of Dallas, 2019 U.S. Dist. LEXIS 189538, 2019 WL 5684668 (E.D. Tex., Oct. 31, 2019)*

Core Terms

Ordinance, employees, sick leave, motion to dismiss, unionized, preliminary injunction, preempted, supplemental jurisdiction, regulation, challenges, subpoena, administrative subpoena, state law claim, unenforceable, preemption, factors, courts, collective bargaining agreement, standing to bring, provisions, quotation, pleaded, comity, merits, rights, marks, weigh, municipal ordinance, federal court, third-party

Counsel: **[**1]** For ESI/Employee Solutions, LP, Hagan Law Group LLC, Plaintiffs: Ryan Daniel Walters, Robert Earl Henneke, Texas Public Policy Foundation, Austin, TX.

For State Of Texas, Plaintiff: Anne Marie Mackin, LEAD ATTORNEY, Office of The Attorney General of Texas, Austin, TX; William Thomas Thompson, Office of The Attorney General of Texas, Capitol Station, Austin, TX.

For Dallas City of, T.C. Broadnax, in his official capacity as City Manager of the City of Dallas, Beverly Davis, in her official capacity as Director of the City of Dallas Office of Equity and Human Rights, Defendants: Kathleen MacInnes Fones, LEAD ATTORNEY, Charles Steven Estee, Stacy Jordan Rodriguez, Dallas City Attorney's Office, Dallas, TX.

For Associated Builders & Contractors of South Texas, Inc., American Staffing Association, BBM-Online, LLC d/b/a BBM Staffing, The Burnett Companies Consolidated, Inc. d/b/a Burnett Specialists, Cardinal Senior Care, LLC d/b/a Cardinal Med Staffing, Choice Staffing, LLC, eEmployers Solutions, Inc., Hawkins Associates, Inc. d/b/a Hawkins Personnel Group, LeadingEdge Personnel, Ltd., Staff Force, Inc. d/b/a Staff-Force Personnel Services, San Antonio Manufacturers Association, San Antonio **[**2]** Restaurant Association, Amicus: Courtney Renea Potter-Gaines, Davis Cedillo & Mendoza Inc, San Antonio, TX.

Judges: SEAN D. JORDAN, UNITED STATES DISTRICT JUDGE.

Opinion by: SEAN D. JORDAN

Opinion

[*709] **MEMORANDUM OPINION & ORDER**

Like several other Texas cities, the City of Dallas has enacted an ordinance requiring employers to provide paid sick leave to most employees working within the Dallas **[*710]** city limits. Plaintiffs, the State of Texas and two Collin County headquartered employers with employees who work in Dallas, ESI/Employee Solutions, L.P. ("ESI") and Hagan Law Group, L.L.C. ("Hagan"), assert that the Dallas paid sick leave ordinance runs afoul of both the federal and state constitutions and is therefore unenforceable.[1]

Before the Court is a Motion to Dismiss filed by Defendants City of Dallas, T.C. Broadnax, and Beverly Davis (collectively, "the City"), (Dkt. #36), and Employer-Plaintiffs' Motion for Preliminary Injunction, (Dkt. #3), joined by the State of Texas, (Dkt. #21). The City has moved to dismiss Plaintiffs' claims under *Federal Rule of Civil Procedure 12(b)(1)* and *Rule 12(b)(6)*. (Dkt. #36). The State of Texas and the Employer-Plaintiffs' motion for preliminary injunction requests that the Court issue an injunction to halt the enforcement of the City's Paid **[**3]** Sick Leave Ordinance until an ultimate ruling on the merits is made.

The Court, having considered the motion to dismiss, response, reply, and applicable law, **GRANTS in part** and **DENIES in part** the motion. (Dkt. #36).[2] The Court further **GRANTS** the Plaintiffs' motion for preliminary injunction. (Dkt. #3, #21).[3]

I. BACKGROUND

A. The City's Paid Sick Leave Ordinance

On April 24, 2019, the City enacted the Paid Sick Leave Ordinance (the "Ordinance"). Dallas, Texas, Ordinance No. 31181; Municipal Code § 20-1-20-12. The Ordinance, which became effective for "medium or large employers" on August 1, 2019, and will become effective for "small employers" on August 1, 2021, requires employers to grant one hour of paid sick leave for every thirty hours worked by an employee within Dallas, regardless of the employer's location.[4] Dall. City Code § 20-4(a)-(b).

The Ordinance allows employees working in Dallas to earn up to sixty-four hours of sick leave time per year for medium or **[*711]** large employers and forty-eight hours of sick leave time per year for small employers. *Id.* § 20-4(c)(1)-(2). Employees under a collective bargaining agreement, however, may bargain to modify the yearly cap. *Id.* § 20-4(e). When an employee uses accrued paid sick leave **[**4]** time, employers are directed to pay employees

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[1] ESI and Hagan will sometimes be collectively referenced herein as the "Employer-Plaintiffs."

[2] The Employer-Plaintiffs have made hearsay and relevance objections to Defendants' Exhibit 2 under *Federal Rules of Evidence 802*, *401*, and *403*. (Dkt. #48 at 27). Defendants' Exhibit 2 consists of the Dallas City Council agenda and minutes from the meeting at which the Ordinance was passed. As this evidence does not support the *Rule 12(b)(1)* portion of the City's motion to dismiss, and the Court does not consider matters beyond the complaint in reviewing a 12(b)(6) motion to dismiss, the Court did not consider Exhibit 2. *See* *Baker v. Putnal, 75 F.3d 190, 196 (5th Cir. 1996)* ("[T]he court may not look beyond the pleadings in ruling on [a *Rule 12(b)(6)*] motion."). The Employer-Plaintiffs' objections to Exhibit 2 are, therefore, overruled as moot.

[3] The Employer-Plaintiffs make several objections in their reply to evidence Defendants offer in support of their response, including that such evidence is hearsay, unauthenticated, and irrelevant. (Dkt. #24). These objections are overruled. *See* *Sierra Club, Lone Star Chapter v. F.D.I.C., 992 F.2d 545, 551 (5th Cir. 1993)* ("[A]t the preliminary injunction stage, . . . the district court may rely on otherwise inadmissible evidence, including hearsay evidence."); *Fed. Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 558 (5th Cir. 1987)* (citing *Univ. of Tex. v. Camenisch, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981))* ("[A] preliminary injunction proceeding is not subject to jury trial procedures."). In any event, the Court did not rely on the objected-to materials in reaching its decision.

[4] The Ordinance defines a "medium or large employer" as "an employer with more than 15 employees at any time in the preceding 12 months, excluding the employer's family members." Dall. City Code § 20-2(8). A "small employer" is "any employer that is not a medium or large employer." *Id.* § 20-2(11).

their normal rate, exclusive of overtime premiums, tips, and commissions, for each hour the employee is absent from work for reasons that are authorized under the Ordinance. *Id.* § 20-5(a). Authorized reasons include absence arising from mental or physical illness and preventative care for the employee or their family members. *Id.* § 20-5(c).

In addition to granting sick leave time, the Ordinance also contains reporting and notice requirements for employers. *Id.* § 20-7. Among those requirements are physical notices of rights and remedies under the Ordinance on signage and in an employee handbook, where one exists. *Id.* § 20-7(b), (e). The employer must also track and report the number of sick leave hours available to each employee in writing on no less than a monthly basis, *id.* § 20-7(a), as well as maintain logs of the hours accrued, used, and available for each employee, *id.* § 20-7(d).

The Ordinance authorizes the City to conduct investigations, triggered by employee complaints, to assess employer compliance. Such investigations may include the use of administrative subpoenas to compel witness attendance or material and document production. *Id.* § 20-10(a)-(b). Violations of any portion of the Ordinance will **[**5]** result in a fine. *Id.* § 20-11(a). However, aside from claims of retaliation under section 20-8, the City will not begin to assess penalties for Ordinance violations against medium or large employers until April 1, 2020, and will not assess any penalties, including retaliation claims, against small employers until April 1, 2021. *Id.* § 20-11(c).

B. The Employer-Plaintiffs and the State of Texas Challenge the Enforceability of the Ordinance

Shortly before the Ordinance became effective, Employer-Plaintiffs ESI and Hagan filed this lawsuit, arguing that the Ordinance violates both the United States Constitution and the Texas Constitution and is, therefore, unenforceable. ESI is a Texas corporation, headquartered in Plano, Texas, that provides temporary staffing in various industries. ESI employs over 300 temporary employees within the City of Dallas at any given time. Hagan is a Texas corporation, based in Allen, Texas, that provides legal counseling and representation to employers and executives in various industries located in Texas. Hagan currently employs one attorney who works full time from home within the City of Dallas.

The Employer-Plaintiffs claim that the Ordinance violates their *Fourth Amendment* right to be free from unreasonable **[**6]** searches and seizures, their *Fourteenth Amendment* right to equal protection under the laws, and both their own and their employees' *First Amendment* right to freedom of association. The Employer-Plaintiffs further allege that the Ordinance is preempted by the *Texas Minimum Wage Act ("TMWA")* and, therefore, violates the Texas Constitution. The Employer-Plaintiffs have requested declaratory and injunctive relief, including a preliminary injunction barring the enforcement of the Ordinance pending a final ruling on the merits. The State of Texas has joined the suit, but it seeks declaratory and injunctive relief only on the claim that the Ordinance is preempted by the TMWA and therefore contravenes the Texas Constitution. The Employer-Plaintiffs filed a preliminary **[*712]** injunction motion, which was later joined by the State.

The City has filed a motion to dismiss all claims made by Plaintiffs under *Federal Rule of Civil Procedure 12(b)(1)* (lack of subject matter jurisdiction) and *Rule 12(b)(6)* (failure to state a claim). The City contends that the Employer-Plaintiffs do not have standing to challenge the Ordinance on *First Amendment* grounds either on their own behalf or on behalf of their employees. Further, the City claims that Plaintiff Hagan does not have standing to bring any claim because **[**7]** enforcement of the Ordinance as to Hagan is too remote in time. The City also claims that all Plaintiffs have failed to state a claim as to each of the federal and state constitutional challenges, and that they have likewise failed to adequately plead municipal liability under *Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)*. Lastly, the City asks the Court, in the alternative, to decline supplemental jurisdiction over Plaintiffs' claim that the Ordinance is preempted by the TMWA under state law.

II. MOTION TO DISMISS UNDER *RULE 12(b)(1)*

The City's *Rule 12(b)(1)* motion challenges (1) the Employer-Plaintiffs' standing to bring a claim under the *First Amendment* on their own behalf and on behalf of their employees, and (2) Hagan's standing to bring any claim with respect to the Ordinance. Because courts must generally address jurisdiction before reaching the merits, the Court will address these questions of standing first. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting Ex parte McCardle, 74 U.S. 506, 7 Wall. 506, 514, 19 L.Ed. 264 (1868)) ("Without jurisdiction, the court cannot proceed at all in any cause." (internal quotation marks omitted)).

A. Rule 12(b)(1) Legal Standards

"'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" Gunn v. Minton, 568 U.S. 251, 256, 133 S.Ct. 1059, 185 L.Ed.2d 72 (2013) (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994)). A federal court has original jurisdiction to hear a suit when it is asked to adjudicate **[**8]** a case or controversy that arises under federal question or diversity jurisdiction. U.S. CONST., art. III, § 2, cl.1; 28 U.S.C. §§ 1331-32. Courts have "an independent obligation to determine whether subject-matter jurisdiction exists . . . ." Arbaugh v. Y&H Corp., 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). However, a defendant may also challenge the court's subject matter jurisdiction by filing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1).

A Rule 12(b)(1) challenge to the court's subject matter jurisdiction to hear a claim may address the sufficiency of the facts pleaded in the complaint (a "facial" attack) or may challenge the accuracy of the facts underpinning the claimed federal jurisdiction (a "factual" attack). *See* King v. U.S. Dep't of Veteran's Affairs, 728 F.3d 410, 413 (5th Cir. 2013) (quoting Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001)) (noting that subject matter jurisdiction is amenable to a facial or factual attack). "An attack is 'factual' rather than 'facial' if the defendant 'submits affidavits, testimony, or other evidentiary materials'" to controvert subject matter jurisdiction. Superior MRI Servs., Inc. v. Alliance Healthcare Servs., Inc., 778 F.3d 502, 504 (5th Cir. 2015) (quoting Paterson v. Weinberger, 644 F.2d 521, 523 (5th Cir. 1981)).

[*713] When, as here, a defendant contests the facial sufficiency of the facts pleaded in the complaint to confer jurisdiction, those facts are entitled to a presumption of truth. *See* Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd., 627 F.3d 547, 553 (5th Cir. 2010) (accepting material allegations in the complaint as true when subject matter jurisdiction was challenged on the basis of the pleadings); Williamson v. Tucker, 645 F.2d 404, 412 (5th Cir. 1981) (noting that the court **[**9]** "must consider the allegations in the plaintiff's complaint as true" if a Rule 12(b)(1) motion is based on the face of the complaint). However, a legal conclusion "couched as a factual allegation" is not entitled to the same presumption of truth. Alfred v. Harris Cty. Hosp. Dist., 666 F. App'x 349, 352 (5th Cir. 2016) (quoting Machete Prods., L.L.C. v. Page, 809 F.3d 281, 287 (5th Cir. 2015)) (per curiam) (unpublished). If the facts as pleaded are sufficient to confer jurisdiction, then a Rule 12(b)(1) motion will not succeed. Paterson, 644 F.2d at 523.

B. Discussion

1. Hagan's standing to bring a claim

The City has moved to dismiss Employer-Plaintiff Hagan's claims for lack of subject matter jurisdiction. Because the Ordinance does not go into effect as to Hagan until August 2021, the City asserts that any injury Hagan alleges based on the Ordinance's enactment is too remote and speculative to appropriately adjudicate at this time. The City, therefore, asks the Court to find that Hagan does not have standing to bring a claim under the Ordinance and to dismiss Hagan's claims for lack of subject matter jurisdiction. The Employer-Plaintiffs argue in response that Hagan's injuries are not remote or speculative because Hagan is indisputably an object of the Ordinance's regulation and will have to take action and expend money to comply with the Ordinance's mandates before it **[**10]** goes into effect.

To allege facts sufficient to establish standing, a plaintiff must show "(1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likel[ihood] that the injury will be redressed by a favorable decision." *Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157-58, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014)* (quoting *Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992))* (internal quotation marks omitted) (alteration in original). An injury satisfies Article III requirements when it is concrete, particularized, and actual or imminent. *Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408, 133 S.Ct 1138, 185 L.Ed.2d 264 (2013)*.

In an action brought under the *Declaratory Judgment Act*, as here, the standing requirement can be met by establishing "actual present harm or a significant possibility of future harm," *Bauer v. Texas, 341 F.3d 352, 357-58 (5th Cir. 2003)* (quoting *Peoples Rights Org. v. City of Columbus, 152 F.3d 522, 527 (6th Cir. 1998))*, "even though the injury-in-fact has not yet been completed," *id.* (quoting *Nat'l Rifle Ass'n of Am. v. Magaw, 132 F.3d 272, 280 (6th Cir. 1997))*. The Supreme Court has stated that "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List, 573 U.S. at 157-58* (quoting *Clapper, 568 U.S. at 414 n.5*). Further, a plaintiff can "bring a preenforcement suit when he 'has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" **[**11]** *Id. at 160* **[*714]** (quoting *Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979))*.

Here, Hagan asserts that it will imminently suffer harm by being forced to act in a financially detrimental way to become compliant with the Ordinance. While the Ordinance states that employees of small employers like Hagan will not begin accruing sick leave time and the City will not begin assessing penalties until August 1, 2021, Hagan must act prior to that time to become compliant. For example, Hagan must procure new software to accommodate tracking requirements, among other things, in preparation for the day the Ordinance becomes enforceable against it.

The City argues that, prior to the Ordinance becoming enforceable, circumstances may change so that Hagan may no longer be subject to the Ordinance. Such speculation fails to address the substance of Hagan's contention: under current circumstances the Ordinance requires Hagan to take action in order to become compliant. Thus, Hagan's injury is "certainly impending" and it has standing to challenge the Ordinance.[5]

For these reasons, the City's *Rule 12(b)(1)* motion to dismiss Hagan's claims for lack of subject matter jurisdiction is DENIED.

2. The Employer-Plaintiffs' standing to bring a claim under the *First Amendment* on their own behalf

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[5] For the same reasons, Hagan's claims are also ripe for review. Unlike standing, the doctrine of ripeness does not speak to who may sue, but instead *when* a claim may be brought. *Thomas v. Union Carbide Agr. Prods. Co., 473 U.S. 568, 580, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985)* (quoting *Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 140, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974))*. "Ripeness 'requir[es] us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Texas v. United States, 523 U.S. 296, 300-01, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998)* (quoting *Abbott Labs. v. Gardner, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967))* (alteration in original).

The City argues that Hagan will not suffer hardship if the issues are not adjudicated at this time because the Ordinance is not yet enforceable as to small employers. *See* Dall. City Code § 20-4(b). But "[t]he Supreme Court has found hardship to inhere in legal harms," specifically, in the "harm of being 'force[d] . . . to modify [one's] behavior in order to avoid future adverse consequences.'" *Texas v. United States, 497 F.3d 491, 499 (5th Cir. 2007)* (quoting *Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 734, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998))* (alteration in original). Because Hagan has shown that it will imminently suffer harm by being forced to act in a financially detrimental way to become compliant with the Ordinance now, its claims are ripe for adjudication.

The City **[**12]** claims that the Employer-Plaintiffs do not have standing to bring a *First Amendment* claim on their own behalf. The Employer-Plaintiffs allege that section 20-4(e) of the Ordinance infringes on their *First Amendment* right to freedom of association. Section 20-4(e) allows employers operating under a collective bargaining agreement to modify the yearly cap on sick leave time. It is undisputed that section 20-4(e) effectively exempts "unionized" employers from the Ordinance because the cap can be bargained down to zero. The Employer-Plaintiffs contend that affording this potential exemption only to unionized employers impermissibly coerces non-unionized employers to give up their constitutionally protected right to refrain from associating with a union. In response, the City argues that the Employer-Plaintiffs have no right or ability to be unionized and, therefore, do not have standing to bring a *First Amendment* claim on that ground. Accordingly, the City asks the Court to dismiss the Employer-Plaintiffs' **[*715]** *First Amendment* claim for lack of standing under *Rule 12(b)(1)*. Because this question properly goes to the merits of the Employer-Plaintiffs' claim rather than to their standing to bring it, the Court DENIES the City's *Rule 12(b)(1)* motion as to the Employer-Plaintiffs' *First Amendment* claim brought on their own behalf.

It is well **[**13]** established that an attack on the validity of a claim does not call into question the court's authority to decide it. *See* *Steel Co., 523 U.S. at 89* ("[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case."(emphasis in original)). Instead, a court has jurisdiction where "the right of the petitioners to recover under their complaint will be sustained if [the laws] are given one construction and will be defeated if they are given another[.]" *Bell v. Hood, 327 U.S. 678, 685, 66 S.Ct. 773, 90 L.Ed. 939 (1946)*. Only when a claim is "immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous" is it appropriate to dismiss for lack of subject matter jurisdiction. *Steel Co., 523 U.S. at 89* (quoting *Bell, 327 U.S. at 682-83*).

The City claims that the Employer-Plaintiffs have no right to unionize and, therefore, lack standing to bring a *First Amendment* claim against the City for infringing upon that right. Not so. Such an argument makes the precise error *Steel Co.* cautions against. Although a business's right to unionize or refrain from unionizing has not been explicitly recognized, the contention that it exists is by no means a frivolous claim **[**14]** nor is it patently foreclosed. *See* *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, ___ U.S. ___, 138 S.Ct. 2448, 2463, 201 L.Ed.2d 924 (2018)* ("The right to eschew association for expressive purposes is likewise protected."); *Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010)* (recognizing that "*First Amendment* protection extends to corporations"); *Mote v. Walthall, 902 F.3d 500, 507 (5th Cir. 2018)* (quoting *Prof'l Ass'n of Coll. Educators, 730 F.2d 258, 262 (5th Cir. 1984))* ("[P]rotected *First Amendment* rights flow to unions as well as to their members and organizers." (internal quotation marks omitted)). Accordingly, an argument centered on whether a business holds a right to unionize in the context of this challenge is properly made on the merits and is not so "insubstantial and frivolous" that it implicates standing.

The Employer-Plaintiffs have sufficiently alleged Article III standing. Their pleadings allege an injury in fact by asserting that the Employer-Plaintiffs' right to freedom of association has been infringed by the enactment of the Ordinance. Specifically, the Employer-Plaintiffs claim that section 20-4(e) impermissibly coerces them to give up their right to refrain from associating with a union. This alleged harm will be redressed if the Ordinance is enjoined. As the Employer-Plaintiffs have made sufficient allegations to justify Article III standing to bring a *First Amendment* claim on their own behalf, the City's *Rule 12(b)(1)* motion to dismiss this claim is DENIED.

3. The Employer-Plaintiffs' third-party standing [**15] to bring a *First Amendment* claim on behalf of their employees

The Employer-Plaintiffs also seek to vindicate their employees' *First Amendment* right to freedom of association, again challenging section 20-4(e) of the Ordinance. **[*716]** The Employer-Plaintiffs maintain that their employees are harmed by the inability of the Employer-Plaintiffs to have the same flexibility as a unionized workplace to modify the yearly cap on sick leave time imposed by the Ordinance. According to the Employer-Plaintiffs, this lack of flexibility will result in the reduction of other benefits currently enjoyed by their employees.

The City contends that the Employer-Plaintiffs have failed to plead any basis for third-party standing to raise First Amendment claims on behalf of their employees. The City further asserts that, even if the Employer-Plaintiffs had pleaded third-party standing, there is no basis for allowing the Employer-Plaintiffs to bring claims on behalf of their employees in this case. Specifically, the City argues that the Employer-Plaintiffs and their employees do not have the type of relationship that would allow for third-party standing because, in the context of unionization issues, the nature of the employer-employee relationship is necessarily adverse. **[**16]** The City further argues that non-unionized employees are not injured by the Ordinance. Although the Court disagrees with the City's reasoning, it concludes that the Employer-Plaintiffs lack third-party standing to assert their employees' First Amendment rights. The City's Rule 12(b)(1) motion to dismiss the Employer-Plaintiffs' First Amendment claim purportedly brought on behalf of their employees is therefore GRANTED.

In addition to constitutional standing requirements under Article III, the Supreme Court has established prudential constraints that are "judicially self-imposed limits on the exercise of federal jurisdiction." *Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004)*. These prudential constraints require the court to refrain from adjudicating claims that allege generalized grievances or assert the rights of third parties, even if Article III requirements are otherwise met. *Warth v. Seldin, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)* (noting that prudential restrictions on standing are in place to avoid courts being "called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights"). However, the prohibition against bringing claims on behalf of third **[**17]** parties is not categorical. The Supreme Court has recognized a limited number of situations in which it is appropriate to allow a party to bring claims on behalf of another. *See* *Powers v. Ohio, 499 U.S. 400, 410-11, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)* (third-party standing); *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp., 207 F.3d 789, 792 (5th Cir. 2000)* (associational standing).

As here, one of the situations in which a litigant may assert the rights of a third party is when, in addition to his or her own Article III standing to bring the claim, the litigant also has a close relationship to the third party such that the parties' interests are aligned and some "hindrance to the third party's ability to protect his or her own interests" exists. *Powers, 499 U.S. at 411*. When any of the three components are missing, courts should dismiss the claim for lack of standing. *Id.*

As discussed above, a motion to dismiss for lack of standing may be either "facial" or "factual." *Superior MRI Servs., Inc., 778 F.3d at 504*. Here, because the City has offered no evidence to contest the Employer-Plaintiffs' third-party standing, the City has made a "facial" attack on **[*717]** standing. "A facial attack on the complaint requires the court merely to look and see if plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." **[**18]** *Cell Sci. Sys. Corp. v. La. Health Serv. Eyeglasses, No. 18-31034, 804 Fed. Appx. 260, 2020 U.S. App. LEXIS 8349, 2020 WL 1285033, at *3 (5th Cir. Mar. 17, 2020)* (per curiam) (unpublished). Liberally construing the Employer-Plaintiffs' Amended Complaint, there are allegations that both ESI and Hagan's employees have chosen not to be unionized, thus suggesting that they do not wish to associate with a union. (Dkt. #9 PP 7-8, 41). The Court notes that the fact that the Employer-Plaintiffs' employees have not unionized does not, standing alone, mean that all, some, or none of those employees affirmatively do not wish to unionize. However, the Court recognizes that it is possible that the interests of the Employer-Plaintiffs and their employees could plausibly align in rejecting a unionized workplace. And because the City has made a facial attack on the Employer-Plaintiffs' standing, at this stage of the proceedings the Court assumes the truth of the Employer-Plaintiffs' assertion that their interests align with their employees on this issue. The relationship prong of the third-party standing requirement is therefore sufficiently pleaded.[6]

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[6] The City additionally argues that "non-unionized employees suffer no loss of benefits and potentially have access to greater benefits under the Ordinance than employees subject to a collective bargaining agreement" to demonstrate a lack of alignment with the Employer-Plaintiffs. (Dkt. #36 at 13). This argument misses the mark at the outset because the Employer-Plaintiffs' allegation—that their employees are harmed because the benefit of bargaining below the cap is denied to them unless they unionize—is entitled to a presumption of truth in the context of the City's facial attack on standing. The City's assertion may also be inaccurate. Although many employees will likely receive a benefit under the Ordinance that they would not have received

In addition to a close relationship and alignment of interests, to establish third-party standing the Employer-Plaintiffs must also plead that their employees are hindered in bringing a *First Amendment* claim themselves. In their **[**19]** Amended Complaint, the Employer-Plaintiffs suggest that, because the Ordinance only regulates employers, employees would not have standing to bring a claim on their own. Because this is a legal conclusion rather than a factual allegation, it is not entitled to a presumption of truth. *See* *Williamson, 645 F.2d at 412* (noting that "the plaintiff is left with safeguards similar to those retained when a *Rule 12(b)(6)* motion to dismiss for failure to state a claim is raised" when a *Rule 12(b)(1)* motion is based on the face of the complaint). Therefore, the Court must determine whether the employees would be hindered in bringing their own *First Amendment* claim under the Ordinance.

When a plaintiff is the object of the regulation he challenges, establishing standing is generally not difficult. *Lujan, 504 U.S. at 561*. However, when a challenge is brought by a litigant who is not the object of the regulation at issue, standing to challenge the law "is ordinarily 'substantially more difficult' to establish." *Id. at 562* (quoting *Allen v. Wright, 468 U.S. 737, 758, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984))*. This is because the causation and redressability aspects of standing may become functions of "the unfettered choices made by independent actors not before the court." *Id.* (quoting *ASARCO, Inc. v. Kadish, 490 U.S. 605, 615, 109 S.Ct. 2037, 104 L.Ed.2d 696* ***[*718]*** *(1989))* (internal quotation marks omitted).

Here, however, Employer-Plaintiffs' employees would **[**20]** not have difficulty establishing their standing to assert a *First Amendment* claim challenging the Ordinance. The injury in fact and redressability elements of standing clearly would be met. First, non-unionized employees subject to the Ordinance could claim that the Ordinance coerces them to give up their *First Amendment* right to refrain from associating with a union in order to enable them to bargain to modify the Ordinance's yearly sick leave cap. In so doing, the employees would state a plausible injury in fact. Second, the plausible injury to the employees' *First Amendment* rights could be redressed through declaratory and injunctive relief like that requested by the Employer-Plaintiffs in this case.

Third, although they are not expressly regulated by the Ordinance, employees are directly impacted as the other half of a regulated dyad. By design, the Ordinance alters the terms of the employer-employee relationship, imposing sick leave requirements that immediately affect both employers and employees, including the Ordinance's provision allowing only unionized workplaces to modify the Ordinance's yearly sick leave cap. For purposes of standing analysis, there is a critical distinction between would-be litigants who are directly **[**21]** impacted by the regulation of a third party, and those who are not. *Compare* *id. at 558* (finding no standing when environmental advocates brought a declaratory action challenging the geographic scope of a statute that regulated federal agencies in funding projects that impacted endangered species), *with* *Craig v. Boren, 429 U.S. 190, 192-96, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976)* (finding standing for a 20-year-old man to challenge a statute that forbade vendors from selling 3.2% beer to men between the ages of 18 and 21). Courts have repeatedly concluded that unregulated parties have standing when their rights are necessarily impacted by the regulation of a third party. *See, e.g.,* *MD II Entm't v. City of Dallas, 28 F.3d 492, 497 (5th Cir. 1994)* (declining to allow third-party standing where there "was no practical obstacle" to dancers raising their own equal protection claim against a zoning statute regulating their employer); *cf.* *Mainstreet Org. of Realtors v. Calumet City, 505 F.3d 742 (7th Cir. 2007)* (refusing to allow realtors to challenge a point-of-sale inspection ordinance because homeowners would be better advocates for their property rights despite homeowners not being directly regulated by the ordinance). Here, the Ordinance applies differently to employers when their employees have chosen to unionize, allowing the sick leave cap to be altered only for unionized workplaces. Thus, although employees **[**22]** are not expressly regulated by the Ordinance, their ability to bargain to reduce the yearly cap is directly conditioned on their own decision to unionize. Because the Ordinance directly impacts employees as well as their employers, the Court concludes that there is no reason to believe that the Employer-Plaintiffs' employees would lack standing to challenge the Ordinance.

For these reasons, the Employer-Plaintiffs have not sufficiently pleaded a hindrance to their employees bringing a claim challenging the Ordinance, leaving no basis on which the Employer-Plaintiffs can properly assert third-party

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otherwise, other employees may be losing a better or less restrictive benefit because their employer must provide sick leave time.

standing. The City's motion to dismiss the Employer-Plaintiffs' *First Amendment* claim brought on behalf of their employees is therefore GRANTED.

III. MOTION TO DISMISS UNDER *RULE 12(b)(6)*

The City also moves for dismissal of all of the Plaintiffs' claims for failure to state **[*719]** a claim under *Rule 12(b)(6)*, as well as all of the Employer-Plaintiffs' constitutional claims for failure to plead municipal liability under *Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)*.

A. *Rule 12(b)(6)* Legal Standards

Under the relaxed pleading standards of *Federal Rule of Civil Procedure 8(a)(2)*, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." When a defendant contends that a plaintiff **[**23]** has failed to meet this standard, *Rule 12(b)(6)* provides a mechanism to challenge the legal sufficiency of a claim early in litigation. Such motions are, however, "viewed with disfavor and rarely granted." *Test Masters Educ. Servs., Inc. v. Singh, 428 F.3d 559, 570 (5th Cir. 2005)*.

To survive a motion to dismiss brought under *Rule 12(b)(6)*, a plaintiff must plead in its complaint only "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)*. "The court's review is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint." *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC, 594 F.3d 383, 387 (5th Cir. 2010)* (citing *Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498-99 (5th Cir. 2000))*.

Although a probability that the defendant is liable is not required, the plausibility standard demands "more than a sheer possibility." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)*. In assessing a motion to dismiss under *Rule 12(b)(6)*, the facts pleaded are entitled to a presumption of truth, but legal conclusions that lack factual support are not entitled to the same presumption. *Id.* To determine whether the plaintiff has pleaded enough to "nudge[] their claims across the line from conceivable to plausible," a court draws on its own "judicial experience and common sense." *Id. at 679-80* (first quoting *Twombly, 550 U.S. at 570*, then citing *Iqbal v. Hasty, 490 F.3d 143, 157-58 (2nd Cir. 2007))* (internal quotation marks omitted). This threshold is surpassed when **[**24]** "a plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. at 678* (citing *Twombly, 550 U.S. at 556*).

B. Municipal Liability under *Monell*

The City moves for dismissal of the Employer-Plaintiffs' constitutional claims based on the assertion that the Employer-Plaintiffs have not sufficiently pleaded the *Monell* requirements necessary to impose liability for deprivation of constitutional rights under *42 U.S.C. § 1983*. *436 U.S. at 694*. Under *Monell*, a municipality cannot be sued under *section 1983* unless it can be established that the constitutional violation was the result of an official policy. *Id.* An official policy is:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.

[*720] *Bennett v. City of Slidell, 735 F.2d 861, 861 (5th Cir. 1984)* (en banc) (per curiam).

The alleged pleading deficiency complained of by the City is that the Employer-Plaintiffs **[**25]** did not specifically identify the *Monell* elements of municipal liability in their complaint. This argument fails. Because the Dallas City Council is the "final policy maker of the [C]ity of Dallas," the Employer-Plaintiffs must only plead that the city council officially adopted and promulgated an unconstitutional ordinance. *See* Groden v. City of Dall., 826 F.3d 280, 284 (5th Cir. 2016) (finding that because "the policymaker is a legal question that need not be pled," a complaint "need only allege facts that show an official policy, promulgated or ratified by the policymaker, under which the municipality is said to be liable" to survive a motion to dismiss). The Employer-Plaintiffs have clearly stated in their amended complaint that "the City enacted the Paid Sick Leave Ordinance," (Dkt. #9 ¶ 13), and that the Ordinance is unconstitutional under various legal theories, (Dkt. #9 ¶¶ 58, 62, 66). The City, in its motion to dismiss, acknowledges that the city council adopted the Ordinance. (Dkt. #36 at 2). The Employer-Plaintiffs have met the pleading requirements necessary to confer municipal liability under section 1983. The City's motion to dismiss on this theory is therefore DENIED.

C. *Rule 12(b)(6)* Challenge to the Employer-Plaintiffs' *First Amendment* Claim

The Employer-Plaintiffs **[**26]** assert that the Ordinance violates their right to associate under the First Amendment, pointing to section 20-4(e) of the Ordinance, which permits unionized employers operating with a collective bargaining agreement to "modify the yearly cap" of paid sick leave. The Employer-Plaintiffs contend that, through section 20-4(e), the Ordinance impermissibly conditions the benefit of bargaining to modify the Ordinance's yearly sick leave cap on employers giving up their right to refrain from unionizing, without the justification of being narrowly tailored to a compelling governmental interest. The Employer-Plaintiffs further allege that, because their employees have not unionized of their own accord, and because as employers they have not voluntarily recognized a union to represent the employees, they are not and do not wish to be "unionized employers." The City argues that the Employer-Plaintiffs have failed to state a claim because they have no unilateral right to unionize.

The First Amendment's freedom of association "provides both public and private employees the right to organize . . . and belong[s] to labor unions." Vicksburg Firefighters Ass'n, Local 1686 Int'l Ass'n of Firefighters v. City of Vicksburg, 761 F.2d 1036, 1039 (5th Cir. 1985) (citing Smith v. Ark. State Highway Emples., Local 1315, 441 U.S. 463, 464-66, 99 S.Ct. 1826, 60 L.Ed.2d 360 (1979)). The government infringes on that right when it "tak[es] steps to discourage or prohibit **[**27]** union membership or association." Smith, 441 U.S. at 466. Similarly, the existence of the right to associate "plainly presupposes a freedom not to associate." Boy Scouts of Am. v. Dale, 530 U.S. 640, 648, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984)) (internal quotation marks omitted).

The unconstitutional conditions doctrine prevents the government from making some benefit contingent on relinquishing a constitutional right. *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013) (quoting Regan v. Taxation **[*721]** With Representation of Wash., 461 U.S. 540, 545, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983)) ("We have said in a variety of contexts that 'the government may not deny a benefit to a person because he exercises a constitutional right.'"). In other words, where government action compelling or prohibiting some sort of association would be unconstitutional, so too is government action coercing the same. *See* Sherbert v. Verner, 374 U.S. 398, 406, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (holding that it is unconstitutional "to condition the availability of benefits" on a person's "willingness to violate a cardinal principle of her religious faith" because doing so "effectively penalizes the free exercise of her constitutional liberties").

At the outset, the Court must determine whether the Employer-Plaintiffs possess the right to unionize. It is undisputed, as the Employer-Plaintiffs correctly state, that individuals, corporations, and other associations generally possess rights under the First Amendment that are of the same nature and quality. **[**28]** *See* Citizens United, 558 U.S. at 342-43 (noting that First Amendment rights extend to corporations and other associations and are not treated differently than rights afforded to natural persons). However, First Amendment rights can be infringed only when those claiming the right have the ability to engage in the activity they contend is improperly coerced. That is to say, there can be no infringement under the First Amendment where it is impossible for the regulated entity to associate in the manner it claims the regulation is coercing.

The Employer-Plaintiffs claim that the Ordinance conditions the benefit of being able to bargain to modify the yearly cap on giving up their right not to associate—that is, their right to refrain from associating with a union.[7] But a union is a special type of association whose creation begins with the actions of *employees*. There is no mechanism for an employer to unilaterally unionize on the employees' behalf without the employees' impetus. Employees alone have the right to seek unionization under the *National Labor Relations Act ("NLRA")* by either asking the National Labor Relations Board ("NLRB") to conduct an election ("election provision") or by requesting that their employer voluntarily recognize the union ("voluntary recognition **[**29]** provision"). *29 U.S.C. § 159(a)*; *id.* *§ 159(c)(1)*; *see also* *Pac. Molasses Co. v. N.L.R.B., 577 F.2d 1172, 1177 (5th Cir. 1978)* (noting the method by which a union establishes the authority to bargain on behalf of employees).

The Employer-Plaintiffs maintain that their ability to "unionize" or, more accurately, to associate with a union, is derived from the voluntary recognition provision of the NLRA. They argue that they "have not elected to invite a union to represent their employees" and, therefore, are exercising their right to refrain from associating with a union. This assertion misunderstands the nature of unions and the authority granted to employers by the voluntary recognition provision. An employer cannot simply elect to recognize a **[*722]** union—they may do so *only* upon a sufficient showing of support from employees. *See* *29 U.S.C. § 159(c)(1)* ("Whenever a petition shall have been filed . . . by an employer, alleging that one or more individuals or labor organization have presented to him a claim to be recognized. . . ."). Similarly, employers cannot choose to refrain from becoming a "unionized" employer when faced with sufficient support from employees. *See id.* ("Whenever a petition shall have been filed . . . by an employee or group of employees. . . alleging that a substantial number of employees **[**30]** wish to be represented. . . ."). Thus, the Employer-Plaintiffs cannot of their own accord decide whether their employees will unionize. Because the Employer-Plaintiffs themselves have no ability to decide whether their employees will unionize, they certainly cannot be coerced into doing so. Therefore, the Employer-Plaintiffs have not stated a legally cognizable claim under the *First Amendment*. Accordingly, the City's *Rule 12(b)(6)* motion to dismiss the Employer-Plaintiffs' *First Amendment* claim brought on their own behalf is GRANTED.

D. *Rule 12(b)(6)* Challenge to the Employer-Plaintiffs' Equal Protection Claim

The City also seeks dismissal under *Rule 12(b)(6)* of the Employer-Plaintiffs' *Fourteenth Amendment* claim that the Ordinance violates their right to equal protection under the laws. Like the Employer-Plaintiffs' *First Amendment* claim, this claim also concerns the provisions of section 20-4(e) of the Ordinance permitting only unionized employers to modify the yearly cap of paid sick leave. The Employer-Plaintiffs allege that, by including section 20-4(e), the Ordinance intentionally and impermissibly distinguishes between employers operating under a collective bargaining agreement and those that are not.

"The *Fourteenth Amendment*[] promise[s] that no person shall be denied equal protection of the laws." *Romer v. Evans, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996)* (citations omitted). However, **[**31]** laws often classify and disadvantage some group. *Id.* Whether a particular type of classification is lawful depends both on the group being classified and the activity being regulated. Laws that draw lines distinguishing a suspect class—like those based on immutable characteristics such as race, alienage, and national origin—or those that affect a fundamental right will be analyzed under strict scrutiny. *Frontiero v. Richardson, 411 U.S. 677, 682, 93 S.Ct. 1764,*

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[7] Although the Employer-Plaintiffs cite to *Citizens United* and *Southwire Co. v. N.L.R.B., 383 F.2d 235, 240 (5th Cir. 1967)*, for the proposition that they possess a *First Amendment* right to refrain from operating as a unionized business, neither case specifically addresses an employer's right to unionize. *See* *Citizens United, 558 U.S. at 342* (recognizing that "*First Amendment* protections extend to corporations" in a discussion of corporate political speech); *Southwire Co., 383 F.2d at 240 (5th Cir. 1967)* (discussing an employer's right to express an opinion regarding unionization rather than its right to unionize).

36 L.Ed.2d 583 (1973). With some exceptions,[8] all others will be reviewed under rational basis scrutiny. Heller v. Doe, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

Because the Employer-Plaintiffs do not have a fundamental right to unionize, as discussed *supra* Section III(C), and are not a protected class, their equal protection claim is subject to rational basis scrutiny. *See* Lyng v. Int'l Union, UAW, 485 U.S. 360, 370, 108 S.Ct. 1184, 99 L.Ed.2d 380 (1988) (determining that a statute refusing food stamps to striking union members did not implicate a protected class or fundamental right). Under rational basis review, the question before the Court is whether the Ordinance's classification of employers operating under a collective bargaining agreement and those who are not is rationally related to some legitimate **[*723]** governmental interest. The Court finds that it is.

Legislation will survive rational basis scrutiny "if there is any reasonably conceivable **[**32]** state of facts that could provide a rational basis for the classification"—even if the legislature does not provide one. Heller, 509 U.S. at 320 (quoting F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)) (internal quotation marks omitted). Accordingly, a law is presumed constitutional unless the challenger can "negative every conceivable basis which might support it." *Id.* (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973)).

Although the rational basis standard is quite deferential, it is not "toothless." Schweiker v. Wilson, 450 U.S. 221, 234, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981) (quoting Mathews v. Lucas, 427 U.S. 495, 510, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976)) (internal quotation marks omitted). "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (citations omitted). Where the plaintiff pleads facts that sufficiently negate any rational basis for the legislation, the equal protection claim will survive a motion to dismiss. But where it does not, the claim will fail. *See* Crook v. El Paso Indep. Sch. Dist., 277 F. App'x 477, 481 (5th Cir. 2008) (per curiam) (unpublished) (upholding the district court's dismissal of plaintiff's equal protection claim where the defendant identified a rational purpose for a classifying policy that the plaintiff did not negate).

In support of its motion to dismiss, the City points to "compliance" with federal labor laws as its legitimate governmental interest. According to the City, **[**33]** because the federal labor laws preempt claims brought under state and local laws that are "substantially dependent upon analysis of the terms of a collective bargaining agreement," the Ordinance carved out employers operating under a collective bargaining agreement to avoid preemption—thereby, as the argument goes, avoiding conflict with federal law and its interests. (Dkt. #36 at 14) (citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985)). Put differently, the City argues that it had to include the collective bargaining agreement classification or risk preemption. The City further defends the distinction by pointing to other state laws which distinguish employers with a collective bargaining agreement from those without one. *Id.* (citing TEX. LAB. CODE ANN. § 413.022(a)) ("Nothing in this section supersedes the provisions of a collective bargaining agreement. . . .").

The Employer-Plaintiffs seize on the City's use of the phrase "complying with federal labor laws" in their attempt to rebut the City's justification. They argue that the City cannot have a legitimate interest in complying with federal labor laws through the collective bargaining agreement distinction because the laws themselves prohibit discrimination based on union status.

While the Employer-Plaintiffs' **[**34]** understanding of the general policy thrust of federal labor law is correct, these arguments are unhelpful to their cause because they do not confront the reason the City claims it created the distinction—to avoid preemption. This rationale has been found to sufficiently justify a regulation subject to rational basis review. *See* Boston Taxi Owners Ass'n, Inc. v. City of Boston, 180 F. Supp. 3d 108, 118-19 (D. Mass. 2016)

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[8] Sex or illegitimacy classifications are analyzed under intermediate scrutiny. *See* Clark v. Jeter, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988) (discrimination based on illegitimacy); Craig, 429 U.S. at 197 (discrimination based on sex).

(acknowledging that drafting a regulation **[*724]** that will not be preempted is a legitimate government objective for a city). Further, courts have dismissed similar equal protection claims despite the NLRA's interest in the equitable treatment of union and non-union workers. *See* Babler Bros., Inc. v. Roberts, 761 F. Supp. 97, 101 (D. Or. 1991), *aff'd*, 995 F.2d 911 (9th Cir. 1993) (finding that an overtime pay statute that exempted contractors that were a party to a collective bargaining agreement did not violate equal protection).

Because treating employers without a collective bargaining agreement differently than those with one is rationally related to the City's interest in crafting legislation that avoids federal preemption, the Employer-Plaintiffs have not rebutted "every conceivable basis" that supports the Ordinance's classification. Accordingly, the City's motion to dismiss the Employer-Plaintiffs' equal protection claim is GRANTED.

E. *Rule 12(b)(6)* Challenge to [35] the Employer-Plaintiffs' *Fourth Amendment* Claim**

The Employer-Plaintiffs claim that the Ordinance is unconstitutional on its face under the Fourth Amendment. Specifically, the Employer-Plaintiffs contend that, because the Ordinance authorizes city officials to issue administrative subpoenas to employers compelling attendance of witnesses or production of documents without precompliance review, it runs afoul of the Fourth Amendment. The City moves to dismiss this claim, arguing that the Dallas City Code does, in fact, provide a sufficient opportunity for subpoenaed employers to obtain precompliance review.

Facial challenges to a statute or ordinance are "the most difficult . . . to mount successfully." United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). But as the Supreme Court has recently explained, it "has never held that these claims cannot be brought under any otherwise enforceable provision of the Constitution." City of Los Angeles v. Patel, 576 U.S. 409, 135 S.Ct. 2443, 2449, 192 L.Ed.2d 435 (2015). To the contrary, and in the specific context of a Fourth Amendment facial challenge to a municipal ordinance, the Supreme Court has made clear that "facial challenges under the Fourth Amendment are not categorically barred or especially disfavored." Patel, 135 S.Ct. at 2449; *see also id.* (observing that the Supreme Court has "allowed [facial] challenges to proceed under a diverse array of constitutional provisions" and that **[**36]** "Fourth Amendment challenges to statutes authorizing warrantless searches are no exception").

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects," to be free from "unreasonable searches and seizures," and requires that warrants must be based on probable cause. U.S. CONST. amend. IV. The rights secured by the Fourth Amendment extend not only to physical searches, but also include compulsory inspection of documents in a commercial establishment. See v. City of Seattle, 387 U.S. 541, 543-44, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967). Generally, warrantless searches conducted without judicial review are "*per se* unreasonable." Patel, 135 S.Ct. at 2452; *see also* Arizona v. Gant, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (explaining that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions") (quoting Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)).

[*725] One of the exceptions to the warrant requirement is the administrative search, which is at issue here. *See* Cotropia v. Chapman, 721 F. App'x 354, 357 (5th Cir. 2018) (per curiam) (unpublished). Administrative subpoenas ordering the production of a business's records do not offend the Constitution if they are "sufficiently limited in scope, relevant in purpose, and specific in directive." *See*, 387 U.S. at 544. Although an administrative subpoena may issue without a warrant, **[**37]** "[a]bsent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." Patel, 135 S.Ct. at 2452; *see also* Donovan v. Lone Steer, Inc., 464 U.S. 408, 414-15, 104 S.Ct. 769, 78 L.Ed.2d 567 (1984) (citing Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 195, 66 S.Ct. 494, 90 L.Ed 614 (1946)) (rejecting a Fourth Amendment claim where the government sought only to enforce a court order for the production of documents "made after adequate opportunity to present objections"). Without this opportunity, a search conducted by means of an administrative subpoena violates the

Fourth Amendment. Patel, 135 S.Ct. at 2452 (noting that searches of hotel records would have been constitutional had they been performed under an administrative subpoena because the parties in that case stipulated that the searched party could have moved to quash it, thus meeting any Fourth Amendment concerns).[9]

The Employer-Plaintiffs allege that the Ordinance ignores these constitutional limitations on administrative searches, pointing to a portion of Article III of the Ordinance, entitled "Enforcement." Article III consists of three provisions, sections 20-9 through 20-11. Section 20-9, entitled "Procedures for Filing Complaints," provides that any employee may file a complaint with the City that the Ordinance is being violated by an employer. *See* ***[**38]*** Dall. City Code § 20-9. Section 20-10, entitled "Investigation," provides procedures for the investigation of such employee complaints, directing that, upon the filing of a complaint, the City "shall commence a prompt and full investigation" to determine "whether there is sufficient cause to believe that a violation of [the Ordinance]" has occurred. *Id.* § 20-10(a). Section 20-10(b) empowers the City, in conducting its investigation of employee complaints, to "issue subpoenas to compel the attendance of a witness or the production of materials or documents in order to obtain relevant information and testimony."[10] Section 20-10(b) goes on to state that, "[r]efusal to appear or to produce any document or other evidence after receiving a subpoena pursuant to this section is a violation of this chapter and subject to sanctions as described in section 2-9 of the Dallas City Code."[11] Finally, section 20-11, entitled **[*726]** "Voluntary Compliance; Violations; Penalties; Appeals," provides that, after seeking voluntary compliance from the employer to remedy a violation of the Ordinance, a civil fine not to exceed $ 500 may be imposed. Section 20-11 also allows employers to appeal any civil penalty imposed for a violation of the Ordinance.

The Employer-Plaintiffs allege that, because the Ordinance **[**39]** fails to include a procedure for obtaining precompliance review of subpoenas issued in conjunction with investigations of employee complaints under section 20-10(b), it violates the Fourth Amendment on its face. The City counters by referencing another portion of the Dallas City Code, section 2-8. Section 2-8 states that, "[i]n all hearings and investigations" conducted by the city council, the city manager, or any person or committee authorized to conduct investigations as to city affairs, the City may "subpoena witnesses and compel the production of books, papers and other evidence material to such inquiry in the same manner as is now prescribed by the laws of this state for compelling the attendance of witnesses and production of evidence in the corporation court."[12] According to the City, section 2-8's subpoena provision "addresses the procedures applicable to *any* subpoena issued by the City." (Dkt. #36 at 17). Based on its contention that section 2-8 provides for precompliance review of *any* subpoena the City issues, including subpoenas specifically authorized by section 20-10(b) of the Ordinance, the City maintains that the Employer-Plaintiffs' Fourth Amendment claim is not viable.

The City's interpretation of section 20-10(b) cannot be reconciled with the text and structure of the Ordinance. Section 20-10(b)'s text **[**40]** makes no reference to section 2-8. Instead, section 20-10(b) describes, in language differing from that of section 2-8, a subpoena process unique to the investigation of employee complaints concerning alleged employer violations of the Ordinance. The omission of any reference to section 2-8 is particularly telling because section 20-10(b) expressly incorporates section 2-9 of the City Code concerning

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[9] As the Fifth Circuit has explained, consistent with Supreme Court precedent, "Texas law contemplates the opportunity for precompliance review of an administrative subpoena before a neutral decisionmaker." Cotropia, 721 F. App'x at 358 n.2. "For example, Texas Occupations Code § 153.007(e) states that if 'a person fails to comply with a [Texas Medical Board] subpoena,' then [the Medical Board] 'may file suit to enforce the subpoena.'" *Id.* (quoting TEX. OCC. CODE ANN. § 153.007(e)). As the *Cotropia* court observed, "[i]n this scenario, a court can, prior to compliance, determine whether the subpoena is valid." *Id.*

[10] Before issuing a subpoena, the City must "seek the voluntary cooperation of any employer to timely obtain relevant information and testimony in connection with any investigation of a complaint filed under [the Ordinance]." Dall. City Code § 20-10(b).

[11] Section 2-9 provides little guidance on the nature of sanctions that may be imposed for, among other things, "refus[ing] to be sworn," "refus[ing] to appear to testify," or "fail[ing] or refus[ing] to produce any book, paper, document or instrument touching any matter under examination" by the City. Dall. City Code § 2-9. According to section 2-9, a person who runs afoul of its provisions is simply "guilty of an offense." *Id.*

[12] Corporation court is the municipal court. TEX. GOV'T CODE ANN. § 29.002.

sanctions. *See id.* § 20-10(b). In drafting and enacting the Ordinance, the City therefore demonstrated that it knew how to incorporate other parts of the City Code into the provisions of the Ordinance. Courts "presume the words in a statute are selected with care" and should "interpret them in a manner that gives meaning to all of them without disregarding some as surplusage." *Plains Capital Bank v. Martin, 459 S.W.3d 550, 556 (Tex. 2015)*. Section 20-10(b)'s explicit incorporation of section 2-9, taken together with the absence of any reference to section 2-8, confirms that section 2-8 is not incorporated into the Ordinance.

To the extent the City contends that, regardless of incorporation into section 20-10(b), the general provisions of section 2-8 concerning administrative subpoenas control over the specific provisions of section 20-10(b), this argument also fails. As the Supreme Court has explained, "[i]t is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012)* (quoting *Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157* ***[*727]*** *(1992))* (internal quotation marks **[**41]** omitted); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: INTERPRETATION OF LEGAL TEXTS 183-87 (2012) (explaining that a later enacted, more specific statute generally governs over an earlier, more general one).[13]

Moreover, even if section 2-8 applied to the Ordinance, the City overreads its provisions, which fail to direct the subject of an administrative subpoena to a neutral forum in which it could obtain review. *See Airbnb, Inc. v. City of New York, 373 F. Supp. 3d 467, 493 (S.D.N.Y. 2019)* (noting that an ordinance that failed to provide procedures or a forum to challenge a demand for production was unconstitutional on its face). Nothing in section 2-8 makes clear that the City will provide constitutionally adequate procedures for precompliance review of its administrative subpoenas. Section 2-8 merely states that any person authorized by the city council or city manager may subpoena witnesses or compel the production of evidentiary materials "in the same manner as now prescribed by the laws of this state for compelling the attendance of witness and production of evidence in the corporation court." Dall. City Code § 2-8. On its face, section 2-8 describes how a subpoena may issue, not a procedure for precompliance review.

The City's reading of section 2-8 effectively concedes that this city code provision **[**42]** does not operate to provide constitutionally adequate precompliance review of administrative subpoenas. As explained by the City, sections 2-8 and 2-9 work in conjunction to allow an employer to "question the reasonableness of the subpoena" only *after* being subject to citation for failing to comply with an administrative subpoena. (Dkt. #36 at 17) ("[A]n employer who refused to comply with a subpoena could be subject to citation and *then* would have an opportunity to appear before the Dallas Municipal Court at which time it would have the 'opportunity to question the reasonableness of the subpoena . . . .'" (quoting *Donovan, 464 U.S. at 415*) (emphasis added)). This is not the order of events contemplated by the *Fourth Amendment*. *See Patel, 135 S.Ct. at 2452* (explaining that the government cannot reasonably force business owners to risk a criminal penalty to invoke statutory safeguards against suspicionless searches). Providing for review only after a citation for noncompliance has issued creates an unconstitutional Hobson's choice for the recipient of an administrative subpoena under section 2-8: comply with a potentially overbroad subpoena in contravention of *Fourth Amendment* protections or risk a citation that may or may not withstand review for reasonableness.

In sum, the Employer-Plaintiffs' **[**43]** claim that the Ordinance does not provide for precompliance review sufficiently states a claim under the *Fourth Amendment* to survive scrutiny under *Rule 12(b)(6)*. Section 20-10(b) of the Ordinance, the operative provision for the issuance of administrative subpoenas to employers during the investigation of employee complaints regarding paid sick leave, provides no mechanism whatsoever for precompliance review, does not incorporate section 2-8 of the city code, and controls over section 2-8's general provisions concerning administrative subpoenas. And, even if section 2-8 applied to administrative subpoenas issued under the Ordinance, section 2-8 does not appear to provide constitutionally adequate precompliance review. The City's motion to **[*728]** dismiss the Employer-Plaintiffs' claim under the *Fourth Amendment* is therefore DENIED.

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[13] Section 2-8 was made part of the Dallas City Code in 1941, while the Ordinance was passed in 2019.

F. Preemption under the Texas Constitution

The City also seeks dismissal under *Rule 12(b)(6)* of the preemption claim asserted by all Plaintiffs under the Texas Constitution. For reasons that are fully explained below, *see infra* Part V(B), the Court holds that Plaintiffs have sufficiently stated a preemption claim. The City's motion to dismiss the preemption claim is therefore DENIED.

IV. SUPPLEMENTAL JURISDICTION

The parties do not dispute that the Court has supplemental jurisdiction **[**44]** over Plaintiffs' preemption claim. *See* *28 U.S.C. § 1367(a)*. The Court agrees. Generally, a district court has original jurisdiction over claims that arise under federal law, *id.* *§ 1331*, as well as cases that arise under state law and meet certain diversity of citizenship and amount in controversy requirements, *id.* *§ 1332*. A court may also exercise supplemental jurisdiction over state law claims that it would not have original jurisdiction over if those claims are "part of the same case or controversy" as the federal claims. *Id.* *§ 1367(a)*.

The Court has original jurisdiction over the constitutional claims made in this case under the *First Amendment*, *Fourth Amendment*, and the *Fourteenth Amendment*, all challenging the enforceability of the Ordinance. The Court has determined that the Employer-Plaintiffs' *First Amendment* and *Fourteenth Amendment* claims should be dismissed. However, the City's motion to dismiss the Employer-Plaintiffs' *Fourth Amendment* claim has been denied, and this claim will be permitted to proceed. Plaintiffs' state law preemption claim, alleging that the Ordinance is also unenforceable because it is preempted by the TMWA, is part of the same case or controversy as the *Fourth Amendment* claim. The Court therefore has supplemental jurisdiction over the preemption claim under *28 U.S.C. § 1367(a)*.

In its motion to dismiss, the City does not raise **[**45]** a question of subject matter jurisdiction as to the preemption claim. Instead, the City asks the Court to exercise its discretion to decline supplemental jurisdiction over the preemption claim. *See id.* *§ 1367(c)*. Under *section 1367(c)*, the Court may decline to exercise supplemental jurisdiction over the state law preemption claim if:

(1) the claim raises a novel or complex issue of state law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Id. Courts should also consider the common law factors of "judicial economy, convenience, fairness, and comity" when determining whether to retain supplemental jurisdiction over a state law claim. *Enochs v. Lampasas Cty., 641 F.3d. 155, 159 (5th Cir. 2011)* (citing *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988))*. Weighing all factors together, with no single factor dispositive, courts should determine whether the overall balance favors declining jurisdiction while "guard[ing] against improper forum manipulation." *Id.* "[I]n the usual case in which all federal law claims are eliminated before trial" the common law factors **[**46]** "will point toward declining to exercise [supplemental] jurisdiction." *Carnegie-Mellon, 484 U.S. at 350 n.7*.

[*729] The City argues that both the predominance of the state law claim and its novelty require the Court to decline supplemental jurisdiction and dismiss the claim. (Dkt. #36 at 18). The State urges that the City has waived the other factors by failing to raise them, but that misstates the law. A defendant waives a challenge to supplemental jurisdiction if it is not raised in the district court, but once the issue is raised, the defendant's failure to discuss all of the factors bearing on supplemental jurisdiction does not preclude their consideration by the Court. *See* *Powers v. United States, 783 F.3d 570, 576-77 (5th Cir. 2015)* (noting that the failure to challenge supplemental jurisdiction in the district court rendered the issue waived on appeal). Accordingly, because the City has appropriately raised the issue, the Court must assess each of the statutory and common law factors to determine whether it should decline supplemental jurisdiction.

As to the first factor described in *section 1367(c)(1)*, this case does not present a novel or complex issue of state law. To the contrary, Texas preemption law is well delineated. *See, e.g., Tex. Manufactured Hous. Ass'n, Inc. v. City of Nederland, 101 F.3d 1095, 1101 (5th Cir. 1996)* (analyzing whether a state statute preempted a local ordinance); **[**47]** *BCCA Appeal Grp., Inc. v. City of Houston, 496 S.W.3d 1, 7-8 (Tex. 2016)* (outlining municipal ordinance preemption and statutory construction). Not only is the applicable Texas preemption law clear, as will be explained further herein, *see infra* Part V(B), Texas's Third Court of Appeals has already held that the TMWA preempts a city ordinance requiring private employers to provide paid sick leave. *See Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425, 440 (Tex. App.—Austin 2018, pet. filed)*. Thus, the Court has the benefit of state court precedent specifically addressing TMWA preemption of a materially similar municipal paid sick leave ordinance. *See Mem'l Hermann Healthcare Sys., Inc. v. Eurocopter Deutschland, GMBH, 524 F.3d 676, 678 (5th Cir. 2008)* ("In making an *Erie* guess, [federal courts] defer to intermediate state appellate court decisions, 'unless convinced by other persuasive data that the highest court of the state would decide otherwise.'") (quoting *Herrmann Holdings Ltd. v. Lucent Techs. Inc., 302 F.3d 552, 558 (5th Cir. 2002))*.[14]

By contrast, cases that have identified novel issues of state law include those that ask the Court to apply the law for the first time. *See, e.g., In re Abbott Labs., 51 F.3d 524, 529 (5th Cir. 1995)* (noting that whether indirect purchasers could state a claim under Louisiana ***antitrust law*** was a novel and complex issue); *Brim v. ExxonMobil Pipeline Co., 213 F. App'x 303, 305 (5th Cir. 2007)* (per curiam) (unpublished) (finding that **[**48]** the question of whether a state statute provided a private cause of action was a novel issue when no state court had decided the issue).

[*730] The City claims that, because there is a petition for review of the *Austin* court's order pending before the Texas Supreme Court, this case presents a novel issue of law. But as the State has correctly noted, such a reading of "novel" under *28 U.S.C. § 1367(c)* would mean that, even where a state's highest court had established a legal standard, any new set of facts involving the application of that standard in federal court would present a "novel" issue. The Court is unaware of any precedent supporting the City's unusual interpretation and rejects such a strained and unworkable construction of the statute.

As to the second factor described in *section 1367(c)(2)*, the City argues that the Court should decline supplemental jurisdiction because the state law claim substantially predominates over the federal claim. When considering whether a claim substantially predominates over others, courts consider the proof required, scope of issues, and "comprehensiveness of the remedy sought." *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)*. The questions before the Court in this case are predominantly legal in nature. It is, therefore, unlikely that **[**49]** any one claim will require substantially more evidentiary proof than another. As the Court has previously observed in the context of venue, the parties have already agreed that "the subject matter [of this case] lends itself to having little evidence to present" and the parties have likewise "point[ed] to no physical evidence that may be required to resolve the case." (Dkt. #49). Nor does the state law claim's scope predominate. Whether the Ordinance is preempted by the Texas Constitution is not a claim that is dependent on the resolution of multiple questions of Texas law. It requires the Court to decide only whether the Texas legislature intended to preempt municipalities from regulating the minimum wage and, if so, whether the paid sick leave mandated by the Ordinance falls within the meaning of the word "wage." Lastly, the remedy sought for the federal *Fourth Amendment* claim and the state law claim is the same—an order enjoining the entire Ordinance. Although the remedy for the federal claim may be narrowed later, this factor asks about the remedy *sought*. Because the remedy sought for the remaining federal claim and the state law claim is the same, the state law claim does not substantially predominate **[**50]** over the federal claim. This factor is therefore neutral.

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[14] A Texas state district court has also issued an order granting a motion temporarily enjoining the enforcement of a similar paid sick leave ordinance enacted in the City of San Antonio. (Dkt. #61-1) (Order on Temporary Injunction of the 408th Judicial District of Bexar County, Texas, in *Associated Builders & Contractors of S. Tex., et al. v. City of San Antonio, et al.*, No. 2019CI13921). Texas's Fourth Court Appeals has abated the appeal of that order pending the resolution of a petition for review before the Texas Supreme Court in the *City of Austin* case, suggesting that the Fourth Court of Appeals considers San Antonio's paid sick leave ordinance to be materially similar to the Austin paid sick leave ordinance enjoined in the *City of Austin* case. *City of San Antonio v. Associated Builders & Contractors of S. Tex., No. 04-20-00004-CV, slip op., 2020 Tex. App. LEXIS 1972 (Tex. App.—San Antonio Mar. 4, 2020 no pet. h.)* (mem op., not designated for publication).

The final two statutory factors, described in *section 1367(c)(3)-(4)*, both weigh in favor of retaining jurisdiction, as a viable federal claim remains and there is no other compelling reason to decline jurisdiction.

Turning to the common law factors, both the convenience and fairness factors are neutral. This Court and a court in Dallas County are roughly equivalent in their convenience to the parties. *See* (Dkt. #49 at 8) (determining that neither the Northern District of Texas nor the Eastern District of Texas was inconvenient for any party associated with the case). And any discovery, research, or briefing that has already been completed by the parties concerning the state law issue will be largely, if not completely, applicable in state court. Thus, neither party would be prejudiced by dismissing the case.

The judicial economy factor, on the other hand, weighs slightly in favor of retaining the case. Although the Court has not yet invested a substantial amount of judicial resources into the case, declining supplemental jurisdiction on the state law claim would require the involvement and attention of an additional court, thereby doubling the effort **[**51]** required to resolve it. *See* *PPG Indus., Inc. v. Cont'l Oil Co., 478 F.2d 674, 680 (5th Cir. 1973)* (noting a " **[*731]** disinclination to encourage duplication of effort"). It is not economical to require a case that could be resolved in one court to proceed in two courts. Because a federal claim remains in this case and will proceed, it is a more efficient use of judicial resources to have all challenges to the Ordinance resolved in one court.

As to the comity factor, the State argues that comity weighs in favor of retaining the state law claim because the State of Texas itself has indicated its desire to proceed in a federal forum. In support, the State analogizes decisions in which federal courts have declined to dismiss cases on the basis of international comity when the United States has brought a claim. The international comity doctrine instructs courts to refuse jurisdiction when adjudicating the case may upset foreign relations. *See* *Derr v. Swarek, 766 F.3d 430, 442 (5th Cir. 2014)* (noting that the purpose of international comity is to defer to foreign judgments that are the result of a "fully and fairly" litigated case). In the cases cited by the State, courts have retained jurisdiction because "declining jurisdiction out of deference to the interest of a foreign nation would be inappropriate" as the **[**52]** executive branch has already weighed international policy interests. *See* *United States v. All Assets Held in Account Number XXXXXXXX, 83 F. Supp. 3d. 360, 372, 314 F.R.D. 12 (D.D.C. 2015)* (refusing to decline jurisdiction over a case brought by the United States which had been previously settled in Nigeria). The State argues that, consistent with the international comity doctrine, Texas's executive branch has already weighed the state and local interests at stake in this case, and has affirmatively decided to proceed in federal court.

Notwithstanding the State executive branch's decision to proceed in federal court, its reliance on the international comity doctrine is unpersuasive. Comity is a factor in determining whether a federal court should retain supplemental jurisdiction over state law claims because of a desire to avoid "needless decisions of state law" and to "promote justice between the parties by procuring for them a surer-footed reading of applicable law." *Gibbs, 383 U.S. at 726*. The Supreme Court has explained that comity, in the federalism context, supports the idea that "the National Government will fare best if the States *and their institutions* are left free perform their separate functions in their separate ways." *Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 10, 107 S.Ct 1519, 95 L.Ed.2d 1 (1987)* (quoting *Younger v. Harris, 401 U.S. 37, 44, 91 S.Ct 746, 27 L.Ed.2d 669 (1971))* (emphasis added). Comity as a common law factor in determining supplemental **[**53]** jurisdiction must, as both *Pennzoil* and *Gibbs* suggest, refer to a more global deference that includes the interests of the parties, courts, and citizens of the state in having state issues decided by state courts. The Court, therefore, concludes that comity, as it normally does in this context, weighs in favor of declining supplemental jurisdiction in this case.

Taken together, the statutory and common law factors weigh in favor of retaining supplemental jurisdiction over the state law claim. That a federal claim remains viable, and that the state law issue is neither novel, complex, nor predominant, weigh in favor of retaining supplemental jurisdiction over the state law claim. And there are no other compelling reasons to decline jurisdiction. Even if one of the statutory factors was invoked, the common law factors do not counsel strongly in favor of declining jurisdiction, with only comity concerns weighing in favor of dismissing the state law claim. Thus, having weighed the statutory and common law factors, the Court will exercise supplemental jurisdiction over the state law claim. The City's **[*732]** motion to dismiss the claim is therefore DENIED.

V. Preliminary Injunction

Having determined **[**54]** that the Plaintiffs have sufficiently stated a claim under the *Fourth Amendment* and under state law to survive the City's dismissal motion, and that the Court should retain supplemental jurisdiction over the state law preemption claim, the Court now turns to the Plaintiffs' motions for preliminary injunction. Because the Court concludes that the Plaintiffs' request for a preliminary injunction on the state law preemption claim is substantially likely to succeed on the merits and otherwise meets the requirements for a preliminary injunction, it will not reach the *Fourth Amendment* claim seeking the same relief.

A. Preliminary Injunction Legal Standard

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)*. To issue such relief, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* It does so by requiring the plaintiff to establish:

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and **[**55]** (4) that the grant of an injunction will not disserve the public interest.

Janvey v. Alguire, 647 F.3d 585, 595 (5th Cir. 2011). While a plaintiff "is not required to prove his case in full," *Univ. of Tex. v. Camenisch, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981)*, he must "clearly carr[y] the burden of persuasion on all four requirements[,]" *Lake Charles Diesel, Inc. v. Gen. Motors Corp., 328 F.3d 192, 196 (5th Cir. 2003)*.

B. Substantial Likelihood of Success on the Merits

At the outset, a plaintiff requesting a preliminary injunction must first demonstrate that he is likely to succeed on the merits of his claim. *Canal Auth. v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974)* ("[I]t is important to consider this requirement, since, regardless of the balance of relative hardships threatened to the parties, the granting of a preliminary injunction would be inequitable if the plaintiff has no chance of success on the merits.").

The Employer-Plaintiffs and the State allege that the Ordinance is preempted by the TMWA and therefore violates the Texas Constitution. This issue is a matter of state law. "A federal court exercising [supplemental] jurisdiction over state law claims, must apply the substantive law of the state in which it sits." *Sommers Drug Stores Co. Emp. Profit Sharing Tr. v. Corrigan, 883 F.2d 345, 353 (5th Cir. 1989)* (citing *Gibbs, 383 U.S. at 726*). That law is enunciated by the state's highest court. *Troice v. Greenberg Traurig, L.L.P., 921 F.3d 501, 505 (5th Cir. 2019)*. When a state's highest court has yet to speak on an issue, a federal court "must follow the decisions of intermediate state courts in the absence of convincing **[**56]** evidence that the highest court of the state would decide differently." *Stoner v. N.Y. Life Ins. Co., 311 U.S. 464, 467, 61 S.Ct. 336, 85 L.Ed. 284 (1940)* (citations omitted).

The Texas Supreme Court has explained the standard for evaluating the type of preemption claim asserted by Plaintiffs: the preemption of a municipal **[*733]** ordinance by state legislation. Home-rule cities,[15] like the City of Dallas, "have broad discretionary powers, provided that no ordinance 'shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.'" *Dall. Merch.'s & Concessionaire's Ass'n v. City of Dallas, 852 S.W.2d 489, 490 (Tex. 1993)* (quoting *TEX. CONST. art. XI, § 5*). Accordingly, home-rule cities have full power of self-governance, limited only by what the Texas legislature

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[15] Home-rule cities are those operating under a municipal charter as provided for in the Texas Constitution. *Barnett v. City of Plainview, 848 S.W.2d 334, 337 (Tex. App.—Amarillo 1993, no pet.)*; *TEX. CONST. art. XI, § 5*.

withholds. *Id.* Regardless of whether a statutory limit on local laws is implicit or explicit, it "must appear with unmistakable clarity" to foreclose coregulation of a matter. *City of Laredo v. Laredo Merchs. Ass'n, 550 S.W.3d 586, 593 (Tex. 2018)* (quoting *Lower Colo. River Auth. v. City of San Marcos, 523 S.W.2d 641, 645 (Tex. 1975))* (internal quotation marks omitted).

Although home-rule cities can regulate broadly, when a municipal ordinance purports to regulate subject matter that is already regulated by a state statute, it is unenforceable "to the extent it conflicts with the state statute." *Dall. Merch's & Concessionaire's Ass'n, 852 S.W.2d at 491* (citing *City of Brookside Vill. v. Comeau, 633 S.W.2d 790, 796 (Tex. 1982))*. Mere coexistence in the same statutory ambit as state legislation does not preempt a municipal **[**57]** ordinance *per se* where it can operate "in harmony with the general scope and purpose of the state enactment." *City of Laredo, 550 S.W.3d at 593* (quoting *Comeau, 633 S.W.2d at 796*) (internal quotation marks omitted). But where the purpose of the state legislation is frustrated by concurrent operation of a municipal ordinance, the ordinance will be unenforceable—even if the laws do not regulate the same subject. *See S. Crushed Concrete, L.L.C. v. City of Houston, 398 S.W.3d 676, 679 (Tex. 2013)* (finding a municipal ordinance that ostensibly regulated land use was preempted by a state statute regulating air quality in part because the ordinance rendered the state statute ineffective); *BCCA Appeal Grp., 496 S.W.3d at 7* (explaining that, "a home-rule city's ordinance is unenforceable to the extent that it is inconsistent with [a] state statute preempting that particular subject matter").

The Texas Supreme Court has not yet addressed the specific preemption issue in this case: whether a city ordinance requiring private employers to provide paid sick leave to their employees is preempted by the TMWA. However, the issue has been decided by Texas's Third Court of Appeals. *See Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. filed)*. The *Austin* court considered a paid sick leave ordinance enacted by the City of Austin that included substantive provisions virtually identical to the Dallas Ordinance at issue here. ***[**58]*** *Id.*[16] In both ordinances, employees are granted one hour of paid sick leave for every thirty hours worked, and in both, employers must pay employees what they would have made if they had been working during hours taken as sick leave. *Compare City of* ***[*734]*** *Austin, 565 S.W.3d at 440* (quoting Austin, Tex. Code of Ordinances §§ 4-19-2(A), (J)) ("[E]mployers must 'grant an employee one hour of earned sick time for every 30 hours worked' . . . [and] must pay the 'earned sick leave in an amount equal to what the employee would have earned if the employee had worked.'"), *with* Dall. City Code §§ 20-4(a), 20-5(a) (same). The plaintiffs in *City of Austin* brought a preemption claim that required the Texas intermediate appellate court to determine whether the Austin ordinance established a "wage" in contravention of the TMWA and the Texas Constitution. Absent "convincing evidence" that the Texas Supreme Court would rule differently on this issue, the Court must follow the *Austin* court's interpretation of Texas law. *Stoner, 311 U.S. at 467*.[17]

The *Austin* court concluded that the "legislative intent in the TMWA to preempt local law is clear." *565 S.W.3d at 439*. The court explained that the TMWA "expressly prohibits municipalities **[**59]** from regulating the wages of employers that are subject to the federal minimum-wage requirements of the *Fair Labor Standards Act (FLSA)*." *Id.*[18] In support of this conclusion, the court cited and quoted *section 62.151 of the TMWA*, which states that any

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[16] The *Austin* court ruled on the matter as part of an appeal of a temporary injunction, which ordinarily would not include a ruling on the merits. *See City of Austin, 565 S.W.3d at 438*. However, the court stated that it "must address the merits of the statutory-preemption claim to determine whether the district court abused its discretion in denying the temporary injunction," as "[t]hat is a legal question that the district court has no discretion to get wrong." *Id.*

[17] As noted herein, *see supra* note 14, a state district court in San Antonio has also temporarily enjoined a substantially similar San Antonio city ordinance on the same preemption grounds. *See Associated Builders & Contractors of S. Tex. v. City of San Antonio*, No. 2019CI13921 (Bexar Cty. Dist. Ct.). However, that opinion does not provide reasoned grounds for the decision and is of limited usefulness in the analysis here.

[18] Generally, the FLSA applies to employers whose "annual gross volume of sales made or business done" is greater than $ 500,000. *See 29 U.S.C. § 206(a)* (setting minimum wage for enterprises "engage[d] in commerce"); *id. § 203(s)(1)(A)(ii)* (stating that an enterprise is "engaged in commerce" if its "annual gross volume of sales made or business done" is greater than $ 500,000).

municipal ordinance "governing wages in private employment . . . [does] not apply to a person covered by the [FLSA]." *Id.* (quoting *TEX. LAB. CODE ANN. § 62.151*) (internal quotation marks omitted). The *Austin* court further explained that, "the TMWA explicitly provides that 'the minimum wage provided by [the TMWA] *supersedes* a wage established in an ordinance . . . governing wages in private employment.'" *Id.* (quoting *TEX. LAB. CODE ANN. § 62.0515(a)*) (emphasis in original).

The Court has no reason to believe that the Texas Supreme Court would reach different conclusions than Texas's Third Court of Appeals concerning the operation and preemptive effect of the TMWA. The Texas legislature's intent to limit local government regulation of wages is perspicuous. The TMWA's plain text states that municipal ordinances governing wages in private employment are inapplicable to employers subject to the FLSA and *section 62.151 of the Texas Labor Code*, and that the minimum wage provided by the TMWA "supersedes" a wage established in, among other things, a municipal ordinance. **[**60]** *TEX. LAB. CODE ANN. § 62.0515(a)*. Working in concert, these TMWA provisions unequivocally yoke the minimum wage in Texas to the TMWA itself and the federal minimum wage, explicitly preempting upward departures imposed by municipalities. Therefore, as the *Austin* court concluded, if the paid sick leave required by the Ordinance establishes a wage, it is preempted by the TMWA and unenforceable.

Because the TMWA does not define the term "wage," the *Austin* court gave that word its ordinary meaning. *City of Austin, 565 S.W.3d at 439*; *see also* *City of Laredo,* ***[*735]*** *550 S.W.3d at 594* ("To decide [the preemption issue], we look, as usual, to the statutory text and the ordinary meaning of words."). The court noted that the word "wage" "refers to a 'payment to a person for service rendered. . . . The amount paid periodically, esp. by the day or week or month, for the labour or service of an employee, worker, or servant.'" *City of Austin, 565 S.W.3d at 439* (quoting COMPACT OXFORD ENGLISH DICTIONARY 693 (2d. ed. 1989), and then citing WEBSTER'S THIRD NEW INT'L DICTIONARY 2568 (2002) (defining "wage" as "a pledge or payment of usu. monetary remuneration by an employer esp. for labor or services")).

In light of the ordinary meaning of "wage," and under the TMWA's plain language, the *Austin* court concluded that the Austin ordinance was **[**61]** preempted because it "establishes the payment that a person receives for services rendered to an employer." *Id.* In this regard, like the Dallas Ordinance, the Austin ordinance mandates that employers provide one hour of sick leave for "every 30 hours worked." *Id.* (quoting Austin, Tex. Code of Ordinances § 4-19-2(A) (internal quotation marks omitted). Under this paid sick leave mandate, "an employer . . . must pay employees who use sick leave for hours that they did not actually work." *Id.* The *Austin* court held that the "effective result" of such provisions "is that employees who take sick leave are paid the same wage for fewer hours worked, or, stated differently, that employees who take sick leave are paid more per hour for the hours actually worked." *Id. at 439-40*.

In short, the *Austin* court concluded that the paid sick leave provisions of the Austin ordinance "increase[] the pay of those employees who use paid sick leave." *Id. at 440*. Based on these conclusions, the *Austin* court determined that (1) the TMWA preempts local regulations that establish a wage, (2) the Austin paid sick leave ordinance establishes a wage, and that, accordingly, (3) the TMWA preempts the Austin ordinance as a matter of law, thus making **[**62]** the ordinance unconstitutional. *Id. at 440-41* (citing *TEX. CONST. art. XI, § 5*) (mandating that no city ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State").

Again, there is no reason to believe the Texas Supreme Court would reach a different conclusion than the *Austin* court on the question of whether the Austin paid sick leave ordinance establishes a wage and is therefore preempted by the TMWA and unenforceable. To the contrary, in construing the relevant provisions of the TMWA and the Austin ordinance, the *Austin* court employed statutory construction tools consistently endorsed and applied by the Texas Supreme Court. The *Austin* court focused on the statutory text to determine legislative intent, adhering to the oft-repeated admonitions of the Texas Supreme Court. *See, e.g.,* *In re Office of Attorney Gen., 422 S.W.3d 623, 629 (Tex. 2013)* ("Legislative intent is best revealed in legislative language."). Likewise, the *Austin* court followed the Texas Supreme Court's guidance that, "[w]here statutory text is clear, that text is determinative of legislative intent unless the plain meaning of the statute's words would produce an absurd result." *Tex. Mut. Ins. Co.*

v. Ruttiger, 381 S.W.3d 430, 452 (Tex. 2012); *see also, e.g.,* State v. Shumake, 199 S.W.3d 279, 284 (Tex. 2006) ("[W]hen possible, we discern **[**63]** [legislative intent] from the plain meaning of the words chosen.").

Applying these tools to interpret the TMWA and the Austin ordinance, the *Austin* court reached the unremarkable conclusion that, when the text of a municipal ordinance mandates that employees be **[*736]** paid their regular wage for hours *not* actually worked based on taking sick leave, the result is an increased wage for hours that *are* worked. Because such an ordinance has the inevitable effect of increasing the pay of employees who use paid sick leave, it is preempted by the plain language of the TMWA and unenforceable under the Texas Constitution. Finally, the *Austin* court's preemption ruling also comports with the Texas Supreme Court's guidance that "a home-rule city's ordinance is unenforceable to the extent that it is inconsistent with [a] state statute preempting that particular subject matter." BCCA Appeal Grp., 496 S.W.3d at 7.

The Court concludes that it is bound to follow the *Austin* court's well-reasoned preemption ruling, which applies equally to the Dallas paid sick leave ordinance because its substantive provisions mirror those of the Austin ordinance held to be unenforceable. *Compare* Austin, Tex. Ordinance No. 20180215-049, § 4-19-2(A) (stating that Austin **[**64]** employers must "grant an employee one hour of earned sick time for every 30 hours worked"), *with* Dall. City Code § 20-4(a) (stating that Dallas employers "shall grant [employees] one hour of earned, paid sick time for every 30 hours worked"). For these reasons, the Court holds that the Employer-Plaintiffs and the State of Texas have established a substantial likelihood of success on the merits of their preemption claim.

C. Substantial Threat of Irreparable Injury

The Court must next consider whether there is a substantial threat of irreparable injury if a preliminary injunction is not granted. Janvey, 647 F.3d at 595. The Court concludes that there is. "Federal courts have long recognized that, when the 'threatened harm is more than de minimis, it is not so much the magnitude but the irreparability that counts for purposes of a preliminary injunction.'" Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 472 (5th Cir. 1985) (quoting *Canal Auth., 489 F.2d at 574*). Irreparability, in this context, refers to the plaintiff's ability to recover monetary remedies. Dennis Melancon, Inc. v. City of New Orleans, 703 F.3d 262, 279 (5th Cir. 2012). Where the plaintiff can be compensated for their harm later through normal litigation mechanisms, a court will not issue a preliminary injunction, even when the threatened harm is substantial. *Id.* (citing Morgan v. Fletcher, 518 F.2d 236, 240 (5th Cir. 1975)).

Here, neither the State of Texas nor the Employer-Plaintiffs **[**65]** will be able to recover for the harm they will suffer if they are subjected to an unconstitutional municipal ordinance. The state invariably suffers irreparable harm when it cannot enforce its laws. Abbott v. Perez, ___ U.S. ___, 138 S.Ct. 2305, 2324 n.17, 201 L.Ed.2d 714 (2018) (citing Maryland v. King, 567 U.S. 1301, 133 S.Ct. 1, 183 L.Ed.2d 667 (2012) (Roberts, C.J., in chambers)) ("[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State."); *see also* New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S.1345, 1352, 98 S.Ct. 359, 54 L.Ed.2d 439 (1977) (Rehnquist, J., in chambers) (holding that a state was irreparably harmed when a court enjoined the enforcement of its laws). The State of Texas has enacted the TMWA, which governs the minimum wage in Texas. TEX. LAB. CODE ANN. §§ 62.151, 62.155. The Texas Constitution states that no municipal law shall conflict with laws enacted by the legislature. Tex. Const. art. XI, § 5. Because the enactment of the Ordinance creates a different minimum wage for employers of people who work in Dallas by superimposing additional requirements on **[*737]** top of the TMWA, the State's law has been effectively nullified as to those workers, despite the State's clear intent to normalize the minimum wage statewide. This type of harm supports a preliminary injunction.

Likewise, the Employer-Plaintiffs will suffer irreparable harm resulting from compliance costs and increased regulatory burden. Specifically, the Employer-Plaintiffs **[**66]** have shown that, in addition to paying employees when they take accrued sick leave time, they will also need to hire additional personnel to oversee compliance, update training materials, rearrange the mix of pay and benefits offered to employees, raise client rates, and change acquisition and benefit priorities. Although these injuries are economic in nature, which normally counsels against irreparable harm, Janvey, 647 F.3d at 600, they are not compensable because the City of Dallas enjoys governmental immunity as a home-rule city under Texas law. *See, e.g., City of Galveston v. Texas, 217 S.W.3d 466, 469 (Tex. 2007)* (stating that home-rule cities are immune from suit for government functions unless a state statute limits immunity). Thus, even if the Employer-Plaintiffs are eventually successful on the merits of their claim, they will not be able to recover their damages and, as such, are irreparably harmed by the Ordinance. *See Harris v. Cantu, 81 F. Supp. 3d 566, 580 (S.D. Tex. 2015)*, *rev'd on other grounds sub nom., Harris v. Hahn, 827 F.3d 359 (5th Cir. 2016)* (finding that economic loss unrecoverable due to immunity constitutes irreparable harm); *Teladoc, Inc. v. Tex. Med. Bd., 112 F. Supp. 3d 529, 543 (W.D. Tex. 2015)* (same); *see also Chamber of Commerce v. Edmondson, 594 F.3d 742, 770-71 (10th Cir. 2010)* (same).

The City's arguments against irreparable harm to the Employer-Plaintiffs are two-fold: it questions the accuracy of ESI's alleged compliance costs and whether Hagan's alleged harm is sufficiently **[**67]** imminent to justify a preliminary injunction. ESI has provided proof that it will incur damages that are "approximately $ 269,000.00 annually if each of its Dallas employees take the full amount of paid leave," and that it will have to hire another employee to "track where employees are placed, track their hours, calculate leave earned and send monthly reports." (Dkt. #3-1, Ex. 1 PP 10-11). The City takes issue with these estimates and suggests that ESI already tracks employees. The City also argues that as a staffing agency, ESI will not bear the sole responsibility for complying with the Ordinance. Neither of these arguments detract from ESI's demonstration of irreparable harm.

The City is correct that the Plaintiffs carry a heavy burden to establish irreparable injury. *See White v. Carlucci, 862 F.2d 1209, 1211 (5th Cir. 1989)* (citing *Enter. Int'l, 762 F.2d at 472*) ("Without question, the irreparable harm element must be satisfied by independent proof, or no injunction may issue."). But after that harm has been established, the element is satisfied; the degree of harm is irrelevant. It is beyond dispute that there are greater than de minimis compliance costs associated with the Ordinance—ESI must spend money on employees that do not work because they are taking **[**68]** sick leave, must track sick leave accrual, and must amend its handbook and training materials. *See Dennis Melancon, 703 F.3d at 279* (finding that $ 2,000 in damages is more than de minimis). Because governmental immunity will preclude recovery against the City regardless of the amount of damage, the irreparable harm element is met.

As to Hagan, the City rests on its standing argument to rebut a claim of irreparable harm, arguing that enforcement for small employers is too remote to justify a **[*738]** preliminary injunction. But Hagan has shown that it will suffer harm for which it cannot recover as it becomes compliant with portions of the Ordinance whose enforcement is delayed. The additional time afforded to small employers before the Ordinance is enforced against them suggests that the City anticipates it will require more time for such employers to become compliant. Thus, these threatened injuries are likely to occur sooner than the date Hagan's employees begin accruing sick leave and are sufficiently imminent to justify considering them in the preliminary injunction context. Because Hagan has or will suffer damages that are more than de minimis and are not recoverable against the City, Hagan has also established that **[**69]** it will suffer irreparable harm if the Ordinance remains in force.

D. Balance of Equities and Public Interest

The balance of equities and public interest also favor granting the requested preliminary injunction. Because the Court has already determined that the Plaintiffs are likely to succeed on their preemption claim, the balance of equities and public interest factors weigh in favor of granting the preliminary injunction. *See Tex. Midstream Gas Servs., L.L.C. v. City of Grand Prairie, No. 3:08-CV-1724, 2008 U.S. Dist. LEXIS 95991, 2008 WL 5000038, at *20 (N.D. Tex. Nov. 25, 2008)* ("Because [the plaintiff] has demonstrated a substantial likelihood of success on the merits of part of its express preemption claim, this suggests that the balance of hardship and public interest factors weigh in favor of granting the preliminary injunction."), *aff'd*, *608 F.3d 200 (5th Cir. 2010)*.

The City argues that the harm it will suffer if it is unable to effectuate its laws, and the potential loss or suspension of benefits to the public, counsel against granting a preliminary injunction. Neither concern alters the balance of equities or ultimate weight of the public interest in preliminarily enjoining the Ordinance. The City's interest in the continued operation of an Ordinance that is most likely preempted by the **[**70]** TMWA, and therefore unenforceable under the Texas Constitution, cannot outweigh the State's interest in enforcing its constitution and laws. The State of Texas is "inviolably sovereign," *Wasson Interests, Ltd. v. City of Jacksonville, 489 S.W.3d 427, 429 (Tex. 2016)*, and its legislature stands above local governments, *see* *TEX. CONST. art XI, § 5(a)*. As the State has correctly noted, each day the Ordinance operates against the express mandate of the Texas legislature to preempt local laws governing wages, the State's sovereignty is violated and the relationship between the legislature and local governments, guaranteed by the Texas Constitution, is turned on its head. Further, allowing the continued accrual of benefits under an Ordinance that is most likely unenforceable, as well as the continued imposition of unrecoverable expenses on regulated businesses, also is not consistent with the public interest.

For all of the foregoing reasons, the Plaintiffs' request for a preliminary injunction is GRANTED. Under *Federal Rule of Civil Procedure 65(c)*, a court granting a preliminary injunction has discretion to require a bond "in an amount that the court considers proper." Because the City is unlikely to accrue any damages if it is wrongly enjoined, nor has it argued for an appropriate bond amount, no security bond will be required. **[**71]** *See* *A.T.N. Indus., Inc. v. Gross, 632 F. App'x 185, 192 (5th Cir. 2015)* (per curiam) (unpublished) (quoting *Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 628 (5th Cir.1996)* ("[U]nder *Rule 65(c)*, 'a court may elect to require no security at all.'").

* * *

[*739] The Court notes that this decision issues at a time when the American public and federal, state, and local authorities are confronted with the unprecedented public health crisis and economic upheaval caused by the Coronavirus Disease 2019 ("COVID-19"). The President has declared a national emergency under the *National Emergencies Act, 50 U.S.C. § 1601, et seq.*, with respect to COVID-19. Businesses large and small, and workers across the country, face tremendous challenges during this national emergency. Likewise, policymakers at all levels of government are developing and implementing strategies to meet and balance the public health and economic concerns of their constituents.[19] Federal courts, on the other hand, although vested with the authority to interpret the law, "possess neither the expertise nor the prerogative to make policy judgments." *Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 538, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012)*. As the Supreme Court has explained, "[t]hose decisions are entrusted to our Nation's elected leaders." *Id.*

Courts' deference in matters of policy, however, "cannot become abdication in matters of law." *Id.* "The peculiar circumstances of the moment may render **[**72]** a measure more or less wise, but cannot render it more or less constitutional." Chief Justice John Marshall, *A Friend of the Constitution No. V*, Alexandria Gazette, July 5, 1819, *reprinted in*JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 190-191 (G. Gunther ed. 1969). Whether or not paid sick leave requirements should be imposed by government on private employers is an important public policy issue, made even more significant under the challenging circumstances faced by our Nation at this moment. The State of Texas, through its constitutional structure and statutory law, has committed that public policy decision to the Texas legislature. The Court's decision to grant a preliminary injunction upholds the state constitution and statutory provisions preempting and rendering unenforceable the City's paid sick leave ordinance.

VI. CONCLUSION

For the reasons stated above, the Court **GRANTS in part** and **DENIES in part** Defendants' Motion to Dismiss. (Dkt. #36). Defendants' *Rule 12(b)(1)* motion is **GRANTED** as to the Employer-Plaintiffs' purported third-party *First Amendment* claim on behalf of their employees and **DENIED** as to Plaintiff Hagan's claims and the Employer-Plaintiffs' *First Amendment* claim brought on their own behalf. Defendants' **[**73]** *Rule 12(b)(6)* motion is

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[19] For example, in response to the rapid proliferation of COVID-19 in the United States, on March 18, 2020, Congress enacted, and the President signed into law, the ***Families First Coronavirus Response Act ("FFCRA")***. Families First Coronavirus Response Act, ***Pub. L. No. 116-127, 134 Stat. 178 (2020)***. The FFCRA, which applies to private sector employers that employ fewer than 500 employees and some public sector employers, provides up to 80 hours of paid sick leave to workers who are ill, quarantined, or seeking treatment as a result of COVID-19, or caring for those who are sick or quarantined as a result of COVID-19. These provisions will be in effect until December 31, 2020. *Id.* §§ 5102(a)-(b), 5108-09, 5110(2)(B).

GRANTED as to the Employer-Plaintiffs' *First Amendment* claim brought on their own behalf, as well as the Employer-Plaintiffs' *Fourteenth Amendment* claim. Defendants' Rule1 2(b)(6) motion is **DENIED** as to the Employer-Plaintiffs' *Fourth Amendment* claim, Plaintiffs' state law preemption claim, and Defendants' request that the Court decline to exercise supplemental jurisdiction.

It is therefore **ORDERED, ADJUDGED, AND DECREED** that the Employer-Plaintiffs' **[*740]** claims brought under the *First Amendment* and *Fourteenth Amendment* are hereby **DISMISSED**.

It is further **ORDERED** that the Plaintiffs' Motion for Preliminary Injunction (Dkt. #3, #21) is hereby **GRANTED**. The City of Dallas's Paid Sick Leave Ordinance, Dallas, Texas, Ordinance No. 31181; Municipal Code § 20-1-20-12, is **ENJOINED** and unenforceable. No officer, agent, servant, employee, attorney, or other person in active concert with the City of Dallas may enforce the Paid Sick Leave Ordinance against any business or entity pending the resolution of this case.

So ORDERED and SIGNED this 30th day of March, 2020.

/s/ Sean D. Jordan

SEAN D. JORDAN

UNITED STATES DISTRICT JUDGE.

Innovation Ventures, L.L.C. v. Custom Nutrition Labs., L.L.C.

United States District Court for the Eastern District of Michigan, Southern Division

March 31, 2020, Decided; March 31, 2020, Filed

4:12-CV-13850-TGB

Reporter

451 F. Supp. 3d 769 *; 2020 U.S. Dist. LEXIS 56219 **; 106 Fed. R. Serv. 3d (Callaghan) 645; 2020-1 Trade Cas. (CCH) P81,157; 2020 WL 1531700

INNOVATION VENTURES, L.L.C. f/d/b/a LIVING ESSENTIALS, Plaintiff, vs. CUSTOM NUTRITION LABORATORIES, L.L.C., NUTRITION SCIENCE LABORATORIES, L.L.C., ALAN JONES, Defendants.

Prior History: *Innovation Ventures, LLC v. Custom Nutrition Labs., LLC, 2013 U.S. Dist. LEXIS 70885 (E.D. Mich., May 20, 2013)*

Core Terms

rule of reason, settlement agreement, covenant, consolidation, parties, Choline, cases, energy, noncompete agreement, leading case, Sherman Act, noncompete, Manufacturing, ingredients, Nutrition, compete, Liquid, Custom, shot, anticompetitive, duration, effects, restrictive covenant, summary judgment motion, restrictions, factors, geographic, damages, courts, district court

LexisNexis® Headnotes

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

Civil Procedure > Judgments > Summary Judgment > Supporting Materials

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact such that the movant is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. A fact is material only if it might affect the outcome of the case under the governing law.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN2[] **Summary Judgment, Evidentiary Considerations**

On a motion for summary judgment, the Court must view the evidence, and any reasonable inferences drawn from the evidence, in the light most favorable to the non-moving party.

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

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

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

HN3[] **Summary Judgment, Entitlement as Matter of Law**

On a motion for summary judgment, the moving party has the initial burden of demonstrating an absence of a genuine issue of material fact. If the moving party carries this burden, the party opposing the motion must come forward with specific facts showing that there is a genuine issue for trial. The trial court is not required to search the entire record to establish that it is bereft of a genuine issue of material fact. Rather, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. The Court must then determine whether the evidence presents a sufficient factual disagreement to require submission of the challenged claims to the trier of fact or whether the moving party must prevail as a matter of law.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN4[] **Trade Secrets & Unfair Competition, Noncompetition & Nondisclosure Agreements**

Reasonableness of a noncompete agreement is inherently fact-specific, but the reasonableness of a noncompetition provision is a question of law when the relevant facts are undisputed. The courts thus must scrutinize such agreements and enforce them only to the extent they are reasonable. Where the parties dispute material facts regarding what the covenants convey, the district court is permitted to allow the jury to decide the reasonableness of the contract's competition-limiting effect.

Civil Procedure > Trials > Consolidation of Actions

HN5[] **Trials, Consolidation of Actions**

Consolidation is governed by *Fed. R. Civ. P. 42(a)*:If actions before the court involve a common question of law or fact, the court may:(1) join for hearing or trial any or all matters at issue in the actions;(2) consolidate the actions; or(3) issue any other orders to avoid unnecessary cost or delay. Whether cases involving the same factual and legal questions should be consolidated for trial is a matter within the discretion of the trial court. A court may issue an order of consolidation on its own motion, and despite the protestations of the parties.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN6[] **Preclusion of Judgments, Law of the Case**

Under the mandate rule, the trial court must proceed in accordance with the mandate of the law of the case as established on appeal and implement both the letter and the spirit of the mandate.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN7[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN8[] Trade Secrets & Unfair Competition, Noncompetition & Nondisclosure Agreements

When analyzing business-to-business noncompete agreements, *Mich. Comp. Laws § 445.784(2)* requires that courts look to federal interpretation of comparable statutes.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN9[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

There is a five-part rule of reason test that plaintiffs must meet in order to pass muster. Consequently, to make out a valid claim under § 1 of Sherman Act, the rule of reason analysis requires the plaintiff to prove (1) that the defendant(s) contracted, combined, or conspired; (2) that such contract produced adverse anticompetitive effects; (3) within relevant product and geographic markets; (4) that the objects of and conduct resulting from the contract were illegal; and (5) that the contract was a proximate cause of the plaintiff's injury. This five-factor test aids the Court in discerning whether a plaintiff as overcome the first of a three-part burden-shifting framework: First, the plaintiff must establish that the restraint produces significant anticompetitive effects within the relevant product and geographic markets. Then, if the plaintiff meets this burden, the defendant must come forward with evidence of the restraint's procompetitive effects to establish that the alleged conduct justifies the otherwise anticompetitve injuries. Finally, if the defendant is able to demonstrate procompetitive effects, the plaintiff then must show that the legitimate objectives can be achieved in a substantially less restrictive manner.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN10[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A common theme among each of the formulations of the rule of reason is that the party challenging a restrictive covenant must demonstrate that it causes some harm to competition in the greater product market. This effect on the greater market appears to be the most substantial difference between the showing that must be made under *Mich. Comp. Laws § 445.774a(1)* and that which would be required under the rule of reason framework.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN11[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

It is not enough for a court to examine a covenant's duration, geographic scope, type of conduct prohibited, and business interests justifying the restriction. The following factors should be considered when applying the rule of reason test to evaluate challenges to noncompete agreements in the business-to-business context under Michigan law: (1) whether the restraint is ancillary to the main business purpose of an otherwise lawful contract; (2) whether the restraint protects legitimate property interests, for example, goodwill; (3) whether the restraint's duration, geographic reach, and scope are reasonable considering the nature of the property interest being protected; and (4) whether the restraint suppresses or destroys competition in the relevant market. The Court must take into account each of these factors to determine whether the restraint is reasonable or void.

Civil Procedure > Trials > Consolidation of Actions

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN12[] **Trials, Consolidation of Actions**

Just because the Court at one time denied a plaintiff's motion to amend its complaint does not preclude a party from later moving to consolidate by invoking the Court's discretionary power to do so under *Fed. R. Civ. P. 42(a)(2)*. This is not barred by the mandate rule because the district court is free on remand to consider issues remanded, issues arising for the first time after remand, and issues that were timely raised before the district and/or appellate courts but which remain undecided.

Civil Procedure > Trials > Consolidation of Actions

HN13[] **Trials, Consolidation of Actions**

Pursuant to *Fed. R. Civ. P. 42(a)(2)*, if actions before the court involve a common question of law or fact, the court may consolidate the actions. The party seeking consolidation, here Plaintiff, bears the burden of proving that consolidation should be granted. And the essential test is whether there are common questions of law or fact. Consolidation is in the sound discretion of the court.

Civil Procedure > Trials > Consolidation of Actions

HN14[] **Trials, Consolidation of Actions**

A trial court making a decision to consolidate must consider: Whether the specific risks of prejudice and possible confusion are overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives. Thus, the decision to consolidate is one that must be made thoughtfully, with specific reference to the factors identified above. Care must be taken that consolidation does not result in unavoidable prejudice or unfair advantage. Conservation of judicial resources is a laudable goal. However, if the savings to the judicial system are slight, the risk of prejudice to a party must be viewed with even greater scrutiny. When cases involve some common issues but individual issues predominate, consolidation should be denied. Consolidation is not justified or required simply because actions include a common question of fact or law. Consolidation is improper when the introduction of voluminous' evidence, relevant to one of the consolidated actions but irrelevant to another, impairs the conduct of trial.

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

HN15[] **Federal Venue Transfers, Convenience Transfers**

28 U.S.C.S. § 1404(a) provides that for the convenience of the parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented. District courts have wide discretion to transfer an action pursuant to *§ 1404(a)*. The Court must weigh several factors: (1) the convenience of the parties; (2) the convenience of the witnesses; (3) the relative ease of access to sources of proof; (4) the availability of processes to compel attendance of unwilling witnesses; (5) the cost of obtaining willing witnesses; (6) the practical problems associated with trying the case most expeditiously and inexpensively; and (7) the interest of justice. The party who brings a motion to transfer venue bears the burden of proving by a preponderance of the evidence that fairness and practicality strongly favor the forum to which transfer is sought. The defendant must show that the plaintiff's chosen forum is unnecessarily burdensome. Merely shifting the inconvenience from one party to another does not meet the defendant's burden. If the court determines that the balance between the plaintiff's choice of forum and the defendant's desired forum is even, the plaintiff's choice should prevail.

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

HN16[] **Federal Venue Transfers, Convenience Transfers**

Judicial economy is served by having the same district court try cases involving the same contracts.

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

HN17[] **Federal Venue Transfers, Convenience Transfers**

Judicial economy is served by having the same district court try the cases involving the same Settlement Agreement.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN18[] **Preclusion of Judgments, Law of the Case**

Generally, the law of the case doctrine is applied differently to appellees because forcing an appellee to raise all possible defenses on a first appeal might increase the complexity and scope of appeals more than it would streamline the progress of the litigation. Full application of the waiver rule to an appellee puts it in a dilemma between procedural disadvantage and improper use of the cross-appeal, justifying a degree of leniency in applying the waiver rule to issues that could have been raised by appellees on previous appeals.

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Judges: TERRENCE G. BERG, United States District Judge.

Opinion by: TERRENCE G. BERG

Opinion

[*773] ORDER

DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (ECF NO. 406); DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (ECF NO. 400); GRANTING IN PART PLAINTIFF'S MOTION TO CONSOLIDATE CASES (ECF NO. 403); AND DISMISSING ALAN JONES AS A DEFENDANT WITH PREJUDICE

This matter is before the Court on the parties' third round of cross-motions for **[*774]** summary judgment. ECF Nos. 400, 406. Also before the Court is Plaintiff's motion to consolidate cases and for clarification of Alan Jones' status as a defendant. ECF No. 403. For the reasons stated herein, the Court will **DENY** Plaintiff's motion for summary judgment, **DENY** Defendants' motion for summary judgment, **GRANT IN PART [**3]** Plaintiff's motion to consolidate, and find that Alan Jones is not personally liable under the Settlement Agreement, as held by the Sixth Circuit.

I. Facts and Procedural History

The facts of this case are set out in detail in this court's prior opinions (ECF Nos. 219, 343) and in the Sixth Circuit's opinion (ECF No. 392), but a brief overview follows.

Some sixteen years ago, Plaintiff Innovation Ventures, L.L.C., f/d/b/a Living Essentials ("Living Essentials"), the manufacturer of the two-ounce energy shot 5-Hour Energy, contracted with now-defunct Custom Nutrition Laboratories ("Custom Nutrition") to manufacture and package 5-Hour Energy. *Innovation Ventures, LLC v. Custom Nutrition Labs., 912 F.3d 316, 324 (6th Cir. 2018)*. The relationship soured and litigation ensued. In August 2009, the parties reached a settlement agreement ("Settlement Agreement" or "noncompete agreement") when, according to Alan Jones, a Custom Nutrition's officer, Custom Nutrition was on the verge of bankruptcy. Under the Settlement Agreement, in exchange for a $1.85 million payment to Custom Nutrition, the "CNL Parties"—defined to include Custom Nutrition and its CEO Alan Jones—agreed to a number of restrictive covenants. As relevant here, the noncompete agreement prohibited the CNL Parties **[**4]** from using any ingredients in the "Choline Family." Living Essentials had recently introduced a new choline-based ingredient, citicoline, into 5-Hour Energy, which according to Living Essentials was a "critical innovation" that it wanted to keep the CNL Parties from using. *Id.*

In October 2009, Custom Nutrition was failing financially, and Jones spoke with Don Lovelace, owner of a company called Lily of the Desert, about acquiring Custom Nutrition. Instead of acquiring Custom Nutrition, Lovelace agreed to purchase its assets and formed a new corporation, Defendant Nutrition Science Laboratories ("NSL") to do so. NSL and Custom Nutrition entered into an Asset Purchase Agreement to complete the sale. After the Asset Purchase Agreement was executed, NSL began selling energy shots. Jones became an employee of Lily of the Desert and represented himself as President of NSL. Over the next few years, NSL sold energy shots containing Choline Family ingredients and substances that Living Essentials contended were chemical equivalents to choline prohibited under the restrictive covenant's catch-all clause. Living Essentials sued, naming Custom Nutrition, NSL, and Alan Jones as Defendants. *Id. at 324-25*.

On an **[**5]** initial round of summary judgment motions in 2015, this Court granted partial summary judgment in favor of Living Essentials, concluding that NSL violated the Choline Family restrictions because the Defendants admitted to producing energy shots containing two ingredients listed in the Choline Family definition in the Settlement Agreement. A jury later concluded in the first phase of a bifurcated jury trial that two other ingredients admittedly used by Defendants were also included in the catch-all clause in the Choline Family definition of the Settlement Agreement (Betaine and Alpha-glycerolphosphorylcholine or "Alpha-GPC"). Regarding liability, this Court concluded first that NSL was bound by the Choline Family restrictions in the Settlement Agreement by virtue **[*775]** of its incorporation into the Asset Purchase Agreement. Second, it concluded that Jones was bound by the Settlement Agreement because he signed it. And third, the Court concluded that the twenty-year duration of the Settlement Agreement was unreasonable under Michigan Law (*M.C.L. § 445.774a(1)*). The Court reformed the duration of the noncompete agreement to three years, as authorized by *§ 445.774a(1)*. *See* *Innovation Ventures, LLC v. Custom Nutrition Labs., LLC, 2015 U.S. Dist. LEXIS 129946, 2015 WL 5679879, at *16-25 (E.D. Mich. Sept. 28, 2015)*; *see also* ECF No. 219.

On a second round of summary **[**6]** judgment motions in 2017, this Court concluded that Plaintiff was not entitled to summary judgment as to liability on its primary breach of contract claim because NSL's affirmative defense of latches raised factual disputes. Second, it concluded that Plaintiff's three proposed methodologies for calculating damages were impermissible but Living Essentials could "still recover lost profits under a non-patent infringement specific method of calculation." *Innovation Ventures, LLC v. Custom Nutrition Labs., LLC, 256 F. Supp. 3d 696, 704, 710-12 & n.8 (E.D. Mich. 2017)*.

Living Essentials disagreed with the Court's ruling on damages and wanted to find a way to appeal. Living Essentials believed the order left it "without any theory of actual damages to present to the jury, leaving only the theory of nominal damages" to recover on its primary breach of contract claim. *912 F.3d at 326*. To expedite appeal of the prior orders and judgment, the parties submitted a proposed judgment awarding nominal damages to Living Essentials, which this court entered.

While the case against Custom Nutrition, Jones, and NSL ("Lead Case") was proceeding, Living Essentials had sought to add Lily of the Desert as another defendant, but the Court did not permit the complaint to be amended. In order to get around the **[**7]** Court's ruling, Living Essentials brought a new lawsuit against NSL ("Secondary Case"), adding Lily of the Desert and including many of the same claims that the Court had dismissed in the Lead Case. The new complaint alleged that discovery in the Lead Case revealed that Lily of the Desert was also liable under the Settlement Agreement because of its relationship to NSL. Because the parties agreed that judgment in the Lead Case rendered the claims in the Secondary Case "effectively moot," this Court also entered Judgment in favor of Defendants. *Innovation Ventures, LLC v. Nutrition Science Labs., LLC, No. 16-11179, 2017 U.S. Dist.*

LEXIS 211640, 2017 WL 4553429, at *1-2 (E.D. Mich. July 17, 2017); *see also* ECF No. 343. The cases were consolidated on appeal.

A. Sixth Circuit Opinion

On appeal, the Sixth Circuit Court of Appeals affirmed in part and reversed in part. First, the court concluded it had appellate jurisdiction over the claims because the parties sought formal dismissal only to expedite appeal of an order which in effect dismissed Living Essentials' claims. *912 F.3d at 327-32*. NSL also sought conditional review of this Court's personal jurisdiction; the Sixth Circuit determined that this objection was waived in both the Lead and Secondary Cases. *Id. at 332-33*. Second, the court concluded that this Court appropriately dismissed Defendants' antitrust counterclaim **[**8]** because it did not relate back to the original complaint. *Id. at 333-34*. Third, it concluded that Jones was not bound by the Settlement Agreement in his individual capacity because he did not sign the document twice as a corporate officer and as an individual, but agreed with this Court that NSL was bound by the Choline **[*776]** Family restrictions of the Settlement Agreement (§5.c.1) by virtue of its incorporation into the Asset Purchase Agreement. *Id. at 335-39*. The Sixth Circuit also agreed with this Court that that whether Betaine and Alpha-GPC are covered by the catch-all clause in the Choline Family definition was ambiguous as a matter of law. *Id. at 339*.

Citing a Michigan Supreme Court decision that had not yet been decided at the time of this Court's prior order, *Innovation Ventures v. Liquid Manufacturing, 499 Mich. 491, 885 N.W.2d 861 (Mich. 2016))*, the Sixth Circuit determined that when this Court found the 20-year duration of the Settlement Agreement to be unreasonable and reformed the contract, it applied the incorrect standard. It should have evaluated the noncompete agreement under the "rule-of-reason test," *912 F.3d at 340*, rather than analogizing the parties' business-to-business noncompete agreement to employer-employee noncompete agreements under *M.C.L. § 445.774a(1)*. The court of appeals also held that the burden of showing the existence **[**9]** of an unreasonable restraint on trade lies with the Defendants (i.e., the party alleging the restraint on trade)." *912 F.3d at 341-42*. Because the Sixth Circuit determined that neither party had fully briefed the application of the rule-of-reason test, and that this "fact intensive determination" fell within this Court's area of expertise, it remanded the Lead Case "so that the parties may provide the detailed record information necessary for the court to apply the rule-of-reason framework." *Id. at 342*. With respect to the Secondary Case, the Sixth Circuit determined that because it was reversing and remanding the Lead Case, it would likewise remand the Secondary Case. *Id.*

Additionally, the Sixth Circuit affirmed this Court's conclusion that disputes of material fact existed relating to the issue of latches. *Id. at 343*. And finally, with respect to Living Essentials' proposed damages calculation methodologies, the Sixth Circuit concluded (1) that the "market-share based calculation of lost profits" is a theory of relief available for Living Essentials to pursue, *id. at 345, (2)* "[a]n estimated reasonable royalty is not an appropriate theory of proof for damages" in a breach of contract case such as this, *id. at 347*, and (3) disgorgement of Defendants' **[**10]** proceeds from selling energy shots that violated the Choline Family restrictions is not appropriate here, *id. at 348*.

On remand, the Court permitted the parties to file motions for summary judgment on the application of the rule of reason test. Before the Court are the parties' cross motions for summary judgment (ECF Nos. 400, 406), as well as Plaintiff's motion to consolidate the Lead and Secondary cases and to seek clarification of Alan Jones' status as a defendant (ECF No. 403). The motions are fully briefed, and the Court heard oral argument on December 16, 2019.

II. Standards of Review

A. Motions for Summary Judgment

HN1[] "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact such that the movant is entitled to a judgment as a matter of law." Villegas v. Metro. Gov't of Nashville, 709 F.3d 563, 568 (6th Cir. 2013); *see also* Fed. R. Civ. P. 56(a). A fact is material only if it might affect the outcome of the case under the governing law. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

HN2[] On a motion for summary judgment, the Court must view the evidence, and any **[*777]** reasonable inferences drawn from the evidence, in the light most favorable to the non-moving party. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (citations omitted); **[**11]** Redding v. St. Eward, 241 F.3d 530, 531 (6th Cir. 2001).

HN3[] The moving party has the initial burden of demonstrating an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the moving party carries this burden, the party opposing the motion "must come forward with specific facts showing that there is a genuine issue for trial." Matsushita, 475 U.S. at 587. The trial court is not required to "search the entire record to establish that it is bereft of a genuine issue of material fact." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir. 1989). Rather, the "nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact." In re Morris, 260 F.3d 654, 655 (6th Cir. 2001). The Court must then determine whether the evidence presents a sufficient factual disagreement to require submission of the challenged claims to the trier of fact or whether the moving party must prevail as a matter of law. *See* Anderson, 477 U.S. at 252.

B. Covenants Not to Compete

HN4[] "Reasonableness of a noncompete agreement is inherently fact-specific, *see, e.g.,* Woodward v. Cadillac Overall Supply Co., 396 Mich. 379, 391, 240 N.W.2d 710 (1976), but '[t]he reasonableness of a noncompetition provision is a question of law when the relevant facts are undisputed.'" Innovation Ventures v. Liquid Mfg., 499 Mich. 491, 885 N.W.2d 861, 870-71 (Mich. 2016) (quoting Coates v. Bastian Bros., Inc., 276 Mich. App. 498, 741 N.W.2d 539, 544 (Mich. Ct. App. 2007)); *see also* Follmer, Rudzewicz & Co., P.C. v. Kosco, 420 Mich. 394, 362 N.W.2d 676, 683 (Mich. Ct. App. 1984) ("The courts thus must scrutinize such agreements and enforce them only to the extent they are reasonable."). Where the **[**12]** parties dispute material facts regarding what the covenants convey, the district court is permitted to allow the jury to decide the reasonableness of the contract's competition-limiting effect. Bar's Prods. Inc. v. Bars Prods. Int'l Inc., 662 Fed.Appx. 400, 410 (6th Cir. 2016) (citing Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp., 511 F.3d 535, 547 (6th Cir. 2007)).

C. Motions to Consolidate

HN5[] Consolidation is governed by Federal Rule of Civil Procedure 42(a):

> If actions before the court involve a common question of law or fact, the court may:
>
> (1) join for hearing or trial any or all matters at issue in the actions;
>
> (2) consolidate the actions; or
>
> (3) issue any other orders to avoid unnecessary cost or delay.

"Whether cases involving the same factual and legal questions should be consolidated for trial is a matter within the discretion of the trial court." Cantrell v. GAF Corp., 999 F.2d 1007, 1011 (6th Cir. 1993) (citing Stemler v. Burke, 344 F.2d 393, 396 (6th Cir. 1965)). "A court may issue an order of consolidation on its own motion, and despite the protestations of the parties." *Id.* (citing In re Air Crash Disaster at Detroit Metro. Airport, 737 F. Supp. 391, 394 (E.D. Mich. 1989)).

III. Analysis

A. Texas Law Does Not Apply to the Noncompete Clause (5.c.i)

Defendants argue for the first time in response to Plaintiff's motion for summary **[*778]** judgment that Texas law, rather than Michigan law, now applies to interpretation of the Choline Family restrictions (§ 5.c.i of the Settlement Agreement) because this Court's prior application of Michigan law to the restrictions was based the Settlement Agreement's choice of law provision (§ 22). Because this **[**13]** Court determined—and the Sixth Circuit affirmed—that NSL is only bound to § 5.c.i, NSL argues that it stands to reason that it is not bound by § 22. As NSL is only bound to § 5.c.i because it was incorporated by reference into the Asset Purchase Agreement, the Court should apply the *Asset Purchase Agreement*'s choice of law provision, rather than the *Settlement Agreement*'s choice of law provision. And because this Court has already determined that Texas law governs the Asset Purchase Agreement, NSL avers that Texas law ought to govern § 5.c.i and this Court's application of it. ECF No. 415, PageID.26015-18. NSL argues this distinction is important, asserting that Texas applies the same three-part analysis as *MCL § 445.774a(1)* rather than a more general rule of reason analysis, or the more stringent Sherman Act formulation proposed by Plaintiff. ECF No. 415, PageID.26017 n.3 (citing *Tex. Bus. & Com. Code Ann. § 15.50(a)*).

Living Essentials argues that application of Texas law here would violate the Sixth Circuit's express mandate to apply Michigan law, which requires courts to apply the federal common law rule of reason to business to business noncompete agreements. Because the Sixth Circuit rejected the application of *MCL § 445.774a(1)* to the Settlement Agreement, and clearly directed **[**14]** this Court to apply the federal common law rule of reason, its decision necessarily excluded the application of some other state law regime which is arguably "the same" as *§445.774a(1)*, such as *§ 15.50(a) of the Texas Code*. ECF No. 417, PageID.26045.

Having considered both sides of the argument, the Court concludes that it should apply Michigan law to §5.c.i. ***HN6***[] First, to do otherwise would violate the mandate rule. Under the mandate rule, "the trial court must proceed in accordance with the mandate of the law of the case as established on appeal" and "implement both the letter and the spirit of the mandate." *Mason v. Mitchell, 729 F.3d 545, 550 (6th Cir. 2013)*. The Sixth Circuit was already implicitly faced with the question of whether to apply Texas law to § 5.c.i and *expressly* stated this Court should apply the rule of reason test as mandated by the Michigan Supreme Court. In its opinion, the Sixth Circuit affirmed this Court's decision that only § 5.c.i of the Settlement Agreement applied to NSL through the doctrine of incorporation by reference; that § 4.2(r) of the Asset Purchase Agreement incorporated the Choline Family restrictions in § 5.c.i "specifically." *912 F.3d at 338*. Indeed, when analyzing § 4.2(r) of the Asset Purchase Agreement to determine whether it "plainly referred to" or "merely mentioned" the Settlement Agreement, the **[**15]** Sixth Circuit stated that § 4.2(r) was an "acknowledgement in the Asset Purchase Agreement that "NSL's rights to the formula were limited by the settlement agreement." *Id.*

In so holding, the Sixth Circuit applied *Michigan* law when interpreting § 5.c.i. It did not divorce § 5.c.i from the Settlement Agreement's choice of law provision in § 22 and apply Texas law to determine what standard should govern the noncompete agreement in § 5.c.i. *See 912 F.3d at 340*. In other words, the Sixth Circuit considered which law to apply to interpret § 5.c.i, and it expressly mandated this Court to apply Michigan law, it did not adopt the **[*779]** analysis suggested by Defendant here—to apply Texas law.

Second, Defendants have not provided the Court with any authority that it should—or could—divorce the noncompete clause of the Settlement Agreement from that agreement's choice of law clause requiring that the Settlement Agreement be interpreted by Michigan law. Defendants cite to no comparable cases where a court has ruled in the manner they ask this court to rule, that is, where a court has held that a provision from Contract A has been incorporated by reference into Contract B, but that when interpreting the meaning of that provision from Contract A, the court **[**16]** must apply the choice of law provision from Contract B. Ultimately, Defendants are challenging a provision of the Settlement Agreement, not a provision of the Asset Purchase Agreement.

In sum, the Court will apply Michigan law to § 5.c.i of the Settlement Agreement because not doing so would violate the letter and the spirit of the Sixth Circuit's mandate and because Defendants have offered no persuasive authority in support of their position that Texas law should apply.

B. Breach of Covenant Not to Compete under the Rule of Reason

The Sixth Circuit instructed this Court to apply the "rule of reason" test to evaluate the reasonableness of the Settlement Agreement's business-to-business noncompete clause. *912 F.3d at 341-42*. Unfortunately, however, the court of appeals did not define the specific contours of what is meant by the rule of reason test, and the parties are at odds over the question. Plaintiff asserts that an effective challenge under the rule of reason test would require Defendants to show that the noncompete clause would violate *§ 1 of the Sherman Act*—which has its own five-factor burden-shifting rule of reason test. Defendants meanwhile contend that the common law rule of reason test requires no more **[**17]** than showing a violation of *M.C.L. § 445.774a(1)*, so that the Court may simply reaffirm its prior holding. Given the lack of clarity in this area, the Court will do its best to discern the meaning of the "rule of reason" test by analyzing its historical roots and development in the relevant Michigan cases.

i. Historical Framework

In 1873, the Michigan Supreme Court considered when a business-to-business noncompete clause would be held valid:

> [I]f, considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specially injurious to the public.

Hubbard v. Miller, 27 Mich. 15, 19, 15 Am.Rep. 153 (1873). The court went on to state:

> whether [a contract with a noncompete clause] can be supported or not, depends upon matters outside of and beyond the abstract fact of the contract or the pecuniary consideration; it will depend upon the situation of the parties, the nature of their business, the interests to be protected by the restriction, its effect **[**18]** upon the public; in short upon all the surrounding circumstances; and the weight or effect to be given to these circumstances is not to be affected by any presumption for or against the validity of the restriction; if reasonable and just, the restriction will be sustained, if not, it will be held void.

[*780] *Id. at 19-20*. Over time, the *Hubbard* standard evolved into a four-factor test in Michigan courts and was recognized as the "common law rule of reason." *See Cardiology Assocs. of Southwestern Michigan, P.C. v. Zencka, 155 Mich. App. 632, 400 N.W.2d 606, 607-08 (Mich. Ct. App. 1985)*. "First, the covenant must be for a just and honest purpose. Second, it must be established for the protection of the legitimate interest of the party in whose favor it is imposed. Third, it must be reasonable as between the parties to the contract. Finally, it must not be specially injurious to the public." *Id.; see also Woodward v. Cadillac Overall Supply Co., 396 Mich. 379, 240 N.W.2d 710, 714 (Mich. 1976)* ("It has long been established in English and Michigan common law that a balancing test is used to test the reasonableness or unreasonableness of a contractual restraint of trade," citing *Hubbard*).

Just as Michigan courts adopted the rule of reason in the context of covenants not to compete, the United States Supreme Court followed a similar course in interpreting the federal *Sherman Act*. ***HN7***[] In *Standard Oil Co. of New Jersey v.* ***[**19]*** *United States*, the Court interpreted the Sherman Act's prohibition against restraints of trade to outlaw only *unreasonable* restraints. *221 U.S. 1, 66-67, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*. One of the best-known explanations of the rule of reason in the Sherman Act context is found in *Board of Trade of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine

> that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.[1]

The Michigan Supreme Court's **[**20]** application of a common-law rule of reason in *Hubbard* thus predated the federal courts' adoption of it in Sherman Act jurisprudence. *See* *Bristol Window & Door, Inc. v. Hoogenstyn, 250 Mich. App. 478, 650 N.W.2d 670, 676 (Mich. Ct. App. 2002)*. Michigan's judicially developed approach to restraints on trade was soon accompanied by state statutory law. In 1905, the Michigan Legislature enacted *MCL § 445.761*, which provided that:

> All agreements and contracts by which any person, copartnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited are hereby declared to be against public policy and illegal and void.

[*781] This broad proscription against any kind of noncompete agreements was limited by exceptions found in *M.C.L. § 445.766*.[2] Interestingly, even though these statutes did not expressly refer to a reasonableness standard, the Michigan Supreme Court continued to apply the rule of reason in addressing the validity of noncompete agreements. *Bristol Window, 650 N.W.2d at 677* (citing *Staebler-Kempf Oil Co. v. Mac's Auto Mart, Inc., 329 Mich. 351, 45 N.W.2d 316 (Mich. 1951))*. As *Bristol Window* points out, in the Michigan Supreme Court's 1951 *Staebler-Kempf* decision, the court quoted and applied the *Hubbard* rule of reason test to an agreement between a gasoline retailer and an oil company where the retailer **[**21]** agreed to exclusively sell the oil company's gasoline and at the same price as that charged by other gasoline retailers that the oil company supplied. *650 N.W.2d at 677*; *45 N.W.2d at 318-19*; *see also* *ARA Chuckwagon of Detroit, Inc. v. Lobert, 69 Mich. App. 151, 244 N.W.2d 393, 398 (Mich. Ct. App. 1976)* ("Covenants not to compete have always been governed by the rule of reason.").

However, Michigan law took another turn in 1984, when the state legislature enacted **[**22]** the *Michigan Antitrust Reform Act ("MARA")*, repealing former *§ 445.761*. Under MARA, "[a] contract, combination, or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful." *M.C.L. § 445.772* (also known as *§ 2 of MARA*). This provision tracks its sister provision in the Uniform State Antitrust Act ("USAA") and was patterned after the Sherman Antitrust Act. *See* USAA Comment to *§ 2* ("This section gathers together and proscribes all concerted or collusive conduct in unreasonable restraint of trade, as under the common law and *section 1* of the Sherman Act, and to monopolize trade, as under *section 2* of the Sherman Act. . . . The adoption of Sherman Act language establishes its general standards of legality, provides needed flexibility, *and makes available to state courts the relevant body of federal precedent*.") (emphasis added).

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[1] As discussed in greater detail below, this test continued to evolve in the Sherman Act context to the point where in the Sixth Circuit, plaintiffs bringing *§ 1* Sherman Act claims must prove that a defendant's conduct unreasonably restrains trade under a rigid "rule of reason" burden-shifting framework that includes a five-part test. *See* *Care Heating & Cooling, Inc. v. American Standard, Inc., 427 F.3d 1008, 1012 (6th Cir. 2005)*.

[2] *MCL § 445.766* provided:

> This act shall not apply to any contract mentioned in this act, nor in restraint of trade where the only object of restraint imposed by the contract is to protect the vendee, or transferee, of a trade pursuit, avocation, profession or business, or the good will thereof, sold and transferred for a valuable consideration in good faith, and without any intent to create, build up, establish or maintain a monopoly; nor to any contract of employment under which the employer furnishes or discloses to the employe[e] a list of customers or patrons, commonly called a route list, within certain territory in which such employe[e] is to work, in which contract the employe[e] agrees not to perform similar services in such territory for himself or another engaged in a like or competing line of business for a period of 90 days after the termination of such contract or services.

When initially enacted, MARA "contained no sections specifically addressing competition agreements," so the Michigan Supreme Court, as explained in *Compton v. Joseph Lepak DDS, PC, 154 Mich. App. 360, 397 N.W.2d 311 (Mich. Ct. App. 1986)*, stated that MARA's general provision—*§ 2*—and the common law rule of reason would govern the enforceability of all covenants restraining trade. *See* *Bristol Window, 650 N.W.2d at 678*. As the Court explained in *Bristol Window*:

> Although the noncompetition agreement **[**23]** at issue in *Compton* contained no limitation of its duration, [the Michigan Court of Appeals], citing the weight of authority from other jurisdictions, federal precedent, and Michigan law, *concluded that the agreement should be enforced to the extent reasonable according to 'the developed common law.'* [The court] reiterate[d] **[*782]** that [it] reached its conclusion despite that *§ 2 of the MARA* makes no explicit reference to a standard of reasonableness.

Id. (internal citations omitted) (emphasis added). *Compton* also explained that MARA was broader than its predecessor, because unlike *§ 445.761* "which declared void any agreement not to compete, whether reasonable or unreasonable, *§ 2 of MARA* only makes unlawful any contract which is an unreasonable restraint of trade, as under the common law or *§ 1* of the Sherman Act or monopolized trade under *§ 2* of the Sherman Act." *Compton, 397 N.W.2d at 314*. As Michigan courts have stated, the legislature's repeal of *§ 445.761*, and codification of *§ 2 of MARA* "clearly demonstrates the Legislature's intent to revive the common-law rule set forth in *Hubbard*, that the enforceability of noncompetition agreements depends on their reasonableness." *Bristol Window, 650 N.W.2d at 679* (internal citations omitted).

In 1987, the Michigan Legislature enacted *§ 4a of MARA*, which codified a test to **[**24]** determine the enforceability of a noncompetition agreement in the employer-employee context. *M.C.L. § 445.774a(1)* states:

> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

Therefore, in the employer-employee context, *§ 445.774a(1)*, rather than the common law rule of reason, governs. Under *§ 445.774a(1)*, an employer-employee covenant not to compete must protect a party's reasonable competitive business interests, and its protection must be reasonable with respect to: (1) duration; (2) geographical scope; and (3) the line of business restricted. *St. Clair Med., P.C. v. Borgiel, 270 Mich. App. 260, 715 N.W.2d 914, 919 (Mich. Ct. App. 2006)*. In support of the consideration of these factors, the court in *St. Clair* looked to *Hubbard* and *Bristol Window* and stated **[**25]** that "*§4a(1)* represents a codification of the common-law rule 'that the enforceability of noncompetition agreements depends on their reasonableness.'" *St. Clair, 715 N.W.2d at 918*.

In considering the challenge to the 20-year noncompete agreement between Living Essentials and CNL in the absence of any conflicting authority from the Michigan Supreme Court, this Court applied *§ 445.774a(1)* to the parties' covenant not to compete, noting that it did not need to apply a different common law the rule of reason test because "a non-compete agreement's enforceability rests on its reasonableness, regardless of whether it involves an employment contract or not." ECF No. 219, PageID.9230 & n.41. This Court then concluded that Settlement Agreement's 20-year noncompete agreement was reasonable in scope and geographic area but was unreasonable as to duration. Consequently, the Court reformed the duration of the covenant to three years. *Id.* at PageID.9232-37. In applying that remedy, the Court relied upon *§ 445.774a(1)*, which empowers a Court to "limit the agreement to render it reasonable in light of the circumstances."

[*783] ii. The *Liquid Manufacturing* Decision

After this Court's decision, however, the Michigan Supreme Court decided *Innovation Ventures, LLC v. Liquid* ***[**26]*** *Manufacturing, LLC*, in which it expressly held that the common law rule of reason, rather than the statutory authority of § 445.774a(1), should be applied to business-to-business noncompete agreements, recognizing that § 2 of MARA was actually a codification of the rule of reason. 885 N.W.2d at 874 & n.18 (citing Bristol Window, 250 Mich. App. 478, 650 N.W.2d 670). In light of *Liquid Manufacturing*, the Sixth Circuit reversed this Court's decision to apply § 445.774a(1) to § 5.c.1 of the Settlement Agreement, explaining that *Liquid Manufacturing* "makes clear that business-to-business noncompete agreements like the one at issue here must be 'evaluated by the rule of reason,' not by analogy to employment noncompete agreements that do not 'address the proper framework.'" 912 F.3d 316, 340 (6th Cir. 2018).

Nonetheless, Defendants assert that § 445.774a(1), which this Court previously applied, is merely a codification of the rule of reason and consequently the Court should again conclude that § 5.c.(1) of the Settlement Agreement is an unreasonable restraint on trade because its duration is unreasonably long.[3] Conversely, Plaintiff suggests that because MARA was patterned after §§ 1-2 of the Sherman Antitrust Act, and Sherman Act jurisprudence has developed to include a rigid "rule of reason" burden-shifting framework, Defendants should be required to establish **[**27]** all the elements of a § 1 Sherman Act claim to demonstrate that the covenant not to compete is an unreasonable restraint on trade.

Unfortunately, neither the Michigan Supreme Court in Liquid Manufacturing nor the Sixth Circuit in its opinion in this case delineated clear standards under the rule of reason test for this Court to apply. And the parties here have capitalized on that ambiguity to advocate for a formulation of the rule of reason that most favors their interests. But in holding that the common law rule of reason—and not § 445.774a(1)—was the proper standard by which to judge business to business noncompete agreements, *Liquid Manufacturing* strongly suggested that the requirements of the two standards are not identical.

So what did the Michigan Supreme Court mean when it said that the rule of reason applies? ***HN8***[] In *Liquid Manufacturing*, it stated that when analyzing business-to-business noncompete agreements, MCL 445.784(2) requires that courts look to *federal* interpretation of *comparable statutes*. The *Liquid Manufacturing* court then cited to a decision from the Sixth Circuit, *Perceptron, Inc. v. Sensor Adaptive Machines, Inc., 221 F.3d 913 (6th Cir. 2000)*, and a decision from the Seventh Circuit, *County Materials Corp. v. Allan Block Corp., 502 F.3d 730, 735 (7th Cir. 2007)*, for the proposition that "federal **[**28]** courts have assessed noncompete agreements between two commercial entities under the rule of reason." *Liquid Mfg., 885 N.W.2d at 874*.

Perceptron involved a plaintiff bringing a breach of contract action alleging the defendant violated a covenant not to compete and a defendant asserting a counterclaim **[*784]** that the noncompete agreement violated ***antitrust law***. *221 F.3d at 917*. The jury found for the plaintiff, concluding that the covenant "was reasonable, enforceable (including permitted under the antitrust laws[])," that the defendant had breached the covenant, and that the defendant had failed to prove that the noncompete agreement constituted an unreasonable restraint of trade in violation of federal antitrust laws. *Id. at 917-18*. Post-trial, the defendant moved for judgment as a matter of law, or in the alternative, for a new trial on both the plaintiff's breach of contract claim and its counterclaims. *Id. at 918*. The trial court denied the defendant's motion. *Id.* On appeal, the defendant contested the jury's finding that the noncompete agreement was a valid and reasonable restraint on competition under federal and state antitrust laws. *Id.* The Sixth Circuit analyzed the legality of the noncompete agreement "under the rule of reason test," citing a Seventh **[**29]** Circuit case, *Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 265 (7th Cir. 1981)*. *Perceptron*'s formulation of the rule reason states:

> [C]ovenants not to compete are valid if (1) ancillary to the main business purpose of a lawful contract, and (2) necessary to protect the covenantee's legitimate property interests, which require that the covenants be as limited as is reasonable to protect the covenantee's interests. *United States v. Addyston Pipe & Steel Co., 85 F. 271, 281-82 (6th Cir. 1898)*; *aff'd as modified*, *175 U.S. 211, 20 S. Ct. 96, 44 L.Ed. 136[ ] (1899)*.

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[3] Defendants cite *Bristol Window* for the proposition that *§ 445.774a(1)* is a codification of the rule of reason, ECF No. 400, PageID.24279, but that is not what *Bristol Window* nor *Liquid Manufacturing* stated. Rather, as the Michigan Court of Appeals made clear in *St. Clair*: "*§4a(1)* represents a codification of the common-law rule 'that the enforceability of noncompetition agreements depends on their reasonableness.'" *St. Clair, 715 N.W.2d at 918*.

221 F.3d at 919 (quoting Lektro-Vend, 660 F.2d at 265).

Interestingly, the Sixth Circuit's formulation is not the traditional five-factor burden shifting framework commonly applied in pure § 1 Sherman Act claims and proposed by Plaintiff to be applied here. *See* Care Heating, 427 F.3d at 1014 (citing Int'l Logistics Grp. Ltd. v. Chrysler Corp., 884 F.2d 904, 907 (6th Cir. 1989)). Rather, when analyzing whether there was any basis for the jury to conclude that the noncompete agreement was a valid and reasonable restraint on competition, the Sixth Circuit considered the evidence the jury heard regarding several factors: (1) whether the aggrieved party continued to develop products that did not compete, (2) the need for the noncompete agreement, (3) the value of the goodwill acquired to determine whether the noncompete agreement was ancillary to the purpose of contract, (4) the reasonableness of the duration, geographic reach, and product scope of the noncompete **[**30]** agreement, and (5) that motivation to escape competition, alone, does not make a noncompete agreement an unreasonable restraint on competition. *Id. at 919-20*. In weighing all of these factors, the Sixth Circuit concluded that "reasonable minds could differ about whether the non-compete agreement was ancillary to the transaction and a *reasonable restraint on competition*" affirming the district court's denial of the defendant's motion for judgment as a matter of law. *Id. at 919* (emphasis added). Of note, the Sixth Circuit concluded that the jury heard evidence that the plaintiff purchased goodwill and a customer base—not just an escape from competition, and that reasonable minds could differ about whether five years was a reasonable duration for the plaintiff to protect its ability to realize the benefit of the transaction. *Id. at 919-20*.

The other federal appellate decision cited by the Michigan Supreme Court as an example of a "rule of reason" case, *County Materials*, did not concern an antitrust claim. 502 F.3d 730, 735 (7th Cir. 2007). Rather, a manufacturer brought an action seeking a declaration that a covenant not to compete in a patent licensing agreement was unenforceable. *Id.* In the patent misuse context, "[u]nder the rule of reason, **[*785]** the finder **[**31]** of fact must decide whether the questioned practices imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." County Materials, 502 F.3d at 735 (quoting Virginia Panel Corp. v. MAC Panel Co., 133 F.3d 860, 869 (Fed. Cir. 1997)). *County Materials* also clarified that "[a]nticompetitive effects . . . are a critical element of any patent misuse case that is evaluated under a rule of reason approach." *Id. at 736*. And, of particular relevance to this case, the court stated that it would assume that it was "not necessary for a plaintiff to plead a case that would suffice to show that the antitrust laws have been violated. *But, at the summary judgment stage, some evidence tending to show an adverse effect in an economically sound relevant market is essential for any claim governed by the rule of reason*." *Id.* (emphasis added).

Specifically, the Seventh Circuit considered whether the noncompete agreement: (1) showed signs of one-sidedness or abuse of power, (2) permitted the aggrieved party to continue selling or producing similar competing products in the market, had temporal and geographic limits, and (3) **[**32]** whether the aggrieved party had shown that the noncompete had a broader effect on the market, as opposed to an effect only on the aggrieved party. *Id. at 736-37*. The court concluded that the covenant not to compete was not "particularly onerous" because it allowed County Materials to continue to manufacture and sell two competing products, was temporally limited because it lasted for only 18 months, and was geographically limited because it applied only to County Materials' exclusive production territory (a section of Wisconsin). Further, because there was no evidence in the record that the restrictive covenant had any effect on the broader market (as opposed to an effect only on County Materials) the defense that the covenant was unreasonable under the rule of reason could not succeed. *Id. at 737*

Liquid Manufacturing also cited the Supreme Court's decisions in State Oil Co. v. Khan, 522 U.S. 3, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997) and Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 38 S. Ct. 242, 62 L. Ed. 683 (1918), two seminal cases applying the rule of reason test in the context of Sherman Act claims.[4] ***HN9***[] More recent jurisprudence under the Sherman Act has evolved to a specific five-part rule of reason test that plaintiffs must meet in order to pass muster. Consequently, to make out a valid claim under § 1 of Sherman Act, the

[4] The *Board of Trade of Chicago* excerpt quoted by *Liquid Manufacturing* is quoted above at page 16.

> [r]ule of reason analysis requires **[**33]** the plaintiff to prove (1) that the defendant(s) contracted, combined, or conspired; (2) that such contract produced adverse anticompetitive effects; (3) within relevant product and geographic markets; (4) that the objects of and conduct resulting from the contract were illegal; and (5) that the contract was a proximate cause of the plaintiff's injury.

Care Heating & Cooling, Inc. v. American Standard, Inc., 427 F.3d 1008, 1014 (6th Cir. 2005). This five-factor test aids the Court in discerning whether a plaintiff as overcome the first of a three-part burden-shifting framework:

> First, the plaintiff must establish that the restraint produces significant anticompetitive effects within the relevant **[*786]** product and geographic markets. [Then,] [i]f the plaintiff meets this burden, the defendant must come forward with evidence of the restraint's procompetitive effects to establish that the alleged conduct justifies the otherwise anticompetitve injuries. [Finally,] [i]f the defendant is able to demonstrate procompetitive effects, the plaintiff then must show that the legitimate objectives can be achieved in a substantially less restrictive manner.

Id. at 1012 (quoting *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003))* (alterations in original).

Plaintiff argues that because the Michigan Supreme Court cited **[**34]** these early Sherman Act cases, it intended to require that any successful challenges to business noncompete clauses must likewise make out a prima facie case of a *§ 1* Sherman Act claim. Put differently, because the Sherman Act rule of reason test developed from the formulation in *Board of Trade of Chicago* to this five-factor test, and because *Liquid Manufacturing* and *Innovation Ventures* make reference to the Sherman Act, Plaintiff argues NSL should be required to meet all five elements of the test set out in *Care Heating* to prove that the covenant not to compete in the Settlement Agreement is an unreasonable restraint on trade.

There is some appeal to Plaintiff's argument. Indeed, why else would the courts in *Liquid Manufacturing* and *Innovation Ventures* cite to Sherman Act cases—where the modern case law has developed its own carefully articulated "rule of reason" test—if they intended to apply some less exacting standard? And both Sixth Circuit and Michigan courts agree that *§ 2 of MARA* "adopted language from and is interpreted consistent with the Sherman Act." *Perceptron, 221 F.3d at 919 n.6* (citing *Compton v. Joseph Lepak, DDS, PC, 154 Mich. App. 360, 397 N.W.2d 311 (Mich. Ct. App. 1986))*.

But it is also the case that the Michigan Supreme Court did not quote *Care Heating* or any number of other governing Sherman Act **[**35]** cases applying this five-factor test. Rather, it quoted a rule of reason test developed in a 1918 Supreme Court Sherman Act case which requires courts to weigh a number of factors, under the framework that "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Bd. of Trade of City of Chicago, 246 U.S. at 238*. Those factors are: "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." *Id.* Additionally, "[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained." *Id.* Also telling, when the Michigan Supreme Court declared that the rule of reason should be applied, it cited *Perceptron* (which involved antitrust claims, but did *not* apply the five-factor test), and *County Materials* and *Bristol Window* (both of which did not involve antitrust claims).

In reviewing the various factors articulated in *Board of Trade, Perceptron*, and *County Materials*, the cases cited in *Liquid **[**36]** Manufacturing*, the Court finds they are more in line with the venerable old *Hubbard* factors from 1873 than they are with the 21st Century five-factor test set out in *Care Heating*.[5] And while "MARA **[*787]** was enacted

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[5] Plaintiffs rely on *Little Caesar Enters., Inc. v. Creative Rest. Inc., No. 16-14263, 2017 U.S. Dist. LEXIS 174623, 2017 WL 4778721 (E.D. Mich. Oct. 23, 2017)*, to argue that a full Sherman Act analysis should be applied when analyzing the breach of a business-to-business restrictive covenant. But that case involved trademark infringement, unfair competition, and trade dress

in order to create uniform state laws and to draw upon federal antitrust decisions," Compton v. Joseph Lepak, D.D.S., P.C., 154 Mich. App. 360, 397 N.W.2d 311, 316 (Mich. Ct. App. 1986), this Court can discern no reason why a defendant seeking to defend against the breach of a covenant not to compete should have to prove all the strict elements of a § 1 Sherman Act claim to meet its burden. The Court may "draw upon federal antitrust decisions" and take guidance from decisions such as *Board of Trade* without necessarily imposing all the requirements of a § 1 Sherman Act claim.[6]

HN10[] This Court also finds that a common theme among each of these formulations of the rule of reason is that the party challenging the restrictive covenant must demonstrate that it causes some harm to competition in the greater product market. This effect on the greater market appears to be the most substantial difference between the showing that must be made under § 445.774a(1) and that which would be required under the rule of reason framework. Indeed, as outlined above, Perceptron, County Materials, and **[**37]** Board of Trade consider duration, geographical scope, and reasonableness between the parties under the rule of reason, but they also consider the restrictive covenant's impact on competition in the wider market. Even *Hubbard* required consideration of the covenant's "effect upon the public." 27 Mich. at 19-20. **HN11**[] In other words, it is not enough—as Defendants contend—for the Court to examine the covenant's duration, geographic scope, type of conduct prohibited, and business interests justifying the restriction—as it did in its prior order. Based on this Court's understanding of the Michigan Supreme Court's reasoning in *Liquid Manufacturing*, the Court concludes that the following factors should be considered when applying the rule of reason test to evaluate challenges to noncompete agreements in the business-to-business context under Michigan law: (1) whether the restraint is ancillary to the main business purpose of an otherwise lawful contract; (2) whether the restraint protects legitimate property interests, for example, goodwill; (3) whether the restraint's duration, geographic reach, and scope are reasonable considering the nature of the property interest being protected; and (4) whether the restraint **[**38]** suppresses or destroys competition in the relevant market. The Court must take into account each of these factors to determine whether the restraint is reasonable or void. Hubbard, 27 Mich. at 20 ("[I]f reasonable and just, the restriction will be sustained, if not, it will be held void.").

iii. Application of the "rule of reason" test

In attempting to apply the rule of reason, the Court first acknowledges the relevance of many of the Court's prior findings. This Court has already found that Plaintiff has a legitimate business interest **[*788]** in the Choline Family restrictions and that the scope and geographic locations of the restrictions are reasonable. ECF No. 219, PageID.9232. Further, as in *Perceptron*, here the Court has already concluded that the noncompete agreement was ancillary to the main purpose of the Settlement Agreement. 221 F.3d at 919. Defendants previously conceded that Living Essentials' desire to protect its goodwill was a legitimate business purpose. ECF No. 219, PageID.9232. And this Court held that the restrictive covenant "had perhaps a greater than normal concern to protect its goodwill from these parties because they had previously admitted to wrongfully manufacturing [5-Hour Energy] in the past." ECF No. 219, PageID.9232.

But **[**39]** this Court also originally held that § 5.c.i's 20-year duration was unreasonable. ECF No. 219, PageID.9234 (stating that "courts have upheld time periods of six months to three years") (quoting Lowry Computer Prods. Inc. v. Head, 984 F. Supp. 1111, 1116 (E.D. Mich. 1997)). However, Lowry involved an employer-employee noncompete agreement, as did Radio One, Inc. v. Wooten, 452 F. Supp. 2d 754, 759 (E.D. Mich. 2006), and Rooyakker & Sitz, P.L.L.C. v. Plante & Moran, P.L.L.C., 276 Mich. App. 146, 742 N.W.2d 409, 418 (Mich. Ct. App.

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infringement claims, not just a breach of contract action. And it neither applied all five Sherman Act factors nor did it clearly hold that all the Sherman Act factors must be met in a breach of contract action.

[6] The Court appreciates that both the Sixth Circuit and the Michigan Supreme Court in *Liquid Manufacturing* considered the Sherman Act concepts of per se violations and horizontal restraints on trade. *See* 912 F.3d at 340-41; 885 N.W.2d at 874. But while the Sixth Circuit and Michigan Supreme Court discussed these Sherman Act concepts, they did not expressly require that defendants challenging a noncompete agreement would necessarily need to prove all the elements of a § 1 Sherman Act claim.

2007). The only cases cited by the Court outside of the employer-employee context were Bristol Window, 650 N.W.2d at 679, and In re Spradlin, 284 B.R. 830, 836 (E.D. Mich. 2002). *In re Spradlin* held that five years was reasonable, 284 B.R. at 836, while *Bristol Window* considered a three-year limitation and remanded for the trial court to determine whether the length was reasonable, 650 N.W.2d 670, 250 Mich. App. at 498.

The Court's additional review of Michigan cases involving business-to-business noncompete agreements has discovered several other cases, one finding a 5-year noncompete clause reasonable, another allowing a duration of 20 years, and a third holding that a never-ending noncompete agreement would be categorically unreasonable. For example, in *Brillhart v. Danneffel*, the Michigan Court of Appeals analyzed a covenant not to compete between the buyer and seller of a restaurant under a reasonableness standard. 36 Mich. App. 359, 194 N.W.2d 63, 65 (Mich. Ct. App. 1971). It held that the business-to-business noncompete agreement was reasonable because the defendant understood they were signing a 5-year, 10-mile **[**40]** restriction, the defendant's agent wrote the agreement, and they voluntarily signed the contract. 36 Mich. App. 359, 194 N.W.2d 63, 65 (Mich. Ct. App. 1971). *Brillhart* distinguished a case in which the court found a covenant to be unreasonable because it required the seller to "never" re-engage in the relevant business. Id. at 65-66 (citing Wolverine Sign Works v. Powers, 248 Mich. 371, 227 N.W. 669, 670 (Mich. 1929) ("Never is a long time. It is a longer time than necessary to enable the purchaser of a business to convert the good will into a good will personal to himself.")).

And more recently, in the unreported decision of *Lieghio v. Loveland Invs.*, the Michigan Court of Appeals held that a 12-mile, 20-year covenant not to compete in a hotel business was not unreasonable because "the parties' agreement is similar to those upheld in a long line of cases, like *Brillhart*, that have sanctioned covenants not to compete where they are merely a reasonable restraint on a seller's competitive efforts in order to promote the buyer's realization of goodwill in the purchased business." Nos. 285393-94, 2009 Mich. App. LEXIS 2284, 2009 WL 3491620, at *1, 5 (Mich. Ct. App. Oct. 29, 2009) (citing Hubbard, 27 Mich. at 19, 21). These decisions do not provide the Court with much comfort that a business-to-business noncompete agreement lasting 20 years would necessarily be found reasonable under the rule of reason test, but nor **[*789]** do they clearly indicate that a 20-year noncompete **[**41]** agreement with otherwise reasonable terms would automatically be voided under the rule of reason. Particularly where, as here, the record indicates that Jones testified he knew the covenant's duration was 20 years when he signed the document, and that NSL was free during this time to manufacture energy shots—though not using Choline Family ingredients. That said, the Court has also already found that Living Essentials "has failed to provide a reasonable justification for a [20-year] restriction" and that its interest in protecting its goodwill does not justify this decades-long restriction. ECF No. 219, PageID.9235. And it has articulated its skepticism that Living Essential's "attempt to achieve the protections of a patent vis-à-vis Custom Nutrition [and NSL] without having demonstrated that it was legally entitled to a patent is not a reasonable use of a non-compete agreement." *Id.* at PageID.9263.

But as explained above, the key feature that makes the rule of reason different from the test the Court already applied in its prior Order is the requirement that a defendant show—in addition to these other factors—a reasonable likelihood that enforcing the restrictive covenant will cause **[**42]** anticompetitive effects. In order to make this showing, the Court concludes a defendant may present the kind of evidence that would tend to support a § 1 Sherman Act claim under the five-factor burden-shifting rule of reason framework because such evidence is probative of the anticompetitive nature of the alleged restraint.[7] But at the same time, it is not necessary that the defendant present evidence sufficient to prove all of the elements required to make out a Sherman Act antitrust violation.

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[7] As detailed above, the Seventh Circuit took a similar approach in *County Materials* for patent misuse cases. 502 F.3d at 736 (stating that it is "not necessary for a plaintiff to plead a case that would suffice to show that the antitrust laws have been violated. *But, at the summary judgment stage, some evidence tending to show an adverse effect in an economically sound relevant market is essential for any claim governed by the rule of reason*") (emphasis added).

Defendants rely on the report provided by Living Essentials' damages expert to show that Plaintiff's product holds a significant percentage of the energy shot market and therefore has market power.[8] Given this market power, Defendants assert there is a potential for anticompetitive effects under the rule of reason. ECF No. 415, PageID.26022-24. But NSL has not argued how *the restrictive covenant* causes anticompetitive effects. The case Defendants rely on, *Realcomp II, Ltd. v. F.T.C., 635 F.3d 815 (6th Cir. 2011)*, requires such a showing.[9] *Realcomp II* holds that: **[**43]** "[m]arket power and *the anticompetitive nature of the restraint* are sufficient to show the potential for anticompetitive effects under a rule-of-reason analysis, and once this showing has been made, [the proponent of the restraint] must offer procompetitive **[*790]** justifications. *Id. at 827*. Here, NSL emphasizes the market power element but entirely ignores the "anticompetitive nature of the restraint" element.

In other words, at this stage, Defendants have not created a genuine issue of material fact that the restrictive covenant has anticompetitive effects on the energy shot market. Regardless of whether Plaintiff has market dominance, Defendants must be able to show a jury that the 20-year restrictive covenant between Plaintiff and Defendants had anticompetitive effects on the market. NSL's reliance on Plaintiff's alleged market dominance alone does not show, or raise a genuine issue of fact, that the restrictions between NSL and Living Essentials "narrows consumer choice" or "hinder[s] the competitive process." *Id. at 829*. *See also* *Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)* (requiring an analysis of "the competitive significance of the restraint"). Put differently, NSL must create a genuine issue of material fact that **[**44]** the restrictive covenant not only harmed NSL, but that it also harmed competition in the greater energy shot market (whether because an NSL free of the restrictive covenant would have been such a significant market competitor that their elimination for 20 years harmed the market as a whole, or for some other reason). That Plaintiff may have captured a large percentage of *NSL's sales* because NSL was unable to produce a competing product containing Choline Family ingredients would be relevant if NSL could show that its lost sales would have been large enough to impact the energy shot market. A subsidiary issue may also be, for example, whether the Choline Family ingredients are influential in determining a product's success in the energy shot market. At this point, Defendants have not made anything like this kind of showing, and the report of Plaintiff's damage expert does not do it for them.[10]

Moreover, this Court has already found that the covenant does not prevent Defendants from competing in the energy shot market. Rather, it prevents Defendants from using one family of ingredients. ECF No. 219, PageID.9233. NSL "can continue to develop, market, and distribute energy liquids using **[**45]** all other types of ingredients." *Id.* Defendants' assertion that Plaintiff's alleged market power is a sufficient showing under *Realcomp* ignores this Court's finding that the noncompete agreement does not prevent Defendants from competing in the energy shot market. It also fails to explain how this market share is *caused* by the restrictive covenant—or indeed how the covenant impacts energy shot manufacturers other than Defendants.

Further, at trial, Jones testified that of the 17 energy shots Custom Nutrition produced at the time it entered into the Settlement Agreement, only 2 were affected by the restrictive covenant, or so he could recall. ECF No. 305,

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[8] The details of this report are under seal. Further, this expert testified he was defining the relevant product markets strictly for purposes of damages calculations, which was a different consideration than defining product markets for purposes of an antitrust analysis.

[9] Notably, *Realcomp II* is a Sherman Act case, and it applies that rigid five-factor burden-shifting test developed in the Sixth Circuit under the Sherman Act. As explained above, in *Liquid Manufacturing*, the Michigan Supreme Court did not hold that the application of the rule of reason test would necessarily require proof of all the elements of a *§1* Sherman Act claim, but it did cite to antitrust cases that have applied the rule of reason, indicating that the kinds of proof offered in such cases would be useful to parties attempting to show anticompetitive effects.

[10] For the same reasons, the Court will not conduct a "quick look rule of reason" analysis under the Sherman Act as NSL suggests. *See* ECF No. 415, PageID.26024. Not only is that a Sherman Act concept not applicable here, it is reserved for the situation where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n. v. FTC, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*. NSL has not shown this degree of anticompetitive effect to warrant any "abbreviated" rule of reason analysis.

PageID.13854. While NSL denies that it produced any of the other 17 energy shots, ECF No. 415, PageID.26014, the question is not whether NSL is harmed by the restriction, but whether the greater energy shot market is. That these other energy shots compete **[*791]** successfully in the marketplace without Choline Family ingredients may be telling. *See* Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 265 (7th Cir. 1981) ("Legitimate reasons exist to uphold noncompetition covenants even though by nature they necessarily restrain trade to some degree. The recognized benefits of reasonably enforced noncompetition **[**46]** covenants are by now beyond question."). In sum, while market power may be inferred from evidence of significant market share, Defendants still must show "the anticompetitive nature *of the restraint*," which Defendants have not shown, or raised a genuine issue of material fact from which a jury could conclude as such. Realcomp II, 635 F.3d at 827.

iv. NSL is entitled to discovery on anticompetitive effects

The Sixth Circuit's remand order on the rule of reason issue acknowledged that this "fact-intensive determination" falls appropriately with the district court and it tasked the parties with providing "the detailed record information necessary" to enable this Court to apply the rule of reason test. 912 F.3d at 342. On its own, the Sixth Circuit did not apply the rule of reason or find as a matter of law that NSL had or had not met the test.

In light of the new test articulated by the Michigan Supreme Court and identified by the Sixth Circuit—and as it must now be applied by this Court—NSL could not have known that it would be required to develop evidence regarding the potential anticompetitive effects of the restrictive covenant to defeat Plaintiff's breach of contract claim when it was initially engaged in discovery with Plaintiff. **[**47]** Neither the parties nor the Court were operating with the understanding that the rule of reason test as outlined by *Liquid Manufacturing*, required by the Sixth Circuit's decision in this case, and now fleshed out by this Court would govern the interpretation of the restrictive covenant and consequently determine the boundaries of relevant evidence affecting the question of its reasonableness. The Court believes this weighs in favor of permitting NSL additional limited discovery on the question of whether § 5.c.i of the Settlement Agreement has anticompetitive effects. *C.f.* Grant v. Metro. Gov't. of Nashville & Davidson Cty., 646 Fed.Appx. 465, 467-68 (6th Cir. 2016) (where additional discovery on remand of disparate impact claim was not allowed because Sixth Circuit found *as a matter of law* that plaintiffs failed to establish a *prima facie* case of disparate-impact discrimination).

This course of action also makes sense because, as explained in greater detail below, the Lead Case is no longer operating on a static record. Living Essentials has moved to consolidate the Lead and Secondary Cases and has requested the Court to allow additional, narrowly tailored discovery on a number of subjects related to the claims of the Secondary Case against Lily of the Desert. Because the Court will **[**48]** grant Plaintiff's motion later in this Order, it will be necessary for discovery to be re-opened in any event. In the interests of justice, both NSL and Lily of the Desert should also be given the opportunity to develop evidence on the issue of anticompetitive effects under the rule of reason.[11]

[*792] Accordingly, the Court **DENIES** Plaintiff's motion for summary judgment (ECF No. 420) and **DENIES** Defendants motion for summary judgment (ECF No. 200), as Defendants should have the opportunity to conduct additional, targeted and limited discovery on whether there is a reasonable likelihood that enforcing the restrictive covenant will cause anticompetitive effects. The Court makes no finding at this time as to whether the restrictive covenant violates the rule of reason. As such, the Court also need not resolve the question at this time as to whether reformation is an appropriate remedy if a business-to-business noncompete agreement is found to violate the rule of reason. Liquid Mfg., 885 N.W.2d at 870-71 & n.21.

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[11] Plaintiff contends that additional discovery is not appropriate because NSL initially brought an antitrust counterclaim and therefore had the opportunity to conduct such discovery. *See* Second Amended Counterclaim, ECF No. 188. First, that claim was dismissed because it was time barred. ECF No. 337. And more importantly, in light of this Court's decision to consolidate the Lead and Secondary Cases on *Plaintiff*'s motion, and to reopen discovery once consolidation is complete, NSL and Lily should have the opportunity to conduct discovery on anticompetitive effects under the rule of reason.

C. Consolidation of the Lead and Secondary Cases

i. Consolidation is warranted

In addition to the parties' cross motions for summary judgment on the application of the rule of reason, Plaintiff also moves to consolidate **[**49]** the Lead Case with the Secondary Case involving Lily of the Desert. *See* ECF No. 403. Plaintiff alleges that while litigating the Lead Case, it learned that NSL was actually the nutrition division of L.D.O.C. Group, Ltd. ("LD Operating"), which in turn was owned by L.D.O.C., Inc. ("LD Inc."). Secondary Case, 16-11179, ECF No. 1, PageID.7. Plaintiff brought suit against LD Operating and LD Inc. (together "Lily"), asserting that they are alter egos of NSL. In the complaint, Plaintiff alleges Lily should be liable for NSL's breaches of § 5.c.i of the Settlement Agreement as uncovered in the Lead Case (if it is found that NSL is insolvent and unable to pay any judgment against it), as well as for additional breaches occurring after discovery concluded in the Lead Case. *Id.* at PageID.36-37.[12] Further, the complaint alleges that Lily, as an alter ego of NSL, produced energy liquids containing Alpha-GPC and Betaine, which a jury has already concluded are prohibited ingredients under the Choline Family restrictions. Jury Verdict Form, ECF No. 296. However, the complaint also alleges that Lily and NSL may have produced energy liquids containing other, unspecified Choline Family ingredients (that presumably **[**50]** could be discovered during the discovery process). No. 16-11179, ECF No. 1, PageID.19, 34.

Alternatively, if LD Operating and LD Inc. are not alter egos of NSL, Plaintiff alleges in the complaint that LD Operating and LD Inc. (as separate and distinct entities) induced Jones, CNL and/or NSL to breach § 5.c.i[13] by assisting them in producing energy liquids containing Choline Family ingredients, resulting in tortious interference with contract and business expectancy. *Id.* at PageID.44-48. Additionally, **[*793]** Plaintiff contends they are liable under the Texas or Michigan Uniform Fraudulent Transfer Act for receiving substantially all of NSL's assets without adequate consideration and Plaintiff seeks an order avoiding those transfers and awarding Plaintiff monetary recovery "in whatever amount Plaintiff is found to be entitled."[14] *Id.* at PageID.48-50. Plaintiff also alleges a civil conspiracy claim against NSL and Lily. *Id.* at 50-51.

With this summary of the Secondary Case in mind, Plaintiff argues that the Lead and Secondary Cases involve multiple common issues of law and fact which should persuade this Court to exercise its discretion and consolidate the cases for trial. ECF No. 403. Living Essentials contends **[**51]** that because a jury trial has already concluded that Alpha-GPC and Betaine are Choline Family ingredients, consolidation will ensure swifter recovery against NSL and Lily for their alleged violations. NSL argues that consolidation is not appropriate because (1) transfer of the Secondary Case to the Eastern District of Texas pursuant to *28 U.S.C. § 1404(a)* is appropriate, (2) Plaintiff did not appeal the Court's order denying Plaintiff's motion to amend its complaint to add the Lily defendants and associated

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[12] Paragraphs 141 and 142 of the Complaint allege that "[i]n April 2014, the NSL division ceased operations and all assets, including at least four of the accounts or agreements to produce the Secret Products, were transferred to LD Operating or LD Inc. and LD Operating began to produce and sell at least four of the Secret Products. . . . Such transfer occurred without any agreement or consideration." No. 16-11179, ECF No. 1, PageID.31.

[13] The Complaint also alleges violations of other provisions of the Settlement Agreement. However, because this Court has already held—and the Sixth Circuit affirmed—that NSL is only bound by § 5.c of the Settlement Agreement by virtue of its incorporation into the Asset Purchase Agreement, the Court will only discuss those counts in the 16-11179 Complaint that assert violations relating to § 5.c. *See 912 F.3d at 338-39*; ECF No. 343 (Order on Motions for Summary Judgment disposing of counts II, IV, V, VII and VII in Lead Case).

[14] It is unclear from Plaintiff's Complaint in Case No. 16-11179 whether Plaintiff is arguing that under the Michigan/Texas Fraudulent Transfer Act, it is able to recover for "new" breaches by Lily of the Desert (i.e., breaches that were not specifically made by NSL during the time frame that the parties' damages experts analyzed).

claims and therefore this holding is the law of the case,[15] and (3) the cases do not involve multiple issues of law and fact justifying consolidation. ECF No. 409.

HN13[] Pursuant to *Federal Rule of Civil Procedure 42(a)(2)*, "[i]f actions before the court involve a common question of law or fact, the court may . . . consolidate the actions." The party seeking consolidation, here Plaintiff, bears the burden of proving that consolidation should be granted. *Invest-Import v. Seaboard Surety Co., 18 F.R.D. 499, 500 (S.D.N.Y 1955)*. And the essential test "is whether there are common questions of law or fact." *Hasman v. G.D. Searle & Co., 106 F.R.D. 459, 460 (E.D. Mich. 1985)* (citing *Brewer v. Republic Steel Corp., 513 F.2d 1222 (6th Cir. 1975))*. "Consolidation is in the sound discretion of the court." *Id.* (citing *Stemler v. Burke, 344 F.2d 393 (6th Cir. 1965))*.

HN14[] A trial court making a decision to consolidate must consider:

> [W]hether the specific risks of prejudice and possible confusion [are] overborne **[**52]** by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Cantrell v. GAF Corp., 999 F.2d 1007, 1011 (6th Cir. 1993) (quoting *Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1495 (11th Cir. 1985))*. "Thus, the decision to consolidate is one that must be made **[*794]** thoughtfully, with specific reference to the factors identified above." *Id.* "Care must be taken that consolidation does not result in unavoidable prejudice or unfair advantage. Conservation of judicial resources is a laudable goal. However, if the savings to the judicial system are slight, the risk of prejudice to a party must be viewed with even greater scrutiny." *Id.* "When cases involve some common issues but *individual issues* predominate, consolidation should be denied. Consolidation is not justified or required simply because actions *include* a common question of fact or law." *Hasman, 106 F.R.D. at 461* (internal citations omitted) (emphasis in original). "Consolidation is improper when the introduction of 'voluminous' evidence, relevant to one of the consolidated actions but irrelevant to another, **[**53]** impairs the conduct of trial." *Id.* (citing *Flintkote Co. v. Allis-Chalmers Corp., 73 F.R.D. 463, 465 (S.D.N.Y. 1977)*.

Applying the *Cantrell* factors here, the Court finds that consolidation is appropriate. First, any risks of prejudice and confusion are overborne by the risk of inconsistent adjudications of common factual and legal issues. In order for Plaintiff to win a judgment from Lily for any of its alleged violations of the Settlement Agreement (pre and post April 2014) in the Secondary Case, Plaintiff would have to prove both that Lily was an alter ego and that Alpha-GPC and Betaine are Choline Family ingredients. Although a jury has already established this in the Lead Case, ECF No. 296, if the Secondary Case is not consolidated, it is at least possible that a second jury might disagree and conclude that Lily's production of energy liquids containing these ingredients does not violate the Choline Family restrictions. In such circumstances, Plaintiff would be unable to recover a judgment from Lily even if it proved that Lily and NSL were alter egos.

Further, special jury verdict forms could be created to avoid juror confusion. In a consolidated trial, the jury could be instructed to first consider whether Lily is NSL's alter ego. If yes, the jury could **[**54]** determine what damages Plaintiff is entitled to for Lily and NSL's usage of the Choline Family ingredients, as litigated in the first trial. If the jury does not conclude that Lily is NSL's alter ego, the jury would be instructed to consider whether, as a discrete and separate entity, Lily violated the Michigan Uniform Fraudulent Transfer Act and engaged in tortious interference with business expectancy and contract. To be sure, Plaintiff's claims against Lily as an alter ego rely, in part, on the speculation that NSL is insolvent and would be unable to pay any judgment against it in the Lead Case. But even if

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[15] ***HN12***[] However, just because the Court at one time denied a plaintiff's motion to amend its complaint does not preclude a party from later moving to consolidate by invoking the Court's discretionary power to do so under *Federal Rule of Civil Procedure 42(a)(2)*. This is not barred by the mandate rule because the district court is free on remand to consider issues remanded, issues arising for the first time after remand, and "issues that were timely raised before the district and/or appellate courts but which remain undecided." Wright & Miller Fed. Prac. & Proc. § 4478.3 (quoting *United States v. Morris, 259 F.3d 894, 898-99 (7th Cir. 2001))*.

Lily is not found to be NSL's alter ego, Plaintiff's tortious interference and fraudulent transfer claims would still be closely related to the Lead Case. This is because Plaintiff argues they arise from Lily's interference with Plaintiff's rights under § 5.c.1 "and its improper efforts—*during the course of the* [*Lead Case*]—to assist NSL in avoiding ultimate judgment collection." Secondary Case, No. 16-11179, ECF No. 16, PageID.643. Indeed, as the Sixth Circuit acknowledged when it consolidated the Lead and Secondary Cases on appeal, "[a]ll claims in the Secondary Case relate to the **[**55]** same nucleus of fact as in the Lead Case, and [Living Essentials] concedes that the claims in the Secondary Case 'rise or fall with the rulings in the lead case.'" *912 F.3d at 326*.

Second, any risk of prejudice or confusion is overcome by the burden on the parties, witnesses and available judicial resources posed by multiple lawsuits, including the time and expense of trying multiple suits rather than a single one. While limited discovery would be required to determine whether an alter ego relationship **[*795]** exists, whether Lily tortiously interfered with NSL's obligations under the Settlement Agreement, and to investigate and calculate additional damages for any alleged violations by Lily after April 2014, such limited discovery would be a comparatively minor inconvenience compared to the amount of judicial resources saved by not duplicating discovery in the Lead Case for the Secondary Case. Indeed, Plaintiff has cited to discovery from the Lead Case that it intends to use to prove an alter ego relationship and underlying facts for the remaining Lily claims. This weighs in favor of consolidation. *See* *White v. Baxter Healthcare Corp., No. 05-71201, 2008 U.S. Dist. LEXIS 107241, 2008 WL 5273661, at *3 (E.D. Mich. Dec. 17, 2008)* (concluding that the burden to the parties, witnesses, and the Court would be significant if separate **[**56]** trials were conducted where the trials would be conducted in close proximity and one case required only limited discovery, which could be conducted in an expedited manner). Plaintiff has stated it needs only an additional 120 days of discovery on the limited issues of alter ego relationship, Lily's tortious interference, existence of a fraudulent transfer and additional production and sales of energy liquids by Lily that violate § 5.c.i. Unlike when Plaintiff filed its motion to amend the complaint, the case is not on the eve of trial, so there is less concern for prejudice to NSL.

ii. Transfer to the Eastern District of Texas is not appropriate

In arguing that consolidation is not appropriate, NSL incorporates by reference the arguments it made in its motion to transfer venue, filed in the Secondary Case. Likewise, Plaintiff incorporates the arguments it made in its response to NSL's motion. The parties dispute whether, under *28 U.S.C. § 1404(a)*, it would be in the interests of justice to transfer the Secondary Case to the United States District Court for the Eastern District of Texas.

HN15[] *Section 1404(a) of Title 28 of the United States Code* provides that "[f]or the convenience of the parties and witnesses, in the interests of justice, a district court may transfer **[**57]** any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." District courts have wide discretion to transfer an action pursuant to *§ 1404(a)*. *Audi AG v. D'Amato, 341 F. Supp. 2d 734, 749 (E.D. Mich. 2004)*. The Court must weigh several factors: "(1) the convenience of the parties; (2) the convenience of the witnesses; (3) the relative ease of access to sources of proof; (4) the availability of processes to compel attendance of unwilling witnesses; (5) the cost of obtaining willing witnesses; (6) the practical problems associated with trying the case most expeditiously and inexpensively; and (7) the interest of justice." *Id.* (quoting *MCNIC Oil & Gas Co. v. IBEX Resources Co., 23 F. Supp. 2d 729, 738-39 (E.D. Mich. 1998))*. "The party who brings a motion to transfer venue bears the burden of proving by a preponderance of the evidence that 'fairness and practicality *strongly favor* the forum to which transfer is sought.'" *Weather Underground, Inc. v. Navigation Catalyst Syst., Inc., 688 F. Supp. 2d 693, 696 (E.D. Mich. 2009)* (emphasis added) (quoting *Amphion, Inc. v. Buckeye Elec. Co., 285 F. Supp. 2d 943, 946 (E.D. Mich. 2003)*. The defendant must show that the plaintiff's chosen forum is "unnecessarily burdensome." *Boling v. Prospect Funding Holdings, LLC. 771 Fed.Appx. 562, 568 (6th Cir. 2019)*. "Merely shifting the inconvenience from one party to another does not meet [the] [d]efendant's burden. If the court determines that the balance between the plaintiff's choice of forum and the defendant's desired forum **[**58]** is even, the plaintiff's **[*796]** choice . . . should prevail." *Choon's Design, LLC v. Larose Industries, LLC, No. 13-13569, 2013 U.S. Dist. LEXIS 156695, 2013 WL 5913691, at *2 (E.D. Mich. Nov. 1, 2013)* (internal citations and quotations omitted).

In considering all of these factors, the Court finds that "fairness and practicality" do not "strongly favor" Texas as the forum. *Weather Underground, 688 F. Supp. 2d at 696*. As discussed above, any purported inconvenience to NSL is overcome by the significant common issues of law and fact between the Lead and Secondary Cases. ***HN16***[] Judicial economy is served by having the same district court try cases involving the same contracts. *In re Volkswagen of Am., Inc., 566 F.3d 1349, 1351 (Fed. Cir. 2009)* (transfer on inconvenience grounds where district court could try two cases involving the same patents).

While the Secondary Case will involve the additional issues of alter ego and fraudulent transfer, the court adjudicating the Secondary Case will be tasked with determining several issues that are already before this Court—just for a new timeline with respect to damages. Namely, whether post-April 2014 conduct by Lily (as an alter ego for NSL) was a violation of the Settlement Agreement. While the Court appreciates that the fraudulent transfer claim would involve an alleged transfer of assets between two Texas corporations, an ultimate question for the Court to consider in the Secondary Case is whether **[**59]** Lily, as a potential alter ego of NSL, violated §5.c.i of the Settlement Agreement through conduct that was not at issue in the Lead Case (post-April 2014 sales). Whether Lily manufactured products that contained Choline Family ingredients and therefore violated the Settlement Agreement, and how damages should be calculated for any determined violation are precisely the same issues the Court has been considering and will further determine in the Lead case for violations by Custom Nutrition and NSL up through April 2014. Additionally, in the Secondary Case Plaintiff alleges that NSL concealed documents that would have shown an alter ego relationship *during the litigation of the Lead Case*, further linking the two cases. This Court is already all-too-familiar with the parties, witnesses, and legal issues at play, the relevant provisions of the Settlement Agreement, and the Choline Family ingredients. And many of the witnesses and parties have already testified before this Court.

Therefore, while "these cases may not involve precisely the same issues, there will be significant overlap and a familiarity with the [Settlement Agreement that] could preserve time and resources. . . . ***HN17***[] [J]udicial economy **[**60]** is served by having the same district court try the cases involving the same [Settlement Agreement]." *In re Volkswagen of America, Inc., 566 F.3d 1349, 1351 (Fed. Cir. 2009)*. Accordingly, in determining that consolidation is appropriate here, the Court also concludes that transfer of the Secondary Case to the United States District Court for the Eastern District of Michigan under *28 U.S.C. § 1404(a)* is not appropriate.

D. Clarification of Jones as a Defendant

Finally, Plaintiff has moved for clarification of whether Alan Jones may still be considered a defendant in this matter. *See* ECF No. 403. This issue was explicitly addressed by the Sixth Circuit in ruling on whether Jones was bound by the Settlement Agreement in his personal capacity and therefore whether he would remain a defendant in the case. The Sixth Circuit explicitly held: "the Settlement Agreement does not bind Jones in his personal capacity." *912 F.3d at 337*. While this holding would seem to resolve the issue by **[*797]** indicating that Jones is no longer a defendant, the Sixth Circuit also affirmed this Court's holding that NSL is bound by § 5.c.i because it was incorporated by reference into the Asset Purchase Agreement, which NSL signed—and so did Jones. *Id. at 338-39*.

Living Essentials asserts that as a result of these holdings, Jones should still **[**61]** be a defendant in the case because he signed the Custom Nutrition-NSL Asset Purchase Agreement in his personal capacity as a "member of CNL," binding himself to that agreement and (like NSL) incorporating by reference the obligations of § 5.c.i of the Settlement Agreement. This argument is exactly the one made by the Court in dicta in its 2015 Order on the parties' motions for summary judgment. ECF No. 219. In a footnote, this Court stated:

> The Court notes that the same incorporation by reference rationale that binds Nutrition Science to the Choline Family restriction applies regarding Alan Jones. Jones signed the Asset Purchase Agreement twice, once in his representative capacity for Custom Nutrition and a second time in his individual capacity. Thus, there is no question that Jones's signature complies with the Statute of Frauds. As explained above, § 4.2(r) incorporates the Settlement Agreement's Choline Family restrictions by reference. According to the Asset Purchase Agreement, Section 4.2(r) was a representation made not only by CNL (the Seller) but also by its "Members."

> Jones signed the agreement as a Member of CNL and consequently also made the representation in § 4.2(r). As a result, Jones also incorporated the **[**62]** Choline Family restrictions by reference. However, because the Court finds below that Jones is personally bound under Settlement Agreement, the Court need not hold Jones liable under incorporation by reference.

ECF No. 219, PageID.9222.

The question is whether the Sixth Circuit's holding that "the Settlement Agreement does not bind Jones in his personal capacity," precludes Plaintiff from arguing on remand that under the logic of the Court's dicta, Jones is still bound to the Settlement Agreement because he also signed the Asset Purchase Agreement as a member of CNL, and that agreement incorporated by reference part of the Settlement Agreement. This presents an interesting question under the "law of the case" doctrine because it concerns an appellee seeking to revisit an issue on remand that was previously decided by the district court and explicitly reversed (but on other grounds) by the court of appeals. Living Essentials was both appellee and cross-appellant before the court of appeals. Jones and NSL appealed this Court's ruling that Jones was bound personally to the Settlement Agreement. On appeal, Living Essentials had every incentive to defend the district court's ruling—and was **[**63]** fully aware that the district court had expressed in dicta an alternative legal basis for finding that Jones was bound to the Settlement Agreement. Living Essentials chose not to raise this alternative ground in defending the district court's ruling on appeal, but has swiftly resurrected it on remand knowing that the court of appeals was not given the chance to consider it.

HN18[] Generally, the "law of the case" doctrine is applied differently to appellees because "[f]orcing an appellee to raise all possible defenses on a first appeal 'might increase the complexity and scope of appeals more than it would streamline the progress of the litigation.' '[F]ull application of the waiver rule to an appellee puts it in a dilemma between procedural disadvantage and improper use of the cross-appeal,' justifying **[*798]** 'a degree of leniency in applying the waiver rule to issues that could have been raised by appellees on previous appeals.' Wright & Miller Fed. Prac. & Proc., § 4478.6 Law of the Case—Related Doctrines (quoting *Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 738-741, 311 U.S. App. D.C. 1 (D.C. Cir. 1995))*. Applying such a degree of leniency may not be appropriate here, however, because raising the district court's alternative basis for binding Jones would not have unduly complicated the appeal **[**64]** and would have added clarity to the Sixth Circuit's decision. While that general rule may not preclude Living Essentials from arguing on remand that Jones is personally liable under the Settlement Agreement through incorporation by reference, even though it failed to raise the issue with the Sixth Circuit when it had the chance, there is an element of "lying in wait" about Plaintiff's tactics that gives the Court pause in considering whether justice would be served by allowing Jones to be brought back into the case after the Sixth Circuit has ruled he is out.

Regardless, however, in looking closely at the Sixth Circuit's holding, it is clear that the issue of Jones' status as a defendant has been conclusively decided by the Sixth Circuit and was not remanded to permit further consideration by this Court. The Sixth Circuit determined that Jones was not individually liable because under Michigan law "he signed the Agreement in his capacity as a corporate officer." *912 F.3d at 337* (quoting *Liquid Mfg., LLC, 499 Mich. 491, 885 N.W.2d 861, 867 n.6 (Mich. 2016))*. To permit Plaintiff to now resurrect the logic in this Court's prior footnote would go against "both the letter and the spirit of the mandate." *Mason v. Mitchell, 729 F.3d 545, 550 (6th Cir. 2013)*.

Accordingly, the Court holds that because the Sixth Circuit concluded **[**65]** "the Settlement Agreement does not bind Jones in his personal capacity," he is no longer a party to the Lead Case. Jones is **DISMISSED WITH PREJUDICE** in his personal capacity.

IV. Conclusion

For the reasons stated above the Court **DENIES** Plaintiff's Motion for Summary Judgment (ECF No. 420), **DENIES** Defendants' Motion for Summary Judgment (ECF No. 400), **GRANTS IN PART** Plaintiff's Motion to Consolidate the Lead Case and the Secondary Case (ECF No. 403), and **DISMISSES WITH PREJUDICE** Alan Jones as a defendant from the Lead Case.

IT IS FURTHER ORDERED that the parties shall meet and confer to develop and propose a stipulated scheduling order within 21 days of the date of this Order, and shall file the same with Court.

IT IS SO ORDERED.

DATED: March 31, 2020.

BY THE COURT:

/s/ Terrence G. Berg

TERRENCE G. BERG

United States District Judge

In re German Auto. Mfrs. Antitrust Litig.

United States District Court for the Northern District of California

March 31, 2020, Decided; March 31, 2020, Filed

MDL No. 2796 CRB (JSC)

Reporter

612 F. Supp. 3d 967 *; 2020 U.S. Dist. LEXIS 57625 **; 2020-1 Trade Cas. (CCH) P81,151; 2020 WL 1542373

IN RE: GERMAN AUTOMOTIVE MANUFACTURERS ANTITRUST LITIGATION. This Order Relates To: Dkt. Nos. 391, 392, 409, 410, 411

Prior History: *In re German Auto. Mfrs. Antitrust Litig., 392 F. Supp. 3d 1059, 2019 U.S. Dist. LEXIS 101014, 2019 WL 2509771 (N.D. Cal., June 17, 2019)*

Core Terms

allegations, conspiracy, prices, steel, Sherman Act, relevant market, arms race, collusion, diesel, tanks, market share, antitrust, electric, competitors, motion to dismiss, innovation, features, state law claim, coordinated, manufacturers, standardize, factors, factual allegations, alleged agreement, amended complaint, anticompetitive, technological, submarket, alleged conspiracy, rule of reason

LexisNexis® Headnotes

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

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

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

Pursuant to *Fed. R. Civ. P. 12(b)(6)*, a complaint may be dismissed for failure to state a claim upon which relief may be granted. Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. A complaint must plead enough facts to state a claim to relief that is plausible on its face. A claim is plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

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

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

When evaluating a motion to dismiss, the court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party. Courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on *Fed. R. Civ. P. 12(b)(6)* motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

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

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

HN3[] **Judges, Discretionary Powers**

If a court does dismiss a complaint for failure to state a claim, it should freely give leave to amend when justice so requires. *Fed. R. Civ. P. 15(a)(2)*. A court nevertheless has discretion to deny leave to amend due to undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment.

Antitrust & Trade Law > Sherman Act > Claims

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

HN4[] **Sherman Act, Claims**

The Sherman Act, 15 U.S.C.S. § 1, forbids competitors from entering agreements that unreasonably restrain trade.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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

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

HN5[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Two forms of analysis may be applied to determine whether a restraint on trade is unreasonable. The rule of reason is the presumptive or default standard, and it requires the antitrust plaintiff to demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive. Some types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for pro-competitive benefit, that they are deemed unlawful per se. Per se treatment is reserved for conduct that is manifestly anticompetitive and without any redeeming virtue. The U.S. Supreme Court has expressed reluctance to adopt per se rules where the economic impact of certain practices is not immediately obvious.

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

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

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

HN6[] Relevant Market, Geographic Market Definition

The rule of reason requires Plaintiffs to plead a relevant market impacted by Defendants' anticompetitive conduct. A relevant market includes both a geographic market and a product market. The product market must encompass the product at issue as well as all economic substitutes for the product. Economic substitutes are the goods and services that have reasonable interchangeability of use or cross-elasticity of demand with the product in question. This standard ensures that the relevant market includes all sellers or producers who have actual or potential ability to deprive each other of significant levels of business. Failure to plead a relevant market is grounds to dismiss.

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

HN7[] Relevant Market, Product Market Definition

Submarkets may constitute product markets for antitrust purposes if they are economically distinct from the general product market. Industry or public recognition of the sub-market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors may all indicate an economically distinct submarket.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

HN8[] Attempts to Monopolize, Elements

An antitrust plaintiff who successfully pleads a relevant market must also allege that the defendant has power within that market. Once a relevant market has been pled, market power can be demonstrated by evidence that the defendant owns a dominant share of the relevant market and that there are significant barriers to entry and existing competitors lack the capacity to increase their output in the short run. Alternatively, direct evidence of the injurious exercise of market power, such as supra-competitive prices and restricted output, may be an adequate substitute for elaborate market analysis.

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

HN9[] Scope, Monopolization Offenses

A price differential alone is insufficient to establish an economically distinct sub-market for antitrust purposes.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN10[] Standing, Requirements

But parallel pricing alone does not demonstrate collusion for an antitrust claim, even, or especially, when market participants stand to benefit from reacting to each other's decisions or similar market pressures.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN11[] **Cartels & Horizontal Restraints, Price Fixing**

Interdependence, however, does not entail collusion for purposes of an antitrust claim, as interdependent firms may engage in consciously parallel conduct through observation of their competitors' decisions, even absent agreement.

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Judges: CHARLES R. BREYER, United States District Judge.

Opinion by: CHARLES R. BREYER

Opinion

[*973] ORDER RE: DEFENDANTS' MOTIONS TO DISMISS

Consumers and auto dealers ("IPPs" and "DPPs," respectively) have filed two related consolidated class actions against the five leading German car manufacturers—Audi AG, BMW AG, Daimler AG, Porsche AG, and Volkswagen ("VW") AG—and their American subsidiaries. Plaintiffs allege that Defendants colluded to restrain competition in violation of the Sherman Act and various state laws. Last June, this Court granted Defendants' joint motion to dismiss without prejudice, concluding that Plaintiffs' allegations were insufficient to state **[**21]** a claim. IPPs and DPPs both filed amended complaints. IPPs have narrowed their focus, zeroing in on an alleged agreement to standardize the dosage rate and tank sizes for the substance AdBlue. DPPs continue to allege a broad conspiracy, now styled as a "no arms race" agreement to divide market share by limiting brand differentiation and technical innovation. Neither effort is sufficient to plead Sherman Act violations or Plaintiffs' related state law claims. Both complaints are dismissed without prejudice.

I. BACKGROUND

On June 17, 2019, this Court granted without prejudice Defendants' initial joint motion to dismiss. See generally Order re MTD (dkt. 387). The initial consolidated complaints alleged that Defendants agreed to "slow[] down the pace of innovation," reducing the quality of their cars. Id. at 1-2. But Plaintiffs provided only two specific examples. The first was an alleged agreement that soft-top convertibles should only open or close at speeds under thirty-one miles per hour. Id. at 2. The second example was a series of alleged agreements on the size of AdBlue tanks (AdBlue is a substance that breaks emissions from diesel engines down into less harmful compounds). Id. at 2-3. These allegations (like **[**22]** many in the initial complaints) were based on reports of investigations by the European Commission's competition department ("ECC") and Germany's Federal Cartel Office into a possible antitrust cartel among Defendants. Id. at 3. Plaintiffs also relied on VW and Daimler's proffers to the ECC as part of that agency's leniency program. Id. VW's proffer admitted agreements amongst the defendants about vehicle development, costs, suppliers and markets, discussions about vehicle development, "exchange of . . . sensitive technical data," jointly established "technical standards" and agreements to use "only certain technical solutions," and the possibility that Defendants' actions may have violated cartel law. Id.

This Court rejected Plaintiffs' allegations of a "'de facto whole car conspiracy' to reduce innovation." Id. at 13. It concluded that the two actual examples of agreement "relate[d] to niche vehicle features" and could not support Plaintiffs' theory of a conspiracy to reduce innovation across the board. Id. It also rejected the significance of VW and Daimler's proffers to European antitrust authorities, finding the admissions "too general and too vague to plausibly support the broad agreement to reduce **[**23]** innovation that Plaintiffs allege." Id. at 13-15. The investigations by European antitrust authorities were also unhelpful, because it was "unknown whether the investigation[s] w[ould] result in indictments or nothing at all." Id. at 15 (citing *In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007)*). Similarly, "[a]llegations about how Defendants used working groups and trade associations to further their 'whole car conspiracy'" lacked crucial details such **[*974]** as "what was agreed to in these meetings." Id.

This Court rejected several other alleged agreements as inadequately pled. Relevant here, it concluded that Plaintiffs had not adequately alleged injury from a purported agreement to "coordinate . . . purchases of car parts and steel," because such an agreement was most likely to have lowered the cost of steel and therefore the prices paid by Plaintiffs. Id. at 17-18 (citing Thomas A. Piraino, Jr., A Proposed Antitrust Approach to Collaborations Among Competitors, *86 Iowa L. Rev. 1137, 1178 (2001)*). Although DPPs alleged they were harmed because "Defendants pocketed the cost savings and did not pass along a single cent to the Dealer Plaintiffs," they failed to allege that Defendants either agreed to "pocket[] the cost savings" or that it was otherwise wrongful for them to do so. Id. at 18.

Finally, this Court dismissed **[**24]** IPPs' various state law claims, because "[t]he factual bases and theories of injury for these claims [were] the same as those for the Sherman Act claims." Id. at 19.

Both IPPs and DPPs filed amended complaints. See IPP Compl. (dkt. 391); DPP Compl. (dkt. 392). The IPP Complaint focuses on an alleged decade-long conspiracy to limit the development and implementation of certain features of diesel emissions control systems. IPP Compl. ¶¶ 3-4. It alleges Defendants agreed to standardize the rate at which AdBlue would be used in their diesel vehicles and the size of those vehicle's AdBlue tanks. Id. ¶ 119. These agreements allegedly occurred during various meetings and in follow-up communications between Defendants' managers, beginning in 2006. See, e.g. id. ¶¶ 129-31, 133, 135, 142, 156-57.

As before, IPPs' allegations rely heavily on the ECC's investigation. In particular, IPPs point to an ECC press release, issued after briefing on the previous motions to dismiss, "announcing that it had sent a Statement of Objections to the Defendant parent companies . . . that reflected the ECC's current view that the Defendants had in fact violated ***antitrust law*** by participating in a collusive scheme 'to restrict **[**25]** competition on the development of technology to clean the emissions of petrol and diesel vehicles.'" Id. ¶ 150. The Statement of Objections asserts that Defendants "coordinated their strategies" on the size of AdBlue tanks and the rate at which AdBlue would be used in diesel vehicles. Id. The IPP Complaint also relies on Daimler and VW's leniency proffers. See id. ¶¶ 112-13.

The DPP Complaint builds on the alleged AdBlue agreements to plead a "no arms race" conspiracy, whose object was ostensibly to ensure "that Defendants would not compete against each other on certain technological innovations to gain market share against each other." DPP Compl. ¶ 109.

DPPs offer various allegations besides the AdBlue agreements to support the purported "no arms race" conspiracy. They allege additional agreements on parking brakes, convertible tops, and particle filters, id. ¶ 157, and that Defendants' failure to meaningfully invest in electric vehicles is another example of the "no arms race" principle at work, id. ¶ 254. They point to examples of Defendants updating or refreshing similar vehicle lines around the same time as additional evidence of collusion. Id. ¶¶ 199-200.

The DPP Complaint also **[**26]** expands on the previously alleged steel-purchasing agreement. DPPs describe a scheme in which Defendants negotiated a baseline price with steel producers and then agreed to a standardized purchase price index on top of the baseline, which accounted for fluctuations **[*975]** in the cost of raw materials. Id. ¶ 161.

DPPs also allege that Defendants prevented dealerships from differentiating their vehicles based on price by setting the highest possible retail price (the MSRP) unusually close to the lowest possible retail price (the inventory price). Id. ¶¶ 204-11. The DPP Complaint alleges that additional economic evidence, including pricing information and Defendants' relative market shares over time, demonstrates the existence of a successful market allocation conspiracy. Id. ¶¶ 192-98. Finally, DPPs point to various "plus factors" that ostensibly establish that Defendants had the motive or opportunity to collude. Id. ¶¶ 181-89.

In the alternative, DPPs allege that the AdBlue agreement, id. ¶ 250, agreement not to develop electric vehicles, id. ¶ 254, and steel-purchasing agreements, DPP Opp'n (dkt. 419) at 5 n.6, each constitute Sherman Act violations regardless of whether the "no arms race" **[**27]** conspiracy is adequately pled.

Defendants jointly moved to dismiss the IPP and DPP Complaint. See Joint MTD (dkt. 409). VW and BMW also filed individual motions to dismiss. See VW MTD (dkt. 411); BMW MTD (dkt. 410).

II. LEGAL STANDARD

HN1[] Pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a complaint may be dismissed for failure to state a claim upon which relief may be granted. Dismissal may be based on either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Godecke v. Kinetic Concepts, Inc., 937 F.3d 1201, 1208 (9th Cir. 2019)*. A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 697, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. at 678*.

HN2[] When evaluating a motion to dismiss, the Court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)*. "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on *Rule 12(b)(6)* motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court **[**28]** may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)*.

HN3[] If a court does dismiss a complaint for failure to state a claim, it should "freely give leave [to amend] when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. A court nevertheless has discretion to deny leave to amend due to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Leadsinger, Inc. v. BMG Music Pub., 512 F.3d 522, 532 (9th Cir. 2008)* (citing *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962))*.

III. DISCUSSION

As explained below, the Amended Complaints fail to plausibly allege any Sherman Act violation that can be traced to a cognizable injury suffered by Plaintiffs. This **[*976]** conclusion is equally fatal for IPPs' state law claims, which depend on the same factual allegations and theories of injury. See Order re MTD at 19. It is therefore unnecessary to consider Defendants' other arguments against the Sherman Act claims, including that those claims are time-barred, Joint MTD at 41-47, and that they are barred by the *Foreign Trade Antitrust Improvements Act*, id. at 35-41. It is also unnecessary to address various arguments specific to certain defendants, see generally Volkswagen MTD; BMW MTD, or state law claims, see Joint MTD at 47-54.

A. AdBlue [29] Conspiracy**

Both IPPs and DPPs allege a conspiracy to standardize certain features related to AdBlue, which ostensibly reduced the quality of Defendants' diesel vehicles. See IPP Compl. ¶¶ 3-4; DPP Compl. ¶ 250. This section first addresses whether Plaintiffs adequately allege the existence of agreements related to AdBlue, and then, concluding that they do, analyzes whether those allegations are sufficient to plead claims under the Sherman Act.

1. Whether an agreement is adequately alleged.

HN4[] *Section 1 of the Sherman Act* forbids competitors from entering agreements that unreasonably restrain trade. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. The Amended Complaints plausibly allege that Defendants agreed on "the rate at which AdBlue pollution treatment solution would be used in their diesel-powered vehicles, as well as the size of the vehicles' AdBlue tanks which determined the range that those vehicles could travel before needing to be refilled with AdBlue." IPP Compl. ¶ 119. Both Amended Complaints contain detailed factual allegations describing Defendants' "coordination" of AdBlue dosage rate and tank size, including the content of Defendants' agreements (including direct quotes from allegedly criminal negotiations), see, e.g. id. ¶ 133, **[**30]** the positions of the conspirators within Defendants' corporate hierarchies, see, e.g. id. ¶ 135, and where and when the agreements were made, see, e.g. id. ¶¶ 130-31; see also DPP Compl. ¶¶ 111-39. "[W]ho, did what, to whom (or with whom), where, and when" is adequately alleged.[1] *In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1194 n.6 (9th Cir. 2015)* (quoting *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008))*.

Plaintiffs argue that these allegations are supported by the ECC's Statement of Objections, which concluded that "Defendants coordinated their strategies on the amount of pollution treatment solution (such as AdBlue) that would be used in diesel-powered German Diesel Vehicles, as well as the size of the vehicles' AdBlue tanks and the range the vehicles could travel before needing to be refilled with AdBlue." IPP Compl. ¶ 150. Defendants contest the relevance of the Statement of Objections, pointing out that this Court has previously recognized government investigations **[*977]** typically "carry 'no weight in pleading an antitrust conspiracy,' for it is 'unknown whether the investigation[s] will result in indictments or nothing at all.'" See Order re MTD at 15 (quoting *In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007))*. Plaintiffs respond that they are now relying on the ECC's Statement of Objections, which is comparable **[**31]** to an indictment. IPP Opp'n at 13-14.

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[1] The Amended Complaints also allege various "plus factors" ostensibly supporting their allegations of unlawful anticompetitive conduct. See IPP Compl. ¶ 176; DPP Compl. ¶ 181. Because Plaintiffs plead direct evidence of agreements on AdBlue-related features, it is unnecessary to evaluate whether the plus factors, when combined with parallel conduct, would adequately allege the existence of such collusion. See *B & R Supermarket, Inc. v. Visa, Inc., No. 16-01150 WHA, 2016 U.S. Dist. LEXIS 136204, 2016 WL 5725010, at *6 (N.D. Cal. Sept. 30, 2016)* ("An impermissible conspiracy can be alleged through either direct or circumstantial evidence."). The plus factors' relevance vis a vis other alleged anticompetitive agreements is discussed below.

It is unnecessary to determine the significance of the Statement of Objections in this proceeding. Even assuming, without deciding, that the analogy to an indictment is sound, and that an indictment is more significant than a mere investigation, the Statement of Objections adds little to Plaintiffs' case. It establishes agreements on AdBlue tank size and dosing rates. But as explained above, those agreements are already established by Plaintiffs' other well-pled factual allegations. And while the Statement of Objections may support the conclusion that those agreements violated European cartel law, what matters here is whether Plaintiffs' have met the requirements for pleading a violation of the Sherman Act.[2] That requires more than pointing to the findings of European authorities regarding European law. Similarly, it remains the case that Daimler and Volkswagen's leniency applications "are too general and too vague" to plausibly allege that those defendants violated American law. See id. at 13-15.

While the AdBlue agreements are plausibly alleged, Plaintiffs do not adequately plead the existence of a broader conspiracy "to restrict the development of **[**32]** [Defendants'] vehicles' diesel emissions control systems and not to compete on quality." IPP Opp'n at 16. Although this purported conspiracy is narrower than a "'de facto whole car conspiracy' to reduce innovation," Order re MTD at 12, it remains broader than the Amended Complaints' well-pled allegations can support. Every agreement alleged with any amount of detail dealt with AdBlue tank size and dosing rate. See IPP Compl. ¶¶ 119-42; DPP Compl. ¶¶ 102-09, 116-36, 139. Just as agreements on convertible roofs and AdBlue tanks could not plausibly support a "whole car" conspiracy, see Order re MTD at 12-13, agreements on AdBlue tank size and dosing rate alone do not plausibly support the existence of a broader conspiracy covering Defendants' entire diesel emissions control system.

It is therefore necessary to determine whether the allegations of an AdBlue conspiracy adequately state a Sherman Act claim. They do not, because Plaintiffs have failed to plead facts showing that the AdBlue agreements were an unreasonable restraint on competition.

2. Whether Plaintiffs adequately allege that the AdBlue agreements constituted an unreasonable restrain on trade in violation of the Sherman Act.

[33]** ***HN5***[] Two forms of analysis may be applied to determine whether a restraint on trade is unreasonable. "The rule of reason is the presumptive or default standard, and it requires the antitrust plaintiff to 'demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive.'" *California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1132-33 (9th Cir. 2011)* (quoting *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006))*. "Some types of restraints, however, have such predictable **[*978]** and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. Per se treatment is reserved for conduct that is "manifestly anticompetitive" and without "any redeeming virtue." *Leegin, 551 U.S. at 886*. "The Supreme Court has 'expressed reluctance to adopt per se rules where the economic impact of certain practices is not immediately obvious.'" *Safeway, 651 F.3d at 1133* (quoting *Dagher, 547 U.S. at 5*).

IPPs argue the AdBlue agreements constitute a per se Sherman Act violation, because an agreement to reduce quality is tantamount to output reduction. IPP Opp'n at 28-29. This Court's previous order endorsed the logic of this theory, though not its underlying assumption that the AdBlue agreements necessarily constituted agreements to reduce quality. Order re MTD at 12. In the alternative, IPPs suggest that even if "Defendants' misconduct does not fit into established per se categories," it is of a type which "always or almost always tend[s] to restrict competition and decrease output."[3] IPP Opp'n at 29.

These arguments fail, because it is not "immediately obvious" that the AdBlue agreements had an exclusively anticompetitive impact. *Safeway, 651 F.3d at 1133*. As this Court recognized in its previous order, an agreement to

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[2] These requirements include showing either a per se Sherman Act violation or satisfying the rule of reason. See infra Section III.A.2.

[3] DPPs do not offer an independent argument for treating the AdBlue agreement as per se unlawful. See DPP Opp'n at 17-18.

use only certain technical solutions may have procompetitive benefits, even **[**34]** if it reduces a product's quality in other respects. Order re MTD at 14. For example, standard setting may "serve[] . . . useful ends, such as protecting consumers from inferior goods, increasing compatibility among products that must be interchangeable with the products of other manufacturers, or focusing customer comparison on essential rather than nonessential differences." Id. (internal quotations and citations omitted). Similarly, "[c]ollaboration for the purpose of developing and commercializing new technology can result in economies of scale and integrations of complementary capacities that reduce costs, facilitate innovation, eliminate duplication of effort and assets, and share risks that no individual member would be willing to undertake alone." *Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1335 (Fed. Cir. 2010)*. Because procompetitive effects are possible, per se treatment is inappropriate for joint ventures and standard setting. See *Leegin, 551 U.S. at 886*.

This logic applies to the alleged AdBlue agreements. The well-pled allegations in the Amended Complaints describe agreements to abide by certain technical standards and adopt the same or similar technical solutions. Plaintiffs' effort to transmogrify those agreements into output restrictions or pricing agreements **[**35]** is strained. See, e.g. IPP Compl. ¶ 5. And their argument that the standard setting and joint venture cases are inapplicable because the alleged conspiracy does not resemble other standard setting organizations, see IPP Opp'n at 27-28; DPP Opp'n at 10-11, misses the point. Defendants do not need to demonstrate that the alleged misconduct fell into a narrow category of behavior governed by the rule of reason. The opposite is true—per se treatment is reserved for narrowly defined categories of collusion that clearly have no redeeming virtues. *Leegin, 551 U.S. at 886*. The question is not whether the alleged AdBlue conspiracy resembles other standard **[*979]** setting groups. It is whether its anticompetitive economic impact is so obvious that this type of coordination should be per se illegal. *Dagher, 547 U.S. at 5*.

The Amended Complaints' own allegations demonstrate that the answer to that question is no, because the AdBlue agreements may have had procompetitive effects. Plaintiffs acknowledge that the standards Defendants agreed to were beneficial in some respects. Having fewer AdBlue injections reduced engine clogging and the risk of damage to the vehicle. IPP Compl. ¶ 155. Smaller AdBlue tanks took up less space, leaving more room for **[**36]** other features. DPP Compl. ¶ 115. True, Plaintiffs also plead that these benefits came at a cost—increased NOx emissions. See id. ¶ 115. But Plaintiffs' own allegations demonstrate that the trade-off did not necessarily result in vehicles of inferior quality. Defendants may have agreed to a standard that they believed would ultimately benefit all consumers. This is not to say that the agreements necessarily improved the quality of Defendants' diesel vehicles or were clearly not unreasonable. It simply demonstrates that whether the agreements were reasonable or not should be assessed under the rule of reason.

And, contrary to Plaintiffs' position, which framework to apply can be determined at the pleading stage. It is true that in some cases courts have concluded that which framework applied was a fact-bound determination that could not be determined on the pleadings. See *Kamakahi v. Am. Soc'y for Reprod. Med., No. C 11-cv-01781, 2013 U.S. Dist. LEXIS 61250, 2013 WL 1768706, at *8 (N.D. Cal. Mar. 29, 2013)*. But as with any other claim, a Court can determine that a complaint fails to adequately allege a per se violation of the Sherman Act. See, e.g. *Analogix Semiconductor, Inc. v. Silicon Image, Inc., No. C 08-2917 JF (PVT), 2008 U.S. Dist. LEXIS 118508, 2008 WL 8096149, at *1, *4 (N.D. Cal. Oct. 28, 2008)* (determining, on a motion to dismiss, that rule of **[**37]** reason analysis applied). That is the case here, because Plaintiffs' own allegations contradict their assertion that the AdBlue agreements necessarily lacked any procompetitive effect. It is therefore appropriate to consider whether Plaintiffs have adequately asserted Sherman Act claims under the rule of reason.

HN6[] They have not. The rule of reason requires Plaintiffs to "plead a relevant market" impacted by Defendants' anticompetitive conduct. *Hicks v. PGA Tour, Inc., 897 F.3d 1109, 1120 (9th Cir. 2018)*. A relevant market "include[s] both a geographic market and a product market." Id. The product market "must encompass the product at issue as well as all economic substitutes for the product." Id. (quoting *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008))*. Economic substitutes are the goods and services that have "reasonable interchangeability of use" or "cross-elasticity of demand" with the product in question. Id. (quoting *Newcal, 513 F.3d at 1045*). This standard ensures that the relevant market includes all "sellers or producers who have actual or potential ability to deprive each other of significant levels of business." Id. (quoting *Newcal, 513 F.3d at 1045*). Failure to plead a relevant market is grounds to dismiss. Id.

HN7[] Submarkets may "constitute product markets for antitrust purposes" if they are "economically distinct from the general **[**38]** product market." *Id. at 1121* (internal citations omitted). "[I]ndustry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors" may all indicate **[*980]** an economically distinct submarket. Id. (internal citations omitted).

HN8[] A plaintiff who successfully pleads a relevant market must also allege "that the defendant has power within that market." *Newcal, 513 F.3d at 1044-45*. Once a relevant market has been pled, market power can be demonstrated by evidence "that the defendant owns a dominant share of [the relevant] market" and "that there are significant barriers to entry and . . . existing competitors lack the capacity to increase their output in the short run." Id. Alternatively, "direct evidence of the injurious exercise of market power," such as "supracompetitive prices" and "restricted output," may be an adequate substitute for "elaborate market analysis." *FTC v. Indiana Fed. of Dentists, 476 U.S. 447, 461, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*.

Plaintiffs efforts to plead a relevant market are facially deficient. IPPs do not argue that they have pled a relevant product market, see IPP Opp'n at 29, nor could they. To the extent the IPP **[**39]** Complaint suggests that "German Diesel Vehicles" are a cognizable submarket, that suggestion is belied by IPPs' own allegations that Defendants were driven to collude on "clean diesel" technology by competition from Japanese hybrids. IPP Compl. ¶ 84; see also *Apple Inc. v. Psystar Corp., 586 F. Supp. 2d 1190, 1199 (N.D. Cal. 2008)* (complaint that acknowledged that Apple computers running Mac OS faced competition, but which did not include those competitors in its market definition or explain why they should be excluded, failed to plead a relevant market).

DPPs' efforts suffer similar flaws. Their complaint alleges a submarket of "German Luxury Vehicles." DPP Compl. ¶¶ 69-80. But again, that claim is belied by DPPs' own allegations, which acknowledge that Defendants competed with Italian, American, and Japanese brands. See DPP Compl. ¶¶ 80, 95, 130-32, 164. And even if DPPs' own allegations did not undermine their theory, "judicial experience and common sense" would. See *Hicks, 897 F.3d at 1121*. Non-German luxury cars exist (Tesla, Lexus, and Maserati all come to mind). It is implausible that national origin alone puts German automakers in a separate market from their high-end foreign rivals, or that a buyer looking at a Mercedes would not consider a Tesla if it were cheaper or **[**40]** of higher quality. DPPs rely on a supposed price premium for German cars, see DPP Compl. ¶ 72, ***HN9***[] but a price differential alone is insufficient to establish an economically distinct submarket. *Psystar Corp., 586 F. Supp. 2d at 1199*. And if anything, German automakers attempts to set themselves apart with advertising demonstrate that they were competing with non-German luxury brands. See id. ("[V]igorous advertising is a sign of competition, not a lack thereof."); see also DPP Compl. ¶ 75.

In the alternative, DPPs allege a more plausible submarket of luxury vehicles. DPP Compl. ¶ 80 n.15. But these allegations fail for a different reason: DPPs have not alleged facts to support a finding that Defendants have market power in the luxury car market writ large. The only evidence they offer in support of this claim is their estimate that Defendants enjoy approximately a 50% share "of the broader luxury car market." DPP Opp'n at 23 n.17. But "[c]ourts generally require a 65% market share to establish a prima facie case of market power." *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1206 (9th Cir. 1997)*.

Nor have DPPs "alleged actual adverse effects," see DPP Opp'n at 23 n.17, that would excuse their failure to show a relevant market and market power. DPPs do **[*981]** not support this claim with any citation **[**41]** to the allegations in their complaint, so it is unclear what actual adverse effects they believe they have alleged. See id. To the extent DPPs argue that the AdBlue agreements were tantamount to price fixing or output restrictions, those claims are inadequately alleged for the same reasons that Plaintiffs have failed to plead a per se Sherman Act violation.

The failure to plead a relevant market is fatal to Plaintiffs' contention that the AdBlue agreements state a cognizable Sherman Act claim. It is equally fatal to DPPs' alternative theories of liability, which fail to plausibly allege per se

Sherman Act violations for the reasons explained below. Indeed, DPPs' other allegations of anticompetitive agreements fail for an additional reason besides the failure to plead a relevant market. DPPs fail to plausibly allege either the existence of or injury from those agreements.

B. "No Arms Race" Conspiracy

DPPs allege that "[t]he operating principle of [Defendants'] conspiracy was 'no arms race,' which was a euphemism for avoiding competition for market share on the basis of technological developments and brand differentiation." DPP Compl. ¶ 10. This theory fails for the same reason as its very **[**42]** similar predecessor, the "whole car conspiracy" rejected by this Court in its previous order. See Order re MTD at 12-17. Once again, DPPs attempt to plead a broad conspiracy with untenably narrow allegations. This Order proceeds by explaining why each of DPPs' several categories of allegations fails to plausibly demonstrate a "no arms race" conspiracy, even when considered as a whole.

1. Agreements to limit technological innovation.

DPPs' chief evidence of the "no arms race" conspiracy is the AdBlue agreement discussed above. The Court previously rejected agreements on AdBlue tank size as insufficient to plead a similarly broad "de facto whole car conspiracy," even in combination with a second example of collusion on technical standards. Id. at 13. DPPs offer no real argument for a different result here. Their position is that they do not need to "argue that all, or even most, of the class vehicles' components and features were subject to the conspiracy," because they "contend that Defendants refrained from innovating or improving features on the class vehicles in such a way that their respective market shares would remain the same." DPP Opp'n at 10. But DPPs' Complaint and briefing offer no **[**43]** explanation for why an agreement to standardize what the Court has previously described as a "niche vehicle feature[]" would be adequate to maintain each Defendants' market share. Order re MTD at 13.

DPPs suggest Defendants reached agreements on several other vehicle features, such as "particulate filters, convertible roofs, and parking brakes." DPP Compl. ¶ 157. Most of these allegations lack any detail at all. The DPP complaint does not allege what was agreed to regarding parking brakes, who agreed to it, or when and where such an agreement took place. And it alleges only that Defendants agreed they would not allow convertible roofs to open and close at speeds above thirty-one miles per hour, an allegation the Court has previously rejected as insufficient to plead a broad "whole car" conspiracy, even combined with allegations of the AdBlue agreements. Order re MTD at 13.

Only the agreement on particle filters is supported by any factual allegations regarding "who, did what, to whom (or with whom), where, and when." See *In re Musical Instruments, 798 F.3d at 1194 n.6*. DPPs allege that "[b]eginning in 2009, Defendants also entered into agreements to **[*982]** avoid, or at least to delay, the introduction of particle filters in their new (direct **[**44]** injection) gasoline passenger car models between 2009 and 2014." DPP Compl. ¶ 137. But DPPs admit these "filters were used predominantly in passenger vehicles sold in Europe." Id. ¶ 137 n.68. The alleged agreement on an additional niche feature predominantly used in cars irrelevant here does not plausibly support the existence of a conspiracy meant to divide the American market into static shares.

2. Steel-buying conspiracy.

DPPs allege that Defendants unlawfully agreed not to compete for the lowest price on steel. DPP Compl. ¶¶ 158-65. Even assuming the existence of an unlawful conspiracy regarding steel prices, this allegation does little to support the "no arms race" theory.[4] DPPs insist that by avoiding competition on the cost of steel, Defendants helped ensure their respective shares of the market would remain static. Id. ¶ 165. Just as it is implausible to infer

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[4] Whether the steel-buying conspiracy can stand as its own Sherman Act violation is discussed below.

that standardizing a few niche technical features would enable Defendants to keep their respective market shares stable, it is unlikely that adopting similar formulas for the price of a single raw material (albeit an important one) would be enough to keep shares of the American market in an agreeable equilibrium. The leap **[**45]** from steel prices to overall market allocation is not "plausible on its face," even considered alongside DPPs' other allegations. See *Twombly, 550 U.S. at 570*.

3. Electric cars.

As explained in greater detail below, the alleged conspiracy to avoid developing electric vehicles has an obvious innocent explanation posited by the DPP Complaint itself. And DPPs do not even allege that all Defendants' conduct was parallel with respect to this alleged conspiracy. See infra Section III.C. These allegations add little or nothing to the "no arms race" conspiracy.

4. Parallel conduct.

Other allegations amount to little more than parallel conduct with obvious innocuous explanations. DPPs' allege that Defendants "coordinated major product updates and refreshes," and provide three examples of similar product lines being updated or refreshed within a year or two of each other. DPP Compl. ¶ 199-200. But as Defendants point out, the fact that they all released new products at similar times tends to suggest that they were competing with each other, rather than the opposite. Joint Reply (dkt. 425) at 10; see also *In re Musical Instruments, 798 F.3d at 1193* ("In an interdependent market, companies base their actions in part on the anticipated reactions of their competitors."). **[**46]** Allegations that Defendants' prices remained mostly constant relative to each other is equally uninformative, DPP Compl. ¶ 194-98, because firms may lawfully set prices in reaction to their competitors, *In re Musical Instruments, 798 F.3d at 1193*.

Relatedly, DPPs claim that "Defendants prevented dealers from using sales price to upset the status quo." DPP Opp'n at 11. Their complaint explains that Defendants set their vehicles' maximum price (the MSRP) and minimum price (the inventory price) unusually close together, reducing variation in the final sales price. DPP Compl. ¶¶ 204-11. DPPs do not claim that such "manipulation," standing alone, would be unlawful, and in fact acknowledge **[*983]** that "[u]nder the automotive franchise system, Defendants have absolute and sole control over [wholesale] prices" and the MSRP. Id. ¶¶ 205, 210. But the DPP Complaint also does not allege any unlawful collusion in setting wholesale prices and MSRPs, other than a half-hearted claim that it is "highly likely that the manufacturers coordinated the setting of dealer wholesale prices and MSRP." Id. at 204. Apparently, this is because all Defendants set wholesale prices and MSRPs unusually close together and stood to benefit from the thin margins. See id. ¶¶ 207-09, **[**47]** 211. ***HN10***[] But parallel pricing alone does not demonstrate collusion, even (or especially) when market participants stand to benefit from reacting to each other's decisions or "similar market pressures." *In re Musical Instruments, 798 F.3d at 1193*.

Because the parallel conduct alleged in the DPP Complaint could just as easily (or even more plausibly) reflect legitimate conscious parallelism as opposed to collusion, it does not support their "no arms race" theory. *Id. at 1194* ("Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a *§ 1* violation." (internal quotation marks and citations omitted)).

5. Plus factors.

Nor is this a case where "plus factors . . . inconsistent with unilateral conduct" can push DPPs' otherwise inadequate allegations over the line. See id. ("This court has distinguished permissible parallel conduct from impermissible conspiracy by looking for certain 'plus factors.'"). Most of DPPs' plus factors go either to Defendants' alleged "strong motive to conspire" or the susceptibility of the relevant market to collusion. See DPP Compl. ¶¶ 182, 185-89. The Ninth Circuit has rejected comparable arguments, noting **[**48]** that "alleging 'common motive to conspire' simply restates that a market is interdependent (i.e., that the profitability of a firm's decisions regarding pricing depends on competitors' reactions)." *Musical Instruments, 798 F.3d at 1194-95*. ***HN11***[] "Interdependence, however, does not entail collusion, as interdependent firms may engage in consciously parallel conduct through observation of their competitors' decisions, even absent agreement." *Id. at 1195*. DPPs' allegations that the market was susceptible to collusion or gave Defendants a motive to conspire reduce to allegations that the market is interdependent,[5] and are therefore of little help in pleading an antitrust conspiracy. See DPP Compl. ¶¶ 182, 185-89.

DPPs allege that "Defendants had and took advantage of literally thousands of opportunities to conspire through secret meetings" and during trade meetings. DPP Compl. ¶ 183. This Court has previously rejected the significance of similar allegations because Plaintiffs failed to "identify what was agreed to in the[] **[*984]** meetings." Order re MTD at 16. Once again DPPs do not allege what was agreed to during the alleged meetings, see DPP Compl. ¶ 183, aside from the purported collusion on certain niche features discussed above.

Defendants' **[**49]** ostensible actions against self-interest are similarly redundant of the insufficient allegations of agreement. DPPs allege "Defendants engaged in conduct inconsistent with their independent self-interests by, among other things, revealing to each other proprietary technological information and trade secrets." Id. ¶ 184. But the only such revelations alleged in any kind of detail would have to be related to the agreements on AdBlue and particle filters. Those agreements do not plausibly establish a "no arms race" conspiracy for the reasons discussed above.

Finally, DPPs allege "economic . . . outcomes" supposedly inconsistent with independent action. See *In re Musical Instruments, 798 F.3d at 1194* (defining "plus factors" as "economic actions and outcomes that are largely inconsistent with unilateral action but largely consistent with explicitly coordinated action"). They allege that Defendants' overall market share grew even as each Defendant's market share remained stable relative to the other alleged conspirators, demonstrating the success of the conspiracy. DPP Compl. ¶¶ 192-93. But although DPPs conclusorily state that "[t]he stability of Defendants' market shares is economically consistent with the existence of a market **[**50]** allocation agreement," id. ¶ 193, they make no effort to allege that it is inconsistent with conscious parallelism or some other innocent explanation. And they undermine their own argument by acknowledging that the inter-Defendant market was not, in fact, completely static. Id. At best these allegations provide only mild support for DPPs' alleged conspiracy.

In sum, DPPs' narrow allegations of agreements to standardize niche features or prices for steel cannot support the wide-ranging conspiracy they attempt to plead. Additional allegations of parallel conduct and plus factors are too speculative and conclusory to cover the gap.

C. Electric Car Conspiracy

In the alternative, DPPs plead a narrower conspiracy not to engage in an arms race to develop electric vehicles. Once again, this parallel conduct is insufficient to support an antitrust claim, because it has a perfectly innocuous explanation. Indeed, that explanation is provided by the DPP Complaint itself. Defendants did not invest in electric vehicles because they "had already invested heavily in diesel engines." DPP Compl. ¶ 112. That suggests it is just

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[5] One arguable exception is DPPs' allegation that "commonality of suppliers increased transparency into cost functions of each of the firms within the German Luxury Car Market, providing mechanisms to police the cartel." DPP Compl. ¶ 185. Since this allegation goes to the ease of enforcing collusive agreements, rather than the extent to which a firm's pricing decisions will be driven by competitors' behavior, it may be distinguishable from allegations that the market is interdependent. However, by facilitating "observation of their competitors' decisions," the alleged "transparency" would facilitate "conscious parallelism" by Defendants just as much as unlawful agreement. See *In re Musical Instruments, 798 F.3d at 1195*. This allegation, like others about Defendants' motive or ability to successfully collude, is equally consistent with lawful behavior as an anticompetitive conspiracy.

as if not more plausible that Defendants "arrive[d] at identical decisions independently, **[**51]** [because] they [were] cognizant of—and reacting to—similar market pressures." *In re Musical Instruments, 798 F.3d at 1193*.

The plausibility of a conspiracy not to invest in electric vehicles is further undercut by the DPP Complaint's admission that Audi, BMW, and Porsche did produce electric and hybrid vehicles in 2013 and 2014. DPP Compl. ¶ 144. The DPP Complaint tries to reconcile this fact with the claimed conspiracy by alleging that the electric and hybrid vehicles produced were not advanced enough. Id. This simply underscores the weakness of their theory. DPPs are reduced to arguing that Defendants must have unlawfully agreed to underinvest in electric vehicles, because absent such an agreement they would have made a better electric vehicle. Absent direct evidence of agreement, or more robust allegations of plus factors than the ones discussed above, this (barely) parallel conduct cannot support an antitrust claim.

[*985] D. Steel-Buying Conspiracy

This Court has previously considered DPPs' allegations that "the five leading German car makers agreed to coordinate their purchases of . . . steel." Order re MTD at 17; see also DPP Compl. ¶¶ 158-65. In its prior order, the Court concluded that even if Defendants had agreed on the price **[**52]** of steel, "the prices they paid for those inputs would presumably have dropped," which "would likely have benefited car purchasers, not harmed them." Order re MTD at 17. DPPs seek to avoid a similar result this time around by alleging that Defendants colluded to pay higher prices, because their goal was to pay the same price for steel as their competitors, even if that meant everyone paid more. According to the DPP Complaint, this allowed Defendants to avoid competing for market share based on steel prices and assured they could pass any price increase on to their customers. DPP Compl. ¶¶ 161-65.

This theory is not supported by DPPs' factual allegations. Those allegations describe a scheme in which each Defendant agreed with the steel manufacturers on a baseline price for steel. DPP Compl. ¶ 161. Additionally, and apparently unlawfully, Defendants agreed to a standardized "purchase price 'index' on top of the baseline price to account for fluctuations in the market for raw materials—this element of the cost was calculated at shorter intervals and, if the index rose or fell, the automobile manufacturers paid more or less, respectively." Id. This arrangement accommodated the steel manufacturers' **[**53]** need to account for short term fluctuations in the cost of raw materials, but also Defendants' desire for a "fixed, predictable [steel] cost[]" that would allow them "to set car model prices for the year." Id. ¶ 160.

Other than conclusory claims to the contrary, DPPs never adequately explain why this agreement would raise the prices they paid to Defendants. Although the index price was additional to the baseline price, that does not mean it increased the price Defendants paid for steel. Absent the baseline/index formula, Defendants presumably would have paid a single, higher price that accounted for the cost of raw materials. See id. The July 12, 2018, Bundeskartellamt press release DPPs seek to rely on is unhelpful, because it discusses only the steel manufacturers—it does not even mention Defendants, let alone support the allegation that they agreed to pay higher prices for steel than they would have absent the collusion. See DPP Opp'n at 14 n.10 (citing Bundeskartellamt, Press Release, Bundeskartellamt imposes first fines totaling approx. 205 million euros on special steel companies, (July 12, 2018) http://tinyurl.com/seeloqn).[6]

Finally, DPPs' allegations that Defendants offset rising **[**54]** steel costs by increasing prices do nothing to support their theory of injury from the alleged agreement on steel purchases. DPP Compl. ¶ 162-65. Notably, DPPs do not allege that the increased prices were caused by Defendants' agreement. To the contrary, they acknowledge that Japanese automobile manufacturers were also impacted by the alleged price increase. Id. ¶ 164.

DPPs allege that Daimler was able to offset higher steel costs by raising prices and that as a group Defendants maintained higher margins than their Japanese competitors. The DPP Complaint concludes these outcomes are

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[6] Because the Court has reviewed the press release's contents and finds it unhelpful, DPPs'request for judicial notice of this document is denied as moot.

inconsistent with any explanation other than collusion. Id. ¶¶ 162-65. But this bare allegation of **[*986]** collusion is belied by the DPP Complaint's factual allegations, which are more consistent with lawful conscious parallelism. DPPs allege that Daimler, discussing its willingness to raise prices, stated that it preferred to "not be the last to move forward on the pricing front, but rather on the other end." Id. ¶ 162. This suggests not an agreement to raise prices, but various firms watching their competitors' pricing decisions and adjusting their own prices in response. This type of "follow the leader" pricing **[**55]** (in which Daimler aspired to be the leader, rather than a follower) is a well-recognized form of lawful conscious parallelism. *In re Musical Instruments, 798 F.3d at 1195* ("[S]o long as prices can be easily readjusted without persistent negative consequences, one firm can risk being the first to raise prices, confident that if its price is followed, all firms will benefit.").

In sum, neither more recent press releases nor DPPs' amended pleadings change the Court's earlier conclusion (and DPPs' original contention) that the steel-purchasing agreements, even if unlawful, most plausibly led to lower prices. Order re MTD at 17; see also Original DPP Compl. (dkt. 244) ¶ 87 (alleging that the steel-purchasing agreements created "cost savings"). They have therefore failed to plead an injury resulting from this alleged agreement. See Order re MTD at 17-18 (failure to plead injury resulting from steel-buying agreements meant those allegations could not support an antitrust claim).

E. State Law Claims

This Court has previously concluded that "[t]he factual bases and theories of injury for [IPPs' various state law] claims are the same as those for the Sherman Act claims." Id. at 19. Because the Sherman Act claims were not well pled, the state law **[**56]** claims were dismissed as well. Id. IPPs do not contend that this was error, or that their state law claims should not live and die with their Sherman Act claim. See IPP Opp'n at 41, 43, 46. IPPs' state law claims are therefore dismissed without prejudice.

IV. CONCLUSION

For the foregoing reasons, the motions to dismiss are granted.[7] It is not a certainty, however, that Plaintiffs cannot allege facts sufficient to plead a relevant market or injury from the alleged steel-buying agreements. The Court thus grants them leave to amend their complaints to attempt to salvage these claims. To the extent that they choose to do so, they must file their amended complaints within **45 days** of this Order.

IT IS SO ORDERED.

Dated: March 31, 2020

/s/ Charles R. Breyer

CHARLES R. BREYER

United States District Judge

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[7] VW's motion to file under seal (dkt. 412) is also granted.

Johannessohn v. Polaris Indus.

United States District Court for the District of Minnesota

March 31, 2020, Decided; March 31, 2020, Filed

Case No. 16-CV-3348 (NEB/LIB)

Reporter

450 F. Supp. 3d 931 *; 2020 U.S. Dist. LEXIS 56107 **; 2020 WL 1536416

RILEY JOHANNESSOHN, et al., Plaintiffs, v. POLARIS INDUSTRIES, INC., Defendant.

Subsequent History: Affirmed by Johannessohn v. Polaris Indus., 2021 U.S. App. LEXIS 24887 (8th Cir. Minn., Aug. 20, 2021)

Prior History: Johannessohn v. Polaris Indus., 2017 U.S. Dist. LEXIS 99843, 2017 WL 2787609 (D. Minn., June 27, 2017)

Core Terms

consumers, heat, exhaust, damages, Plaintiffs', courts, premium, omission, unfair, causation, purchasers, summary judgment, cases, consumer protection, genuine dispute, scienter, material fact, misrepresentations, manifest, parties, state law, extraterritorially, deceptive, expert testimony, alleges, engine, causal nexus, class action, outcome-determinative, practices

LexisNexis® Headnotes

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

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

HN1[] **Deceptive & Unfair Trade Practices, State Regulation**

A federal court sitting in diversity applies the choice-of-law rules of the forum state where it sits. In determining if the Minnesota Consumer Fraud Act can apply extraterritorially, Minnesota courts apply a multistep analysis. The court first determines whether an outcome-determinative conflict exists. If a conflict exists, the court determines whether the law of both states can be constitutionally applied. If it is constitutionally permissible for the forum state to apply its laws, the court then considers five factors to determine whether to apply the forum state law.

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

HN2[] **Deceptive & Unfair Trade Practices, State Regulation**

The Minnesota Consumer Fraud Act (MCFA) prohibits the act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise. *Minn. Stat. § 325F.69, subd. 1*. For an MCFA claim based on an omission, a plaintiff must prove an omission of material fact, as well as special circumstances that trigger a duty to disclose.

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

HN3[] **Nondisclosure, Elements**

Special circumstances triggering a duty to disclose include: (a) one who speaks must say enough to prevent his words from misleading the other party; (b) one who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party; and (c) one who stands in a confidential or fiduciary relation to the other party to a transaction must disclose material facts.

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

Evidence > Types of Evidence > Circumstantial Evidence

HN4[] **Deceptive & Unfair Trade Practices, State Regulation**

Under the Minnesota Consumer Fraud Act (MCFA), a plaintiff need not prove traditional common law reliance. Rather, he or she must establish a causal nexus between the conduct alleged to violate the MCFA and the damages claimed, which can be proved by circumstantial evidence. An element of individual reliance is embedded in the causal nexus requirement because a fraudulent or misleading statement cannot by its nature cause harm unless the statement had some impact on inducing the individual plaintiff's actions.

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

Torts > Business Torts > Unfair Business Practices > Elements

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

HN5[] **Trade Practices & Unfair Competition, State Regulation**

The Unfair Competition Law (UCL) prohibits any unlawful, unfair or fraudulent business act or practice. Bus. & Prof. Code, § 17200. Because the UCL is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. To prevail on a UCL claim, a plaintiff must prove that the defendant engaged in a business practice proscribed under one of these three varieties of unfair competition, and that the plaintiff was injured as a result of the business practice.

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

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

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

HN6[] **State Regulation, Claims**

The three varieties of unfair competition—also known as the prongs of the Unfair Competition Law (UCL)—have different thresholds. Under the unlawful prong, a violation of another law is a predicate for stating a cause of action.

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

HN7[] **Trade Practices & Unfair Competition, State Regulation**

Under one line of cases, an unfair business practice occurs when that practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Consumer Protection > False Advertising > US Federal Trade Commission

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

HN8[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

A second line of cases considers the factors for unfairness set forth in section 5 of the Federal Trade Commission Act: (1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN9[] **Conspiracy to Monopolize, State Regulation**

A third line of cases holds that a plaintiff alleging an unfair business practice must show the defendant's conduct is tethered to an underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of an ***antitrust law***.

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

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

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

HN10[] **State Regulation, Claims**

Finally, a business practice is fraudulent under the Unfair Competition Law (UCL) if members of the public are likely to be deceived.

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

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

HN11[] **Trade Practices & Unfair Competition, State Regulation**

The Consumer Legal Remedies Act (CLRA) prohibits unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer. Civ. Code, § 1770(a). The CLRA defines consumer as an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes. Civ. Code, § 1761(d).

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

HN12[] **Deceptive & Unfair Trade Practices, State Regulation**

To prevail under a Consumer Legal Remedies Act (CLRA) claim, a plaintiff must show that the defendant's conduct was deceptive and that the deception caused them harm. Civ. Code, § 1780(a).

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

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

HN13[] **State Regulation, Claims**

Reliance is a necessary element of a Unfair Competition Law (UCL) claim. The Consumer Legal Remedies Act (CLRA) also requires proof of reliance. To prove reliance on an omission under both the UCL and CLRA, a plaintiff must show that the defendant's nondisclosure was an immediate cause of the plaintiff's injury-producing conduct. A plaintiff need not prove that the omission was the only cause or even the predominant cause, only that it was a substantial factor in his decision. A plaintiff may do so by simply proving that, had the omitted information been disclosed, one would have been aware of it and behaved differently. That one would have behaved differently can be presumed, or at least inferred, when the omission is material. An omission is material if a reasonable consumer would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.

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

HN14[] **Deceptive & Unfair Trade Practices, State Regulation**

In the context of a class action, California requires named class plaintiffs to demonstrate reliance. Under the Consumer Legal Remedies Act (CLRA), named and unnamed plaintiffs must prove the alleged deceptive conduct caused that damage. Causation, and an inference of reliance, for the class in a CLRA claim can be shown as to an entire class by proving materiality. A presumption of reliance does not arise when class members were exposed to quite disparate information from various representatives of the defendant.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN15[] Deceptive & Unfair Trade Practices, State Regulation

Courts applying the Consumer Legal Remedies Act CLRA and UCL have also found that the fact that a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones. Establishing lack of causation as to a handful of class members does not necessarily render the issue of causation an individual, rather than a common, one. Plaintiffs may satisfy their burden of showing causation as to each by showing materiality as to all. If the issue of materiality or reliance is a matter that would vary from consumer to consumer, the issue is not subject to common proof, and the action is properly not certified as a class action.

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

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

HN16[] Trade Practices & Unfair Competition, State Regulation

Florida's Deceptive and Unfair Trades Practices Act (FDUTPA) provides for a civil cause of action for unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce. § *Fla. Stat. 501.204(1)*. A consumer claim for damages under FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. § *Fla. Stat. 501.211(2)*. In any actions brought by a person who has suffered a loss as a result of a violation of this part, such person may recover actual damages.

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

HN17[] Deceptive & Unfair Trade Practices, State Regulation

To satisfy the first element of a Florida's Deceptive and Unfair Trades Practices Act's claim, a plaintiff must show that the alleged practice was likely to deceive a consumer acting reasonably in the same circumstances. Deception occurs if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment. This element is only satisfied by evaluating a reasonable consumer in the same circumstances as plaintiff. The modification of acting reasonably by in the same circumstances' indicates a hybrid standard that may be objectively established as to mindset but subjectively established as to context.

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

HN18[] Deceptive & Unfair Trade Practices, State Regulation

A Florida's Deceptive and Unfair Trades Practices Act (FDUTPA) plaintiff need not show actual reliance on the representation or omission at issue. Proof of actual reliance is unnecessary under the FDUPTA. A demonstration of reliance by an individual consumer is not necessary in the context of FDUTPA.

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

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

HN19[] Deceptive & Unfair Trade Practices, State Regulation

The Missouri's Merchandising Practices Act (MMPA) prohibits any person from engaging in any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce in or from the state of Missouri. *Mo. Rev. Stat. § 407.020*. To prevail on an MMPA claim, a plaintiff must prove he or she: (1) purchased merchandise from the defendant; (2) for personal, family or household purposes; and (3) suffered an ascertainable loss of money or property; (4) as a result of an act declared unlawful under the MMPA. *Mo. Rev. Stat. § 407.025*. The plain language of the MMPA demands a causal connection between the ascertainable loss and the unfair or deceptive merchandising practice. *Mo. Rev. Stat. § 407.025.1*. Under the MMPA, a material fact is any fact which a reasonable consumer would likely consider to be important in making a purchasing decision. 15 C.S.R. 60-9.010(1)(C).

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

HN20[] Deceptive & Unfair Trade Practices, State Regulation

A claim for omission of a material fact under the Missouri's Merchandising Practices Act (MMPA) does have a scienter requirement: it is a failure to disclose material facts that are known to him/her, or upon reasonable inquiry would be known to him/her. 15 C.S.R. 60-9.110. Under the MMPA, the plaintiff must show (1) the defendant was aware of the alleged defect, (2) when defendant became aware, and (3) that defendant purposefully omitted this fact in representations to each individual class member.

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

HN21[] Deceptive & Unfair Trade Practices, State Regulation

New York General Business Law § 349 prohibits deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in New York GBL *§ 349(a)*. To prove a claim under GBL *§ 349(a)*, a plaintiff must show that (1) the challenged act or practice was consumer-oriented,(2) it was misleading in a material way, and (3) the plaintiff suffered injury as a result of the deceptive act. Whether a representation or an omission, the deceptive practice must be likely to mislead a reasonable consumer acting reasonably under the circumstances. To satisfy the GBL's causation requirement, nothing more is required than that a plaintiff suffer a loss because of defendant's deceptive act. A plaintiff seeking compensatory damages must show that the material deceptive practice caused actual, although not necessarily pecuniary, harm.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN22[] Actual Fraud, Elements

Intent to defraud and justifiable reliance by the plaintiff are not elements of the statutory claim.

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

Torts > Business Torts > Unfair Business Practices > Elements

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

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

HN23[] State Regulation, Claims

N.C. Gen. Stat. § 75-1.1 provides in part that unfair or deceptive acts or practices in or affecting commerce are unlawful. N.C. Gen. Stat. § 75-1.1(a). In order to establish a prima facie claim for unfair trade practices, a plaintiff must show: (1) the defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff. The determination of whether an act or practice is an unfair or deceptive practice that violates North Carolina Unfair and Deceptive Trade Practices Act is a question of law for the court.

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

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

HN24[] Trade Practices & Unfair Competition, State Regulation

The Minnesota Consumer Fraud Act does not require proof of individual reliance, but it does require a causal nexus between the violative conduct and damages, such that a defendant's conduct had some impact on inducing the individual plaintiff's actions. In contrast, the Unfair Competition Law and Consumer Legal Remedies Act require reliance on an omission, which may be proved by showing that had the omitted information been disclosed, one would have been aware of it and behaved differently.

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

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

HN25[] Trade Practices & Unfair Competition, State Regulation

Unlike the Minnesota Consumer Fraud Act, the Consumer Legal Remedies Act and Missouri's Merchandising Practices Actare limited to goods or services purchased for personal, family, or household purposes. Civ. Code, § 1761(d).

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

HN26[] Choice of Law, Significant Relationships

For a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair. When considering fairness in this context, an important element is the expectation of the parties.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Governmental Interests

HN27[] Choice of Law, Governmental Interests

The choice-influencing factors are: (1) predictability of result; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interest; and (5) application of the better rule of law. These factors were intended to prompt courts to carefully and critically consider each new fact situation and explain in a straight-forward manner their choice of law.

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

HN28[] **Deceptive & Unfair Trade Practices, State Regulation**

The predictability-of result-factor represents the ideal that litigation on the same facts, regardless of where the litigation occurs, should be decided the same to avoid forum shopping. It addresses whether the choice of law was predictable before the time of the transaction or event giving rise to the claim. This factor applies primarily to consensual transactions where parties desire advance notice of which state law will govern in future disputes. In most tort cases, predictability of result is of little relevance. Consumer protection claims are not based entirely in either tort or contract law.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Governmental Interests

HN29[] **Choice of Law, Governmental Interests**

The maintenance-of-interstate-order factor is concerned with whether applying Minnesota law would manifest disrespect for other state sovereignty or impede the interstate movement of people and goods. An aspect of this concern is to maintain a coherent legal system in which the courts of different states strive to sustain, rather than subvert, each other's interests in areas where their own interests are less strong. By considering whether application of Minnesota law would negatively affect the maintenance of interstate order, the opportunities for forum shopping may be kept within reasonable bounds.

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

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

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

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

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

HN30[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. In assessing whether such a dispute exists, a court must make all reasonable inferences in favor of the non-moving party, but will not resort to speculation. The burden of demonstrating an absence of a genuine dispute of material fact is on the moving party. If the movant does so, the nonmovant must respond by submitting evidentiary materials that set out specific facts showing that there is a genuine issue for trial.

Torts > Remedies > Damages > Proof

HN31[] **Damages, Proof**

The fact of injury must not be speculative, remote, or conjectural, but proved with certainty.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Burdens of Proof > Preponderance of Evidence

HN32[ ] **Expert Witnesses, Daubert Standard**

When considering expert testimony, a district court must ensure that all scientific testimony is both reliable and relevant. To satisfy the reliability requirement, the proponent of the expert testimony must show by a preponderance of the evidence both that the expert is qualified to render the opinion and that the methodology underlying his conclusions is scientifically valid. District courts act as gatekeepers, making preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN33[ ] **Expert Witnesses, Daubert Standard**

It is the responsibility of the Court to determine whether a particular expert has sufficient specialized knowledge to assist jurors in deciding the specific issues in the case.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN34[ ] **Expert Witnesses, Daubert Standard**

To be admissible, expert testimony must be based on reliable principles and methods. *Fed. R. Evid. 702(c)*. Among the many factors courts consider to determine whether expert opinions are reliable are: (1) whether the theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) whether the theory has been generally accepted. (cleaned up). As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN35[ ] **Expert Witnesses, Daubert Standard**

Under Daubert, the known or potential rate of error is indeed important to assessing the scientific validity of an expert's methods.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN36[ ] **Expert Witnesses, Daubert Standard**

To show that the expert testimony is relevant, the proponent of the expert testimony must show that the reasoning or methodology in question is applied properly to the facts in issue. Courts should resolve doubts regarding the usefulness of an expert's testimony in favor of admissibility.

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN37[] **Standing, Elements**

The jurisdiction of federal courts extends only to actual cases or controversies. *U.S. Const. art. III, § 2, cl.1*; The Eighth Circuit has held that under the case-or-controversy requirement, a class must be defined in such a way that anyone within it would have standing. In other words, a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN38[] **Prerequisites for Class Action, Commonality**

Under *Fed. R. Civ. P. 23(b)(3)*, a district court must find that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *Fed. R. Civ. P. 23(b)(3)*. The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. It is satisfied if the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. The superiority requirement asks whether the class action is the best available method for resolving the controversy.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN39[] **Class Actions, Certification of Classes**

Each of proposed statewide classes must also satisfy the requirements of *Fed. R. Civ. P. 23(b)(3)*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN40[] **Class Actions, Certification of Classes**

To determine whether a class action is the best available method to resolve a dispute, courts examine whether a class action would be manageable.

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For James Kelley, individually and on behalf of others similarly situated, Ronald Krans, individually and on behalf of others similarly situated, Kevin R. Wonders, individually and on behalf of others similarly situated, William Bates, individually and on behalf of others similarly situated, James Pinion, individually and on behalf of others similarly situated, Plaintiffs: Andrew N Friedman, Douglas J McNamara, LEAD ATTORNEYS, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Eric A. Kafka, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, New York, NY; Karen Hanson Riebel, Kate M. Baxter-Kauf, LEAD ATTORNEYS, Lockridge Grindal Nauen PLLP, Mpls, MN; Robert E. Gordon, LEAD ATTORNEY, PRO HAC VICE, Gordon & Doner PA, Palm Beach Gardens, FL; Steven Calamusa, LEAD ATTORNEY, PRO HAC VICE, Gordon & Doner, Palm Beach Gardens, FL; Theodore J Leopold, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Palm Beach Gardens, FL.

For Polaris Industries, Inc., Defendant: Andrew Baker Bloomer, Eric Yeager, Paul David Collier, R. Allan **[**3]** Pixton, Wendy L. Bloom, LEAD ATTORNEYS, PRO HAC VICE, Kirkland & Ellis LLP, Chicago, IL; Christopher Keegan, LEAD ATTORNEY, PRO HAC VICE, Kirkland & Ellis LLP, San Francisco, CA; Peter Magnuson, Wendy Jo Wildung, LEAD ATTORNEYS, Faegre Drinker Biddle & Reath LLP, Minneapolis, MN; Richard C Godfrey P C, LEAD ATTORNEY, PRO HAC VICE, Kirkland & Ellis, Chicago, IL.

Judges: Nancy E. Brasel, United States District Judge.

Opinion by: Nancy E. Brasel

Opinion

[*948] ORDER

Plaintiffs bring this action under the laws of six states on behalf of a putative class of all-terrain vehicle ("ATV") buyers. They claim that Defendant Polaris Industries, Inc. omitted material facts about an alleged defect at the time they purchased their Sportsman ATVs. Fact and expert discovery have now closed. Plaintiffs move for class certification, and Polaris moves to strike certain of Plaintiffs' expert opinions and for summary judgment on the named Plaintiffs' claims.[1]

BACKGROUND

[1] Polaris requested permission to file a *Daubert* motion in connection with its class certification motion (ECF No. 321) and Plaintiffs did not object, except with respect to word limits in the briefing. (ECF No. 322.) The Court granted the request. (ECF No. 323.) Polaris then filed a motion for summary judgment. (ECF No. 356.) The Court heard oral argument on all motions together.

The Court draws the following background facts from the summary judgment record, viewing the evidence in the light most favorable to the Plaintiffs. [Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. 2011)](#) (*en banc*).

Polaris, headquartered in Medina, Minnesota, manufactures recreational vehicles, such as ATVs and motorcycles. (ECF **[**4]** No. 340-2 at 23:17-19.) Polaris's ATVs include the Sportsman 450, 570, 850, and 1000. (ECF No. 370 ("Dahl Decl.") ¶¶ 3-4.) The Sportsman 450 and 570 ATVs have smaller single cylinder engines; the Sportsman 850 and 1000 ATVs have larger dual cylinder engines. (*Id.* ¶ 6.)

As early as 2007, Polaris faced consumer complaints about excessive heat in some of its ATVs. In 2014, the U.S. Consumer Production Safety Commission ("CPSC") opened an investigation in response to reports of several ATV fires. Over the course of that investigation, the CPSC made the preliminary determination that Polaris MY2015-16 Sportsman 850 ATVs present "a substantial product hazard" under [15 U.S.C. § 2064(a)](#), noting that "the right **[*949]** hand side heat shield is in close proximity to, and in some cases makes contact with [the] exhaust manifold, posing a burn and fire hazard." (ECF No. 336-23 at 2.) The CPSC requested that Polaris voluntarily recall or correct the potentially hazardous Sportsman 850 ATVs. (*Id.* at 3.) In March 2017, Polaris issued a recall for MY2015-16 Sportsman 850s and 1000 ATVs. (ECF No. 336-24.) Polaris informed consumers that it had developed a new exhaust manifold side panel that "significantly increases the air gap between **[**5]** the exhaust manifold and exhaust manifold side panel and utilizes a metal heat shield." (ECF No. 336-25.)

The CPSC's investigation also sought information about Polaris's Sportsman 570s. (ECF No. 336-22.) Following the investigation, Polaris issued a service advisory in July 2017 offering an "optional Right Hand Side Panel Close Off Kit that will redirect a portion of the heat produced by the engine and exhaust away from the right hand foot well area" for MY2016-17 Sportsman 450s and MY2014-17 Sportsman 570s. (ECF No. 336-26.)

Plaintiffs in this case are Sportsman ATV owners Riley Johannessohn, Daniel C. Badilla, James Kelley, Kevin R. Wonders, William Bates, and James Pinion (collectively, "Plaintiffs").[2] Their Corrected Second Amended Complaint ("Complaint") pleads that Polaris violated the consumer protection laws of Minnesota, California, Florida, Missouri, New York, and North Carolina by failing to disclose the Sportsman line's exhaust heat problems, causing Plaintiffs to suffer injury. (ECF No. 66 ("SAC") ¶¶ 85-175.) The Complaint alleges that "Polaris'[s] omissions artificially inflated the market price for the ATVs" when Polaris "could have and should have warned customers" about **[**6]** what the Complaint refers to as an "exhaust heat defect." (*Id.* ¶ 4.) Plaintiffs now seek to certify a nationwide class of consumers who purchased new MY2011-16 Polaris Sportsman 850s, MY2015-16 Sportsman 1000s, MY2014-17 Sportsman 570s, and MY2016-17 Sportsman 450s (the "Class Vehicles") from October 4, 2010 to the present. (ECF No. 335 at 1 n.1.) In the alternative, they seek to certify six statewide classes for Class Vehicle owners in the states of Minnesota, Florida, California, Missouri, New York, and North Carolina. (*Id.* at 18-19.) Polaris moves for summary judgment on all claims asserted against it in the Complaint. (ECF No. 356.) Polaris also seeks to exclude the expert testimony of Richard Eichmann and Sara Butler. (ECF No. 371.) For the reasons discussed below, all three motions—for summary judgment, for exclusion of expert testimony, and for class certification—are denied.

SUMMARY JUDGMENT

I. Choice of Law

To assess Plaintiffs' claims, the Court must first decide what law applies to them. This task requires a choice-of-law analysis, complex here because Plaintiffs are from six states, each with its own consumer protection statute or statutes. Plaintiffs contend that the [Minnesota Consumer Fraud Act](#) **[**7]** should apply to the consumer fraud claims of all plaintiffs, regardless of their state of residence. *See* [Minn. Stat. § 325F.68 et seq.](#) ("MCFA"). ***HN1***[] A federal court sitting in diversity applies the choice-of-law rules of the forum state where it sits—here, Minnesota's

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[2] The Second Amended Complaint also includes Plaintiff Ronald Krans, a resident of Illinois. His claims have been dismissed from the case. (ECF No. 143.)

choice-of-law rules. *Highwoods Props., Inc. v. Exec. Risk Indem., Inc., 407 F.3d 917, 920 (8th Cir. 2005)*. In determining if the MCFA can apply extraterritorially, Minnesota courts apply a multistep analysis. The **[*950]** court first determines whether an outcome-determinative conflict exists. *Jepson v. Gen. Cas. Co. of Wisc., 513 N.W.2d 467, 469-70 (Minn. 1994)*; *In re St. Jude Med., Inc., 425 F.3d 1116, 1120 (8th Cir. 2005)* ("St. Jude I"). If a conflict exists, the court determines whether the law of both states can be constitutionally applied. *Jepson, 513 N.W.2d at 469*. If it is constitutionally permissible for the forum state to apply its laws, the court then considers five factors to determine whether to apply the forum state law. *Id. at 470*. For the reasons that follow, the Court concludes that each Plaintiff's claims are governed by the state in which he resides.

A. Application of the MCFA: Outcome-Determinative Conflicts

The Complaint alleges that Polaris violated the consumer protection laws of Minnesota, California, Florida, Missouri, New York, and North Carolina, thereby injuring Plaintiffs and other consumers who reside in those states. Plaintiffs maintain that because the consumer protection **[**8]** laws of these states do not conflict with the MCFA, the Court can apply the MCFA to all claims.[3]

The parties focus their briefs on the requirements of reliance or causation and scienter under each state's consumer protection statute or statutes. In doing so, both Plaintiffs and Polaris refer to tables appended to their briefs.[4] Plaintiffs bear the burden of fully analyzing the law of the jurisdictions whose laws may apply to the putative class's claims; it is not Polaris's burden to prove an outcome-determinative conflict exists. *See Thompson v. Allianz Life Ins. Co. of N. Am., 330 F.R.D. 219, 223 (D. Minn. 2019)*. Below, the Court addresses the six state consumer-protection laws and their requirements as to reliance or causation and scienter. Such an analysis is necessary before the Court can compare each state's laws against the MCFA to reach the conflicts issue.

1. Minnesota

The Complaint alleges that Polaris violated the MCFA by omitting material information regarding the Sportsman ATVs' exhaust heat defect, thereby injuring Plaintiff Riley Johannessohn and other purchasers.[5] (SAC Count I.) ***HN2***[] The MCFA prohibits "[t]he act, use, or employment by **[*951]** any person of any fraud, false pretense, **[**9]** false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise." *Minn. Stat. § 325F.69, subd. 1*. A private plaintiff suing for an MCFA violation must prove that "the defendant engaged in conduct prohibited by the statutes and that the plaintiff was damaged thereby." *Grp. Health Plan, Inc. v. Philip Morris Inc., 621 N.W.2d 2, 12 (Minn. 2001)*; *see also* *Wexler v. Bros. Entm't Grp., Inc., 457 N.W.2d 218, 221 (Minn. Ct. App. 1990)* (to prevail on an

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[3] In *In re St. Jude*, the district court concluded that the consumer protection laws of 32 jurisdictions did not have outcome-determinative conflicts with Minnesota. *No. 01-CV-1396 (JRT/FLN), 2006 U.S. Dist. LEXIS 74797, 2006 WL 2943154, at *5 & n.3 (D. Minn. Oct. 13, 2006)*, *rev'd and remanded on other grounds*, *In re St. Jude Med., Inc. ("St. Jude II"), 522 F.3d 836 (8th Cir. 2008)*. That court relied on the plaintiffs' analysis to find no conflicts among certain state consumer protection laws, including the six states forming the basis of Plaintiffs' claims here. *2006 U.S. Dist. LEXIS 74797, [WL] at *5*. This Court has conducted its own analysis of the consumer statutes at issue and comes to a different conclusion based on the facts of this case.

[4] Polaris submitted a detailed table analyzing state consumer protection statutes in support of the argument that the laws conflict. (ECF No. 367-1 ("Polaris App. A").) Plaintiffs respond with a much simpler table indicating "yes" or "no" to four questions about each state's consumer protection statute: whether a private cause of action exists, whether scienter is required, whether individual reliance is required, and whether material omissions are prohibited. (ECF No. 336-2 ("Pls' Tab C").) These four issues were identified as outcome-determinative conflicts for the consumer protection statutes. *In re St. Jude, 2006 U.S. Dist. LEXIS 74797, 2006 WL 2943154, at *5 n.4*. Polaris argues that the states' consumer protection statutes also differ on the requirements of the duty to disclose omissions, materiality, and causation. Plaintiffs address these requirements in summary fashion, asserting that they are not outcome-determinative in the context of this case.

[5] The injury claimed by Plaintiffs is economic, not physical.

MCFA claim, a plaintiff must prove that the defendant violated *Minn. Stat. § 325F.69* and that the plaintiff "was injured in some way by the violation"). For an MCFA claim based on an omission, a plaintiff must prove an omission of material fact, as well as special circumstances that trigger a duty to disclose. *Graphic Communs. Local 1B Health & Welfare Fund "A" v. CVS Caremark Corp., 850 N.W.2d 682, 696 (Minn. 2014)*.[6]

a. Causation under the MCFA

HN4[] Under the MCFA, a plaintiff need not prove traditional common law reliance. *Grp. Health, 621 N.W.2d at 13*. Rather, he or she must establish a causal nexus between the conduct alleged to violate the MCFA and the damages claimed, which can be proved by circumstantial evidence. *Id. at 4, 14*. In *Group Health*, the Minnesota Supreme Court noted that an element of individual reliance is embedded in the causal nexus requirement because a fraudulent or misleading statement cannot by its nature cause **[**10]** harm unless the statement "had some impact on" inducing the individual plaintiff's actions. *State v. Minn. Sch. of Bus., Inc., 935 N.W.2d 124, 141 (Minn. 2019)* (quoting *Grp. Health, 621 N.W.2d at 14*).

Polaris claims that a causal nexus under Minnesota law cannot be presumed, but instead must be proved through evidence for each purchaser. It cites *Buetow v. A.L.S. Enterprises, Inc.*, for the proposition that "[w]hen the plaintiffs are consumers who have proved no future harm . . . it is an error of law to *assume* that a false statement materially deceived and injured the plaintiffs." *650 F.3d 1178, 1183 (8th Cir. 2011)* (emphasis in original). The Court finds *Buetow* distinguishable because there, the plaintiffs sought only injunctive relief without presenting any evidence of a risk of future harm. *See id. at 1182, 1185* (explaining that *Group Health* "requir[es] a private plaintiff seeking injunctive relief for violations of [MCFA] to prove harm or injury-in-fact"). Polaris also relies on the Minnesota Court of Appeals' decision in *State v. Minnesota* ***[*952]*** *School of Business, Inc.*, which held that particular students' testimony that the defendant school's conduct harmed them could be not used to presume a causal nexus for non-testifying students. *915 N.W.2d 903, 911-13 (Minn. Ct. App. 2018)*. But this holding was recently reversed in *State v. Minnesota School of Business, Inc., 935 N.W.2d 124 (Minn. 2019)*. In its opinion, the Minnesota Supreme Court discussed **[**11]** *Group Health*, and reiterated that "direct proof of reliance is not required to establish a causal nexus" under the MCFA. *Id. at 137*. "[W]here a defendant's misrepresentations were directed at and affected a broad group of consumers, proof of direct individual reliance is not required to establish a causal nexus between MCFA violations, and the harm suffered by consumers." *Id. at 135* (citing *Grp. Health, 621 N.W.2d at 14-15*). The court noted that while "individualized direct proof of reliance is not necessary in an MCFA damages case," "there are times when the materiality and pervasiveness of consumer fraud is relevant to support a court's finding that a causal nexus exists between the fraud and the consumer's decision to purchase the product." *Id.*

In Minnesota, a defendant has a chance to rebut evidence of causation presented by the plaintiffs. In *St. Jude II*, the Eighth Circuit explained that "[w]hatever *Group Health* means about the need for these plaintiffs to present direct evidence of individual reliance, it does not eliminate the right of a defendant to present evidence negating a plaintiff's direct or circumstantial showing of causation and reliance." *522 F.3d at 840*. The *St. Jude II* court found that the defendant had presented evidence concerning **[**12]** the reliance or nonreliance of individual physicians and patients on representations made by the defendant, and held that where the defendant was able to present such evidence, the resolution of the defendant's potential liability to each plaintiff under the consumer fraud statutes would be dominated by individual issues of causation and reliance. *Id. at 839-40* (reversing certification of an MCFA

[6] ***HN3***[] Special circumstances triggering a duty to disclose include: (a) one who speaks must say enough to prevent his words from misleading the other party; (b) one who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party; and (c) one who stands in a confidential or fiduciary relation to the other party to a transaction must disclose material facts. *Klein v. First Edina Nat'l Bank, 293 Minn. 418, 421, 196 N.W.2d 619 (1972)*; *see also* ***Graphic Communs., 850 N.W.2d at 695-98*** (citing *Klein, 293 Minn. at 421*). The parties do not dispute that Polaris had a duty to disclose the exhaust heat defect. *See Johannessohn v. Polaris Indus., Inc., No. 16-CV-3348 (PJS/LIB), 2017 U.S. Dist. LEXIS 99843, 2017 WL 2787609, at *4 (D. Minn. June 27, 2017)* ("Polaris does not argue that it lacks a duty to disclose, and *Graphic Communications* is therefore not relevant.").

class).[7] Here, Polaris argues that it will introduce rebuttal evidence to disprove any connection between an individual plaintiff's decision to purchase and the alleged omission.

b. Scienter under the MCFA

Polaris argues that the MCFA requires proof of scienter, noting that the defendant must have acted "with the intent that others rely thereon." Minn. Stat. § 325F.69 subd. 1. Plaintiffs maintain, without elaboration, that scienter is not required. (Pls' Tab C at 2 & n.2.) To the extent the parties read "scienter" to mean intentional misrepresentations, courts have held that the MCFA "does not require the making of an intentional misrepresentation." Freeman v. A & J Auto MN, Inc., No. A03-153, 2003 Minn. App. LEXIS 1143, 2003 WL 22136807, at *4 (Minn. Ct. App. Sept. 16, 2003); *see also* Meyer v. Dygert, 156 F. Supp. 2d 1081, 1086 (D. Minn. 2001) (same).[8]

[*953] *2. California*

On behalf of Plaintiff Daniel Badilla, **[**13]** the Complaint alleges violations of two California statutes: the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, and the Consumer Legal Remedies Act ("CLRA"), *Cal. Civ. Code § 1770(a)(5)*, *(7)*. A plaintiff may base claims under the UCL and CLRA on an alleged omission, "[but] to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact that the defendant was obliged to disclose." Daugherty v. Am. Honda Motor Co., 144 Cal. App. 4th 824, 51 Cal. Rptr. 3d 118, 126 (Cal. Ct. App. 2006) (UCL and CLRA); *see also* Daniel v. Ford Motor Co., 806 F.3d 1217, 1225 (9th Cir. 2015). The Court will review the elements of the UCL and CLRA, then address the issues of reliance and scienter under both statutes.

a. The UCL

HN5[] The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. Because the UCL is "written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent." Lippitt v. Raymond James Fin. Servs., Inc., 340 F.3d 1033, 1043 (9th Cir. 2003), *as amended* (Sept. 22, 2003) (quoting Cel-Tech Commc'ns., Inc. v. L.A. Cellular Tel Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)). To prevail on a UCL claim, a plaintiff must prove that the defendant engaged in a business practice proscribed under one of these three varieties of unfair competition, and that the plaintiff was injured "as a result of" the business practice. In re Gen. Motors LLC Ignition Switch Litig., No. 14-MC-2543 (JMF), 2016 U.S. Dist. LEXIS 92499, 2016 WL 3920353, at *19 (S.D.N.Y. July 15, 2016). The Complaint alleges that Polaris engaged in all **[**14]** three varieties of unfair competition, resulting in injury to

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[7] The recent decision in *State v. Minnesota School of Business* does not address a defendant's ability to negate a plaintiff's direct or circumstantial showing of causation and reliance under the MCFA.

[8] In *Curtis Lumber Co. v. Louisiana Pacific Corp.*, the Eighth Circuit considered several state consumer protection laws, including Minnesota's, in concluding that Arkansas's consumer protection statutes do not require proof of intent to deceive. 618 F.3d 762, 778-79 (8th Cir. 2010). Like the MCFA, the terms of other state statutes "require[] only that a violator intend for a purchaser to *rely* on his acts or omissions." Id. at 778 (emphasis in original) (citing Warren v. LeMay, 142 Ill. App. 3d 550, 491 N.E.2d 464, 474, 96 Ill. Dec. 418 (Ill. App. Ct. 1986)). Despite this statutory language, the court found that the consumer protection laws of other states, including Minnesota, do not require intent to deceive. *See* id. at 778 & n.12 (citing MCFA and ***McNamara v. Nomeco Bldg. Specialties, Inc., 26 F. Supp. 2d 1168, 1171 (D. Minn. 1998)*** ("Simply stated, one making representations in the sale of consumer goods can be held liable, even though he had no specific intent to falsely mislead the consumer.")).

California purchasers. (*See* SAC ¶ 107 (Badilla and class members "suffered injury" as a "direct result" of Polaris's "unlawful, unfair, or fraudulent business acts and/or practices").)[9]

HN6[] The three varieties of unfair competition—also known as the prongs of the UCL—have different thresholds. Under the "unlawful" prong, a "violation of another law is a predicate for stating a cause of action." *Graham v. Bank of Am., N.A., 226 Cal. App. 4th 594, 172 Cal. Rptr. 3d 218, 231 (Cal. Ct. App. 2014)* (citation omitted); *see also* *Lazar v. Hertz Corp., 69 Cal. App. 4th 1494, 82 Cal. Rptr. 2d 368, 375 (Cal. Ct. App. 1999)* (find that under its "unlawful" prong, "the UCL borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL."). The Court presumes that the CLRA forms the basis of the "unlawful" prong of Plaintiffs' UCL claim. *See* *Falco v. Nissan N. Am. Inc., No. CV1300686DDPMANX, 2016 U.S. Dist. LEXIS 46115, 2016 WL 1327474, at *9 (C.D. Cal. Apr. 5, 2016)* ("Plaintiffs can rely on an underlying CLRA violation for their UCL claim.").

In determining whether a business practice is "unfair" under the UCL, California appellate courts have been split regarding the proper test to employ. *See* *Linde, LLC v. Valley Protein, LLC, No. 116CV00527DADEPG, 2019 U.S. Dist. LEXIS 115730, 2019 WL 3035551, at *21 (E.D. Cal. July 11, 2019)* (summarizing split among appellate courts); *Zhang v. Superior Court, 57 Cal. 4th 364, 159 Cal. Rptr. 3d 672, 304 P.3d 163, 174 n.9* ***[*954]*** *(Cal. 2013)* (noting that the standard for determining what business acts or practices **[**15]** are "unfair" in consumer actions under the UCL is unsettled). ***HN7***[] Under one line of cases, an unfair business practice occurs "when that practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Graham, 172 Cal. Rptr. 3d at 233* (citation and quotation marks omitted).

HN8[] A second line of cases considers the factors for unfairness set forth in *section 5* of the *Federal Trade Commission Act*: "(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." *Id.* (citation and quotation marks omitted). ***HN9***[] A third line of cases holds that "a plaintiff alleging an unfair business practice must show the defendant's conduct is tethered to an underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of an ***antitrust law***." *Id. at 233-234* (cleaned up). The Complaint alleges Polaris engaged in "unfair" business practices by "seeking to profit from selling ATVs that possess a latent defect."[10] (SAC ¶ 104.) **[**16]** Because the Complaint alleges these practices are "immoral, unscrupulous, and offends public policy," Plaintiffs appear to be proceeding under the first standard for unfairness (and possibly the third).

HN10[] Finally, a business practice is "fraudulent" under the UCL if "members of the public are 'likely to be deceived.'" *Graham, 172 Cal. Rptr. 3d at 234* (quoting *Buller v. Sutter Health, 160 Cal. App. 4th 981, 74 Cal. Rptr. 3d 47, 51 (Cal. Ct. App. 2008))*.

b. The CLRA

HN11[] The CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer." *Cal. Civ. Code § 1770(a)*. The CLRA defines "consumer" as "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes." *Cal. Civ. Code § 1761(d)*. The Complaint alleges that through fraudulent omissions about the Sportsman ATVs' exhaust heat defect, Polaris violated *CLRA §§ 1770(a)(5)* and *1770(a)(7)*, which prohibit representing that goods "have . . . characteristics . . .

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[9] More specifically, the Complaint alleges Polaris engaged in "unlawful business acts and/or practices by not informing consumers that [its] Sportsman ATV could cause risks of product deformation and burns," (SAC ¶ 102), "unfair business acts and practices" by "seeking to profit from selling ATVs that possess a latent defect," and "fraudulent conduct" based on "fail[ing] to inform customers of exhaust heat defect." (*Id.* ¶¶ 104, 105).

[10] Plaintiffs have since abandoned their latent defect theory. Because the parties did not address the three prongs of the UCL in their briefing, it is not clear whether Plaintiffs have likewise abandoned their UCL unfairness claim.

uses, benefits, or quantities that they do not have," *id. § 1770(a)(5)*, and "are of a particular standard, quality, or grade," *id. § 1770(a)(7)*. (SAC ¶¶ 115-16.) ***HN12***[] To prevail under a CLRA claim, a plaintiff must show that the defendant's conduct was deceptive and that the deception caused **[**17]** them harm. *Mass. Mut. Life Ins. Co. v. Superior Court, 97 Cal. App. 4th 1282, 119 Cal. Rptr. 2d 190, 197 (Cal. Ct. App. 2002)* (citing *Cal. Civ. Code § 1780(a)*).

c. Reliance under the UCL and CLRA

HN13[] Reliance is a necessary element of a UCL claim. *Backhaut v. Apple, Inc., 74 F. Supp. 3d 1033, 1047-48 (N.D. Cal. 2014)* (requiring "actual reliance" for claims under all three prongs of the UCL) (citing *In re Tobacco II Cases, 46 Cal. 4th 298, 93 Cal. Rptr. 3d 559, 207 P.3d 20, 39 (Cal. 2009)* (fraud prong); *Durell v. Sharp **[*955]** Healthcare, 183 Cal. App. 4th 1350, 108 Cal. Rptr. 3d 682, 687-88 (Cal. Ct. App. 2010)* (unlawful prong); *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 120 Cal. Rptr. 3d 741, 246 P.3d 877, 888 (Cal. 2011))*. The CLRA also requires proof of reliance. *See Mullins v. Premier Nutrition Corp., No. 13-CV-01271-RS, 2016 U.S. Dist. LEXIS 79983, 2016 WL 3440600, at *3, *5 (N.D. Cal. June 20, 2016)*. To prove "reliance on an omission" under both the UCL and CLRA,

> a plaintiff must show that the defendant's nondisclosure was an immediate cause of the plaintiff's injury-producing conduct. A plaintiff need not prove that the omission was the only cause or even the predominant cause, only that it was a substantial factor in his decision. A plaintiff may do so by simply proving "that, had the omitted information been disclosed, one would have been aware of it and behaved differently."

Daniel, 806 F.3d at 1225 (citation omitted) (quoting *Mirkin v. Wasserman, 5 Cal. 4th 1082, 23 Cal. Rptr. 2d 101, 858 P.2d 568, 574 (Cal. 1993))*. "That one would have behaved differently can be presumed, or at least inferred, when the omission is material . . . . An omission is material if a reasonable consumer 'would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.'" *Id.* (quoting *Tobacco II, 207 P.3d at 39*).

HN14[] In the context of a class action, "California . . . requires *named* class plaintiffs to demonstrate reliance." **[**18]** *Mazza v. Am. Honda Motor Co., 666 F.3d 581, 591 (9th Cir. 2012)* (emphasis added) (considering UCL and CLRA claims). Under the CLRA, "named and unnamed plaintiffs must prove the alleged deceptive conduct caused that damage." *Mullins, 2016 U.S. Dist. LEXIS 79983, 2016 WL 3440600, at *3* (citing *In re Steroid Hormone Prod. Cases, 181 Cal. App. 4th 145, 104 Cal. Rptr. 3d 329, 337-38 (Cal. Ct. App. 2010))*. "Causation, and an inference of reliance, for the class in a CLRA claim can be shown as to an entire class by proving materiality." *Falco, 2016 U.S. Dist. LEXIS 46115, 2016 WL 1327474, at *7* (citation and quotation marks omitted); *see Edwards v. Ford Motor Co., 603 F. App'x 538, 541 (9th Cir. 2015)* (finding that defendant's failure to disclose information that would have been material to a reasonable person purchasing defendant's product gave rise to a rebuttable inference of reliance as to the class). Courts applying these statutes have noted that in some cases, "it is fair to assume that all of the purchasers . . . read some marketing materials regarding the product, [so it is] sufficient to conclude that [d]efendants' conduct in omitting information was likely to deceive members of the public." *McVicar v. Goodman Glob., Inc., No. SACV131223DOCRNBX, 2015 U.S. Dist. LEXIS 110432, 2015 WL 4945730, at *11 (C.D. Cal. Aug. 20, 2015)* (cleaned up). But class certification of UCL and CLRA claims is inappropriate where the plaintiff "cannot show that members of the class were exposed to the same misrepresentations or any omissions, for example, . . . where the misrepresentations or nondisclosures were included (or would **[**19]** have been included) on the product itself." *Id.; see also Mazza, 666 F.3d at 596* ("A presumption of reliance does not arise when class members were exposed to quite disparate information from various representatives of the defendant.") (citation and quotation marks omitted).

HN15[] Courts applying the CLRA and UCL have also found that the fact that "a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones." *Mass. Mut. Life Ins. Co., 119 Cal. Rptr. 2d at 197*. Establishing lack of causation as to a handful of class members "does not necessarily render the issue of **[*956]** causation an individual, rather than a common, one." *In re Vioxx Class Cases, 180 Cal. App. 4th 116, 103 Cal. Rptr. 3d 83, 95 (Cal. Ct. App. 2009)*.

"Plaintiffs may satisfy their burden of showing causation as to each by showing materiality as to all . . . . [I]f the issue of materiality or reliance is a matter that would vary from consumer to consumer, the issue is not subject to common proof, and the action is properly not certified as a class action." *Id.* (cleaned up).

d. Scienter under the UCL and CLRA

California courts applying the UCL and the CLRA have found that neither statute imposes a scienter requirement. *See, e.g., Mazza, 666 F.3d at 591* (stating the UCL and CLRA "have no scienter requirement"); **[**20]** *Cortez v. Purolator Air Filtration Prods. Co., 23 Cal. 4th 163, 96 Cal. Rptr. 2d 518, 999 P.2d 706, 717 (Cal. 2000)* ("[A] plaintiff need not show that a UCL defendant intended to injure anyone through its unfair or unlawful conduct.").[11] But Plaintiffs must establish a defendant's knowledge of an undisclosed defect at the time of sale under the UCL and CLRA. *Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1145-46 (9th Cir. 2012)*; *id. at 1145 n.5* (under the UCL, the "failure to disclose a . . . defect of which [a defendant] is not aware, does not constitute an unfair or fraudulent practice"); *Williams v. Yamaha Motor Co. Ltd., 851 F.3d 1015, 1025 (9th Cir. 2017)* (under UCL and CLRA, "a party must allege . . . that the manufacturer knew of the defect at the time a sale was made.") (citation omitted).

3. Florida

The Complaint alleges that Polaris violated *Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. § 501.201 et seq.*, by omitting material information about the Sportsman ATVs, thus injuring Plaintiff James Kelley and other Florida purchasers. (SAC ¶¶ 130-32.) ***HN16***[] FDUTPA provides for a civil cause of action for "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Fla. Stat. § 501.204(1)*. "A consumer claim for damages under FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." *City First Mortg. Corp. v. Barton, 988 So. 2d 82, 86 (Fla. Dist. Ct. App. 2008)* (citation omitted); *see Fla. Stat. § 501.211(2)* ("In any actions brought by a person **[**21]** who has suffered a loss as a result of a violation of this part, such person may recover actual damages").

HN17[] To satisfy the first element of a FDUTPA claim, a plaintiff "must show that the alleged practice was likely to deceive a consumer acting reasonably in the same circumstances." *Carriuolo v. Gen. Motors Co., 823 F.3d 977, 983-84 (11th Cir. 2016)* (citation and quotation marks omitted); *see Millenium Communs. & Fulfillment Inc. v. Office of the Attorney Gen, 761 So. 2d 1256, 1263 (Fla. Dist. Ct. App. 2000)* (quoting *Sw. Sunsites, Inc. v. Fed. Trade. Comm'n, 785 F.2d 1431, 1434-35)* ("[D]eception [occurs] if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."). This element "is only satisfied by evaluating a reasonable consumer in the same circumstances as plaintiff." *Maor v. Dollar Thrifty Auto. Grp., Inc., No. 15-22959-CIV,* ***[*957]*** *2018 U.S. Dist. LEXIS 168664, 2018 WL 4698512, at *6 (S.D. Fla. Sept. 30, 2018)* (citation omitted). "The modification of 'acting reasonably' by 'in the same circumstances' indicates a hybrid standard that may be objectively established as to mindset but subjectively established as to context." *Id.* (quoting *Deere Constr. v. Cemex Constr. Materials Fla., LLC, No. 15-24375-CIV, 2016 U.S. Dist. LEXIS 193561, 2016 WL 8542540, *3 (S.D. Fla. Dec. 1, 2016))*; *Goldemberg v. Johnson & Johnson Consumer Cos., Inc., 317 F.R.D. 374, 390 (S.D.N.Y. 2016))* (describing FDUTPA's "hybrid standard" as being "objectively established as to mindset but subjectively established as to context.").

a. Reliance under the FDUTPA

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[11] At least one court has found that one of the unfair business practice claims under the CLRA has a scienter requirement. *Mullins, 2016 U.S. Dist. LEXIS 79983, 2016 WL 3440600, at *6* (citing ***Cal. Civ. Code § 1770(a)(9)*** (prohibiting "[a]dvertising goods or services with intent not to sell them as advertised.")).

HN18[] A FDUTPA plaintiff "need not show actual reliance on the **[**22]** representation or omission at issue." *Davis v. Powertel, Inc., 776 So. 2d 971, 973 (Fla. Dist. Ct. App. 2000)*; *see also* *Maor, 2018 U.S. Dist. LEXIS 168664, 2018 WL 4698512, at *6* (noting "proof of actual reliance is unnecessary" under the FDUPTA). A "demonstration of reliance by an individual consumer is not necessary in the context of FDUTPA." *Turner Greenberg Assocs., Inc. v. Pathman, 885 So. 2d 1004, 1009 (Fla. Dist. Ct. App. 2004)*; *see, e.g., Davis, 776 So. 2d at 974* (holding class members proceeding under FDUTPA "need not prove individual reliance on the alleged representation"). Rather, "a plaintiff must simply prove that an objectively reasonable person [in the same circumstances as the plaintiff] would have been deceived." *Lombardo v. Johnson & Johnson Consumer Cos., 124 F. Supp. 3d 1283, 1290 (S.D. Fla. 2015)* (quoting *Fitzpatrick v. Gen. Mills, Inc., 635 F.3d 1279, 1283 (11th Cir. 2011))*.

b. Scienter under the FDUTPA

While neither the parties nor the Court were able to locate case law addressing FDUTPA and scienter *per se*, courts have found that a plaintiff does not need to prove "the seller's intent to deceive" under FDUTPA. *See, e.g., In re Schurtenberger, No. 12-17246-BKC-AJC, 2014 Bankr. LEXIS 76, 2014 WL 92828, at *5 (Bankr. S.D. Fla. Jan. 9, 2014)* (citing *Davis, 776 So. 2d at 974*). Some courts have held that FDUTPA does not require a defendant "to have subjective knowledge of the alleged defects." *Gavron v. Weather Shield Mfg., Inc., 819 F. Supp. 2d 1297, 1302 (S.D. Fla. 2011)*; *see also* *Motorola Mobility, Inc. v. CT Miami, LLC, No. 11-23753-CV, 2012 U.S. Dist. LEXIS 202815, 2012 WL 13014338, at *3 (S.D. Fla. May 11, 2012)*, *report and recommendation adopted*, *No. 11-23753-CIV, 2012 U.S. Dist. LEXIS 202816, 2012 WL 13014339 (S.D. Fla. June 13, 2012)* ("FDUTPA focuses on whether an act is deceptive, not whether a defendant knew that the allegedly violative conduct was occurring.").

4. Missouri

The Complaint alleges that Polaris failed to inform consumers of the Sportsman **[**23]** ATVs' exhaust heat defect, thereby violating *Missouri's Merchandising Practices Act ("MMPA"), Mo. Rev. Stat. § 407.010, et seq.*, and injuring Plaintiff Kevin Wonders and other Missouri purchasers. (SAC Count VI.) The Complaint alleges that Wonders brings this claim individually and on behalf of consumers who purchased a Sportsman ATV "primarily for personal, family or household purposes."[12] (SAC ¶ 145.) ***HN19***[] The MMPA prohibits any person from engaging in "any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . . in or from **[*958]** the state of Missouri." *Mo. Rev. Stat. § 407.020*. To prevail on an MMPA claim, a plaintiff must prove he or she: (1) purchased merchandise from the defendant; (2) for personal, family or household purposes; and (3) suffered an ascertainable loss of money or property; (4) as a result of an act declared unlawful under the MMPA. *Murphy v. Stonewall Kitchen, LLC, 503 S.W.3d 308, 311 (Mo. Ct. App. 2016)*; *see* *Mo. Rev. Stat. § 407.025*. "[T]he plain language of the MMPA demands a causal connection between the ascertainable loss and the unfair or deceptive merchandising practice." *Owen v. Gen. Motors Corp., 533 F.3d 913, 922 (8th Cir. 2008)* (citing *Mo. Rev. Stat. § 407.025.1*). Under the MMPA, a "material fact" is "any fact which a **[**24]** reasonable consumer would likely consider to be important in making a purchasing decision." *Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758, 773 (Mo. 2007)* (citing *15 C.S.R. 60-9.010(1)(C)*).

[*959] a. Reliance under the MMPA

The parties agree that a consumer's reliance on an unlawful practice is not required under the MMPA. *Hess, 220 S.W.3d at 774*; *Plubell v. Merck & Co., 289 S.W.3d 707, 713 (Mo. Ct. App. 2009)* (The MMPA "eliminat[ed] the need to prove an intent to defraud or reliance.").

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[12] Plaintiffs do not so limit any of their other state consumer protection claims.

b. Scienter under the MMPA

HN20[] A claim for "omission of a material fact under the MMPA does have a scienter requirement: it is a failure to disclose material facts that are 'known to him/her, or upon reasonable inquiry would be known to him/her.'" *Plubell, 289 S.W.3d at 714 n.4* (quoting *15 C.S.R. 60-9.110*); Under the MMPA, the plaintiff must show (1) the defendant "was aware of the alleged defect," (2) "when [defendant] became aware," and (3) "that [defendant] purposefully omitted this fact in representations to each individual class member." *Hope v. Nissan N. Am., Inc., 353 S.W.3d 68, 84 (Mo. Ct. App. 2011)*.

5. New York

The Complaint alleges that Polaris violated *New York's General Business Law* ("GBL"), *N.Y. Gen. Bus. § 349*, by failing to disclose the Sportsman ATVs' exhaust heat defect, thereby injuring Plaintiff William Bates and other New York purchasers. (SAC Count VII.) **HN21**[] *GBL § 349* prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce **[**25]** or in the furnishing of any service in [New York]." *GBL § 349(a)*. To prove a claim under *GBL § 349(a)*, a plaintiff must show that (1) "the challenged act or practice was consumer-oriented,"(2) "it was misleading in a material way," and (3) "the plaintiff suffered injury as a result of the deceptive act." *Stutman v. Chem. Bank, 95 N.Y.2d 24, 731 N.E.2d 608, 611, 709 N.Y.S.2d 892 (N.Y. 2000)*. Whether a representation or an omission, the deceptive practice must be "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Id.* (citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 647 N.E.2d 741, 745, 623 N.Y.S.2d 529 (N.Y. 1995))*. To satisfy the GBL's causation requirement, "nothing more is required than that a plaintiff suffer a loss because of defendant's deceptive act." *Goldemberg, 317 F.R.D. at 392* (cleaned up) (citing, among others, *Stutman, 95 N.Y.2d at 30*). A plaintiff seeking compensatory damages must show that the material deceptive practice caused "actual, although not necessarily pecuniary, harm." *Catalano v. BMW of N. Am., LLC, 167 F. Supp. 3d 540, 562 (S.D.N.Y. 2016)* (citing *Oswego Laborers' Local 214 Pension Fund, 647 N.E.2d at 745*).

a. Reliance under the GBL

HN22[] The parties agree that individual reliance is not required under *GBL § 349*. *Oswego Laborers' Local 214 Pension Fund, 647 N.E.2d at 745*; *Koch v. Acker, Merrall & Condit Co., 18 N.Y.3d 940, 967 N.E.2d 675, 676, 944 N.Y.S.2d 452 (N.Y. 2012)* ("Justifiable reliance by the plaintiff is not an element" of *GBL § 349*); *Small v. Lorillard Tobacco Co., 94 N.Y.2d 43, 720 N.E.2d 892, 897, 698 N.Y.S.2d 615 (N.Y. 1999)* ("Intent to defraud and justifiable reliance by the plaintiff are not elements of the statutory claim.").

b. Scienter under the **[**26]** GBL

The parties also agree that scienter is not required under *GBL § 349*. *Oswego Laborers' Local 214 Pension Fund, 647 N.E.2d at 745* ("Although it is not necessary under the statute that a plaintiff establish the defendant's intent to defraud or mislead, proof of scienter permits the court to treble the damages up to $1,000.").

6. North Carolina

The Complaint alleges that Polaris violated *North Carolina's Unfair and Deceptive Trade Practices Act* ("NCUDTPA"), *N.C. Gen. Stat. § 75-1.1(a)*, by not disclosing the defect in the Sportsman ATVs to customers, thereby injuring Plaintiff James Pinion and other North Carolina purchasers. (SAC ¶¶ 171-74.) **HN23**[] *Section 75-1.1* provides in part that "unfair or deceptive acts or practices in or affecting commerce" are unlawful. *N.C. Gen. Stat. § 75-1.1(a)*. "In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) [the]

defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Bumpers v. Cmty. Bank of N. Va., 367 N.C. 81, 747 S.E.2d 220, 226 (N.C. 2013)* (brackets omitted) (quoting *Dalton v. Camp, 353 N.C. 647, 548 S.E.2d 704, 711 (N.C. 2001))*. "The determination of whether an act or practice is an unfair or deceptive practice that violates [NCUDTPA] is a question of law for the court." *Gray v. N.C. Ins. Underwriting Ass'n, 352 N.C. 61, 529 S.E.2d 676, 681 (N.C. 2000)*.

Courts applying the NCUDTPA **[**27]** have held that "[in] order for silence or an omission by the defendants to be an actionable fraud, it must relate to a material matter known by the defendants which they had a legal duty to communicate to plaintiff." *Resnick v. Hyundai Motor Am., Inc., No. CV1600593BROPJWX, 2017 U.S. Dist. LEXIS 139179, 2017 WL 6549931, at *18 (C.D. Cal. Aug. 21, 2017)* (emphasis omitted) (citing *Breeden v. Richmond Cmty. Coll., 171 F.R.D. 189, 196 (M.D.N.C. 1997)* (finding plaintiff failed to state NCUDTPA claim based on defendants' lack of knowledge)).

a. Reliance under the NCUDTPA

North Carolina courts have held that a plaintiff must prove actual and justifiable reliance for a NCUDPTA claim based on a misrepresentation. *See, e.g., Bumpers, 747 S.E.2d at 226*. Courts have applied this rule to omissions as well. *See, e.g., Arnesen v. Rivers Edge Golf Club & Plantation, Inc., 368 N.C. 440, 781 S.E.2d 1, 7 (N.C. 2015)* (affirming dismissal of *NC § 75-1.1* claim because "plaintiffs have failed to sufficiently allege justifiable reliance on any omission" and that any action "was the proximate cause of their harm"); *W. Franklin Pres. Ltd. P'ship v. Nurtur N.C., LLC, No. 14-CV-00266, 2016 U.S. Dist. LEXIS 69714, 2016 WL 3039832, at *4 (M.D.N.C. May 27, 2016)* (explaining that a NCUDTPA claim would fail for lack of proximate cause if the jury concluded that either (1) the consumer "did not rely on" the concealment of material fact or a material false statement, or (2) "that its **[*960]** reliance was unreasonable"). This Court agrees that "reliance on an omission is required to state [a NC] UDTPA claim." *Baranco v. Ford Motor Co., 294 F. Supp. 3d 950, 970 (N.D. Cal. 2018)* (citing *Sain v. Adams Auto Grp., Inc., 244 N.C. App. 657, 781 S.E.2d 655, 659 (N.C. Ct. App. 2016))*.

Plaintiffs note that **[**28]** even if reliance is required under the NCUDTPA, reliance can be proved by circumstantial evidence that consumers found a misrepresentation material and relied upon it. (ECF No. 335 ("Pls' Class Cert. Br.") at 27 n.109 (citing *Rikos v. Procter & Gamble Co., 799 F.3d 497, 517-18 (6th Cir. 2015)* (affirming class certification of NCDUTPA claim where "classwide proof—that the alleged misrepresentation is material and was made in a generally uniform manner to all class members—would also suffice in North Carolina to show actual reliance"))); *see, e.g., In re TD Bank, N.A. Debit Card Overdraft Fee Litig., 325 F.R.D. 136, 162 (D.S.C. 2018)* (finding "sufficient evidence of the uniformity and materiality of the putative misrepresentations and omissions has been presented to presume class-wide reliance" under NCUDTPA).

b. Scienter under the NCUDTPA

The parties agree that scienter is not required under the NCDUTPA. *See Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (N.C. 1981)* ("If unfairness and deception are gauged by consideration of the effect of the practice on the marketplace, it follows that the intent of the actor is irrelevant."). While "it is not necessary for the plaintiff to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception, plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood **[**29]** of deception." *Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150, 153 (N.C. Ct. App. 1985)* (citation omitted).

7. Outcome-determinative conflicts exist

Based on the assessment of consumer protection statutes above, the Court agrees that consumer protection laws "vary considerably," and that "different states have material variances between their consumer protection laws and

Minnesota's." St. Jude I, 425 F.3d at 1120. For example, outcome-determinative conflicts exist between the MCFA and the three prongs of California's UCL, which have different thresholds from the MCFA. **HN24**[] The MCFA does not require proof of individual reliance, but it does require a causal nexus between the violative conduct and damages, such that a defendant's conduct had some impact on inducing the individual plaintiff's actions. In contrast, the UCL and CLRA require reliance on an omission, which may be proved by showing that "had the omitted information been disclosed, one would have been aware of it and behaved differently." Daniel, 806 F.3d at 1225.

Courts applying the MCFA and the California statutes also differ in their consideration of proof of non-reliance in class actions. Courts applying the MCFA have concluded that where a defendant can present evidence concerning the non-reliance of individual plaintiffs, the resolution of the defendant's **[**30]** potential liability to each plaintiff will be dominated by individual issues of causation and reliance. *See, e.g.,* St. Jude II, 522 F.3d at 839-40. In contrast, courts applying the UCL and CLRA have held that such evidence would not preclude class certification. Mass. Mut. Life Ins., 119 Cal. Rptr. 2d at 197. This difference is outcome-determinative here because Polaris has offered evidence raising individual issues of causation and reliance. (*See, e.g.*, ECF No. 336-39 ("Pinion Dep.") at 85:17-19 (Pinion purchased a **[*961]** second Sportsman ATV for his wife after his first melted); ECF No. 359-2 ("Johannessohn Dep.") at 207:19-22, 209:1-9 (Johannessohn requested and received a new Sportsman ATV after filing this lawsuit)).

Another conflict exists as to the scope of the laws. **HN25**[] Unlike the MCFA, the CLRA and Missouri's MMPA are limited to goods or services purchased for "personal, family, or household purposes." *See* Cal Civ. Code § 1761(d), Murphy, 503 S.W.3d at 311. Polaris offers evidence that a portion of Sportsman ATV purchasers use them for farming, ranching, and other business purposes. (*See e.g.*, ECF No. 367 (Pixton Decl.) Ex. 8, ("Flambures Decl.") ¶ 11 (dealership general manager stating that approximately 30 percent of his buyers purchase for commercial use).) Ignoring this element would allow some claims under **[**31]** the MCFA which would fail under the CLRA and MMPA.

As to the remaining states, outcome-determinative differences emerge as well. The MCFA and Florida's FDUPTA have outcome-determinative differences because of FDUPTA's "hybrid standard" for determining deceptive acts or unfair practices. *See* Maor, 2018 U.S. Dist. LEXIS 168664, 2018 WL 4698512, at *6 (explaining the hybrid standard "may be objectively established as to mindset but subjectively established as to context" (citation omitted)). The MCFA and New York's GBL have outcome-determinative differences because unlike the MCFA's causal nexus standard, the GBL requires nothing more than that a plaintiff suffer a loss because of defendants' deceptive conduct. Finally, an outcome-determinative difference exists between the MCFA and North Carolina's NCDUPTA because the NCDUPTA requires actual and justifiable reliance.

Plaintiffs argue that the consumer protection statutes of Minnesota, California, Florida, Missouri, and New York (1) do not conflict because none of them require proof of individual reliance, and (2) permit consumers to prove injury and measure of damages by showing consumers paid a price premium artificially inflated by the seller's deceptive conduct. (ECF No. 391 ("Pls' Class Cert. **[**32]** Reply Br.") at 25-26.) On this point, the cases cited by Plaintiffs are unhelpful in determining the choice of law issue, as they do not consider whether conflicts exist among state laws.[13]

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[13] *See, e.g.,* Gold v. Lumber Liquidators, Inc., 323 F.R.D. 280, 290-91 (N.D. Cal. 2017) (not addressing conflicts of law; granting certification of multiple classes based on various consumer protection statutes, including a California class based on the UCL and CLRA, a class for violations of FDUTPA, and a class for violations of MCFA); In re Kind LLC "Healthy & All Natural" Litig., 209 F. Supp. 3d 689, 697 & n.4 (S.D.N.Y. 2016) (providing little analysis of states' statutes, and not determining which, if any, state's consumer protection law would apply to a nationwide class.); Goldemberg, 317 F.R.D. at 386 (not addressing conflicts of law where plaintiffs moved to certify three classes based on products purchased in California, Florida, and New York); Khoday v. Symantec Corp., No. CIV. 11-180 JRT/TNL, 2014 U.S. Dist. LEXIS 43315, 2014 WL 1281600, *20 n.9 (D. Minn. Mar. 13, 2014) (explaining that the court did not undertake a choice of law analysis because it found that choice-of-law clauses governed the defendants' contracts with the plaintiffs).

B. Constitutionality of Extraterritorial Application

Having determined that outcome-determinative conflicts exist between the state consumer protection statutes, the Court considers the constitutionality of applying the MCFA extraterritorially. The inquiry is into the contacts with Minnesota arising out of the nonresident-parties' claims. *St. Jude I, 425 F.3d at 1120*. And the analysis begins with a presumption: "In general, there is a presumption against the extra-territorial application of a state's **[*962]** statutes." *Arnold v. Cargill, Inc., No. CIV. 012086 (DWF/AJB), 2002 U.S. Dist. LEXIS 13045, 2002 WL 1576141, at *2 (D. Minn. July 15, 2002)* (citing *In re Pratt, 219 Minn. 414, 18 N.W.2d 147, 153 (Minn. 1945))*. Polaris argues that the MCFA cannot be applied extraterritorially because the Minnesota legislature did not specify that it is intended to apply outside Minnesota. *See In re Syngenta AG MIR 162 Corn Litig., 131 F. Supp. 3d 1177, 1232-33 (D. Kan. 2015)* (concluding MCFA "may be applied in this case only to conduct taking place in Minnesota" where plaintiffs did not point to any statutory language allowing for its extraterritorial application).

Plaintiffs do not provide any statutory language indicating **[**33]** that the MCFA applies extraterritorially. Rather, they argue simply that it has been done before; that is, that courts have applied the MCFA to the claims of parties from other forum states. *See, e.g., In re St. Jude, 2006 U.S. Dist. LEXIS 74797, 2006 WL 2943154*, *rev'd on other grounds, St. Jude II, 522 F.3d 836*; *Mooney v. Allianz Life Ins. Co. of N. Am., 244 F.R.D. 531, 534-35 (D. Minn. 2007)*. None of the cases cited by Plaintiffs holds that the Minnesota legislature intended the MCFA to apply extraterritorially. Given the presumption against the extraterritorial application of Minnesota statutes and the lack of any statutory language allowing such an application, the Court concludes that the MCFA may be applied only to conduct that occurred in Minnesota. *See Syngenta, 131 F. Supp. 3d at 1233*.

Even if the Minnesota legislature generally intended the MCFA to apply extraterritorially, it does not follow that doing so would be constitutionally permissible in this particular case. *See, e.g., Arnold, 2002 U.S. Dist. LEXIS 13045, 2002 WL 1576141, at *4* (noting that even if the court found the MHRA provided for extraterritorial application, "the Court does not find, under a due process analysis, sufficient contacts with the state of Minnesota" with respect to nonresident plaintiffs). ***HN26***[] "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation **[**34]** of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)*; *Jepson, 513 N.W.2d at 469*; *see also Shutts, 472 U.S. at 821-22* (holding a state must have a significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class to apply that state's law). When considering fairness in this context, "an important element is the expectation of the parties." *Shutts, 472 U.S. at 822*.

Plaintiffs argue that Minnesota has significant contacts with Polaris and with the facts giving rise to their claims because: (1) Polaris designed, manufactured, and tested the defective vehicles at issue in Minnesota; (2) Polaris received consumer complaints and warranty claims in Minnesota; and (3) Polaris is headquartered in Minnesota. *See Mooney, 244 F.R.D. at 535* ("As a Minnesota corporation, Allianz can not claim surprise by the application of Minnesota law to conduct emanating from Minnesota.").

The location of a defendant's headquarters, by itself, is not enough to apply the law of that state. In *St. Jude I*, the Eighth Circuit reversed the district court's decision to apply Minnesota law to claims of nonresident plaintiffs. There, even though the defendant had significant contacts with Minnesota, including **[**35]** being headquartered there, and even though much of the conduct relevant to the claims occurred or emanated from Minnesota, the Eighth Circuit remanded because the district **[*963]** court failed to conduct a thorough conflicts-of-law analysis with respect to each plaintiff. *425 F.3d at 1119-21*. So even combined with the fact that Polaris's headquarters are in Minnesota, the fact that some relevant conduct occurred or emanated from Minnesota may not be sufficient to apply Minnesota law. *See id.; accord Arnold, 2002 U.S. Dist. LEXIS 13045, 2002 WL 1576141, at *4* (holding that the fact that defendant's headquarters were located in and its contested policies emanated from Minnesota was "insufficient to justify extraterritorial application, particularly when there is no evidence . . . [defendant] could not otherwise be held accountable in the courts of other states where the named plaintiffs reside and/or work.").

That Polaris designed, manufactured, tested, and received complaints about Sportsman ATVs in Minnesota certainly supports Polaris's expectation that the MFCA would apply. But this evidence does not support the assertion that nonresident Plaintiffs expected Minnesota law to apply. Plaintiffs claim that consumers expected Minnesota law to apply based on Polaris's Minnesota **[**36]** address and phone number in the owner's manual. The Court finds this argument unpersuasive, particularly given that the sales contracts of some Plaintiffs reference the laws of the states in which they purchased their ATVs. (*See, e.g.*, ECF No. 359-7 (Bates's contract referencing "the law of the State of New York"); ECF No. 359-9 (Kelley's contract referencing Florida law); ECF No. 359-12 (Pinion's contract "[North Carolina] law does not provide for a 'cooling off' or other cancellation period for this sale"); ECF No. 359-5 (Badilla's contract with similar disclosure under California law)). Indeed, Plaintiff Badilla admitted that he did not know the location of Polaris's headquarters when he bought his ATV. *See* *St. Jude I, 425 F.3d at 1120* (reversing choice of law decision where there was "no indication out-of-state parties 'had any idea that Minnesota law could control' potential claims when they received their" products). Plaintiffs purchased their ATVs from dealers in their state of residence, not from Polaris in Minnesota. *See* *Rapp v. Green Tree Servicing, LLC, 302 F.R.D. 505, 517 (D. Minn. 2014)* (distinguishing *Mooney* because there, plaintiffs "purchased a financial product directly from the defendant" located in Minnesota).

Given the dearth of evidence that the parties expected **[**37]** Minnesota law would apply to the nonresident Plaintiffs' claims against Polaris, Minnesota does not have contacts sufficient to create a state interest, and it would be arbitrary and fundamentally unfair to apply the MCFA to such claims. The Court therefore concludes that extraterritorial application of the MCFA is not constitutionally permissible in this case.

C. Five-Factor Test

Even if applying the MCFA extraterritorially were constitutionally permissible, the choice-of-law factors buttress the Court's determination not to apply the MCFA to the nonresident Plaintiffs' claims. ***HN27***[] Those choice-influencing factors are: "(1) predictability of result; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interest; and (5) application of the better rule of law." *Jepson, 513 N.W.2d at 470*. These factors were intended to "prompt courts to carefully and critically consider each new fact situation and explain in a straight-forward manner their choice of law." *Id.*

1. Predictability of Result

HN28[] The predictability-of result-factor "represents the ideal that litigation on **[*964]** the same facts, regardless of where the litigation occurs, should be decided **[**38]** the same to avoid forum shopping." *Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co., 604 N.W.2d 91, 94 (Minn. 2000)*. It addresses whether the choice of law was predictable before the time of the transaction or event giving rise to the claim. *Rapp, 302 F.R.D. at 517*. This factor applies primarily to consensual transactions where parties "desire advance notice of which state law will govern in future disputes." *Nodak Mut. Ins. Co., 604 N.W.2d at 94*. In most tort cases, predictability of result is of little relevance. *Nesladek v. Ford Motor Co., 46 F.3d 734, 738 (8th Cir. 1995)*. Consumer protection claims are not based entirely in either tort or contract law. *In re St. Jude, 2006 U.S. Dist. LEXIS 74797, 2006 WL 2943154, at *5*.

Plaintiffs argue that this factor favors them because Polaris is headquartered in Minnesota, where it designed, engineered, manufactured and tested the ATVs, received consumer complaints, and allegedly decided to conceal the heat exhaust defect from consumers. But as noted above, Plaintiffs purchased their ATVs from dealers in their states of residence (not directly from Polaris), and most of the sales contracts with Plaintiffs provide that the laws of their states of residence apply. These facts indicate that, before the time of the transaction, the parties would predict that the law of the state of each plaintiff's residence would apply.

2. Maintenance of Interstate Order

HN29[] The maintenance-of-interstate-order factor is concerned **[**39]** with whether applying Minnesota law would manifest disrespect for other state sovereignty or impede the interstate movement of people and goods. In re Baycol Prods. Litig., 218 F.R.D. 197, 207 (D. Minn. 2003). "An aspect of this concern is to maintain a coherent legal system in which the courts of different states strive to sustain, rather than subvert, each other's interests in areas where their own interests are less strong." Nodak Mut. Ins. Co., 604 N.W.2d at 95. By considering whether application of Minnesota law would negatively affect the maintenance of interstate order, "the opportunities for forum shopping may be kept within reasonable bounds." Jepson, 513 N.W.2d at 471.

In *Hughes v. Wal-Mart Stores, Inc.*, the Eighth Circuit explained that where a state "has little or no contact with a case and nearly all of the significant contacts are with a sister state," the factor suggests that a state should not apply its own law to the dispute. 250 F.3d 618, 620-21 (8th Cir. 2001) (citation and quotation marks omitted). In that case, a Louisiana resident had purchased the product at issue at a Wal-Mart in Louisiana, the injury occurred in Louisiana, and the injured party was a Louisiana resident. Id. at 621. The only contact Arkansas had to the litigation was that the defendant had its principal place of business in the state. *Id.* The court found that **[**40]** this contact was insufficient to apply Arkansas law. *Id.; cf.* Sportsman for Sportsman v. Cal. Overland, Ltd., No. CV 17-1064 (DWF/KMM), 2018 U.S. Dist. LEXIS 65265, 2018 WL 1865930, at *5 (D. Minn. Apr. 18, 2018) (concluding that defendant's "substantial business operations in Minnesota are the more relevant contacts" where "relevant conduct by [defendant] that most likely occurred within this state is central to Plaintiff's case").

Plaintiffs maintain that Minnesota has a stronger interest in a case that involves a remedial statute like the MCFA than one involving common law claims. In support, they cite Land O' Lakes, Inc. v. Employers Mutual Liability Insurance Company of Wisconsin. 846 F. Supp. 2d 1007, 1040 (D. Minn. 2012). That case involved insurance claim issues, finding that Minnesota **[*965]** had a strong interest in applying its law to contribution claims against insurers who write policies in Minnesota. Id. at 1040. The court applied the law of where the insured was located, *i.e.*, Minnesota, to the contribution claims, rather than the state law that generally governed the insurer's policies. *Id.* No party had argued for the law of the insurer's headquarters.

Here, Plaintiffs' claims are based on Polaris's failure to disclose the alleged heat exhaust defect in the Sportsman ATVs. The parties agree that Plaintiffs' alleged injuries occurred where each plaintiff resides or purchased a Sportsman ATV. *See* ***[**41]*** In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1017 (7th Cir. 2002) ("If recovery for . . . consumer fraud is possible, the injury is decidedly where the consumer is located, rather than where the seller maintains its headquarters."); *cf*. Restatement (Second) of Conflict of Laws § 145, subd. 2, cmts. (e), (f) (1971) (noting the location of the injury is "less significant" in the case of fraudulent misrepresentations). As revealed in the Court's analysis above, states have adopted different regulatory regimes to protect consumers within their borders. Applying the MCFA to the claims of nonresident plaintiffs would demonstrate disrespect for these regulatory regimes. St. Jude I, 425 F.3d at 1120 ("[S]tate consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules."). Given Minnesota's limited contact with these claims, particularly as compared with the significant contacts with Plaintiffs' states of residence, the Court finds that applying the MCFA to the nonresident Plaintiffs' claims would subvert the interests of those states.

3. Simplification of the Judicial Task

In considering the simplification of the judicial task, "the relevant question is not whether applying the law of one state would be simpler than applying the laws **[**42]** of 50 states. Instead, the question is whether, with respect to any particular claimant, applying the law of Minnesota would be simpler than applying the law that would otherwise apply." Rapp, 302 F.R.D. at 518 (citing St. Jude I, 425 F.3d at 1120). The parties did not address this factor in any detail, likely because Minnesota courts do not give this factor much weight. *See, e.g.,* Nodak Mut. Ins. Co., 604 N.W.2d at 95. With respect to any particular plaintiff, the Court is capable of applying the MCFA or the state law of that plaintiff's residence. Thus, this factor is neutral.

4. Advancement of the Forum's Governmental Interest

In considering the advancement of the forum's governmental interest, the Court must weigh the policy interests of Minnesota with those of a nonresident plaintiff's home state. *Nesladek, 46 F.3d at 739-40*. This factor "generally weighs in favor of application of the state law in which the plaintiff lives and in which the injury occurred." *In re Baycol Prods. Litig., 218 F.R.D. at 207* (collecting cases). Plaintiffs claim that Minnesota has a compelling interest in redressing wrongs committed within its borders because the reputations of other Minnesota businesses are tarnished. While they cite *Boatwright v. Budak* for this proposition, the case does not support it. *625 N.W.2d 483, 489 (Minn. Ct. App. 2001)*. *Boatwright* addressed choice of law in the context of **[**43]** vicarious liability for a car accident that occurred in Iowa and found that Iowa law should apply because it "best serves Minnesota's interest in compensating tort victims." *Id.* The Eighth Circuit has held that "[a]bsent some relevant connection between a state and the facts underlying the litigation," it **[*966]** "fail[ed] to see how any important [state] governmental interest is significantly furthered by ensuring that nonresidents are compensated for injuries that occur in another state." *Hughes, 250 F.3d at 621*.

Plaintiffs also rely on *Mooney*, which found that this factor favored application of the MCFA to a nonresident's claim because "[b]y allowing 'any person' to sue under the [MCFA], the Minnesota legislature has evinced a strong policy of providing redress for fraudulent business practices that occur within Minnesota's borders, regardless of where a consumer's injury occurs." *244 F.R.D. at 537*. But there is no reason to believe that consumer protection laws of the nonresident Plaintiffs' states could not equally or more effectively hold Polaris accountable for its alleged wrongdoing. *See* *Rapp, 302 F.R.D. at 518* (rejecting *Mooney*). This factor therefore favors applying the laws of the nonresident Plaintiffs' states.

*5. Application of the Better Rule **[**44]** of Law*

The better-rule-of-law factor is not considered unless the other factors do not resolve the choice-of-law issue. *Medtronic, Inc. v. Advanced Bionics Corp., 630 N.W.2d 438, 455-56 (Minn. Ct. App. 2001)*; *Nodak Mut. Ins. Co., 604 N.W.2d at 96* (noting that the court "has not placed any emphasis on this factor in nearly 20 years"). Courts have refrained from resolving a conflict of law question based on the better-rule-of-law factor, recognizing that "states often have competing policy considerations for governing similar transactions or events in different manners such that the laws do not necessarily lend themselves to being labeled either 'better' or 'worse.'" *Hughes, 250 F.3d at 621*. The Court will refrain from determining which state has the "better" rule of law, as the states at issue have competing policy considerations for crafting their consumer protection laws.

Because most of the five factors do not favor applying the MCFA to the claims of the nonresident plaintiffs, the Court declines to do so. The law of each Plaintiff's state will apply to him.

II. Summary Judgment

With the choice of law question settled, the Court turns to the summary judgment motion, beginning with the familiar standard under *Rule 56*. ***HN30***[] "Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits show that **[**45]** there is no genuine [dispute] as to any material fact and that the movant is entitled to judgment as a matter of law." *Gannon Int'l, Ltd. v. Blocker, 684 F.3d 785, 792 (8th Cir. 2012)* (citing *Fed. R. Civ. P. 56(c)*). In assessing whether such a dispute exists, "[a] court must 'make all reasonable inferences in favor of the non-moving party,' but will 'not resort to speculation.'" *Hill v. Sw. Energy Co., 858 F.3d 481, 487 (8th Cir. 2017)* (quoting *Solomon v. Petray, 795 F.3d 777, 788 (8th Cir. 2015))*. "The burden of demonstrating an absence of a genuine dispute of material fact is on the moving party." *Farver v. McCarthy, 931 F.3d 808, 811 (8th Cir. 2019)*. "If the movant does so, the nonmovant must respond by submitting evidentiary materials that set out 'specific facts showing that there is a genuine issue for trial.'" *Torgerson, 643 F.3d at 1042* (quoting *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986))*.

Polaris contends that summary judgment is proper and that it is entitled to judgment as a matter of law because there is no evidence that any of the named Plaintiffs were injured and because four of the named Plaintiffs cannot establish required elements of their consumer protection **[*967]** claims. (ECF No. 358 ("Polaris Summ. J. Br.") at 18-29.) For the reasons discussed below, Polaris's arguments are unsuccessful.

A. Price Premium Theory

Polaris argues that each of the named Plaintiffs "must prove . . . the fact and extent of their claimed injury" to survive summary judgment. (Polaris Summ. J. Br. at 18.) ***HN31***[] The **[**46]** fact of injury must not be "speculative, remote, or conjectural," but proved "with certainty." *Storage Tech. Corp. v. Cisco Sys., Inc., 395 F.3d 921, 928-29 (8th Cir. 2005)*. The "injury" claimed by Plaintiffs appears to be twofold. First, Plaintiffs argue that they did not receive the benefit of their bargain because the Sportsman ATVs present a risk of injury from overheating. Second, Plaintiffs argue that they overpaid for their Sportsman ATVs because the market would have valued the ATVs for less if consumers had known that the ATVs presented this risk. Polaris focuses on this second prong of the injury in its summary judgment motion, arguing that the "overcharge" or "price premium" theory presented by Plaintiffs cannot survive summary judgment.

Polaris's argument against the price premium theory is that (1) Plaintiffs cannot use their own testimony, because an individual is not competent to testify about what the ATV price would have been but for the non-disclosure; (2) Plaintiffs cannot use their expert testimony, because the experts have no opinion as to any individual Plaintiff; and (3) Plaintiffs cannot use their expert testimony for the additional reason that the experts testify only to aggregate damages for the market.

The first problem with Polaris's **[**47]** arguments is that Polaris does not tie them to the state laws governing Plaintiffs' claims. (*Compare* Polaris Summ. J. Br. at 18-25 (arguing simply "no evidence establishes that any plaintiff was injured" without reference to the state laws at issue) *with id.* at 26-29 (arguing Johannessohn, Pinion, Kelley, and Bates cannot survive summary judgment under the MCFA, NCUDPTA, FDUTPA, and GBL, respectively).) Whether a failure to "prove . . . the fact and extent of [a] claimed injury" entitles Polaris to judgment as a matter of law depends on the requirements of the state laws that apply to Plaintiffs' claims.[14] As the Supreme Court explained in *Anderson v. Liberty Lobby, Inc.*, "the substantive law will identify which facts are material" because "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. The Court must then analyze the theory under each state's law.

1. The price premium theory is a legally cognizable injury under each state's law.

Each state statute at issue recognizes, as a general proposition, that a consumer who pays a premium for a product based on a defendant's actionable misrepresentations **[**48]** or omissions has suffered a legally cognizable injury. That is, the MMPA, UCL, CLRA, FDUTPA, GBL, NCUDTPA, and MCFA each recognize that a consumer who overpays for an item because the actual value of the item he purchased was less than the value of the item as represented can establish that he has been injured. *See, e.g., Marty v. Anheuser-Busch* ***[*968]*** *Companies, LLC, 43 F. Supp. 3d 1333, 1347 (S.D. Fla. 2014)* (denying motion to dismiss UCL, CLRA, FDUTPA, and GBL claims, among others, because plaintiffs claimed that they had paid a premium price for beer based on the mistaken belief that it was imported from Germany). Courts applying the MMPA have reasoned that "under the benefit of the bargain rule as applied to MMPA claims, [p]laintiff[s] need only allege that the actual value of the product as purchased was less than the value of the product as represented to state a claim for an ascertainable loss." *Kelly v.*

[14] Polaris appears to recognize as much when distinguishing Plaintiffs' cited authorities. *See* Polaris Summ. J. Reply at 16 (arguing Plaintiffs cannot rely on *Carriuolo, 823 F.3d 977* in support of their Minnesota law arguments because it applies Florida law).

Cape Cod Potato Chip Co., 81 F. Supp. 3d 754, 758-59 (W.D. Mo. 2015). Similarly, courts applying California's UCL and CLRA have determined that paying a price premium attributable to a defendant's actionable conduct is a cognizable injury under both of those statutes. *See, e.g.,* In re Gen. Motors LLC Ignition Switch Litig., 2016 U.S. Dist. LEXIS 92499, 2016 WL 3920353, at *21-*22 (denying motion to dismiss UCL and CLRA claims because plaintiffs alleged "they purchased products that they otherwise would not have, or paid more than they otherwise **[**49]** would have paid, due to New GM's failure to disclose the ignition defects in their cars").

Courts have also determined that a plaintiff can establish a legally cognizable injury under the GBL by showing that she "overpaid for the product, or, stated differently, [that she] paid a premium for a product based on the defendants' inaccurate representations." Greene v. Gerber Prods. Co., 262 F. Supp. 3d 38, 68 (E.D.N.Y. 2017) (cleaned up).[15] Similarly, a consumer who has paid a premium attributable to a defendant's actionable omissions or misrepresentations has suffered a cognizable injury under the FDUTPA. *See, e.g.,* Dzielak v. Whirlpool Corp., 26 F. Supp. 3d 304, 341 (D.N.J. 2014) (denying motion to dismiss where complaint alleged that "plaintiffs paid a price premium for an Energy Star certified washer, and paid higher energy bills because the machine did not in fact comply with efficiency standards").

Although this Court has found few cases addressing the price premium theory of damages under the NCUDTPA, it finds the reasoning of Suchanek v. Sturm Foods, Inc., No. 11-CV-565-NJR-RJD, 2018 U.S. Dist. LEXIS 213658, 2018 WL 6617106 (S.D. Ill. July 3, 2018) instructive. In *Suchanek*, plaintiffs brought claims under various state consumer fraud statutes, including the NCUDTPA, asserting that they and their class members were misled into paying the price of ground coffee **[**50]** for a product that was predominantly instant coffee. 2018 U.S. Dist. LEXIS 213658, [WL] at *2. The *Suchanek* court directed the parties to submit filings addressing, among other things, the elements of each statute that could be established using common proof. *Id.* The court first noted that under North Carolina law, "[a]ctual injury may include the loss of the use of specific and unique property, the loss of any appreciated value of the property, and such other elements of damages as may be shown by the evidence." 2018 U.S. Dist. LEXIS 213658, [WL] at *15 (quoting Coley v. Champion Home Builders Co., 162 N.C. App. 163, 590 S.E.2d 20, 22 (N.C. Ct. App. 2004)). The court then determined that the price premium model set forth by the plaintiffs could suffice to show injury under the NCUDTPA. *See* 2018 U.S. Dist. LEXIS 213658, [WL] at *15-16. Based on the reasoning of Suchanek, the Court concludes that paying a premium attributable to a defendant's actionable omissions or misrepresentations **[*969]** is a cognizable injury under the NCUDTPA.

This Court has also found few cases addressing the price premium theory of damages under the MCFA in similar circumstances. But based on its review of the relevant authority, it appears that paying a premium attributable to a defendant's actionable omissions or misrepresentations is a cognizable injury under the MCFA. *See, e.g.,* Laughlin v. Target Corp., No. 12-CV-489 (JNE/JSM), 2012 U.S. Dist. LEXIS 104526, 2012 WL 3065551, at *5 (D. Minn. July 27, 2012) (denying motion to dismiss where plaintiff claimed **[**51]** "she would not have purchased . . . footwear had she known that the shoes did not provide the advertised benefits, that she paid an increased price for the shoes, and that she therefore suffered injury").

In addition to the fact of injury, proof of the extent of injury depends on the substantive laws at issue. Under the applicable state statutes, once the fact of injury is established, the extent of the injury need not be proved with precision, particularly at the summary judgment stage. *See, e.g.,* Ebin, 2014 U.S. Dist. LEXIS 26439, 2014 WL 737878, at *2 ("New York . . . law squarely place[s] the burden of ascertaining the amount of damages, when the existence of damage is known but its extent is opaque, upon the alleged wrongdoer."); In re Gen. Motors LLC Ignition Switch Litig., 407 F. Supp. 3d 212, 231-32 (S.D.N.Y. 2019) ("Although [p]laintiffs may not need to prove the amount of damages to an absolute certainty to survive summary judgment, they do — under the law[s] of [California, Missouri, and Texas] — need some evidence of the fact of damages . . . to create a triable issue on that element of their claim."(emphasis omitted)). Polaris's cited authority is not to the contrary. *See* Polaris Summ. J. Br. at 18 (citing Storage Tech. Corp., 395 F.3d at 928-29 ("Under Minnesota law, damages may not be speculative,

[15] *See also* Koenig v. Boulder Brands, Inc., 995 F. Supp. 2d 274, 288 (S.D.N.Y. 2014) (collecting cases); Ebin v. Kangadis Food Inc., No. 13 CIV. 2311 JSR, 2014 U.S. Dist. LEXIS 26439, 2014 WL 737878, at *2 (S.D.N.Y. Feb. 25, 2014) (denying summary judgment where plaintiffs had adduced evidence that they had overpaid because they paid the price of olive oil for pomace).

remote, or conjectural. However, once the fact of damages **[**52]** is proved with certainty, the extent of damages need only be shown to have a reasonable basis in the evidence." (citation omitted))).

2. Daubert motion.

Having concluded that the price premium theory can establish an injury under the relevant state consumer protection laws, the Court turns to whether the record contains evidence that would allow a reasonable factfinder to find such injury. Plaintiffs offer the expert testimony of Richard Eichmann and Sara Butler, who have assessed an 8.8 percent price premium attributable to Polaris's failure to disclose the exhaust heat defect. (ECF No. 385 ("Pls' Summ. J. Opp.") at 25-29 ("Plaintiffs' experts Sara Butler and Richard Eichmann can provide the injury evidence called for under the applicable state law.").)

HN32[] Polaris contends that the opinions and related work of Butler and Eichmann are inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, and *Rule 702 of the Federal Rules of Evidence.* "When considering expert testimony, a district court must ensure that all scientific testimony is both reliable and relevant." *In re Wholesale Grocery Prods. Antitrust Litig., 946 F.3d 995, 1000 (8th Cir. 2019)* (citation and quotation marks omitted). "To satisfy the reliability requirement, the proponent of the expert testimony must show by a preponderance of the evidence both that the expert is qualified to render **[**53]** the opinion and that the methodology underlying his conclusions is scientifically valid." *Id.* (quoting *Marmo v. Tyson Fresh Meats, Inc., 457 F.3d 748, 757-58 (8th Cir. 2006))*. District courts act as gatekeepers, making "preliminary assessment of whether the reasoning or **[*970]** methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert, 509 U.S. at 592-93*. The Eighth Circuit has cautioned that the "rejection of expert testimony is the exception rather than the rule." *In re Wholesale Grocery Prods. Antitrust Litig., 946 F.3d at 1001*; *see also Johnson v. Mead Johnson & Co., LLC, 754 F.3d 557, 562 (8th Cir. 2014)* (collecting cases).

a. Methodology

Butler and Eichmann submitted reports and deposition testimony that Plaintiffs claim establish evidence of (1) an 8.8 percent price premium attributable to Polaris's purported undisclosed exhaust heat defect and (2) cost-of-repair damages.

To calculate the price premium attributable to Polaris's alleged undisclosed exhaust heat defect, Butler and Eichmann were tasked with determining what the price of Polaris's affected ATVs would have been if Polaris had disclosed its existence. Butler did the first part: she created a conjoint survey to test whether exposure to a warning about an exhaust heat defect would decrease consumers' willingness to pay for Sportsman ATVs. (ECF No. 407-6 **[**54]** ("Butler 1st Rpt.") ¶¶ 17, 20.) Survey respondents completed a questionnaire that showed them various attributes associated with ATVs— *e.g.*, brand, engine size, front rack/rear rack capacity, suspension travel, ground clearance, and price. (*Id.* ¶ 42.) A key feature of Butler's survey is that those of her respondents who were sorted into a "Test" group were shown the following statement:

> Please note: the design of the Polaris Sportsman ATVs causes heat from the exhaust that can reach temperatures that exceed Polaris's specifications and can cause discomfort to riders and melt plastic parts.

(*Id.* ¶ 21.) Survey respondents who were sorted into a "Control" group were not shown that statement but were otherwise provided with the same information as members of the "Test" group about ATV brands, attributes, and prices. (*Id.* ¶ 22.) All survey respondents were then asked to choose the ATV they preferred after being shown various brand, attribute, and price combinations. (*Id.* ¶¶ 48-49.) Using the information from this survey, Butler calculated an average decline of $1,614 in willingness to pay for a Polaris Sportsman ATV with the exhaust heat defect. (ECF No. 407-5 "(Butler 2d Rpt.") ¶ 92.)

Eichmann **[**55]** used the $1,614 figure calculated by Butler to conduct a market simulation with the aim of determining the shifts in supply and demand in the market that would affect pricing had the defect been disclosed.

(ECF No. 407-13 ("Eichmann 2d Rpt.") ¶ 22.) He relied on Butler's calculations to calculate shifts in the demand side of the market. (*Id.*). For the supply side, he used historical data of units sold in the "1-Up Big Bore" market segment in 2016 (*id.* ¶ 24), and Manufacturer Suggested Retail Price ("MSRP") data. (*See, e.g., id.* ¶ 43.) Eichmann's market simulation focused on four types of ATVs: Polaris, Yamaha, CanAm, and Other (a composite of minor offerings in the marketplace). (*Id.* ¶¶ 25-26.) He treated each of these as separate firms in his analysis, assuming that each firm is profit maximizing. (*Id.* ¶ 27.) Although there are two Sportsman ATVs in the "1-Up Big Bore" market—the Sportsman 850 and the Sportsman 1000—Eichmann created an "average" Sportsman to represent both of these by "taking the unit sales weighted average of MSRP and physical characteristics across Sportsman 850 and 1000, while using the sum of the unit sales across these models as total sales." (*Id.*) **[*971]** With these **[**56]** inputs on the supply side and Butler's input on the demand side, Eichmann's market simulation determined that the price for a Polaris Sportsman after disclosure of the defect would have been 8.8 percent lower than consumers actually paid. (*Id.* ¶ 30.)

b. Qualifications

HN33[] "[I]t is the responsibility of the [Court] to determine whether a particular expert has sufficient specialized knowledge to assist jurors in deciding the specific issues in the case." *Medalen v. Tiger Drylac U.S.A., Inc., 269 F. Supp. 2d 1118, 1127 (D. Minn. 2003)* (citation and quotation marks omitted). Butler is the Managing Director at NERA Economic Consulting ("NERA"), where she is Chair of the Survey and Sampling Practice. (Butler 1st Rpt. ¶ 1.) She has a Master's degree in sociology from Temple University. (*Id.* Ex. A.) To this Court's knowledge, she has never been deemed unqualified to testify as an expert. And after the Court's review of her resume and work as a litigation expert, it concludes that she has considerable experience designing and implementing conjoint surveys. (*See, e.g., id.*) That is what she did here.

Polaris does not appear to dispute Butler's considerable experience with conjoint surveys. (*See, e.g.*, ECF No. 406 ("Polaris Daubert Reply") at 2.) At bottom, it contests whether **[**57]** Butler has the training and experience to calculate a demand curve. (*Id.*) But Butler does not hold herself out to be an economist. Nor is it this Court's understanding that, if a trial were held, Butler would be the one to explain to the jury what, if anything, her survey results have to do with shifts in the demand curve. The Court understands that to be Eichmann's role. The Court is satisfied that Butler is qualified to testify as to the design and implementation of her conjoint survey.

Eichmann is a Director for NERA. (ECF No. 407-9 ("Eichmann 1st Rpt.") ¶ 1.) He has a Master's degree in Applied Economics from the University of Michigan. (Eichmann First Rpt., App. A.) He has over 20 years of experience as an economics consultant. (Eichmann 1st Rpt. ¶ 1.) The National Association for Certified Valuators and Analysts has certified him as a Master Analyst in Financial Forensics and a Certified Valuation Analysis. (Eichmann 1st Rpt., App. A.) Federal and state courts have deemed him qualified as an expert to testify to statistical methods, sampling, survey design, business valuations, and econometrics. (Eichmann 1st Rpt. ¶ 1.) To this Court's knowledge, he has never been deemed unqualified **[**58]** to testify as an expert.

Polaris contends that while Eichmann may be qualified to "estimate some types of alleged damages," he lacks the training and experience to conduct a market simulation. (Polaris Daubert Reply at 3.) But Eichmann has testified that while he has never "done [a] grab-a-willingness-to-pay figure market analysis the way [he did] here as a testifying expert on another case before," he has worked on "at least 20 or so" cases in which he received the results of a conjoint study and then used a market simulation to compute market equilibrium prices. (ECF No. 378-2 ("Eichmann Dep.") at 16:21-17:5; 18:23-19:2.) The Court is satisfied that Eichmann has sufficient training and experience to testify as to the design and results of his market simulation.

c. Scientific Validity

HN34[] To be admissible, expert testimony must be based on "reliable principles and methods." *Fed. R. Evid. 702(c)*. Among the many factors courts consider to **[*972]** determine whether expert opinions are reliable are: "(1) whether the theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) whether the theory **[**59]** has been generally accepted." *Lauzon v. Senco Prods., Inc., 270 F.3d 681, 687 (8th Cir. 2001)* (cleaned up). "As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility." *Bonner v. ISP Techs., Inc., 259 F.3d 924, 929 (8th Cir. 2001)*.

Although it is a close question, the Court determines that Butler's methodology is admissible, and that Polaris's complaints about it go to its weight, not its admissibility. It is undisputed that conjoint questionnaires are not ordinarily designed to be given to separate "test" and "control" groups. (*See, e.g.*, Butler 2d Rpt. ¶ 46.) But the Court is persuaded that sufficiently similar approaches have been tested and subject to peer review, and thus the Court will allow it to be presented at trial. (*See, e.g.*, ECF No. 407-6 ("Mizik Supp. Rep."), App. 3 (listing published articles discussing atypical conjoint survey designs).)

The Court is also of the view that Butler's survey is sufficiently representative of the relevant population. Butler's sample contained prospective purchasers as well as those who had bought a new ATV within five years of taking Butler's questionnaire. (Butler 1st Rpt. ¶ 31.) And it appears that Butler randomly assigned sample members to the "test" and "control" groups. (Butler 1st Rpt., Exhibit **[**60]** D at 5.) The Court finds the sample to be sufficiently representative of the relevant population—consumers whose views would have affected the market price of the Sportsman ATVs had Polaris disclosed the alleged exhaust heat defect—to be admissible.

Polaris's myriad arguments to the contrary do not persuade the Court. Among other things, Polaris contends that Butler's test and control groups were not properly randomized because both had too many women (Polaris's customers are primarily men) and the control group had too many Polaris owners. The Court is not convinced by Polaris's argument that randomization failed because the demographics of Butler's survey sample differ from those of actual Polaris buyers. The population of Polaris buyers is surely smaller than the population of prospective ATV buyers, and thus would be less reflective of the market. Nor is the Court convinced that the presence of additional Polaris owners in the control group means that randomization failed.

Polaris also contends that Butler made various mistakes in designing her survey. Among other things, it argues that the purchasing environment simulated by Butler's survey was "divorced from the undisputed facts," **[**61]** that it made members of the "control" group pay undue attention to the exhaust-heat warning, that her survey omitted certain key attributes that actual ATV purchasers find most important, and that Butler misinterpreted the results from the software she used to generate her findings. (ECF No. 374 ("Polaris Daubert Br.") at 21.) These are matters for cross-examination and do not mandate the exclusion of her opinions and testimony. *See, e.g., Murphy v. Wheelock, No. 16-CV-2623 (DWF/BRT), 2019 U.S. Dist. LEXIS 132477, 2019 WL 3719035, at *5 (D. Minn. Aug. 7, 2019)* (concluding that defendant's criticisms of expert's methodology were matters to be addressed on cross examination).

The Court also concludes that Eichmann's methodology is admissible. There is no question that a market simulation is a scientifically valid method to determine the market equilibrium price in **[*973]** a counterfactual world. Polaris's dispute is over many of the assumptions Eichmann made before running his market simulation. Among other things, it argues that Butler's survey results could not give Eichmann the proper inputs for a demand curve, that Eichmann should have not assumed that the "1-Up Big Bore" market segment was representative of the markets where the Sportsman ATVs are sold, that Eichmann should not have combined Polaris Sportsman **[**62]** 850 and Polaris Sportsman 1000 data to create an "average" Sportsman, that Eichmann should not have combined the smaller actors in the "1-Up Big Bore" market segment into one firm, and that Eichmann should not have used MSRP for price data. Although it is again a close question, the Court concludes Polaris's challenges to Eichmann's methodology go to the weight, not the admissibility, of his opinion and testimony.

Eichmann's model is not so disconnected from the facts of the case that his opinion must be excluded. For example, although Polaris criticizes Eichmann heavily for using MSRP data when vehicles are ordinarily sold at individually negotiated prices (Polaris Daubert Reply at 13), Eichmann does not need actual prices to conduct his market simulation. Eichmann seeks to find the difference between Polaris's prices in the actual world (the world in which, according to the Plaintiffs' theory of damages, Polaris commanded a price premium) and in the Plaintiffs' counterfactual world (the world in which Polaris promptly disclosed the exhaust heat defect). It is not unreasonable to assume that MSRP data may be used to capture this difference—*i.e.*, the overcharge percentage—because there **[**63]** is some correlation between MSRP and actual price. That is, if Eichmann captured an 8.8 percent change in MSRP, then it is reasonable to assume that mirrors an 8.8 percent change in actual price. Whether changes in MSRP do or do not track changes in actual price is fodder for cross-examination.[16]

Polaris also points out that Eichmann did not report the margins of error for his calculations. ***HN35***[] Under *Daubert*, the "known or potential rate of error" is indeed important to assessing the scientific validity of an expert's methods. *Lauzon, 270 F.3d at 687*. The Court is satisfied that Eichmann's and Butler's work papers contained sufficient information to allow for computation of the potential rate of error, and their testimony will not be excluded on this basis.

d. Relevance

HN36[] "To show that the expert testimony is relevant, the proponent [of the expert testimony] must show that the reasoning or methodology in question is applied properly to the facts in issue." *Marmo, 457 F.3d at 758*. "Courts should resolve doubts regarding the usefulness of an expert's testimony in favor of admissibility." *Id.* Here, Butler opines that she has calculated an average decline of **[*974]** $1,614 in willingness to pay for Polaris Sportsman ATV with the exhaust heat **[**64]** defect. And Eichmann opines that, based on the $1,614 decline in willingness to pay and data he gathered from the "1-Up Big Bore" market segment, his market simulation calculates an 8.8 percent price premium that is attributable to the exhaust heat defect. The Court concludes that this evidence would be helpful to the jury's consideration of whether Polaris charged a price premium that can be attributed to an undisclosed exhaust heat defect.

Polaris disputes the relevance of Butler's testimony, and thus, the relevance of Eichmann's testimony as well. In particular, Polaris argues that Butler tested the wrong proposition because her survey design does not take into consideration disclosures all ATV manufacturers make in their brochures and owner's manuals. This is, at bottom, a factual dispute between the parties as to the purchasing environment that would inform consumers' decisions in the counterfactual world. The Court concludes that the purchasing environment envisioned by Butler's survey "is sufficiently grounded in the facts of the case to be helpful to the jury." *Scoular Co. v. Ceres Glob. AG Corp., No. CV 14-1881 (JRT/HB), 2017 U.S. Dist. LEXIS 130826, 2017 WL 3535210, at *17 (D. Minn. Aug. 16, 2017)*.

e. Eichmann's Cost-of-Repair Damages

Polaris also seeks to exclude **[**65]** Eichmann's calculation of cost-of-repair damages. Because Eichmann's cost-of-repair damages model is not relevant to Polaris's summary judgment motion, the Court need not opine on its admissibility.

3. Application of expert testimony to individual claims.

According to Polaris, Plaintiffs' expert evidence is "irrelevant" because, contrary to the Plaintiffs' assertions, it does not prove "that each individual plaintiff was in fact damaged or that each plaintiff's damages were the same or

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[16] In its summary judgment briefing, Polaris argues that because Eichmann's model relies on averages, the Plaintiffs offer no evidence that can be used to prove the named Plaintiffs' individual damages. (*See, e.g.*, Polaris Summ. J. Reply at 12 (arguing "average or 'normalized' data like Eichmann's cannot as a matter of law be used to prove individual (or, for that matter, class-wide) damages").) This is another attack on the assumptions underlying Eichmann's model and his subsequent calculation of an overcharge percentage attributable to the alleged defect—more ammunition for cross-examination. Polaris's cited authority stands for the uncontested proposition that "[w]hether a representative sample may be used to establish class-wide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action." *Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1049, 194 L. Ed. 2d 124 (2016)*.

similar." (ECF No. 399 ("Polaris Summ. J. Reply") at 12.) Polaris contends that the named Plaintiffs cannot rely on Butler and Eichmann, because the experts did not analyze each Plaintiff's claims individually. Rather, Butler and Eichmann opine as to "class-wide" damages, examining the supply and demand side of the market.[17] Thus, Polaris argues, the experts are not legally competent to testify as to the hypothetical price of any single ATV, because the experts did not interview any Plaintiff or opine as to any individual's purported economic losses. (*Id.* at 19-20.)

To the extent Polaris argues that market-based expert evidence can never prove an individual plaintiff's overpayment, this contention finds no support in **[**66]** the law. *See, e.g., Ebin, 2014 U.S. Dist. LEXIS 26439, 2014 WL 737878, at *2* (denying summary judgment on GBL claim after concluding that plaintiffs' market-based expert evidence was sufficient evidence of injury); *cf. In re Gen. Motors LLC Ignition* ***[*975]*** *Switch Litig., 407 F. Supp. 3d at 234-40* (concluding that "[a]lthough the issue [was] a close one," market-based expert evidence was insufficient to establish plaintiffs suffered damages under California, Missouri, and Texas law because the expert did not account for the interaction of supply and demand in the relevant hypothetical market conditions). None of the statutes at issue here precludes individual plaintiffs from relying on expert evidence of the shifts in supply and demand affecting pricing if Polaris had disclosed that the Sportsman ATVs are at risk of overheating. And Polaris cites no case law interpreting any of the statutes in such a manner. Rather, courts applying these statutes have allowed market-based evidence to be used to establish the fact of injury and damages.

Like the *Suchanek* court, this Court concludes that market-based evidence may be used to establish the fact of injury under the CLRA, UCL, GBL, and NCUDTPA. *2018 U.S. Dist. LEXIS 213658, 2018 WL 6617106, at *15-16* (determining that the price premium model set forth by plaintiffs could suffice to show injury). As to Florida, the Eleventh Circuit found that damages under **[**67]** the FDUTPA are measured by the difference between the market value of the product as promised and the market value of the product delivered, explaining that "the FDUTPA's 'benefit of the bargain' model provides a standardized class-wide damages figure because the plaintiff's out-of-pocket payment is immaterial." *Carriuolo, 823 F.3d at 986* (noting that "the proper question is not how much the erroneous sticker may have reduced the vehicle's perceived value for any individual purchaser or lessee"). Based on the reasoning in *Carriuolo*, this Court concludes that Florida courts would allow an individual plaintiff's claim for damages under the FDUTPA to be proved using marketbased expert evidence. As to Missouri, at least one court has concluded that the plaintiffs' alleged injury was subject to common proof under the MMPA. *See In re McCormick & Co., Inc., Pepper Prods. Mtk'g & Sales Practices Litig., 422 F. Supp. 3d 194, 2019 U.S. Dist. LEXIS 114583, 2019 WL 3021245, at *47 (D.D.C. 2019)*. In *In re McCormick*, the court reasoned that under the plaintiffs' theory of causation and loss—that the plaintiffs had received less pepper than they thought they were purchasing—"every purchaser would have suffered the same loss." *Id.* It rejected the argument that individualized inquiries would be necessary **[**68]** to establish injury, emphasizing "the alleged injury is the difference in value of the pepper as represented and the value of the pepper as received." *Id.* Based on this reasoning, the Court concludes that market-based evidence may be used to establish the fact of injury under the MMPA.

Finally, as to Minnesota, based on the limited authority addressing this issue under the MCFA, the Court believes that market-based evidence may also be used to establish the fact of injury under the MCFA. *See, e.g., Khoday, 2014 U.S. Dist. LEXIS 43315, 2014 WL 1281600, at *33* (finding *Rule 23(b)(3)* predominance satisfied for MCFA claims because plaintiffs "presented a method that allow[ed] for a determination of the actual value to consumers of" the product and damages were amenable to common proof).

While the cases above address evidence of injury and damages on a class-wide basis, rather than for an individual plaintiff, the Court does not find a compelling reason to preclude the named Plaintiffs from relying on market-based

[17] The Court's acceptance or rejection of expert testimony to support individual damages does not inform the Court's decision on class certification. Though Butler and Eichmann are referred to as "class-wide" experts, this term was coined by Plaintiffs, who are moving for class certification. Butler and Eichmann simply analyze a large base of consumers and provide a model of damages that Plaintiffs wish to apply to their individual claims. In general, Butler and Eichmann attempt to capture shifts in the market that would affect the market equilibrium price at which Sportsman ATVs would have sold had Polaris disclosed their heat issues, and from there extrapolate the price premium attributable to the alleged exhaust heat defect. The Court thus uses the term "market-based" evidence, rather than "class-wide" evidence, particularly in view of its decision to deny class certification.

evidence of injury and damages where courts allow such evidence to support class-wide claims. Polaris's argument that the experts did not interview any Plaintiff or opine as to any individual's purported economic losses are best left to cross-examination. **[**69]** It is for a **[*976]** factfinder to decide whether such evidence proves the named Plaintiffs' injury and damages.

B. Fact Issues

Having determined the applicable legal standards, the Court turns to whether summary judgment is proper against any of the named Plaintiffs. It is Polaris's burden to show that no genuine dispute of material fact exists, under the law of the state of residence of each Plaintiff. For the reasons set forth below, it fails to meet that burden.[18]

1. Badilla and Wonders

Badilla's claims are governed by California law and Wonders's claim is governed by Missouri law. Polaris contends that Badilla cannot establish that he suffered an injury. Polaris does not dispute that Badilla can establish the other elements of his UCL and CLRA claims on the summary judgment record. For example, Polaris does not contest whether Badilla can establish that Polaris knew of the exhaust heat defect at the time of sale, as required under both the UCL and CLRA. Nor does Polaris contest whether Badilla can establish that Polaris's nondisclosure was an immediate cause of his injury-producing conduct, as required by the CLRA. Polaris only disputes whether Badilla has adduced evidence that he suffered an **[**70]** injury. Badilla has testified that, had he known that the Sportsman ATV he bought had the heat issues he experienced and learned about after his purchase, then he would not have bought it at all. (*See* ECF No 383-6 ("Badilla Dep.") at 204-05.) And the Court has concluded that Plaintiffs have adduced admissible evidence under California law of an 8.8 percent price premium attributable to the exhaust heat defect. Drawing all reasonable inferences in Badilla's favor, the summary judgment record suffices to at least create a genuine dispute of material fact as to whether Badilla suffered injury under the UCL and the CLRA. Thus, summary judgment as to Badilla will be denied.

Similar to Badilla, other than the fact and extent of injury, Polaris does not argue that any disputes exist that can affect the outcome of Wonders's claim under the MMPA. For example, Polaris does not dispute that Wonder can establish, on the summary judgment record, that Polaris failed to disclose to Wonders facts that Polaris knew or should have known. Again, Polaris only disputes whether Wonders has adduced evidence that he suffered an injury. Wonders, too, testified that had he known about the heat problems that **[**71]** he experienced later, he would not have purchased his Sportsman ATV. (*See* ECF No. 383-5 ("Wonders Dep.") at 235.) And following Missouri law, the Court will allow evidence of the price premium calculated by Butler and Eichmann to prove injury. Thus, because genuine disputes of material fact exist as to whether Wonders suffered an injury, awarding Polaris summary judgment against Wonders is not proper.

2. Johannessohn

As to Johannessohn, Polaris contests both the causal nexus required by the MCFA and the evidence of injury. Polaris does not dispute that Johannessohn can establish the other elements of his MCFA claim on the summary judgment record. For example, Polaris does not dispute that Johannessohn can establish that Polaris omitted a material fact or that special circumstances triggering a duty to disclose exist.

[*977] Polaris claims that Johannessohn cannot show that Polaris's omission had some effect on his decision to purchase a Sportsman ATV, because Johannessohn asked for and received a new ATV after his original Sportsman ATV caught fire. Johannessohn has an explanation: he testified that he thought his first Sportsman ATV

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[18] While repetitive, the Court discusses each named Plaintiff individually to emphasize that each Plaintiff's claims must be examined under the laws of his state of residence.

was a lemon, that is, that the issues that caused that ATV **[**72]** to catch fire were unique to that first ATV. (*See* ECF No. 383-1 ("Johannessohn Dep.") at 393-400.) And he testified that he is unhappy with his second Sportsman ATV, too, and purchased a Can-Am Maverick "[s]o [he] had something to ride, because [he] couldn't ride [his] Polaris." (*Id.* at 222.) This testimony is sufficient to generate a genuine dispute as to whether there is a causal nexus between Polaris's actions and an injury.

Polaris also disputes whether Johannessohn has adduced evidence that he suffered an injury. Like the others, Johannessohn testified that, had he known that Polaris's Sportsman 1000 ATV had been suffering from heat-related issues and Polaris had no plans to fix it until model year 2017, he would not have purchased his Sportsman 1000 in August of 2015. (*Id.* at 393.) In light of this testimony and the expert evidence of an 8.8 percent price premium attributable to the exhaust heat defect, the summary judgment record suffices to create a genuine dispute as to whether Johannessohn suffered an injury under the MCFA. Because genuine disputes of material fact exist, awarding Polaris summary judgment against Johannessohn is not warranted.[19]

3. Kelley

Kelley's claim is governed by the FDUTPA. **[**73]** As with Johannessohn, Polaris contends that Kelley cannot establish causation or actual damages. Polaris does not dispute that Kelley can establish the other elements of his FDUTPA claim on the summary judgment record. For example, Polaris does not dispute that Kelley can establish that Polaris committed a deceptive act or unfair practice.

As with Johannessohn, Polaris contests Kelley's evidence of causation and injury. Polaris argues that Kelley "already knew about allegedly excessive heat—including melting parts—from owning prior Sportsman ATVs." (Polaris Summ. J. Br. at 28.) Kelley explained that although he had experienced problems with the heat emitted by his prior Sportsman ATVs, he thought that Polaris had done "some research" and "improved the design" and that therefore the Sportsman ATVs he purchased later would "stay cooler." (ECF No. 383-3 ("Kelley Dep.") at 96-98.) Kelley also testified that, had he known that Polaris's ATVs exceeded its own 115 degree "comfort threshold," he would not have purchased his Sportsman 1000 and 850 in 2016. (*Id.* at 189-90.) The Court finds this testimony sufficient to generate a genuine dispute as to causation.

Polaris also claims that, because Kelley had **[**74]** heat issues with his prior Sportsman ATVs, he purchased his Sportsman 1000 and 850 ATVs "with knowledge of their supposed defects." (Polaris Summ. J. Br. at 29.) Assuming without deciding that knowledge of the defects would bar recovery under the price premium theory of damages, the Court finds that Kelley's testimony above is sufficient to generate a genuine dispute as to this issue as well.

Finally, Polaris disputes whether Kelley has offered evidence that he suffered an **[*978]** injury. But, as noted above, Kelley testified that he would not have purchased his Sportsman ATVs in 2016 if he had known they suffered from heat issues. And the Plaintiffs have adduced evidence of an 8.8 percent price premium attributable to the exhaust heat defect. Thus, under the FDUTPA, drawing all reasonable inferences in Kelley's favor, the summary judgment record suffices to prove injury under the FDUTPA. Because genuine disputes of material fact exist, awarding Polaris summary judgment against Kelley is not proper.

4. Bates

As a New York resident, Bates's claim is governed by the GBL. Polaris contends that Bates cannot recover because "New York consumers who know of the alleged omission cannot recover under" **[**75]** the GBL and Bates has adduced no evidence of injury. Polaris does not dispute that Bates can establish the other elements of his GBL

[19] Polaris also argues that Johannessohn continued to drive his ATV after learning of the alleged exhaust heat defect, a fact which precludes him from demonstrating causation. *See* Polaris Summ. J. Reply at 18. This, too, raises an issue for a factfinder to decide.

claim on the summary judgment record. For example, Polaris does not dispute that Bates can establish that the challenged act or practice was consumer-oriented or that it was misleading in a material way.

In support of its argument that Bates's knowledge of the exhaust heat defect prior to purchase bars his recovery, Polaris points to Bates's testimony that he had "heard about this [excessive heat] happening back as far as like 2012" from other consumers. (Polaris Summ. J. Br. at 29.) Polaris interprets Bates's statement to mean that Bates knew about the exhaust heat defect in its Sportsman vehicles as far back as 2012. (*See id.*) Plaintiffs disagree and, in light of Bates's subsequent testimony, interpret this statement to mean that Bates believes that Polaris should have known about the exhaust heat defect because many consumers were complaining about excessive heat "back as far as . . . 2012." (Pls' Summ. J. Opp. at 36-37.) Assuming without deciding that under the GBL, consumers' knowledge of the defect would bar recovery even under a price premium theory **[**76]** of damages, the Court finds that there is a genuine dispute as to whether Bates knew of the exhaust heat defect before purchasing his Sportsman ATV. That is, the Court finds that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and thus Bates's GBL claim is not barred as a matter of law. *Anderson, 477 U.S. at 248*.

As with the other Plaintiffs, Polaris disputes whether Bates has presented evidence that he suffered an injury. But Bates, like the others, has testified that, had he known that Sportsman ATVs suffer from heat issues, he "probably would have bought another brand." (*See* ECF No. 383-4 ("Bates Dep.") at 128.) And the Plaintiffs offer expert evidence of a price premium attributable to the exhaust heat defect. Drawing all reasonable inferences in Bates's favor, genuine disputes of material fact exist as to whether Bates suffered an injury under the GBL, thus precluding summary judgment against Bates.[20]

5. Pinion

Pinion is a North Carolina resident, and thus the NCUDTPA governs his claim. Polaris contends that Pinion cannot prove reliance and has adduced no evidence of injury. Polaris does not dispute that Pinion can establish the other elements of his NCUDTPA claim **[**77]** on the summary judgment record. For example, Polaris does not contest that Pinion can establish that Polaris committed an unfair or deceptive act or practice and that the **[*979]** action in question was in or affecting commerce. Nor does Polaris contest that Pinion can establish an omission relating to a material matter known by Polaris that it had a legal duty to communicate to Pinion.

Polaris argues instead that Pinion cannot prove actual reliance, which is required under the NCUDTPA. *See* *Bumpers, 747 S.E.2d at 226, 367 N.C at 87*; *Arnesen, 781 S.E.2d at 7*. Polaris maintains that Pinion cannot prove actual reliance because he purchased a used Sportsman ATV for his wife after experiencing difficulties with his own Sportsman ATV. But Pinion also testified that he bought the ATV for his wife used for $6,600—less than the $14,200 Pinion paid for his own Sportsman ATV—"not long after" purchasing his own Sportsman ATV. (ECF No. 383-2 ("Pinion Dep.") at 44, 61-62.) After he testified to his experience with side pieces melting on his Sportsman ATV, Pinion stated "I don't know who would want to buy an ATV that's having those problems." (*Id.* at 162.) The Court finds Pinion's testimony sufficient to generate a genuine dispute as to whether Pinion would have purchased his Sportsman **[**78]** ATV for $14,200 if he had known about the exhaust heat defect because the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See* *Anderson, 477 U.S. at 248*.

Polaris also argues that Pinion cannot prove justifiable reliance as required under the NCUDTPA. *See* *Bumpers, 747 S.E.2d at 226*; *Arnesen, 781 S.E.2d at 7*. Polaris contends that Pinion must prove that he "inquired, or was prevented from inquiring, about the allegedly omitted information," and that he has not done so. (Polaris Summ. J. Br. at 27.) Assuming without deciding that under applicable North Carolina law Pinion must make such a showing to prove justifiable reliance, the Court finds that Pinion's testimony is sufficient to generate a genuine dispute as to the issue. Pinion testified that, before he purchased his ATV, he saw a television advertisement released by Polaris, and read the product brochure published by Polaris. (Pinion Dep. at 50-51, 67-68.) Considering all reasonable inferences in Pinion's favor, there is a genuine dispute as to whether he inquired about the heat issues.

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[20] The Court disregards any arguments raised by Polaris for the first time on reply.

Finally, Polaris disputes whether Pinion has adduced evidence that he suffered an injury. But, as noted above, Pinion's testimony is sufficient to generate a genuine dispute as to whether **[**79]** he would have purchased his Sportsman ATV for $14,200 if he had known about the exhaust heat defect. Moreover, Plaintiffs have adduced admissible evidence of an 8.8 percent price premium attributable to the exhaust heat defect. Thus, drawing all reasonable inferences in Pinion's favor, the record suffices to create a reasonable inference that Pinion suffered an injury under the NCUDPTA. Because genuine disputes of material fact exist, awarding Polaris summary judgment against Pinion is not proper.

In sum, Polaris has not met its burden and there is a genuine dispute as to some material facts, so summary judgment against Plaintiffs is denied.

CLASS CERTIFICATION

Plaintiffs move for class certification under *Rule 23 of the Federal Rules of Civil Procedure*. "To certify a class, a district court must find that the plaintiffs satisfy all the requirements of *Rule 23(a)* and one of the subsections of *Rule 23(b)*." *Hale v. Emerson Elec. Co., 942 F.3d 401, 403 (8th Cir. 2019)*. The party seeking class certification "must affirmatively demonstrate his compliance with the Rule." *Stuart v. State Farm Fire & Cas. Co., 910 F.3d 371, 374 (8th Cir. 2018)* (quoting *Wal-Mart Stores, Inc. v. **[*980]** Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011))*.

Plaintiffs seek to certify a nationwide class of consumers who purchased Class Vehicles from October 4, 2010 to the present. In the alternative, they seek to certify six classes for residents of the states of California, Florida, Minnesota, **[**80]** Missouri, New York, and North Carolina who purchased Class Vehicles during differing windows of time. (*See generally* ECF No. 332.) For the reasons below, the Court finds that Plaintiffs do not meet their burden under *Rule 23*.

I. Standing

The Court first addresses Polaris's argument as to standing, because it is jurisdictional and therefore foundational. ***HN37***[] The jurisdiction of federal courts extends only to actual cases or controversies. *U.S. Const. art. III, § 2, cl.1*; *Neighborhood Transp. Network, Inc. v. Pena, 42 F.3d 1169, 1172 (8th Cir. 1994)*. The Eighth Circuit has held that under the case-or-controversy requirement, a "class must be defined 'in such a way that anyone within it would have standing.'" *Stuart, 910 F.3d at 377 (8th Cir. 2018)* (quoting *Avritt v. Reliastar Life Ins. Co, 615 F.3d 1023, 1034 (8th Cir. 2010))*. In other words, a "named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." *Avritt, 615 F.3d at 1034*.

To understand the standing argument in this case, one must review the Eighth Circuit's rules applicable to cases involving "latent" defects. In cases where a physical defect is alleged, the Eighth Circuit has affirmed dismissal of class action warranty and consumer protection cases for failure to state a claim under the "manifest defect" doctrine. Under this doctrine, a plaintiff must establish that the product "exhibited the alleged defect"—that is, that the defect is **[**81]** not latent, but has manifested itself in the product. *O'Neil v. Simplicity, Inc., 574 F.3d 501, 503 (8th Cir. 2009)*. "It is well established that purchasers of an allegedly defective product have no legal recognizable claim where the alleged defect has not manifested itself in the product they own." *Briehl v. Gen. Motors Corp., 172 F.3d 623, 628 (8th Cir. 1999)*.

In *O'Neil*, the Eighth Circuit affirmed dismissal of a class action seeking overpayment damages because the defect (a malfunctioning drop-side crib) had not manifested. *574 F.3d at 503-04*. The Eighth Circuit called such suits "no-injury suits" and the classes that bring them "no-injury classes," citing, among other cases, its opinion in *Briehl*: "An overwhelming majority of courts have dismissed these unmanifested defect claims and rejected the idea that the Plaintiffs can sue manufacturers for speculative damage." *Briehl, 172 F.3d at 630*, *quoted in O'Neil, 574 F.3d at 505*.

Two years after *O'Neil*, the Eighth Circuit examined the manifest defect rule in the context of the *Avritt* standing analysis. In *In re Zurn Pex Plumbing Products Litigation*, the Eighth Circuit observed that "[i]n most cases the question whether a plaintiff has a cognizable injury sufficient to confer standing is closely bound up with the question of whether and how the law will grant him relief." *644 F.3d 604, 616 (8th Cir. 2011)* (cleaned up). The *Zurn* plaintiffs complained **[**82]** about leaky plumbing systems, and the defendant argued that the plaintiffs whose plumbing systems have not leaked (the "dry plaintiffs") had no standing and could not be represented by class members whose plumbing had leaked. The Eighth Circuit applied the *O'Neil* manifest defect rule to its standing analysis: "it 'is not enough' for [the] plaintiff 'to allege that a product line *contains a defect* or that a product is *at* ***[*981]*** *risk for manifesting this defect*; rather, the plaintiffs must allege that their product *actually exhibited* the alleged defect.'" *Id.* (quoting *O'Neil, 574 F.3d at 503* (emphasis added)); *see also* *Thunander v. Uponor Inc., 887 F. Supp. 2d 850, 864 (D. Minn. 2012)*. The court determined that the requirements for Article III standing were satisfied because the plaintiffs had adduced evidence that the defect in the pipes was "already manifest in all systems" because it would "afflict[] all of the fittings upon use, regardless of water conditions or installation practices." *Zurn, 644 F.3d at 616-17*.

Plaintiffs do not dispute that the manifest defect rule applies to Article III standing under *Zurn*; indeed, they argue that *Zurn* is the proper analogue to this case because they, too, have presented evidence that the design defect was manifest in all Class Vehicles. In contrast, Polaris likens **[**83]** this case to *O'Neil* and *Briehl*, among others, arguing that Plaintiffs have not brought forward proof that the alleged exhaust heat defect has manifested itself in all Class Vehicles.[21]

Against the landscape of this case law, Plaintiffs' evidence is insufficient to establish injury-in-fact for the class. This case is unlike *Zurn*, where the allegations and evidence did not merely establish pipe fittings that presented a "risk" of developing harm, which in that case was stress corrosion cracking in the pipes. *644 F.3d at 617*. Rather, the *Zurn* plaintiffs alleged that stress corrosion cracking was "already manifest in all systems," and brough forward expert testimony opining that the stress corrosion cracking would occur in the pipes "as soon as they [were] exposed to domestic water." *Id.*[22]

The Class Vehicles are far more like the cribs in *O'Neil* and the brakes in *Briehl*. Plaintiffs' experts have opined that many of the Class Vehicles generated temperatures that caused discomfort, burned riders, and melted parts of afflicted ATVs. But Plaintiffs have adduced no evidence of a common design that necessarily manifests itself in discomfort, burns, or melting. **[**84]**

Plaintiffs claim that their expert, Colin Jordan, has identified that the Class Vehicles have "a common design for thermal management." (*See* ECF No. 335 at 15.) They claim they have "amassed a wealth of evidence that the Class Vehicles have a common design defect of excessive heat that extends across all versions of all those models," in particular, evidence that a "hot exhaust manifold sits obscured beneath a thin plastic side cover, and the

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[21] Following the *Zurn* rule, a court in this District recently rejected two claims against Polaris for allegedly defective ATVs, concluding that the plaintiffs lacked standing to assert their claims because they did "not allege, directly or by reasonable inference, that *all* of the vehicles that contain the defective engine *necessarily* overheat, catch fire, or otherwise malfunction." *In re Polaris Mktg., Sales Practices, & Prods. Liab. Litig., 364 F. Supp. 3d 976, 984 (D. Minn. 2019)* ("Polaris Mktg. I") (emphasis in original); *see generally* *In re Polaris Mktg., Sales Practices, & Prods. Liab. Litig., No. 18-CV-0939 (WMW/DTS), 2020 U.S. Dist. LEXIS 32822, 2020 WL 919259, at *1 (D. Minn. Feb. 26, 2020)* ("Polaris Mktg. II").

[22] Because, as *Zurn* notes, the standing issue is intertwined with an analysis on the merits, the manifest defect rule has also been analyzed under state law, as was the case in *Briehl* and *O'Neil*. Since the Eighth Circuit addresses this issue as one of constitutional standing, the Court does so as well. *See, e.g.,* *Penrod v. K&N Eng'g, Inc., No. 18-CV-02907 (ECT/LIB), 2020 U.S. Dist. LEXIS 8559, 2020 WL 264115, at *3 (D. Minn. Jan. 17, 2020)* ("The law is clear in the Eighth Circuit that a federal court lacks subject-matter jurisdiction over absent class members' defective-product claims if there is no allegation that the product manifested the defect.").

high [exhaust gas temperatures] and low clearance **[*982]** create melt risks to the ATV and burn risks to the rider." (*See id.* at 30.)[23]

A review of the record indicates that Plaintiffs paint with too broad a brush in their attempt to identify a design defect universal to all Class Vehicles. The Class Vehicles encompass ATVs with different body architectures and different heat management systems that pose different melting and burning risks. (*See generally* ECF No. 368 (filed under seal).) They include Sportsman 450s, 570s, 850s, and 1000s. These have four different engine sizes: 499 cubic centimeters, 567 cubic centimeters, 850 cubic centimeters, and 952 cubic centimeters, respectively. The Sportsman 450s and 570s have single cylinder engines and the Sportsman 850s **[**85]** and 1000s have dual cylinder engines. They also differ in engine orientation. The engines in the Sportsman 450s and 570s have an east-west orientation while the engines in the Sportsman 850s and 1000s have a north-south orientation. These differences result in differences in the ways the Class Vehicles route exhaust gases. The exhaust pipe in the Sportsman 450s and 570s routes exhaust gases from the engine toward the front and wraps around the front and side of the engine. The exhaust pipe in the Sportsman 850s and 1000s routes exhaust gases from the engine toward the side and back.

These differences appear to result in variations in how riders experienced problems with the heat emitted by Class Vehicles. For example, Polaris's riders complained most heavily that the Sportsman 570 blew hot on air on them, specifically, their right legs. (*See, e.g.*, ECF No. 340-26 ¶ 21(a).) In comparison, complaints about the Sportsman 850s and 1000s center around melting side panels. (*See* ECF No. 240-26 ¶ 21(b).) Indeed, Polaris has offered different fixes for heat problems associated with the Sportsman 450s and 570s than those associated with the Sportsman 850s and 1000s. For the Sportsman 450s and **[**86]** 570s, Polaris offered a right-hand side panel close-off kit to block heat from hitting riders' right ankles and calves. (*See* ECF No. 340-26 ¶ 9(b).) For the Sportsman 850s and 1000s, Polaris issued a recall and provided dealers with a recall kit. (*See* ECF No. 340-26 ¶ 9(c).) Polaris's polling data indicates that proportionally fewer customers accepted the close-off kit on the Sportsman 450s and 570s than the recall kit on the Sportsman 850s and 100s.

Plaintiffs' expert nonetheless contends that the Class Vehicles "had a [common] design problem, namely[,] the lack of a sufficient air gap and insufficient heat protection for machine, rider, and other critical components." (*See* ECF No. 340-26 ¶ 21.)[24] But the record does not indicate that, as a matter of design, low clearances across the Class Vehicles rendered them defective. For example, Polaris employee Robin Stroot, himself a Sportsman ATV owner, testified that while some Polaris **[*983]** employees reported that the side panels of their Sportsman 850s were melting, he had no such problems. (*See* ECF No. 340-10 at 95.) One of those employees, an engineer, determined that his exhaust pipe was touching the nylon side panel. (*See id.* at 97.) Stroot determined **[**87]** that his own Sportsman 850 had a gap between the pipe and the nylon. (*See id.*) And he testified that the model used at the time had a six and-a-half millimeter gap between the exhaust pipe and side panel. (*See id.*) Stroot testified that with the clearance between the exhaust pipe and the side panel on his vehicle, he never had an issue. (*See id.* at 240-41.) But he testified that Polaris is aiming to increase the gap to "make sure" that it is "covered for any kind of manufacturing tolerances" because six and-a-half- millimeters "doesn't suffice for manufacturing tolerance." (*See id.* at 241.) As evidence of consumer complaints bore out, this means that, as in *O'Neil*, some Sportsman ATVs will exhibit heat-related issues (discomfort, burns, melting), while others will not.

Thus, the allegations and the evidence establish that the vehicles are *at risk of* overheating and causing discomfort or injury. Eighth Circuit law is clear that this distinction is critical. *Briehl, 172 F.3d at 627*. Plaintiffs' inability to bring

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[23] Plaintiffs presented a similar argument before Judge Schiltz in opposition to Polaris's motion to dismiss their amended complaint. Judge Schiltz rejected Polaris's argument that Plaintiffs lacked standing to represent class members who had purchased other Sportsman models or model years because Plaintiffs had "adequately pleaded standing by alleging that the entire Sportsman line shares the same design defect—the routing of high-temperature exhaust next to the rider's leg and under the rider's seat." (ECF No. 42 at 13.) This Court agrees that the Complaint on its face alleges a common design defect. But in response to Plaintiffs' motion for class certification, Polaris has presented evidence that the Class Vehicles differ significantly in their exhaust heat management—the issue at the very heart of Plaintiffs' case. As discussed further below, on this record the standing analysis therefore yields a different outcome.

[24] As noted above, the record indicates that mechanisms for heat management differ across the Class Vehicles.

forward evidence of a defect that manifested in the Class Vehicles dooms the class on standing grounds. *See, e.g., Penrod, 2020 U.S. Dist. LEXIS 8559, 2020 WL 264115, at *4* (dismissing plaintiffs' class action complaint on standing grounds because on its face the proposed class **[**88]** included purchasers of oil filters that never exhibited a defect); *Polaris Mktg. I, 364 F. Supp. 3d at 984*.

Plaintiffs argue that their case is different, because their case involves the theory of economic loss from customer dissatisfaction due to risk of overheating. According to Plaintiffs, the economic loss allegation is sufficient to confer standing. Eighth Circuit case law suggests that it is not. Economic loss was also alleged in *Briehl* and *O'Neil*, and under those cases and *Zurn*, there must be *some* defect manifested for the class to be dissatisfied. As noted above, Plaintiffs do not present evidence that all Class Vehicles contained a defect that actually manifested. In short, the theory Plaintiffs assert—that *all* Class Vehicles had a design defect causing "excessive heat" such that customers were overcharged for their Sportsman ATVs because the ATVs did not perform as expected— is not borne out by the record before the Court. Because class membership depends on Class Vehicle ownership, there are members of Plaintiffs' proposed class who fall outside of the group of those who experienced excessive heat issues. Those class members do not have standing, and the class cannot be certified. *See, e.g., Phelps v. Powers, 295 F.R.D. 349, 353 (S.D. Iowa 2013)* (concluding proposed **[**89]** class could not be certified because it was not defined to include only class members with Article III standing).

II. *Rule 23(b)(3)*:[25] Predominance

Even if the standing issue did not require the Court to deny class **[*984]** certification, Plaintiffs' proposed class cannot meet the requirements of *Rule 23(b)(3)*, which is the alleged vehicle by which they seek certification.[26] ***HN38***[] Under *Rule 23(b)(3)*, "a district court must find 'that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Stuart, 910 F.3d at 374* (quoting *Fed. R. Civ. P. 23(b)(3)*). "The 'predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Id. at 374-75* (quoting *Amchem, 521 U.S. at 623*). It is satisfied "if 'the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Id. at 375* (quoting *Tyson Foods, Inc., 136 S. Ct. at 1045*). "The superiority requirement asks whether the class action is the best available method for resolving the controversy." *Cullan & Cullan LLC v. M-Qube, Inc., No. 8:13CV172, 2016 U.S. Dist. LEXIS 132325, 2016 WL 5394684, at *6 (D. Neb. Sept. 27, 2016)*.

A. Proposed Nationwide Class

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[25] Because the predominance requirement of *Rule 23(b)(3)* is more demanding than the commonality and typicality requirements of *Rule 23(a)*, and all four requirements of *Rule 23(a)* must be satisfied for a proposed class to be certified, the Court need not address *Rule 23(a)* to rule on the Plaintiffs' motion for class certification. *See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* ("Even if *Rule 23(a)*'s commonality requirement may be satisfied by that shared experience, the predominance criterion is far more demanding."); *see, e.g., Avritt, 615 F.3d at 1029* ("Like the district court, we will assume that the Avritts could satisfy the prerequisites of *Rule 23(a)* and will focus our attention on their arguments that the class should be certified under *Rule 23(b)(2)* or *23(b)(3)*.")

[26] In the Order on Defendant's Motion to Dismiss, Judge Schiltz noted, "The Court tends to agree with those courts that have found that, in the context of a putative class action, the question whether a named plaintiff may represent class members who purchased products that differed in some respect from the product purchased by the named plaintiff is not an issue of standing, but rather an issue to be resolved at the class-certification stage." (ECF No. 42 at 12.) This Court, too, agrees that the challenge presented here—that of whether a named plaintiff may represent class members who purchased products different from the product purchased by the named plaintiff—is better suited for a predominance inquiry than a standing inquiry. The Court will therefore address both.

The Eighth Circuit has explained **[**90]** that "an individualized choice-of-law analysis must be applied to each plaintiff's claim in a class action." *St. Jude I, 425 F.3d at 1120*. The same three-part test applies to the choice-of-law analysis in the context of class certification. As set forth above, this Court has analyzed the consumer protection laws of each of the named Plaintiffs' states of residence and found outcome-determinative conflicts. And Plaintiffs acknowledge that the consumer protection laws of 19 other states conflict with the MCFA. (Pls' Class Cert. Br. at 33.) This Court has considered the constitutionality of applying the MCFA extraterritorially, as well as the five-factor test, and found that the MCFA should not be applied to the claims of nonresident Plaintiffs. And as the Eighth Circuit has noted, "'[s]tate consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules." *St. Jude I, 425 F.3d at 1120* (quoting *In re Bridgestone/Firestone, Inc., 288 F.3d at 1018*). Thus, the Court cannot apply the MCFA to Plaintiffs' proposed nationwide class. And, as discussed in detail above, the Court has identified various outcome-determinative differences among Plaintiffs' states' consumer protection statutes. The Court **[**91]** concludes that due to these differences in state law, "individualized legal issues will substantially predominate over common legal issues in this litigation." *In re Nat'l Hockey League Players' Concussion Injury Litig., 327 F.R.D. 245, 266 (D. Minn. 2018)* (collecting cases). The Court would be required to apply a wide range of legal standards to adjudicate class members' claims. Because these individualized legal analyses would **[*985]** overshadow the common issues, the Court cannot certify a nationwide class under *Rule 23(b)(3)*. *See id.*

Even if the Court could apply the MCFA to Plaintiffs' proposed nationwide class, individualized evidence supporting elements of Plaintiffs' claims would predominate over common issues. As the Eighth Circuit held in *St. Jude II*, although individual plaintiffs may not be required to present direct proof of individual reliance under MCFA, defendants may "present evidence negating a plaintiff's direct or circumstantial showing of causation and reliance." *522 F.3d at 836*. It concluded that given the showing by St. Jude that it would "present evidence concerning the reliance or non-reliance of individual physicians and patients on representations made by St. Jude," it was clear that there would be plaintiff-by-plaintiff determinations and "common issues [would] not predominate the inquiry **[**92]** into St. Jude's liability." *Id. at 840*. On remand, the district court concluded that although the *St. Jude II* court primarily focused on the plaintiffs' MCFA misrepresentation claims, under its reasoning the plaintiffs also could not satisfy the *Rule 23* requirements with respect to their MCFA material omissions claims. *In re St. Jude Med. Inc. Silzone Hearts Prods. Liab. Litig., No. 01-CV-1396 (JRT/FLN), 2009 U.S. Dist. LEXIS 54286, 2009 WL 1789376, at *3-*5 (D. Minn. June 23, 2009)*. Like the defendant in *St. Jude II*, Polaris is prepared to present evidence to dispute the causal nexus between Polaris's actions and the alleged injury the class members suffered. Polaris's rebuttal opportunity requires plaintiff-by-plaintiff determinations of causation.

The Court is not persuaded by Plaintiffs' arguments to the contrary. Among other things, Plaintiffs claim that its evidence of an 8.8 percent price premium can establish the causal nexus required by the MCFA because "[t]he overcharge theory shows that everyone who bought overpaid, no matter what they saw or what they knew." (Pls' Class Cert Reply Br. at 13.) In other words, "the overcharge theory makes individual knowledge (like individual reliance) moot." (*Id.* at 14.) As the Court has noted above, the MCFA still requires a plaintiff to establish that the defendant's conduct had some impact on inducing the individual plaintiff's **[**93]** actions. What Plaintiffs request is for the expertdriven overcharge theory to supplant required showings of causation, injury *and* damages. No court considering the MCFA has allowed such an expansive use of this theory, and it is not appropriate in this case either.

For these reasons, Plaintiffs cannot satisfy the *Rule 23(b)(3)* predominance requirements with respect to their proposed nationwide class, and class certification will be denied.

B. Proposed Statewide Classes

HN39[] Each of proposed statewide classes must also satisfy the requirements of *Rule 23(b)(3)*.[27] *Stuart, 910 F.3d at 374*. Here, too, individualized issues as to injury and causation or reliance would predominate in the proposed California and North Carolina classes, in addition to their proposed Minnesota class. As explained above, individualized issues predominate for claims governed by Minnesota law. Because the UCL, CLRA, and NCDUTPA all require actual reliance, individualized issues would also predominate as to claims governed by these laws.

III. Superiority

HN40[] To determine whether a class action is the best available method to **[*986]** resolve a dispute, courts examine whether a class action would be manageable. *In re Baycol Prods. Litig., 218 F.R.D. at 209*. One of the Court's considerations is whether variations in state law render **[**94]** class action unmanageable. *See, e.g., id. at 209-10*; *Bridgestone/Firestone, 288 F.3d at 1018* ("Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable.").

Nationwide class treatment would not be a superior method of adjudication here. As explained above, the Court cannot apply the MCFA extraterritorially to Plaintiffs' proposed nationwide class, and class treatment is not appropriate under the laws of so many different states. *Bridgestone/Firestone, 288 F.3d at 1018*.

That leaves the only logical alternative to be six statewide classes. Proceeding in such a manner would present a significant risk of jury confusion and would create enormous challenges to trial management. Individual issues would dominate the trial, including the different Sportsman ATV models and mechanisms for routing heat exhaust, the issue of causation, and individualized inquiries into each Plaintiff's knowledge and experience with the Sportsman ATV, where necessary under applicable state law. The management of such a trial is not superior to more individualized methods of adjudication. Thus, the Court declines to certify subclasses as well. *See Bridgestone/Firestone, 288 F.3d at 1018-19* (noting the variability in proof for each claim and concluding that "this litigation is not **[**95]** manageable as a class action even on a statewide basis"); *In re Tetracycline Cases, 107 F.R.D. 719, 733 (W.D. Mo. 1985)* (declining to certify subclasses where keeping track of each subclass would likely confuse the jury and complicate structuring and managing trial).

CONCLUSION

Based on the foregoing and on all the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. Polaris's Motion to Exclude Expert Testimony (ECF No. 371) is DENIED;
2. Polaris's Motion for Summary Judgment (ECF No. 356) is DENIED; and
3. Plaintiffs' Motion to Certify Class (ECF No. 332) is DENIED.

Dated: March 31, 2020

BY THE COURT:

/s/ Nancy E. Brasel

Nancy E. Brasel

United States District Judge

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[27] As to statewide classes, because of the Court's determination on predominance, the Court again does not reach the *Rule 23(a)* factors.

Marion Healthcare, LLC v. S. Ill. Healthcare

United States District Court for the Southern District of Illinois

March 31, 2020, Decided; March 31, 2020, Filed

Case No. 3:12 -CV-871 -MAB

Reporter

2020 U.S. Dist. LEXIS 55724 *; 2020-1 Trade Cas. (CCH) P81,150; 2020 WL 1527772

MARION HEALTHCARE, LLC, Plaintiff, vs. SOUTHERN ILLINOIS HEALTHCARE, Defendant.

Subsequent History: Summary judgment granted by *Marion Healthcare, LLC v. S. Ill. Healthcare, 2020 U.S. Dist. LEXIS 55730 (S.D. Ill., Mar. 31, 2020)*

Prior History: *Marion HealthCare, LLC v. S. Ill. Healthcare, 2019 U.S. Dist. LEXIS 229793 (S.D. Ill., Nov. 14, 2019)*

Core Terms

causation, Recommendation, antitrust, argues, summary judgment, exclusive contract, patients, redacted, damages, summary judgment motion, parties, contracts, sealed, incorrect, in-network, monopolization, decreasing, correctly, survive summary judgment, antitrust case, out-of-network, DECLINES, antitrust claim, providers, analyzed, volume, summary judgment stage, triable issue, Sherman Act, Healthcare

LexisNexis® Headnotes

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

Civil Procedure > Judicial Officers > Masters

HN1[] **Entitlement as Matter of Law, Appropriateness**

A de novo review requires the district court to give fresh consideration to those issues to which specific objections have been made and make a decision based on an independent review of the evidence and arguments without giving any presumptive weight to the special master's conclusion. On a motion for summary judgment, all material facts and all inferences are construed in the light most favorable to the non-moving party. When a Special Master is appointed in a case and prepares a report on summary judgment, the court reviews the Special Master's legal conclusions de novo and accepts his findings of fact unless they are clearly incorrect. *Fed. R. Civ. P. 53(f)(3)*. The court may accept, reject or modify the Special Master's recommended decision.

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

HN2[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is standardized across cases of various topics, even in antitrust cases that require a nuanced, fact-specific analysis. Summary judgment is proper where there is no dispute as to a material fact that entitles the movant to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*.

Antitrust & Trade Law > Procedural Matters

HN3[] **Antitrust & Trade Law, Procedural Matters**

Antitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies.

Antitrust & Trade Law > Procedural Matters

HN4[] **Antitrust & Trade Law, Procedural Matters**

Ambiguous evidence is defined as evidence of conduct as consistent with permissible competition as with illegal conspiracy. Ambiguous evidence alone does not support an inference of an antitrust conspiracy because courts should not infer illegal conduct when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct.

Antitrust & Trade Law > Procedural Matters

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

HN5[] **Antitrust & Trade Law, Procedural Matters**

An antitrust claim which makes no economic sense can on that ground be dismissed on summary judgment. To put it bluntly, you cannot obtain damages without proving injury.

Antitrust & Trade Law > Procedural Matters

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN6[] **Antitrust & Trade Law, Procedural Matters**

An antitrust injury is of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. Courts have, at times, analyzed antitrust injury as an element of antitrust standing, however, antitrust injury can and should be analyzed outside of standing as it is a necessary element to prove an antitrust claim.

Antitrust & Trade Law > Procedural Matters

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN7[] **Antitrust & Trade Law, Procedural Matters**

To establish causation, a plaintiff must show that the anticompetitive conduct claimed was the cause in fact of the injury, or that but for the violation, the injury would not have occurred. Antitrust injury must reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation. Antitrust injury requires not only that the injury is of the type intended to be protected by the antitrust laws, but that the violation was the cause-in-fact of the injury: that but for the violation, the injury would not have occurred. To prevail on an antitrust claim, a plaintiff must establish that the injuries alleged would not have occurred but for the defendant's antitrust violation adding necessity to the materiality requirement of our antitrust causation analysis.

Antitrust & Trade Law > Procedural Matters

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

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

HN8[] **Antitrust & Trade Law, Procedural Matters**

A plaintiff must be able to distinguish between financial loss from the lawful activities of a competitor from loss caused by the unlawful acts of the defendant. If the alleged antitrust violation is too removed from an injury with other intervening factors that could have led to the claimed injury, courts have granted motions for summary judgment for the moving party. At the summary judgment stage, if there is no causation, then that is the end of the case as there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Antitrust & Trade Law > Procedural Matters

HN9[] **Antitrust & Trade Law, Procedural Matters**

If lawful competition fully accounts for a plaintiff's claimed injury, the law will deny any injury because the plaintiff's situation would be the same with or without the challenged restraint.

Antitrust & Trade Law > Procedural Matters

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

HN10[] **Antitrust & Trade Law, Procedural Matters**

To create a triable issue in terms of injury for summary judgment, there must be some evidence to show that defendant's conduct had the effect on the market of raising prices or decreasing output.

Antitrust & Trade Law > Procedural Matters

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

HN11[] **Antitrust & Trade Law, Procedural Matters**

For causation, a plaintiff must establish that but for the antitrust violation, their injury would not have occurred. Causation, like injury, is integral to a party surviving summary judgment.

Antitrust & Trade Law > Procedural Matters

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

HN12[] **Antitrust & Trade Law, Procedural Matters**

In determining whether a party can survive summary judgment on the issue of causation, the plaintiff must establish the but for test, meaning but for the alleged antitrust violation, the plaintiff's injury would not have occurred.

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For Marion Hospital Corporation, Interested Party: Richard J. Behr, LEAD ATTORNEY, **[*2]** Evans & Dixon LLC - St. Louis, St. Louis, MO; Jason W. Kinser, Behr, McCarter & Potter, P.C., St. Louis, MO.

For USA, Interested Party: Jonathan H. Lasken, LEAD ATTORNEY U.S. Department of Justice - Antitrust Division, Washington, DC.

Judges: MARK A. BEATTY, United States Magistrate Judge.

Opinion by: MARK A. BEATTY

Opinion

MEMORANDUM AND ORDER

BEATTY, Magistrate Judge:

This matter is currently before the Court on the Report and Recommendation (Docs. 402 (sealed); 421 (public redacted))[1] of Special Master Stephen C. Williams (*see* Doc. 391 appointing the Special Master). The Report and

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[1] The Court found that the Report and Recommendation contained certain information that qualified as confidential proprietary information or trade secrets under Seventh Circuit precedent (*See* Doc. 418); *see also* *Learning Curve Toys, Inc. v. PlayWood Toys, Inc., 342 F.3d 714, 722 (7th Cir. 2003)*; *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325 (7th Cir. 1986)*. The

Recommendation[2] recommends the Court grant Defendant Southern Illinois Healthcare's Motion for Summary Judgment on all of Plaintiff Marion Healthcare, LLC's claims and dismiss this case with prejudice (Doc. 421 at 39). Plaintiff Marion Healthcare, LLC ("MHC") filed timely objections (Docs. 424 (sealed); 446 (public redacted))[3] on December 5, 2019 to which Defendant Southern Illinois Healthcare ("SIH") filed a timely response on December 23, 2019 (Doc. 432). SIH also filed an objection to the Special Master's Report and Recommendation (Doc. 426) to which MHC responded (Docs. 427 (sealed); 448 (public redacted)).[4] The parties fully briefed **[*3]** motions and responses to SIH's Motion for Summary Judgment (Docs. 334 (sealed), 333 (public redacted); 337 (public redacted); 353 (sealed), 352 (public redacted))[5], the Special Master's Report (Doc. 421), and the parties' objections and responses to the Special Master's Reports (Docs. 446; 426 (public redacted); 427 (sealed), 448 (public redacted); and 432 (public redacted))[6] are presently before the Court and sufficiently apprise the Court of the facts and arguments of the case.

Because timely objections have been lodged to the Special Master's Recommendations, the Court must undertake a *de novo* review of the Report and Recommendation. *See* *Fed. R. Civ. P. 53(f)*. Having carefully considered both the evidence and the parties' arguments and for the reasons stated below, the Court **ADOPTS** in part and **DECLINES TO ADOPT** in part the Report and Recommendation. Specifically, the Court adopts the Special Master's recommendation that: (1) summary judgment in favor of SIH is warranted because MHC cannot demonstrate that SIH's exclusionary contracts caused an antitrust injury; (2) MHC cannot prove causation or a link between any of SIH's conduct and its own injuries; and (3) **[*4]** MHC's claims are not tied to the damages theory pled in the Third Amended Complaint. The undersigned **DECLINES TO ADOPT** the Special Master's Report and Recommendation that the anti-trust theories advanced by MHC are sound as they are not dispositive of the decision here. Accordingly, SIH's Motion for Summary Judgment (Docs. 313 (public redacted), 314 (sealed), and 439 (final public redacted))[7] will be granted consistent with this Order.

The Court need not make a determination as to the other findings related to SIH's alleged *Sherman Act* 1 and 2 violations outlined in Special Master Williams' Report and Recommendation because without injury and causation, an antitrust claim cannot survive the summary judgment stage of litigation; therefore, the Court is declining to adopt the portions of the Report and Recommendation on the definition of the market, including its analysis on exclusive dealing, substantial foreclosure, tying, and coercion (Doc. 421 at 12-29). Accordingly, the outstanding issues in SIH's Motion for Summary Judgment related to the market and whether MHC was foreclosed or excluded from it; whether SIH engaged in tying or exclusive contracts with payers illegally; and **[*5]** whether SIH had a negative impact on the market as a whole are **MOOT** as they are unnecessary for the Court's decision.

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record contains both a sealed version (Doc. 402) and a public redacted version (Doc. 421). Throughout the ensuing Order, in the interest of brevity, the Court will simply cite to the public redacted version of this document rather than both, each time.

[2] Prior to docketing his formal Report and Recommendation, pursuant to the terms of appointment, the Special Master served a draft Report and Recommendation on the parties and allowed informal objections and proposed changes (See Doc. 391). The Special Master Williams refers to this informal objection process in his Report and Recommendation in footnotes 9, 11, 12, 13, 15, and 17. *See* Doc. 421 at 20, 28, 30, 31, 34, and 35.

[3] On February 4, 2020, the Court provided a detailed analysis on the record regarding what information in the parties motions and exhibits qualified as confidential or proprietary information or trade secrets and could be appropriately redacted under Seventh Circuit precedent (Doc. 435); (*see also* Doc. 437 (transcript of Feb. 4, 2020 hearing)); *see also* *Learning Curve Toys, Inc., 342 F.3d 714*; *Ball Mem'l Hosp., Inc., 784 F.2d 1325*. The Court directed the parties to file final public redacted versions of its pleadings and exhibits in accord with the Court's rulings (Docs. 435, 437 (transcript), and 442). Throughout the ensuing Order, the Court will cite to the public redacted version of the pleadings and briefs.

[4] *Supra* note 3.

[5] *Id.*

[6] *Supra* notes 1; 3.

[7] *Supra* note 3.

PROCEDURAL BACKGROUND

MHC filed its original Complaint on August 13, 2012 (Doc. 2). MHC is an ambulatory surgery center ("ASC") that performs outpatient surgical services (Doc. 421 at 2). The operative Amended Complaint was filed on February 17, 2016 (Doc. 127), in which MHC contends that SIH, a not-for-profit health care system in Southern Illinois that owns three hospitals, violated *Sections 1* and *2 of the Sherman Act* (and corresponding Illinois State Statutes) by engaging in exclusive contracts with health insurance providers, or "payers,"[8] like Blue Cross Blue Shield ("BCBS") and HealthLink. MHC claims that these exclusive contracts are illegal and violate *Section 1* of the Sherman Act. In addition, MHC claims these contracts enabled SIH to maintain and extend its monopoly power in the Southern Illinois market unlawfully in violation of *Section 2* of the Sherman Act (Doc. 127 at 4). SIH filed its Answer to the Third Amended Complaint on March 7, 2016 (Doc. 136), denying MHC's claims related to exclusive contracts and other alleged antitrust violations. The parties engaged in an extensive discovery **[*6]** process, with both parties (and interested parties) advocating for various protective orders to file certain documents related to competitively-sensitive information, including rate and reimbursement information, under seal (*See, e.g.*, Docs. 37, 48 (granting protective orders). Additionally, the Court conducted two hearings with the parties and non-parties, where the Court considered, analyzed and ruled on what information could be redacted as confidential, proprietary information and/or trade secrets (*See* Docs. 418, 435, and 437 (transcript of Feb. 4, 2020 hearing)). In addition, the Court held status conferences to ensure the case was moving forward.

On October 13, 2017, SIH filed a Motion for Summary Judgment (Doc. 439), arguing it had not engaged in illegal, anticompetitive conduct and that MHC cannot establish SIH's actions caused an injury to the market or damages to MHC. In its Motion for Summary Judgment, SIH relied heavily on a Seventh Circuit case, *Methodist Health Services Corp. v. OSF Healthcare System, 859 F.3d 408 (7th Cir. 2017)* ("*Methodist II")*, to support its argument that MHC cannot survive summary judgment. MHC filed its response on December 15, 2017 (Doc. 337) arguing that *Methodist II* is distinguishable from the present case and that SIH's **[*7]** exclusive contracts not only hurt MHC, but also the Southern Illinois healthcare market (Doc. 337 at 23, 26-28).

At that same time, SIH filed three Motions *in Limine* to Exclude John R. Bowblis's Testimony (Doc. 311), Dennis Knobloch's Testimony (Doc. 309), and John Meindl's Testimony (Doc. 307), all three of which will be addressed in separate Orders.[9] MHC filed its Response to these Motions *in Limine* on November 30, 2017 (Docs. 325 and 326; 328 (sealed) and 327 (public redacted)).[10] SIH filed its Reply to MHC's Response to the Motions in Limine on December 22, 2017 (Docs. 338 (public redacted) and 339 (sealed); 340 (public redacted) and 341 (sealed); and 342 (public redacted) and 343 (sealed)).[11] The Court responded by setting these matters for hearing on April 10, 2018 with discovery disputes lasting throughout the end of that year.

In January 2019, this case was assigned to the undersigned following the departure of Judge Williams from the bench. A status conference was held on February 13, 2019, at which time the parties discussed the appointment of a Special Master to review the record and issue a Report and Recommendation on Motions to Exclude the Testimony of John Bowblis **[*8]** (Docs. 400 (sealed); 420 (public redacted))[12] and John Meindl and Dennis

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[8] *See* Doc. 421 at 3; For a full accounting of the uncontested facts, *see* Doc 421 at 2-11.

[9] Today, the Court is entering three Orders (including this one) on three separate Reports and Recommendations prepared by the Special Master on certain motions filed by SIH. Each of SIH's motions and the accompanying Report and Recommendation warrants its own separate Order (*See* Docs. 451 (Memorandum and Order on Motion in Limine as to John Bowblis); 452 (Memorandum and Order on the Motion in Limine as to John Meindl and Dennis Knobloch)). Nevertheless, the analysis of the issues contained in both this Order and the other two entered by the Court today is intertwined and all of the Orders must be viewed in tandem.

[10] *Supra* note 3.

[11] *Id.*

Knobloch (Doc. 401), and the Motion for Summary Judgment (Doc. 421). Both Plaintiff and Defendant were in favor of appointing former Judge Williams (now Mr. Williams) as Special Master because of his unique familiarity with the case, which was made official on February 19, 2019 (Doc. 391). As Special Master Williams reviewed the record, both MHC and SIH were afforded the opportunity to submit informal objections and comments to him before he finalized his Report and Recommendation on each motion referred to him as Special Master.

CONCLUSIONS OF THE REPORT AND RECOMMENDATION

In his Report and Recommendation on the Motion for Summary Judgment, Special Master Williams found that MHC was missing a crucial element of proof in its case. MHC could not show that SIH's conduct caused an antitrust injury to the general market or MHC itself; therefore, he recommended that the Court grant the Defendant's Motion for Summary Judgment (Doc. 421 at 2).

After outlining the uncontested facts in this case, Special Master Williams analyzed each of MHC's Sherman Act *§§ 1* and *2* antitrust claims as to whether the parties presented evidence **[*9]** to support triable issues for the necessary elements, including exclusive dealing, monopolization, causation, and injury. To survive summary judgment on any of its claims, MHC must show that SIH's conduct caused an antitrust injury, defined as an injury "on the market" of raising prices or decreasing output, generally (Doc. 421 at 29). *See also* *Stamatakis Indus. v. King, 965 F.2d 469, 471 (7th Cir. 1992)*; *Serfecz v. JewelFood Stores, 67 F.3d 591, 597 (7th Cir. 1995)*; *Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 394 (7th Cir. 1984)*.

Special Master Williams found MHC's theories of liability related to tying, substantial foreclosure, and coercion to be sound;[13] however, whether MHC could survive summary judgment would be based on whether it could link SIH's actions to these theories of liability. Special Master Williams found that MHC "offered insubstantial proof to create a triable issue on whether SIH's exclusionary contracts caused an antitrust injury" (Doc. 421 at 29, 33). MHC fell short in demonstrating that SIH's conduct and use of exclusive contracts with payers led to an actual injury to MHC or an injury on the market in the form of "raising prices or decreasing output." (*Id.* at 29).[14]

Special Master Williams could not find any evidence in the record that patients were actually denied access to care. In other words, there is no evidence that patients in the market **[*10]** were injured by SIH's alleged illegal actions. MHC argued that "decreased outpatient surgery services mean[s] decreased choice for patients in the types of providers." (*Id.* at 30; Doc. 337 at 48). This suppressed patient choice, MHC argued, is enough to show an antitrust injury; however, Special Master Williams emphasized that "***antitrust law*** does not require the preservation of maximum choice in providers. The law protects access to care." (Doc. 421 at 31). *See also* *Nelson v. Monroe Reg. Med. Ctr., 925 F.2d 1555, 1564 (7th Cir. 1991)*. With no evidence in the record showing a disruption in access to care, MHC's arguments for causation lacked proof.

Even so, MHC continued, arguing injury to MHC itself in the form of an overall decrease in the volume of patients as the result of SIH's alleged illegal contracts and monopoly power in the Southern Illinois healthcare market. MHC argued that SIH created a monopoly in the area by engaging in exclusive contracts with payers that, essentially,

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[12] *Supra* note 1.

[13] Special Master Williams noted there is "enough evidence in the record to create a triable issue of whether MHC was substantially foreclosed from the commercially insured outpatient surgical market." (Doc. 421 at 24; *see also* Doc. 421 at 26, 28-29).

[14] More specifically, Special Master Williams highlights that MHC's main argument is that the exclusive contracts SIH entered into with payers created higher rates for payers in the Southern Illinois market than in other markets throughout the state (Doc 421 at 29). But the Special Master found that the record does not clearly show the time period these numbers come from, so the link between the higher rates and SIH's exclusive contracts is not clear enough to create a triable issue to survive summary judgment. MHC cannot effectively argue that one can infer that SIH's actions caused market price increases (Doc. 421 at 29-30). Similarly, the Special Master notes there is no evidence in the record to show an actual injury to MHC itself.

locked MHC out of the patient market since MHC was not "in-network" with these payers. MHC argued that patients were corralled into seeking care at in-network hospitals and surgery centers simply because of the in-network status, even though they are more expensive than MHC. This **[*11]** led to a decrease in MHC patient volume and an increase in the amount patients paid for surgeries throughout the Southern Illinois market (Doc. 421 at 31).[15] Special Master Williams agreed MHC put forth substantial proof that insured "out-of-network" MHC patients chose to have surgery at regional hospitals at an increasing rate over time; however, he did not find evidence in the record to link this phenomenon to SIH's alleged illegal activity (*Id.* at 29).

In examining whether MHC was forced to be an out-of-network provider because of SIH's exclusive contracts with payers and alleged monopoly power, Special Master Williams sifted through extensive records of evidence, but still could not find a clear connection that SIH's relationship with payers in the region caused MHC's status as an out-of-network surgical facility. In fact, Special Master Williams found the opposite—that MHC had not become an in-network provider because of its own business strategy. MHC feared it would not have the capacity to treat the influx of patients that would result from going in-network with payers, detailed in its board minutes (*Id.* at 35; Doc. 439 at 17-22, 26). Without evidence of a clear link, Special Master Williams could **[*12]** not draw a reasonable inference that MHC's claims and alleged harm were caused by SIH's alleged illegal activity (Doc. 421 at 12). *Omnicare, Inc., v. UnitedHealth Grp., 629 F.3d 697, 704 (7th Cir. 2011)*. Put more simply, MHC failed to properly demonstrate causation or injury, two central antitrust elements.

Special Master Williams recommended that this Court grant Defendant's Motion for Summary Judgment and dismiss this case with prejudice on the basis of causation and injury, two crucial antitrust elements, because "while the theory is sound, the proof is not in the record." (Doc. 421 at 33-34, 37-38).

DISCUSSION

Because timely objections were filed, the Court must undertake a *de novo* review of the Report and Recommendation. *28 U.S.C. § 636(b)(1)(B)*,*(C)*; *Fed. R. Civ. P. 72(b)*; *SDILLR 73.1(b)*; *Harper v. City of Chicago Heights, 824 F. Supp. 786, 788 (N.D. Ill. 1993)*; *see also, Govas v. Chalmers, 965 F.2d 298, 301 (7th Cir. 1992)*. ***HN1***[] A *de novo* review requires the district court to "give fresh consideration to those issues to which specific objections have been made" and make a decision "based on an independent review of the evidence and arguments without giving any presumptive weight to the [special master's] conclusion." *Harper, 824 F. Supp. at 788* (citation omitted); *Mendez v. Republic Bank, 725 F.3d 651, 661 (7th Cir. 2013)*. On a motion for summary judgment, all material facts and all inferences are construed in the light most favorable to the non-moving party. *See Serfecz, 67 F.3d at 596*. When a Special Master is appointed in a case **[*13]** and prepares a report on summary judgment, the Court reviews the Special Master's legal conclusions *de novo* and accepts his findings of fact unless they are clearly incorrect. *Fed. R. Civ. P. 53(f)(3)*; *Cook v. Niedert, 142 F.3d 1004, 1010 (7th Cir.1998)*. The Court "may accept, reject or modify the [Special Master's] recommended decision." *Harper, 824 F. Supp. at 788*.

The Court has reviewed all materials, evidence, and pleadings before the Court in this matter, including both parties' objections to the Special Master's Report and Recommendation as well as the Report and Recommendation itself. Special Master Williams meticulously combed through voluminous records to determine the uncontested facts. Special Master Williams also lived with this case for many years, acting as the presiding judge starting in 2016 (*see* Doc. 123) until his departure from the bench and then as the appointed Special Master. Ultimately, both parties had the opportunity to object to the Special Master's factual findings and neither did so. The Court **ADOPTS** the Special Master's findings of fact as they are not "clearly incorrect." Indeed, the Special Master's findings of fact are a thorough and detailed recitation of the relevant facts necessary for resolving the instant

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[15] MHC argues SIH's exclusive contracts "forced [patients to] obtain outpatient surgeries at hospitals instead of less expensive ASCs (such as MHC in particular)." (Doc 421 at 33).

summary judgment motion and this Order will **[*14]** be in accordance with those findings of fact.[16] *Fed. R. Civ. P. 53(f)(3)*; *Cook, 142 F.3d at 1010*.

Additionally, the Court **ADOPTS** the Report and Recommendation's analysis on the dispositive issues of antitrust injury, causation, and damages, and the Special Master's recommendation that summary judgment in favor of SIH is warranted. MHC's objections are therefore **OVERRULED** in part and **MOOT** in part insofar as they relate to the issues the Court declines to adopt. The Court **DECLINES TO ADOPT** the Report and Recommendation with respect to the recommendation that there are triable issues on substantial foreclosure and tying.[17] Whether these theories are sound or not does not change or have any ultimate impact on the Court's analysis on the dispositive issues of injury, causation, and damages and, therefore, the Court need not address them. Although SIH has lodged objections to the Special Master's recommendation that MHC's theories are sound, SIH's objections are deemed **MOOT** since the Court is declining to adopt this section of the Report and Recommendation. SIH's Motion for Summary Judgment will therefore be **GRANTED**, consistent with this Memorandum and Order.

A. Plaintiff's Objections

MHC objects to several portions of the Special Master's **[*15]** Report and Recommendation on the Motion for Summary Judgment. First, MHC argues that Special Master Williams did not utilize the correct legal standard to determine summary judgment in an antitrust case and that there is "a more sophisticated standard for antitrust claims" he should have employed (Doc. 446 at 1-2). Second, MHC argues the Report and Recommendation "improperly conflates [a]ntitrust injury with [c]ausation." (*Id.* at 1). Third, MHC argues that Special Master Williams found that MHC failed to present enough evidence for causation *sua sponte* as SIH did not address causation in its Motion for Summary Judgment or subsequent briefs. Fourth, MHC argues the Report and Recommendation relies on incorrect evidence to conclude that MHC cannot show an antitrust injury, causation, and damages. Fifth, MHC argues that the Report and Recommendation incorrectly held that Dr. Bowblis's calculations for damages were not reliable. And sixth, MHC argues that the Report and Recommendation incorrectly finds that the monopolization claims fail because there was not a separate analysis of damages apart from the analysis related to tying and exclusive dealing.

As the Court is granting Defendant's Motion **[*16]** for Summary Judgment and adopting the Report and Recommendation as to the dispositive issues of causation, injury and damages (and declining to adopt the portions describing the relevant market), the Court will address objections below relevant to its analysis and related to the antitrust elements of causation, injury, and damages (as far as damages are relevant to and support this Court's analysis of causation and injury).[18]

1. Plaintiff MHC's Objection to the Summary Judgment Standard

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[16] As noted, neither party lodged a specific objection to the findings of fact made by Special Master Williams and the Court accordingly adopts the facts as stated herein. Even if a party had objected to the Special Master's factual findings, the Report and Recommendation contains a careful and meticulous factual background supported by the record and is not "clearly incorrect." In fact, the Special Master did a commendable job in his Report and Recommendation, distilling down and synthesizing the relevant facts in this highly complex and long running case.

[17] The relevant portions of the Report and Recommendation this Court is analyzing for purposes of its decision are the sections on antitrust injury, causation, and damages (Doc. 421 at 29-40).

[18] Special Master Williams finds in the Report and Recommendation that MHC's damages theory is not tied to its claims, and MHC's expert does not make a reliable damages estimate (Doc. 421 at 37-38). MHC objects to this portion of the Report and Recommendation, arguing that an estimation is the only way to assess damages in the current case and its expert, Dr. Bowblis, made reasonable and reliable damages calculations (Doc. 446 at 17-20). The Court addresses these arguments in its separate Order on the Motion *In Limine* on the Testimony of Dr. Bowblis (Doc. 451).

MHC asserts that Special Master Williams uses an incorrect summary judgment standard in the Report and Recommendation thereby holding MHC "to a higher standard," and acting "as a trier of fact." (Doc. 446 at 4). MHC argues that the Report and Recommendation should not have included the "normal" standard for summary judgment. According to MHC, it should have employed the "more sophisticated standard for antitrust claims" as outlined by the Supreme Court and Seventh Circuit case law, specifically two cases, *Eastman Kodak v. Image Technical Services, Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* ("*Kodak")* and *JTC Petroleum Co., v. Piasa Motor Fuels, Inc., 190 F.3d 775 (7th Cir. 1999)* ("*JTC*"). But MHC is incorrect that these two cases elucidate a separate summary judgment standard and that this "more sophisticated standard should" be applied to the case at **[*17]** hand.

HN2[] Summary judgment is standardized across cases of various topics, even in antitrust cases that require a nuanced, fact-specific analysis.[19] Special Master Williams highlights in the Report and Recommendation that "summary judgment is proper where there is no dispute as to a material fact that entitles the movant to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

The *Matshushita* standard, as SIH correctly notes, is regularly cited and employed by the Seventh Circuit as the standard for summary judgment in antitrust cases (Doc. 432 at 4) (citing *Kleen Prods. LLC v. Georgia-Pac. LLC, 910 F.3d 927, 941-42 (7th Cir. 2018)*; *In re Dairy Farmers of Am., Inc., 801 F.3d 758, 763 (7th Cir. 2015)*; *Omnicare, 629 F.3d at 720*; *United Rentals Highway Techs., Inc. v. Ind. Constructors, Inc., 518 F.3d 526, 532 (7th Cir. 2008)*; *Miles Distribs., Inc. v. Specialty Const. Brands, Inc., 476 F.3d 442, 450 (7th Cir. 2007))*. Indeed, the *Matshushita* standard that MHC seeks to avoid parrots the language of *Rule 56(a)*. The *Matsushita* Court specifically highlights the importance of causation and injury in the summary judgment phase in antitrust cases, even when there is ambiguous evidence. ***HN4***[] Ambiguous evidence is defined as evidence of "conduct as consistent with permissible competition as with illegal conspiracy." *Matsushita, 475 U.S. at 586, 588*, *citing Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. Ambiguous evidence alone does not support an inference of an antitrust conspiracy because the *Matsushita* Court stresses courts should not infer illegal conduct "when such inferences are implausible, because the effect **[*18]** of such practices is often to deter procompetitive conduct." *Matsushita, 475 U.S. at 593*. *See also, Monsanto Comp., 465 U.S. at 762-764*.

In its objection, MHC argues that a more appropriate standard is outlined by two cases, *JTC* and *Kodak*. MHC argues that *Kodak* states the defendant "bears a substantial burden" and must demonstrate that an inference of unlawful conduct is "unreasonable." MHC further contends that at the summary judgment stage, the balance should only tip in favor of granting summary judgment when the challenged conduct appears always or almost always to enhance competition (Doc. 337 at 1).

As Special Master Williams correctly highlights, MHC is mistaken that *Kodak* outlines a separate, special standard for summary judgment in antitrust cases. A careful examination of *Kodak* reveals that it simply employs the normal summary judgment in the context of the facts of that case—*i.e.* all reasonable inferences are drawn in favor of the non-moving party (Doc. 421 at 12). *See generally Kodak, 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265*.

Similarly, MHC argues that *JTC* outlines a separate summary judgment standard where the Special Master should have asked whether a rational jury, "construing the evidence before it as favorably as the record permits," could find in favor of the plaintiff (Doc. **[*19]** 337 at 2). MHC argues *JTC* provides guidance as to how a court should weigh evidence at the summary judgment stage and that when there is conflicting evidence, the court should not draw

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[19] ***HN3***[] "[A]ntitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies." *Concord v. Boston Edison Co., 915 F.2d 17, 22 (C.A.1 1990)* (internal quotation marks omitted). SIH argued in its Motion for Summary Judgment that one Seventh Circuit Case, *Methodist II*, is analogous here. As Special Master Williams recommended, SIH's arguments supported by *Methodist II* are compelling because the facts of *Methodist II* and our present case are so similar. This Court's analysis demonstrates that *Methodist II* is highly instructive.

conclusions; rather, the court should examine the evidence to determine if it is "sufficiently plausible." If it is, then the party has survived summary judgment.

Even within the parameters of *JTC*, MHC's arguments fail because *JTC* uses the *Matsushita* standard. In fact, the *Matsushita* standard in the context of the *JTC* facts provides the Court with helpful language for the present matter. *JTC* emphasizes the importance of demonstrating an injury at the summary judgment stage in order to survive summary judgment because ***HN5***[] "an antitrust claim which makes no economic sense can on that ground be dismissed on summary judgment." *JTC, 190 F.3d at 778* ("To put it bluntly, you cannot obtain damages without proving injury."); *see also* *Matsushita, 475 U.S. at 586*. MHC is mistaken—*Kodak* and *JTC* do not hold that there are varying standards for summary judgment; rather, these cases show the parameters of the summary judgment standard applied to cases with varying facts.

At the heart of MHC's case is the inquiry of whether SIH's exclusive contracts with payers caused **[*20]** damages to MHC and the market. MHC argues that SIH's exclusive contracts with payers are evidence of illegal antitrust activity intrinsically; however, the Special Master correctly highlights that exclusive contracts are not, alone, *per se* illegal (Doc. 421 at 12).[20] Exclusive contracts, as pled in this case, are an example of ambiguous evidence (*i.e.*, evidence that could be "consistent with permissible competition as with illegal conspiracy."). *Matsushita, 475 U.S. at 586, 588*. MHC fails at this summary judgment stage because there is insufficient evidence in the record (viewing all reasonable inferences in favor of MHC) to demonstrate the key elements of its case. This Court would have to engage in "'pure speculation'—to find sufficient evidence of antitrust injury, causation, or damages in this case." (*See* Docs. 432 at 3; 421 at 37). These issues of proof will be addressed in the forthcoming sections of this Order;[21] however, it is clear, from the breadth of antitrust case law, the summary judgment standard utilized by Special Master Williams in his Report and Recommendation, and outlined in *Matsushita* as well as numerous other antitrust cases, is correct and applicable here.

2. The Antitrust Elements of Causation [*21] and Injury and Plaintiff's Objections

Plaintiff MHC objects to the Report and Recommendation in three areas related to injury and causation. MHC's first main objection is that Special Master Williams conflated antitrust injury and causation in his Report and Recommendation. In the next two objections related to causation and injury, MHC argues that Special Master Williams relied on incorrect evidence to come to his conclusions on antitrust injury and then addressed issues of causation *sua sponte*, not relying on arguments or evidence introduced in the record by the parties. MHC is mistaken—Special Master Williams clearly outlines the evidence he relies on to reach his conclusions and uses correct legal standards to come to those conclusions.

a. MHC Argues Special Master Williams Conflated Antitrust Injury and Causation

MHC's first objection is that Special Master Williams improperly conflated injury and causation in his reasoning. MHC argues there is a "substantial record of evidence—from which a jury could reasonably conclude—that the injury it alleges resulted directly from the exclusive contracts; but injury-in-fact—whether the exclusive caused the alleged injury—is a question of causation." **[*22]** (Doc. 446 at 4-5). MHC further argues the Report and Recommendation engages in a "hypothetical, assuming away the violation or ignoring a causal link between the violation and the harm and positing other sources" (*Id.* at 6).

MHC's overall argument is that antitrust injury is an essential component of standing, and that Special Master Williams analyzes causation incorrectly under the antitrust injury standard for standing (*Id.* at 4-5). MHC is

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[20] The Court is not addressing this issue at length in the body of this Order because it is unnecessary for the analysis, given that it is clear MHC cannot demonstrate key elements of antitrust injury, causation, and damages, which warrants summary judgment.

[21] *See Infra* p.17-28

imprecise with the case law and standards for each element of an antitrust case to its own failings, and this objection is no different. Special Master Williams analyzed both injury and causation correctly, in accordance with case law and the record.

Antitrust injury is a central element MHC must demonstrate in order to survive on any of its claims. ***HN6***[] An antitrust injury is "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 881 F. Supp. 1309 (W.D. Wisc. 1994)*(quoting *Local Beauty Supply, Inc. v. Lamaur, Inc., 787 F.2d 1197, 1201 (7th Cir. 1984)* (*quoting* *Brunswick Co. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1978))*. Courts within the Seventh Circuit have, at times, analyzed antitrust injury as an element of antitrust standing as MHC argues; however, antitrust injury can and should be analyzed outside of standing as it is a *necessary element* to prove an antitrust claim. **[*23]** *Blue Cross & Blue Shield, 881 F. Supp. at 1315*.

HN7[] To establish causation, a plaintiff must show that the anticompetitive conduct claimed was "the cause in fact of the injury," or that "'but for' the violation, the injury would not have occurred." *Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 718 (7th Cir. 2006)* (antitrust injury must "reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation"). *See also* *O.K. Sand & Gravel, Inc., v. Martin Marietta Tech., Inc., 36 F.3d 565, 573 (7th Cir. 1994)* (holding that antitrust injury requires "not only that the injury is of the type intended to be protected by the antitrust laws, but that the violation was 'the cause-in-fact of the injury: that but for the violation, the injury would not have occurred'") (citing *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 395 (7th Cir. 1993)*; *In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 66 (2d Cir. 2012)* ("to prevail on an antitrust claim, a plaintiff must establish that 'the injuries alleged would not have occurred *but for* [the defendant's] antitrust violation' ... adding necessity to the materiality requirement of our antitrust causation analysis.")

HN8[] In addition, a plaintiff must be able to distinguish between "financial loss from the *lawful* activities of a competitor" from loss "caused by the *unlawful* acts of the defendant." *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1161 (7th Cir. 1983)* (citing *Brunswick Corp., 429 U.S. at 489*). If the alleged antitrust violation is too removed from an injury with other intervening factors that could have led to the claimed injury, **[*24]** Seventh Circuit courts have granted motions for summary judgment for the moving party. *See* *Greater Rockford Energy, 998 F.2d 391 (7th Cir. 1993)*. *See also* *Eli Lilly and Co. v. Zenith Goldline Pharmaceuticals, Inc., 172 F. Supp. 2d 1060 (S.D. Ind. 2001)*.[22] At the summary judgment stage, if there is no causation, then that is the end of the case as "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

Ultimately, "[i]n order to sustain any of its claims, MHC must prove that SIH's conduct caused an antitrust injury." (Doc. 421 at 29). The parties submitted evidence throughout its briefing to argue issues related to both causation and injury. MHC has been on notice of the arguments surrounding causation and has, in fact, submitted evidence to attempt to link SIH's alleged action to its injury to prove causation.

Although MHC argues that Special Master Williams conflates causation and injury, it is MHC who misstates the record and evidence as related to injury and causation. ***HN10***[] To create a triable issue in terms of injury for summary judgment, there must be *some evidence* to show that "SIH's conduct had the effect on the market of raising **[*25]** prices or decreasing output." (*Id.* at 29).

To show injury, MHC argues that SIH's exclusive contracts with payers created higher rates in the Southern Illinois market, more so than in other markets throughout the state (*Id.*). MHC argues that the prices continued to rise over time from the exclusive contracts; however, this alleged violation is without support in the record. The Special

[22] ***HN9***[] If lawful competition "fully accounts for" a plaintiff's "claimed injury," the law will "deny any injury" because "the plaintiff's situation would be the same with or without the challenged restraint." Areeda & Hovenkamp, ***Antitrust Law*** ¶ 338b-c.

Master correctly noted that the deposition excerpts MHC relied on to support its position (e.g., Lee Biederman's deposition) do not refer to *actual rate increases* and do not refer to a specific timeframe (*Id.* at 30).

MHC then argued that there was an injury to the market from these exclusive contracts because they had the effect of decreasing choice for patients "in the types of providers" they could choose, as these contracts allegedly caused a decrease in outpatient surgery services overall (*Id.* at 30). Ultimately, though, the Court can find nothing in the record to support the fact patients were denied access to care and "preservation of maximum choice in providers" is not required by the law (*Id.* at 31). Special Master Williams found that MHC "overstates the testimony in the record that it relied upon, and—implies a connection between **[*26]** those prices and SIH's conduct for which there is no proof." (*Id.* at 29). After a careful review of the record, this Court agrees with the Special Master.

Both parties submitted evidence in the record as to causation as well through their briefing and expert testimony (*See* Doc. 432 at 5; Doc. 337 at 49-50). ***HN11***[] For causation, a plaintiff must establish that "but for" the antitrust violation, their injury would not have occurred. *Greater Rockford Energy, 998 F.2d at 395*. Causation, like injury, is integral to a party surviving summary judgment.

MHC argues that it lost volume of patients and business because MHC was foreclosed from being in-network with the same payers who had exclusive contracts with SIH because of those exclusive contracts. ***HN12***[] In determining whether a party can survive summary judgment on the issue of causation, Special Master Williams rightfully outlined that the plaintiff must establish the "but for" test, meaning "but for" the alleged antitrust violation, the plaintiff's injury would not have occurred (Doc. 421 at 34). Here, there are too many intervening factors that make the link between MHC's claimed injury and SIH's alleged illegal activity faint. This is not a case of "hypothetical, assuming away the violation or **[*27]** ignoring a causal link between the violation and the harm and positing other sources," as MHC argues. There are real evidence issues in the record that make it impossible for the Court to infer that but for SIH's exclusive contracts with payers, MHC's injury would not have occurred.

MHC alleges that SIH's exclusive contracts caused MHC to lose patient volume because being out-of-network deterred patients from seeking care at an out-of-network facility like MHC. MHC argues this is because patients would have to pay more for the services (*Id.* at 34). If this were the only reason as to why MHC lost patient volume alleged in the record, then perhaps MHC would have created a triable issue of fact to survive summary judgment on causation. However, this is *not* the only reason why MHC remained out-of-network with certain payers, like BCBS. MHC remained out-of-network as a business strategy, at times complaining that the rates being offered by payers were not competitive and at other times, remaining out-of-network because MHC did not believe it could handle the increased patient volume that would flow from an in-network agreement with certain payers (*See* Doc. 439 at 25-26)("In 2010, MHC's board minutes **[*28]** report that MHC understood that attempting to negotiate a contract with BCBSIL would require more patients than MHC physicians currently treated to be worthwhile—However, going in-network with any of them would require a much larger volume of patients."). In addition, MHC did enter into a contract with HealthLink twice and is still in-network with HealthLink (Docs. 421 at 5, 33, 35; 313-25; 313-10; 313-26).

From the record, it appears that SIH's exclusive contracts with payers had little effect on MHC. MHC was able to contract with some payers, like HealthLink, successfully to go in-network and declined to contract with others as a business strategy, all during a time when SIH had exclusive contracts with these payers in the region (Doc. 421 at 35-36).

MHC is mistaken that Special Master Williams incorrectly conflated injury and causation. He nimbly maneuvered through both tests and extensive facts to correctly determine that MHC did not provide facts to support finding triable issues as to causation and injury necessary for MHC to move past this summary judgment phase.

b. MHC Argues Special Master Williams Made Recommendations about Causation *Sua Sponte*

Second, MHC argues that Special **[*29]** Master Williams made his recommendations on causation *sua sponte* because he relied on facts not pled by the parties. As opposed to its first objection, where MHC argued that Special

Master Williams used incorrect standards for injury and causation, relying on incorrect facts from the record, here, MHC argues that Special Master Williams addressed an issue not introduced by the parties at all.

MHC argues that SIH's Motion for Summary Judgment advanced five theories.[23] MHC argues that SIH addressed issues related to causation only once, when SIH argued that MHC cannot prove causation because MHC's expert, Dr. Bowblis, "ignored intervening causes that are indisputable" and that his damages calculations are flawed (Doc 446 at 8; Doc. 439 at 41-44). MHC argues that instead of just examining this one element of proof for causation (*e.g.*, Dr. Bowblis ignoring intervening factors in his statistical conclusions), Special Master Williams examined causation elsewhere throughout the record, "improperly draw[ing] inference[s] (and erroneous ones at that) as to whether Plaintiff would have contracted with BCBS and HA had it been given the opportunity" (Doc 446 at 10).

MHC is incorrect. SIH **[*30]** argues causation throughout its briefs and Special Master Williams addressed causation arguments brought up by the parties directly. SIH correctly notes in its Response to Plaintiff's Objections that both SIH and Special Master Williams outlined the areas of the record in which SIH makes the argument that MHC has not supported its arguments for causation.[24] Special Master Williams addresses this issue directly in his Report and Recommendation:

> In the informal objection process, MHC argued that SIH had not actually raised this issue of causation in its briefing. It argues that the undersigned impermissibly relies on an issue for which it had no opportunity to address. In support of this proposition, MHC cites *Edwards v. Honeywell, 960 F.2d 673, 675 (7th Cir. 1992)* & *Malhotra v. Cotter & Co., 885 F.2d 1305, 1310 (7th Cir. 1989)*. While the undersigned takes no issue with the legal proposition, it cannot be said this argument was not raised—raised vigorously in fact—by SIH. The fact that the undersigned has analyzed it under the rubric of causation, and that SIH argued it extensively under a different heading, does not give MHC license to ignore it. It does not take a clairvoyant to know that an argument raised over six pages of SIH's brief should be responded to. MHC ignored it at its peril.

(Doc. 421 **[*31]** at 35).

The Court agrees. MHC has been on notice repeatedly - in fact from the moment it filed this case in 2012 until this point - that it must have evidence related to causation and must respond to arguments made by SIH, otherwise forfeiting those arguments at this stage. As Special Master Williams found, "MHC ignored [this issue] at its peril." (*Id.*).

c. MHC Argues Special Master William Relied on Incorrect Evidence for Antitrust Injury

Finally, MHC objects to Special Master Williams' Report and Recommendation on the grounds that Special Master Williams relied on incorrect evidence in his reasoning. Specifically, MHC contends the Report and Recommendation "incorrectly concludes that Plaintiff cannot show antitrust injury or causation of damages because

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[23] MHC outlines the five issues as follows: "a) Under *Methodist II*, Defendant's contracts with BCBS and HA are legal because they were not "exclusive," because (1) their members always could seek treatment at other providers, whether contracted or not, including MHC, and (2) MHC could compete for its own contracts due to the short duration of SIH's; b) MHC was not 'foreclosed' or excluded from competing for outpatient surgery patients; c) MHC's tying claim fails because (1) there was not 'tie' as payers never ask to contract for a hospital's inpatient and outpatient services separately, and (2) payers testified they agreed willingly to the provisions; d) MHC's monopolization claim fails because (1) MHC has not been excluded from referral sources, (2) MHC makes no attempt to define the proper universe of 'market' to know what allegedly was monopolized, (3) MHC offers no damages at all for it monopolization claim; and e) MHC's claims in whole fail because (1) it cannot show higher prices (and thus competition was not harmed), and (2) it cannot establish the essential elements of causation or (3) damages for any of its claims (Doc. 439 at 2-3; Doc 446 at 8).

[24] Both SIH and the Special Master correctly specify the parts of the record in which SIH repeatedly made this argument (*See* Doc. 432 at 4) (citing Resp. to Mot. To Supp. (Doc. 410) at 8-10 (listing 15 bullet points where this argument appeared)); see also Doc. 421 at 35 n.17 (stating that SIH raised this argument in 'over six pages' of its Motion for Summary Judgment alone).

it never would have contracted with Blue Cross (BC) or Health Alliance (HA) even in the absence of exclusivity." (Doc. 446 at 2, 10-15). MHC further argues that Special Master Williams applied the incorrect reasoning in this section, requiring a "causal link between the exclusivity and MHC's injury to a black-and-white certainty." (*Id.* at 11). MHC contends Special Master Williams should have evaluated injury under a separate standard and asked **[*32]** if the injury was "a material element or, and substantial factor in producing, the injury" because it "need not be the sole cause of the alleged injuries" (*Id.*) *See also* *Greater Rockford Energy & Tech Corp. v. Shell Oil Co., 998 F.2d 391, 395 (7th Cir. 1993)*. MHC claims it had the required "intention and preparedness" to contract as evident by the record (Doc. 446 at 11-13) and that it "repeatedly sought contracts from the restricted carriers and it actually contracted, on two different occasions, through HealthLink with dozens of unrestricted carriers." (*Id.* at 12).

Again, MHC misstates the evidence in the record. Although MHC cites to *Grip-Pak, Inc. v. Ill Tool Works, 694 F.2d 466, 475 (7th Cir. 1982)* ("*Grip-Pak")* to argue that a plaintiff is required to demonstrate only "intention and preparedness to enter the market," in order to show causation, Special Master Williams rightfully found that MHC misstated this test. Intention and preparedness to enter a market is the threshold showing to bring suit for damages (Doc. 421 at 34, n.15). In fact, Special Master Williams correctly highlights that *Grip-Pak* is explicit that this test is a way to *limit* who can bring claims instead of a "how to" guide to establish the element of causation for a claim (*Id.*).

Ultimately, even if MHC had not misstated this test, the evidence does not support that it ever **[*33]** had the intention to enter into contracts with payers like BCBS absent SIH's exclusive contracts. MHC had opportunities to negotiate contracts with BCBS and chose not to enter into contracts with them because of "the low rates being offered." (Docs. 421 at 35; 313-25). Throughout the evidence related to contract negotiations between MHC and payers like BCBS, there is *nothing* in the record that shows MHC would have contracted with payers *absent exclusive contracts with SIH* (Doc. 421 at 36). Special Master Williams rightfully found that it would be "pure speculation for a trier of fact to conclude that MHC would be in-network with BCBS without the exclusivity provisions." (*Id.* at 37). There is simply no evidence in the record to support that connection. MHC's "intention and preparedness" evidence can only push it so far down the causation path. That evidence alone is simply not enough to create a triable issue in terms of causation.[25]

B. Plaintiff's Monopolization Claims under Act 2 of the Sherman Act

In addition to its Sherman Act *§ 1* arguments, MHC also argued that because of SIH's use of exclusive contracts with payers in the Southern Illinois region, SIH created an illegal monopoly, violating *§ 2* **[*34]** of the Sherman Act. Special Master Williams quickly disposes of MHC's Sherman Act *§ 2* monopolization claims in the Report and Recommendation because MHC does not provide proof, in the form of an expert opinion or damages calculation, for this claim (Doc. 421 at 39). Special Master Williams recommends the Court grant summary judgment as to all of MHC's claims, including monopolization, because MHC has not proven an antitrust injury and causation, and MHC's success rests on those two key claims. MHC objects to his findings, arguing that its proof for its exclusive dealing and tying arguments prove its monopolization claim as well. MHC argues that the Court should hold that these three claims survive summary judgment as the proof overlaps and MHC has included enough in the record to prove all three arguments (Doc. 446 at 20).

The Court has given fresh consideration to MHC's arguments and agrees with the Special Master that the proof is simply not in the record as to MHC's monopolization claims. While the Court is not assessing the validity of MHC's exclusive dealing and tying arguments (as they are not dispositive of this matter), it is clear there is not enough evidence in the record to **[*35]** support MHC's monopolization claims.[26] Even so, the Special Master correctly

[25] The Court has carefully considered all of the arguments raised by the parties and all of the objections to the Report and Recommendation. But this was no easy task. MHC frequently conflated arguments made by SIH and findings made by the Special Master, making it difficult to parse the issues out in an organized fashion. The Court has spent an extensive amount of time analyzing and giving fresh consideration to all of the issues in this case. Nevertheless, if there is any argument or objection raised by MHC that is not specifically addressed by this Memorandum and Order, the Court can confidently say that it considered it and has rejected it.

highlights that without proof of an antitrust injury or causation, MHC cannot prove its Sherman Act *§ 2* monopolization claims either (Doc. 421 at 39). Because the Court has concluded that MHC cannot survive summary judgment because it lacks sufficient evidence of an antitrust injury and causation, MHC's monopolization claims must also fail.

Conclusion

For the reasons set forth above, the Court **ADOPTS IN PART and DECLINES TO ADOPT IN PART** the Special Master's Report and Recommendation. MHC's objections are **OVERRULED**; SIH's objections are **MOOT**. SIH's motion for summary judgment is **GRANTED** consistent with this Memorandum and Order. MHC's claims will therefore be **DISMISSED with prejudice** and the Clerk of Court will be directed to enter judgment accordingly and close this case on the Court's docket.

IT IS SO ORDERED.

DATED: March 31, 2020

/s/ Mark A. Beatty

MARK A. BEATTY

United States Magistrate Judge

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[26] In fact, MHC admits it cannot prevail on its monopolization claims without proof of its exclusive dealing or tying claims (Doc. 421 at 39).

Jacobs v. Fareportal, Inc.

United States District Court for the District of Nebraska

April 1, 2020, Decided; April 1, 2020, Filed

8:17CV362

Reporter
2020 U.S. Dist. LEXIS 59129 *; 2020 WL 1545921

IAN V. JACOBS, Plaintiff, vs. FAREPORTAL, INC., Defendant.

Prior History: *Jacobs v. Fareportal, Inc., 2019 U.S. Dist. LEXIS 81955 (D. Neb., May 15, 2019)*

Core Terms

respectfully, requests, parties, Zwart, clarification, trademark, false advertising, unjust enrichment, summary judgment, advertising, briefing, uscourts, keyword, raises

Counsel: **[*1]** For Ian V. Jacobs, Plaintiff: Britton D. McClung, HEDRICK, KRING LAW FIRM, Dallas, TX; Carol A. Svolos, John P. Passarelli, KUTAK, ROCK LAW FIRM - OMAHA, Omaha, NE; Jacob B. Kring, Laura M. Fontaine, PRO HAC VICE, HEDRICK, KRING LAW FIRM, Dallas, TX.

Judges: Cheryl R. Zwart, United States Magistrate Judge.

Opinion by: Cheryl R. Zwart

Opinion

ORDER

The court has reviewed the emailed letters submitted by the parties. (Attached). Due to the press of other matters related to the COVID-19 Pandemic, the court will not take up Defendant's requests absent a formal motion.

Dated this 1st day of April, 2020.

BY THE COURT:

/s/ Cheryl R. Zwart

United States Magistrate Judge

From: Lackman, Eleanor

To: "zwart@ned.uscourts.gov"

Cc: Svolos, Carol A.; "john.passarelli@kutakrock.com"; Jacob Kring; "Joel Bailey"; "Michael Hilgers"; Lewis, Marissa

Subject: Jacobs v. Fareportal Inc., 8:17-cv-00362 (CRZ) - Letter requesting clarification

Date: Tuesday, March 31, 2020 7:00:28 AM

Attachments: Letter to Judge Zwart re Clarification - 2020-03-31.pdf

Dear Judge Zwart:

On behalf of defendant Fareportal Inc., we respectfully submit the attached letter requesting clarification of certain points in the Court's summary judgment order. We have informed counsel **[*2]** for plaintiff Jacobs regarding our intention to submit this letter, along with the general substance, and we have learned that Jacobs intends to oppose. Accordingly, unless the Court prefers to dispense with one, we request a conference when convenient for all parties.

Respectfully submitted,

Eleanor M. Lackman

March 31, 2020

VIA E-MAIL ONLY (ZWART@NED.USCOURTS.GOV)

Hon. Cheryl R. Zwart, U.S.M.J.

566 Federal Building

100 Centennial Mall North Lincoln, Nebraska 68508

Re: *Jacobs v. Fareportal Inc.*, No. 8:17 Civ. 00362 (CRZ) (D. Neb.)

Dear Judge Zwart:

We represent defendant Fareportal Inc. ("Fareportal") in the above-referenced action. As the Court is aware, the parties have been diligently exploring settlement negotiations by various means over the course of the past few months. However, as the Court is also aware, the parties have not reached a resolution and have elected to move ahead with the proceedings while continuing to work on their efforts to resolve the case.

It is in this context that Fareportal has also turned back to preparing for a possible trial, and it wishes to do so in as streamlined of a fashion as possible. With this in mind, Fareportal respectfully asks the Court to clarify **[*3]** particular points in its September 19, 2019 Memorandum and Order (Doc. #232) (the "Order") that leave certain claims or points either unaddressed or otherwise ambiguous — an understandable outcome in light of the volume of claims and submissions from the parties, but one that has an impact on the nature and scope of any trial that may happen if the case does not settle. Fareportal does not seek reconsideration on any point briefed and decided, even if it disagrees with the interpretation of the facts or the law; rather, it raises only specific issues that remain unclear or which were newly raised by the Court in its Order. This submission reflects Fareportal's hope, with a goal that is in the interest of both parties, to ensure that if a particular claim or issue is no longer before the Court, the resources of the Court and the parties are not expended on those points. Fareportal respectfully requests a telephone conference, if the Court prefers to hold one.

False Advertising and Designation of Origin. As the Court recognized, Plaintiff Ian Jacobs ("Jacobs") asserted a cause of action for "false advertising and designation of origin," (*see* Order at 13), which Fareportal had observed **[*4]** appeared to be a mash-up of two separate causes of action under the Lanham Act: (1) false designation of origin (*15 U.S.C. § 1125(a)(1)(A)*), and (2) false advertising (*15 U.S.C. § 1125(a)(1)(B)*). *See* Doc. # 183 at 33 & n.15. Fareportal identified the very different standards that apply to the former claim (essentially, a variation of a trademark infringement claim) and the latter claim (which, generally stated, targets express or implied statements about the nature or quality of a good or service). Fareportal noted that Jacobs never identified any false statement as the law requires, *id.*at n.15, and Jacobs did not dispute the point. Accordingly, there should be no false advertising claim remaining in the case, but the Court's overview at the start of its analysis (Order at 17) does not mention the claim, and therefore by default, the claim remains in the case. However, if Jacobs has not sought to support his claim, it should not be an issue for trial on which the parties would need to prepare jury instructions or engage in other preparation. Fareportal therefore respectfully requests that the Court clarify its Order to confirm that no false advertising claim remains in the action for trial.

The Parties' Respective Unjust Enrichment* [*5] *Claims. In their motions, Fareportal asked for judgment dismissing Jacobs' claims against it and affirmatively asking for judgment on its claims against Jacobs. In contrast, Jacobs asked for dismissal only of Fareportal's claims against it — not for judgment affirmatively on his claims. However, the Order (at 39) denies Jacobs' request for judgment on his unjust enrichment claim, which for the reason just stated is not a request Jacobs made. It was Fareportal that asked for Jacobs' unjust enrichment claim to be dismissed — in particular, on the ground that unjust enrichment claims that are duplicative of Lanham Act claims cannot survive with a separate act that would open the door to such an additional claim, and that an equitable remedy is not available where one at law exists. *See* Doc. # 183 at 53-54; *see also* *Select Comfort Corp. v. Baxter, 156 F. Supp. 3d 971, 994 (D. Minn. 2016)*. Fareportal therefore respectfully requests that the Court clarify its views on whether Jacobs' unjust enrichment counterclaim raises an issue of fact for trial.[1]

The Viability of Jacobs' Keyword Bidding Claim. Jacobs' claims arise from two acts: (1) the radio/television ads, which contained the "We Go CheapO" slogan and which ran for 16 **[*6]** months in 2016-17, and (2) the bidding on the term "cheapo" (among other misspells of its "CheapOair" name), which Fareportal had been doing consistently for over a decade as part of its keyword advertising search-engine marketing strategy. At page 27 of the Order, the Court notes that bidding on keywords is not actionable as unfair competition without some other use (such as displaying the trademark in the resulting advertisement in a confusing manner, which Fareportal is not alleged to have done). *See* cases cited *id.*; *see also* *Stephen T. Greenberg, M.D., P.C. v. Perfect Body Image, LLC, 2019 U.S. Dist. LEXIS 111721, 2019 WL 3485700, at *9 (E.D.N.Y. July 2, 2019)*, *report and recommendation adopted*, *2019 U.S. Dist. LEXIS 141201, 2019 WL 3927367 (E.D.N.Y. Aug. 20, 2019)*; *Multi Time Machine, Inc. v. Amazon.com, Inc., 804 F.3d 930, 935-36 (9th Cir. 2015)*; Doc. # 183 at 47-49. However, while the implication is that Jacobs' claim against Fareportal relating to its longstanding keyword advertising fails as a matter of law, the Order does not appear to expressly reach that conclusion, referring instead to the television/radio ad that was never alleged (much less shown with any evidence, admissible or not) to be tied to Fareportal's decade-long bidding on misspells of its name. Understanding which activities remain in the case is a significant matter, as Fareportal's "offline" and "online" advertising involves very different documents and witnesses and will have a material **[*7]** impact on the length of the trial. Therefore, Fareportal respectfully requests that the Court clarify whether Jacobs may maintain his claims pertaining to keyword advertising as a matter of law.[2]

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[1] Similar confusion seems to have arisen regarding Fareportal's various affirmative defenses, which Fareportal briefly referenced collectively to underscore the overall theme that Jacobs has spent more efforts to offer a website that looks like Fareportal's CheapOair brand than he has in trying to develop his later-created travel referral site under his claimed "Cheapo" brand independently. *See* Doc. 183 at 55. Jacobs did not move to strike Fareportal's affirmative defenses, but the Court appears to have done so as to the mitigation defense, adopting Jacobs' misconstruction of the defense. Order at 36; Doc. No. 197 (Jacobs Opp.) at 127; *compare* Doc. No. 54 (Answer) at 14 ("Plaintiff has suffered no damages, and even if he did, he failed to mitigate them."). However, as the pleading makes clear, the defense is directed at damages. *See id.*; *see also* *Bauer Bros., LLC v. Nike, Inc., 159 F. Supp. 3d 1202, 1215 (S.D. Cal. 2016)*; *accord* *Hokto Kinoko Co. v. Concord Farms, Inc., 810 F. Supp. 2d 1013, 1039 (C.D. Cal. 2011)* (declining to address the defendant's failure to mitigate defense on summary judgment because it is "pertinent only to the issue of damages and [is] not [a] defense[] to Plaintiff's claims for trademark infringement and unfair competition"). The Court's Order remains unclear about whether its dismissal of the defense is as to liability only (as to which the defense was not asserted), or for all purposes (*i.e.*, including with respect to damages). Particularly as the parties are in the damages phase of the case, Fareportal submits that clarification on this ground may prevent confusion and objections among the parties regarding the taking of discovery on this point.

[2] The Federal Trade Commission has recently weighed in on keyword bidding, taking the issue that even bidding on a competitor's name (to say nothing of a variation of one's own name) is necessary for consumer choice, and thus restrictions on

Validity of CHEAPOAIR as a Trademark. The Order opines that CHEAPOAIR is a descriptive term and that the trier of fact could find that Fareportal's mark is merely descriptive and has not acquired a secondary meaning. *See* Order at 23, 29. However, Jacobs has not raised the argument that CHEAPOAIR is invalid; it is Fareportal who has argued that it can use the term "cheapo" as a play on its own brand name, not that the term is descriptive. Moreover, Fareportal's challenge to Jacobs' mark is not on descriptiveness grounds, but on the grounds that the registration is not supported by continued use, and that Jacobs' use in the travel space infringes on Fareportal's prior rights in its CHEAPO-family of marks. Accordingly, the commentary in the Order raises a new issue that neither parties have asserted and therefore potentially expands the scope of trial. Moreover, had it been raised, Fareportal would have argued that a trier of fact cannot make such **[*8]** a finding because, among other reasons, the law prohibits a finding of descriptiveness as to trademarks that, as here, have achieved incontestable status. *See* *15 U.S.C. §§ 1065*; 1115(b); *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 105 S. Ct. 658, 83 L. Ed. 2d 582 (1985)* (incontestable trademarks cannot be attacked on descriptiveness grounds).[3] Therefore, to avoid future confusion about whether the trier of fact can hear evidence pertaining to a legal impossibility, Fareportal respectfully requests that the Court strike the portions of the Order pertaining to the validity of Fareportal's trademark registrations.

We thank the Court for its attention to this matter, and we and our client wish good health and safety to Your Honor, the clerks and staff, and all other colleagues at the courthouse and their families.

Respectfully,

/s/ Eleanor M. Lackman EML

Eleanor M. Lackman EML

From: Joel Bailey

To: Lackman, Eleanor; "zwart@ned.uscourts.gov"

Cc: Svolos, Carol A.; "john.passarelli@kutakrock.com"; Jacob Kring; "Michael Hilgers"; Lewis, Marissa

Subject: Re: Jacobs v. Fareportal Inc., 8:17-cv-00362 (CRZ) - Letter requesting clarification

Date: Tuesday, March 31, 2020 9:06:40 AM

Dear Judge Zwart,

The letter from Ms. Lackman constitutes a Motion for Reconsideration ("Motion") of the Court's Memorandum **[*9]** Opinion and Order (the "Opinion") that was entered over six months ago. Fareportal claims that the Opinion was "ambiguous." (Motion at 1). Yet, Fareportal's Motion does not consider the conclusion of the Opinion where the Court clearly stated:

> "1) Fareportal's motion for summary judgment, (Filing No. 182), is granted as to Jacobs' counterfeiting, tortious interference, and Nebraska Consumer Protection Act claims, but ***in all other respects, it is denied***.
> 2) Jacobs' motion for partial summary judgment, (Filing No. 178), is denied."

[Dkt. No. 232, at 42] (emphasis added). Six months after this Opinion (and after two hearings with the Court discussing case status where Fareportal never raised these issues), Fareportal now raises disagreements concerning parts of this Opinion for the very first time. After working together with Fareportal to arrive at new

keyword bidding violate ***antitrust law***. *See 1-800 Contacts Inc. v. Federal Trade Commission*, No. 18-3848 (2d Cir.). Therefore, the keyword bidding question has implications well beyond the scope of this proceeding, which may also affect the parties' trial preparation. To the extent this issue is no longer in the case, efficiency would be greatly increased for this reason as well.

[3] Under the cited provision, a mark may become generic (as have once-registered brand names like "aspirin," "trampoline," "cellophane," "zipper," and "escalator"), but it can never be challenged as descriptive of the goods or services associated therewith. *See id.*

discovery and case deadline in light of COVID-19, it was disappointing to receive this Motion that seeks to re-open a closed chapter of this case.

Although Fareportal argues this will streamline the case or make the case more efficient, this statement is incorrect. Specifically, Fareportal's Motion seeks to re-open the thousands of pages of **[*10]** summary judgment briefing submitted by the parties and thoroughly considered by the Court. The Motion raises substantive arguments that will require substantive briefing in response. The length of each party's summary judgment briefing was nowhere near the model of efficiency, so there is nothing about re-opening that summary judgment briefing that will lead to increased efficiency here. After the Court's Opinion, Plaintiff believed this matter had proceeded past the liability phase; unfortunately, Fareportal wants to re-litigate the past.

Therefore, Plaintiff respectfully requests that the Court deny this request outright without any telephonic hearing or further briefing. This saves all parties and the Court the time, expense, and fees associated with re-litigating prior issues. If the Court intends to consider the substantive arguments asserted in the letter, Jacobs respectfully requests that he be given the full 14-days to respond as provided by Local Rule 7.1(b).

Joel B. Bailey

Hedrick Kring, PLLC

Office: 214-880-9664

Cell: 817-648-4350

From: Lackman, Eleanor <eml@msk.com>

Sent: Tuesday, March 31, 2020 6:58 AM

To: 'zwart@ned.uscourts.gov' <zwart@ned.uscourts.gov>

Cc: Svolos, Carol A. <Carol.Svolos@kutakrock.com>; **[*11]** 'john.passarelli@kutakrock.com' <john.passarelli@kutakrock.com>; Jacob Kring <Jacob@hedrickkring.com>; 'Joel Bailey' <joel@hedrickkring.com>; 'Michael Hilgers' <mhilgers@hilgersgraben.com>; Lewis, Marissa <mbl@msk.com>

Subject: Jacobs v. Fareportal Inc., 8:17-cv-00362 (CRZ) - Letter requesting clarification

Dear Judge Zwart:

On behalf of defendant Fareportal Inc., we respectfully submit the attached letter requesting clarification of certain points in the Court's summary judgment order. We have informed counsel for plaintiff Jacobs regarding our intention to submit this letter, along with the general substance, and we have learned that Jacobs intends to oppose. Accordingly, unless the Court prefers to dispense with one, we request a conference when convenient for all parties.

Respectfully submitted,

Eleanor M. Lackman

End of Document

Wun- Ling Chang v. Blue Cross of Cal.

Superior Court of California, County of Los Angeles

April 3, 2020, Decided; April 3, 2020, Filed

LASC Case No: 19STCV02777

Reporter

2020 Cal. Super. LEXIS 1475 *

WUN-LING CHANG, M.D., INC., on behalf of itself and all others similarly situated, Plaintiff, v. BLUE CROSS OF CALIFORNIA d/b/a ANTHEM BLUE CROSS; ANTHEM BLUE CROSS LIFE AND HEALTH INSURANCE COMPANY, and DOES 1 through 20, Inclusive, Defendants.

Core Terms

providers, emergency service, reimbursement, non-contracted, unfair, enrollees, demurrer, alleges, health care service plan, patient, restitution, declaratory relief, business practice, factors, consumer, fraudulent, injunctive relief, unfair competition, violates, insurance company, contracting, methodology, pleading stage, stabilization, argues, customary, remedies, rates, prejudgment interest, prompt payment

Judges: [*1] Kenneth Freeman, Judge of the Superior Court.

Opinion by: Kenneth Freeman

Opinion

COURT'S RULING AND ORDER RE: DEFENDANTS' DEMURRER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

I.

BACKGROUND

Plaintiff, a medical corporation, has brought this putative class action against Defendants Blue Cross of California dba Anthem Blue Cross and Anthem Blue Cross Life and Health Insurance Company (collectively, "Anthem"), which operate a health care service plan. Plaintiff alleges that Anthem has violated California's emergency services reimbursement laws. Plaintiff alleges that health care service plans such as Blue Cross of California are subject to the Health and Safety Code ("H&S Code").[1] *H&S Code § 1371.4(b)* states that a health care service plan "shall reimburse providers for emergency services and care provided to its enrollees, until the care results in stabilization of the enrollee, except as provided in subsection (c)."[2] Subsection (c) provides, in part, that "[p]ayment for

[1] Second Amended Complaint ("SAC"), ¶8.

[2] *Id.*

emergency services and care may be denied only if the health care service plan...reasonably determines that the emergency services and care were never performed."[3]

According to the SAC, "'[r]egulations of the Department of Managed Health Care provide that a health **[*2]** care service plan must pay 'the reasonable and customary value for the health care services rendered based upon statistically credible information that is updated at least annually and takes into consideration: (i) the provider's training, qualifications, and length of time in practice; (ii) the nature of the services provided; (iii) the fees usually charged by the provider; (iv) prevailing provider rates charged in the general geographic area in which the services were rendered; (v) other aspects of the economics of the medical provider's practice that are relevant; and (vi) any unusual circumstances in the case....'"[4]

Plaintiff alleges that "Blue Cross of California has engaged in a practice of failing to pay the reasonable rates of non-contracting providers when they have performed emergency services for its enrollees as hospital-admitted patients."[5] Further, Blue Cross allegedly "has failed to implement claims procedures to adequately identify and reimburse non-contracted providers for emergency services provided to its enrollees, as required by California law, including failing and refusing to recognize services performed by non-contracting specialists as emergency services when **[*3]** those services are performed on an emergent basis in a hospital instead of in an emergency room."[6] Per the SAC, "[v]arious types of specialists, such as surgeons, infectious disease experts, and others, frequently provide services to a patient on an emergent basis, after the patient has been admitted to the hospital, but prior to the time when care has resulted in the stabilization of the patient."[7] Blue Cross allegedly "does not identify and recognize these emergency, pre-stabilization services, and unlawfully and improperly calculates payment for services based on its non-contracted rates that are well below the reasonable value of the specialists' emergency services."[8]

Further, Plaintiff alleges that insurance companies such as Anthem Blue Cross Life and Health Insurance Company are subject to the Insurance Code.[9] *Section 10112.7*, the SAC alleges, provides that "A group or individual health insurance policy issued, amended, or renewed on or after January 1, 2014 that provides or covers any benefits with respect to services in an emergency department of a hospital shall cover emergency services for non-contracted providers in a manner that is not more restrictive than for contracted providers." **[*4]** [10]

However, Defendant Anthem has allegedly "engaged in a practice of failing to pay the appropriate rates of non-contracting providers when they have performed emergency services for its enrollees as hospital-admitted patients."[11] The Defendants have allegedly "failed to implement claims procedures to adequately identify and reimburse non-contracted providers for emergency services provided to its enrollees, as required by California law, including failing and refusing to recognize services performed by non-contracting specialists as emergency services when those services are performed on an emergent basis in a hospital instead of in an emergency room."[12]

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[3] *Id.*

[4] SAC, ¶9 (citing *28 CCR § 1300.71 (a)(3)(B)*.

[5] SAC, ¶10.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] SAC, ¶11.

[10] *Id.*

[11] SAC, ¶12.

[12] *Id.*

The second broad area of allegedly unlawful conduct under the SAC is Defendant Anthem's violation of prompt payment laws in violation of *Health and Safety Code §§ 1371* and *1371.35*, and *Insurance Code § 10123.13*. Despite its obligations, Defendant Anthem has allegedly failed to make timely payment of claims that involve emergency services, or has underpaid those claims, and has not paid the interest and penalties due for late payments.[13]

The third broad area of allegedly unlawful conduct is Anthem's alleged failure to remit payment to non-contracting providers. Anthem's obligation to pay non-contracting **[*5]** providers for emergency services requires that Anthem directly remit reimbursement payments to the non-contracting providers for those services.[14] Further, California law allegedly does not permit Anthem to reduce the reimbursement paid to the provider for any patient share of cost (i.e., co-payment, co-insurance, and/or deductible amounts), but must remit full reimbursement to the provider and address such patient share issues with the patient.[15] The complaint alleges that despite these obligations, Anthem has improperly and unlawfully made payment to the patients for the emergency services rendered by the non-contracting providers, including reduction of reimbursement for emergency services by patient share of cost.[16]

Based on these allegations and the other allegations set forth in the SAC, Plaintiff alleges claims for violation of *Business and Professions Code §§ 17200, et seq.*, declaratory relief, and quantum meruit. Plaintiff brings these claims on behalf of the following putative class:

> All licensed medical providers (including provider groups) who have submitted claims for reimbursement to Anthem for services provided to a patient with Anthem health coverage, where the provider was a non-contracted provider with Anthem and Anthem **[*6]** (a) did not pay a claim for emergency services, (b) did not meet the prompt payment deadlines and did not pay the appropriate interest or penalty, and/or (c) paid the patient instead of the non-contracted provider. Excluded from this definition are claims arising under federal plans, such as ERISA, FEHBA, Medicare Advantage, and Medi-Cal plans.[17]

Defendants demur to the SAC. For the reasons discussed *infra*, the demurrer is overruled. The Court strikes the request for late payment penalties and the references to a "fraudulent" UCL claim.

II.

DEMURRER TO SAC

A. Standards governing demurrers

CCP § 430.10(e) is grounds for a demurrer when the complaint fails to state facts sufficient to constitute a cause of action. For purposes of ruling on a demurrer, material facts properly pleaded in the complaint must be taken as true. *Serrano v. Priest (1971) 5 Cal.3d 584, 491*. A demurrer may challenge only defects that appear on the face of the pleading or from matters which are judicially noticeable. *Blank v. Kirwan (1985) 39 Cal.3d 311, 31*; *Donabedian v. Mercury Ins. Co. (2004) 116 Cal.App.4th 968, 994, 11 Cal. Rptr. 3d 45*; California Practice Guide, Civil Procedure Before Trial, ¶7:8 (The Rutter Group 2019).

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[13] SAC, ¶16.

[14] SAC, ¶17.

[15] *Id.*

[16] SAC, ¶18.

[17] SAC, ¶22.

The function of a demurrer is to test the legal sufficiency of a complaint, but not the truthfulness of the allegations. *Donabedian v. Mercury Ins. Co., supra, 116 Cal.App.4th at 994*; *Lewis v. Safeway, Inc. (2015) 235 Cal.App.4th 385, 388, 185 Cal. Rptr. 3d 228*; *SJJC Aviation Services, LLC v. City of San Jose (2017) 12 Cal.App.5th 1043, 1051-1052, 219 Cal. Rptr. 3d 637*; California Practice Guide, Civil Procedure Before **[*7]** Trial, ¶7:5 (The Rutter Group 2019). Demurrers are to be sustained where a pleading fails to plead adequately any essential element of the cause of action. *Cantu v. Resolution Trust Corp. (1992) 4 Cal.App.4th 857, 879-80, 6 Cal. Rptr. 2d 151*.

"'A demurrer tests the pleadings alone and not the evidence or other extrinsic matters. Therefore, it lies only where the defects appear on the face of the pleading or are judicially noticed (*Code Civ. Proc, §§ 430.30*, *430.70*). The only issue involved in a demurrer hearing is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action.'" *Hahn v. Mirda (2007) 147 Cal.App.4th 740, 747, 54 Cal. Rptr. 3d 527*. *Accord* *McKenney v. Purepac Pharmaceutical Co. (2008) 162 Cal.App.4th 72, 79*.

When considering demurrers, courts read the allegations liberally and in context. *McKenney, supra*, 167 Cal.App.4th at 77; *Taylor v. City of Los Angeles Dept. of Water and Power (2006) 144 Cal.App.4th 1216, 1228, 51 Cal. Rptr. 3d 206*. "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer." *Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 38, 77 Cal. Rptr. 2d 709, 960 P.2d 513* (emphasis added).

B. Discussion

Defendant Anthem Blue Cross demurs to the UCL claim and to the declaratory relief claim in the SAC. Defendant Anthem Blue Cross Life and Health Insurance Company demurs to the complaint in its entirety. The Defendants raise several arguments in the demurrer, which are taken in turn.

1. Violation of the UCL

a. The UCL Generally

Business and Professions Code ("B&P Code") *§ 17200, et seq.* forms **[*8]** part of California's Unfair Competition Law ("UCL"). Under *B&P Code § 17200*, "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *B&P Code § 17203* provides:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of *Section 17204* and complies with *Section 382 of the Code of Civil Procedure*, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.

The UCL's scope is broad, and the UCL's "coverage is sweeping, embracing anything that can **[*9]** properly be called a business practice and that at the same time is forbidden by law." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527* (internal citations and quotation marks omitted). "The statutory language referring to 'any unlawful, unfair *or* fraudulent practice...makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law. Because *Business and Professions Code section 17200* is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa." *Id.* (Internal citations and quotation marks omitted).

"The unfair competition statute is not confined to anticompetitive business practices, but is also directed toward the public's right to protection from fraud, deceit, and unlawful conduct." *Hewlett v. Squaw Valley Ski Corp. (1997) 54 Cal.App.4th 499, 519-520, 63 Cal. Rptr. 2d 118*; California Practice Guide, *B&P Code § 17200* Practice, ¶3:17 (The Rutter Group 2019).

(1) Fraudulent business practices under the UCL

"The fraudulent business practice prong of the UCL has been understood to be distinct from common law fraud. 'A [common law] fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who **[*10]** incurs damages. None of these elements are required to state a claim for injunctive relief under the UCL. [Citations.] This distinction reflects the UCL's focus on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices." *In re Tobacco II (2009) 46 Cal.4th 298, 312, 93 Cal. Rptr. 3d 559, 207 P.3d 20*. "No proof of direct harm from a defendant's unfair business practice need be shown, such that '[a]negations of actual deception, reasonable reliance, and damage are unnecessary.'" *Day v. AT&T(1998) 63 Cal.App.4th 325, 332, 74 Cal. Rptr. 2d 55* (citing *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 211, 197 Cal. Rptr. 783, 673 P.2d 660)*. A business practice is "fraudulent" within the meaning of *§ 17200* if "members of the public are likely to be deceived." *Committee on Children's Television v. General Foods Corp. (1983) 35 Cal.3d 197, 211, 197 Cal. Rptr. 783, 673 P.2d 660*; *Kasky v. Nike, Inc. (2002) 27 Cal.4th 939, 119 Cal. Rptr. 2d 296, 45 P.3d 243*; *Prata v. Sup.Ct. (2001) 91 Cal.App.4th 1128, 1144, 111 Cal. Rptr. 2d 296*.

(2) "Unlawful" UCL Claim

Section 17200's prohibition of "unlawful" business practices proscribes "anything that can properly be called a business practice and that at the same time is forbidden by law." *People v. McKale (1975) 25 Cal.3d 626, 634, 159 Cal. Rptr. 811, 602 P.2d 731*; *Barquis v. Merchants Collection Ass 'n. (1972) 7 Cal.3d 94, 113*. Virtually any law or regulation - federal or state, statutory or common law - can serve as a predicate for a *§ 17200* "unlawful" violation. Stern, William: *Business & Professions Code § 17200* Practice, 13:56 (2019). Thus, if a "business practice" violates any law - literally - it also violates *§ 17200* and may be redressed under that section. *Id.*

Where the UCL claim is based on allegations the defendants **[*11]** violated another statute, the plaintiff must allege facts showing that her purchase was caused by the underlying violation. *Medina v. Safe-Guard Products, Inc. (2008) 164 Cal.App.4th 105, 115, 78 Cal. Rptr. 3d 672* (dismissing UCL claim of buyer of vehicle service contract against an unlicensed seller because buyer did not allege that he "relied on [defendant's] having a license required by the vehicle service contract statutes, or that [defendant's] unlicensed status *caused* him to part with the money he paid for the tire and wheel contract").

Where a plaintiff is barred from proving the statutory violation alleged as a basis for the plaintiff's UCL claim, the UCL claim is also barred. *Ingels v. Westwood One Broad. Servs. (2005) 129 Cal.App.4th 1050, 1060, 28 Cal. Rptr. 3d 933*.

(3) "Unfair" Conduct under the UCL - Consumer Claims

In *Camacho v. Automobile Club of Southern California (2006) 142 Cal.App.4th 1394, 1403, 48 Cal. Rptr. 3d 770*, the Court applied the following test for an "unfair" UCL claim by a consumer: (1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and

(3) it must be an injury that consumers themselves could not reasonably have avoided. *See also* Klein v. Chevron U.S.A., Inc. (2012) 202 Cal.App.4th 1342, 1376, 137 Cal. Rptr. 3d 293 (citing *Camacho*).

Other courts have determined that the definition of "unfair" under the UCL is uncertain. Durell v. Sharp Healthcare (2010) 183 Cal.App.4th 1350, 1364, 108 Cal. Rptr. 3d 682. However, the *Durell* court adopted the following definition of "unfair" in the context of UCL, non-competitor **[*12]** actions: "'[t]o show a business practice is unfair, the plaintiff must show the conduct 'threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.''" Durell, 183 Cal.App.4th at 1366 (citing Byars v. SCME Mortgage Bankers, Inc. (2003) 109 Cal.App.4th 1134, 1147, 135 Cal. Rptr. 2d 796). *See also* Scripps Clinic v. Superior Court (2003) 108 Cal.App.4th 917, 940, 134 Cal. Rptr. 2d 101 ("'where a claim an unfair act or practice is predicated on public policy, we read *Cel-Tech* to require that the public policy which is a predicate to the action must be 'tethered' to specific constitutional, statutory or regulatory provisions'") (citing Gregory v. Albertson's, Inc. (2002) 104 Cal.App.4th 845, 854, 128 Cal. Rptr. 2d 389).

However, the Second District has consistently followed the *Camacho* definition for consumer claims. *See* Rubenstein v. The Gap, Inc. (2017) 14 Cal.App.5th 870, 880, 222 Cal. Rptr. 3d 397; Klein, supra; Davis v. Ford Motor Credit Co. (2009) 179 Cal.App.4th 581, 584, 594-597, 101 Cal. Rptr. 3d 697; Dougherty v. American Honda Motor Co., Inc. (2006) 144 Cal.App.4th 824, 838-839. This Court, therefore, adopts the *Camacho* definition for consumer claims based on the UCL's "unfair" prong.

b. Analysis

As alleged in the SAC, there are three (3) overarching bases for the UCL claim: 1) Anthem's violation of emergency services reimbursement laws; 2) Anthem's violation of prompt payment laws; and 3) Anthem's failure to remit payment to non-contracting providers.[18]

(1) UCL Unlawful Violation and the Knox-Keene Act

H&S Code §§ 1340, et seq. is known as the Knox-Keene Health Care Service Plan **[*13]** Act of 1975 (the "Knox-Keene Act" or "the Act"). The Knox-Keene Act applies to health care service plans and specialized health care service plan contracts as defined by statutes. Cal. Jur. 3d Insurance Contracts § 281 (2019). One treatise describes the purpose of the Act as follows:

> The purpose of the Act is to promote the delivery of health and medical care to the people of this state who enroll in, or subscribe for the services rendered by, a health care service plan or specialized health care service plan by, among other things, assuring the continued role of the professional as the determiner of the patient's health needs, assuring that subscribers and enrollees are educated and informed of the benefits and services available, helping to assure the best possible health care for the public at the lowest possible cost by transferring the financial risk of health care from patients to providers, and assuring that subscribers and enrollees receive available and accessible health and medical services rendered in a manner providing continuity of care. 39A Cal. Jur. 3d Insurance Contracts § 281 (referencing H&S Code § 1342(a), (b), (d), and (g)).

A key component of the Knox-Keene Act addresses the obligation of **[*14]** insurers to reimburse emergency room services to health care providers that are out of the insurers' network ("out-of-network providers"). H&S Code § 1371.4 addresses that obligation:

> (a) A health care service plan that covers hospital, medical, or surgical expenses, or its contracting medical providers, shall provide 24-hour access for enrollees and providers, including, but not limited to, noncontracting

[18] See generally SAC, ¶¶8-18.

> hospitals, to obtain timely authorization for medically necessary care, for circumstances where the enrollee has received emergency services and care is stabilized, but the treating provider believes that the enrollee may not be discharged safely. A physician and surgeon shall be available for consultation and for resolving disputed requests for authorizations. A health care service plan that does not require prior authorization as a prerequisite for payment for necessary medical care following stabilization of an emergency medical condition or active labor need not satisfy the requirements of this subdivision.
>
> (b) A health care service plan, or its contracting medical providers, shall reimburse providers for emergency services and care provided to its enrollees, until the care results in stabilization **[*15]** of the enrollee, except as provided in subdivision (c). As long as federal or state law requires that emergency services and care be provided without first questioning the patient's ability to pay, a health care service plan shall not require a provider to obtain authorization prior to the provision of emergency services and care necessary to stabilize the enrollee's emergency medical condition.
>
> (c) Payment for emergency services and care may be denied only if the health care service plan, or its contracting medical providers, reasonably determines that the emergency services and care were never performed; provided that a health care service plan, or its contracting medical providers, may deny reimbursement to a provider for a medical screening examination in cases when the plan enrollee did not require emergency services and care and the enrollee reasonably should have known that an emergency did not exist. A health care service plan may require prior authorization as a prerequisite for payment for necessary medical care following stabilization of an emergency medical condition. *H&S Code § 1371.4(a)*, *(b)*, and *(c)*.

The Department of Managed Health Care ("DMHC") is charged with the administration and enforcement **[*16]** of the laws relating to health care service plans. *Children's Hospital Central California v. Blue Cross of California (2014) 226 Cal.App.4th 1260, 1271, 172 Cal. Rptr. 3d 861* (referencing *H&S Code § 1341*). "To carry out its duties, the DMHC is authorized to promulgate regulations." *Id.* (Citing *H&S Code § 1344*).

One such regulation promulgated by the DMHC appears at *28 CCR § 1300.71*. *Section 1300.71(a)(3)(B)* "defines 'Reimbursement of a Claim' for noncontracted providers." *Children's Hospital, supra, 226 Cal.App.4th at 1271*. As explained by the *Children's Hospital* court:

> Such reimbursement means "the payment of the reasonable and customary value for the health care services rendered." The reasonable and customary value is to be "based upon statistically credible information that is updated at least annually" and takes six factors into consideration. These factors are: "(i) the provider's training, qualifications, and length of time in practice; (ii) the nature of the services provided; (iii) the fees usually charged by the provider; (iv) prevailing provider rates charged in the general geographic area in which the services were rendered; (v) other aspects of the economics of the medical provider's practice that are relevant; and (vi) any unusual circumstances in the case." *Children's Hospital Central California v. Blue Cross of California (2014) 226 Cal.App.4th 1260, 1271, 172 Cal. Rptr. 3d 861* (citing *28 CCR § 1300.71(a)(3)(B)*).

These factors are known as the "*Gould* factors" (stemming from *Gould v. Workers' Comp. Appeals Bd. (1992) 4 Cal.App.4th 1059, 6 Cal. Rptr. 2d 228*). "If a provider disputes the payor's calculation of the fair and reasonable value **[*17]** of the health care services he has rendered, the provider is free to seek resolution of that dispute in a court of law or through any other available civil remedy." *Children's Hospital, supra, 226 Cal.App.4th at 1273*.

The *Children's Hospital* court also observed:

> [I]n adopting *section 1300.71(a)(3)(B)*, the DMHC established the minimum criteria for reimbursement of a claim, not the exclusive criteria. The DMHC refused to set specific amounts noting that neither billed charges nor government rates are determinative of the reasonable value of the medical services. Rather, the DMHC intended that reasonable value be based on the concept of quantum meruit and that value disputes be resolved by the courts. In fact, the DMHC has acknowledged that, unlike the courts, it "'lacks the authority to set specific reimbursement rates under theories of *Quantum meruit* and the jurisdiction to enforce a

> reimbursement determination on both the provider and the health plan.'" *Children's Hospital, 226 Cal.App.4th at 1273* (citing *Bell v. Blue Cross of California (2005) 131 Cal.App.4th 211, 218, 31 Cal. Rptr. 3d 688)*.

With this background in mind, Defendant Anthem argues that the Plaintiff UCL claim (and, for that matter, the declaratory relief claim) essentially seeks to regulate and supervise health plans (and the prompt pay laws), in contravention of the DMHC's authority. Paragraph 26, for instance, alleges in **[*18]** pertinent part that "Anthem has violated the UCL by systematically and repeatedly violating California's emergency services reimbursement laws, prompt payment laws, failing to timely remit reimbursement, interest, and penalties, and to otherwise comply with California's prompt payment laws, remitting payments to Anthem's enrollees instead of to providers, and performing other unfair acts of which plaintiff is presently unaware."[19] There are two theories of alleged unlawful conduct: 1) Anthem's failure "to implement claims procedures to adequately identify and reimburse non-contracted providers for emergency services provided to its enrollees, as required by California law"[20] ; and 2) Anthem's failure to "unlawfully and improperly calculate[] payment for services based on its non-contracted rates that are well below the reasonable value of the specialists' emergency services."[21]

According to Defendant Anthem, one court has rejected the notion that the failure to implement a reimbursement methodology that complies with the *Gould* factors violates California's prompt pay laws. *See NorthBay Healthcare Grp. - Hosp. Div. v. Blue Shield of Cal. Life & Health Ins. (N.D. Cal. 2018) 342 F.Supp.3d 980, 988*. In *NorthBay Healthcare Group*, the federal district court granted the motion of Blue **[*19]** Shield (a health care service plan) for summary judgment against a nonprofit healthcare organization (NorthBay Healthcare Group). Among other claims, NorthBay alleged that Blue Shield engaged in unfair business practices under the UCL for failing to compensate NorthBay hospitals for non-contracted services, and manipulating data inputted to a flawed methodology to underpay non-contracted claims. *NorthBay Healthcare Group*, 342 F.Supp.3d at 985. The *NorthBay Healthcare* court determined that there was "no unlawful conduct that can be deduced from NorthBay's claim that BlueShield 'improperly' applied the [*Gould*] considerations....[T]he regulation and the *Gould* factors it is based on...are considered minimum criteria.... The re is no mandatory methodology to apply beyond taking consideration of the factors. Even if Blue Shield improperly applied the considerations as NorthBay alleges, implicit in that claim is that Blue Shield did consider them consistent with the minimum requirements of *Section 1300.71*."

With that said, though, the *NorthBay* court also recognizes that "[a]mple case law *supports a right to predicate UCL claims for inadequate or unpaid reimbursements on violations of Section 1371.4." NorthBay HealthCare Group*, 342 F.Supp.3d at 987 (referencing *Children's Hospital Cent. Cal. supra, 226 Cal.App.4th at 1275* (emphasis added); *Cal. Pac. Reg'l. Med. Ctr., No. 13-CV-00540-NC, 2013 WL 2436602, at *5 (N.D. Cal. June 4, 2013)*; *Prospect Med. Grp., Inc. v. Northridge Emergency Med. Grp. (2009) 45 Cal.4th 497, 505, 87 Cal. Rptr. 3d 299, 198 P.3d 86))*.

Bell v. Blue Cross of California, supra, 131 Cal.App.4th at 216 states that the DMHC's "jurisdiction **[*20]** is not exclusive and there is nothing in *section 1371.4* or in the Act generally to preclude a private action under the UCL or at common law on a quantum meruit theory." *Bell, 131 Cal.App.4th at 216*. The *Bell* court further referenced the DMHC's support of private enforcement, and the DMHC's position "that a 'provider's private action or reimbursement under the ...UCL does not infringe upon the Department's jurisdiction over the Knox-Keene Act." *Bell at 218*. The *NorthBay* court ultimately rejected the UCL claim in that case, since it sought "to enjoin the *methodology* Blue Shield uses under *Section 1300.71(a)(3)(B)* and the *Gould* factors, not challenge the actual reasonable and customary value *derived* from that methodology." *NorthBay*, 342 F.Supp.3d at 987 (emphasis added).

Thus, the question presented is whether Plaintiff is challenging Anthem's *methodology* to reimburse out-of-network providers for emergency services, or the actual and reasonably customary value of the services provided *derived from* that methodology. Taking a liberal reading of the complaint at the pleading stage, the failure "to implement

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[19] SAC, ¶26.

[20] SAC, ¶10.

[21] *Id.*

claims procedures to adequately identify and reimburse non-contracted providers for emergency services provided to its enrollees, as required by California law" alleged at ¶10 could be read **[*21]** to fall into the latter category. For Plaintiffs part, it is not challenging Anthem's methodology by which Defendant Anthem calculates the "reasonable and customary value" of medical services, or that Anthem improperly applies any of the *Gould* factors.[22]

Plaintiff, in other words, argues that it is alleging Defendant Anthem's *total failure* to apply the *Gould* factors - not *how* those factors are applied - and is seeking "to recover the value allegedly owed for a reasonable and customary reimbursement" under *Gould* and *section 1300.71(a)(3)(B)*.[23] The allegation of a failure to identify and reimburse non-contract providers for emergency services does not appear to challenge the methodology employed by Anthem. Therefore, the Court does not find that permitting the "unlawful" UCL claim to go forward at the pleading stage would allow Plaintiff to "assume general regulatory powers over health maintenance organizations through the guise of enforcing *Business and Professions Code section 17200*[.]" *Samura v. Kaiser Foundation Health Plan, Inc. (1993) 13 Cal.App.4th 1284, 1301-1302*.

The necessary implication under *§ 1371.4* is that the *Gould* factors must be followed. To the extent those factors are not being followed at all (Plaintiff argues there has been a "total failure" to follow the *Gould* factors), this provides the necessary predicate for a UCL "unlawful" **[*22]** violation. In that sense, *NorthBay* is not persuasive at the pleading stage.

If, following discovery, it becomes apparent that it is really Anthem's *methodology* Plaintiff is contesting, and that Plaintiff is in fact challenging *how* the *Gould* factors are applied (as opposed to *whether* the factors are applied) then this could be the appropriate subject of a motion for summary adjudication. Under these circumstances, at the pleading stage, a UCL unlawful claim has been stated, premised on a violation of the Knox-Keene Act.

(2) "Fraudulent" UCL claim

While the SAC invokes the definition of unfair competition under *§ 17200* as including any unlawful, unfair, or fraudulent business practice, the SAC itself does not allege a basis for a UCL claim based on fraudulent acts. As such, the references to the UCL "fraudulent" allegation are stricken.

(3) "Unfair" UCL claim

Defendant Anthem argues the UCL "unfair" claim fails because Plaintiff is neither a competitor of Defendant Anthem nor a consumer of Anthem's services. As observed by the *NorthBay* court, "[t]he 'unfair' prong of the UCL prohibits a business practice if it 'violates established public policy or if it is immoral, unethical, oppressive or unscrupulous **[*23]** and causes injury to consumers which outweighs its benefits.'" *NorthBay Healthcare Group, supra*, 342 F.Supp.3d at 988. *B&P Code § 17204* provides that actions for UCL relief may be brought, among others, "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition."

There is no carve-out under the UCL requiring "unfair" claims to be brought by either a competitor or a consumer. *Herr v. Nestle U.S.A., Inc. (2003) 109 Cal.App.4th 779, 135 Cal. Rptr. 2d 477* establishes that a plaintiff need not be a consumer or a competitor in order to bring a UCL "unfair" claim. The *Herr* court rejected as meritless the defendant's argument that the UCL was intended to protect consumers and competitors, and not employees (and that the plaintiff's remedy for age discrimination was therefore limited to FEHA). *Herr, 109 Cal.App.4th at 789*. In doing so, the *Herr* court referenced *B&P Code § 17205* which provides that "[u]nless otherwise expressly provided, the remedies or penalties provided by this chapter are *cumulative to each other and to the remedies or penalties available under all other laws of this state*." While two federal district court cases *[Centre for Neuro Skills v. Blue*

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[22] See Opposition at 7:8-10.

[23] Opposition at 7:13-15.

*Cross of California, 2013 WL 5670889, at *9 (E.D. Cal. Oct. 15, 2013)* and *Almost v. Equilon Enters., 2012 WL 3945528, at *9 (N.D. Cal. Sept. 12, 2012))* dismissed UCL claims where the plaintiffs were not consumers or competitors, *Herr* is a Court of Appeal decision out of our own Second District, and is binding. Thus, the Defendant's argument **[*24]** that the UCL "unfair" claim cannot go forward on grounds that Plaintiff is neither a consumer nor a competitor with Anthem is not persuasive.

(4) Monetary and Injunctive Relief

Defendant Anthem next argues that there is no basis for the monetary or injunctive relief sought.

(a) Restitution

Under the UCL, "to establish the right to restitution under *§ 17203*, a plaintiff must do more than merely prove he or she has suffered economic injury as the result of unfair competition. 'Restitution under *section 17203* is confined to restoration of any interest in 'money or property, real or personal, which may have been *acquired* by means of such unfair competition.' ... A restitution order against a defendant thus requires both that money or property have been lost by a plaintiff, on the one hand, and that it have been acquired by a defendant, on the other.'" *Beraze v. Wilshire Landmark, LLC 2014 WL 729216 (Feb. 24, 2014) at *10* (citing *Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 336, 120 Cal. Rptr. 3d 741, 246 P.3d 877)*.

The Court in *Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937* referenced the definition of "restitution" set forth in *Kraus v. Trinity Management Services, Inc. (2000) 23 Cal.4th 116, 96 Cal. Rptr. 2d 485, 999 P.2d 718* - an order "'compelling a UCL defendant to return money obtained through an unfair business practice *to those persons in interest from whom the property was taken*, that is, to persons who had an ownership interest in the property or those claiming through that person.'" *Korea Supply at 1144-145* (citing *Kraus, 23 Cal.4th at pp. 126-127*) (emphasis **[*25]** added.) See also *B&P Code § 17203*. The Court further noted that "[u]nder the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits *in which the plaintiff has an ownership interest." Korea Supply at 1148* (emphasis added). In other words, "[t]he object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." *Id.*

"[T]he notion of restoring something to a victim of unfair competition includes two separate components. The offending party must have obtained something to which it was not entitled *and* the victim must have given up something which he or she was entitled to keep." *Day v. AT&T Corp. (1998) 63 Cal.App.4th 325, 340, 74 Cal. Rptr. 2d 55*.

Damages are unavailable under *§§ 17200, et seq.* *See* *Bank of the West v. Superior Court (1992) 2 Cal.4th 1254, 1266, 10 Cal. Rptr. 2d 538, 833 P.2d 545*; *Heller v. Norcal Mut. Ins. Co. (1994) 8 Cal.4th 30, 45, 32 Cal. Rptr. 2d 200, 876 P.2d 999*; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal.4th 163, 179, 83 Cal. Rptr. 2d 548, 973 P.2d 527*.

According to Defendant Anthem, the measure of the monetary relief Plaintiff seeks cannot be characterized as restitution, because it has no vested interest in any money or property in Anthem's possession. To the contrary, Anthem argues the monetary relief is, in essence, damages, which Plaintiff cannot recover under its UCL claim.

The question here is whether the money Plaintiff seeks was once in its possession, or represents a sum in which Plaintiff has a **[*26]** vested/ownership interest. Plaintiff's position is that the unpaid amounts for emergency services are akin to earned wages. These allegations are sufficient to survive the demurrer.

Defendant Anthem relies on *Korea Supply, supra*, for the notion that the monetary relief sought is damages and not restitution. In *Korea Supply*, the plaintiff (KSC) was a business representing manufacturers of military equipment. KSC was representing a company called MacDonald Dettwiler and Associates, Ltd. in a bid for a contract from the government of the Republic of Korea. MacDonald ultimately lost the bid to Lockheed Martin Tactical Systems, Inc. KSC sued Lockheed Martin under the UCL, alleging that it would have received a $30 million commission had MacDonald won the bid, and that Lockheed Martin had engaged in various unfair business practices in procuring the bid. The California Supreme Court concluded that the sum KSC sought was nonrestitutionary disgorgement of profits, and that KSC's characterization of the relief sought as "restitution" was inaccurate because KSC had neither an ownership interest or a vested interest in the money it sought to recover.

Defendant argues that "[j]ust as KSC's interest in the commission **[*27]** in *Korea Supply Company* was not 'vested' because it was contingent on an uncertain event (i.e., MacDonald winning the bid) so too here Plaintiff's *restitutionary* interest in the reasonable and customary value of her services is contingent on an uncertain event (*i.e.*, the identification of claims for reimbursement as emergent)."[24]

However, *Korea Supply* is distinguishable on that point. In *Korea Supply*, "KSC merely alleged that it had an economic expectancy in that it was acting as MacDonald Dettwiler's broker and it expected a commission if the contract was awarded to MacDonald Dettwiler." *Korea Supply, 29 Cal.4th at 1157*. In contrast, Plaintiff here alleges that it, as well as the class, have *performed* the alleged emergent services for which they have not been compensated due to Defendant's failure to characterize those services as emergent. At the pleading stage, the measure of Plaintiff's monetary loss may be viewed as restitution.

John Muir Health v. Global Excel Management, 2015 WL 1359154 (N.D. Cal. March 25, 2015) aids in the analysis. In that case, plaintiff (a non-profit corporation that provides medical care to patients) sued defendant (a Canadian for-profit corporation that arranges for the provision of health care services to its enrollees and/or pays for or reimburses part or all of the cost **[*28]** for those services). Plaintiff alleged that it provided medical treatment to certain individuals enrolled in in defendant's health plan, and billed defendant certain sums for the treatment of the enrollees. Defendant paid only a portion of the sums allegedly owed to the plaintiff, despite plaintiff's demands for an additional $459,985.90. Following various amendments, the plaintiff alleged claims for quantum meruit and violation of the UCL. Defendant moved to strike various portions of the complaint, including the request for $459,985.90 sought in the UCL claim. Defendant argued in part that this amount did not represent restitution (and was unavailable under the UCL); instead, the defendant opined that the amount was "really a damages claim in disguise, because it has requested the same amount in its quantum meruit claim." *John Muir Health v. Global Excel Management, 2015 WL 1359154 at *4*.

The federal district court denied the motion to strike. The court first observed that a plaintiff can state valid claims for the same amount as both damages and restitution. *John Muir Health v. Global Excel Management* at *5. The court reasoned that "Plaintiff can state a valid claim that it conferred a benefit directly on Defendant-namely, the stabilizing emergency **[*29]** care of Defendant's enrolled beneficiary.... Plaintiff can also allege that Defendant had a legal duty to reimburse it for this benefit under *section 1371.4(b)*, that Defendant failed to do so, and that Plaintiff is entitled to restitution as a result." *John Muir Health v. Global Excel Management* at *5.

The situation in *John Muir Health* is analogous to the case at bar. Like in *John Muir Health*, plaintiff's UCL claim seeks a reimbursement of funds which it claims are due and owing for services rendered (and which conferred a benefit on Defendant). Due to Defendant Anthem's alleged UCL violation and failure to characterize services as emergent, Plaintiff can allege that Defendant had a legal duty to reimburse it for the alleged emergent services performed and that it is entitled to restitution.

For these reasons, Plaintiff has adequately stated a basis, at the pleading stage, to seek restitution.

(b) Injunctive relief

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[24] Defendant's Reply at 6:9-13.

Defendant Anthem also challenges the prayer for injunctive relief under the UCL. *In re Tobacco Cases II, supra*, discussed the scope of a Court's authority to order injunctive relief:

> "A trial court has broad authority to enjoin conduct that violates *section 17200*. [Citation.] That authority is expansive but not unlimited. Although the **[*30]** [UCL] imposes liability for past acts, in order to grant injunctive relief under *section 17204* or *section 17535*, there must be a threat that the wrongful conduct will continue. 'Injunctive relief will be denied if, at the time of the order of judgment, there is no reasonable probability that the past acts complained of will recur, i.e., where the defendant voluntarily discontinues the wrongful conduct.' " (*Colgan, supra, 135 Cal.App.4th at p. 702, 38 Cal.Rptr.3d 36*.) " 'The grant or denial of a permanent injunction rests within the trial court's sound discretion and will not be disturbed on appeal absent a showing of a clear abuse of discretion.' " [Citation.] *In re Tobacco II Cases, supra, 240 Cal.App.4th 779, 802-803*.

The Legislature "intended ... to permit courts to enjoin ongoing wrongful business conduct in whatever context such activity might occur." *See* *Barquis v. Merchants Collection Ass'n (1972) 7 Cal.3d 94, 111*; see also *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 210, 197 Cal. Rptr. 783, 673 P.2d 660*. However, "[t]he general rule is that 'injunctive relief will be denied if at the time of the order or judgment, there is no reasonable probability that the past acts complained of will recur, i.e., where the defendant voluntarily discontinues the wrongful conduct.'" California Practice Guide, *B&P Code § 17200* Practice, ¶8:35 (The Rutter Group 2019) (citing *California Service Station & Auto. Repair Ass'n. v. Union Oil of Calif. (1991) 232 Cal.App.3d 44, 57, 283 Cal. Rptr. 279)*. "Injunctive relief has no application to wrongs which have been completed [citation], absent a showing **[*31]** that past violations will probably recur." *People v. Toomey (1984) 157 Cal.App.3d 1, 20, 203 Cal. Rptr. 642*. *B&P Code § 17205* states that the remedies provided under the UCL "are cumulative to each other and to the remedies or penalties available under all other laws of this state."

Further, injunctions may be granted, among other instances, "[w]here pecuniary compensation would not afford adequate relief and "[w]here it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief." *Civil Code § 3422*.

Defendant argues that injunctions are not proper where there is a plain, complete, speedy and adequate remedy at law. Here, though, as set forth above, the remedies under the UCL are cumulative to other potential remedies. Thus, despite the alternative allegation of quantum meruit relief, Plaintiff also is entitled to plead its UCL violation.

Moreover, there is no legal remedy sought in the instant complaint in the form of damages. The terms of any injunction would have to be based on further events in the case, as they develop, and Plaintiff is not tasked with defining the precise scope of that injunction at the pleading stage. For now, Plaintiff seeks injunctive relief (in addition to restitution and interest) "to correct Anthem's failure **[*32]** to comply with California's emergency services reimbursement laws, the prompt payment laws, and the practice of paying Anthem enrollees instead of the non-contracting providers."[25] This is sufficient at the pleading stage.

(c) Prejudgment interest and statutory penalties

Defendant argues that Plaintiff cannot recover statutory penalties and interest under the UCL, because those penalties have not been adjudicated, and because the statutory remedy does not vest until final judgment.

Defendant's pleading challenge is a demurrer, and not a motion to strike. A demurrer does not lie to a portion of a cause of action. See *Kong v. City of Hawaiian Gardens Redevelop. Agency (2003) 108 Cal.App.4th 1028, 1046, 134 Cal. Rptr. 2d 260)*. In any event, though, the Court of Appeal in *Espejo v. The Copley Press, Inc. (2017) 13 Cal.App.5th 329, 221 Cal. Rptr. 3d 1* stated as follows with respect to a court's authority to award prejudgment interest in a UCL action:

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[25] SAC, ¶28.

> Although a court may not award prejudgment interest under Civil Code section 3287, subdivision (a), to a restitutionary award under the UCL, the court nevertheless has discretion in *equity* to award prejudgment interest on a UCL award as a component of restitution. The policy underlying an award of prejudgment interest is to make the injured party whole for the accrual of wealth that could have been produced during the period of loss. *Espejo v. The Copley Press, Inc. (2017) 13 Cal.App.5th 329, 375, 221 Cal. Rptr. 3d 1* (citations omitted; emphasis added). **[*33]**

Thus, it is apparent that the Court, in its equitable discretion, could award prejudgment interest on a UCL award. It is premature to strike the prayer for prejudgment interest at this time.

With respect to statutory penalties, "[i]n a suit under the UCL, a public prosecutor may collect civil penalties, but a private plaintiff's remedies are 'generally limited to injunctive relief and restitution.'" *Demetriades v. Yelp, Inc. (2014) 228 Cal.App.4th 294, 300, fn.3, 175 Cal. Rptr. 3d 131* (citing *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527* and *B&P Code §§ 17203*, *17206*). Plaintiff's prayer seeks, among other relief, "late payment penalties[.]"[26] The Court was unable to find authority that provides that late payment penalties are an available remedy under a private plaintiff's UCL claim.[27] Accordingly, the Court strikes the request for late payment penalties.

(5) Declaratory relief claim

Defendant demurs to the declaratory relief claim, on grounds that the Plaintiff's claims exclusively concern past events (emergency services rendered by Plaintiff) "and should not be a substitute for the procedure contemplated by the Legislature (*i.e., quantum meruit* claims)."[28] Defendant further submits that declaratory relief "is particularly inappropriate where the Court can readily make the requested determination when evaluating Plaintiffs **[*34]** other causes of action."[29]

To state a claim for declaratory relief, a plaintiff must allege:

> 1. Person interested under a written instrument or a contract; or
> 2. a declaration of his or her rights or duties;
> a. with respect to another; or
> b. in respect to, in, over or upon property; and,
> 3. an actual controversy.

CCP § 1060; *Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal. App. 4th 592, 605-06, 98 Cal. Rptr. 2d 277*; *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 549, 305 P.2d 20*. *See also* *City of Cotati v. Cashman (2002) 29 Cal. 4th 69, 80, 124 Cal. Rptr. 2d 519, 52 P.3d 695* ("'an actual, present controversy must be pleaded specifically" and "the facts of the respective claims concerning the [underlying] subject must be given.'"); *Osseous Technologies of Amer., Inc. v. DiscoveryOrtho Partners LLC (2010) 191 Cal.App.4th 357, 364, 119 Cal. Rptr. 3d 346*. Procedurally, with exceptions, a demurrer must be overruled, if an actual controversy is alleged, even if plaintiffs are not entitled to a judgment in their favor. *Osseous Technologies of Amer., Inc. v. DiscoveryOrtho Partners LLC (2010) 191 Cal.App.4th 357, 364, 119 Cal. Rptr. 3d 346* (judges lack discretion to dismiss claims for declaratory relief where complaints are sufficiently alleged and reveal that the relief is entirely appropriate); *Lockheed Martin Corp. v. Continental Ins. Co., (2005) 134 Cal. App. 4th 187, 221, 35 Cal. Rptr. 3d 799*, *disapproved on other grounds by* *State v. Allstate Ins. Co. (2009) 45 Cal.4th 1008, 1036 n.11, 90 Cal. Rptr. 3d 1, 201 P.3d 1147*; *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4lh 592, 606; *Farmers Ins. Exchange v. Zerin (1997) 53 Cal.*

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[26] SAC, Prayer, ¶1.

[27] The *Cortez* decision does not hold that such penalties are available to a private plaintiff. In light of the *Demetriades* court's recognition that a private plaintiff's penalties are generally limited only to injunctive relief and restitution, *Cortez* is not persuasive.

[28] Demurrer at 14:1-4.

[29] Demurrer at 14:10-11.

App. 4th 445, 460, 61 Cal. Rptr. 2d 707 ("[s]trictly speaking, a demurrer is not an appropriate weapon to attack a claim for declaratory relief inasmuch as the plaintiff is entitled to a declaration of its rights, even if adverse.") Also, "[t]he mere circumstance that another remedy is available is an insufficient ground **[*35]** for refusing declaratory relief, and doubts regarding the propriety of an action for declaratory relief pursuant to [CCP §] 1060 generally are resolved in favor of granting relief." *Filarsky v. Sup. Ct. (2002) 28 Cal.4th 419, 433, 121 Cal. Rptr. 2d 844, 49 P.3d 194*.

The SAC alleges as follows, with respect to the declaratory relief claim:

> [A]n actual controversy now exists between Plaintiff and Anthem regarding their rights and liabilities under the emergency services reimbursement laws, the prompt payment laws, and Anthem's obligation to pay non-contracting providers instead of Anthem enrollees. These claims do not include any claims arising under federal plans, such as ERISA, FEHBA, Medicare Advantage, and Medi-Cal plans.[30]

Taking a liberal reading of the SAC, Anthem's alleged practice is ongoing. Thus, Defendant's argument that declaratory relief "should not be used to adjudicate past events" is not persuasive.[31] Further, while there may be other remedies available to address Defendant Anthem's allegedly wrongful conduct, this would not be grounds for refusing declaratory relief, if proven true. In any event, while Plaintiff may ultimately be required to make an election of remedies at an appropriate stage of the case, the demurrer to the declaratory relief claim is premature, **[*36]** and is overruled.

(6) Demurrer as to ABCLH

Separately, Defendant ABCLH demurs to the complaint in its entirety (as opposed to just the UCL and declaratory relief claims, to which Defendant Anthem Blue Cross demurs), on grounds that ABCLH is not a health plan and is not subject to the Knox-Keene Act. Instead, *Blue Cross of California, Inc., supra*, 180 Cal.App.4th at 1242 recognized that "ABCLH is not a health care service plan, but a life and disability insurer subject to the Insurance Code and regulated by the California Department of Insurance."

With respect to Defendant ABCLH, the SAC alleges:

> Anthem Blue Cross Life and Health Insurance Company has engaged in a practice of failing to pay the appropriate rates of non-contracting providers when they have performed emergency services for its enrollees as hospital-admitted patients. Anthem Blue Cross Life and Health Insurance Company has failed to implement claims procedures to adequately identify and reimburse non-contracted providers for emergency services provided to its enrollees, as required by California law, including failing and refusing to recognize services performed by non-contracting specialists as emergency services when those services are performed on an emergent basis in a hospital instead **[*37]** of in an emergency room. Anthem Blue Cross Life and Health Insurance Company does not identify and recognize these emergency services, provided after the patient has been admitted to the hospital, but prior to the time when care has resulted in the stabilization of the patient, and unlawfully and improperly makes payments that are below the rates Anthem Blue Cross Life and Health Insurance Company applies to contracted providers, and well below the reasonable value of the specialists' emergency services.[32]

According to Defendants, the SAC's allegations against ABCLH fail because it is not subject to the DMHC. While it is true that ABCLH, as a life and disability insurer, is not subject to the DMHC (but is instead regulated by the Department of Insurance), the SAC also invokes Insurance Code §§ 10112.7 and 10123.13 as bases for the claims. Paragraphs 11 and 15 allege:

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[30] SAC, ¶31.

[31] Demurrer at 13:24.

[32] SAC, ¶12.

> 11. Insurance companies such as Anthem Blue Cross Life and Health Insurance Company are subject to the Insurance Code. *Insurance Code section 10112.7* provides that "A group or individual health insurance policy issued, amended, or renewed on or after January 1, 2014, that provides or covers any benefits with respect to services in an emergency department of a hospital shall cover emergency **[*38]** services for non-contracted providers in a manner that is not more restrictive than for contracted providers.
>
> ...
>
> 15. Similarly, pursuant to *Insurance Code section 10123.13*, health insurers must reimburse any claim, or if contested, any uncontested portion of a claim, as soon as practicable, but no later than 30 working days after receipt of the claim, or provide written notice that the claim is contested or denied and the specific reasons therefor within the same time limits. For any claim contested or denied on the basis that the plan has not received sufficient information, reimbursement must be paid with 30 working days after receipt of any necessary information. For any claim not timely reimbursed, interest accrues at a rate of 10% per annum.[33]

As Defendants note, Plaintiffs cannot premise a UCL claim on violation of *Insurance Code § 790.03* (and particularly *§ 790.03(h)(3)*). *Bates v. Hartford Life and Ace. Ins. Co.* (CD. Cal. 2011) 765 .Supp.2s 1218, 1221. *Section 790.03(h)(3)* defines as an "unfair method[] of competition and unfair and deceptive act[] or practice[] in the business of insurance" an insurer's knowing "fail[ure] to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies."

The allegations **[*39]** above, however, while seemingly overlapping in part with the conduct prohibited by *§ 790.03(h)(3)*, also are broader. In *Zhang v. Superior Court (2013) 57 Cal.4th 364, 159 Cal. Rptr. 3d 672, 304 P.3d 163*, the California Supreme Court the California Supreme Court determined that "when insurers engage in conduct that violates both the UIPA and obligations imposed by other statues or the common law, a UCL action may lie. The Legislature did not intend the UIPA to operate as a shield against any civil liability." *Zhang, 57 Cal.4th at 384*. While *Zhang* was admittedly a first party case (*Zhang, supra, at 369, fn.2*), there is no specific prohibition on third party actions based on grounds independent from *§ 790.03*, where that insurer's conduct also violates *§ 790.03*. Thus, it it is premature at the pleading stage to eliminate entirely the allegations against Defendant ABCLH.

III.

RULING AND ORDER

For the foregoing reasons, the demurrer is overruled in its entirety. In overruling the demurrer, however, the Court also strikes the request for late payment penalties and the references to a "fraudulent" UCL claim.

The Court sets a further status conference in this matter for Tuesday, August 18, 2020 at 2 p.m. The parties shall submit a joint statement to the Court by August 11, 2020 addressing proposals for how to proceed in subsequent phases of the litigation. **[*40]**

Dated: April 3, 2020

/s/ Kenneth Freeman

Kenneth Freeman

Judge of the Superior Court

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[33] SAC, ¶¶11, 15.

Ashton Woods Holdings LLC v. USG Corp. (In re Domestic Drywall Antitrust Litig.)

United States District Court for the Eastern District of Pennsylvania

April 6, 2020, Decided; April 7, 2020, Filed

CIVIL ACTION MDL No. 13-2437; 15-cv-1712

Reporter
2020 U.S. Dist. LEXIS 61227 *; 2020-1 Trade Cas. (CCH) P81,164; 2020 WL 1695434

IN RE: DOMESTIC DRYWALL ANTITRUST LITIGATION;THIS DOCUMENT RELATES TO: Ashton Woods Holdings LLC, et al., Plaintiffs, v. USG Corp., et al., Defendants.

Prior History: *In re Domestic Drywall Antitrust Litig., 939 F. Supp. 2d 1371, 2013 U.S. Dist. LEXIS 52566 (J.P.M.L., Apr. 8, 2013)*

Core Terms

Homebuilder, damages, Plaintiffs', drywall, estimates, reliability, purchasers, cointegration, umbrella, prices, pass-through, market share, tests, pass through, manufacturer, increased price, antitrust, trier of fact, price-fixing, calculate, indirect, parties, sales, expert testimony, Cartwright Act, distributors, conspiracy, downstream, Reply, federal law

Counsel: **[*1]** For IN RE: DOMESTIC DRYWALL ANTITRUST LITIGATION, IN RE (2:13-md-02437-MMB): H. LADDIE MONTAGUE, JR., BERGER MONTAGUE PC, Philadelphia, PA.

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Judges: MICHAEL M. BAYLSON, United States District Judge.

Opinion by: MICHAEL M. BAYLSON

Opinion

MEMORANDUM RE: DAUBERT MOTIONS

Baylson, J.

Table of Contents

I. Introduction[1]

Plaintiffs in this action are twelve large homebuilders ("Homebuilder Plaintiffs")[2] that operate in various parts of the United States. They have brought suit against several drywall manufacturers in the Northern District of California alleging a conspiracy to fix prices. The case was consolidated for pretrial proceedings in this Court by a Judicial Panel on Multidistrict Litigation (the "MDL").

The Court separated the plaintiffs in the MDL into three groups: the Direct Purchaser Plaintiffs ("DPPs"); the Indirect Purchaser Plaintiffs ("IPPs"); and the Homebuilder Plaintiffs. The Court certified a class of DPPs, and that case settled several years ago. Although certification of a proposed class of IPPs was **[*4]** denied, a settlement was subsequently reached in the IPP action as well. In addition to this case, there is one opt-out action, Home Depot v. LaFarge, Docket No. 18 5305, that is currently pending.

In the Homebuilder Plaintiffs action, there have been a number of pretrial proceedings, which have been extensively summarized in other memoranda. Much of the discovery that took place centered on the class actions, and pursuant to an agreement, Homebuilder Plaintiffs secured a great deal of evidence from the extensive class actions discovery.

Pending before the Court are three motions that challenge the admissibility of various expert testimony under *Federal Rule of Evidence ("Rule") 702* and Daubert:

- **[ECF 321] Homebuilder Plaintiffs' Motion to Preclude the Testimony of Defendants' Expert, David Hall**. Hall is a certified public accountant who gave expert opinions on the concept of downstream pass through.[3]

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[1] Unless the name of the docket entry is relevant to this Memorandum, the Court will refer to docket entries solely by their assigned number. All ECF references are to the Ashton Woods docket, 15-1712, unless the citation states otherwise. The Class Actions docket is available at 13 2437. Reporter and Westlaw citations for opinions issued in this litigation are provided in footnotes.

[2] Plaintiffs are Ashton Woods Holdings LLC ("Ashton Woods"); Beazer Homes Holdings Corp. ("Beazer Homes"); CalAtlantic Group, Inc. ("CalAtlantic"); D.R. Horton Los Angeles Holding Company, Inc. ("D.R. Horton"); Hovnanian Enterprises, Inc. ("Hovnanian"); KB Home; Meritage Homes Corporation ("Meritage Homes"); M/I Homes, Inc. ("M/I Homes"); Pulte Home Corporation ("Pulte Home"); The Drees Company ("Drees"); Toll Brothers, Inc. ("Toll Brothers"); and TRI Pointe Homes, Inc. ("TRI Pointe").

[3] There are two types of pass through that are discussed in the Daubert motions: (1) *upstream pass through*, which refers to whether Homebuilder Plaintiffs paid higher prices for drywall because of overcharges resulting from the alleged price-fixing conspiracy that were passed on to each plaintiff; and (2) *downstream pass through*, which refers to whether increases in prices of drywall could have caused increases in prices of homes sold by Homebuilder Plaintiffs to homebuyers. In other words, *upstream pass through* refers to the price increase that is passed from the manufacturer to the Homebuilder Plaintiff, and *downstream pass through* refers to the price increase that is passed from the Homebuilder Plaintiff to the ultimate homebuyer.

• **[ECF 320] Homebuilder Plaintiffs' Motion to Preclude the Testimony of Defendants' Expert, Dr. Robert Willig**. Dr. Willig is an economist who gave expert opinions on various issues including upstream and downstream pass through; the likelihood of conspiracy; and market dynamics.

• **[ECF 319] Defendants' Motion to Preclude the [*5] Testimony of Homebuilder Plaintiffs' Expert, Dr. Daniel Ingberman**. Dr. Ingberman is an economist who gave expert opinions on the fact of Homebuilder Plaintiffs' injury and the calculation of damages.

Following extensive briefing on the Daubert motions, oral argument was delayed because the parties advised the Court that they were attempting to settle the case. Several original Defendants have since settled with Homebuilder Plaintiffs (the "Settling Defendants"), but the case continues against L&W (a subsidiary of USG Corporation) and PABCO (together, "Defendants").

The Court held oral argument on the pending Daubert motions on January 9, 2020. The parties submitted supplemental briefing after the hearing. (Docket No. 13-2437, ECF 899 (Pls.' Supp. Mem.); ECF 437 (Defs.' Supp. Mem.).) The Court requested that the parties provide an additional round of supplemental briefing answering specific questions related to the motions regarding Hall and Dr. Ingberman. (ECF 439.) The parties submitted the requested briefing thereafter. (ECF 440, Pls.' Supp. Mem. re Ingberman; ECF 441, Pls.' Supp. Mem. re **[*6]** Hall; ECF 442, Defs.' Supp. Mem. re Hall; ECF 443, Defs.' Supp. Mem. re Ingberman.)

Stated briefly, governing Third Circuit law[4] liberally permits experts to testify as long as the expert has established basic qualifications; offers reliable testimony, and gives testimony that fits the facts of the case. Applying this standard, and after considering the arguments of the parties articulated in the briefing, at oral argument, and in the supplemental materials, the Court will **GRANT** Homebuilder Plaintiffs' Motion to Preclude the Testimony of Defendants' Expert, David Hall, (ECF 321); **DENY** Homebuilder Plaintiffs' Motion to Preclude the Testimony of Defendants' Expert, Dr. Robert Willig, (ECF 320); and **DENY** Defendants' Motion to Preclude the Testimony of Homebuilder Plaintiffs' Expert, Dr. Daniel Ingberman, (ECF 319).

II. Background

The factual background and chronology of this case have been summarized comprehensively in previous memoranda. (ECF 390;[5] ECF 397.[6]) The Court therefore limits its background discussion to the facts and principles that relate to the pending Daubert motions.

The Court notes that because the briefing related to Defendants' Motion to Preclude Dr. Ingberman uses a different reference point for pass through, the upstream and downstream pass through terms take on different meaning in those papers. For purposes of this Memorandum, upstream pass through refers to the price increase passed from manufacturer to Homebuilder Plaintiff, and downstream pass through refers to the price increase passed from Homebuilder Plaintiff to homebuyer.

[4] The Court's decision on Defendants' Motion to Dismiss Homebuilder Plaintiffs' State-Law and *§ 1 Sherman Act* Claims held that "Third Circuit law is binding in this case on federal issues," but that "special consideration" would be given to Ninth Circuit law given that the action may be transferred back to the Northern District of California. (ECF 101 at 4, 5.) Both of the remaining Defendants, L&W and PABCO, and Homebuilder Plaintiffs have advised the Court that they consider the law of the Third Circuit, not the law of the Ninth Circuit, to be binding. (ECF 430 (L&W); ECF 431 (PABCO); ECF 432 (Homebuilder Plaintiffs).)

[5] Reporter Citation: *In re Domestic Drywall Antitrust Litig., 399 F. Supp. 3d 280 (E.D. Pa. 2019)* (Memorandum re Motion for Summary Judgment (Choice-of-Law)) (Baylson, J.).

[6] Westlaw Citation: *Ashton Woods Holdings LLC v. USG Corp. (In re Domestic Drywall Antitrust Litig.), MDL No. 13-2437, Civil Action No. 15-cv-1712, 2019 U.S. Dist. LEXIS 120522, 2019 WL 3254090 (E.D. Pa. July 19, 2019)* (Memorandum re USG Defendants' Motion for Summary Judgment) (Baylson, J.).

A. Elements of Price-Fixing Case

In this antitrust price-fixing case, Homebuilder **[*7]** Plaintiffs have the burden to show three elements of proof.

First, Homebuilder Plaintiffs must show that Defendants conspired to fix prices. Defendants contest the existence of a conspiracy but the Court previously determined Homebuilder Plaintiffs produced sufficient evidence that, if credited by the trier of fact, would establish these Defendants engaged in an agreement to increase prices and eliminate job quotes. Therefore, the Court properly denied the Motion for Summary Judgment as to Defendants. (ECF 397.)

Although the price of drywall increased each year from 2012 to 2015, the Court limited the conspiracy period to the 2011 and 2012 conduct that led to "the price increases for 2012 and 2013." (ECF 93 at 6.) The Court found that the facts alleged were "insufficient to set out any plausible claims based on the 2014 and 2015 price increases."[7] (Id.) Despite this ruling, Homebuilder Plaintiffs (with expert support) asserted that the effects of the illegal price-fixing agreement continued in calendar years 2014 and 2015. The Court has determined that Homebuilder Plaintiffs may include proof of damages for those years. See id. at 8 n.5 ("The parties should not confuse [the conspiracy] window with **[*8]** the possibly different time period for the calculation of damages. It is possible that Homebuilder Plaintiffs . . . may be able to prove damages for a broader time period than the scope of discovery and liability.").

Second, Homebuilder Plaintiffs have the burden of proving the fact of injury. The Court determined that California law will apply to Homebuilder Plaintiffs' state antitrust claims arising from (a) purchases made in states that repealed the rule of *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, barring indirect purchasers from recovering against antitrust violators ("repealer states"), and (b) purchases made in states that did not repeal Illinois Brick ("nonrepealer states"). (ECF 400 ¶ 10.)[8]

Third, Homebuilder Plaintiffs must prove compensable injuries. For the reasons discussed in the Court's October 3, 2019 Memorandum, Homebuilder Plaintiffs are permitted to proceed on an "umbrella" theory of damages. That is, they may seek damages for prices that were charged by drywall sellers that were not involved in the price-fixing conspiracy, but whose prices were artificially high due to the alleged conspiratorial behavior of Defendants and Settling **[*9]** Defendants. (ECF 414, Umbrella Damages Opinion at 22.)[9]

B. Summary of Likely Presentation of Facts at Trial

Before examining the challenged expert opinions that are the subject of the pending Daubert motions, it is important to summarize how the facts are likely to be presented at trial. This will provide context for the following analysis of the admissibility of the expert testimony proffered by the parties.

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[7] The Court summarized the 2012 and 2013 price increases in the Memorandum re Defendants' Motions for Summary Judgment in the Class Actions. (Docket No. 13-2437, ECF 351 at 84-88 (¶¶ 100, 111, 112, 115, 116, 120, 121); 100-105.) Reporter Citation: *In re Domestic Drywall Antitrust Litig., 163 F. Supp. 3d 175, 223-26, 232-35 (E.D. Pa. 2016)* (Baylson, J.). The Court summarized the 2014 and 2015 price increases in the Memorandum re Defendants' Motion to Dismiss Homebuilder Plaintiffs' Claims Based on 2014 and 2015 Price Increases. (ECF 93 at 3-4.) Westlaw Citation: *Ashton Woods Holdings LLC v. USG Corp. (In re Domestic Drywall Antitrust Litig.), MDL No. 13-2437, Civil Action No. 15-cv-1712, 2016 U.S. Dist. LEXIS 81673, 2016 WL 3453147, at *2 (E.D. Pa. June 22, 2016)* (Baylson, J.).

[8] Westlaw Citation: *Ashton Woods Holdings LLC v. USG Corp. (In re Domestic Drywall Antitrust Litig.), MDL No. 13-2437, Civil Action No. 15-cv-1712, 2019 U.S. Dist. LEXIS 123107, 2019 WL 3326030, at *2 (E.D. Pa. July 24, 2019)* (Baylson, J.).

[9] Westlaw Citation: *In re Domestic Drywall Antitrust Litig., MDL No. 13-2437, Civil Action No. 15-cv-1712, 2019 U.S. Dist. LEXIS 172396, 2019 WL 4918675, at *12 (E.D. Pa. Oct. 3, 2019)* (Baylson, J.).

Each Homebuilder Plaintiff has presented evidence, including deposition testimony, of how they purchased drywall. The exhibits attached to Homebuilder Plaintiffs' separate statement of material facts in support of their opposition to Defendants' Motion for Partial Summary Judgment on Umbrella Damages provide some of this evidence.[10]

At trial, the owners or managers of Homebuilder Plaintiffs will testify from first-hand personal experience and business records about the volume of drywall purchased by them from different sources. The evidence in the record shows that Homebuilder Plaintiffs mainly purchased drywall from intermediaries, either distributor intermediaries (i.e., direct purchasers of drywall that eventually sold to Homebuilder Plaintiffs) **[*10]** or installer intermediaries (i.e., direct purchasers that provided drywall to Homebuilder Plaintiffs as part of an installation service, also known as turnkey installers). The Court's Umbrella Damages Opinion overviews the declarations of these intermediate purchasers regarding the extent to which they passed on the cost increases implemented by Defendants. (Umbrella Damages Opinion at 8-9, Appendix.) As Homebuilder Plaintiffs operate all over the United States, it is likely that the testimony will vary somewhat as to the individual methodology of purchase. This variation may include testimony about participation in a special regional purchase program. The volume of drywall purchased will not be difficult to prove.

From the evidence gathered in the merits discovery stage of this MDL, in which Homebuilder Plaintiffs thoroughly participated, Homebuilder Plaintiffs will be able to present evidence that would permit a jury to find there was an agreement to fix prices for certain periods of time. Homebuilder Plaintiffs will also be able to present evidence based on their business records and opinions of experts that would allow the trier of fact to determine the amount of the illegal overcharge. **[*11]**

C. The Court's Umbrella Damages Opinion

It will also be helpful to review the Court's most recent substantive memorandum in this case, which analyzed one of the theories of damages that is likely to be asserted by Homebuilder Plaintiffs at trial. The memorandum addressed Defendants' Motion for Partial Summary Judgment on Umbrella Damages, which sought a determination that Homebuilder Plaintiffs cannot seek damages for price increases that were charged by nonconspiring manufacturers ("umbrella damages") on the theory that the prices of those nonconspiring manufacturers were artificially inflated as a result of Defendants' anticompetitive conduct. The Court previously determined that California law applied to the state law claims and, interpreting California's Cartwright Act, rejected Defendants' contention that umbrella damages are categorically unavailable. (Umbrella Damages Opinion at 22.)

There are a number of distinctions that the parties and the Court have drawn over the course of this litigation. Before deciding whether and how Homebuilder Plaintiffs could seek umbrella damages, the Court had to assess the implications of two of those distinctions: the distinction between indirect **[*12]** and direct purchasers, and the distinction between damages claims brought under federal law and damages claims brought under state law.

The first distinction involved the difference between indirect and direct purchasers. Under Supreme Court precedent, *indirect* purchasers such as Homebuilder Plaintiffs are barred from seeking damages for antitrust violations under federal law.[11] (Umbrella Damages Opinion at 12-13.) More specifically, in Illinois Brick, the Supreme Court held that an indirect purchaser cannot use the direct purchaser's pass on of an overcharge as the basis for damages. *431 U.S. at 730*.

However, Illinois Brick only governs federal antitrust claims. Following Illinois Brick, a number of states passed laws that limited the Supreme Court's holding by allowing indirect purchasers to recover for antitrust claims brought

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[10] These exhibits are filed under seal at ECF 308, ECF 308-1, ECF 308-2, ECF 308-3, ECF 308 4, ECF 308-5, and ECF 308-6.

[11] There is one limited exception to the Court's characterization of Homebuilder Plaintiffs as indirect purchasers. Two of the Homebuilder Plaintiffs, Ashton Woods and D.R. Horton, seek damages from L&W *directly*. These direct purchaser claims for damages are asserted under federal law. Pursuant to the Court's September 27, 2019 Order, (ECF 413), Homebuilder Plaintiffs submitted documentary evidence indicating that these Plaintiffs purchased directly from L&W, (ECF 417 at 4.)

under *state* law. These statutes, known as "Illinois Brick repealer" statutes, authorize indirect purchasers to recover for antitrust claims brought under state law. California passed one such statute, the Cartwright Act. The Cartwright Act is important in the context of this case because, before passing on umbrella damages, the Court had analyzed choice of law and determined **[*13]** that California law would apply to *all* of Homebuilder Plaintiffs' state law claims. (ECF 400 ¶ 10.)

The second distinction, therefore, involves the difference between damages claims brought under federal law and damages claims brought under state law. Because Homebuilder Plaintiffs did not seek umbrella damages under the Sherman Act, the Court did not reach Defendants' arguments regarding the unavailability of umbrella damages under federal law. (Umbrella Damages Opinion at 12 n.7.) And the fact that Homebuilder Plaintiffs could proceed with their antitrust claims under California law sharpened, but did not answer, the question of whether umbrella damages are available under the Cartwright Act. To resolve *that* question, the Court looked to California case law and determined that the Cartwright Act does not bar umbrella damages as a matter of law. This meant that Homebuilder Plaintiffs can proceed on a theory of umbrella damages, but need to adduce sufficient evidence to get the theory to the jury.

In summary, although Illinois Brick forbids claims for indirect purchases that are brought under federal law, Homebuilder Plaintiffs have made clear that they intend to pursue damages for indirect **[*14]** purchases under *California's Cartwright Act*. Since the Court found that the Cartwright Act does not categorically bar umbrella damages, Homebuilder Plaintiffs may pursue and present evidence on this theory at trial, along with evidence of more typical theories of antitrust damages.

III. Summary of Challenged Experts' Reports

The Daubert motions reference the reports and conclusions of four experts: Defendants' experts David Hall and Dr. Robert Willig; and Homebuilder Plaintiffs' experts Dr. Daniel Ingberman and Dr. Louis Wilde. Only three of the experts are subject to Daubert challenges: (A) Defendants' expert David Hall; (B) Defendants' expert Dr. Robert Willig; and (C) Homebuilder Plaintiffs' expert Dr. Daniel Ingberman. A summary of the conclusions and findings of these experts' reports follows.

A. David Hall's Report

Hall's Report analyzes the extent to which Homebuilder Plaintiffs passed on the increased costs of drywall resulting from the price-fixing conspiracy and responds to the report of Homebuilder Plaintiffs' expert Dr. Wilde.[12] The dispute between Dr. Wilde and Hall concerns the downstream pass through question: were Homebuilder Plaintiffs able to pass on the increased drywall **[*15]** costs to homebuyers? Dr. Wilde answers the question in the negative, while Hall answers affirmatively.

According to Dr. Wilde's analysis of economic theory, Homebuilder Plaintiffs "could not" have passed on the increase in the cost of drywall, because Homebuilder Plaintiffs do not set prices based on construction costs but rather use "the demand side of the market" to inform pricing strategies. (Wilde Report ¶¶ 7, 27.)[13] Wilde concludes that "once the decision is made to proceed with a project, there is no longer any relationship between costs and sales prices" and notes that this pricing strategy is consistent with neoclassical economic theory. (Id. ¶ 20.)

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[12] Defendants do not make a Daubert challenge to the admissibility of the opinion of Homebuilder Plaintiffs' expert Dr. Wilde. Homebuilder Plaintiffs explained that they "only provided an expert report addressing downstream pass-through out of an abundance of caution so as to avoid being precluded from doing so in the unlikely event the Court at a later date determines that a pass through defense is available." (ECF 315 at 5 n.3.)

[13] Dr. Wilde's report, dated December 22, 2017, is available at Exhibit B to Defendants' Motion to Preclude Hall. The Wilde Report, which is filed under seal, is available at pp.5-51 of ECF 315 12.

In contrast to Dr. Wilde's theoretical approach, Hall's forensic accounting analysis involves a review of publicly available data of average annual construction costs, average annual costs of drywall, and total sales prices, as well as a survey of statements in Defendants' public filings, deposition testimony, and internal documents regarding pricing.[14] Hall declines to opine on Wilde's economic theory and instead summarizes the record evidence contradicting the conclusions of Wilde's economic analysis. In support of his conclusion **[*16]** that empirical evidence indicates Homebuilder Plaintiffs successfully passed on the increased drywall costs to homebuyers, Hall makes five conclusions:

> 1. The pass-through of increasing construction costs—including drywall costs—to home purchasers is more likely to occur in a growing and favorable homebuilding environment. Such an environment existed in the U.S. homebuilding industry from at least 2012 through 2015 when the industry experienced a resurgence that included significant increases in new home starts, average selling prices, and profitability.
> 2. The drywall cost increases at issue in this litigation—which occurred during 2012 through 2015—occurred during a period when the homebuilding industry generally experienced increasing construction materials and labor costs.
> 3. [Homebuilder] Plaintiff[s]' financial statements reflect significant growth in new home sales, average home prices, revenues, gross profits, and gross margins during 2012 through 2015.
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> 4. Contrary to Dr. Wilde's opinion, there is substantial evidence that during 2012-2015, [Homebuilder] Plaintiff[s] considered construction costs when setting new home prices. This evidence indicates that [Homebuilder] Plaintiff[s] **[*17]** successfully passed through the increased construction costs—including drywall—to home buyers.
> 5. [Hall] disagree[s] with Dr. Wilde's opinions that estimating the impact of pass through is exceptionally difficult if not impossible and that there is not a causal connection between increased construction costs—including drywall costs—and increased new home prices.

(Hall Report at 11.)

B. Dr. Robert Willig's Report

Dr. Willig submitted two reports in this litigation. Each responds to one of Dr. Ingberman's reports. Homebuilder Plaintiffs' Daubert challenge targets testimony based on one portion of Dr. Willig's second report.

The first report, submitted January 26, 2018, largely responds to Dr. Ingberman's evidence on whether collusion would have affected the price of drywall. Dr. Willig concludes, based on economic theory and empirical evidence, that the price increases seen in the market were more likely the result of oligopoly and external market forces than collusion. Homebuilder Plaintiffs do not seek to preclude Dr. Willig from testifying regarding the contents of this first report.

Dr. Willig's second report ("Willig Report II"),[15] submitted February 26, 2018, responds to Dr. Ingberman's **[*18]** evidence on damages. The report concludes that multiple flaws in Dr. Ingberman's model undermine his damages estimates.

Relevant here, after arguing that Dr. Ingberman's forecasting model is flawed, (Willig Report II ¶¶ 19-62), Dr. Willig develops his own forecasting model which he claims is superior, (id. ¶¶ 63-74). Specifically, Dr. Willig's model does not use the "first differences" methodology that Dr. Ingberman uses, meaning, Dr. Willig asserts, that his model is more efficient than Dr. Ingberman's. (Id. ¶¶ 60-63.) Applying his non-first-differences model, he finds that actual drywall prices are consistent with demand and inconsistent with the alleged conspiracy. (Id. ¶¶ 72-73.) Dr. Willig

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[14] The Hall Report, dated January 26, 2018, is available at Exhibit A to Homebuilders Plaintiffs' Memorandum in Support of their Motion to Preclude David Hall. The Hall Report, which is filed under seal, is available at pp.42-65 of ECF 315; pp.1-24 of ECF 315-1 at 1-24; and pp.1-18 of ECF 315-2.

[15] Willig Report II, dated February 26, 2018, is available at Exhibit A to Homebuilder Plaintiffs' Memorandum in Support of their Motion to Preclude Dr. Robert Willig. The Willig II Report, which is filed under seal, is available at pp.22-130 of ECF 413.

then conducts robustness tests and concludes that his model is robust. (Id. ¶ 74.) Dr. Willig's model is a partial basis for some of his conclusions that Dr. Ingberman's model is unreliable and that the alleged conspiracy did not affect drywall prices. (Id. ¶¶ 8, 15.)

C. Dr. Daniel Ingberman's Report

Dr. Daniel Ingberman drafted two damages report on behalf of Homebuilder Plaintiffs. In his first report, Dr. Ingberman assumed that Defendants colluded to raise the price of drywall, and evaluated **[*19]** whether Homebuilder Plaintiffs paid an artificially higher price for drywall as a result.[16] (Ingberman FoI ¶ 11.) In his second report, Dr. Ingberman estimated the amount of damages each Homebuilder Plaintiff sustained as a result of the price increases.[17] (Ingberman AoD ¶ 4.)

1. Dr. Ingberman's Fact of Injury Report

Dr. Ingberman applies economic theory about price-fixing schemes and predicts that collusive price increases in the drywall market would cause Homebuilder Plaintiffs to pay an artificially high price for drywall. (Ingberman FoI ¶ 14.) Based on several market characteristics, such as Defendants' control over the market, (id. ¶¶ 158, 168-69), and Defendants' elimination of job quotes, (id. ¶¶ 198-99), Dr. Ingberman concludes that a conspiracy to raise prices would have been effective here, (id. ¶ 141.)

Dr. Ingberman then considers whether Homebuilder Plaintiffs purchased their drywall from distribution channels that should be expected to have passed through Defendants' price increases to Homebuilder Plaintiffs. (Id. ¶ 215.) General characteristics of the distributor and turnkey channels in the drywall market suggest intermediate distributors would pass on price increases to homebuilders. **[*20]** (Id. ¶¶ 221-22, 242-43.) In fact, some of the distributors in these channels confirmed that they had done so. (Id. ¶¶ 250-65, 267-69.) Dr. Ingberman ultimately concludes that, assuming Defendants colluded, any price increases should be expected to have fully passed through to Homebuilder Plaintiffs. (Id. ¶ 271.)

2. Dr. Ingberman's Amount of Damages Report

After concluding that Defendants' price increases should be expected to have been passed through to Homebuilder Plaintiffs, Dr. Ingberman estimates the total overcharges Homebuilder Plaintiffs paid as a result of Defendants' price increases. Part of Dr. Ingberman's report is highly technical.

From the Court's review, Dr. Ingberman appears to have calculated Homebuilder Plaintiffs' damages using a regression that compared drywall prices from 2012-2015, with drywall prices during a period in which prices were untainted by collusion. (Ingberman AoD ¶¶ 9, 16-17.) Controlling for many factors, Dr. Ingberman's regression ultimately deduces that, on average, estimated overcharges on drywall sold to direct purchasers ranged from a low of fifteen percent in 2012 to a high of thirty-five percent in 2015. (Id. ¶¶ 12, 32-42.)

Dr. Ingberman then ran **[*21]** another regression to estimate how much of Defendants' overcharges passed through from intermediate distributors to Homebuilder Plaintiffs. (Id. ¶ 75.) Under a "top-and-bottom" approach, Dr. Ingberman's model was unable to reject a dollar-for-dollar pass through rate, or a percent-for-percent pass through rate. (Id. ¶¶ 93-94.) Ultimately, Dr. Ingberman's regression estimates Homebuilder Plaintiffs' damages at between $233 million and $277 million. (Id. ¶ 111.)

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[16] The Fact of Injury ("FoI") Report, dated December 22, 2017, is available at Exhibit 4 to Defendants' Memorandum in Support of their Motion to Preclude Dr. Daniel Ingberman. The FoI Report, which is filed under seal, is available at ECF 323-4.

[17] The Amount of Damages ("AoD") Report, dated January 26, 2018, is available at Exhibit 5 to Defendants' Memorandum in Support of their Motion to Preclude Dr. Daniel Ingberman. The AoD Report, which is filed under seal, is available at ECF 323-5.

Relevant to Defendants' Motion to Preclude Dr. Ingberman, the Amount of Damages report also calculates each Defendant's share of these damages. (Id. ¶¶ 110, Ex. 9A-9E.) In Exhibit 9C, Dr. Ingberman appears to estimate how much drywall each Homebuilder Plaintiff bought from each manufacturer based on that Defendant's market share. Homebuilder Plaintiffs state that this one-page exhibit shows each manufacturer's actual sales for the twelve Homebuilder Plaintiffs in the years 2012-2015, broken down by drywall manufacturer (including Defendants). The Exhibit includes data for CertainTeed and Georgia Pacific, which, as discussed in the Umbrella Damages Opinion, were situated differently than other manufacturers. Although CertainTeed **[*22]** had been sued, the Court granted summary judgment in its favor in the class actions, (Docket 13-2437, ECF 352 ¶ 2), and Homebuilder Plaintiffs voluntarily dismissed it in this action, (ECF 178.) Homebuilder Plaintiffs never sued Georgia Pacific.

Dr. Ingberman's report states his work as to Exhibit 9C as follows:

> In Exhibit 9C, purchases are allocated among wallboard manufacturers based on state-level quantity sales shares for the period January 2012 through July 2013, the longest period during 2012-2015 for which *transaction data are available for all wallboard manufacturers*. Temple-Inland's sales share is added to Georgia-Pacific's sales share beginning in August 2013, subsequent to its acquisition by Georgia-Pacific. For Drees' Nashville and Cincinnati/Northern Kentucky divisions, CertainTeed is assumed to have 100% market share.

(Id. Notes to Exhibit 9A-9E (emphasis added).) According to Homebuilder Plaintiffs, to calculate the figures in Exhibit 9C, Dr. Ingberman:

> (i) [T]ook the undisputed manufacturer data for the longest time period available (covering sales from January 2012 through July 2013, a significant portion of the alleged conspiracy and prior to Temple-Inland selling its **[*23]** drywall business to Georgia-Pacific);
> (ii) [S]orted the manufacturer sales data by state to determine the market share of each manufacturer on a state-by-state basis; and
> (iii) [H]aving already separately calculated the amount of drywall purchased by each Plaintiff in each state (calculations which have not been challenged in any motion by Defendants), Dr. Ingberman used the state-by-state market share of each manufacturer to estimate the amount of drywall purchased by each Plaintiff in each of the states in which they purchase drywall.

(Pls.' Supp. Mem. re Ingberman at 2 (footnote omitted).) In other words, to estimate the figures in Exhibit 9C, Dr. Ingberman appears to have calculated each Defendant's share of the direct purchasing distributor market, and used that same number to estimate how much of each Defendant's drywall Homebuilder Plaintiffs bought when they purchased drywall from intermediate distributors. (Ingberman AoD Notes to Ex. 6, 8, 9A-9E.)

IV. Parties' Arguments on Daubert Motions

A. Homebuilder Plaintiffs' Motion to Preclude Testimony of David Hall[18]

Homebuilder Plaintiffs' Motion makes arguments for exclusion under all three of the Third Circuit's trilogy of *Rule 702* requirements—qualification, **[*24]** reliability, and fit. Homebuilder Plaintiffs argue that the testimony of Hall should be precluded because (1) he is not qualified; (2) his failure to use economic test makes his testimony unreliable; and (3) he does not offer scientific, technical, or specialized knowledge. (Mot. re Hall at 3.) Defendants respond in opposition to all three of Plaintiffs' reasons. (ECF 335, Opp'n re Hall at 1.) Homebuilder Plaintiffs reply in support of their Motion and respond to Defendants' arguments. (ECF 345, Reply re Hall at 1.)

[18] Homebuilder Plaintiffs' Motion to Preclude the Testimony of Defendants' Expert, David Hall is filed at ECF 321. The sealed Memorandum in Support of the Motion is filed at ECF 315. The Court will hereafter refer to Homebuilder Plaintiffs' Memorandum as "Mot. re Hall."

1. Hall is Unqualified

First, Homebuilder Plaintiffs argue that Hall is not qualified in this matter because he is an accountant not an economist. (Mot. re Hall at 7-8.) Since Hall lacks training in fundamental principles of antitrust, according to Homebuilder Plaintiffs, he lacks the knowledge and qualifications necessary to provide economic analysis, and therefore does not have the specialized expertise required of a witness qualified as an expert under *Rule 702*. (Id. at 10.) Defendants respond that Hall has expressed his opinion as a forensic accountant and does not purport to opine on any of Dr. Wilde's economic theories. (Opp'n re Hall at 14-15.)

2. Hall Fails to Use Economic Tests

Second, **[*25]** Homebuilder Plaintiffs argue that Hall's testimony should be precluded because his methods lack reliability. (Mot. re Hall at 16.) All three of Homebuilder Plaintiffs' reasons for why Hall's analysis is not reliable seem to revolve around the first reliability factor set forth by the Third Circuit: the testability of the expert's method and hypothesis.

Homebuilder Plaintiffs initially argue that Hall "did not attempt to perform any sort of econometric analysis . . . to demonstrate that home prices increased as a result of increased drywall costs and not some other cost or other supply and demand factor." (Id. at 18.) In other words, according to Homebuilder Plaintiffs, Hall assumed causation without attempting to determine what home sale prices would have been but for the drywall cost increases, (id. at 19), and he failed to account for other factors that may have led to the increase in home sale prices, (id. at 20.) Defendants respond that Hall did not assume causation; but rather, analyzed direct evidence that included public investor statements, deposition testimony, and internal documents that led him to the conclusion that "a relationship between [Homebuilder] Plaintiffs' construction costs and the prices **[*26]** they charge[d] to their customers" existed. (Opp'n re Hall at 24.) Defendants argue that Hall's Opinion 4, which is discussed at pp.33-61 of his Report, demonstrates that Hall conducted an extensive analysis on causation. (Id.)

Homebuilder Plaintiffs also critique Hall for failing to conduct any analyses to test the validity of his opinions. (Mot. re Hall at 24.) Homebuilder Plaintiffs take issue with Hall's use of statements he sourced from public filings, earnings calls, and depositions, arguing that Hall "frequently ignores [the] context in which these statements were made" and that this demonstrates a "fundamental misunderstanding" of pass through. (Id. at 25, 26.) Defendants respond that Homebuilder Plaintiffs' expert Dr. Wilde "relied on . . . record evidence [similar to the evidence relied on by Hall] in support of his economic theories." (Opp'n re Hall at 30.)

Finally, Homebuilder Plaintiffs argue that Hall ignored real-world evidence showing that his assumption "that drywall price increases must have been passed through because Plaintiffs continued to profit during [the conspiracy] period is not only purely speculative, it is farfetched." (Mot. re Hall at 30.) Homebuilder Plaintiffs highlight **[*27]** two pieces of evidence that, in their view, Hall erroneously ignored: the fact that new home sales constitute a small fraction—approximately ten percent—of the market for single family homes (sales of existing single-family homes comprise the remaining ninety percent of the market for single family homes); and the fact that Homebuilder Plaintiffs "price to market" (i.e., price their homes as high as the market will allow). (Id. at 31.) Homebuilder Plaintiffs argue that Hall's disregard of these facts demonstrates the unreliability of his opinion, because these facts establish that "more than 90% of the single-family home market does not consider construction costs in determining the market price of a home, [so] it is simply implausible that Homebuilder Plaintiffs would be able to raise the market price of each and every home they sold in 2012 through 2015 by the amount of the drywall cost increase." (Id.) Defendants respond that Homebuilder Plaintiffs' argument "is simply another cross-examination argument dressed up as a Daubert challenge." (Opp'n re Hall at 30.)

3. Hall's Report Does Not Fit

Third, Homebuilder Plaintiffs argue that Hall's report does not offer any scientific, technical, or **[*28]** specialized analysis, but rather is a third-party recitation of publicly available financial documents. (Mot. re Hall at 32-33.) According to Homebuilder Plaintiffs, "[t]he only expertise . . . Hall . . . employs . . . is expertise in compiling and presenting data, not in rigorously and scientifically analyzing that data as Daubert requires." (Id. at 34.) Defendants respond that Homebuilder Plaintiffs' claim "is false," because Hall's forensic accounting analysis of "hundreds of annual and quarterly public filings, earnings press releases, conference call transcripts, and internal financial records" required him to "make numerous professional accounting judgments." (Opp'n re Hall at 31.)

More fundamentally, the parties debate whether Hall's testimony aids the trier of fact since the purpose of his opinion is to support a defense that, according to Homebuilder Plaintiffs, is not available. Homebuilder Plaintiffs contend that Hall's testimony, which focuses on the extent of downstream pass through, is not relevant because "a purported pass-through defense is not available to Defendants in this action, where there is absolutely no risk of duplicative recovery to indirect purchasers." (Mot. re Hall **[*29]** at 5 n.3). Defendants respond that the legal availability of the pass-through defense should have been raised at summary judgment, and that the Court should not consider the issue in the context of the pending Daubert motion. (Opp'n re Hall at 24 n.4.) Homebuilder Plaintiffs reply that Defendants should have sought to "limit their liability based on a purported pass-through defense in a summary judgment motion."[19] (Reply re Hall at 2 n.1.)

B. Homebuilder Plaintiffs' Motion to Preclude Testimony of Dr. Robert Willig[20]

Homebuilder Plaintiffs attack the reliability of Dr. Willig's forecasting model.[21] They contend that for the forecasting model to be reliable, either Dr. Willig's data must be "cointegrated," or he must use "first differences" analysis as a robustness check or corrective technique. (Mot. re Willig at 5-8.) They argue that because Dr. Willig did not demonstrate cointegration to their satisfaction, and he did not use the first differences method, his forecasting model is unreliable and should be discarded. (Id. at 7-9.)

1. Cointegration

Homebuilder Plaintiffs' first line of attack concerns the *cointegration*[22] of Dr. Willig's data. The parties agree that if Dr. Willig's data are not cointegrated, **[*30]** his forecasting model is unreliable. (ECF 338, Opp'n re Willig at 1.) Dr.

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[19] The Court permitted the parties to submit separate supplemental briefing on the availability of the pass-through defense following oral argument on the Daubert motions, which resolved these timeliness objections. As discussed in subsection VI.A., the legal availability of a defense based on pass through is dispositive to Homebuilder Plaintiffs' Motion challenging the admissibility of Hall's testimony.

[20] Homebuilder Plaintiffs' Motion to Preclude the Testimony of Defendants' Expert, Dr. Robert Willig is filed at ECF 320. The sealed Memorandum in Support of the Motion is filed at ECF 314. The Court will hereafter refer to Homebuilder Plaintiffs' Memorandum as "Mot. re Willig."

[21] Aside from their dispute as to the admissibility of the forecasting model, the parties dispute what the purported inadmissibility of the forecasting model would mean for the rest of Dr. Willig's testimony. Homebuilder Plaintiffs insist that the forecasting model is intertwined with the entire February 26 report such that the forecasting model cannot be excluded without excluding the entire report. Defendants respond that the forecasting model is a limited portion of the report, and the effect of its inclusion could be cabined. Because the forecasting model is admissible, it is not necessary to reach this issue.

[22] Cointegration is a characteristic some nonstationary datasets have that allows analysts to use ordinary least squares regressions without using other corrective techniques to address the nonstationarity.

Nonstationary data is data whose underlying properties change over time. (Id. at 5.) For example, many facts about the drywall market might change with overall national economic conditions; the drywall market is therefore nonstationary with respect to national economic conditions. Typically, an analyst working with nonstationary data must use one of several analytical techniques to control for nonstationarity. (Id.) There is no dispute that Dr. Willig's data are nonstationary. (Id.)

Willig concluded that his data were cointegrated based on two standard tests for cointegration—the "Kao" and "Pedroni" tests. (Willig Report II ¶¶ 61.) Homebuilder Plaintiffs agree that the Kao and Pedroni tests are sometimes valid tests for cointegration. (Mot. re Willig at 9-10.) However, they argue that in certain circumstances, the tests will spuriously report cointegration. (Id. at 10-12.) Specifically, based on Dr. Willig's own testimony, they argue that the Kao and Pedroni tests may be "skewed towards finding" cointegration because his data shows "signs" of a characteristic called "codependency."[23] (Id. (quoting Willig Dep.).)

Following Dr. Ingberman's deposition, Dr. Willig found that his data passed a third cointegration test (the "Westerlund" test) which is not reflected in his reports. (Mot. re Willig at 11 n.2.) Dr. Willig ran the Westerlund test to address Dr. Ingberman's critique of his (Dr. Willig's) use of the Kao and Pedroni tests. (Id.) Homebuilder Plaintiffs argue that Dr. Willig cannot use this post-hoc research to supplement or shore up his reports. (Id.) "In any event, Willig **[*31]** admitted that . . . the Westerlund test '*doesn't give perfect results* . . . .'" (Id. (quoting Willig Dep.).)

Defendants have three responses.

First, they argue that economic theory and "common sense" provide that supply, demand, and price should be cointegrated. (Opp'n re Willig at 5-7.) The econometrics literature recognizes that theory can provide evidence of cointegration. (Id. at 6 n.3.) Moreover, empirically, price and demand are "highly correlated" in this industry, which provides support for cointegration. (Id. at 6 (quoting Willig Dep.).)

Second, notwithstanding Homebuilder Plaintiffs' contrary excerpts of his testimony, Dr. Willig largely stood behind the effectiveness of the Kao and Pedroni tests. (Opp'n re Willig at 8-9.) Moreover, Homebuilder Plaintiffs provide no evidence of codependency in Dr. Willig's data, so any codependency-based critique is "purely hypothetical." (Id. at 8.) Boiled down, "the differences between Dr. Willig and Dr. Ingberman over the Kao and Pedroni tests represent a disagreement over mainstream econometric tools." (Id. at 9.) And "[t]his is a dispute that must go to the jury, not a subject for a Daubert motion." (Id. at 10 (citing *In re TMI Litig., 193 F.3d 613, 665 (3d Cir. 1999)*, amended, *199 F.3d 158 (3d Cir. 2000))*.)

Finally, Defendants argue that Dr. Willig's supplemental **[*32]** use of the Westerlund test to support his finding of cointegration was appropriate. In response to Homebuilder Plaintiffs' argument that the Westerlund test is inadmissible because Dr. Willig admitted it is not "perfect," they argue that "[t]he grounds for the expert's opinion merely have to be good, they do not have to be perfect," (Opp'n re Willig at 11-12 (quoting *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 744 (3d Cir. 1994))*.) And they respond to Homebuilder Plaintiffs' argument that the Westerlund test comes too late for admissibility by arguing that it is expert rebuttal evidence under *Federal Rule of Civil Procedure 26(a)(2)(D)(ii)*.[24] (Opp'n re Willig at 12.)

However, certain nonstationary datasets are *cointegrated*. Cointegration means that the data respond similarly enough to the source of nonstationarity that the nonstationarity does not ultimately undermine the regression. (Id. at 5-6.) Homebuilder Plaintiffs borrow the example of "a drunkard and her leashed dog walking on the street. The drunkard's path may resemble a random walk (and therefore appear to be nonstationary) and so does the path of her dog. But, because they are walking forward together and in more or less the same direction, they will not 'deviate' too far from one another and their paths can therefore be considered cointegrated." (Id. at 6.)

[23] Homebuilder Plaintiffs do not define codependency. Per Defendants' opposition brief, "In the context of the regressions in this case, which use data at the state-month level to regress price on supply and demand factors, cross-sectional dependence [codependency] could, but does not necessarily, arise if the unexplained portion of prices are correlated across states." (Opp'n re Willig at 8 n.4.)

[24] "Absent a stipulation or court order, the disclosures must be made: . . . (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under ***Rule 26(a)(2)(B)*** or ***(C)***, within 30 days after the other party's disclosure." Although this material was disclosed more than thirty days after Dr. Ingberman's critique was revealed, "both parties' experts disclosed additional work they had done in response to the opposing expert's opinions on the date of their depositions." (Opp'n re Willig at 12.)

Homebuilder Plaintiffs reply that this first response, from theory, proves too much. (ECF 347, Reply re Willig at 3-6.) The second response, they argue, mistakenly puts the burden on Homebuilder Plaintiffs to rebut Dr. Willig's testimony when the burden actually falls on Dr. Willig to demonstrate the reliability of his testimony. (Id. at 10.) And finally, they argue that the Westerlund test is immaterial, unreliable, and does not actually support Dr. Willig's position that his data are cointegrated, particularly when run with intermediate-term rather than long-term lags. (Id. at 9-11.)

2. First Differences

Homebuilder Plaintiffs argue that Dr. Willig **[*33]** should have used a "first differences" regression model either to correct for the data's nonstationarity, or at the least as a robustness check on his non-first-differences regression. (Mot. re Willig at 7, 13-16.) They argue that because he failed to do so, his report is unreliable. (Id. at 15-16.)

Defendants argue in response that Dr. Willig was entitled to conclude that his data were cointegrated based on his use of the Kao, Pedroni, and Westerlund tests, and there was no need to use the first differences method as a robustness check. (Opp'n re Willig at 13-15.)

C. Defendants' Motion to Preclude Testimony of Dr. Daniel Ingberman[25]

1. Defendants' Arguments

Defendants challenge the reliability of Dr. Ingberman's method of estimating market share to apportion damages. Defendants argue that Dr. Ingberman's share of sales estimates for the homebuilder market extrapolates from Defendants' share of the direct purchasing distributor market without any basis for doing so. (Mot. re Ingberman at 9-10.) Specifically, Defendants contend that Dr. Ingberman's assumption that Homebuilder Plaintiffs' indirect purchases from direct purchasing distributors "mirror exactly" the manufacturers' direct sales to those distributors **[*34]** is not supported by any explanation as to why those two markets "would be the same, or even predictive of," each other. (ECF 346, Reply re Ingberman at 4-5.) According to Defendants, Dr. Ingberman should not have estimated Homebuilder Plaintiffs' damages using estimates of Defendants' direct purchaser market share because "[t]he makeup of wallboard distributors is distinct from the makeup of the resellers and installers that eventually supply wallboard to the Homebuilders." (Mot. re Ingberman at 13.)

Essentially, Defendants argue that calculating their shares of Homebuilder Plaintiffs' purchases was based on speculation and unsupportable inference, and that there was actual data available to Homebuilder Plaintiffs from their suppliers that could have provided this information but was either not requested or not received and/or not made available to Dr. Ingberman. (Defs.' Supp. Mem. re Ingberman at 3.) Homebuilder Plaintiffs did not, for example, "pull the transactions from the distributors to determine what manufacturer" shipped what purchase to what homebuilder. (Mot. re Ingberman at 10-11; Reply re Ingberman at 7-8.)

Defendants further assert that Dr. Ingberman's method of estimating **[*35]** the total quantity of wallboard purchased by each Homebuilder Plaintiff, and his attribution of portions of that estimated quantity to specific manufacturers, is without any factual basis in the record. (Defs.' Supp. Mem. re Ingberman at 1-3.) In addition, Defendants contend that the results from Dr. Ingberman's decision to extrapolate market share data contradicts existing evidence. (Mot. re Ingberman at 14.)

[25] Defendants' Motion to Preclude the Testimony of Homebuilder Plaintiffs' Expert, Dr. Daniel Ingberman is filed at ECF 319. The sealed Memorandum in Support of the Motion is filed at ECF 323. The Court will hereafter refer to Homebuilder Plaintiffs' Memorandum as "Mot. re Ingberman."

2. Homebuilder Plaintiffs' Arguments

Homebuilder Plaintiffs counter that, although they have not demonstrated that Dr. Ingberman's market share theory is commonly accepted, it is the only theory they can use if their theory of umbrella damages is not supported by sufficient evidence at trial or is not accepted by the trier of fact. Thus, Homebuilder Plaintiffs contend they can present it as an alternate theory of damages. Homebuilder Plaintiffs further contend that because Dr. Ingberman's calculations are based on the "best available data" and "accepted economic principles" of estimating unknown properties from incomplete data, his damages calculations are admissible. (ECF 334, Opp'n re Ingberman at 14, 16.)

Homebuilder Plaintiffs argue that there is a rational connection between **[*36]** Defendants' share of the direct purchasing distributor market and Defendants' share of Homebuilder Plaintiffs' drywall purchases because drywall is a commodity, its demand is inelastic, the market is an oligopoly, and Defendants have relatively high market shares. (Id. at 14 (quoting Ingberman Dep.).) Homebuilder Plaintiffs do not assert that Dr. Ingberman relied on any scientific or actual data, but contend that given his overall familiarity with the case, Homebuilder Plaintiffs' purchases, and Defendants' sales, of drywall, his estimates were reasonable. (Pls.' Supp. Mem. re Ingberman at 2-3.)

As to Defendants' argument that Dr. Ingberman's results contradict existing evidence, Homebuilder Plaintiffs respond that the resolution of this type of conflicting evidence is for the jury to decide. (Opp'n re Ingberman at 17.)

Homebuilder Plaintiffs conclude their argument by asserting that:

> The practicality of Dr. Ingberman's approach—namely, that manufacturer direct sales in each state mirror indirect sales to Plaintiffs in each state—is further supported by Dr. Ingberman's evaluation of the drywall industry in general. Dr. Ingberman testified extensively about the nature of the drywall market, including **[*37]** that: (i) drywall is a commodity product; (ii) due to its size and weight; "[m]anufacturers rarely ship wallboard" long distances; and (iii) as a result of these shipping limitations and because it is a commodity product, Plaintiffs purchase drywall based on availability in their geographic region with no other preferences, other than that the drywall be produced domestically.

(Pls.' Supp. Mem. re Ingberman at 3 (alteration in original) (footnotes omitted).)

V. Legal Standard: Admissibility of Expert Testimony

The admissibility of expert testimony is governed by *Rule 702*, which provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Under *Rule 702*, a district court judge functions as a gatekeeper to "ensure that any and all **[*38]** scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. The Third Circuit has clarified that "in doubtful cases," *Rule 702* "favor[s] admissibility." *Linkstrom v. Golden T. Farms, 883 F.2d 269, 270 (3d Cir. 1989)*; see also *Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 806 (3d Cir. 1997)* ("*Rule 702* . . . has a liberal policy of admissibility."). The "touchstone" for *Rule 702* analysis is the broad helpfulness of the expert's testimony to the trier of fact. *Linkstrom, 883 F.2d at 270* (quoting *Breidor v. Sears, Roebuck & Co., 722 F.2d 1134, 1139 (3d Cir. 1983))*; see also *Pineda v. Ford Motor Co., 520 F.3d 237, 243 (3d Cir. 2008)* ("The Rules of Evidence embody a strong preference for admitting *any evidence* that may assist the trier of fact." (emphasis added)).

On appeal, a district court judge's conclusion on a Daubert challenge is reviewed for abuse of discretion and will be overturned only if the decision "rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *TMI Litig., 193 F.3d at 666* (quoting *Hanover Potato Prods., Inc. v. Shalala, 989 F.2d 123, 127 (3d Cir. 1993))*. The Third Circuit will not interfere "unless there is a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *TMI Litig., 193 F.3d at 666* (quoting *Hanover, 989 F.2d at 127*).

Rule 702 imposes three requirements for admissibility of expert testimony: "(A) the proffered witness must be an expert, i.e., must be qualified; (B) the expert must testify about matters requiring scientific, technical **[*39]** or specialized knowledge; and (C) the expert's testimony must assist the trier of fact." *Pineda, 520 F.3d at 244*; see also *Schneider ex rel. Estate of Schneider v. Fried, 320 F.3d 396, 404 n.3 (3d Cir. 2003)* (noting that *Rule 702* "was amended to include the trilogy of restrictions (qualifications, reliability, fit) in its text after the Supreme Court decided Daubert").

A. Qualification

First, a witness must offer specialized expertise or experience to qualify as an "expert" under *Rule 702*. *Id. at 404*. The Third Circuit defines the qualification requirement "liberally," allowing "a broad range of knowledge, skills, and training [to] qualify an expert." Id. The liberal policy in favor of admissibility "extends to the substantive as well as the formal qualifications of experts." *Pineda, 520 F.3d at 244*. A district court abuses its discretion if it "exclude[s] testimony simply because [it] does not deem the proposed expert to be the best qualified or because the proposed expert does not have the specialization that the court considers most appropriate." *Holbrook v. Lykes Bros. S.S. Co., Inc., 80 F.3d 777, 782 (3d Cir. 1996)*; see, e.g., *Paoli, 35 F.3d at 753* (reversing district court's conclusion that doctor offered as an expert was not qualified because the doctor, "while arguably a relatively poor clinician and less than fully credible witness, qualifie[d] as an expert" under the liberal standard for qualification). The result of **[*40]** the Third Circuit's liberal approach to admitting expert testimony under *Rule 702* is that arguments regarding an expert's qualifications generally relate to the weight to be given to the testimony—not to its admissibility. *Holbrook, 80 F.3d at 782*.

B. Reliability

Second, for the testimony of a qualified witness to be admissible under *Rule 702*, the witness must use a methodology or technique that is reliable. *Paoli, 35 F.3d at 742*. The reliability inquiry requires evaluating if "the expert's testimony is supported by 'good grounds.'" *Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 81 (3d Cir. 2017)*. The Third Circuit has identified eight factors for district courts to consider in assessing whether "good grounds" support potential expert testimony:

> (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.

Paoli, 35 F.3d at 742 n.8.

These reliability factors are not exhaustive and **[*41]** may not apply in every case. See *Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)* ("Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case."). Indeed, the factors should not be applied rigidly because "[t]he inquiry envisioned by *Rule 702* is . . . a flexible one." *Daubert, 509 U.S. at 594*. However, "some analysis of these factors is necessary." *UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres, 949 F.3d 825, 834 (3d Cir. 2020)*.

The standard for determining reliability "is not that high . . . even given the evidentiary gauntlet facing the proponent of expert testimony under Rule 702." TMI Litig., 193 F.3d at 665. The court's focus in assessing reliability "must be solely on principles and methodology, not on the conclusions that they generate." Daubert, 509 U.S. at 595; see also Karlo, 849 F.3d at 81 ("The test of admissibility is not whether a particular scientific opinion has the best foundation, or even whether the opinion is supported by the best methodology or unassailable research."); Paoli, 35 F.3d at 744 ("A judge will often think that an expert has good grounds to hold the opinion that he or she does even though the judge thinks that the opinion is incorrect."). At the reliability phase of the Daubert analysis, "[c]ourts look for rigor, not mere 'haphazard, intuitive inquiry.'" UGI Sunbury, 949 F.3d at 834 (quoting Oddi v. Ford Motor Co., 234 F.3d 136, 156 (3d Cir. 2000)).

C. Fit

Third, for reliable testimony to be admissible, **[*42]** Rule 702 requires that the testimony "fit" the facts and the context of the case in which it is offered. Daubert, 509 U.S. at 591. An expert's testimony fits the case if the testimony will "assist the trier of fact." Paoli, 35 F.3d at 743. Thus, the fit requirement "goes primarily to relevance." Daubert, 509 U.S. at 591; see also Dominguez v. Yahoo!, Inc., No. 13-1887, 2017 U.S. Dist. LEXIS 11346, 2017 WL 390267, at *14 (E.D. Pa. Jan. 27, 2017) (Baylson, J.) ("[T]o be admissible, the expert testimony must help the trier of fact understand the evidence or determine a fact issue."). Said differently, the fit requirement simply extends "the requirement of reliability, or 'good grounds,' . . . to each step in an expert's analysis all the way through the step that connects the work of the expert to the particular case." Paoli, 35 F.3d at 743. As an illustration of Rule 702's fit requirement, the Third Circuit described how "animal studies [would] be admissible to prove causation in humans" only if "there [were] good grounds to extrapolate from animals to humans." Id.

VI. Discussion

A. Hall's Testimony Will Be Precluded

Homebuilder Plaintiffs' Motion challenges Hall's testimony on all three prongs of the Daubert analysis: qualification, reliability, and fit. However, other conclusions the Court reached between the filing of Homebuilder Plaintiffs' Motion (July 2, 2018) and oral argument (January 9, 2020) altered **[*43]** the landscape of pertinent legal arguments. Following those conclusions, the key issue regarding Hall's testimony is the third prong of Daubert—the "fit" of his testimony to the facts of the case.

At the hearing and in their supplemental briefing, Homebuilder Plaintiffs argue that one of the Court's interim rulings, namely the Court's decision to apply California's Cartwright Act to the state law claims, obviates the relevance of Hall's testimony entirely. (See Pls.' Supp. Mem. at 2 ("[I]n light of the Court's July 24, 2019 order on choice-of-law, ruling that California's Cartwright Act applies to all of [Homebuilder] Plaintiffs' state law claims . . . Mr. Hall's testimony offered for the sole purpose of calculating downstream pass-through is no longer relevant to any issue in this case as a matter of law.").) The importance of this line of argument only became clear *after* the Court decided the choice of law question in July 2019.

The Court agrees with Homebuilder Plaintiffs and will preclude Hall's testimony on grounds that it is not relevant as required by Daubert.

1. The Pass-Through Defense

Hall's Report and purported testimony concern downstream pass through; that is, the extent to **[*44]** which Homebuilder Plaintiffs passed on the conspiracy-induced drywall prices to homebuyers. The term "downstream pass through" is used because at this step in the distribution chain (the step from Homebuilder Plaintiff to homebuyer), the product is moving downstream towards the consumer and ultimate purchaser. Whether

Homebuilder Plaintiffs passed the price increases through to their buyers is germane because it may provide an affirmative defense—the "pass-through" defense. Defendants' theory is that, although Homebuilder Plaintiffs may have initially paid an increased price for drywall as a result of the price-fixing conspiracy, they successfully "passed through" the price increases to their customers (the homebuyers), and therefore suffered no injury.

The availability of this defense is somewhat unsettled and may depend on whether the claim is brought under federal or state ***antitrust law***. Because of these complexities, Defendants argue that Homebuilder Plaintiffs waived the issue by failing to raise it in a motion for partial summary judgment. (Defs.' Supp. Mem. at 4.) However, after the parties submitted their post-hearing supplemental briefing, the Court allowed each party to submit **[*45]** an additional, separate memorandum devoted exclusively to explaining the party's position on the legal availability of the pass-through defense under the law of California, which is the law that the Court determined governs Homebuilder Plaintiffs' state law claims. The supplemental briefing on the legal availability of the pass-through defense (to which Hall's testimony relates) enabled the parties to focus their arguments and the submissions fully apprised the Court of the relevant issues.[26]

2. Hanover Shoe and Clayworth

The availability of the pass-through defense under California's Cartwright Act is governed by the Supreme Court of California's decision in *Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 111 Cal. Rptr. 3d 666, 233 P.3d 1066 (Cal. 2010)*. To appreciate the holding of Clayworth, it is important to first understand the Supreme Court's rejection of the pass-through defense for claims brought under federal law in *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*.

Hanover Shoe concluded that "the buyer is equally entitled to damages if he raises the price for his own product" because "[a]s long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows." *Id. at 489*. In other words, a buyer that suffers an antitrust injury in the first instance but passes on the illegal price increase **[*46]** is nonetheless entitled to recover. See id. ("At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower."). Stated simply, Hanover Shoe largely foreclosed the availability of a pass-through defense to antitrust claims brought under federal law. The Court carved out narrow exceptions to this general principle of unavailability; for example, where, "an overcharged buyer has a pre-existing 'cost-plus' contract." *Id. at 494*.

Over forty years later, the Supreme Court of California examined whether the pass-through defense, which had been rejected by the Supreme Court for price-fixing claims brought under federal law in Hanover Shoe, is available for price-fixing claims brought under California state law. See *Clayworth, 233 P.3d at 1072* (noting that the issue was "whether under the Cartwright Act an antitrust defendant can defeat liability by asserting a pass-on defense"). To answer this question, the Supreme Court of California reviewed Hanover Shoe, considered the text and legislative history of the Cartwright Act, and explored broader policy considerations. *Id. at 1072-86*. Clayworth ultimately held that:

> For state antitrust purposes, the Hanover Shoe rule **[*47]** should apply even as indirect purchasers are allowed to sue. We therefore conclude, under the Cartwright Act as under federal law, that a pass-on defense generally may not be asserted. Instead, in an antitrust price-fixing case, the presumptive measure of damages is the amount of the overcharge paid by the plaintiff.

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[26] Because "[i]t is well established that a trial judge possesses the discretion to prohibit parties from raising matters they have failed to advance during the pretrial proceedings," the trial court also has the discretion to consider arguments that were preserved but not actively litigated. *Sample v. Diecks, 885 F.2d 1099, 1106 (3d Cir. 1989)*. This Court exercises that discretion here because both parties had the opportunity to set forth their substantive arguments regarding the availability of the pass-through defense.

Id. at 1086. Two exceptions apply to the general rule that the pass-through defense is unavailable under the Cartwright Act: (a) cases involving "'cost-plus' contracts" and (b) cases where application of the defense is necessary "to avoid duplication in the recovery of damages." Id.

3. Analysis

The legal availability of the pass-through defense under California's Cartwright Act is a foundational question. If the defense is not available, then Hall's purported testimony, which focuses exclusively on downstream pass through, is completely irrelevant. As the Supreme Court noted in Daubert, "[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *509 U.S. at 591*.

The parties agree on this essential principle. (Pls.' Supp. Mem. re Pass Through at 1; Defs.' Supp. Mem. re Pass Through at 2.) However, they diverge in their conclusions on whether California **[*48]** permits a pass-through defense to antitrust claims brought under state law, and this divergence leads to differing conclusions on whether Hall's testimony is relevant. The Court concludes that because Clayworth bars the pass-through defense, Hall's testimony is not responsive to any legal issue, and therefore his testimony must be precluded under Daubert.

Clayworth unambiguously forecloses use of the pass-through defense except in the two narrow situations noted by Supreme Court of California (i.e., cost-plus contracts and duplicative recovery). The Clayworth opinion leaves no room for doubt that the pass-through defense is generally unavailable under the Cartwright Act. See *233 P.3d at 1086* ("[U]nder the Cartwright Act as under federal law, . . . a pass-on defense generally may not be asserted."). Moreover, as Homebuilder Plaintiffs point out, courts applying Clayworth have overwhelmingly recognized that, unless one of the two exceptions applies, Clayworth is a bar to a defense based on the purported pass through of a price increase. See, e.g., *Tawfilis v. Allergan, Inc., No. 15-307, 2017 U.S. Dist. LEXIS 122974, 2017 WL 3084275, at *10 (C.D. Cal. June 26, 2017)* (citing Clayworth for the proposition that "[a pass through defense] is unavailable under either the Sherman Act, Hanover Shoe . . . , or the Cartwright Act"); **[*49]** *Cty. of San Mateo v. CSL Ltd., No. 10-5686, 2014 U.S. Dist. LEXIS 116342, 2014 WL 4100602, at *5 (N.D. Cal. Aug. 20, 2014)* ("Clayworth adopted the Hanover Shoe rule, which bars antitrust defendants from asserting the affirmative defense that direct purchasers who pass on an overcharge cannot sue for damages."); *In re Refrigerant Compressors Antitrust Litig., No. 09-2042, 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at *10 (E.D. Mich. Apr. 9, 2013)* (noting that the question in Clayworth was whether "the Cartwright Act permits a pass-on defense or whether, like federal law, it precludes it" and that the Clayworth court concluded pass through is generally unavailable as a defense); *In re TFT-LCD (Flat Panel) Antitrust Litig., No. 07-1827, 2012 U.S. Dist. LEXIS 182373, 2012 WL 6709621, at *2 (N.D. Cal. Dec. 26, 2012)* (permitting the defendant to proceed with the pass-through defense because "there [wa]s a very real prospect of duplicative recovery," and therefore the case fit Clayworth's second exception).

As recognized by subsequent courts, the plain language of Clayworth bars pass-through defenses. The Supreme Court of California's unequivocal statement that an alleged antitrust violator cannot defend on the basis of the plaintiff's pass through compels this Court to reject Hall's testimony as not relevant to any live legal issue in the case. Defendants articulate two reasons why Hall's testimony is relevant under Daubert, but neither argument persuades the Court.

First, Defendants attempt to distinguish downstream pass through as a defense to liability from downstream pass **[*50]** through as an offset of damages. (Defs.' Supp. Mem. re Pass Through at 3.) Defendants assert that because they seek to use downstream pass through to reduce damages—*not* to bar liability—Clayworth is not an impediment. (Id.) However, this distinction is unsupported by either Clayworth or Hanover Shoe. To the contrary, Clayworth suggests its rejection of the pass-through defense applies to damages. See *233 P.3d at 1086* ("[I]n an antitrust price-fixing case, the presumptive measure of *damages* is the amount of the overcharge paid by the plaintiff." (emphasis added)).

Second, Defendants argue that even if the pass-through defense is not available for Homebuilder Plaintiffs' Cartwright Act claims, it is relevant to Homebuilder Plaintiffs' claims under California's Unfair Competition Law ("UCL"). (Defs.' Supp. Mem. re Pass Through at 5.) Specifically, Defendants point to a portion of Clayworth discussing standing under the UCL stating "[t]hat a party may ultimately be unable to prove a right to damages . . . does not demonstrate that it lacks standing to argue for its entitlement to them." *233 P.3d at 1087*. Shortly after Clayworth was decided, the Supreme Court of California issued its decision in *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (Cal. 2011)*, a case brought under **[*51]** the UCL. The Kwikset court rejected an argument raised by the defendant-manufacturer that the court characterized as a "pass-on defense in disguise." *Id. at 893*. Kwikset explained that "in the eyes of the law, a buyer forced to pay more than he or she would have is harmed at the moment of purchase, and further inquiry into such subsequent transactions, actual or hypothesized, ordinarily is unnecessary." Id. (footnotes omitted). Although Defendants correctly note that the factual context is very different here, the Court cannot ignore the unmistakable language of *Kwikset*.[27]

In summary, the unavailability of the pass-through defense is inescapable given the clear language of Clayworth. The distinction Defendants attempt to draw between liability and damages is unsupported by Clayworth, and Defendants' invocation of Homebuilder Plaintiffs' UCL claim does not require a different conclusion because Kwikset makes clear that the ban on pass-through defenses also applies to UCL claims. Because the pass-through defense is generally unavailable under California law,[28] Hall's testimony—which focuses entirely on downstream pass through—does not have "the 'potential for assisting the trier **[*52]** of fact.'" *United States v. Schiff, 602 F.3d 152, 173 (3d Cir. 2010)* (quoting *Kannankeril, 128 F.3d at 806*). Hall's testimony therefore fails to satisfy the "fit" prong of the Daubert analysis and must be precluded under *Rule 702*.

B. Dr. Willig's Testimony Will Not Be Precluded

Homebuilder Plaintiffs' attacks based on cointegration, and their attacks on Dr. Willig's choice not to use the first differences method, converge, and so they can be analyzed together. Overall, Homebuilder Plaintiffs seek to preclude Dr. Willig's testimony by transmuting a few qualified statements into "damning" admissions of a "*fundamental flaw* in his methodology," and as "Dr. Willig kn[o]w[ing] there was a test available to confirm the accuracy of his results [that] he failed to run." (Pls.' Supp. Mem. at 6-7 (emphasis in original).) Their theory, however, overstates the issues with Dr. Willig's testimony, and in some respects is mistaken as to the basic issue.

The question is whether Dr. Willig's analysis of cointegration, and therefore his forecasting model, is reliable. This is not the same inquiry as whether Dr. Willig has run every conceivable test for cointegration. Of course, even once Daubert reliability is established, Homebuilder Plaintiffs can argue that there were more, or better, **[*53]** tests that Dr. Willig should have run. But Homebuilder Plaintiffs will have to make those arguments to the trier of fact, not this Court.

The Court concludes that Dr. Willig's analysis of cointegration is reliable. To begin with, it is helpful to review one more time what tests Dr. Willig ran, and what his supposedly damning admissions about each were.

First, Dr. Willig ran the Kao and Pedroni tests. The parties agree that these would ordinarily be adequate cointegration tests. However, "in the presence of cross-sectional codependency," these tests may be "skewed towards finding the cointegrating relationship." (Mot. re Willig at 12 (quoting Willig Dep.).) Dr. Willig was not sure how severe that skew was. (Mot. re Willig at 12 (quoting Willig Dep.).) Asked whether the panel data Dr. Willig used

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[27] Defendants reference *Elite Logistics Corp. v. MOL America, Inc., No. 11-2952, 2016 U.S. Dist. LEXIS 13019, 2016 WL 409650 (C.D. Cal. Feb. 2, 2016)*. In that case, the court was "not persuaded by [the] suggestion that the Kwikset court imposed a general bar on pass-on defenses, or even a bar in all UCL cases." *2016 U.S. Dist. LEXIS 13019, [WL] at *3*. But in a previous opinion in that case, the Elite court cited Kwikset for the proposition that "the California Supreme Court has rejected such ... 'pass-on' defenses, even outside the antitrust context." *Elite Logistics Corp. v. MOL Am., Inc., No. 11-2952, 2013 U.S. Dist. LEXIS 124109, 2013 WL 4601237, at *4 (C.D. Cal. Aug. 29, 2013)*. The Court agrees with the first conclusion reached by Judge Pregerson in Elite.

[28] As noted, Clayworth recognized two exceptions to the general rule of unavailability. Homebuilder Plaintiffs argue that it is undisputed neither exception is implicated here. (Pls.' Supp. Mem. at 4; Pls.' Supp. Mem. re Pass Through at 8.) Defendants do not agree or disagree, nor do they offer arguments under either exception.

displayed "ha[d] cross-sectional [co]dependency," Dr. Willig acknowledged that there were "signs of it." (Mot. re Willig at 11 (quoting Willig Dep.).) At one point, asked to confirm whether there was "an issue about whether [the Kao and Pedroni tests] accurately" assess cointegration, Dr. Willig responded, "I think that's fair." (Mot. re Willig at 11 (quoting Willig Dep.).)

Second, Dr. Willig ran **[*54]** the Westerlund test.[29] During his deposition, he admitted that the Westerlund test only showed a cointegrating relationship when run with longer time lags. When run with intermediate-term time lags, the test "couldn't affirmatively say yes, there is a cointegrating relationship that covers those intermediate lags." (Reply re Willig at 11 (quoting Willig Dep.).) Using both long-term and intermediate-term time lags "is the standard practice." (Reply re Willig at 11 (quoting Willig Dep.).) He found the results from the Westerlund test to be "not perfect, but it's encouraging." (Reply re Willig at 10 (quoting Willig Dep.).)

Third, Dr. Willig believes that since empirical evidence shows that demand and price are highly correlated and move together, and since economic theory generally expects supply, demand, and price to move together, his data should be cointegrated.

Together, these three analyses are sufficient to show that Dr. Willig's methods are reliable enough for admission. For an expert's opinion to be reliable, "[t]he grounds for the expert's opinion merely have to be good[;] they do not have to be perfect." *Paoli, 35 F.3d at 744*. Here, Dr. Willig has used three different methods to assess the cointegration **[*55]** of his data. Collectively, the three analyses demonstrate reliability, even if each may have individual flaws.

Homebuilder Plaintiffs have not shown otherwise. As to the Kao and Pedroni tests, all Homebuilder Plaintiffs have demonstrated is that there is an "issue" about whether the Kao and Pedroni tests may be "skewed" in Defendants' favor to an unknown extent based on codependency, which the data shows "signs" of. As to the Westerlund test, Homebuilder Plaintiffs have demonstrated that it did not affirmatively demonstrate cointegration when run using intermediate time-lags. And Homebuilder Plaintiffs have possibly shown that Dr. Willig's results could be considered more reliable had he also used the first-differences method as an additional check for cointegration. The facts, however, that there are "signs" that one method may yield "skewed" results, or that another method does not yield "perfect" results, or that there was an additional means of assessing reliability that Dr. Willig did not apply, are not enough to make Dr. Willig's testimony unreliable.

Homebuilder Plaintiffs also complain that Dr. Willig's early deposition testimony, asserting that his methods were reliable, was **[*56]** premised on his mistaken assumption that he had used the first differences methodology. (Pls.' Supp. Mem. at 7-8.) However, Dr. Willig stood behind the reliability of his methods even after being reminded that he did not use the first differences methodology. To the extent that Homebuilder Plaintiffs wish to explore the purported tension between the "testimony given after he corrected the record, seeking to now downplay the significance of the first difference test" and "his earlier admissions," (Pls'. Supp. Mem. at 8), that exploration must occur at trial.

Finally, contrary to Homebuilder Plaintiffs' position, admitting Dr. Willig's testimony is consistent with this Court's decision in Dominguez. Dominguez barred expert testimony on the grounds that the experts' hypotheses were literally untestable: the software at issue was "no longer operable, and could not be resuscitated, [which] basically prevented any expert, no matter how qualified" from testing it. *Dominguez, 2017 U.S. Dist. LEXIS 11346, 2017 WL 390267, at *19-20*. By contrast, Dr. Willig's testimony was testable and tested. Homebuilder Plaintiffs' quarrel is with the choice of tests. For the reasons already discussed, that is a matter for a trier of fact, not for Daubert.

C. Dr. Ingberman's [*57] Testimony Will Not Be Precluded

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[29] Although Homebuilder Plaintiffs briefly complained of the timing of the Westerlund analysis at oral argument, Hr'g Tr. 76:21-77:1, neither Homebuilder Plaintiffs' reply brief nor their post-hearing supplemental briefing addresses the timeliness of the Westerlund analysis. The Court concludes that it is timely rebuttal testimony under ***Rule 26(a)(2)(D)(ii)***, as is Dr. Ingberman's attack on the Kao and Pedroni tests at his deposition.

1. Proving Damages at Trial

Defendants challenge one aspect of the report of Dr. Ingberman, who Plaintiffs intend to call as a damages expert. As a preamble to the discussion of Defendants' Daubert objection to Dr. Ingberman's proposed testimony, the Court will describe how Homebuilder Plaintiffs will likely present the factual and expert bases for their damages claim.

As the Third Circuit has held, Homebuilder Plaintiffs have a less rigorous burden to prove damages in an antitrust price-fixing case than they do to prove the existence of a price-fixing agreement, or that Homebuilder Plaintiffs suffered economic injury because of artificially increased price levels. *LePage's Inc. v. 3M, 324 F.3d 141, 166 (3d Cir. 2003)* (en banc) (citing *Bonjorno v. Kaiser Aluminum & Chem. Corp., 752 F.2d 802, 812-13 (3d Cir. 1984))*. Accordingly, this Court is under an obligation to be more "liberal" in the admissibility of evidence as to the amount of damages, and in considering the legal sufficiency of damages evidence. This lower standard applies to expert testimony as well as fact evidence.

In a general sense, the measure of damages in a price-fixing case is the increased cost that a purchaser paid because of the agreement to raise prices. In the drywall industry, because Homebuilder **[*58]** Plaintiffs have testified that they frequently do not know the manufacturer of the drywall that they have purchased,[30] and because they were indirect purchasers, proving damages is likely to be a two-step process.[31]

The first step of proof will come from Homebuilder Plaintiffs themselves, who can testify, from personal knowledge and their own business records (or from Defendants' data produced during discovery), of the quantity and cost of drywall each of them purchased. This data is already in the record, and is not in dispute. The second step will likely come from an expert, in this case Dr. Ingberman. Homebuilder Plaintiffs have presented Dr. Ingberman's expert opinion that uses a regression to estimate damages and tabulates those estimates in various ways.

To account for the possibility that there may not be umbrella damages in this case, Dr. Ingberman's report estimates damages for each Defendant based on what market share a particular Defendant had of the overall drywall sales during a specific year. Thus, if a specific Homebuilder Plaintiff shows that it purchased 100,000 square feet of drywall during a specific year, but is unable to prove the identity of the manufacturer of that **[*59]** drywall, then that Homebuilder Plaintiff intends to have Dr. Ingberman testify, as an expert, as to his estimate of the market share that the Defendant (either L&W or PABCO) possessed, and calculate damages based on that market share.

For example, if L&W had 25% of the overall U.S. sales of drywall in a particular year, then the Homebuilder Plaintiff could use that 25% share to estimate the quantity of drywall that they purchased from L&W (by applying it to the 100,000 square feet of drywall they purchased), and compute its compensable damages. That volume estimate would then be multiplied by the overcharge amount, to reach the amount of damages recoverable by that Homebuilder Plaintiff from L&W.[32] The same method could be replicated to estimate damages against PABCO.

2. Dr. Ingberman's Market Share Testimony

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[30] Defendants have asserted that the drywall purchased always shows the identity of the manufacturer. This is a disputed factual issue for trial. For purposes of this Motion, the Court assumes Homebuilder Plaintiffs were unaware of the manufacturer of their drywall purchases.

[31] The Umbrella Damages Opinion may allow Homebuilder Plaintiffs to proceed without identifying the specific manufacturer from whom they purchased. Under an umbrella damages theory, as applied to proof of damages, each Homebuilder Plaintiff can prove damages based on its overall purchases of drywall, without regard to the identity of the manufacturer, if the evidence shows that the nonconspiring manufacturers raised their prices because of the price-fixing conspiracy. *Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573, 584 n.45 (3d Cir. 1979)*.

[32] Those Defendants who have already settled, of course, cannot be held liable at the upcoming Homebuilder Plaintiffs' trial. However, the prices they charge for drywall may be admissible at trial.

As an initial matter, the Court rejects Homebuilder Plaintiffs' arguments that Defendants' contentions are mooted by this Court's ruling on umbrella damages. (Pls.' Supp. Mem. 9-10.) The Court's ruling on umbrella damages was without prejudice. Defendants, therefore, can raise the issue again at trial if the evidence adduced fails to prove Homebuilder Plaintiffs' theory. (Umbrella **[*60]** Damages Opinion at 22.) The Court's ruling was also without prejudice as to Homebuilder Plaintiffs, so if their theory of umbrella damages does not prevail, they may present an alternate theory of damages. Because Homebuilder Plaintiffs still need to prove their umbrella damages theory at trial, Defendants' Motion to Preclude Dr. Ingberman's market share estimates is not moot.

As for the substance of Defendants' Daubert motion, although Defendants have some support for their argument that mismatched market share estimates are inherently suspect, the Court will not accept Defendants' arguments to preclude Dr. Ingberman's reliance on market share estimates if Homebuilder Plaintiffs' theory of umbrella damages is not accepted by the trier of fact. Defendants agree that estimates are not per se prohibited from use by appropriately qualified expert witnesses, (Reply re Ingberman 2), and Dr. Ingberman has used some market data to make his conclusions about market shares.

When deciding questions of reliability, "the trial judge [has] considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho, 526 U.S. at 152*. This is especially true when **[*61]** ruling on issues related to damages. Cf. *Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1934-35, 195 L. Ed. 2d 278 (2016)* (upholding the district court's discretion to award enhanced damages in Patent Act cases).

The Supreme Court's interpretation of the Patent Act in Pulse is of some resonance in an antitrust case where damages are also often complex to calculate. This is particularly true in antitrust cases where there are, as in this case, multiple and complex channels of distribution. Damages in these cases are not easy to compute, and, as noted above, the Court must be "liberal" in ruling on admissibility.

In *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254 (3d Cir. 2012)*, the Third Circuit reaffirmed this liberal view of the admissibility of damages evidence, especially in circumstances in which the plaintiff will be unable to prove damages without it. ZF Meritor was an antitrust case in which the defendant's anticompetitive conduct foreclosed a substantial share of the market to competitors. *Id. at 263*. The district court excluded the plaintiffs' expert's testimony estimating damages because the expert impermissibly relied on the plaintiffs' internal market share and profit margin projections. *Id. at 267*. The district court also denied the plaintiffs' request for permission to amend the expert's report to estimate damages with an econometric **[*62]** model that did not rely on the plaintiffs' projections, but instead relied on external sources to estimate market share. *Id. at 267-68, 295*. Without the expert's testimony, the plaintiffs were unable to prove damages, resulting in a damages award of *$0. Id. at 268*.

The Third Circuit reversed the district court's decision not to permit the expert to use his econometric model to estimate market share mainly because of "the critical nature of the evidence, and the consequences if permission to amend [wa]s denied." *Id. at 299*. The same would be true here if the Court were to preclude Dr. Ingberman's market share testimony. "[I]n the antitrust context, a damages award not only benefits the plaintiff, it also fosters competition and furthers the interests of the public by imposing a severe penalty (treble damages) for violation of the antitrust laws." *Id. at 300* (citing *Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972))*. As Defendants admit, "Dr. Ingberman's estimate of market share is Homebuilders' only avenue for presenting purported evidence of how much wallboard they bought from any particular defendant or from the allegedly conspiring defendants as a group." (Defs.' Supp. Mem. re Ingberman at 4.) In other words, if Homebuilder Plaintiffs' theory of umbrella damages does not prevail at **[*63]** trial, then without Dr. Ingberman's estimates, "not only will [Homebuilder] Plaintiffs be unable to recover for the antitrust injury [Defendants] caused, the policy of deterring antitrust violations through the treble damages remedy will also be frustrated." *ZF Meritor, 696 F.3d at 300* (citing *Paoli, 35 F.3d at 750*). This weighs strongly in favor of admitting Dr. Ingberman's market share estimates.

Defendants do not cite any Third Circuit precedent rejecting estimates made by an expert with the type of experience that Dr. Ingberman developed from working on this case. Nor have Defendants shown any Third Circuit precedential holding that forbids experts from relying on estimates that they have arrived at based on their study of a particular industry or a particular market. Instead, there is precedent in the Third Circuit that approves of courts admitting reasonable estimates made by an expert who has familiarity with the overall topic and the facts of the case. See *Schneider, 320 F.3d at 406* (permitting an invasive cardiologist to testify as an expert about drug prescriptions during surgical procedures because his "experience render[ed] his testimony reliable").

The Court finds that Dr. Ingberman's opinion is reliable and will be helpful to the ultimate trier **[*64]** of fact, subject to arguments at trial about his credibility, and the jury's determination of what weight to give to his testimony and to that of Homebuilder Plaintiffs themselves. Hearing Dr. Ingberman's testimony and assessing any potential flaws will be "an important part of assessing what conclusions [are] correct," and may provide, at a minimum, a useful starting point for determining the damages attributable to each Defendant. *Paoli, 35 F.3d at 744-45*. At bottom, Defendants' arguments go to the weight of Dr. Ingberman's opinion, and are not grounds to preclude his testimony.

Here, Dr. Ingberman has developed an extensive familiarity with the topics of this case, and the drywall industry generally, from drafting his two highly detailed expert reports. Based on the long list of materials Dr. Ingberman relied upon to draft his reports, (Ingberman FoI, Attach. C), and complemented by his experience as an expert in other antitrust cases, (Ingberman FoI, Attach. A), the Court is satisfied that Dr. Ingberman has become well-informed on the drywall industry, and has based his estimates on his experience in the field. Considering Dr. Ingberman's familiarity with the drywall industry and his background in antitrust **[*65]** cases, the Court finds that his method of estimating Defendants' market share is reliable. See *CB Aviation, LLC v. Hawker Beechcraft Corp., No. 10-1411, 2011 U.S. Dist. LEXIS 128918, 2011 WL 5386359, at *6 (E.D. Pa. Nov. 8, 2011)* (DuBois, J.) (permitting an expert in aircraft appraisals to make market value estimates because his estimates were "based on extensive experience and [were] thus reliable"); *Floorgraphics, Inc. v. News Am. Mktg. In-Store Servs., Inc., 546 F. Supp. 2d 155, 172-73 (D.N.J. 2008)* (Hughes, M.J.) (admitting an expert's damages estimates even though the expert did not adjust his estimates to account for factors that may have changed the results).

This Court is satisfied that Dr. Ingberman has diligently attempted to use the best available data, and his reliance on his own subjective estimates is not necessarily, in these circumstances and under settled law on calculating damages in antitrust cases, inadmissible. Defendants' Motion to Preclude Dr. Ingberman's market share estimates will be denied.

VII. Conclusion

For the foregoing reasons, Homebuilder Plaintiffs' Motion to Preclude the Testimony of Defendants' Expert, David Hall, (ECF 321), is granted and Hall will be precluded from testifying at trial. Homebuilder Plaintiffs' Motion to Preclude the Testimony of Defendants' Expert, Dr. Robert Willig, (ECF 320), and Defendants' Motion to Preclude the Testimony of Homebuilder Plaintiffs' Expert, Dr. **[*66]** Daniel Ingberman, (ECF 319), will both be denied, and Dr. Willig and Dr. Ingberman may testify at trial.

An appropriate Order follows.

ORDER RE: DAUBERT MOTIONS

AND NOW, this 6th day of April, 2020, upon consideration of Homebuilder Plaintiffs' Motion to Preclude the Testimony of Defendants' Expert, David Hall, (ECF 321), Homebuilder Plaintiffs' Motion to Preclude the Testimony of Defendants' Expert, Dr. Robert Willig, (ECF 320), and Defendants' Motion to Preclude the Testimony of Homebuilder Plaintiffs' Expert, Dr. Daniel Ingberman, (ECF 319), the responses and replies thereto, oral argument, and the supplemental materials submitted by the parties, for the reasons stated in the foregoing memorandum it is hereby **ORDERED** that:

1. Homebuilder Plaintiffs' Motion to Preclude the Testimony of Defendants' Expert, David Hall, (ECF 321), is **GRANTED**.

2. Homebuilder Plaintiffs' Motion to Preclude the Testimony of Defendants' Expert, Dr. Robert Willig, (ECF 320), is **DENIED**.

3. Defendants' Motion to Preclude the Testimony of Homebuilder Plaintiffs' Expert, Dr. Daniel Ingberman, (ECF 319), is **DENIED**.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON

United States District Court Judge

Dated: April 6, [*67] 2020

Atm Shafiqul Khalid v. Microsoft Corp.

United States District Court for the Western District of Washington

April 6, 2020, Decided; April 6, 2020, Filed

CASE NO. C19-130-RSM

Reporter
2020 U.S. Dist. LEXIS 60263 *; 2020-1 Trade Cas. (CCH) P81,178; 2020 WL 1674123

ATM SHAFIQUL KHALID, an individual and on behalf of similarly situated, XENCARE SOFTWARE, INC., Plaintiff, v. MICROSOFT CORP., a Washington Corporation, and JOHN DOE n, Defendants.

Subsequent History: Affirmed by *Khalid v. Microsoft Corp., 2023 U.S. App. LEXIS 6012 (9th Cir. Wash., Mar. 14, 2023)*

Prior History: *Khalid v. Microsoft Corp., 409 F. Supp. 3d 1023, 2019 U.S. Dist. LEXIS 150633, 2019 WL 4190397 (W.D. Wash., Sept. 4, 2019)*

Core Terms

patent, amended complaint, anticompetitive, enterprise, antitrust, conspiracy, plaintiff's claim, patent rights, extortion, vendor, allegations, predicate act, leave to amend, rule of reason, price-fixing, racketeering, inventions, violations, argues, declaratory relief, Sherman Act, Disclosure, monopolize, entity, restraint of trade, employees, license, rights, right of first refusal, declaratory judgment

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Judges: RICARDO S. MARTINEZ, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: RICARDO S. MARTINEZ

Opinion

ORDER GRANTING DEFENDANT MICROSOFT CORPORATION'S MOTION TO DISMISS

I. INTRODUCTION

This matter comes before the Court on Defendant Microsoft Corporation ("Microsoft")'s Motion to Dismiss Plaintiff ATM Shafiqul Khalid's Second Amended Complaint. Dkt. #32. The Court finds oral argument unnecessary to resolve the underlying issues. Having reviewed Defendant's Motion, Plaintiff's Response, Defendant's Reply, and the remainder of the record, the Court GRANTS Defendant's Motion to Dismiss and dismisses Plaintiff's claims with prejudice and without leave to amend.

II. BACKGROUND

On September 4, 2019, this Court dismissed Plaintiff's First Amended Complaint. Dkt. #20. The Court granted Plaintiff leave to amend three of his claims: Counts 1 and 2 under the Sherman Act, and Count 3 under the *federal Racketeer Influenced and Corrupt Organizations Act ("RICO")*. *Id.* at 22. The Court **[*2]** also granted Plaintiff leave to amend two of his requests for declaratory relief, Counts 9 and 10. The remainder of Plaintiff's claims were dismissed with prejudice and without leave to amend. *Id.* On November 29, 2019, Plaintiff filed the Second Amended Complaint. Dkt. #29. Microsoft's Motion to Dismiss seeks dismissal of Plaintiff's remaining claims with prejudice. Dkt. #32 at 17.

Plaintiff's Second Amended Complaint ("SAC") provides many of the same facts asserted in his First Amended Complaint. After accepting a position with Microsoft as a Senior Program Manager in its Bing division, Plaintiff signed Microsoft's Employee Agreement (the "Employee Agreement"). Dkt. #29 at ¶¶ 14-16. This agreement included a provision under Section 5 that assigned to Microsoft all rights, title and interest in all inventions that the employee "may conceive, develop, reduce to practice or otherwise produce" during his employment with Microsoft. Dkt. #29-1 at 2-3. Section 6 of the Employee Agreement asked Plaintiff to attach a list "describing all Inventions belonging to me and made by me prior to my employment with MICROSOFT that I wish to have excluded from this Agreement. If no such list is attached, I represent that **[*3]** there are no such Inventions." Dkt. #29 at ¶ 16. The Employment Agreement further noted on its first page: "If you wish to attach a list of inventions, per paragraph 6, below, please contact your recruiter." *Id.* at ¶ 14.

Plaintiff signed the Employee Agreement on December 19, 2011 and sent a separate email to his recruiter, Shannon Carlsen, attaching an invention exclusion list (the "Exclusion List") that listed nine patentable items. *Id.* at ¶¶ 17-19. This Exclusion List included inventions for a minicloud subscription service ("the '637 patent") and a framework to protect computer systems from viruses and spyware ("the '219 patent") that he had filed prior to starting work at Microsoft. *Id.* at ¶¶ 19-20; Dkt. #29-5. At his Microsoft employee orientation program in January 2012, Plaintiff signed a hard copy of the Employee Agreement, submitted his Exclusion List for the second time and noted by hand in the hard copy Employee Agreement that he submitted additional pages. *Id.* at ¶ 18. Plaintiff worked at Microsoft from January 9, 2012 until his termination in early February 2015. *Id.* at ¶ 22.

On February 19, 2015, Microsoft's in-house counsel notified Plaintiff that he had not listed any inventions under Section 6 of **[*4]** the Employment Agreement. *Id.* at ¶¶ 44-45. For that reason, in-house counsel stated, Microsoft retained an assignment right in the patents for the '637 and '219 patents. Plaintiff claims that Microsoft continued to deny receipt of his Exclusion List, despite Plaintiff's requests to various employees for hard copies of his signed Employee Agreement. *Id.* at ¶¶ 46-51. On July 9, 2015, Microsoft offered to put together an agreement if Plaintiff "agreed to give Microsoft royalty free access to all present and future patents related to the Mini-cloud systems in exchange for resolving all disputes." *Id.* at ¶ 50. Plaintiff declined this offer on the basis that it was unfair and anti-competitive.

On May 27, 2016, Plaintiff received a letter from Microsoft's outside counsel, Merchant & Gold. This 2016 letter ("the M&G letter") re-stated Microsoft's position that Plaintiff had granted Microsoft a "royalty-free license, irrevocable, worldwide license" to those inventions. *Id.* at ¶ 53 (quoting Dkt. #29-7 at 4). Outside counsel offered to transfer to Plaintiff all of Microsoft's ownership interest in the '219 and '637 patent families in exchange for his granting Microsoft a non-exclusive, royalty-free license to the disputed **[*5]** patent families and fully releasing Microsoft from all claims and liability. *Id.*

Plaintiff claims that Citrix Systems, Inc. ("Citrix"), a Microsoft vendor that employed Plaintiff before he began working at Microsoft, took part in issuing the May 2016 M&G letter. Dkt. #29 at ¶ 178. Plaintiff had sued Citrix in state court in October 2015 in an effort to clear title to the '219 and '637 patents, which Citrix had also attempted to claim. *Id.* at ¶ 56. On August 1, 2018, the state court entered a $5.8 million judgement in favor of Plaintiff against Citrix. *Id.* at ¶ 62. Plaintiff maintains that during the state court trial, a chief architect of Citrix "testified and suggested that Citrix wanted to protect its partner and suggested that Khalid's patent could have been hostile to those partners. [The chief architect] also testified that Citrix never sold anti-virus kind of products, an area 219 patent targeted to solve." *Id.* at ¶ 60.

Plaintiff's Second Amended Complaint alleges that Microsoft, acting in concert with its vendor, Citrix, engaged and continues to engage in a patent-grabbing scheme through its patent rights assignment provision in the Employee Agreement. *Id.* at ¶¶ 69-79. He maintains that Microsoft **[*6]** fraudulently denied the existence of his exclusion list, *id.*, and that Citrix acted in concert with Microsoft to cloud Plaintiff's patent title and threaten him with baseless litigation. *Id.* at ¶¶ 111-112, 131, 178. Plaintiff claims that Microsoft's scheme violates antitrust laws under *Sections 1* and *2* of the Sherman Act and the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). *Id.* at ¶¶ 96-114. He also seeks declaratory relief that the Employee Agreement violated *RCW 49.44.140* and that Microsoft engaged in inequitable conduct. *Id.* at ¶¶ 151-157.

III. DISCUSSION

A. Legal Standard

In making a 12(b)(6) assessment, the court accepts all facts alleged in the complaint as true and makes all inferences in the light most favorable to the non-moving party. *Baker v. Riverside County Office of Educ., 584 F.3d 821, 824 (9th Cir. 2009)* (internal citations omitted). However, the court is not required to accept as true a "legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. The complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id. at 678*. This requirement is met when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct **[*7]** alleged." *Id.* The complaint need not include detailed allegations, but it must have "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555*. Absent facial plausibility, a plaintiff's claims must be dismissed. *Id. at 570*. Because Plaintiff is proceeding pro se, his pleadings must be liberally construed. *Eldridge v. Block, 832 F.2d 1132, 1137 (9th Cir. 1987)*.

B. Claims Previously Dismissed with Prejudice and Surreply

As an initial matter, Plaintiff has improperly used his Second Amended Complaint to replead claims dismissed with prejudice and without leave to amend. *See* Dkt. #29 at ¶¶ 120-124 (RICO claim predicated on forced labor); ¶¶ 125-132 (civil rights claims); ¶¶ 141-150 (fraud); and ¶¶ 158-179 (declaratory relief for *Fourteenth Amendment* violations). The Court instructed Plaintiff in its initial order of dismissal, Dkt. #20, and again in its order denying Plaintiff's motion for reconsideration, Dkt. #28, that he was not granted leave to amend these claims. The Court will not reconsider them here. Similarly, Plaintiff has renewed his request that he represent a class of all Microsoft employees who signed an employment contract with Microsoft similar to the Employee Agreement that he signed. Dkt. #29 at ¶¶ **[*8]** 133-140. The Court has already addressed this issue and will not reconsider it here. *See* Dkt. #20 at 6-7.

Plaintiff also filed a surreply, Dkt. #36, but provided no notice to the Court as required by this district's Local Rules. *See* *Local Rules W.D. Wash. LCR 7(g)(1)*. While pro se parties are generally held to less stringent standards, a pro se litigant must follow the same rules of procedure that govern other litigants. *Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir. 1995)*. Moreover, Plaintiff has improperly used the surreply to pose the same or additional arguments in opposition to the Motion to Dismiss. Microsoft's reply brief does not raise new arguments, but merely reiterates the grounds for dismissal asserted in its opening brief. Therefore, the court will not consider the surreply in resolving the motion and hereby strikes it.

C. Sherman Act *Section 1* Claims

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations . . . ." *15 U.S.C. § 1*. To state a claim under *Section 1*, a plaintiff must allege (1) a contract, combination, or conspiracy between two or more entities; (2) in unreasonable restraint of trade; that (3) affects interstate **[*9]** commerce. *See id.*; *Am. Ad. Mgmt., Inc. v. GTE Corp., 92 F.3d 781, 788 (9th Cir. 1996)*. Here, Plaintiff identifies three "agreements" entered into by Microsoft that allegedly violated *Section 1*: (a) the Employee Agreement; (b) the vendor agreement with Citrix; and (c) the 2016 M&G letter from Microsoft's outside counsel, either on its own or in combination with the Citrix vendor agreement. Dkt. #29 at ¶¶ 98-102.

1. Actionable Conspiracy

Microsoft contends that Plaintiff has failed to state an actionable conspiracy with respect to the Employee Agreement because there can be no conspiracy between the parties to the agreement—here, Plaintiff and Microsoft. Dkt. #32 at 10-11. The Court agrees. The Court has previously considered and dismissed Plaintiff's theory that the Employee Agreement may violate *Section 1*. Dkt. #20 at 7 ("It is well-established that *Section 1 of the Sherman Act* does not reach "wholly unilateral" conduct by a single entity) (citing *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (internal quotations omitted)). Plaintiff responds that the Employee Agreement is not subject to the single entity rule because, as a potential competitor of Microsoft, he "didn't have economic unity" with his employer. Dkt. #34 at 10 (citing *Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1147 (9th Cir. 2003)*, *as amended on denial of reh'g* (Apr. 24, 2003)).

Plaintiff's argument to preserve his *Section 1* claim **[*10]** as to the Employee Agreement is difficult to follow and appears to contradict the gravamen of his complaint. Although courts recognize exceptions to the "single entity" principle generally applied to intra-company agreements, such an exception applies to situations where an individual is acting as a coconspirator with the corporation because of his "independent personal stake" in the conspiracy's success. *American Needle, Inc. v. National Football League, 560 U.S. 183, 200, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* ("Agreements within a firm can constitute concerted action covered by *§ 1* when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action."). Setting aside the logical fallacy of Plaintiff's argument, the SAC makes clear that he does not intend to claim that he was in conspiracy with Microsoft nor that he derived any benefit from the Employee Agreement—indeed, he alleges the very opposite. *See, e.g.*, Dkt. #29 at ¶¶ 99-100. Accordingly, Plaintiff's *Section 1* claim as to the Employee Agreement again fails to state an actionable conspiracy.

2. Unreasonable Restraint of Trade

Turning to the remaining two "agreements," the Citrix vendor agreement and the May 2016 M&G letter, Microsoft **[*11]** argues that Plaintiff has failed to allege an unreasonable restraint of trade as to any agreements between Microsoft and Citrix. Dkt. #32 at 12. A *Section 1* plaintiff must sufficiently plead a restraint of trade that falls under one of three rules of analysis: rule of reason, per se, or quick look. While courts typically need not decide which standard to apply at the pleading stage, they must still determine whether the complaint has alleged sufficient facts to state a claim under at least one of these three rules. *See* *In re High-Tech Employee Antitrust Litig., 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012)* ("Indeed, that decision is more appropriate on a motion for summary judgment.").

The rule of reason is the presumptive, default standard and "requires the antitrust plaintiff to demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive." *California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1133 (9th Cir. 2011)*. This rule requires a court to examine a variety of factors such as information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history and effect. *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. Next, a small category of restraints are considered illegal per se because "they always or almost always tend to restrict competition and decrease output." *Ohio v. Am. Express Co., 138 S. Ct. 2274, 2283, 201 L. Ed. 2d 678 (2018)*.

Because per se agreements are so "manifestly **[*12]** anticompetitive" and lacking in "any redeeming virtue," the detailed industry analysis required under the rule of reason is not required for per se restraints. Finally, the "quick look" analysis applies to a certain class of restraints that is "not unambiguously in the per se category" but "may require no more than cursory examination to establish that their principle or only effect is anticompetitive." *Safeway, Inc., 651 F.3d at 1133*. Under the quick look analysis, courts conduct a "truncated rule of reason" analysis if the anticompetitive effects on customers and markets are clear in the absence of a detailed market analysis. *Id.*

Microsoft argues that the rule of reason applies and that Plaintiff has failed to allege restraint of trade under this standard. Dkt. #32 at 12. Plaintiff responds that both agreements are either per se *Section 1* violations or restraints of trade under the quick look approach, and he is therefore relieved from having to plead injury to competition. Dkt. #34 at 16. It is well-established that a plaintiff is not required to plead under all three possible rules. *United States v. eBay, Inc., 968 F.Supp.2d at 1030, 1037-38 (2013)* ("A plaintiff is the master of its complaint and may choose which claims to allege. The strategy of alleging only **[*13]** per se and quick look violations is not an unprecedented one."). However, a plaintiff must be prepared to "abide by the consequences of its pleading decisions," which includes risk of dismissal. *Id. at 1038*.

To the extent Plaintiff attempts to assert "per se" violations of the Sherman Act, he fails to allege sufficient facts to support this theory. It is not apparent that either the vendor agreement or the M&G letter have "manifestly anticompetitive effects," or that they "lack any redeeming virtue." *California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1133 (9th Cir. 2011)*. The M&G letter applies to Plaintiff alone without any application to other competitors in the market. The vendor agreement's "anticompetitive effect" is likewise unclear. This agreement claims all intellectual property produced by Citrix's employees during their employment with Citrix and transfers it to Microsoft. Dkt. #29 at ¶ 54. Plaintiff has failed to direct the Court to any cognizable per se restraint of trade contained therein. *Cf. United States v. Joyce, 895 F.3d 673, 677 (9th Cir. 2018)* (per se violations include horizontal agreements among competitors to fix prices or divide markets, group boycotts, tying arrangements, and output limitations).

Plaintiff responds that Citrix and Microsoft's intellectual property agreements equate to "naked price-fixing" **[*14]** because their claims clouded title to his patents and reduced their value to zero. Dkt. #29 at ¶ 99; Dkt #34 at 8. Accepting these claims as true, the Court still finds no support for Plaintiff's theory that clouding his patent title—even in bad faith—equates to one of the four price-fixing arrangements recognized under ***antitrust law***. *Cf. Knevelbaard Dairies v. Kraft Foods, Inc. 232 F.3d 979. 988 (9th Cir. 2000)* (Describing the four types of price-fixing arrangements: horizontal minimum price-fixing, horizontal maximum price-fixing, vertical minimum price-fixing, and vertical maximum price-fixing).

Similarly, Plaintiff has alleged insufficient facts to support a "quick look" analysis of his claims. Under quick look, a court must be able to determine that an agreement has anticompetitive effects from the perspective of an observer "with even a rudimentary understanding of economics." *Harris, 651 F.3d at 1138*. Without any attempt by Plaintiff to provide market analysis, the Court cannot find that an intellectual property transfer agreement between Citrix and Microsoft has obvious anticompetitive effects. *Safeway, Inc., 651 F.3d at 1133*. In addition to Plaintiff's "naked price-fixing" argument considered and rejected above, he contends that these agreements are subject to quick look because they violate the "constitutional **[*15]** policy" under *Article 1, Section 8, Clause 8* "to provide an incentive to inventors to promote the Progress of Science and useful Arts." Dkt. #34 at 16. This constitutional argument offers no explanation for why the vendor agreement or the M&G letter should be subject to quick look rather than rule of reason.

In sum, Plaintiff has failed to sufficiently plead the existence of restraints that are subject to either per se or quick look analysis. More fatally, because he attempted to avoid pleading anticompetitive effects, he failed to plead these restraints under the rule of reason. *See* Dkt. #34 at 16-17. To state a *Section 1* claim under the rule of reason, plaintiffs must plead facts which, if true, will prove "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012)*. Additionally, plaintiffs must plead that they were harmed by the defendant's anti-competitive contract, combination, or conspiracy, and that this harm flowed from an "anticompetitive aspect of the practice under scrutiny." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. This **[*16]** fourth element is generally referred to as "antitrust injury" or "antitrust standing." *See, e.g., id.*

Plaintiff has failed to plead actual injury to competition and antitrust standing. To allege actual injury to competition, a plaintiff must plead facts that, if true, would show that the agreement adversely affects competition in the relevant market as a whole—not just the plaintiff. *Twombly, 550 U.S. at 556*. To sufficiently allege antitrust injury, the plaintiff must not only allege that the defendant's behavior is anticompetitive, but that his injury is *because of* the anti-competitive aspect of the practice. *Brantley, 675 F.3d at 1200* (citing *Atl. Richfield Co., 495 U.S. at 334*). Plaintiff's complaint only describes injuries to himself with no mention of actual harm to competition. *See* Dkt. #29 at ¶ 102 ("The restraint restricted Khalid from developing his patents furthers causing damage to his IP licensing and incubation business in 2015/2016 and negatively impacted Khalid's recovery from Microsoft partner Citrix along with added litigation cost."). Because Plaintiff has failed to sufficiently plead injury to competition, he cannot show that his injury is because of any anticompetitive conduct. For that reason, he has likewise failed to plead antitrust standing.

[*17] Accordingly, Plaintiff has failed to state a claim under *Section 1* as to the Employee Agreement, the vendor agreement with Citrix, or the M&G letter.

3. *Walker Process* Claim

Plaintiff also claims that Microsoft threatened baseless litigation in violation of *Section 1*. *Id.* at ¶ 101. It is "well-established" in ***antitrust law*** that using baseless litigation to drive out competition may amount to an antitrust violation. *Int'l Techs. Consultants, Inc. v. Pilkington PLC, 137 F.3d 1382, 1390 (9th Cir. 1998)* (citing *CVD, Inc. v. Raytheon Co., 769 F.2d 842 (1st Cir. 1985))*. Microsoft acknowledges that this type of claim, known as a *Walker Process* claim, is cognizable, but counters that Plaintiff "makes no plausible allegation that Microsoft sent its letter in bad faith, or that it knew its claim was baseless." Dkt. #35 at 7.

The Court agrees. Plaintiff has undermined his bad faith claim by acknowledging that Microsoft may have misplaced his Disclosure List due to negligent bookkeeping rather than as part of an intentional, fraudulent scheme. *See* Dkt. #29 at ¶ 83 ("The M&G letter and Miki's case show either irreparable and costly neglect in Microsoft's applicant/new employee document bookkeeping, or show a blatant cover-up"). Moreover, nothing in the M&G letter suggests a threat of litigation—it notifies Plaintiff that Microsoft disputes his patent claims, **[*18]** it asserts Microsoft's patent rights, and it offers settlement. *See* Dkt. #29-7 at 2-5. On this basis, Plaintiff has failed to state a *Walker Process* claim. *See* *K-Lath, Div. of Tree Island Wire (USA), Inc. v. Davis Wire Corp., 15 F. Supp. 2d 952, 956-57, 964 (C.D. Cal. 1998)* (dismissing *Walker Process* claim where defendants reserved their rights but did not actually threaten suit).

D. *Section 2* Sherman Act Claims

Section 2 of the Sherman Act provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . . [commits a felony]." *15 U.S.C. § 2*. To state a claim for monopolization under this provision, a plaintiff must allege that the defendant (1) possessed monopoly power in the relevant markets; (2) willfully acquired or maintained its monopoly power through exclusionary conduct; and (3) caused antitrust injury. *Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc., 108 F.3d 1147, 1151 (9th Cir. 1997)*. To state a claim for attempted monopolization, a plaintiff must allege (1) specific intent to control process or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving "monopoly power" and (4) causal antitrust injury. *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1432-1433 (9th Cir. 1995)*.

Here, Plaintiff claims that through Microsoft's **[*19]** Employee Agreement, its vendor agreement with Citrix, and its ability to pay no development cost of the '637 patent to Plaintiff, Microsoft attempted to gain or maintain its monopoly in the patent submarket attached to the '637 patent. He specifies that Microsoft sought to retain "100% market power within the $4 billion sub-market attached to the '637 patent." Dkt. #29 at ¶ 105. Microsoft argues that dismissal of Plaintiff's Section 2 claim is warranted because he has again failed to adequately allege maintenance of or a dangerous probability of Microsoft achieving monopoly power. Dkt. #32 at 12-13. Microsoft also argues that obtaining Plaintiff's patent does not equate to Microsoft obtaining power *in the relevant market. Id.* at 13.

The Court agrees that the SAC's added references to a $4 billion market for the '637 patent within a broader $400 billion cloud/gaming market fail to remedy the defects the Court identified in his previous complaint. *See* Dkt. #29 at ¶¶ 104-105. Plaintiff has again only alleged market share without providing market analysis (e.g., barriers to entry or hyper-competitive pricing) or allegations that Microsoft willfully acquired or maintained monopoly power within the submarket rather than as a consequence of superior **[*20]** product, business acumen, or historical accident. *See* Dkt. #20 at 8. Plaintiff responds that ownership of the '637 patent equates to a monopoly within the patent's submarket. Dkt. #34 at 12 (citing *FTC v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2011))*. However, nothing in *Actavis* contradicts the well-recognized principle that economic market power cannot be inferred from the mere fact that one holds a patent. *See Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 43, n.4, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. For this reason, even though Plaintiff alleged Microsoft's intent to acquire his patent rights, an intent to acquire patent rights does not automatically equate to an intent to monopolize or attempt to monopolize a particular market. *See id. at 45-46* ("[A] patent does not necessarily confer market power upon the patentee.")

Lastly, Plaintiff has failed to allege injuries within the scope of antitrust injury contemplated by Section 2. *See* Dkt. #20 at 9 (citing *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California, 190 F.3d 1051, 1055 (9th Cir. 1999)* ("[T]he antitrust laws are only intended to preserve competition *for the benefit of consumers*.") (emphasis added)). Similar to his First Amended Complaint, Plaintiff describes how Microsoft's conduct has reduced the value of *his* patents and prevented *him* from entering the market, *see* Dkt. #29 at ¶ 105, but he has failed to plausibly link Microsoft's conduct or his own injury to an injury to competition **[*21]** within the identified markets or to consumer welfare. For these reasons, dismissal is warranted.

E. Racketeering Claims under *18 U.S.C. § 1962*

Plaintiff also alleges civil RICO violations through extortion. *See* Dkt. #29 at ¶¶ 106-114. To plead a RICO claim under *18 U.S.C. § 1962(c)*, a plaintiff must allege: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Howard v. America Online, Inc., 208 F.3d 741 (9th Cir. 2000)*. A "pattern of racketeering activity" requires at least two predicate acts to constitute racketeering activity. *See 18 U.S.C. §1961(5)*. Microsoft challenges Plaintiff's RICO claim for failure to sufficiently allege an enterprise and predicate acts as well as a failure to meet the heightened pleading requirements for wire fraud. Dkt. #32 at 13-15. The Court will first address enterprise.

1. Enterprise

Section 1962(c) targets conduct by "any person employed by or associated with any enterprise . . . ." "This expansive definition is 'not very demanding.'" *United States v. Christensen, 828 F.3d 763, 780 (9th Cir. 2015)* (quoting *Odom v. Microsoft, 486 F.3d 541, 548 (9th Cir. 2007))*. An enterprise that is not a legal entity is commonly known as an "associationin-fact" enterprise and does not require "any particular organizational structure, separate or otherwise." *Odom, 486 F.3d at 551*. To plead the existence of an association-in-fact enterprise, a plaintiff must allege (1) a purpose; (2) relationships among **[*22]** those associated with the enterprise; and (3) longevity sufficient to permit these associates to pursue the enterprise's purpose. *Boyle, 556 U.S. at 946*. Microsoft argues that the Second Amended Complaint fails to allege the first and third factors. Dkt. #32 at 13-15.

Here, Plaintiff claims that Citrix and Microsoft associated together for the common purpose of "taking ownership" of Plaintiff's '219 and '637 patents through a racketeering scheme. Dkt. #29 at ¶ 108. Microsoft counters that such allegations are "paper-thin" and insufficient to plausibly allege an association for the purpose of appropriating the Mini-Cloud and Safe and Secure patents. Dkt. #32 at 14. While the Court acknowledges the thin allegations in

Plaintiff's Complaint, the Court disagrees that Plaintiff has failed to allege a common purpose. Construed liberally, the Complaint sets forth Plaintiff's theory that Citrix and Microsoft associated to obtain employees' patents through fraudulent means, which is sufficient to state a common purpose. Odom, 486 F.3d at 552 (finding associated-in-fact enterprise where "Microsoft and Best Buy had a common purpose of increasing the number of people using Microsoft's Internet service through fraudulent means.").

However, the Court **[*23]** agrees that Plaintiff has failed to sufficiently plead the ongoing relationship between Citrix and Microsoft that is necessary to establish an "association-in-fact." The Complaint provides no facts on when Microsoft and Citrix formed the vendor relationship, how long they have maintained this relationship, nor how this timeline corresponds to the alleged predicate acts. Because the alleged predicate acts span a nine-year period from 2009 to 2018, *see* Dkt. #29 at ¶ 109, the dearth of information as to the alleged Citrix-Microsoft enterprise relationship make it impossible for the Court to determine whether the relationship was in place at the time any or all of the alleged predicate acts occurred. Plaintiff has likewise failed to provide specific facts as to its organization, such as how one company may control, direct, or manage the other, thus leaving the Court to guess the structure of the alleged enterprise. *See* Ellis v. J.P. Morgan Chase & Co., 950 F. Supp. 2d 1062, 1089 (N.D. Cal. 2013) ("No specific factual allegations explain how [the scheme] occurs, and without this information, the Court cannot ascertain the structure of the alleged enterprise."). For these reasons, Plaintiff has failed to sufficiently allege an enterprise.

2. Predicate Acts

Plaintiff **[*24]** has also failed to allege the predicate acts necessary to sustain a RICO claim. Plaintiff claims that several of Microsoft's actions constitute extortion under either the Hobbs Act or extortion in the second degree under the Washington Racketeering Act, RCW 9A.56.130. Dkt. #29 at ¶¶ 3-4. The Hobbs Act defines extortion as "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b). The "obtaining" element "requires a showing that a defendant received something of value from the victim of the alleged extortion and that the "thing of value can be exercised, transferred, or sold." United States v. McFall, 558 F.3d 951, 956 (9th Cir. 2009). Washington law defines "extortion" as "knowingly to obtain or attempt to obtain by threat [the] property or services of the owner . . . ." RCW 9A.56.110. Extortion in the second degree means "extortion by means of a wrongful threat . . . ." RCW 9A.56.130.

None of the six predicate acts listed in the complaint state a claim for extortion under either the Hobbs Act or Washington law. These acts include (1) Microsoft initiating a lawsuit against Miki Mullor, which ended in settlement; (2) the May 27, 2016 M&G letter asserting Microsoft's patent **[*25]** rights; (3) Citrix withholding severance money; (4) Citrix threatening litigation; (5) objections to discovery requests; and (6) Citrix refusing Plaintiff's $50,000 patent licensing offer. Dkt. #29 at ¶ 109. Plaintiff argues that the "property" the enterprise sought to obtain was his (and Mullor's) patent rights. Yet none of these alleged actions entail Microsoft or Citrix obtaining Plaintiff's patent rights with his consent through force, fear, or threats as required under 18 U.S.C. § 1951(b); *see also* McFall, 558 F.3d at 956.

Plaintiff argues that these actions constitute "wrongful threats" under the Washington Racketeering Act because Microsoft and/or Citrix sought to use these threats to substantially harm his business or financial condition in order to procure his patent rights. Dkt. #34 at 18-19. However, regardless of what Washington law labels "extortion," an act "cannot qualify as a predicate offense for a RICO suit unless it is capable of being generically classified as extortionate." Wilkie v. Robbins, 551 U.S. 537, 567, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007) (internal quotation marks and citation omitted). Under both the Hobbs Act and the generic definition, actual or threatened fear of financial loss must be "wrongful" to be extortionate. United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Constr. Trades Dep't, AFL-CIO, 770 F.3d 834, 843 (9th Cir. 2014).

Here, the SAC makes clear that Microsoft's asserted **[*26]** rights over the '219 and '637 patents, including those stated in the M&G letter, were based on its understanding of the Employee Agreement. Dkt. #29 at ¶ 53. The SAC likewise makes clear that Plaintiff signed this agreement when he began working at Microsoft. *See id.* at ¶¶ 14-18.

The gravamen of Plaintiff's lawsuit is that he submitted an Exclusion List under this legal agreement and that Microsoft now falsely denies its existence. This issue, which concerns the interpretation and application of the Employee Agreement to Plaintiff's patent rights, amounts to a contract dispute—particularly given Plaintiff's acknowledgement that Microsoft may have lost his Disclosure List due to negligent bookkeeping, not because of intentional fraud. *See, e.g., Union Nat'l Bank of Little Rock v. Federal Nat'l Mortgage Association, 860 F.2d 847, 857 (8th Cir.1988)* (holding that regardless of whether the defendant actually had a right to monies claimed, defendant's demands "were motivated by [the defendant's] interpretation of the agreement" and therefore not extortion). Regardless of whether Microsoft actually had a right to the patents, its demands were based on its understanding of its rights under the Employee Agreement and therefore cannot amount to a "wrongful threat" for purposes of a RICO claim.

This leaves **[*27]** wire fraud as the only remaining predicate act. Plaintiff contends that Microsoft committed wire fraud by falsely representing that he could submit the Exclusion List and by sending the M&G letter, which falsely claimed that he never submitted an Exclusion List. Dkt. #29 at ¶ 112. Wire fraud under *18 U.S.C. § 1343* requires (1) the formation of a scheme to defraud; (2) the use of the mails or wires in furtherance of that scheme; and (3) the specific intent to defraud. *Eclectic Props. E. v. Marcus & Millichap Co., 751 F.3d 990, 997 (9th Cir. 2014)*. Plaintiff must also satisfy the heightened pleading standards for fraud under *Rule 9(b)*. *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1401 (9th Cir. 1986))*.

Because Plaintiff has conceded that the missing Disclosure List may be the product of negligent bookkeeping, *id.* at ¶ 83, he cannot plausibly allege that Microsoft had a specific intent to defraud him—let alone every employee who signs the agreement. Moreover, Plaintiff has failed to allege formation of a scheme to defraud its employees. While he states with particularity the events leading to Microsoft's denial of his own Exclusion List, *see id.* at ¶¶ 17-18, 53-54, the only facts he provides beyond his own dispute with Microsoft are vague allegations related to another former Microsoft employee, Miki Mullor. *See id.* at ¶¶ 82-84. The Court finds these claims **[*28]** insufficient to reasonably infer that Plaintiff's and (possibly) Mullor's disputes with Microsoft comprise part of a larger scheme by Microsoft to defraud any employee who submits a Disclosure List with their Employee Agreement.

Plaintiff also brings claims under *Section 1962(d)* for conspiring to violate RICO. Dkt. #29 at ¶ 114. *Section 1962(d)* provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of *subsection (a)*, *(b)*, or *(c)* of this section." "To establish a violation of *section 1962(d)*, a plaintiff must allege either an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses." *Howard v. America Online Inc., 208 F.3d 741, 751 (9th Cir. 2000)*. Because Plaintiff has failed to allege the requisite substantive elements of RICO under *Section 1962(c)*, his claim for conspiracy under *Section 1962(d)* also fails. *See id.* (A plaintiff's failure to adequately plead substantive violation of RICO precludes a claim for conspiracy).

F. Declaratory Relief

Finally, Plaintiff seeks two declaratory judgments: (1) that the "right of first refusal" clause in Section 5 of the Employee Agreement violates *RCW 49.44.140(1)*; and (2) that Microsoft engaged in "inequitable conduct" through its ambiguous and indefinite patent assignment provision.

The *Declaratory Judgment Act ("DJA")* **[*29]** authorizes a district court to "declare the rights and other legal relations of any interested party seeking such declaration" when there is an "actual controversy." *28 U.S.C. § 2201(a)*. To have subject matter jurisdiction over a claim brought under the DJA, there must be an "actual controversy." *See Teva Pharms. USA, Inc. v. Novartis Pharms. Corp., 482 F.3d 1330, 1338*. An "actual controversy" under the DJA is the same as an Article III case or controversy. *See id.* A party bringing a declaratory judgment claim must therefore show "that under 'all the circumstances,' there is an actual or imminent injury that was caused by the opposing party, is redressable by judicial action, and is of 'sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Multimedia Patent Tr. v. Microsoft Corp., 525 F. Supp. 2d 1200, 1218 (S.D. Cal. 2007)* (internal citation omitted). Even if an actual controversy exists, the Court may decline to issue a declaratory judgment. *Weyerhaeuser Co. v. Novae Syndicate 2007, No. C18-0585-JLR, 2019 U.S. Dist. LEXIS 121631, 2019 WL 3287893, at *1 (W.D. Wash. July 22, 2019)*.

The Court previously found that Plaintiff failed to allege an actual case or controversy arising from Microsoft attempting to enforce the "right of first refusal" clause. *See* Dkt. #20 at 21. Nothing in Plaintiff's Second Amended complaint remedies this deficiency. Plaintiff argues that Microsoft invoked the **[*30]** right of first refusal when he approached them first before he tendered his patents to Google. Dkt. #34 at 22. However, his complaint makes clear that Microsoft never invoked the right of first refusal—instead, it claimed ownership of his patents because of the missing Exclusion List under Section 6. Dkt. #29 at ¶ 154 ("Microsoft countered that offer by claiming free exclusive license leading to this litigation."). Accordingly, Plaintiff's facial challenge to the legality of the "right of first refusal" clause under Section 5 is not tied to any actual dispute, does not rest on any concrete injury, and is not ripe for adjudication. *See* *Lee v. Capital One Bank, No. C07-4599-MHP, 2008 U.S. Dist. LEXIS 17113, 2008 U.S. Dist. LEXIS 17113, 2008 WL 648177, at *4 (N.D. Cal. Mar. 5, 2008)* (Claim does not present a "case or controversy" because "the allegedly unconscionable provisions in the Agreement have not been implicated in an actual dispute."). Plaintiff invokes previously rejected constitutional arguments and the fact that Microsoft's demand letter is public record, Dkt. #34 at 22-26, but neither of these arguments address the issue that Microsoft never invoked the right of first refusal.

Finally, Plaintiff's request for a declaratory judgment that Microsoft engaged in "inequitable conduct" remains too broad and **[*31]** vague to warrant declaratory relief. The Court previously cautioned Plaintiff that "broad and vague declaratory relief" that "does not 'admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts' is unripe. Dkt. #20 at 21 (citing *Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41, 57 S. Ct. 461, 81 L. Ed. 617 (1937)* (internal quotations omitted)). The Court likewise cautioned Plaintiff that his amended complaint "must request specific relief from the Court based on his own dispute with Microsoft—not broad relief based on hypothetical injuries to other Microsoft employees." *Id.* at 22.

Plaintiff's Second Amended Complaint fails to remedy these defects. Plaintiff again requests broad-based relief, claiming "Microsoft action is inequitable in nature" and that the "[p]ublic has tremendous interest in patent rights including how patent rights propagate[] among parties." Dkt. #29 at ¶¶ 170, 172. The Court remains unclear what, within Plaintiff's broad request, he seeks to declare inequitable—Microsoft's use and enforcement of its Employment Agreement in general, its denial of Plaintiff's disclosure list, its transmission of the M&G letter, and/or other allegations referenced throughout **[*32]** the complaint. *See* Dkt. #29 at ¶¶ 167-172. Accordingly, the Court again finds dismissal appropriate.

G. Leave to Amend

Where claims are dismissed for failure to state a claim on which relief can be granted, permission to file an amended complaint is typically granted. *See* *Fed. R. Civ. P. 15(a)* ("[L]eave to amend shall be freely given when justice so requires"). However, where amendment would be futile, a claim is properly dismissed with prejudice. *Dumas v. Kipp, 90 F.3d 386, 393 (9th Cir. 1996)*; *see also* *DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992)* ("A district court does not err in denying leave to amend where the amendment would be futile") (internal citation omitted).

The court recognizes that "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (quoting *Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976))* (internal quotation marks omitted). However, "federal courts are far less charitable when one or more amended pleadings already have been filed with no measurable increase in clarity." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1217 (3d ed. 2004); *see also Schmidt v. Herrmann, 614 F.2d 1221, 1224 (9th Cir. 1980)*.

Here, Plaintiff's Second Amended Complaint is largely identical to his First Amended Complaint and suffers from similar pitfalls. For the second time, Plaintiff has alleged what appears **[*33]** to be, in essence, a contract dispute with Microsoft over the missing Disclosure List. To fit his claims into the framework of the Sherman Act and RICO, Plaintiff has attempted to extrapolate from his own dispute various large-scale antitrust and racketeering schemes against Microsoft employees. However, without offering specific facts beyond his singular case, he has twice failed to plausibly establish a broader scheme or conspiracy. Furthermore, with respect to his missing Disclosure List, he has now twice contradicted his own claims of intentional fraud or conspiracy by acknowledging the possibility of negligent—rather than fraudulent—bookkeeping. Finally, regarding his requests for declaratory relief, he has failed to remedy the deficiencies the Court identified in its order dismissing Plaintiff's First Amended Complaint. Considering all the above, the Court concludes that permitting further amendment here would be futile.

IV. CONCLUSION

Having reviewed Defendant's Motion, Plaintiff's Response, Defendant's Reply, and the remainder of the record, it is hereby ORDERED that Defendant's Motion to Dismiss, Dkt. #32, is GRANTED. Plaintiff's claims are hereby DISMISSED with prejudice and **[*34]** without leave to amend.

DATED this 6th day of April, 2020.

/s/ Ricardo S. Martinez

RICARDO S. MARTINEZ

CHIEF UNITED STATES DISTRICT JUDGE

End of Document

United States v. Sabre Corp.

United States District Court for the District of Delaware

April 7, 2020, Decided

C.A. No. 19-1548-LPS

Reporter
452 F. Supp. 3d 97 *; 2020 U.S. Dist. LEXIS 64637 **; 2020-1 Trade Cas. (CCH) P81,156; 2020 WL 1855433

UNITED STATES OF AMERICA, Plaintiff, v. SABRE CORP., SABRE GLBL INC., FARELOGDC INC., and SANDLER CAPITAL PARTNERS V, L.P., Defendants.

Subsequent History: Vacated by, Motion granted by *United States v. Sabre Corp., 2020 U.S. App. LEXIS 26973 (3d Cir., July 20, 2020)*

Core Terms

airlines, booking, travel agency, travel, connect, REDACTED, customers, platform, merger, channel, technology, bypass, prices, compete, offers, passthrough, two-sided, websites, relevant market, aggregator, competitor, products, calculated, innovation, provider, sales, capabilities, tickets, negotiations, geographic

LexisNexis® Headnotes

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

HN1[] **Antitrust Statutes, Clayton Act**

Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, prohibits any merger in any line of commerce or in any, activity affecting commerce in any section of the country whose effects may be substantially to lessen competition, or to tend to create a monopoly. *15 U.S.C.S. § 18*. To prevail on a claim under Section 7, the government must show a reasonable probability that the merger will substantially lessen competition. While the government need not prove anticompetitive effects with certainty, it is not enough to show the mere possibility of the prohibited restraint.

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

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Market Definition

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

Courts considering a Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, merger challenge follow a burden-shifting framework. First, the court determines whether the government has established a prima facie case that the proposed merger is anticompetitive by (1) identifying the proper relevant market and (2) showing that the effects of the merger are likely to be anticompetitive. If the government succeeds at this first step, the court next determines whether the defendants have rebutted the government's prima facie case. Finally, if defendants do successfully rebut the government's prima facie case, the burden of production shifts back to the government and merges with the ultimate burden of persuasion, which is incumbent on the government at all times. Ultimately, the government's burden is to prove, by a preponderance of the evidence, a reasonable probability that the merger it seeks to enjoin will substantially lessen competition. The relevant market is defined as the area of effective competition. It consists of two components: a product market and a geographic market. A properly-identified relevant market must correspond to the commercial realities of the industry.

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

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Market Definition

HN3[ ] **Market Definition, Relevant Market**

Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act. Because plaintiffs have the burden of defining the relevant market, the failure to properly define either a product or geographic market is fatal to plaintiffs' case.

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

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Market Definition

HN4[ ] **Market Definition, Relevant Market**

In the context of Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, and identifying the proper relevant market, it is not always necessary to consider both sides of a two-sided platform (entities that offer different products or services to two different groups who both depend on the platform to intermediate between them), such as when the impacts of indirect network effects and relative pricing in that market are minor. However, it is always necessary to consider both sides of two-sided transaction platforms that facilitate a single, simultaneous transaction between participants and cannot make a sale unless both sides of the platform simultaneously agree to use their services. These platforms, supply only one product - transactions. Because these transactions necessarily involve both sides of the market, only other two-sided platforms can compete with a two-sided platform for transactions. In other words, for two-sided transaction platforms, competition cannot be accurately assessed by looking at only one side in isolation.

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

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Market Definition

HN5[ ] **Market Definition, Relevant Market**

In the context of Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, according to the Second Circuit, the relevant market for a two-sided transaction platform must as a matter of law include both sides.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

HN6[] **Antitrust Statutes, Clayton Act**

In the context of Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, only other two-sided platforms can compete with a two-sided platform for transactions. Even if it is not always necessary to consider both sides of a two-sided transaction platform, it is necessary to do so where both sides of the platform facilitate a single, simultaneous transaction between participants.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

HN7[] **Antitrust Statutes, Clayton Act**

In the context of Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, if the government seeks to stop a global distribution system from buying a one-sided competitor, it must show that this purchase will harm competition on both sides of the two-sided market.

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

HN8[] **Relevant Market, Product Market Definition**

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. Thus, products comprising a relevant market need not be identical, only reasonable substitutes. To determine the reasonable interchangeability of products, courts consider price, use, and qualities.

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

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

Courts can determine the boundaries of a product market by examining practical indicia such as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Hence, courts evaluating whether different products are in the same product market often examine real-world market conditions, like whether customers switch back and forth between the products, or if firms compete against each other to offer these products.

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

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

The relevant geographic market is comprised of the area where customers look to buy a seller's products or services. The geographic market is not comprised of the region in which the seller attempts to sell its product, but rather is comprised of the area where his customers would look to buy such a product.

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

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

Herfindahl-Hirschman Index (HHI) is a commonly-used measurement of market concentration. The HHI is calculated by summing the squares of the individual firms' market shares. In determining whether the HHI demonstrates a high market concentration, courts consider both the post-merger HHI number and the increase in the HHI resulting from the merger. A post-merger market with a HHI above 2,500 is classified as highly concentrated, and a merger that increases the HHI by more than 200 points is presumed to be likely to enhance market power. The Government can establish a prima facie case simply by showing a high market concentration based on HHI numbers.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

HN12[] **Regulated Practices, Monopolies & Monopolization**

Barriers to entry are factors, such as regulatory requirements, high capital costs, or technological obstacles, that prevent new competition from entering a market in response to a monopolist's supracompetitive prices. While not a required element of a Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, claim, evidence of barriers to entry in the relevant market can bolster the government's case. In addition, defendants can rebut the government's prima facie case by showing that the relevant market exhibits low barriers to entry.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

HN13[] **Antitrust Statutes, Clayton Act**

In the context of Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, a merger can substantially lessen competition by diminishing innovation if it would encourage the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger.

Governments > Courts > Court Records

Governments > Courts

HN14[] **Courts, Court Records**

While the public enjoys a common law right of access to judicial proceedings and records, this right is not absolute. To overcome the presumption of access, parties must show that the information they seek to protect is the kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure. Such information includes sources of business information that might harm a litigant's competitive standing. Moreover, in granting a party's request to protect information, courts must (1) articulate the compelling, countervailing interests to be protected, (2) make specific findings on the record concerning the effects of disclosure, and (3) provide an opportunity for interested third parties to be heard. Further, they must conduct a document-by-document review of the contents of the challenged documents.

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Judges: HONORABLE LEONARD P. STARK, UNITED STATES DISTRICT JUDGE.

Opinion by: LEONARD P. STARK

Opinion

AMENDED ON APRIL 13, 2020 TO CORRECT ATTORNEY LISTING

/s/ Leonard P. Stark

STARK, U.S. District Judge:

[*103] INTRODUCTION

The United States Department of Justice ("DOJ" or "government") filed this expedited antitrust action seeking to permanently enjoin the proposed acquisition by Defendants Sabre Corporation and Sabre GLBL Inc. (collectively, "Sabre") of Defendants Farelogix Inc. ("Farelogix") and Sandler Capital Partners V, L.P. ("Sandler") (collectively with Sabre, "Defendants"). Sabre and Farelogix both play roles, which are described in great detail below, in the airline travel industry. The government contends that allowing Sabre to acquire Farelogix, and eliminate Farelogix as an independent entity, would harm competition, and thereby violate *Section 7 of the Clayton Act, 15 U.S.C. § 18*. DOJ contends Farelogix is an innovative disruptor in the market for "booking services," a market historically dominated by just three global distribution systems ("GDSs"), including Sabre, who have tried to stifle innovation in a market in which they earn billions of dollars annually.

The Court held an eight-day bench trial in January and February 2020. **[**3]** (*See* D.I. 251, 253, 254, 255, 256, 257, 258, 260, 261, 263, 264, 265, 266, 267) ("Tr.")[1] After the trial, both sides submitted detailed proposed findings of fact (DJ. 234, 236) as well as opening and answering briefs (D.I. 233, 235, 241, 242).

Pursuant to *Federal Rule of Civil Procedure 52(a)*, and having carefully considered the entire record in this case, the arguments of the parties, and the applicable law, the Court concludes that DOJ has failed to meet its burden of

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[1] "Citations to the trial transcript are in the form: "([Witness last name] Tr. [page])."

proof. Therefore, the Court will enter judgment for Defendants and against the government. The Court will not enjoin Sabre's proposed acquisition of Farelogix.

PROCEDURAL BACKGROUND

DOJ filed its complaint on August 20, 2019. (D.I. 1) On September 26, 2019, the Court scheduled a bench trial to begin on January 27, 2020. (D.I. 31) After consideration of various requests relating to the length of the trial (*see, e.g.*, D.1. 147 at 8, 15 (parties initially asking for two-week trial within three months of case being filed); D.I. 175 at 2 (parties requesting 30 hours per side)), the Court ultimately allocated each side up to 25 hours for its trial presentation (*see* D.I. 197 at 11).

The parties prepared expeditiously and efficiently for trial, raising only two discovery **[**4]** disputes. (*See* D.I. 127 at 2-3) Trial began, as scheduled, on January 27 and was completed, with a full day of closing arguments and questions to counsel, on February 6, 2020.[2]

[*104] The Court commends all of the many attorneys on both sides for consistently outstanding performances throughout this litigation and especially at trial.

At trial, the government called the following witnesses,[3] including many who were adverse to DOJ's case:

- Cory Garner, Vice President ("VP") for Distribution and Sales for American Airlines ("AA" or "American") (Garner Tr. 89)
- Michael Radcliffe, Director of Distribution for United Airlines ("United") (Radcliffe Tr. 169)
- Susan Carter, Senior VP of Marketing for Farelogix (Carter Tr. 235)
- Jim Davidson, President and Chief Executive Officer ("CEO") of Farelogix (Davidson Tr. 364)
- Chris Boyle, VP of Corporate Development and Mergers and Acquisitions for Sabre (Boyle Tr. 484)
- Theo Kruijssen, Chief Financial Officer ("CFO") of Farelogix (Kruijssen Tr. 585) Sean Menke, President and CEO of Sabre (Menke Tr. 664)

- Gregory **[**5]** Gilchrist, Senior VP Travel Solutions Group for Sabre (Gilchrist Tr. 748)
- Jorge Vilches, former Senior VP of Airline Business for Sabre (Vilches Tr. 785) (by deposition)
- Chris Wilding, Senior VP Airline Line of Business for Sabre (Wilding Tr. 824)
- Dr. Aviv Nevo, economics expert (Nevo Tr. 878)
- Torn Klein, former CEO of Sabre (Klein Tr. 1072) (deposition)
- Christina Larson, Managing Director of Sales Analytics, Distribution, and Planning for Hawaiian Airlines (Larson Tr. 1108) (deposition)
- Jeffrey Lobl, Managing Director of Distribution Strategy, Delta Airlines ("Delta") (Lobl Tr. 1148)

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[2] It should be understood that the Court is issuing this Opinion in the midst of the global coronavirus (COVID-19) pandemic. As readers today (i.e., April 2020) well understand, we are living through a national emergency, in which courtrooms (although not Courts) are largely closed, and most people (including judges, law clerks, lawyers, and assistants) are working remotely from home.

As of this writing, it is generally known and can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned, that the travel industry, and particularly air travel, has been hit particularly hard by the virus. *See, e.g.*, U.S. Department of the Treasury, *Procedures and Minimum Requirements for Loans to Air Carriers. . . under. the Coronavirus Aid, Relief and Economic Security Act* (March 30, 2020), https://home.treasury.gov/system/files/136/Procedures%20and%20Minimum%20Requirements%20for%20Loans.pdf (last accessed April 7, 2020); Tr. Mar. 30, 2020 teleconference at 4-5; *see generally* Fed. R. Civ. P. 201. Understandably, however, no evidence was presented at trial about the impact of the coronavirus, or how its devastation might itself transform the air travel industry. Therefore, and necessarily, the Court has not considered the potential consequences of the virus in making its findings of fact or conclusions of law. To be clear, the Court's forward-looking analysis does not (and cannot) take into account the current crisis caused by the pandemic.

[3] All witnesses testified live at trial, unless otherwise noted.

Defendants, in addition to essentially conducting direct examinations of many of the above-listed witnesses during the government's case-in-chief, called the following witnesses at trial:

- Kurt Ekert, President and CEO of CWT (Ekert Tr. 1178)
- Rose Stratford, Executive VP Global Supply Relations and Strategic Sourcing, BCD Travel (Stratford Tr. 1211) (deposition)
- Werner Kunz-Cho, CEO Fareportal (Kunz-Cho Tr. 1280) (deposition)

- Tim Reiz, Chief Technology Officer for Farelogix (Reiz Tr. 1320) Dr. Kevin Murphy, economics expert (Murphy Tr. 1419) David Shirk, President of Travel Solutions for Sabre **[**6]** (Shirk Tr. 1580) Rocky Wiggins, Senior VP and Chief Information Officer for Spirit Airlines ("Spirit") (Wiggins Tr. 1638) (deposition) Torn Gregorson, Chief Strategy Officer for the Airline Tariff Publishing **[*105]** Company,[4] better known as "ATPCO" (Gregorson Tr. 1667) (deposition) Shane Tackett, Executive VP of Planning and Strategy for Alaska Airlines (Tackett Tr. 1698)
- Derek Adair, Managing Director of Revenue Management Development for Delta Airlines (Adair Tr. 1717)

One of the notable features of the trial was the juxtaposition of invariably excellent legal skill demonstrated by the attorneys combined with numerous witnesses who were not credible and/or not persuasive on multiple key points, as further explained below in the Court's findings of fact.

FINDINGS OF FACT

This section contains the Court's findings of fact ("FF"). Certain findings of fact may also be provided in connection with the Court's legal analysis later in this Opinion.

A. The Parties And Proposed Transaction

1. The United States Department of Justice Antitrust Division ("Dar) enforces the nation's antitrust laws, including by challenging proposed mergers of private companies that may be anticompetitive. *See* 15 U.S.C. § 25; D.I. 1 **[**7]** ¶ 17.

2. Sabre Corporation is a Delaware corporation headquartered in Southlake, Texas. (DJ. 184 (Pretrial Order ("PTO")) Ex. 1 ¶ 2) Sabre Corporation is the ultimate parent entity of Sabre GLBL Inc., Sabre's principal operating subsidiary and a signatory to the merger agreement with Farelogix. (*Id.* ¶ 3)

3. Sabre's Travel Solutions division contains its Travel Network and Airline Solutions business units. (Menke Tr. 679) Travel Network operates Sabre's global distribution system ("GDS"). (PTO Ex. 1 ¶ 5) Sabre's GDS is the largest in the United States. (PX389 at -437) Airline Solutions sells other information technology ("IT") products for airlines, including a passenger service system ("PSS"). (PTO Ex. 1 ¶ 7)

4. In 2018, Sabre's revenues were approximately $3.9 billion. (PTO Ex. 1 ¶ 9) Most of Sabre's revenues and profits come from GDS booking fees paid by Sabre's airline customers. (Menke Tr. 665)

5. Farelogix, Inc. is a Delaware corporation headquartered in Miami, Florida. (PTO Ex. 1 ¶ 11) Farelogix's majority owner is Sandler Capital Partners V, L.P., a private equity fund, which is also a signatory to Sabre's merger agreement with Farelogix. (*Id.* ¶ 12)

6. Farelogix is an IT provider **[**8]** to airlines and offers a range of products related to distributing and merchandising airline content. (Carter Tr. 261-63)

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[4] *See* Carter Tr. 289.

7. In 2018, Farelogix's revenues were approximately [TEXT REDACTED BY THE COURT] million. (DX145 at -006) Farelogix Open Connect, also commonly referred to as "FLX OC," generates more than half of Farelogix's revenues. (PTO Ex. 1 ¶ 19)

8. On November 14, 2018, Sabre agreed to purchase Farelogix in a transaction valued at approximately $360 million (the "acquisition," "merger," or "transaction"). (PTO Ex. 1 ¶ 1)

B. Airlines, Content, And Distribution Generally

9. Airlines sell "content" — tickets and ancillary products and services, such as early boarding and seat upgrades — directly to travelers through their websites, call **[*106]** centers, and airport kiosk ticket counters, and also indirectly through travel agencies. (PTO Ex. 1 ¶¶ 4, 22; Stratford Tr. 1215, 1218) "Ancillaries" are "anything beyond the fare." (Wiggins Tr. 1641)

10. Distribution through airlines' proprietary channels is referred to as direct distribution, the direct channel, or colloquially, "airline.com." (Carter Tr. 240; PX025 at -943)

11. Distribution through travel agencies is referred to as the indirect **[**9]** channel or indirect distribution. (Gamer Tr. 91-92; Radcliffe Tr. 171)

12. The indirect channel accounts for about 40% of airline bookings today. (Murphy Tr. 1430-31)[5] The vast majority of indirect channel sales — 95% by passenger volume — are made through a global distribution system ("GDS"). (*Id.*) The remaining 5% are sales directly between an airline and a travel agency or corporation ("direct connections"). (*Id.*)[6]

13. Travel agencies can be divided into online travel agencies ("OTAs") and traditional travel agencies ("TTAs"), including travel management companies ("TMCs"). OTAs such as Expedia and Priceline primarily operate through consumer-facing websites and target leisure customers. (Kunz-Cho Tr. 1281-83) TMCs such as Carlson Wagonlit Travel ("CWT") and BCD Travel ("BCD") manage business travel for corporations. (Ekert Tr. 1178)

14. For many airlines, travel agencies are a critical sales channel, accounting for a significant portion of their revenue. (*See* Gamer Tr. 92 (stating American earns half its revenue through indirect channel); Tackett Tr. 1703-04)

15. Airlines that sell tickets through travel agencies need to communicate with travel agencies in a format compatible **[**10]** with the agencies' internal systems. (Gamer Tr. 146-47)

16. When a travel agent creates a booking, the agent typically receives a record of the booking that is compatible with the agency's IT system, which allows the agent to easily manage the booking and provide post-booking services like invoicing and duty of care. (Stratford Tr. 1220-21) (explaining automated processes applied to records and limitations of "passive segments," that is, records of bookings created outside of the GDS)

17. Travel agencies serve their customers by using proprietary systems to shop for and book flights. (Ekert Tr. 1180-83) For example, a travel agency that serves corporate customers may use comparison shopping engines that allow the agency to pull up only those options that adhere to a corporation's travel policies. (*Id.*) Generally,

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[5] The specific numbers in this paragraph do not appear in the trial transcript; they were shown on Dr. Murphy's Demonstrative slide number 7, which was marked confidential at trial, and therefore alluded to but not discussed specifically in open Court. Instead, counsel, the witness, and the Court looked at their own copies of the demonstrative while the witness testified. Although the demonstrative was not admitted into evidence, the Court does not understand there to be a dispute about the specific percentages recited in this paragraph. If there is a dispute, it is not material to any issue in this case.

[6] An important but confusing fact in this case is that a "direct connect" is part of the ***indirect*** channel of distribution, as it refers to a direct connection between an airline and a travel agency.

travel agencies cannot meet the needs of their traveler customers by searching for and booking flights on airlines' websites. (Stratford Tr. 1215-16 (explaining that booking through airline website does not allow BCD to provide benefits that their customers value); Ekert Tr. 1184-85 (explaining that CWT allows corporate **[*107]** travelers to access full array of airline content))

18. **[**11]** Airline ticket sales may also be characterized based on whether the passenger is traveling for business or leisure. (Kunz-Cho Tr. 1282-83)

19. Airlines typically sell to leisure travelers through the direct channel. (Garner Tr. 101, 123-25) Leisure travelers tend to have less-complicated itineraries and are more price conscious. (Ekert Tr. 1184) Thus, leisure travelers typically purchase tickets through an airline's website, an OTA, or a metasearch engine (e.g., Kayak or Google Flights). (*Id.*; Murphy Tr. 1439)

20. Business travelers tend to purchase more expensive tickets with more complicated itineraries (often booking at the last minute and making changes, all of which usually results in higher fares and fees and, thus, more revenue for the airlines), and maybe subject to employer-specific travel policies. (Radcliffe Tr. 173; Ekert Tr. 1181-82) For these reasons, business travelers often rely on TMCs to purchase tickets on their behalf. (Ekert Tr. 1183-85)

C. Direct Distribution Channel

21. Airlines prefer that customers search and pay for fares and ancillaries on their websites because — unlike when a traveler uses an aggregated search tool — an airline's website displays only that **[**12]** airline's content, airlines can better control the retail experience on their own websites, and airlines' costs are typically lower when using their own websites. [TEXT REDACTED BY THE COURT] Searching for airfares on the airline's website can, therefore, diminish price transparency and airlines' incentive to compete on price. (Ekert Tr. 1 192-93)

22. In 2005, direct distribution accounted for approximately 50% of bookings by U.S. passenger volume. (Murphy Demonstrative at 26) In 2018, direct distribution accounted for 58.8% of bookings by U.S. passenger volume. (Murphy Demonstrative at 7)[7] In recent years sales volume has shifted from GDSs to airline.com. (Adair Tr. 1726; Wilding Tr. 864) As a result, direct channel sales now account for about 50-70% of airline bookings. (Garner Tr. 91; Wiggins Tr. 1640; [TEXT REDACTED BY THE COURT].

23. Airlines have several tools to encourage travelers to search for and book tickets through the direct channel. Airlines can make lower price fares available only on their websites. [TEXT REDACTED BY THE COURT] Airlines can also provide an "advantageous retail experience" on their own websites. [TEXT REDACTED BY THE COURT]

24. Airlines may also drive bookings to their websites through metasearch engines **[**13]** such as Kayak and Google Flights. (Tackett Tr. 1701, 1711-12) Metasearch engines attract price-sensitive leisure travelers who are typically searching for the lowest fare regardless of airline, and airlines can require the metasearch engine to send the traveler to the airline's website rather than an OTA to book the ticket. (Tackett Tr. 1701-02, 1712-13)

25. In the early 2000s, the launch of airline websites led to a large volume of indirect bookings shifting to the direct channel, but over the last decade, the "[c]hannel shift to direct distribution has stabilized." (PX245 at -286)

D. Indirect Distribution Channel

26. In the indirect channel, unlike in the direct channel, airline content is sold through intermediaries such as travel agencies. [TEXT REDACTED BY THE COURT] Travel agencies offer **[*108]** customers many valuable services, including access to and the ability to book content from thousands of travel suppliers, including hundreds of airlines.

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[7] The two Murphy Demonstrative slides relied on in this paragraph were not admitted into evidence, but the Court understands the data reported here are not in dispute. Any dispute on these points is not material to any issue in this case.

(Ekert Tr. 1179, 1189) This access to content from many travel suppliers allows travel agencies to provide their customers with comparison shopping and fare transparency, which travel agencies consider one of their most significant value propositions. **[**14]** (Stratford Tr. 1243) Accordingly, airlines that use travel agencies can reach customers who seek to do comparison shopping that they cannot do through airline.com. (Lobl Tr. 1171-72; [TEXT REDACTED BY THE COURT]

27. The travel industry distinguishes between two types of travel agencies: online travel agencies ("OTAs") and traditional travel agencies ("TTAs"). (Garner Tr. 100-03; Klein Tr. 1078)

28. OTAs are travel agencies that sell travel primarily via the internet. (PTO Ex. 1 ¶ 23) OTAs cater primarily to cost-conscious leisure travelers who value comparison shopping. (PTO Ex. ¶ 25) Examples of OTAs are Booking.com, Priceline, Expedia, and Fareportal. (PTO Ex. ¶ 24)

29. OTAs are an important and lucrative distribution channel for airlines. (PX237 at -764; Radcliffe Tr. [TEXT REDACTED BY THE COURT] OTAs enable airlines to reach customers they might not otherwise reach through airline.com by allowing travelers to comparison shop across airlines, hotels, cars, and other travel options, a service airline.com does not offer. (Gamer Tr. 124; Radcliffe Tr. 172) OTAs also enable airlines to sell tickets to customers in areas where they "don't have a large presence," and to customers they might **[**15]** not reach through the direct channel based on brand loyalty alone. (Tackett Tr. 1703-04)

30. TTAs are comprised of travel management companies ("TMCs") and other brick- and-mortar travel agencies. (Gamer Tr. 100-03) BCD Travel, CWT, and American Express Global Business Travel ("Amex GBT") are examples of TMCs. (PTO Ex. ¶ 28)

31. TMCs primarily serve business travelers, which is the most profitable traveler segment for many airlines because they tend to book more expensive airline tickets than leisure travelers. (PTO Ex. ¶¶ 27, 29-30) Indeed, business travelers are often required by their employer to book through a given TMC. (Radcliffe Tr. 172-73) TMCs ensure that business travelers comply with their employers' travel policies, help with duty of care, provide expense reporting and other back-office support, and manage changes to travel itineraries. (Stratford Tr. 1211-12, 1243-47)

32. A GDS is a transaction platform that connects a large number of travel suppliers, such as airlines, hotels, and car rental companies, to a large number of travel agencies. (Carter Tr. 266) For instance, Sabre's GDS connects more than 400,000 travel agencies (Radcliffe Tr. 206) to more than 400 airlines (PX253 **[**16]** at -166) and "thousands of car companies or hotel companies" (Davidson Tr. 442). These connections allow travel suppliers to distribute their content to travel agencies and create and manage bookings. (D.I. 22 ¶ 22) Airlines rely on GDSs to sell tickets through both OTAs and TTAs. (Gamer Tr. 92, 100-03)

33. The GDSs rely on a "traditional" payment model, under which airlines pay GDSs like Sabre a "booking fee" for each flight a passenger takes. (Gamer Tr. 107-08) The GDS then keeps part of the fee and gives the rest to the travel agency as an "incentive payment." (Gamer Tr. 108; Stratford Tr. 1209-10; *see also* Murphy Tr. 1435-36 (defining GDS "net fee" as what GDS retains after paying incentives to travel agencies)) Sabre's contracts with the hundreds of thousands of travel agencies **[*109]** within its network typically require Sabre to pay travel agencies an incentive per segment. (Stratford Tr. 1210) While the majority of Sabre's revenue is generated by GDS booking fees (Menke Tr. 663), Sabre also pays out millions of dollars in incentive payments (Shirk Tr. 1603).

34. GDSs provide various services, including "offer creation;" by using airlines' fare, scheduling, and availability information, **[**17]** GDSs assemble the flight options that an airline can provide in response to a travel agent's search. (PX096 at -098; Radcliffe Tr. 190) Offer creation is also called "constructing an offer" or "shopping." (Gamer Tr. 97)

35. GDSs such as Sabre also provide "normalization" and "aggregation" services by combining flight options from various airlines, thereby allowing travel agencies to request and receive offers from multiple airlines. (PX237 at -752; Gamer Tr. 92; Menke Tr. 718-19) As BCD's Stratford explained, the aggregation capabilities of GDSs are their "number one value proposition" because "customers want us to shop and compare." (Stratford Tr. 1243)

36. Although airlines cannot distribute their full range of products and services through Sabre's legacy GDS technology (Gamer Tr. 93; Radcliffe Tr. 177-78; Adair Tr. 1719), GDSs allow airlines to send offers to travel agencies, create bookings when agencies select an offer, and manage any changes to those bookings (Lobl Tr. 1150; Adair Tr. 1721-22). GDSs also provide travel agencies additional services and technology, notably mid- and back-office software. (Radcliffe Tr. 203; Ekert Tr. 1193-94)

37. The reach and distribution capability **[**18]** of GDSs allows airlines to distribute their products and services globally in seconds, without spending millions of dollars on marketing. (Stratford Tr. 1241) It is critical for all travel agencies that GDSs can provide this aggregation function in sub-second response times. (Kunz-Cho Tr. 1299)

38. In addition to providing real value to airlines and end-user travelers, the intermediary players in the indirect distribution channel - especially GDSs and travel agencies - have strong financial incentives to preserve the travel distribution ecosystem and maintain it in its current form. GDSs earn billions of dollars each year by charging airlines for each passenger segment booked through their GDS. (Gamer Tr. 107; Menke Tr. 665; PTO Ex. ¶¶ 9-10) Travel agencies earn a sizable income each year from incentive payments from GDSs for booking airline tickets through the GDSs. (Stratford Tr. 1209-10; Ekert Tr. 1203-04; PX092 at -622)

E. Sabre's Competitors, Including Other GDSs

39. Sabre's GDS is a two-sided transaction platform. (Nevo Tr. 964; Murphy Tr. 1422-23)[8]

40. As Dr. Murphy explained, "the value of the Sabre [GDS] ... occurs on two sides, where on the one side" travel agents value **[**19]** Sabre's GDS "because it gives them access to a wide range of travel suppliers in a single spot... Because it's attractive to travel agencies and travel agencies want to use Sabre to do their side of the business, it's therefore attractive to airlines, because airlines after all want to sell their product and they want the customers." (Murphy Tr. 1423; *see also* Murphy Tr. 1425 (GDS "platform provides value to two sets of customers — the travel agencies and travelers on one side and the travel suppliers, including airlines, on the other"))

[*110] 41. Sabre has controlled around 50 percent of the airline bookings made through travel agents in the United States. (Nevo Tr. 931, 947; PX389 at -437)

42. Because of the two-sided nature of Sabre's GDS, the primary competitors for Sabre's GDS "in the long run" are "the rival GDSs," Amadeus and Travelport. (Murphy Tr. 1433; *see also* Stratford Tr. 1250; PTO Ex. ¶ 31)

43. Chris Wilding of Sabre testified that "travel agencies, when they're looking to a GDS, they want to make sure that the GDS can provide them with all the relevant content." (Wilding Tr. 860) Ekert of CWT similarly stated that if "Sabre was to lose content or enable content but on a noncompetitive **[**20]** basis ... then we have the ability to shift business away from them to another GDS." (Ekert Tr. 1186)

44. As Dr. Murphy explained, "[i]f [Sabre] do[es]n't provide [the airline content that] customers want, they'll lose travel agencies to Amadeus and Travelport, and if they don't provide what the airlines want and they don't get the airline content, that will cause them to lose on the travel agency side as well." (Murphy Tr. 1433)

45. Sabre's 2018 10-K filed with the U.S. Securities and Exchange Commission ("SEC") identifies "other GDSs" as competitors, but also lists "local distribution systems and travel marketplace providers primarily owned by airlines or government entities and direct distribution by travel suppliers." (PX251 at-160)

46. In addition to competitive pressures arising from other GDSs, airlines' direct distribution channels, including airline.com, constitute the "most important short-term constraint" on Sabre's GDS fees. (Murphy Tr. 1433) While airline.com is "relevant to both TTA and OTA bookings ... it's especially important for OTA bookings" because "direct channel is a mouse click away" (Murphy Tr. 1434; *see also id.* 1438-39; Adair Tr. at 1726 (testifying that

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[8] *See also* US Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43, 58 (2d Cir. 2019).

Delta.com is responsible **[**21]** for roughly 50 percent of Delta's distribution and "volume has gone away directly from GDSs").

47. Chris Wilding, the Sabre employee responsible for GDS contract negotiations with airlines, testified: "Airline.com is one of the primary competitors that we face as a GDS." (Wilding Tr. 860)

48. Because airline.com, including the use of airline.com fostered by metasearch engines, competes for bookings with travel agencies, it poses a significant constraint on Sabre's GDS fees, as airlines can undermine the Sabre GDS by withholding content that the airline will only provide through its own direct distribution channel. (Murphy Tr. 1437-38)

49. The competition Sabre faces from both airlines' direct channels and the other GDSs is apparent from the decline in Sabre's "net fee" — i.e., the difference between the GDS fee charged to airlines and incentives paid to travel agencies. (Murphy Tr. 1435-36) GDS fees have declined since 2000. (Murphy Tr. 1435-36; *see also* Stratford Tr. 1250 (testifying that GDSs compete for BCD's bookings through incentives))

50. A sizable portion of travel agencies' revenue, sometimes around 10%, comes from GDS payments. (Ekert Tr. 1203; DX306 at 5; *see also* DX306 at 1) **[**22]**

51. Among the GDSs, Amadeus offers a New Distribution Capability ("NDC") application programming interface ("APT') solution (Carter Tr. 270; Shirk Tr. 1629-30), but Travelport does not (Davidson Tr. 475).

52. To switch GDSs, travel agencies may have to retrain their agents on how to use the new GDS platform. (Stratford Tr. 1216-17) Travel agencies also often rely on **[*111]** mid- and back-office systems provided by their GDS, so moving away from their GDS would require a significant adjustment to their workflows. (Ekert Tr. 1193-94)

53. Travel agencies also face significant switching costs in transitioning customers from one GDS to another. (Ekert Tr. 1185-86, 1205-06, 1381 (explaining it took CWT[TEXT REDACTED BY THE COURT] months and cost[TEXT REDACTED BY THE COURT] to migrate business between GDSs); Stratford Tr. 1216-18)

54. Sabre's GDS contracts with airlines may limit how well airline direct connects can compete with it.' For example, Sabre has had contracts with[TEXT REDACTED BY THE COURT] Likewise, Sabre's agency contracts also have other financial elements, like bonuses or technology grants, that incentivize agencies to book through Sabre. (Ekert Tr. 1381-83)

55. Due to these incentive **[**23]** structures and switching costs, most travel agencies use a single GDS in a given geography or for a particular corporate client. (Garner Tr. 119; Ekert Tr. 1185; Stratford Tr. 1216)

56. As a result of these market dynamics, airlines must distribute through all three GDSs to reach the entire universe of travelers booking through travel agencies. (PTO Ex. 1 ¶ 32)

57. Thus, while GDSs compete with one another, and their competition places some constraints on Sabre's ability to raise prices, that competition is also constrained.

F. New Distribution Capability ("NDC")

58. The New Distribution Capability ("NDC") application programming interface ("API") was initially developed at Farelogix by its Chief Technology Officer, Tim Reiz. (Reiz Tr. 1324-25)

59. An NDC API is an API that communicates using the NDC schema to enable other technology systems or third parties — such as GDSs, travel agents, or an airline's own public-facing website — to access an airline's passenger services system ("PSS"). (Carter Tr. 264-65; Reiz Tr. 1325-27) A PSS houses IT infrastructure critical to an airline's operations, including its reservations and inventory systems. (PTO Ex. 1 ¶ 8) Hence, an NDC API is one type **[**24]** of API that enables airlines to communicate offers and orders between the airline's PSS and third parties. (Stratford Tr. 1253-54)

60. In or around 2012, Farelogix donated the schema it had developed to the International Air Transport Association ("IATA"). (Carter Tr. 277-78; Reiz Tr. 1325; PX096 at - 097; PTO Ex. ¶ 58) Later in 2012, IATA approved the new standard and labeled it NDC. (Carter Tr. 277)

61. Since 2012, IATA alone has controlled the development of NDC as a public and open standard, releasing two new versions on its website every year since it was first published in 2015. (Garner Tr. 150; Carter Tr. 278-79) As a result, NDC today "looks nothing like" the original schema donated by Farelogix in 2012, and Farelogix must now expend additional resources to "keep up" with NDC. (Carter Tr. 278)

62. NDC is not patent-protected; instead, the NDC schemas are open source and are available on IATA's website to any third-party company to implement and use. (Carter Tr. 271; Reiz Tr. 1327) According to IATA's website, more than 160 companies are NDC certified, and it is realistic for any programmer to become certified. (Reiz Tr. 1327-28)

63. In late 2017, IATA released version 17.2 of the **[**25]** NDC schema, which was the first "commercially viable" version of NDC. (Garner Tr. 150; *see also* Radcliffe **[*112]** Tr. 208-09; Davidson Tr. 433) This led in 2018 to a significant increase in the number of airlines looking to adopt an NDC API. (Radcliffe Tr. 209; Carter Tr. 287-88)

64. In mid-2018, American Airlines announced it would offer an NDC-enabled corporate bundle — essentially, a package of fares and ancillaries customized to a particular company's needs with pricing consideration. (Carter Tr. 286-87; Davidson Tr. 424) United Airlines announced a similar bundle shortly thereafter. (Carter Tr. 286-87)

65. NDC is an XML-based messaging schema designed to facilitate electronic communication between airlines and third parties for the purpose of distributing airline content. (PTO Ex. 1115; Reiz Tr. 1324-26) As an XML-based schema, NDC differs from EDIFACT — the schema principally used to distribute airline content in the indirect channel today — because it can accommodate varied and complex airline content. (PX237 at 80-81; Davidson Tr. 444-45; Reiz Tr. 1324-25; PX246 at - 981 (NDC "allows for enhanced communications between airlines and travel agents"))

66. NDC allows airlines to present more **[**26]** ancillary products in a more attractive way, including the potential to enable more personalized offers that bundle fare price with other products, which can increase airline revenue and consumer choice. (Wiggins Tr. 1648-49; Carter Tr. 261-62, 276) NDC gives travelers greater choice and enables airlines to increase their sale of ancillary products. (PX104 at -707 to -708; Radcliffe Tr. 178; Wiggins Tr. 1648) Hence, NDC allows "increased airline product innovation and consumer choice." (Davidson Tr. 395; *see also* PX104 at -707; PX197 at -917, -919 to -920 (outlining new types of offers available through next-generation technology)) In this way, greater use of NDC promises to increase revenues for airlines and travel agents.

67. NDC also shifts two key functions away from the GDS. First, unlike legacy GDS technology, NDC allows an airline to create its own offer instead of relying on the GDS for offer creation. (Radcliffe Tr. 190; Carter Tr. 249 ("The whole point of NDC is for the airline to have more control over its offer."); Davidson Tr. 385; Lobl Tr. 1151; Adair Tr. 1719) By shifting offer creation from the GDS to the airline, NDC gives an airline greater control over the distribution **[**27]** of its products. (Davidson Tr. 385; Adair Tr. 1719; PX300 at -260; PX025 at -953 (Farelogix marketing materials stating NDC API gives airline "[f]ull control over distribution and channel management, with less dependence on GDS/PSS")) Second, NDC enables airlines to decouple order management from the GDS bundle, allowing airlines to reduce their distribution costs. (Garner Tr. 107; Radcliffe Tr. 175; PX300 at-253 ([TEXT REDACTED BY THE COURT]) In these ways, greater use of NDC promises to decrease airlines' costs.

68. Although some airlines still tout the costs savings generated by use of NDC, more airlines view NDC technology as being beneficial primarily because of its ability to increase revenues, not cut costs. (*See* Carter Tr. 265-66; [TEXT REDACTED BY THE COURT] Wiggins Tr. 1648) [TEXT REDACTED BY THE COURT]

69. By enabling airlines to totally or partially disintermediate the GDS, NDC poses a threat to Sabre's traditional business model. (Adair Tr. 1719, 1736-37; PX002 at -885 ("NGD [Next Generation Distribution] shifts control to airlines and weakens the GDS value proposition;" "as an airline gains control of offers, the value of the intermediated channel will decrease"))

G. Farelogix's [28] FLX OC And Its Uses**

70. Farelogix sells a suite of IT solutions for airlines. (PTO Ex. ¶ 13)

[*113] 71. Farelogix has no travel agency customers and no commercial relationship with travel agencies. (Carter Tr. 266-67; PTO Ex. 1 ¶¶ 48-49; PX096 at -097 ("Airlines are our only customers; No travel agency subscribers"))

72. Farelogix sells an NDC API product to airlines that it calls "Open Connect," which is also referred to as FLX OC. (Carter Tr. 236, 264, 266)

73. Farelogix refers to FLX OC, which is at the "core" of its business (Davidson Tr. 366, 382), and its NDC API as its "order management" or "order delivery" product (Carter Tr. 238; Davidson Tr. 405; *see also* PX072 at -232; PX025 at -949).

74. FLX OC consists of two main components: an NDC API, which provides the "pipe" that carries messages between the airline and the travel agency or other third party; and an orchestration layer, which standardizes and normalizes the content transmitted between the airline's and third party's internal systems. (PTO Ex. 1 ¶ 17; PX025 at -948, -949, -951; Carter Tr. 238-39, 243, 246-47; Reiz Tr. 1348-49) Farelogix always sells Open Connect and its NDC API together. (Carter Tr. 264)

75. Since donating the **[**29]** NDC API schema to IATA, Farelogix must now retrofit legacy technology to match the latest NDC versions. (Carter Tr. 279; Davidson Tr. 420) Moreover, Farelogix must maintain several different aging NDC API connections for legacy customers, going back to versions of NDC from 2015, which is costly. (Davidson Tr. 421; Reiz Tr. 1331- 32) Because support for these connections is "much more labor intensive," Farelogix must devote more employees to FLX OC. (Reiz Tr. 1339)

76. Farelogix holds no patents and has no trade secret protection covering FLX OC. (Carter Tr. 271; Davidson Tr. 417)

77. In the direct channel, airlines can use FLX OC to distribute directly to travel consumers, including through the airline's own website or a mobile app. (PX081 at FLX-000704047; Carter Tr. 283) Two of Farelogix's current customers use FLX OC for their own websites. (Carter Tr. 283)

78. Airlines can also use FLX OC in the indirect channel, to reach travel agencies in three ways. (PX081 at - 046; PX025 at -943; Radcliffe Tr. 178-79) Through each of the three booking paths, Farelogix allows an airline to send offers, receive bookings, and make changes to those bookings. (Nevo Tr. 886-87; Radcliffe Tr. 179-80) **[**30]**

79. First, FLX OC enables airlines to establish "direct connects" with travel agencies. (PX081 at -047; Carter Tr. 283) A direct connect is a link directly between an airline and a travel agency without an intermediary such as a GDS (and, hence, without paying GDS fees). (Radcliffe Tr. 175; Tackett Tr. 1705-06; Adair Tr. 1724; PX025 at -953) Thus, a direct connect is part of the "indirect channel" of distribution and is a form of "GDS bypass." (Garner Tr. 106-07; Carter Tr. 240; PX084 at -887)[9]

80. Second, FLX OC enables airlines to connect to travel agencies via a non-GDS aggregator, such as Travelfusion. (Murphy Tr. 1494; *see also, e.g.*, Stratford Tr. 1221 (explaining that BCD uses Travelfusion to access Lufthansa content)) Distribution through a non-GDS aggregator is another form of GDS bypass. (Carter Tr. 241-42, 284; Murphy Tr. 1494)

[*114] 81. Third, FLX OC enables airlines to connect to travel agencies who continue to use a GDS as an aggregator. This delivery path, referred to as "GDS passthrough," enables an airline to use its Farelogix NDC API to push NDC content to travel agencies using GDS aggregation. (Carter Tr. 284; Davidson Tr. 367-68; PX084 at -887)

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[9] A travel agency can access content from an airline's direct connect via a Farelogix proprietary user interface, known as SPRK, or the agency's own aggregation platform. (PX025 at -952; Reiz Tr. 1349-50; *see also* Gamer Tr. 99-100)

82. Farelogix is agnostic **[**31]** as to whether an airline chooses the GDS bypass or GDS passthrough delivery path; either pathway increases the number of bookings made through Farelogix's NDC API and, therefore, increases Farelogix's revenue. (Radcliffe Tr. 202; Carter Tr. 265; Davidson Tr. 367-68) Farelogix does not distinguish between GDS bypass and GDS passthrough in how much it charges its Open Connect customers per ticket. (Davidson Tr. 368)

83. When an airline books through FLX OC, whether in GDS bypass or GDS passthrough, Farelogix provides the order management services. (Gamer Tr. 118; Neva Tr. 886-88; *see also* Carter Tr. 238, 244-45)

84. FLX OC is not a GDS. (Radcliffe Tr. 202; Carter Tr. 266) FLX OC "do[es]n't aggregate content," and offers only "one airline per connection." (Carter Tr. 266-67) FLX OC is "an input to the airline that the airline can then use to connect to customers or connect to travel agents . . . . Farelogix is not a platform. It doesn't bring the set of customers to any airline or other travel supplier." (Murphy Tr. 1425)

85. FLX OC enables airlines, like AA and United, to distribute differentiated content to Priceline, Orbitz, and other global OTAs (PX025 at -954), and enables these airlines **[**32]** to distribute corporate bundles through TMCs like AmTrav and TripActions (Radcliffe Tr. 195-96; PX033 at -340, -342). As United's director of distribution explained, Farelogix direct connects enable airlines to put "interesting content" into the market faster than is possible with the GDSs. (Radcliffe Tr. 174-76)

86. AA estimated that it is 80-90 percent cheaper to book through a Farelogix direct connect than through the Sabre GDS. (Gamer Tr. 107; PX453 at -969)

87. Even in GDS passthrough, FLX OC enables airlines to push for lower booking fees because the airline creates the offers and Farelogix handles order management instead of the GDS. (Radcliffe Tr. 190-91; *see also* Wilding Tr. 848-49; PX496 (noting that airlines want to use NDC to "drive down cost and use as leverage with GDSs")) [TEXT REDACTED BY THE COURT] *see also* PX085 at -595 (over time, airlines' NDC APIs will "fully replace their existing legacy GDS connectivity," which may lead to lower GDS booking fees); PX300 at -260; Radcliffe Tr. 190-91)

88. Airlines using FLX OC can also gain leverage vis-a-vis Sabre by threatening to withhold content from Sabre by distributing it only through direct connect. (D.I. 228 ("Judicial Notice **[**33]** Order") ¶¶ 13, 24; *see also* Murphy Tr. 1570-71 (explaining that airlines can threaten to withhold content to negotiate better deal with GDSs)) Sabre's CEO acknowledged that the value of Sabre's GDS decreases when an airline withdraws content from the GDS. (Menke Tr. 672; *see also* PX156 at -953 ("Loss of content devalues GDS and causes uncertainty"))

89. In its SEC filings, Sabre acknowledged that airlines with "direct connect initiatives" can use the threat of direct connects to "apply pricing pressure" and negotiate GDS contracts that are "less favorable" to Sabre. (PX251 at -162; *see also* Menke Tr. 667-68 (discussing this risk and admitting that "pricing pressure is competition"); PX173 at -232; PX251 at -162)

90. U.S. airlines first used Farelogix and other GDS alternatives as leverage during **[*115]** the 2005-06 round of GDS negotiations. (Nevo Tr. 939-40, 1062) Dr. Nevo determined that airlines were able to obtain better prices from GDSs in 2006 than in 2003, which he attributed (at least in part) to leverage gained from GDS new entrants ("GNEs"), including Farelogix. (Nevo Tr. 938-40) Defendants' economic expert, Dr. Murphy, wrote in a 2012 white paper submitted to the Department of Justice **[**34]** on behalf of Sabre that [TEXT REDACTED BY THE COURT] had "leveraged the introduction of non-Sabre distribution channels in 2006 to reduce its booking fees." (Judicial Notice Order ¶ 4) By the next round of negotiations, in 2011-12, Farelogix was the only new entrant remaining in the market, but airlines maintained their gains from the 2005-06 negotiations. (Nevo Tr. 942-43; *see also* Radcliffe Tr. 170-71 (noting that G2 Switchworks was "purchased by Travelport and shut down")) Sabre's former CEO testified that airlines put Farelogix and direct connects on the table in their 2013 negotiations with Sabre as "something that they would trade" for things that "would benefit them." (Klein Tr. 1080-82)

H. Other Airline Travel Industry IT: PSS And FLX-M

91. A PSS is an airline's system for managing its operations, including inventory, departure control, check-in, and other functions. (Davidson Tr. 450)

92. An airline's PSS ordinarily includes three interrelated systems: an airline reservation system, which controls the sale of seats, scheduling, passenger name records ("PNR"), and the issuance of tickets; an airline inventory system, which provides information on available seats; and a departure **[**35]** control system, which is used to check-in passengers at the airport. (Davidson Tr. 450)

93. Sabre's main competitor for PSS modules is Amadeus. (Menke Tr. 717; Gilchrist Tr, 770)

94. Sabre provides non-core PSS modules that are PSS dependent and can, therefore, only be used with the core Sabre PSS. (Gilcrhist Tr. 780; Shirk Tr. 1632)

95. Farelogix provides only non-core PSS modules. Unlike Sabre's PSS modules, "the Farelogix solution is PSS agnostic, meaning it can attach to pretty much anybody's PSS system." (Gilcrhist Tr. 780-81)

96. Farelogix also sells four non-core PSS "offer management" modules (also referred to as "offer engines") that help airlines create combinations of itineraries, fares, and ancillary products to offer travelers. (PTO Ex. 1 ¶ 20; PX025 at -945, -956, -974, -979, -985; PX086; PX100 at -054 (offer engines help drive greater adoption of Open Connect); Carter Tr. 239; Davidson Tr. 479-80) Farelogix's offer management products are distinct from FLX OC. (Carter Tr. 239; Davidson Tr. 383)

97. Farelogix's primary offer management product, FLX Merchandise (also known as FLX M), is a tool that helps airlines create offers for ancillary products. (PTO Ex. 1 ¶¶ 14, 21; Carter **[**36]** Tr. 277; Reiz Tr, 1337-38) Farelogix's other non-core PSS modules are FLX Shop & Price, FLX Schedule Builder, and FLX Availability Calculator. (PX025 at 5; Carter Tr. 239)

98. FLX M is currently market leading and can drive hundreds of millions of dollars in additional revenue to airlines that use the product. (Tackett Tr. 1710., [TEXT REDACTED BY THE COURT] An airline can choose to use FLX M in the direct channel (*see, e.g.*, Tackett Tr. 1705) — that is, airline.com — and also in the indirect channel, if the airline has a content distribution API (*see, e.g.*, [TEXT REDACTED BY THE COURT].

[*116] 99. FLX M is sold separately from FLX OC, although airlines can buy multiple Farelogix products together. (Carter Tr. 281-82)

100. Sabre's merchandising solution is not competitive. (Kruijssen Tr. at 629 (Farelogix's CFO stating that FLX M is "better than Sabre's merchandising engine"); Boyle Tr. at 552-53 (explaining that Sabre "didn't have a compelling product" that could "create an offer with a flexible rules engine"); Gilchrist Tr. at 771 ("[TEXT REDACTED BY THE COURT])

I. Farelogix Has Historically Been An Innovator While Sabre Has Resisted Change

101. AA's VP of sales and distribution strategy has **[**37]** described Farelogix as "the GDSs' leading competitor/agitator for years." (PX452; *see also* Garner **Tr**. 130 (describing Farelogix as "lone disruptor" and "lone alternative to GDS distribution")) Similarly, a Delta executive described Farelogix as "a disruptor in the industry" that is "forcing the GDSs to innovate and be more responsive to airline and agency commercial needs." (Adair Tr. 1720-21, 1735-36; *see also* [TEXT REDACTED BY THE COURT] United's director of distribution testified that Farelogix is '[TEXT REDACTED BY THE COURT], which "keeps GDSs on their toes relative to innovating to keep up" (PX299 at -770).

102. In 2005, Farelogix introduced an aggregation platform for travel agencies that managed content from both GDSs and direct connects. (Reiz Tr. 1356-57) As this platform began to gain traction, Sabre launched an initiative to "shut down" Farelogix. (PX096 at -108, -119; *see also* Davidson Tr. 400)

103. In 2009, Sabre and Amadeus canceled their developer agreements with Farelogix, cutting off Farelogix's feed to GDS content. (Reiz Tr. 1357-58) This forced Farelogix to shut 'down its travel agency-facing business. (Reiz Tr. 1359)

104. In and around 2011, Sabre and the other GDSs **[**38]** tried to stop travel agencies from establishing direct connects with airlines using Farelogix's technology. (Davidson Tr. 388-89)

105. In the early 2010s, Farelogix pioneered the development of NDC. (Carter Tr. 255)

106. The GDSs tried to undermine the development of the NDC standard. (Davidson Tr. 401; PX096 at -109) Between 2011 and 2013, Sabre and the other GDSs lobbied against IATA' s petition to approve the NDC standard. (Davidson Tr. 401; PX096 at -109; PX104 at -718 (Sabre's critiques of NDC were "consistent with a desire to ensure that the status quo stays in place"))

107. As recently as January 2018, Farelogix complained to the European Commission that the "GDSs consistently seek to block new non-GDS technology solutions that deliver what consumers need." (PX096 at -107; *see also* Davidson Tr. 397-98) Farelogix further told the Commission that the GDSs had engaged in "A Decade of Resistance and Changing Tactics" designed to "[u]ndermine and delay" the industry's effort to move toward NDC. (PX096 at -109; *see also* Davidson Tr. 401-02)

108. Also in 2018, Farelogix told a prospective buyer "the slow adoption" of Farelogix's order delivery products, like FLX OC, "was solely and unarguably **[**39]** due to the blocking and pressure GDSs put on Farelogix, airlines and travel agencies to not adopt NDC." (PX072 at -243; *see also* Davidson Tr. 412)

J. Travel Agencies Prefer GDSs To Direct Connects And Non-GDS Aggregators

109. Building individual direct connections to numerous airlines requires travel **[*117]** agencies to spend millions of dollars in upfront capital. (Ekert Tr. 1196-98; Kunz-Cho Tr. 1311-12) Ms. Stratford testified that the cost to BCD Travel of building a new agent point of sale system would be greater than [TEXT REDACTED BY THE COURT] (Stratford Tr. 1257)

110. Maintaining direct connects raises operating costs "exponentially" for travel agencies, because servicing bookings made with a direct connect is much costlier than servicing bookings made using the GDSs. (Ekert Tr. 1196)

111. Two of the largest TMCs in the world, CWT and BCD Travel, have estimated that if they were to move transactions away from GDSs and to direct connect, costs per booking would rise approximately $ 15. (Ekert Tr. 1196-97; Stratford Tr. 1256) Even when a booking is made outside of the GDS, the travel agency must then bring it back into the GDS to store the booking information. (Stratford Tr. 1255) This **[**40]** type of booking is "static" (Ekert Tr. 1191; Stratford Tr. 1255-56); so if, after a booking is completed, the customer needs to make a change, the travel agency is unable to make that change itself but must instead reach out directly to the airline (Ekert Tr. 1191; Stratford Tr. 1256). The increased costs of static bookings are ultimately passed on to the customer in the form of additional fees. (Stratford Tr. 1264-65)

112. Direct connects negatively impact travel agency operations by slowing response times, in part due to lengthier search processes. (Stratford Tr. 1255 ("[W]e prefer to use the GDS. Just from an efficiency standpoint, we don't want to go to multiple places to assess content."); Kunz-Cho Tr. 1298-99 ("[A] request to a large number of providers naturally has a tendency to cause delays and latencies.")) Removing content, and therefore bookings, from the GDS channel requires agents to search multiple platforms for travel content, thereby reducing efficiency and resulting in a "degraded user experience" compared to the GDS. (Ekert Tr. 1191-92; *see also* Stratford Tr.

1263; Kunz-Cho Tr. 1300) "[H]aving access to a wider array of airfare content and ancillaries through a single **[**41]** pipe is far more efficient." (Kunz-Cho Tr. 1288)

113. [TEXT REDACTED BY THE COURT]

114. Use of a non-GDS aggregator presents the same added costs and inefficiencies that make direct connects unattractive to travel agencies. As Mr. Ekert of CWT testified, aggregators are "highly inefficient for us, and the user experience and quality of what we do is degraded when we. . . access inventory through Travelfusion as compared to the GDSs." (Ekert Tr. 1190) Rather than the sub-second response times of the GDS, aggregators typically have response times of 15 to 20 seconds. (*Id.)* This time delay for every transaction, when multiplied by tens of thousands of searches for travel content, would result in an "unreal" increase in the labor costs of travel agencies. (Ekert Tr. 1191-92)

115. In addition, non-GDS aggregators do not provide the services — e.g., mid- and back-office support and facilitating duty of care — that the GDSs provide, and present similar added expenses as direct connect transactions. (Ekert Tr. 1198-99 ("Whether that is through Travelfusion or a, quote, 'non-GDS' direct connect, it is basically indifferent to us."); Stratford Tr. 1223-24 ("1 think the challenge of even using a **[**42]** third-party aggregator today. . . is that, again, you're still searching in multiple places. So I still have to go to the GDS to search."))

K. Sabre And Farelogix View Each Other As Competitors

116. Notwithstanding Defendants' repeated denials at trial (*see, e.g.*, Kruijssen **[*118]** Tr. 624-25; Menke Tr. 737), a preponderance of the evidence shows that Sabre and Farelogix do view each other as competitors, although only in a limited fashion.

117. Sabre considers Farelogix a competitor in developing NDC technology for direct connects. (PX011 at 6 (Sabre document stating, "NDC Connect is similar in concept to our AS Direct Connect, though priced lower"); PX246 at -989 (listing Farelogix as among "the competition" for NDC); PX197 at -938 (describing Farelogix as "non-GDS competitor[]" in next-generation offer and order management))

118. The record reflects competition between Sabre's and Farelogix's direct connect solutions for major airlines.

119. For example, between 2017 and 2019, [TEXT REDACTED BY THE COURT]

120. Sabre and Farelogix also competed to provide an NDC direct connect platform to [TEXT REDACTED BY THE COURT] (PX316 at -534) Sabre viewed Farelogix as its "main competitor" for the [TEXT **[**43]** REDACTED BY THE COURT] opportunity. (PX316 at -534; Gilchrist Tr. 761)

121. Some of the services Sabre and Farelogix offer airlines overlap with each other. (Garner Tr. 94, 118; Murphy 1495-96) Sabre and Farelogix each allow airlines to send their offers to travel agencies, process orders or bookings, and service those orders. (LobI Tr. 1150; Adair Tr. 1721-22)

122. Farelogix identified Sabre as a "key competitor" in order delivery and offer management. (PX072 at -219)

123. Some airlines view Sabre's GDS and Farelogix's Open Connect as partial substitutes.

124. AA has described Farelogix's direct connect technology as "providing a low cost substitute for GDSs." (PX453 at -968, -972; *see also* Judicial Notice Order ¶ 5 (AA describing GDSs and Farelogix as "Competitive Booking Sources"); PX452 (describing Farelogix as "the GDSs' leading competitor")

125. Similarly, a United executive testified that Farelogix offers United its only alternative way to reach U.S. travel agencies, other than going through a GDS. (Radcliffe Tr. 174-76)

126. A Delta executive testified that Farelogix provides airlines with an alternative to the GDS for distributing content to travel agencies. (Lobl Tr. 1150-53)

127. **[**44]** However, there are also great differences between Sabre's GDS — which provides services to travel agencies as well as airlines — and FLX OC, which is only an input for airlines. (Radcliffe Tr. 202-03; Carter Tr. 267, 273)

128. Unlike the Sabre GDS, FLX OC does not create offers, it only delivers them. (Davidson Tr. 385-86; Vilches Tr. 802-03)

129. In part because Farelogix provides fewer services to airlines, Farelogix's prices are significantly lower than Sabre's. (Radcliffe Tr. 175; Gamer Tr. 107) The cost to airlines for FLX OC is "roughly a tenth" of Sabre's GDS fee. (Murphy Tr. 1453-54) Dr. Murphy explained that this disparity is attributable to "comparing the price of an input to the price of the final product." (Murphy Tr. 1453)

130. FLX OC is sold on a per-ticket basis and requires airlines to pay a subscription fee. (Kruijssen Tr. 603; Nevo Tr. 993) By contrast, Sabre's GDS is sold on a per-segment basis. (Gamer Tr. 107-08; Nevo Tr. 990)

L. Farelogix Has Transformed Its Business Model Several Times

131. Farelogix's business strategy has changed dramatically multiple times over the last 15 years. (Carter Tr. 272-73; Davidson Tr. 435-36)

132. Prior to 2009, Farelogix tried — and failed **[**45]** — to be a GDS (Davidson Tr. 442-43), **[*119]** and tried — and failed — to sell a product to travel agencies that aggregated content from multiple GDSs (Carter Tr. 272-73). Farelogix abandoned this business model by 2009. (Carter Tr. 272-73)

133. In 2009, Farelogix repositioned itself as a provider of technology solely to airlines. (Carter Tr. 273) The company focused on a product called Direct Connect, which was an XML API that airlines could use to create direct connections with travel agencies. (Carter Tr. 273) This period is referred to by Farelogix's head of marketing as "ancient history" when she trains new Farelogix employees. (Carter Tr. 274)

134. Farelogix's Direct Connect failed because it did not attract a sufficient volume of transactions for Farelogix's airline customers, as travel agencies rejected its use. (Carter Tr. 274)

135. By approximately 2011, responding to the airlines' "ancillary awake[ning]," Farelogix began aggressively marketing FLX M, a software product that had been under development since 2008. (Carter Tr. 276-77; Reiz 1337-38)

136. Farelogix also developed three other offer engines to assist airlines in creating richer offers: FLX Shop & Price, FLX Schedule Builder, **[**46]** and FLX Availability Calculator. (PX025 at 5; Carter Tr. 239)

137. Farelogix's marketing message in 2020 "very, very rarely" addresses the use of NDC as a basis for costs savings because now "the message that resonates more with our airlines . . . is all about revenue and bow much money they can make selling ancillaries through their NDC pipe." (Carter Tr. 265)

M. Farelogix Is A Successful Competitor, Despite Facing Challenges, And Is Likely To Create Great Value For Sabre

138. Sabre's and Farelogix's portrayal of Farelogix at trial as a non-unique company floundering in the NDC API marketplace was unpersuasive.

139. Defendants emphasize there are many other providers of NDC API's, and this is true.

140. But no other provider of NDC API enjoys Farelogix's unique combination of a history of innovation, experience servicing the largest global carriers, strong reputation, presence in the United States, and seeming financial stability. [TEXT REDACTED BY THE COURT] Wiggins Tr. 1645) For over 15 years, Farelogix has built expertise working with large airline customers. (Davidson Tr. 409, 478; PX072 at -223; PX033 at -336-41 (outlining NDC case studies from Farelogix's work with American, United, **[**47]** Qantas, and Lufthansa))

141. Farelogix told a prospective buyer in a June 2018 presentation that it is the "NDC market leader," the "only company" that does NDC order delivery "at scale," and overall "Holds a Unique and Deeply Rooted Position in a Market with High Entry Barriers." (PX072 at -223, -226; *see also* PX025 at -953 (in 2016, Farelogix was "the only provider in the marketplace delivering NDC offer and order management with production-proven, PSS-agnostic connectivity, comprehensive functionality, orchestration and support — all fully under the airline's control"); Davidson Tr. 408-11)

142. Farelogix has augmented its NDC APIs with proprietary schemas that fill the gaps in the basic NDC schema. (Davidson Tr. 411) Farelogix also offers dedicated teams for most airline customers and has a group that assists airlines in connecting to travel agencies or third-party aggregators. (Carter Tr. 247, 253; Davidson Tr. 370; PX025 at -951; PX037 at -938)

143. No other third-party NDC API provider offers the additional capabilities offered **[*120]** by Open Connect. (Adair Tr. 1721; PX072 at -226 (no other NDC provider supports travel agency interface like SPRK); *see also* Garner Tr. 152-53)

144. Large **[**48]** U.S. airlines would not rely on IATA certifications to assess a potential NDC API provider's suitability (*see* Garner Tr. 121-22) and do not view IATA certifications as a reliable measure of IT providers' capabilities (*see* Radcliffe Tr. 230).

145. Datalex, an Irish travel software company, is the only non-GDS order management provider other than Farelogix that currently serves a U.S. airline on the NDC leaderboard (Jetblue). (Nevo Tr. 1022; D.I. 182 (PTO) Ex. 1 ¶¶ 64-65) [TEXT REDACTED BY THE COURT] Davidson Tr. 476; Menke Tr. 681; *see also* Murphy Tr. 1556)

146. OpenJaw, which is owned by a Chinese governmental entity, is unlikely to expand in the U.S. market, as its relationship with China presents airlines with data security concerns. [TEXT REDACTED BY THE COURT] Davidson Tr. 656)

147. Other NDC providers, like JR Technologies and TP Connects, are unattractive because they lack experience supporting an airline with global operations. [TEXT REDACTED BY THE COURT]

148. Hewlett Packard Enterprise ("HPE"), also known as DXC, is not a viable option even for United Airlines, which uses HPE as its PSS provider. [TEXT REDACTED BY THE COURT] (PX300 at -257; *see also* Radcliffe Tr. 213 (citing DXC's **[**49]** lack of support services and "lack of experience with travel agencies and airlines"))

149. The ATPCO NDC Exchange ("NDC Exchange") is an airline-owned entity that converts non-NDC APIs into standardized NDC APIs. (DX210 at -101520; Davidson Tr. 448-49; Reiz Tr. 1344-45; Gregorson Tr. 1667, 1671) Recently Southwest — a large, complex U.S. airline, which accounts for a significant portion of the volume of direct connect transactions in the United States — chose to use the NDC Exchange, despite initially engaging in discussions with Farelogix. (Davidson Tr. 448-49; Reiz Tr. 1345; Nevo. Tr. 1008) ATPCO was able to develop NDC connections to Southwest's API connection in two weeks. (Gregorson Tr. 1686)

150. But ATPCO's NDC Exchange does not provide an NDC API for airlines and lacks other key functionality. (Garner Tr. 122; Gregorson Tr. 1691 (explaining that NDC Exchange lacks ticketing capabilities and does not facilitate offer or order management)) ATPCO's chief strategy officer confirmed that NDC Exchange does not compete with any products offered by Sabre or Farelogix; nor do any of ATPCO's other services. (Gregorson Tr. 1689-1690, 1693-1694; PX141 at 1-2)

151. Airlines themselves are **[**50]** also self-supplying their own NDC APIs, which has been made easier by the updates to the IATA NDC schema. (Davidson Tr. 433) British Airways and Delta Air Lines (both of which are considered top 20 airlines worldwide) have self-supplied NDC APIs instead of purchasing a third-party's product such as FLX OC. (Radcliffe Tr. 217-18; Carter Tr. 271; Davidson Tr. 419-20, 446-47) Air France has also built its own NDC API. (Radcliffe Tr. 217; Carter Tr. 271)

152. Both American and [TEXT REDACTED BY THE COURT] have told Farelogix during negotiations that they could replace Farelogix by self-supplying their own NDC API or choosing an alternate vendor. (Garner Tr. 128-29; [TEXT REDACTED BY THE COURT]

153. Farelogix consider's airline self-builds to be a significant competitive threat. (Carter 270-71; Davidson Tr. 446-47, 635-36)

[*121] 154. Farelogix has had to lower its price for FLX OC in each of its negotiations with [TEXT REDACTED BY THE COURT]

155. But airline own-build solutions do not appear to be a feasible, cost-effective alternative for distribution, even for large U.S. full-service carriers. AA estimated that building its own NDC API would cost about $ 40 million and require annual ongoing maintenance **[**51]** and troubleshooting costs of $ 20-25 million. (Garner Tr. 127; *see also* Wiggins Tr. 1645-46 (building systems for airlines requires "a lot of money")) Smaller U.S. airlines also do not have plans or the resources to build NDC APIs in-house; they would prefer to license third-party IT solutions. ([TEXT REDACTED BY THE COURT] Wiggins Tr. 1644-45; DX306 at 20-21 [TEXT REDACTED BY THE COURT])

156. Moreover, it would take four to five years for AA or [TEXT REDACTED BY THE COURT] just to replace Farelogix's existing capabilities. (Garner Tr. 127-28, 159-60; [TEXT REDACTED BY THE COURT] *see also* Wiggins Tr. 1645-46 (building systems for airlines "takes many years"))

157. NDC is an open standard (Carter Tr. 271; Reiz Tr. 1326-27) and, as a result, NDC has enabled many other IT companies — including many new entrants — to compete for and win NDC API bids in the past five years (Carter Tr. 269, 270-71; Reiz Tr. 1327; Gregorson Tr. 1687)). Mr. Reiz, the only technologist who testified at trial and the individual who created the NDC standard, testified that any company who can build an NDC API could do so for a full service airline. (*See* Reiz Tr. 1329)

158. Defendants emphasize that in 2018 and 2019, **[**52]** after the introduction of schema version 17.2, Farelogix has submitted [TEXT REDACTED BY THE COURT] bids for FLX OC in response to RFPs, and won only [TEXT REDACTED BY THE COURT] of those bids. (Carter Tr. 269; Davison Tr. 639-40; Murphy Tr. 1471-72)

159. Since 2015, Farelogix has submitted a total of [TEXT REDACTED BY THE COURT] bids for its NDC API product, FLX OC. Of those [TEXT REDACTED BY THE COURT] bids, Farelogix won [TEXT REDACTED BY THE COURT]-a [TEXT REDACTED BY THE COURT] success rate. (Carter Tr. 271; Davidson Tr. 639-40) In that same period, Farelogix has lost NDC API bids to competitors such as Amadeus, Datalex, OpenJaw, and TPConnects. (Davidson Tr. 270)

160. Since 2015, Amadeus has won at least [TEXT REDACTED BY THE COURT] NDC API RFPs. (Davidson Tr. 648) Amadeus also provides NDC API services to Spirit Airlines. (Wiggins Tr. 1646)

161. Since 2018, Datalex has won [TEXT REDACTED BY THE COURT] NDC API RFP, the same as Farelogix. (Davidson Demonstrative 1; *see also* Davidson Tr. 467 (admitting Davidson Demonstrative 1) Datalex currently provides NDC API to Scandinavian Airlines and JetBlue. (Nevo Tr. 1022)

162. Likewise, since 2018, OpenJaw and TPConnects have both won [TEXT **[**53]** REDACTED BY THE COURT] NDC API RFP, the same number as Farelogix. (*See* Davidson Demonstrative 1; *see also* Davidson Tr. 467 (admitting Davidson Demonstrative 1))

163. DXC — formerly Hewlett-Packard — won [TEXT REDACTED BY THE COURT] to provide NDC API services in 2017. (Radcliffe Tr. 213) Although DXC provides an NDC API to a smaller airline (Flybe), IATA's schema standardization makes connections built for smaller airlines no different than those built for larger airlines. (Reiz Tr. 1329) SAP, one of the largest technology providers in Europe, currently provides the NDC API for Easyjet, which is a top 20 airline worldwide. (Davidson Tr. 641)

164. But these facts, and Defendants' characterization of them, merely mask the reality that Farelogix has won more RFPs than any other NDC API provider (Davidson Tr. 648) and has actually been quite successful in recent years.

165. In April 2018, IATA announced a leaderboard of airlines committed to making **[*122]** at least 20 percent of their indirect channel bookings via an NDC API by December 2020. (PTO Ex. ¶ 1163) Farelogix provides the NDC API for nearly half of these airlines, including two of the three U.S. airlines on the list. (PTO Ex. ¶¶ 64-65; **[**54]** PX094 at -566, -569; Davidson Tr. 373-74, 651)

166. Defendants count as Farelogix "losses" RFPs that remain open or may have been withdrawn. (Davidson Tr. 653-55) Defendants exclude [TEXT REDACTED BY THE COURT] whose contract Farelogix just renewed, and its active opportunity with [TEXT REDACTED BY THE COURT] (Davidson Tr. 649, 655-56) Defendants also wrongly equate every RFP with every other, without accounting for the size and importance of any particular airline's business — despite the uncontestable fact that Farelogix is working for two of the largest U.S. carriers: AA and United. (Davidson Tr. 649; Davidson Demonstrative 1) Nor does Defendants' argument attribute any weight to the fact that Farelogix's ability to win recent RFPs may have been impacted by the prospect that, in the near future, it may be owned by a GDS. (*See generally* Davidson Tr. 652-53) (Farelogix CEO acknowledging that some airlines are taking "wait-and-see" approach while merger is pending)

167. Today, Farelogix processes more NDC bookings than any other order management services provider. (Davidson Tr. 374; PX094 at -569) Farelogix has established a larger base of airline customers for NDC services than any **[**55]** other provider in the U.S. market. (Menke Tr. 731-32; PX072 at -223)

168. Farelogix is doing GDS bypass implementations for AA, United, and Lufthansa, as well as other airlines. (Davidson Tr. 375) AA and United already use Farelogix direct connects to distribute through OTAs, like Priceline and Orbitz, and TMCs, including AmTrav and TripActions. (Carter Tr. 249-50, 259, 261; Radcliffe Tr. 191-92; PX025 at -954; PX033 at -340, -342)

169. AA and Lufthansa also use Farelogix's NDC API to connect to third-party aggregators. (Garner Tr. 95, 112, 139; Carter Tr. 259-60) For example, CWT and BCD use Travelfusion to access the Lufthansa Group content distributed through Farelogix's NDC API. (Reiz Tr. 1352-54)

170. Farelogix is now handling 26 NDC GDS integration projects, as compared to just six at the start of 2018. (Carter Tr. 287-88; Davidson Tr. 375-76, 381-82, 439, 441)

N. NDC Will Likely Be Used More For GDS Passthrough Than GDS Bypass

171. To some extent, this case requires the Court to predict whether widespread adoption of NDC technology is going to lead to greater use of GDS bypass, essentially eliminating the role of Sabre's GDS, or whether it is more likely to foster the expansion of **[**56]** GDS passthrough, by which NDC allows for the creation, delivery, and servicing of richer airline content through GDSs, including Sabre. The Court finds that NDC will likely be used more for GDS passthrough than GDS bypass. (*See generally* Murphy Tr. 1461) ("I think we're going to end up with the GDS integration. It just makes too much economic sense.")

172. Farelogix has enabled airlines to establish direct connects with some of the largest OTAs, thereby bypassing the GDSs. (Gamer Tr. 103-04 (about 10-11% of AA's OTA bookings are made using American's Farelogix NDC API); Radcliffe Tr. 175-76 (describing United direct connect with Priceline); PX453 at -970)

173. American estimates it has achieved annual cost savings of $35 million from shifting OTAs to direct connects. (PX453 at -970)

[*123] 174. One large OTA, Fareportal, established Farelogix-enabled direct connects with [TEXT REDACTED BY THE COURT] to access certain fare and ancillary content not available on a GDS; it is also in talks with [TEXT REDACTED BY THE COURT] for a direct connect. (DX306 at 5-7)

175. However, since 2016, FLX OC ticket volumes resulting from direct connects for American have declined and for United have stagnated. (Rein **[**57]** Tr. 1335-36)

176. Industry participants predict that the volume of NDC use for GDS bypass — that is, direct connects and transactions through non-GDS aggregators — is unlikely to grow significantly in the future. (*See, e.g.*, Ekert Tr. 1186-87; Stratford Tr. 1245-47)

177. Today, and for the foreseeable future, airlines expect a major portion of NDC bookings eventually to come from GDS passthrough. ([TEXT REDACTED BY THE COURT])

178. [TEXT REDACTED BY THE COURT]

179. Farelogix expects most of its growth to come from GDS passthrough. (Davidson Tr. 375-76; PX072 at -241)

180. Farelogix CEO Davidson expects "pretty much all" future growth in FLX OC volumes to "come from GDS passthrough." (Davidson Tr. 442) Farelogix's Carter agreed that "the number one thing that [Farelogix] hear[s] from airlines now is about plugging into a GDS." (Carter Tr. 285)

181. Chris Wilding of Sabre reinforced this view, testifying that "every airline I talk with very much wants [Sabre] to implement NDC . . . . [E]veryone that is working with an NDC solution wants to have it integrated into the Sabre GDS because they believe that is the best way to distribute their content." (Wilding Tr. 857)

182. Rose Stratford of BCD **[**58]** Travel believes "broad delivery of systemwide NDC solutions will be best delivered by the GDS" because "it really is about the infrastructure that TMCs have and . . . servicing the workflows. The GDSs . . . know what those are and understand the complexities." (Stratford Tr. 1265-66)

183. Travel agencies have informed United that they prefer using the GDSs to direct connections. (DX246 at -084) ("Big 3 TMCs will wait for the GDSs to deploy NDC capabilities.")

184. GDS passthrough, not direct connects or transactions through non-GDS aggregators, has led to the recent increased interest in NDC. (Carter Tr. 287-88) Farelogix is currently working on 26 GDS passthrough implementations. (Davidson Tr. 381-82)

185. If a particular transaction is processed via GDS bypass, the GDS is cut out and does not collect any fee. Even when a transaction is conducted via GDS passthrough, GDS fees are likely to be reduced, since the GDS performs fewer functions than it does when airlines use non-NDC legacy technology through the GDS.

186. United's director of distribution expects to pay lower booking fees for GDS passthrough bookings because United will "take the heavy lifting" of creating and pushing out **[**59]** offers. (Radcliffe Tr. 190-91; *see also* [TEXT REDACTED BY THE COURT]; Nevo Tr. 1066-67; PX300 at -260 (United noting that using Farelogix NDC for "GDS pass through replaces existing legacy technology" and may result in lower GDS segment fees))

187. As AA's Garner put it, with GDS passthrough, Sabre's role is reduced to being just "an aggregator for travel agents." (Garner Tr. 118)

188. When Sabre established its GDS passthrough connection with American, Sabre's then-president of Airline Solutions, Shirk, observed that Sabre "need[ed] to be careful to not have this over enable **[*124]** Farelogix only to hurt us in all our accounts." (PX308 at -982; *see also* Shirk Tr. 1599)

189. Using NDC technology like FLX OC in a GDS passthrough implementation has also helped airlines persuade GDSs to switch to a "wholesale model" in the OTA market. (Garner Tr. 108; PX453 at -970 (indicating AA will not pay GDS fees for OTA bookings where it offers direct connect option)) Under the wholesale model, the, payment flow shifts: the airline, not the GDS, pays the travel agency an incentive, and the travel agency pays the GDS a technology fee for each booking made through the GDS. (Garner Tr. 108-09)

190. Under the **[**60]** wholesale model, airlines pay less for distribution. (Garner Tr. 109; Nevo Tr. 943-44) For example, American estimates that it has achieved cost savings of $66 million per year from shifting OTAs to the wholesale model. (PX453 at -970)

191. Also under the wholesale model, GDSs will likely earn lower fees. (*See* Davidson Tr. 108-09; Nevo Tr. 944)

O. Dr. Nevo's Analysis Is Unpersuasive

192. DOJ relies on the economic expert analysis of Professor Aviv Nevo of the University of Pennsylvania and its Wharton School of Business. (*See* Nevo. Tr. 876) Dr. Nevo is well-credentialed, including having served as the Deputy Assistant Attorney General for Economic Analysis at the Antitrust Division of the Department of Justice, and has testified on behalf of DOJ and the Federal Trade Commission in other merger review cases. (*See* Nevo. Tr. 875-78) In this case, however, his analysis was flawed and, ultimately, unpersuasive.

193. Dr. Nevo testified that he followed "a standard multistep approach," which he described as starting by "learning about the industry and the market realities because they were really kind of the key input into what I do later." (Nevo Tr. 880) Dr. Nevo emphasized the importance of **[**61]** learning about the particular market he was analyzing, stating "it is important to ground the analysis in the facts of the industry, to really understand what is going on. . . . This ultimately is a practical analysis that is aimed to answer a question, and for that I really have to understand the market and the reality." (Nevo. Tr. 881)

194. After he felt he understood the market realities, Dr. Nevo followed a "three-step approach:"

> First, you define the relevant antitrust market . . . [T]hen I go and evaluate the competitive effect. And then, finally, I look to see if there's any mitigating factors that could offset these competitive effects.

(*Id.*)

195. Unfortunately, Dr. Nevo did not instill confidence at even the first step of this process: gaining knowledge and familiarity with the airline industry.

196. Dr. Nevo opined that there are relevant product markets for "booking services." (Nevo Tr. 885)

197. According to Dr. Nevo, "booking services" include: (1) transmitting an airline offer to a travel agency or aggregator; (2) receiving or processing an order or booking; and (3) receiving or processing changes to the order. (Nevo Tr. 899-900)

198. Witnesses, including those with lengthy **[**62]** service in the airline industry ecosystem, consistently testified that "booking services" is not a term they use or have heard and, more importantly, that there is no standalone "booking services" product that either Sabre or Farelogix has ever offered for sale. (*See, e.g.*, Carter Tr. 268; Davidson Tr. 443; Wilding Tr. 848; Reiz Tr. 1348)

[*125] 199. Dr. Nevo had to acknowledge that Sabre has not provided "booking services" in a commercial transaction in the United States; therefore, he is "separat[ing]" out "booking services" functionality from the services that Sabre actually sells through its GDS platform. (Nevo Tr. 985-87)

200. At trial, Dr. Nevo was unable to provide a clear answer as to which of Farelogix's products other than FLX OC (if any) comprise what he considers the "booking services" product. (*See* Nevo Tr. 959-61)

201. Dr. Nevo was unable to determine a value or price for either Sabre's or Farelogix's "booking services." (Nevo Tr. 987) When Dr. Nevo was asked the price attributable to the booking services functionality within Sabre's GDS platform, he explained that "Sabre has not offered it in the U.S. I believe there is no price." (*Id.*) When asked the value of the "booking services" **[**63]** functionality within the Sabre GDS, Dr. Nevo testified that he "did not quantify what [the] value is" and that it "was not part of [his] analysis." (*Id.*) When Dr. Nevo was asked whether he compared the value of the "booking services" functionality in the Sabre GDS to the value of the "booking services" in FLX OC, he testified: "That is not something that I've offered, no." (*Id.*)

202. In attempting to identify and confirm the relevant product market, Dr. Nevo applied the hypothetical monopolist test, which assumes that the hypothetical monopolist controls all the relevant products in the market for the given geography, then asks whether the hypothetical monopolist would profitably impose a small price increase (i.e., a small but significant and non-transitory increase in price, or "SSNIP") on those products. (Horizontal Merger Guidelines § 4.1.1 ("Guidelines"); Nevo Tr. 910) If so, the market is a relevant market.

203. Dr. Nevo calculated that a five percent SSNIP on OTA booking services would be $0.10. (Nevo Tr. 910) He then considered whether an airline would accept the SSNIP and adjust its fares to reflect the higher costs, or reject the SSNIP and stop using OTA booking services. (Nevo Tr. **[**64]** 910-12) Dr. Nevo concluded that an airline would accept a SSNIP because it would be more expensive for an airline to forgo distribution through OTAs than accept the SSNIP. (Nevo Tr. 910-14) To reject a SSNIP, the airline would need to be able to persuade travelers booking through OTAs to switch to other distribution channels, or sell additional tickets to different travelers through other channels. (Nevo Tr. 904, 906-12)

204. Dr. Nevo calculated that a SSNIP on TTA services would be $0.11. (Nevo Tr. 912-13) A SSNIP on TTA services is smaller relative to the average price of airline tickets booked through TTAs, and business travelers are relatively less price sensitive, so they are unlikely to shift in response to a small price increase. (Nevo Tr. 912-13) TTAs are a critical sales channel for airlines, who would rather pay a SSNIP than pull out of all TTAs. (Gamer Tr. 101-02, 109-10; Radcliffe Tr. 172-74, 348-49)

205. The Court does not find Dr. Nevo's SSNIP analysis persuasive, for reasons explained elsewhere in this Opinion. (*See, e.g., infra* FF 215-16)

P. The Relevant Product Market For OTAs Has To Include Airline.com

206. Dr. Nevo excluded from his relevant product market all the airline **[**65]** tickets that are sold directly by airlines to end-user travelers. (*See* Nevo Tr. 914-15) That is, Dr. Nevo excluded airline.com from the relevant market. The Court finds, however, that airline.com has to be included in **[*126]** the relevant market, at least with respect to the OTA market.

207. Airline.com accounts for approximately half of all airline tickets sold to leisure travelers in the United States. (Garner Tr. 91; Wiggins Tr. 1640; [TEXT REDACTED BY THE COURT]

208. Airlines believe they can succeed in shifting bookings from the indirect channel (which involves OTAs and TTAs) to the direct sales channel (i.e., airline.com). (Lobl Tr. 1165- 66; DX287 at 1 (Delta distribution strategy documents state that "[d]riving customers to direct channels is core to our strategy"); *see also* Tackett Tr. 1702-03 (testifying Alaska Airlines is seeking to grow volumes in direct channel))

209. [TEXT REDACTED BY THE COURT]

210. Chris Wilding, who has negotiated as many as 100 GDS agreements with airlines on behalf of Sabre, testified that airline websites are "one of the primary competitors that we face as a GDS" and explained that Sabre continues to see "a point of [market] share shift from the GDS channel **[**66]** to the dot corn," on average, every year. (Wilding Tr. 860, 864)

211. The competition between OTAs and airline websites has increased with the rise of metasearch sites that provide direct channel results alongside OTA results. [TEXT REDACTED BY THE COURT] Metasearch sites may direct the consumer to the OTA website or the airline's website — in the latter instance, the sale is a direct channel sale. (Tackett Tr. 1701-02) The metasearch site may even permit a consumer to complete a booking through the airline's website without leaving the metasearch site. (Tackett Tr. 1701-02)

212. Fareportal co-CEO Werner Kunz-Cho testified that there is competition between OTAs and the direct channel via metasearch sites like Google Flights. (Kunz-Cho Tr. 1300)

213. Defendants' economics expert, Dr. Kevin Murphy of the University of Chicago,[10] opined persuasively, and consistent with the record, that airlines have recognized that much of their revenues derived through sales via OTAs can be replaced by sales through airline websites. (Murphy Tr. 1438-39, 1485) For an airline, the "closest alternative" to distribution through an OTA is distribution through its own website. (Murphy Tr. 1552)

214. Dr. Murphy **[**67]** opined that airline direct sales have exerted significant competitive pressure on GDS fees. (Murphy Tr. 1426) Aside from the Amadeus and Travelport GDSs, airline.com is the biggest constraint on Sabre's GDS fees. (Murphy Tr. 1433)

215. Even Dr. Nevo agreed that airline.com serves as a competitive constraint on Sabre's GDS. (Nevo Tr. 1009-10) But in conducting his SSNIP analysis, Dr. Nevo could not (and did not even attempt to) determine whether airline.com was a bigger competitive constraint on Sabre's GDS than is FLX OC. (Nevo Tr. 1006, 1026-27)

216. Dr. Nevo's SSNIP tests assume that an airline confronted with a hypothetical price increase has only two choices: pay the increase or walk away. (Murphy Tr. 1481-82) As Dr. Murphy explained, however, Dr. Nevo's assumption "ignores" that airlines also have the "ability to withhold content or not reach a deal" with a GDS and instead try to steer traffic from OTAs to airline.com. (Murphy Tr. 1481)

[*127] Q. U.S. Point Of Sale Is Not The Relevant Geographic Market

217. Bookings made through travel agents located in the United States are referred to by Dr. Nevo as "U.S. point of sale." (Nevo Tr. 897, 1017; *see also* Wilding Tr. 836, 853) To Dr. Nevo, **[**68]** an OTA has a U.S. point of sale if its IP address has a U.S. address. (Nevo Tr. 897) A TTA has a U.S. point of sale if it is physically located in the U.S. (*Id.*)

218. Dr. Nevo opined that there is a relevant market for "booking services" with a U.S. point of sale because "[i]t's not practical for an airline to substitute away from a U.S. point of sale." (Nevo Tr. 897-98) Airlines cannot easily induce travelers to switch from booking through U.S. travel agencies to booking through travel agencies in other parts of the world, and they cannot easily replace sales to travelers in the United States with sales to travelers in other countries. (*Id.*)

219. Sabre's GDS business has a strategy for the U.S. market and appears to separately track its market share for U.S. point of sale and rest-of-world point of sale. (PX389 at -437) For certain airlines, Sabre's GDS charges a lower price for U.S. point-of-sale bookings as compared to rest-of-world point-of-sale bookings. (Wilding Tr. 852-53; PX389 at -437)

220. However, DOJ failed to persuade the Court that U.S. point of sale — that is, travel agencies located in the U.S. — is the relevant geographic market. The reasons Dr. Nevo gave for his opinion **[**69]** are unsupported by the record.

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[10] Dr. Murphy, like Dr. Nevo, has impressive and pertinent qualifications. Dr. Murphy received his Ph.D. in economics from the University of Chicago, has published articles in around 70 journals, and has received both the John Bates Clerk medal and the MacArthur fellowship. (Murphy Tr. 1415-18)

221. Dr. Nevo said that his geographic market is based on "who the customer for the product is." (Nevo Tr. 1016) But, as Dr. Nevo recognized, Farelogix's customers for FLX OC are airlines. (*Id.*) Thirteen of 15 FLX OC customers are airlines based outside of the United States. (Nevo Tr. 1018) Yet the point of sale Dr. Nevo used for his relevant market is not where the airline using FLX OC is based, as one would assume if the market is based on "who the customer" is. Instead, Dr. Nevo's point of sale is where the travel agent — with whom Farelogix has no relationship, and who does not use FLX OC — is based.

222. Dr. Neva further explained that the geographic market for technology products "depends on how they're priced," i.e., whether it is a product "that you can buy in the U.S. that has a different price than if you buy it, for example, in Israel." (Nevo Tr. 1017-18) But Dr. Nevo provided no evidence that the transaction fee for FLX OC varies by the location of the travel agency that purchases a ticket. (Nevo. Tr. 1070)

R. DOJ Did Not Prove It Is Entitled To A Presumption Of Competitive Harm

223. DOJ contends that Dr. Nevo's market analysis gives rise to a **[**70]** presumption that the proposed merger will lead to competitive harm. The Court disagrees.

224. Dr. Nevo measured market concentration using the Herfindahl-Hirschman Index ("HHI"). (Nevo Tr. 919-20) The HHI is a standard measure used in economic literature and is calculated by computing the share of each firm in the market, squaring the shares, and summing them. (Nevo Tr. 919-20; Guidelines § 5.3) An industry with an HHI over 2,500 is considered highly concentrated, and a merger that causes an increase in HHI of more than 200 points raises significant competitive concerns. (Nevo Tr. 915-16, 920-21; Guidelines § 5.3)

225. In calculating shares for his alleged market for booking services sold through OTAs, Dr. Nevo calculated that Farelogix had 3.9% market share in 2018, while Sabre had 48.0% market share. (Nevo Tr. **[*128]** 917) Using Sabre's projections for 2020, Dr. Nevo calculated that Farelogix would have 12.5% market share in 2020, while Sabre would have 43.7% market share. (Nevo Tr. 917) Using 2018 data, Dr. Nevo calculated a post-merger HI-H level of 4,268, with a post-merger change in HHI of 371. (Nevo Tr. 920-21) Using Sabre's projections for 2020, he calculated a post-merger HHI of 4,465, with a **[**71]** change in HHI of 1,093. (*Id.*) These calculations would support a presumption of competitive harm, as they all exceed the standards set out in the Guidelines.

226. In calculating shares for his alleged market for booking services sold through TTAs, Dr. Nevo calculated that Farelogix had 0.1% market share in 2018, while Sabre had 54.8% market share. (Nevo Tr. 922)[11] Using Sabre's projections for 2020, Dr. Nevo calculated that Farelogix will increase to 6.4% market share in 2020, while Sabre would drop to 51.1% market share. (*Id.*) Using 2018 data, Dr. Nevo calculated a post-merger HHI level of 3,895, with a post-merger change in HHI of 6. (*Id.*) Using Sabre's projections for 2020, he calculated a post-merger HHI of 4,085, with a change in HHI of 657. (Nevo Tr. 922-23) These calculations would support a presumption of competitive harm, as all but the post-merger change based on 2018 data exceed the standards set out in the Guidelines.

227. Dr. Murphy identified flaws in Dr. Nevo's HHI analyses.

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[11] Dr. Nevo's market share calculations in the TTA market included bookings made through Southwest's "self-build" API. (Nevo Tr. 921). Because Southwest does not compete to provide "booking services" for other airlines, its inclusion in these calculations is conservative, as it makes the reported market shares lower than they would otherwise be. (Nevo Tr. 921-22)

Some of specific data cited in this paragraph do not actually appear in the trial record, as neither Dr. Nevo nor Dr. Murphy expressly stated all the numbers during their testimony and their demonstratives were not admitted into evidence. The relevant numbers and calculations appear in the expert reports (which were also not admitted). The Court understands there to be no dispute between the parties as to how Dr. Nevo calculated his HIE numbers or the resulting numbers if the adjustments suggested by Dr. Murphy are made. While the parties disagree about the import of the HHI analyses, and whether Dr. Nevo's or Dr. Murphy's analysis is more pertinent, they do not disagree as to what figures result from each expert's inputs.

228. With respect to the OTA market, Dr. Nevo excluded all sales made through airline.com. (Murphy Tr. 1480-81) If Dr. Nevo's calculations using 2018 data are corrected so that airline direct channel **[**72]** sales are included in his alleged market for booking services sold through OTAs, the result is a post-merger HHI level of 1115 and a change in HHI of 19. (Murphy Tr. 1485) If Dr. Nevo's calculations using Sabre's 2020 projections are corrected so that airline direct channel sales are included in his alleged market for booking services sold through OTAs, the result is a post-merger HHI level of 1127 and a change in HHI of 53. (Murphy Tr. 1485) All four of these numbers fall below the Guidelines criteria (i.e., 2500 and 200) for presumptive competitive harm.

229. With respect to the TTA market, Dr. Nevo attributed all sales from GDS passthrough to Farelogix, not to any GDS. (Nevo Tr. 919; Murphy Tr. 1483-86) However, when an NDC-enabled sale is made through a GDS in a passthrough, it is the GDS that maintains the connection as well as the commercial relationships with travel agencies and airlines; the NDC provider (such as Farelogix) does not replace the GDS but, instead, acts as an upstream, vertical complement to the GDS. (Carter Tr. 269; Murphy Tr. 1446-48, 1456-58) It is the GDS, not Farelogix, that gets paid for **[*129]** this passthrough transaction, as even Dr. Nevo recognizes. (Neva Tr. **[**73]** 1068-69) Consequently, the sale through GDS passthrough is more properly understood as a sale by the GDS, not by Farelogix. (Murphy Tr. 1486)

230. If Dr. Nevo's calculations using 2018 data are corrected so that GDS passthrough sales are credited to the GDS, not the NDC API supplier, the result is an HHI level of 3,895 and the HHI change is just 6. If Dr. Nevo's calculations using Sabre's 2020 projections are corrected in the same manner, the result is an HHI level of 3,898 and an HHI change of 19.[12] This is ambiguous support for a presumption of harm in the TTA market, as 3,895 and 3,898 exceed the Guidelines criteria, but 6 and 19 do not.

S. Sabre's Story Is Not Credible

231. Sabre contends that it does not view NDC, even when used for GDS bypass, as a threat. Sabre further contends that the principal reason it wants to acquire Farelogix is for its FLX M product, not for FLX OC or to address the risk of GDS bypass and passthrough. The Court does not believe Sabre.

232. Sean Menke, Sabre's CEO, testified that GDS bypass is not a threat to Sabre. (Menke Tr. 736-41) This testimony is not credible as it does not comport with the record.

233. Sabre's 2018 10-K identified "direct connect initiatives **[**74]** . . . bypassing the GDSs" as a risk factor for Sabre's business. (PX251 at -162; *see also id.* at -162-63 (also identifying direct distribution through airline.com as another risk factor))

234. The 10-K contains another section on competition, which notes that the "travel distribution market is highly competitive, and [Sabre is] subject to competition from other GDS providers, direct distribution by travel suppliers and ***new entrants or technologies that may challenge the GDS model***" — a concept which includes at least GDS bypass — and that "[a]ny inability or failure [by Sabre] to adapt to technological developments or the evolving competitive landscape could harm [Sabre's] business operations and competitiveness." (PX251 at -166) (emphasis added)

235. PX343 at -188, which is a slide from Sabre's planning forecast for 2020, also shows that Sabre views direct connect as a forward-looking risk: it states that "risks center around . . . [n]ew airline models and ability for the major carriers to shift share to direct connect." (*See also* Shirk Tr. at 1621-22 [TEXT REDACTED BY THE COURT]; PX 156 at -953; PX497)

236. Defendants' expert, Dr. Murphy, also concluded that direct connects can be a **[**75]** competitive constraint on GDSs and that "GDS bypass is somewhat of a threat" to Sabre. (Murphy Tr. 1520, 1558-59)

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[12] These specific figures are not in the trial record, but they are in Murphy's expert report. As with other data described above, the Court understands the parties to be in agreement as to these numbers but not as to their relevance and import.

237. Even Menke admitted (eventually) that Sabre would be impacted if even a portion of the market shifts to GDS bypass. (Menke Tr. 739, 746)

238. The Court does not find credible the Sabre witnesses' testimony that none of the uses of Farelogix technology is viewed as a threat to Sabre. It would be irresponsible for Sabre's leadership not to understand that GDS bypass, and even GDS integration and the wholesale model, are threats to Sabre's traditional revenue flow.

239. Because GDS bypass is a threat to Sabre, and because Farelogix is a major player in enabling GDS bypass, it is logical to conclude that part of Sabre's interest in **[*130]** acquiring Farelogix is to mitigate the risk from GDS bypass. Notwithstanding CEO Menke's unequivocal denial that there is "any connection" between GDS bypass and Sabre's "reason for buying Farelogix" (Menke Tr. 744), other evidence — including internal Sabre documents — prove that this is part of Sabre's motivation.

240. Chris Boyle, who led Sabre's evaluation of the proposed Farelogix acquisition, sent a presentation to Menke identifying as part **[**76]** of the "value" of acquiring Farelogix that it would "[m]itigate risk from potential GDS bypass." (PX011 at 3; PX012 at 7; *see also* Boyle Tr. 506-07) Menke then forwarded a version of this presentation containing the "mitigate risk" language to the chairman of Sabre's board of directors. (Menke Tr. 741)

241. Boyle testified the "mitigate the risk of GDS bypass" bullet point was inserted at the last minute into a July 2018 draft internal powerpoint deck, that it was done by two subordinates during a hectic period, that the bullet is inconsistent with the rest of the document as well as an earlier deal rationale document from February 2018, and that he deleted the bullet after he noticed it because it did not reflect his views. (Boyle Tr. 506, 516-17, 544-46, 553-57; *see also* DX086) The final presentation prepared for Sabre's board of directors to approve the Farelogix transaction did not include "mitigating the risk of GDS bypass" as a rationale for the deal. (DX145)

242. However, ordinary course documents indicate that, in fact, Boyle did participate in the meeting where the slide was created and suggest he likely deleted the bullet in September 2018 after speaking with Sabre's antitrust **[**77]** counsel. (Boyle Tr. 513-16, 519-35; PX024; PX014; PX492; PX493; PX494; PX495; PX439)

243. Menke testified that the principal reason Sabre is interested in acquiring Farelogix is to own the FLX M merchandising product. (Menke Tr. 744-45 (explaining that Sabre's primary focus was on Farelogix's "merchandising capabilities to help our online customers sell the products and services that they want"); *see also* Boyle Tr. 552-53 (Farelogix deal leader testifying that interest in acquiring Farelogix, an idea Sabre had abandoned in 2017, was "instigat[ed]" by interest in "their merchandising engine"))

244. FLX OC generates the majority of Farelogix's revenue. (Davidson Tr. 379) Approximately two-thirds of Farelogix's employees work on Open Connect and NDC API, while far fewer Farelogix employees (around 15) work on FLX M. (Davidson Tr. 379, 382-83)

245. Internal Sabre documents do show that Sabre is according substantial value to Farelogix's FLX M and the further value that could be created by integrating it into Sabre's technology. (DX145 at -005 (November 10, 2018 presentation made to Sabre's board of directors for approval of the Farelogix acquisition, indicating that transaction would enable **[**78]** airlines to "integrate[] PSS-agnostic merchandising engine with PSS"); *see also* Boyle Tr. 552-53 (explaining that Sabre viewed FLX M "as a key building block, an ability to create an offer with a flexible rules engine [that] we hadn't done ourselves"); Gilchrist Tr. 781-82 (acquiring FLX M "will give [Sabre] inroads in [to] new customers that we can't currently do business [with] today as far as merchandising is concerned" and "[for [Sabre's] existing PSS customers who have struggled without merchandising capabilities [offering Farelogix's merchandising solution] will give [Sabre] a much, much stronger level of capability"))

246. While the Court finds that integration of FLX-M into Sabre's offerings will promote innovation and enable Sabre **[*131]** to better compete against its GDS counterparts, this is only one motivation for Sabre's desire to acquire Farelogix. Other motivations are dealing with an entity Sabre views as a competitor and threat and transforming NDC technology from a risk to an opportunity for innovation and integration, including by obtaining control over FLX OC, the employees who work on it, and the revenues generated from it.

247. As the Court has already found (*see supra* **[**79]** FF Part K), Sabre and Farelogix view each other as competitors, both to supply NDC APIs and for a component of the traditional full-service GDS.

248. In a presentation created for a potential acquirer, Farelogix described Sabre and Amadeus as its primary "Order Delivery" competitors, both in their development of NDC APIs and in "traditional GDS distribution until NDC is fully adopted." (PX072 at -219)

249. Similarly, Sabre strategy documents identify Farelogix as one of Sabre's "most relevant threats" and as a competitor in next-generation distribution. (PX048 at -802; *see also* PX005 at -927; PX197 at -938 (describing Farelogix as a "non-GDS competitor[]" in next-generation order management))

250. In a February 2, 2018 deal discussion presentation, Sabre's Boyle noted that Farelogix's technology solutions would help Sabre "bring[] NDC-enabled distribution to scale in the marketplace." (Boyle Tr. 555) (referencing DX086 at 4) Sabre's November 10, 2018 presentation seeking approval from its board of directors detailed how combining with Farelogix would accelerate Sabre's "NDC-enabled strategy." (DX145 at 5) (describing several value propositions of possible merger with Farelogix, including **[**80]** that Farelogix "has key building blocks that complement our organic plans enabling at-scale NDC+," "NDC Offers integrated in the GDS," "Immediate access to NDC API," "Ability to scale NDC volume quickly," "Adds NDC platform to leading Sabre product offering") These benefits are not limited to acquisition of Farelogix's FLX M product but also will be derived from Sabre's acquisition of FLX OC.

T. Sabre's Promises About Post-Merger Pricing And Availability

251. On August 9, 2019, Sabre CEO Menke sent letters to current Sabre and Farelogix airline customers, making commitments concerning what Sabre would do following its acquisition of Farelogix. (Menke Tr. 720-22; DX225)

252. Specifically, Mr. Menke wrote that after the acquisition, Sabre will:

(a) Continue to offer and support Farelogix's NDC APIs and Open Connect capabilities to any third parties and all outlets that wish to use them to connect to Sabre, other GDSs, other distribution partners, or directly to travel agents;

(b) Continue to offer Farelogix's NDC APIs and Open Connect capabilities to airlines and other third parties for both GDS bypass and GDS pass-through;

(c) Continue to make Open Connect agnostic to any form of distribution **[**81]** of provider;

(d) Commit to make Farelogix's NDC APIs and Open Connect available at industry competitive rates that are no greater than they are today;

(e) Provide at least the current level of support (or more) for the capabilities;

(f) Continue to invest in the development of Farelogix's capabilities at **[*132]** levels no less than current levels; and

(g) Offer to extend any existing Sabre GDS contract or Farelogix contract on the same terms for a period of at least three years past the current termination date.

(DX225)

253. A three-year extension of FLX OC contracts would provide airlines that currently use FLX OC time to find an alternative supplier before their next negotiation with Sabre or with other GDS providers. [TEXT REDACTED BY THE COURT]

254. Notwithstanding that the Court does not believe Sabre's story about why it seeks to acquire Farelogix (*see supra* FF Part S), the Court does believe that Menke intends to abide by the commitments he has expressed to customers and the market. However, as the government correctly notes, Sabre has not memorialized its offer in any legally binding agreement, and no airline has accepted Sabre's offer. (Menke Tr. 730) Furthermore, CEOs — and even firm cultures **[**82]** — can change.

U. Most, But Not All, Players In The Airline Travel Ecosystem Support The Proposed Transaction

255. Most of the players in the airline travel ecosystem — including especially travel agencies and airlines — support the proposed transaction. Several of those who do not, American Airlines and United Airlines, have obvious interests in seeing the deal die.

256. Kurt Ekert, CEO of CWT, testified that the proposed acquisition "will enable Sabre to . . . offer much better value to the airlines than they can today." (Ekert Tr. 1199) He added that "if Sabre at scale . . . is able to make NDC a reality, well, that means we don't have to go and make fundamental changes to how we operate our business." (Ekert Tr. 1201)

257. Werner Kunz-Cho, CEO of Fareportal, stated, "Sabre with a Farelogix merger will be able to embrace a wider array of content, particularly in the low cost carrier domain which is very important to us." (Kunz-Cho Tr. 1316; *see also id.* 1290-91 (noting one benefit of merger will be enhanced ability to meet growing traveler demand for ancillaries))

258. BCD Travel noted in a letter to Dal that the Sabre-Farelogix combination "will benefit the travel industry as a whole — by accelerating **[**83]** the adoption of the [NDC] protocol — as well as the travel agencies that use global distribution systems (GDSs) such as Sabre, and companies and travelers we serve." (DX284 at 1)

259. Rocky Wiggins, Chief Information Officer at Spirit Airlines, testified that the deal "is a great step" because "it would accelerate Sabre's capability in the NDC area." (Wiggins Tr. 1658; *see also id.* 1661-62 (agreeing with proposition that combining with Farelogix "is another example of Sabre['s] commitment to deliver the end to end NDC-enabled retailing, distribution and fulfillment technology required to accelerate . . . profitability and growth"))

260. [TEXT REDACTED BY THE COURT]

261. As far as the record shows, the entities opposing the proposed acquisition are two of the largest airlines in the United States, American and United Airlines.[13]

262. Both American and United have previously attempted to acquire Farelogix. Specifically, in 2015, United considered a **[*133]** joint venture with AA to acquire Farelogix and gain "strategic influence over product direction" at Farelogix. (PX299; *see also* Radcliffe Tr. at 223) Starting in 2017, United began considering another offer to acquire Farelogix. (Radcliffe Tr. 224-25) **[**84]** That effort ended in 2018. (Radcliffe Tr. 225-26)

263. [TEXT REDACTED BY THE COURT]

264. AA's opposition to the transaction is in tension with its offer to Sabre to publicly support the proposed merger if Sabre were to agree to grant significant concessions on commercial terms fo[TEXT REDACTED BY THE COURT] (DX202; *see also* Garner Tr. 155-56, 158)

V. The Merger's Likely Impact On Pricing, Innovation, And Leverage

265. Based on the evidence, the Court predicts that the merger of Sabre and Farelogix will not increase prices nor deter innovation, even though it may reduce one source of airlines' leverage in negotiating with GDSs.

266. During negotiations leading to the Sabre-Farelogix transaction, some consideration was given to whether acquiring Farelogix would enable Sabre to raise prices. Sabre's and Farelogix's CEOs discussed whether the transaction could lead to a "possible uplift on GDS transaction fees." (Boyle Tr. 496-97; *see also* PX227 at -130 ("[T]his is something we discussed on the phone and you had a strong level of confidence surrounding the

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[13] Shortly after the acquisition was announced, a senior Delta executive told his CEO that [TEXT REDACTED BY THE COURT] *see also* Adair Tr. 1720-21 (Farelogix is "an airline-centric entity" that "think[s] about how airlines want to solve the problems"))

opportunity.")) Farelogix and its private equity owner, Sandler, believed Sabre would be able to increase Sabre's booking fees post-merger. **[**85]** (Boyle Tr. 486-87, 492-93, 495; PX006 at -279; PX009 at -037) In August 2018, Farelogix's CFO noted that, for Sabre, buying Farelogix could reduce the "price pressure in [the] market." (PX187 at -960; *see also* Kruijssen Tr. 615-16) On the day the acquisition was announced, a Sabre senior vice president wrote: AA's "FLX bill is going up big time." (PX140 at -639; *see also* Gilchrist Tr. 751)

267. Even though the Court rejects Sabre's story about not perceiving GDS bypass as a threat and about acquiring Farelogix principally for FLX M, the Court does find credible Sabre's representations to the market that it intends to hold or even lower prices for FLX OC if it succeeds in acquiring Farelogix. Doing so would be consistent with the internal financial modeling Sabre used in deciding to pursue the transaction.

268. As part of Sabre's due diligence, Chris Boyle created three sets of projections to model the value of a potential acquisition: the Farelogix "Management Case," "Sabre Base Case," and "Sabre Synergy Case" models. (PX015 at 59; *see also* Boyle Tr. 538-40) Sabre's Board relied on Boyle's projections to approve the deal. (Menke Tr. 717-18) The FLX OC projections in the "Sabre Synergy **[**86]** Case" mirror those in the "Sabre Base Case" and both models project FLX OC prices decrease over time. (Boyle Tr. 567-70) In all three cases, the projected revenue per ticket was lower than current FLX OC prices. (Boyle Tr. 569)

269. [TEXT REDACTED BY THE COURT]

270. [TEXT REDACTED BY THE COURT]

271. The record is not devoid of contrary evidence. In January 2019, after a particular airline asked for no change to its current Open Connect terms with Farelogix, Sabre quoted that airline a price nearly [TEXT REDACTED BY THE COURT] times higher than Farelogix's pricing. (*Compare* PX393 at -079; PX392 at -026-27; Wilding Tr. 828-30 [TEXT REDACTED BY THE COURT] (segment) *with* Davidson Tr. 413-14; PX087 at -734; PX011 at 6 [TEXT REDACTED BY THE COURT]

272. Still, on the whole, the Court is persuaded that the most likely impact on **[*134]** pricing is that prices will remain the same or be reduced following the transaction.

273. Bringing Farelogix's technology in-house will foster Sabre's integration of NDC into its GDS, allowing it to respond more effectively to market demand.

274. Since at least 2017, Sabre's GDS business has been "under urgent pressure from key airline carriers" — including [TEXT REDACTED **[**87]** BY THE COURT] — "to deliver NDC capabilities in the near-term." (PX241 at -318; *see also* Menke Tr. 685)

275. In 2017, AA began paying a S2 per booking incentive to travel agencies for any bookings made using NDC technology. (PX072 at -300) Farelogix's CEO, Davidson, told his board that AA's NDC incentive program would put pressure on GDSs to speed up their GDS passthrough implementation efforts. (Davidson Tr. 374-75; PX097 at -235) Likewise, Sabre viewed [TEXT REDACTED BY THE COURT] as a "commercial action to force GDSs to incorporate NDC connectivity." (PX241 at -318)

276. Faced with this pressure, in August 2017, Sabre laid out a strategy to catch up to and surpass Farelogix's next-generation offer and order management capabilities by 2020. (Menke Tr. 682-83; PX197 at -937 to -938; PX002 at -914 (Sabre recognizing an "opportunity . . . to leapfrog" Farelogix's NDC API)) Sabre recognized that if it did not invest in next-generation distribution technology, there would be a "tipping point" at which large airlines' efforts to bypass the GDSs could lead to a steep fall in Sabre's GDS booking volume. (Boyle Tr. 504-06; PX005 at -046, -048-49 (listing FLX OC customers Lufthansa, AA, Qantas, **[**88]** and United as carriers with "GDS bypass motivation"))

277. Acquiring Farelogix, and integrating its FLX OC NDC API into its GDS, will allow Sabre to use new technology to deliver services airlines and agencies are demanding in a more efficient manner. (*See, e.g.*, Kunz-Cho Tr. 1307)

(Fareportal CEO testifying that "this merger will likely help innovation and allow Sabre to provide better content in ways that airlines wish to see that content displayed")

278. Additionally, Farelogix's Tim Reiz, the inventor of the NDC API and the only technologist to testify at trial, has considered developing a new type of PSS, but could not do so due to Farelogix's limited resources. (Reiz Tr. 1371-73) Reiz is excited by the prospect of joining Sabre and the opportunity, potentially, to develop a next generation PSS and artificial intelligence technologies. (Reiz Tr. 1346)

279. At least some individuals within Sabre believe that acquiring Farelogix will help Sabre gain leverage over airlines in the next round of negotiations. One Sabre senior vice president predicted that AA's Garner would "hate" the Farelogix deal because "it entrenches us more," vividly describing an independent Farelogix as American's **[**89]** "Trojan horse to f— us." (Gilchrist Tr. 750-51; PX140 at -639)

280. In 2017, United's director of distribution advised United's leadership that partnering with Farelogix for NDC distribution would "improve[] United's position" in upcoming contract negotiations with Sabre, Amadeus, and Travelport. (PX300 at -253; *see also* Radcliffe Tr. 187) He added that, even in the most recent GDS negotiations, "[t]he existence of the direct connect alternative powered by Farelogix gave me the ability to command a lower price from the GDSs" and otherwise obtain "better terms." (Radcliffe Tr. 189; *see also id.* at 181-82 (United has "certain freedoms in the [GDS] agreement that are made possible because of the existence of a bypass opportunity"))

281. United's director of distribution wrote to colleagues that "[i]f a GDS owns Farelogix, they may . . . remove a major **[*135]** threat that is out there in the industry that helps apply pressure to GDSs when we negotiate. Without that alternative in the market, we lose leverage." (PX299 at -770; *see also* Radcliffe Tr. 184-86) He described the acquisition as the "stuff of nightmares" and "the worst case scenario coming true." (PX301 at -261; *see also* Radcliffe Tr. 231-34)

282. Similarly, **[**90]** Delta's managing director of distribution strategy testified that having Farelogix as a GDS alternative improved Delta's bargaining position with the GDSs. (Lobl Tr. 1152-54)

283. It follows that the loss of an independent Farelogix will somewhat reduce airlines' leverage in the next round of negotiations with GDSs.

LEGAL STANDARDS

HN1[] *Section 7* of the Clayton Act prohibits any merger "in any line of commerce or in any, activity affecting commerce in any section of the country" whose "effect[s] . . . may be substantially to lessen competition, or to tend to create a monopoly." *15 U.S.C. § 18*. To prevail on a claim under *Section 7*, the government must show a "reasonable probability that the merger will substantially lessen competition." *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. While the government need not prove anticompetitive effects "with 'certainty,'" *FTC v. H.J. Heinz Co., 246 F.3d 708, 719, 345 U.S. App. D.C. 364 (D.C. Cir. 2001)*, it is "not enough" to show "[t]he mere possibility of the prohibited restraint," *FTC v. Consol. Foods Corp., 380 U.S. 592, 598, 85 S. Ct. 1220, 14 L. Ed. 2d 95 (1965)* (internal quotation marks omitted).

HN2[] Courts considering a *Section 7* merger challenge follow a burden-shifting framework. First, the Court determines whether the government has established a prima facie case that the proposed merger is anticompetitive by (1) identifying the proper relevant market and (2) showing that the effects of the merger **[**91]** are likely to be anticompetitive. *See* *FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 337-38 (3d Cir. 2016)*. If the government succeeds at this first step, the Court next determines whether the defendants have rebutted the government's prima facie case. *See* *id. at 337*. Finally, if defendants do successfully rebut the government's prima facie case, "the burden of production shifts back to the [g]overnment and merges with the ultimate burden of persuasion, which is incumbent on the [g]overnment at all times." *Id.* Ultimately, the government's burden is to prove, by a preponderance of the evidence, a reasonable probability that the merger it seeks to enjoin will substantially lessen competition. *See* *United States v. Anthem, Inc., 236 F. Supp. 3d 171, 192 (D.D.C. 2017)*, *aff'd*, *855 F.3d 345, 428 U.S. App. D.C. 403 (D.C. Cir. 2017)*.

"The relevant market is defined as the area of effective competition." *Ohio v. American Express Co., 138 S. Ct. 2274, 2285, 201 L. Ed. 2d 678 (2018)* (internal quotation marks omitted) ("*Amex*"). It consists of two components: a "product market" and a "geographic market." *Brown Shoe, 370 U.S. at 324*. A properly-identified relevant market "must correspond to the commercial realities of the industry." *Amex, 138 S. Ct. at 2285* (internal quotation marks omitted).

HN3[] "[D]etermination of the relevant market is a necessary predicate to a finding of a violation of the *Clayton Act*" *Brown Shoe, 370 U.S. at 324*. Because "[p]laintiffs have the burden of defining the relevant market," the failure to properly define either a product **[**92]** or geographic market is fatal to plaintiffs' case. *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436-42 (3d Cir.* ***[*136]*** *1997)*; *see also* *FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1053 (8th Cir. 1999)*.

DISCUSSION

I. DOJ Failed To Establish A Prima Facie Case

Based on the Court's findings of fact, set out above, and as further explained below, the Court concludes that DOJ failed to establish a prima facie case that the merger of Sabre and Farelogix will violate *Section 7* of the Clayton Act. Specifically, DOJ has not identified a proper relevant market. As a matter of ***antitrust law***, Sabre, a two-sided transaction platform, only competes with other two-sided platforms, but Farelogix only operates on the airline side of Sabre's platform. Even if that were not the law, DOJ's market analysis fails because it does not relate to the relevant product market or the relevant geographic market. In the alternative, even if the Court were to assume that DOJ has identified a relevant product market, and were to assume that the record at least supports a prima facie case that the effects of the merger are likely to be anticompetitive, the Court further concludes that Defendants have rebutted the government's prima facie case. After making credibility determinations, drawing the reasonable inferences the Court deems most warranted, and weighing **[**93]** the evidence, the Court concludes that the government has failed to prove by a preponderance of the evidence that the Sabre-Farelogix transaction is reasonably probable to substantially lessen competition.

A. As A Matter of *Antitrust Law*, Sabre And Farelogix Do Not Compete In A Relevant Market

The first dispositive flaw in the government's case is that, as a matter of ***antitrust law***, Sabre, which is a two-sided platform facilitating transactions between airlines and travel agencies, does not compete with Farelogix, which indisputably only interacts with airlines and is not a two-sided platform. Due to the combination of the Supreme Court's 2018 *Amex* decision, holding that "[o]nly other two-sided platforms can compete with a two-sided platform for transactions," *138 S. Ct. at 2287*, and the Second Circuit's 2019 finding that the Sabre GDS is a two-sided transaction platform, Sabre and Farelogix do not compete in a relevant market.

In *Amex*, the United States and several states alleged that American Express violated *Section 1 of the Sherman Act* by requiring merchants to agree to "antisteering" contract provisions that prohibited merchants from discouraging the use of American Express cards. *Id. at 2283*. The Court first evaluated **[**94]** the relevant market and concluded that "the credit-card market is one market, not two." *Id. at 2283, 2285-87*. It noted that credit-card networks like American Express were what economists call "two-sided platforms:" entities that "offer[] different products or services to two different groups who both depend on the platform to intermediate between them." *Id. at 2280, 2286*. According to the Court, these platforms "cannot raise prices on one side without risking a feedback loop of declining demand;" thus, the Court held, "courts must include both sides of the platform" when defining a relevant market for purposes of antitrust analysis. *Id. at 2285*.

HN4[] The Court emphasized that "it is not always necessary to consider both sides of a two-sided platform," such as when "the impacts of indirect network effects and relative pricing in that market are minor." *Id. at 2286*. However, the Court continued, it is always necessary to consider both sides of "two-sided transaction platforms" that "facilitate a single, simultaneous transaction between participants" and "cannot make a sale unless both sides of **[*137]** the platform simultaneously agree to use their services." *Id. at 2286-87*. These platforms, according to the Court, "suppl[y] only one product - transactions." *Id. at 2286*. Because **[**95]** these transactions necessarily involve both sides of the market, "[o]nly other two-sided platforms can compete with a two-sided platform for transactions." *Id. at 2287*. In other words, for two-sided transaction platforms, "competition cannot be accurately assessed by looking at only one side . . . in isolation." *Id.*

DOJ argues that *Amex* does not govern here, but its arguments are unavailing. At trial DOJ suggested that *Amex* may be limited just to the credit card industry, but DOJ points to nothing in *Amex* to support such a conclusion. (*See* Tr. 1834-35) DOJ also observes that the record in this case, including from Defendants' expert Dr. Murphy, shows that "GDSs can face competition from one-sided competitors." (D.L 233 at 13) (citing Murphy Tr. 1521-22) While the government has accurately characterized the record, the facts presented in the instant case cannot change the binding precedential law issued by the Supreme Court.

DOJ maintains that Sabre and Farelogix are competitors because "a firm can compete in more than one market [a]nd the booking services portion of the Sabre GDS competes in a one-sided booking service market." (Tr. 1831) However, *Amex* establishes that two-sided transaction platforms **[**96]** such as the Sabre GDS supply "only one product:" the transactions that link both sides of the market. *Amex, 138 S. Ct. at 2286*. Because Farelogix indisputably does not supply this product - it offers services to airlines, not to travel agencies - it does not compete with Sabre.

While relatively few courts have had an opportunity to apply *Amex*, the Second Circuit has, in a different case that happened to be all about Sabre's GDS. In *US Airways v. Sabre Holdings Corp., 938 F.3d 43, 48-49 (2d Cir. 2019)* ("*US Airways*"), US Airways alleged that Sabre's restrictive contract provisions and "monopoliz[ation of] the distribution of system services to Sabre subscribers" violated *Sections 1* and *2* of the Sherman Act, respectively. A jury found that the relevant market was one-sided - and also that, even if the market were two-sided, US Airways had proven competitive harm - and returned a verdict for US Airways. *See id. at 53*.

On appeal, the Second Circuit vacated the jury verdict, determining it was based on the jury's "erroneous" conclusion that "the relevant market was one-sided." *Id. at 57-58*. Applying *Amex*, the Second Circuit held that the Sabre GDS is a two-sided transaction platform because it "offer[s] different services to different groups of customers - to airlines, access to travel agents; to travel agents, **[**97]** flight and pricing information - and [it] connect[s] travel agents to airlines in simultaneous transactions." *Id. at 58*. HN5[] Thus, according to the Second Circuit in *US Airways*, "the relevant market for such a platform must as a matter of law include both sides." *Id.*

DOJ is correct that the Second Circuit's *US Airways* decision was directed to a different legal question, was based on review of a different factual record than the one created here, and is, of course, not binding precedent in the Third Circuit.[14] However, the Court agrees with Defendants that, for purposes of understanding *Amex*, there is no meaningful distinction between *Section 1* Sherman Act claims and **[*138]** a *Section 7* Clayton Act merger challenge. (*See* D.I. 235 at 11-12)[15] This Court finds the Second Circuit's application of *Amex* to the very same Sabre GDS platform this Court is required to consider highly persuasive authority and chooses to follow it. Moreover, DOJ agrees that the Sabre GDS operates in a two-sided market. (Tr. 1831, 1836; *see also* D.I. 233 at 15 (acknowledging that at least Sabre's aggregation function "is properly classified as a two-sided service"))

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[14] As best as the Court can tell, the Third Circuit has not yet had occasion to consider *Amex*.

[15] *See also United States v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698, 1705, 16 L. Ed. 2d 778 (1966)* ("We see no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act."); *Hornsby Oil Co. v. Champion Spark Plug Co., 714 F.2d 1384, 1393 n.9 (5th Cir. 1983)*; *Kellam Energy, Inc. v. Duncan, 616 F. Supp. 215, 218 n.3 (D.Del. 1985)*.

From these conclusions it necessarily follows that DOJ cannot prevail on its **[**98]** claim as a matter of law. ***HN6***[] "Only other two-sided platforms can compete with a two-sided platform for transactions," *Amex, 138 S. Ct. at 2287*, and Farelogix is not a two-sided platform, as even DOJ concedes (*see* Tr. 1836). Even if "it is not always necessary to consider both sides of a two-sided transaction platform," it is necessary to do so where, as here, both sides of Sabre's GDS platform "facilitate a single, simultaneous transaction between participants." *Id. at 2286-87*. Airlines on one side of Sabre's GDS cannot make a sale to travel agencies on the other side of the GDS "unless both sides of the platform simultaneously agree to use" Sabre's GDS services. *Id. at 2286*. This is a requirement in order for Sabre's GDS to provide its product: "transactions." *Id.* Even if all of this were not the case, and if it were possible as a matter of law for Farelogix on one side of the two-sided GDS platform to be found to compete in a relevant market, the evidence presented by DOJ does not adequately account for the fact that Farelogix is a one-sided player and Sabre is a two-sided transaction platform. That is, DOJ has failed to produce evidence that the anticompetitive impact of the merger on the airline side of the GDS platform would be **[**99]** so substantial that it would sufficiently reverberate throughout the Sabre GDS to such an extent as to make the two-sided GDS platform market, overall, less competitive. DOJ did not even try to meet this burden. Instead, DOJ (and its expert, Dr. Nevo) "look[ed] at only one side" of the Sabre GDS "in isolation," which "cannot" result in an "accurate[] assess[ment]" of competitive effects. *Amex, 138 S. Ct. at 2287*. Thus, again, given *Amex* and *US Airways*, DOJ cannot, as a matter of law, make out a prime facie case of a *Section 7* Clayton Act violation.

Finally, the government warns that a conclusion that, as a matter of law, Sabre and Farelogix do not compete for purposes of ***antitrust law*** would give "any GDS ... carte blanche to buy any one-sided competitor, free from scrutiny under *Section 7*." (D.I. 233 at 13) The Court is not persuaded (although, even if it were, the Court would still be compelled to follow the Supreme Court's decision in *Amex*). ***HN7***[] Rather, *Amex* provides that if the government seeks to stop a GDS from buying a "one-sided competitor," it must show that this purchase will harm competition on both sides of the two-sided market - i.e., the market for travel services to airlines and the market for travel services to travel **[**100]** agencies. Here, however, the government only attempted to demonstrate harm to the airlines side of the two-sided market. It has, thus, failed to meet its burden.

[*139] Notwithstanding this dispositive ruling, the Court will proceed and, in the remainder of this Opinion, assess the government's attempt to meet its burden on the assumption, in the alternative, that Farelogix and Sabre could be found to compete in a relevant market, even though they are not both two-sided platforms.[16] As explained below, the Court finds that DOJ has failed even when given the benefit of that assumption.

B. As A Factual Matter, DOJ Failed To Identify A Relevant Product Market

HN8[] "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe, 370 U.S. at 325*. Thus, products comprising a relevant market "need not be identical, only reasonable substitutes." *United States v. Energy Sols., Inc., 265 F. Supp. 3d 415, 436 (D. Del. 2017)*. To determine the reasonable interchangeability of products, courts consider "price, use, and qualities." *Queen City Pizza, 124 F.3d at 437*.

DOJ argues that the relevant product market consists of "booking services" sold through online travel agencies ("OTA") and brick-and-mortar **[**101]** traditional travel agencies ("TTA"). (D.I. 233 at 9) In the government's view, "[t]hese markets encompass the nexus of competition that exists between Sabre and Farelogix and are the

[16] The Court does so for multiple reasons, including the present lack of guidance from the Third Circuit on applying *Amex*, the possibility of appellate review in this case, the expedited nature of this litigation, and the enormous resources the parties and the Court have devoted to this case. Additionally, as is clear from the findings of fact, the Court has found as a matter of real-world economic reality that Sabre and Farelogix do compete to a certain extent, so resting a decision in this case entirely on a determination of law that Sabre and Farelogix cannot compete in a relevant market is not a comfortable result. Further, the *US Airways* decision was issued after the government filed this case, so it also does not seem right to summarily terminate DOJ's case based on a non-binding subsequent decision from an appellate court in a case in which the government was not even involved.

appropriate focus for analyzing the competitive effects of this merger." (*Id.*) According to DOJ's economics expert, Dr. Nevo, "booking services" are a "component of what we saw in the GDS bundle ... of getting the offer from, after it was created using the airline data and getting it either through the travel agency or through the aggregator that then gets it to the travel agency." (Nevo Tr. 899) The Court concludes that DOJ failed to identify a relevant product market.

DOJ's product market is flawed for several reasons. Foremost among them is that DOJ selectively (without persuasive explanation) dissects Sabre's overall GDS services into what DOJ refers to as "booking services." In doing so, DOJ improperly excludes the services Sabre's GDS provides to travel agencies, inconsistent with *Amex*, as already discussed above. But even as a factual matter, DOJ's proposed "booking services" product market does not accurately correspond to what actually is transacted in a market relevant to the proposed transaction. **[**102]**

As Defendants aptly put it: "DOJ contends that a single technical functionality of Sabre's unitary GDS transaction platform, which is sold in a two-sided market, can be extracted from the GDS and placed in competition against a slice of FLX OC, which is sold in a different, one-sided market." (D.I. 235 at 12) "No party can expect to gerrymander its way to an antitrust **[*140]** victory without due regard for market realities." *It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676, 683 (4th Cir. 2016)*.

DOJ urges the Court not to "[f]ocus[] on the breadth of Sabre's entire bundle of GDS products" but instead to evaluate the one "submarket" of "booking services," which DOJ says is a "one-sided product." (D.I. 233 at 13-15) However, DOJ has not proven that the Sabre GDS's "booking services" is a "well-defined submarket [that] constitute[s] a relevant product market." *Tunis Bros. Co. v. Ford Motor Co., Inc., 952 F.2d 715, 723 (3d Cir. 1991)*. DOJ failed to show that the Sabre GDS "booking services" is a distinct product that generates separate demand. Thus, DOJ's proposed product market is at odds with the "commercial realities of the industry." *Amex, 138 S. Ct. at 2285* (internal quotation marks omitted).

Both sides introduced evidence that the Sabre GDS platform performs several different functions, including aggregating and normalizing content, automating rules set **[**103]** by corporate travel policies, and creating offers for travel agencies. (*See, e.g.*, FF 34-36) The Court agrees with Defendants that the correct interpretation of the record is that the subset of Sabre services DOJ labels "booking services" are not a separate product but, instead, have "no independent economic significance." (D.I. 235 at 13)

Dr. Nevo's testimony failed to persuade the Court that there is separate demand for Sabre's "booking services." Dr. Nevo acknowledged that Sabre's "booking services" are not sold as a separate product in the market, but are only "sold as part of a bundle," so he himself "separate[d] them" for his analysis. (Nevo Tr. 985-86) Besides seeming to be an arbitrary exercise, Dr. Nevo's approach is unpersuasive also because he was unable to identify basic features of his purported product. For instance, Dr. Nevo could not identify a price of the Sabre GDS's "booking services" functionality because, as he testified, "Sabre has not offered it in the U.S. I believe there is no price." (Nevo Tr. 987) Dr. Nevo further testified that he "did not quantify what [the] value is" of the Sabre GDS "booking services," as this "was not part of my analysis." (*Id.*) Fundamentally, **[**104]** Dr. Nevo gave the Court no solid basis to conclude that "booking services" is a product customers are demanding from Sabre.[17]

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[17] An analogy can be made to tying cases, in which a plaintiff must prove "an agreement by a party to sell one product [or service] but only on the condition that the buyer also purchases a different (or tied) product [or service]." *Avaya, Inc., RP v. Telecom Labs, Inc., 838 F. 3d 354, 394 (3d Cir. 2016)*. In these cases, "the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 19, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*, *partially abrogated on other grounds by* *Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. Thus, "to identify a distinct product market" for a service that is included in a larger "package" of services, a plaintiff must show "sufficient demand for the purchase of [that] service[] *separate* from [the package]." *Id* (emphasis added); *see also* *Avaya, 838 F.3d at 397*; *Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 477-78 (7th Cir. 1988)* (holding that because "no separate demand exists for pathological services that is sufficient to create a separate market [from hospital services]," pathological and hospital services "combine in the form of one product, not two tied products").

As part of its effort to show that Sabre offers "booking services," DOJ points to Sabre's "new NDC API" that it has tried to sell to two airlines (D.I. 233 at 15), as **[*141]** well as Dr. Nevo's testimony that "[i]n kind of the early 2000s, there was a case where the Brazilian Airline asked Sabre to help it in creating a kind of a direct connect product" (Nevo Tr. 937; *see also* D.I. 233 at 15). Even this evidence, however, fails to show that the Sabre ***GDS platform*** includes a distinct "booking services" component that generates separate demand; at best, it shows that Sabre has tried to market an ***entirely different product*** that provides booking services.[18]

Accordingly, DOJ's proposed product market — which assumes a Sabre "booking services" product exists (or at minimum can be meaningfully and non-arbitrarily separated out from Sabre's actual GDS functionality) and competes with Farelogix's FLX OC — fails to "correspond to the commercial realities of the industry." *Amex, 138 S. Ct. at 2285* (internal quotation marks omitted). DOJ failed **[**105]** to show that a portion of Sabre's GDS and Farelogix's FLX OC are reasonable substitutes for one another.

There are other flaws in DOJ's efforts to identify a relevant product market. One is that the OTA booking services market improperly excludes sales made by airlines in the direct channel on their websites, at kiosks, and through call centers. That is, DOJ wrongly excludes airline.com from the OTA market.

HN9[] Courts can determine the "boundaries" of a product market by "examining ... practical indicia" such as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe, 370 U.S. at 325*. Hence, courts evaluating whether different products are in the same product market often examine real-world market conditions, like whether customers "switch back and forth between [the] products," or if firms "compete against each other" to offer these products. *Energy Sols., 265 F. Supp. 3d at 437-38*.

Substantial evidence supports the Court's conclusion that airline.com is reasonably interchangeable with the travel services the Sabre GDS offers through OTAs. Airline.com **[**106]** and OTA both target leisure travelers. (*See, e.g.*, Garner Tr. 101, 123-25; Radcliffe Tr. 172; Kunz-Cho Tr. 1282-83) End-user travelers switch back and forth between OTAs — like Expedia and Priceline — and airlines' own websites. (*See, e.g.*, FF 46, 211) Defendants' expert, Dr. Murphy, persuasively explained how airline.com is the "closest alternative consumers can see" to OTAs. (Murphy Tr. 1553) He added that airline.com is the "most important short-term constraint" on GDS fees, because airline.com is only "a mouse click away" from OTAs. (Murphy Tr. 1433-34) Even Dr. Nevo testified that he "believe[s] that there is some competitive pressure [to GDSs] from airline.com" (although he could not say whether airline.com exerts more or less competitive pressure on Sabre's GDS than FLX OC does). (Nevo Tr. 1009-10)

Further, airlines view OTAs as competitors with airline.com and believe they can steer at least a substantial portion of OTA sales to their own direct sales channels. (*See* Murphy Tr. 1438-49; Lobl Tr. 1165 (Delta Director of Distribution testifying Delta is "hoping that customers will **[*142]** choose" Delta's direct channels); DX287) Airlines can switch from offering at least some of their **[**107]** leisure traveler tickets from OTAs to airline.com.

DOJ insists that Defendants are wrong, and that airline.com is properly excluded from the OTA market, because Dr. Murphy did not use the small but significant and non-transitory increase in price ("SSNIP") test to evaluate whether airline.com should be included in the relevant product market. (D.I. 233 at 17-18) As an initial matter, the burden is on the government to show that airline.com is not part of the relevant OTA market, and it has failed to meet that burden. In any case, while the SSNIP test is a "common method" that courts can use to define the relevant market, *see Penn State Hershey, 838 F.3d at 338*, it is not the only one. Here, the Court is evaluating economic "practical indicia" to assess whether products are "reasonably interchangeable," which is another permissible analysis. *Brown*

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[18] Likewise, while DOJ attempts to show "distinct demand for booking services and aggregation services" by suggesting that Farelogix and Travelfusion offer these services on a standalone basis (*see* D.I. 241 at 3), this evidence does not demonstrate that *Sabre* offers these products on a standalone basis; nor does it establish that Sabre participates in these product "submarkets."

Shoe, 370 U.S. at 325; *see also* Energy Sols., 265 F. Supp. 3d at 437-38. Doing so, the Court concludes that airline.com and OTAs are reasonably interchangeable.

DOJ also tries to justify excluding airline.com from the OTA booking services market on the grounds that airlines cannot "replace enough of their OTA bookings with airline.com to make forgoing OTA distribution economically feasible." (D.I. 233 at 18) But the test for a relevant product **[**108]** market is whether the "commodities [are] reasonably interchangeable by consumers for the same purposes" — not whether it is feasible to convert all users to only one of those commodities. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956); *see also* Tunis Bros., 952 F.2d at 722; FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 122 (D.D.C. 2004) ("In determining interchangeability, therefore, the Court must consider the degree to which buyers treat the products as interchangeable, but need not find that *all* buyers will substitute one commodity for another.").[19]

For at least these reasons, DOJ has failed to identify a relevant product market.[20]

C. DOJ Failed To Identify A Relevant Geographic Market

HN10[] The relevant geographic market is comprised of the area where customers look to buy a seller's products or services. *See* Tunis Bros., 952 F.2d at 726 ("[T]he geographic market is not comprised of the region in which the seller attempts to sell its product, but rather is comprised of the area where his customers would look to buy such a product."). Here, **[*143]** the evidence shows the customers of the purported "booking services" are airlines. (*See, e.g.*, FF 70-71, 221) Therefore, the relevant geographic market must be based on where airlines look to purchase these services. (*See* Nevo Tr. 906, 1016)

DOJ relies on Dr. Nevo's analysis that the relevant geographic **[**109]** market is "U.S. point of sale," that is, for TTAs those travel agencies located in the U.S. and for OTAs those travel agencies having an IP address in the U.S. (*See Nevo* Tr. 836, 853, 897; FF 217-18) DOJ reasons that airlines looking to sell tickets in the U.S. will only use travel agencies operating in the U.S. because U.S. travelers will not use foreign travel agencies. (D.I. 233 at 19-21; D.I. 241 at 6-7)

The Court disagrees with the government. Instead, the Court agrees with Defendants that DOJ's geographic market is a "contortion," wrongly "focus[ing] not on FLX OC's actual customers in the upstream market (i.e., the airlines), but rather those customers' customers in the downstream market (i.e., the travel agencies or travelers)." (D.I. 242 at 3) The airlines' demand for travel agency services is not a useful starting point for the geographic market analysis because airlines that use "booking services" (assuming, for the sake of argument, this is an accurate and meaningful description of a relevant product) need not — and frequently do not — sell their tickets through travel agencies. Indeed, airlines that use "booking services" such as FLX OC can (and do) distribute their tickets **[**110]** through several means other than travel agencies, such as their own websites or mobile apps, or through non-GDS aggregators. (*See, e.g.*, PX081 at -047; Carter Tr. 283-84)

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[19] It is not as clear whether airline.com must be included in the "TTA booking services" market. TTAs primarily serve business travelers and offer specific support services that these travelers request, which are not available from airline.com. (Radcliffe Tr. 172-73, 335; Ekert Tr. 1184) There is also a lack of evidence that airlines view TTAs as an alternative to airline.com or that airline.com exerts competitive pressure on TTAs. It may be, then, that DOJ's TTA market analysis is somewhat less flawed than its OTA market analysis.

[20] The Court agrees with Defendants that, to the extent DOJ is now inviting the Court to "unilaterally change the defective market allegations if necessary to save its case," it would be wrong for the Court to do so under the circumstances here, which include that both parties (and the Court) have already devoted enormous resources to the case the government chose to bring. (D.I. 235 at 2; *see also id.* at 18-20; D.I. 242 at 2 n.3; *see generally* D.I. 233 at 30 n.6 (DOJ: "The Court is not limited to considering the markets that the Government alleged; if the Court finds harm in any relevant market based on the evidence presented, the Court may find a Section 7 violation."))

Moreover, the evidence shows that airlines do not look only within the United States to purchase "booking services." As Dr. Nevo testified, the vast majority of Farelogix's customers, 13 out of 15, are airlines located outside the United States. (Nevo Tr. 1018) Farelogix also competes with foreign competitors for bids. (*See, e.g.*, FF 145-46, 159-63) Likewise, when Sabre marketed a standalone direct connect product — what DOJ labels a Sabre "booking services" product — Sabre tried selling it to airlines located outside the United States. (Gilchrist Tr. 761; PX316 at -534; Nevo Tr. 937; *see also* D.I. 233 at 15) Thus, DOI's proposed U.S.-based geographic market is at odds with commercial realities. Additionally, there is no evidence that the transaction fee for FLX OC varies by the location of the agency that purchase a ticket. (*See* FF 222)

For at least these reasons, DOJ has failed to identify a relevant geographic market. *See* *Dicar, Inc. v. Stafford Corrugated Prods., 2010 U.S. Dist. LEXIS 23667, 2010 WL 988548, at *12 (D.N.J. Mar 12, 2010)* ("Where, as here, there is no indication that a consumer would be unable to purchase a product **[**111]** abroad, the Court will not arbitrarily limit the geographical market to the U.S."); *E&E Co. v. Kam Hing Enters., 2008 U.S. Dist. LEXIS 65323, 2008 WL 3916256 at *8 (N.D.. Cal. August 25, 2008)* (finding plaintiff did not adequately allege relevant market when it "fail[ed] to indicate why similar bed coverings originating from other countries would not be reasonably interchangeable by consumers for the same purposes") (internal quotation marks omitted). This failing (like others already described by the Court) is dispositive.

II. Even Assuming DOJ Made Out A Prima Facie Case, The Record Does Not Demonstrate A Reasonable Probability That The Merger Will Substantially Lessen Competition

A. DOJ Is Not Entitled To A Presumption Of Anticompetitive Harm

Because DOJ has not identified the relevant market where competition occurs — **[*144]** and has offered evidence of likely harm only with respect to its flawed markets — it cannot prove the second step of its prima facie case: that "the effect of the merger in [the relevant] market is likely to be anticompetitive." *Penn State Hershey, 838 F.3d at 337-38*. However, even if DOJ were correct that the relevant market is "booking services" at the "U.S. point of sale," DOJ has still failed to prove likely harm to competition in this market.

At trial, DOJ presented Herfindahl-Hirschman Index ("HHI") measurements **[**112]** to show that Sabre's acquisition of Farelogix would harm competition in the relevant market. (D.I. 233 at 21-23) Even assuming that DOJ identified the correct market, this evidence was not persuasive.

HN11[] HHI is a commonly-used measurement of market concentration. *See* *Penn State Hershey, 838 F.3d at 346*. As the Third Circuit has explained:

> The HHI is calculated by summing the squares of the individual firms' market shares. In determining whether the HHI demonstrates a high market concentration, we consider both the post-merger HHI number and the increase in the HHI resulting from the merger. A post-merger market with a HHI above 2,500 is classified as "highly concentrated," and a merger that increases the HHI by more than 200 points is "presumed to be likely to enhance market power." The Government can establish a prima facie case simply by showing a high market concentration based on HHI numbers.

Id. at 346-47 (internal citations omitted).

DOJ offered HHI evidence for both of its proposed markets. To calculate HHI in the "OTA booking services" and "TTA booking services" markets, Dr. Nevo relied on 2018 market share data, Sabre's projections for Farelogix's growth, and Farelogix's own projections. (Nevo Tr. 916-21) Dr. Nevo testified that **[**113]** in both the "OTA bookings services" and "TTA booking services" markets, the post-merger HHI greatly exceeds the threshold for a highly concentrated market (2,500) and the increase in HHI exceeds the level at which enhanced market power is presumed (200). (Nevo Tr. 920-23)

But Dr. Nevo's HHI cannot be relied on because it ignores industry realities. In calculating market shares in the "OTA booking services" market, Dr. Nevo excluded airline.com — but Dr. Nevo's own testimony, and much other evidence besides, showed that airline.com exerts competitive pressure on the Sabre GDS. (*See, e.g.*, Nevo Tr. 1009-10; FF 206-16) Likewise, when calculating market shares in the "TTA booking services" market, Dr. Nevo attributed sales generated by GDS passthrough to Farelogix rather than to the GDS — even though the GDS controls the sale and the commercial relationship. (*See* Nevo Tr. 917-18; Murphy Tr. 1486; FF 229) When these errors are corrected, the HHI results look much different. As Dr. Murphy showed at trial, adding airline.com market shares to the "OTA booking services" market and attributing GDS passthrough sales to the GDS in the "TTA booking services" market yields post-merger HHI levels **[**114]** and increases that do not give rise to a presumption of harm to competition. (*See* Murphy Tr. 1485-86; FF 228, 230) DOJ's HHI analysis, therefore, does not satisfy DOJ's prima facie burden and does not entitle DOJ to a presumption of harm to competition.

B. DOJ Did Not Prove A Reasonable Probability Of Anticompetitive Harm

Because DOJ does not enjoy a presumption of anticompetitive harm, had DOJ proven a relevant product and geographic market, it would still be the government's **[*145]** burden to prove, considering all of the evidence — including that produced by Defendants to rebut DOJ's prima facie case — that the merger of Sabre and Farelogix is reasonably probable to substantially lessen competition. Even if the Court were to reach this part of the analysis (which it does solely as an alternative to the other deficiencies already identified in the government's case), the Court would conclude that DOJ has failed to meet its burden. Some of the reasons for this conclusion are discussed below.

1. DOJ Failed To Prove That Barriers To Entry Prevent Adequate Competition To FLX OC

HN12[] "Barriers to entry are factors, such as regulatory requirements, high capital costs, or technological obstacles, that prevent **[**115]** new competition from entering a market in response to a monopolist's supracompetitive prices." *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007)*. While not a required element of a *Section 7* claim, evidence of barriers to entry in the relevant market can "bolster[]" the government's case. *FTC v. Univ. Health, Inc., 938 F.2d 1206, 1220 (11th Cir. 1991)*; *see also FTC v. H.J Heinz Co., 246 F.3d 708, 717, 345 U.S. App. D.C. 364 (D.C. Cir. 2001)*. In addition, defendants can rebut the government's prima facie case by showing that the relevant market exhibits low barriers to entry. *See Energy Sols., 265 F. Supp. 3d at 443*.

DOJ identifies three barriers to entry in the relevant market: (1) the technological challenge of building an "NDC booking services solution;" (2) the "need for a good reputation and track record serving major airlines;" and (3) GDS contract provisions that discourage airlines and travel agencies from switching to "new entrants." (D.I. 233 at 32) DOJ has failed to persuade the Court that any one or a combination of these barriers significantly affects the analysis here.

The record does not establish that building an adequate "NDC booking services solution" is particularly difficult. As several witnesses testified, the schema for developing a marketable NDC API product is publicly available, which has allowed numerous companies to begin offering NDC API services. (Davidson Tr. 433, 439; Nevo Tr. 1038-39) For **[**116]** example, Farelogix Chief Technology Officer Tim Reiz testified that programmers can easily compete with Farelogix for NDC API services "[b]ecause they have web services that they can connect to the airline systems." (Reiz Tr. 1342-43) Marketplace evidence supports these witnesses. Datalex and Amadeus have successfully built and marketed NDC API services for several airlines. (FF 160-61) Likewise, Delta, British Airways, and Air France have built and supplied NDC APIs for themselves. (Carter Tr. 271; Davidson Tr. 446-47; Adair Tr. 1732; FF 151) While executives from American Airlines and United Airways believe only Farelogix can provide adequate NDC API services (Garner Tr. 121; Radcliffe Tr. 229-30), the totality of the evidence persuades the Court that these are personal (or company) preferences, not market realities.

Farelogix's vigorous competition with rival NDC API providers further undermines DOJ's remaining arguments. Farelogix has competed for bids to supply NDC API services with at least eight other companies, losing bids to [TEXT REDACTED BY THE COURT] (Carter Tr. 270-71) While, in the overall context, Farelogix has competed well against other NDC API suppliers (*see* FF 164-70), **[**117]** and has some unique advantages (*see* FF 140-50), these other suppliers have also enjoyed success, demonstrating that new entrants can develop a "good reputation and track record" despite Farelogix's established position in the market. The large **[*146]** number of suppliers who have won bids further suggests that GDS contract provisions have not shut out new NDC API providers.

At trial, and again in the post-trial briefing, the parties devoted a great deal of attention to what was marked as Davidson Demonstrative 1, which listed NDC API projects Farelogix bid on in recent years, purporting to depict the results of its efforts. In the Court's view, DOJ has the more persuasive interpretation of this demonstrative. It shows — consistent with the facts supported by the record — that Farelogix has fared just fine in recent years. [TEXT REDACTED BY THE COURT] Furthermore, Farelogix currently provides its services to two of the largest U.S. airlines as well as the largest airlines in Australia and Mexico. (*See* Davidson Demonstrative I; Davidson Tr. 469; FE 166) Farelogix is currently working on 26 GDS integration installations, far more than any other NDC API provider (as far as the record reveals). **[**118]** The Court is not persuaded by Defendants' puzzling attempts at trial to portray Farelogix as a failure.

Notwithstanding all this, however, the reality that Farelogix is competing successfully against other NDC API suppliers does nothing to alter the fact that there are not significant barriers to entry into, and success in, the NDC API market.

2. DOJ Failed To Prove That A Post-Merger Sabre Will Harm Competition By Eliminating FLX OC Or Raising FLX OC Or GDS Prices

The Court is persuaded that at various points Sabre has viewed FLX OC as a competitive threat. Among other things, Sabre believed that FLX OC was "a real alternative to the GDS" (PX367 at -277-78), and that Farelogix's NDC technology has [TEXT REDACTED BY THE COURT] (PX247 at -766). Further, the Court is persuaded that some at Sabre viewed the acquisition of Farelogix as way to neutralize this perceived threat, including employees who wrote that the deal would "[m]itigate risk from potential GDS bypass" (PX011 at 3; PX012 at 7), in a document that was at one point sent to Sabre's board (*see, e.g.*, FF 240-41). The record also demonstrates that, historically, Sabre has resisted change while Farelogix has been a pioneering innovator **[**119]** and disruptor of the airline travel services ecosystem. (*See* FF 101-08) Moreover, this evidence suggests that Sabre will have the incentive to raise prices, reduce availability of FLX OC, and stifle innovation.

Nevertheless, DOJ has not persuaded the Court that Sabre will likely act consistent with its history or these incentives and actually harm competition if it is permitted to complete the acquisition of Farelogix. This is yet another problem for the government's case because the claim the government has brought necessarily requires the Court to undertake a forward-looking analysis. *See generally* *United States v. Baker Hughes, 908 F.2d 981, 988, 991, 285 U.S. App. D.C. 222 (D.C. Cir. 1990)* (explaining that merger analysis "focus[es] on the future" and requires Court to "[p]redict[] future competitive conditions").

The evidence does not suggest that Sabre is acquiring Farelogix to eliminate FLX OC from the marketplace. Rather, it supports the opposite conclusion: that Sabre intends to continue offering FLX OC by integrating it into the Sabre GDS platform, allowing Sabre to better meet the demands of airlines and travel agencies. In a 2018 presentation to Sabre's board of directors, Sabre's management sought approval for the merger by arguing it would allow Sabre to integrate **[**120]** FLX DC's NDC capabilities. (*See* DX145 at -005; *see also* Boyle Tr. 555 (Sabre VP of Corporate Development testifying that deal is intended, in part, to "bring[] NDC-enabled distribution to scale in the marketplace"); **[*147]** DX086 at -037) Several industry participants have applauded the deal for this very reason. (*See, e.g.*, FF 256-60) All of this is consistent with the strong evidence that the future of airline ticket distribution is more likely to be characterized by GDS passthrough — i.e., integrating NDC capabilities into the GDS platform — rather than GDS bypass. (*See, e.g.*, PX081 at -045-47; *supra* FF Part N)

Further supporting these conclusions are the public commitments Sabre CEO Menke has made, including to continue offering FLX OC to airlines (at their current or better prices) after the merger closes. (*See supra* FF Part T) DOJ did not persuade the Court that Sabre is likely to raise prices for its GDS platform after the merger, even though the Court has found that the merger will likely reduce some of the leverage airlines currently have in negotiations with Sabre. (*See* FF 265, 279-83) While a Farelogix board member recommended that Sabre increase its post-merger GDS booking fees **[**121]** (*see* Boyle Tr. 494-95; PX007 at -734), no evidence has been presented that anyone at Sabre or Farelogix has taken steps to act on this recommendation. (*See also* FF 265-77) Also, because Sabre competes with rival GDS providers Amadeus and Travelport for travel agency customers, it faces constraints on the prices it can charge. Indeed, CWT CEO Kurt Ekert testified that "if. . . Sabre was to lose content or enable content but on a noncompetitive basis to how another GDS provides that, then we have the ability to shift business away from them to another GDS." (Ekert Tr. 1186; *see also* Murphy Tr. 1433)

DOJ also failed to persuade the Court that the merger is likely to lead to higher prices for FLX OC. DOJ points to Sabre's January 2019 proposal to raise an airline's post-merger price for FLX OC services. (D.I. 233 at 25; *see also* Gilchrist Tr. 751-60; Wilding Tr. 828-30; PX392 at -026-27; FF 271) However, that airline rejected Sabre's proposal, with one Sabre employee reporting that the proposal "caused a kerfuffle." (PX393 at -079; *see also* Gilchrist Tr. 758) If anything, this evidence suggests that Sabre will face serious resistance if it tries to raise FLX OC prices after the merger.

[122]** Farelogix's rivals will likely further constrain Sabre's ability to raise prices for FLX OC. As discussed above, Farelogix now vigorously competes with — and often loses business to — other NDC API providers. Farelogix also faces some threat that airlines will self-supply NDC API services (although many airlines do not view this as an attractive option). Thus, it is unlikely that Sabre will be able to raise prices on FLX OC services without driving customers to competitively priced alternatives.

For at least these reasons, DOJ failed to prove that Sabre, after the merger, will likely harm competition by raising prices or eliminating FLX OC.[21]

3. DOJ Did Not Prove That The Merger Will Harm Innovation

HN13[] "A merger can substantially lessen competition by diminishing innovation if it would 'encourag[e] the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger." *United States v. Anthem, 236 F. Supp. 3d at 229-30* (quoting 2010 DOJ and FTC Horizontal Merger Guidelines §§ 1, 6.4 (2010)) While DOJ argues that Sabre's purchase of Farelogix will "reduce competition to innovate" (D.I. 233 at 28), the Court is not persuaded.

[*148] DOJ offers nothing more in support of its contention than vague theories from Dr. Nevo, who testified that the merger involves **[**123]** "taking an innovative firm that has been driving, driving ahead, creating the industry shakeup, and putting that under a firm that does not have the same incentive." (Nevo Tr. 950-51) These generalities do not help the Court conclude that the merger would harm innovation.

Moreover, the record evidence, overall, suggests the opposite. While it is undisputed that Farelogix developed the original NDC schema and has been an innovator (*see* FF 58; *see also supra* FF Part I), no party offered evidence that Farelogix has more recently created or introduced innovative products or services. Further, as has been repeatedly noted, the public availability of the NDC schema has allowed (and will continue to allow) new firms to enter the market and compete successfully with FLX OC.

DOJ also failed to persuade the Court that Sabre is purchasing Farelogix to delay innovation. (*See D.I.* 233 at 28) As discussed above, the evidence suggests that Sabre seeks to integrate FLX OC into its platform, not eliminate it,

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[21] Because DOJ failed to prove a relevant market, the Court need not and will not address Dr. Nevo's SSNIP analysis in any greater detail than it already has elsewhere in this Opinion.

and that in doing so Sabre is following the industry trend towards GDS passthrough. (*See, e.g., supra* FF Parts N, S)

Finally, the Court is persuaded that the merger may well promote innovation, as **[**124]** numerous witnesses have forecast. (*See, e.g.*, Ekert Tr. 1199-1201 (CWT CEO stating that merged Sabre-Farelogix could offer additional technology services to airlines and allow travel agencies to "drive more high yield traffic to the airlines"); Kunz-Cho Tr. 1316 (Fareportal CEO stating that merged entity "will be able to embrace a wider array of content, particularly in the low cost carrier domain which is very important to us")) Moreover, Farelogix Chief Technology Officer Tim Reiz credibly predicted that the merger will allow him to develop new projects (such as a next-generation PSS) using artificial intelligence, because he would have access to Sabre's resources, including data, the lack of which was previously a "roadblock." (Reiz Tr. 1346-47)

On balance, then, DOJ has not proven that the Sabre-Farelogix merger will harm innovation.

CONCLUSION

The Court recognizes that the outcome here may strike some, including the litigants, as somewhat odd. On several points that received a great deal of attention at trial — whether Farelogix is a valuable company enjoying relative success in the market, whether Sabre and Farelogix compete, whether Sabre understands GDS bypass is a threat, whether **[**125]** Sabre stands to lose revenue even from the expansion of GDS passthrough, and Sabre's motivation for its proposed acquisition of Farelogix -- the Court is more persuaded by DOJ than by Defendants. This is largely due to the surprising lack of credibility on these points of certain defense witnesses, including Sabre CEO Menke, Sabre deal leader Boyle, and Farelogix CEO Davidson.

Despite these findings and conclusions, however, Defendants have won this case. This is because the burden of proof was on DOJ, not Defendants. Defendants opted to tell the Court a story that is not adequately supported by the facts, but it was their ***choice*** whether to do so, and their failing does not determine the outcome of this case. Instead, it is DOJ which, under the law, has the ***obligation*** to prove its contention that the Sabre-Farelogix transaction will harm competition in a relevant product and geographic market. DOJ failed. It based its case on the expert analysis of Dr. Nevo, but that analysis — including Dr. Nevo's explanation and defense of it — was **[*149]** simply unpersuasive. Unlike Defendants' evidentiary failings, DOJ's are dispositive.

Under our laws, and in our (regulated) market economy, private entities **[**126]** like Sabre and Farelogix are generally free to enter into agreements and relationships with one another, whether or not the government prefers that they do so. If DOJ is to get the Court to enjoin such a transaction, it must meet its burden of proof. Here, the government has not done so. Accordingly, the Court must enter judgment for Defendants.

APPENDIX

CLOSING THE COURTROOM AND SEALED PORTIONS OF THE RECORD

HN14[] While the public enjoys a "common law right of access [] to judicial proceedings and records," this right is "not absolute." *In re Avandia Marketing, Sales Practices and Prods. Liability Litig., 924 F.3d 662, 672 (3d Cir. 2019)*. To overcome the presumption of access, parties must show that the information they seek to protect is "the kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure." *Id. at 672*; *see also* *Genentech, Inc. v. Amgen Inc., C.A. No. 17-1407-CFC D.I. 659 at 6, 2020 U.S. Dist. LEXIS 54775 (D. Del. Mar. 30, 2020)*. Such information includes "sources of business information that might harm a litigant's competitive standing." *Avandia, 924 F.3d at 679*. Moreover, in granting a party's request to protect information, courts "must [1] articulate the compelling, countervailing interests to be protected, [2] make specific findings on the record concerning **[**127]** the effects of disclosure, and [3] provide[] an opportunity for interested third parties to be heard." *Id. at 672-73* (internal quotations omitted and numerals added). Further, they must "conduct a document-by-document review of the contents of the challenged documents." *Id. at 673* (internal formatting and quotations omitted).

This issue often emerges in trials of government challenges to a proposed merger based on antitrust concerns, during which witnesses almost inevitably discuss sensitive business information such as prices, forward-looking strategy, and analyses of competitive conditions. To balance the public's right of access with the parties' interest in avoiding competitive injury, courts routinely close the courtroom when witnesses discuss "competitively sensitive information," while otherwise allowing full public access. *See, e.g., FTC v. Tronox Ltd.*, 18-cv-01622 D.I. 80 at 8-9 (D.D.C. July 26, 2018) (agreeing to seal courtroom for witness testimony about "competitively sensitive information"); *FTC v. Wilhelmsen et al.*, 18-cv-00414 D.I. 62 at 85 (D.D.C. May 29, 2018) ("[W]e will have portions of the trial in which there's confidential commercial information that will be elicited. And so I'm going **[**128]** to have to close the courtroom briefly."); *FTC v. Sysco* Corp.,15-cv-00256 D.I. 183 at 465-66 (D.D.C. June 26, 2015) (sealing courtroom to "accommodate confidential business information").

The Court followed this approach during trial. At various points, the litigants and several third parties asked the Court to close the courtroom to protect competitively sensitive information, such as forward-looking business analyses, commercial agreements, and strategic plans. (*See, e.g.*, D.I. 212 at 3-5; D.I. 219 Ex. 1 at 1-2) There were no objections to these requests. The Court evaluated each request separately, and granted requests to close the courtroom after describing the requesting party's interest in protecting commercially sensitive information or specifically referring to prior rulings where it had articulated this interest. (*See, e.g.*, Tr. 20 ("[T]here **[*150]** is some forward-looking financial competitively sensitive information that ... is not something that ... the public necessarily has a right to know because of the clearly defined and serious injury that it would cause to those defendants and to the third parties, particularly as they contemplate further transactions, negotiations, [and] **[**129]** agreements, in the future."); Tr. 87 ("So I am persuaded for the reasons discussed earlier, the reasons in the letters I received over the weekend, the declaration that I received over the weekend as well as further discussion today that, particularly what I have been told about the NDA, that this witness is bound by ... that it is appropriate to close the courtroom for limited portions of the testimony that will discuss those commercially sensitive negotiations."); *see also* Tr. 196-97, 229, 360-61, 662-63, 1088) The Court also allowed limited redactions of documents for the same reasons it occasionally limited access to the courtroom and ensured that the parties made the complete redacted record of the trial available to the public in a timely manner. (*See* D.I. 252, 254, 256, 259, 262, 264, 266, 268; *see also* Tr. 1742-43)

The parties also provided the Court with a helpful summary of the limited information they believed would need to be redacted if it were included in this Opinion. (*See* D.I. 271) With the parties' cooperation, the Court will be able to issue a public version of this Opinion quickly, notwithstanding its length.

The Court commends counsel for working cooperatively with **[**130]** one another to ensure the efficient presentation of the evidence at the expedited trial while assisting the Court in ensuring the public's access to the courtroom, the trial record, and this Opinion.

ORDER

At Wilmington this **7th** day of **April, 2020**:

For the reasons stated in the Opinion issued this same date, **IT IS HEREBY ORDERED** that judgment is entered **FOR** Defendants and **AGAINST** Plaintiff.

IT IS FURTHER ORDERED that, because the Opinion was issued under seal, the parties shall meet and confer and provide the Court a proposed redacted version, consistent with their submission earlier today (*see* D.I. 271), no later than **April 8, 2020 at 10:00 a.m**. Thereafter, the Court will release a public version of its Opinion.

IT IS FURTHER ORDERED that the parties shall meet and confer and, no later than **April 14, 2020**, submit a joint status report, advising the Court as to what, if anything, remains to be done in this case before it is closed.

/s/ Leonard P. Stark

HONORABLE LEONARD P. STARK

UNITED STATES DISTRICT JUDGE

Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.

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

April 9, 2020, Decided; April 9, 2020, Filed

Case No. 5:16-cv-06370-EJD

Reporter
2020 U.S. Dist. LEXIS 62795 *; 2020-1 Trade Cas. (CCH) P81,160; 2020 WL 1812257

OPTRONIC TECHNOLOGIES, INC, Plaintiff, v. NINGBO SUNNY ELECTRONIC CO., LTD., et al., Defendants.

Subsequent History: Affirmed by *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., 2021 U.S. App. LEXIS 35876 (9th Cir. Cal., Dec. 6, 2021)*

Prior History: *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., 2017 U.S. Dist. LEXIS 160238 (N.D. Cal., Sept. 28, 2017)*

Core Terms

injunction, injunctive relief, communicating, products, parties, argues, non-discriminatory, customer, permanent injunction, telescopes, refrain, Sherman Act, competitors, irreparable, violations, terms, public interest, five year, Clayton Act, equitable, prices, violation of antitrust laws, equitable relief, irreparable harm, anticompetitive, accessories, hardships, monetary, damages, courts

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For Celestron Acquisition, Llc, Sw Technology Corporation, Atlas E-Commerce, Movants: **[*2]** Christopher Lynn Frost, Eisner, APC, Beverly Hills , CA USA.

Judges: EDWARD J. DAVILA, United States District Judge.

Opinion by: EDWARD J. DAVILA

Opinion

ORDER GRANTING PLAINTIFF'S MOTION FOR EQUITABLE RELIEF AND JUDGMENT ON UCL CLAIM

Re: Dkt. No. 582

Pursuant to *15 U.S.C. § 26*, *Cal Bus. and Prof. Code § 17200*, and *Federal Rules of Civil Procedure 54(b)* and *58(b)(2)(B)*, Plaintiff Optronic Technologies, Inc. ("Plaintiff" or "Orion") moves this Court for equitable relief and judgment on its claim arising under *California's Unfair Competition Law* ("UCL"). The Court took the matter under submission for decision without oral argument pursuant to Civil *Local Rule 7-1(b)*. For the reasons below, Plaintiff's motion is **GRANTED**.

I. Background

The basic facts and procedural history underlying this case are well known to the Court and the parties. The Court recounts only the pertinent background here.

On November 26, 2019, and after a six-week jury trial, the jury returned a verdict for Plaintiff and against defendants Ningbo Sunny Electronic Co., LTD ("Ningbo Sunny" or, for the purposes of this motion, "Defendant"), Sunny Optics, Inc. ("Sunny Optics"), and Meade Instruments, Corp. ("Meade") on all claims. Dkt. No. 501. The jury found that the defendants had conspired to fix prices or credit terms in violation of the *Sherman Act Section 1* (Claim 1), **[*3]** had conspired to allocate the market for telescopes in violation of the Sherman Act *Section 1* (Claim 2), had attempted to monopolize the market in violation of the Sherman Act *Section 2* (Claim 3), had conspired to monopolize the market in violation of the Sherman Act *Section 2* (Claim 4), and that the acquisition of Meade by Ningbo Sunny and Sunny Optics harmed competition in violation of the Clayton Act *Section 7* (Claim 5). *Ibid.* The jury found that Orion suffered $14 million in damages for each of the Sherman Act claims and $16.8 million for the *Clayton Act* Claim. *Ibid.*

After the verdict, Sunny Optics and Meade entered bankruptcy and the litigation was stayed as to them. Dkt. Nos. 511, 512. On December 5, 2019, the Court entered a partial judgment against Ningbo Sunny on Plaintiff's damages claims awarding Plaintiff $50,400,000 in accordance with the verdict's award of $16,800,000 as trebled pursuant to *15 U.S.C. §15(a)*. Dkt. No. 518. On February 21, 2020, Plaintiff filed a motion for equitable relief and judgment on its UCL claim. Dkt. No. 583 ("Motion"). Defendant opposes the motion. Dkt. No. 596 ("Opposition").

On April 3, 2020, the Court partially granted Defendant's Motion to Alter or Amend Judgment (Dkt. No. 534) and simultaneously **[*4]** granted Plaintiff's Motion for Attorneys' Fees and Costs (Dkt. No. 558). On the same day, the Court issued an Amended Partial Judgment (Dkt. No. 630), which amended the damages to $52,030,371.73 plus post-judgment interest, in accordance with the post-trial motions. The Court denied Ningbo Sunny's Renewed Motion for Judgment as a Matter of Law (Dkt. No. 556) and Motion for a New Trial (Dkt. No. 557). The Court now considers Plaintiff's motion for a permanent injunction and its request for judgment on the remaining UCL claim.

II. Discussion

A. Plaintiff's Request For a Permanent Injunction Under *Section 16*

Under *Section 16* of the Clayton Act, courts have the power to grant injunctive relief for violations of the antitrust laws. *15 U.S.C. § 26* (authorizing "[a]ny person . . . [to] have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity"). Where a violation of law has already been established, injunctive relief should be granted if "there exists some cognizable danger of recurrent violation." *Fed. Trade Comm'n v. Qualcomm Inc., 411 F. Supp. 3d 658, 812 (N.D. Cal. 2019)* (granting injunctive **[*5]** relief under the FTC Act after the court found violations of the FTC and Sherman Acts) (citing *United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)*.

In general, "[t]o obtain permanent injunctive relief, a plaintiff must show (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *California ex rel. Lockyer v. U.S. Dep't of Agric., 575 F.3d 999, 1019-20 (9th Cir. 2009)* (internal quotations and citations omitted).

These four elements apply when considering relief under *Section 16* of the Clayton Act. The Supreme Court has stated that *Section 16*, "which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 131, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*; *15 U.S.C. § 26* (injunctive relief is authorized "when and under the same conditions and principles as injunctive relief . . . is granted by courts of equity"). The traditional principles of equity call for the four-step analysis above. *eBay Inc., v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)* ("According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before **[*6]** a court may grant such relief.").

"The party seeking an injunction 'has the general burden of establishing the elements necessary' to obtain relief." *BladeRoom Grp. Ltd. v. Emerson Elec. Co., No. 5:15-CV-01370-EJD, 2019 U.S. Dist. LEXIS 38826, 2019 WL 1117537, at *2 (N.D. Cal. Mar. 11, 2019)* (citing *Klein v. City of San Clemente, 584 F.3d 1196, 1201 (9th Cir. 2009))*. Ultimately, "[t]he decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court." *eBay, Inc., 547 U.S. at 391*.

i. Irreparable Injury and Inadequacy of Monetary Damages

The first two elements are significantly interrelated. "Irreparable harm may be established where there is the fact of an injury, such as that arising from a breach of contract, but where there is an inability to ascertain the amount of damage." *DVD Copy Control Ass'n, Inc., 176 Cal. App. 4th at 722*. "In other words, to say that the harm is irreparable is simply another way of saying that pecuniary compensation would not afford adequate relief or that it would be extremely difficult to ascertain the amount that would afford appropriate relief." *Ibid.* Therefore, the Court considers the first two elements together.

Plaintiff raises three arguments regarding irreparable harm. First, Plaintiff argues that it "is suffering from irreparable and non-compensable harm because Defendant is engaged in a judgment avoidance scheme." Mot. at 12. **[*7]** Defendant argues that Plaintiff's allegations regarding Defendant's post-judgment conduct are irrelevant to the injunctive relief Plaintiff seeks under *Section 16*. Opp. at 6-8. The Court agrees that the equitable relief to which Plaintiff is entitled under *Section 16* is not meant to provide a remedy for Defendant's post-judgment misconduct. A permanent injunction cannot be ordered merely because the requesting party did not receive the full extent of the legal relief it sought. *See* *BladeRoom Grp. Ltd., No. 15-cv-01370, 2019 U.S. Dist. LEXIS 38826, 2019 WL 1117537, at *3*. To the extent that Defendant's post-judgment misconduct demonstrates an unwillingness to cease its anti-competitive behavior, however, such misconduct offers evidence that the legal violations established at trial are ongoing or likely to recur. These allegations thus weigh in favor of finding a threat of irreparable injury.

Plaintiff next argues that Defendant's violations of antitrust laws have caused structural harm to the U.S telescope market and that such injury will become irreparable if Defendant intentionally puts Meade out of business. Defendant does not directly address this argument. The Court agrees with Plaintiff that Defendant's decision to forego profit by refusing to supply products **[*8]** to its own wholly-owned subsidiary evidences Defendant's intent to unlawfully restrain competition. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* ("The unilateral termination of a voluntary *(and thus presumably profitable)* course of dealing suggest[s] a willingness to forsake short-term profits to achieve an anticompetitive end.") (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, 610-11, 105 S. Ct. 2847, 86 L. Ed. 2d 467*

(1985) (emphasis in original). The jury found that Defendant's acquisition of Meade created a reasonable likelihood of substantially lessening competition or creating a monopoly, and the Court finds that eliminating Meade as a competitor entirely would achieve a similar result by over-concentrating the telescope market. Such an injury to the market would be irreparable.

Defendant argues that this potential injury to Plaintiff and to the market is merely speculative. To support a permanent injunction under Section 16, however, it is enough to show "threatened loss or damage by a violation of the antitrust laws" if injunctive relief is not granted. 15 U.S.C. § 26; Zenith Radio Corp., 395 U.S. at 130 ("section 16 . . . authorizes injunctive relief upon the demonstration of 'threatened' injury. That remedy is characteristically available even though the plaintiff has not yet suffered actual injury."). In any event, the jury expressly found that Plaintiff did suffer actual **[*9]** injury here. *See, e.g.*, Verdict Form, Dkt. No. 501 at 5. The jury's verdict and the evidence on which it was based are sufficient to demonstrate that the threat of irreparable injury to the market is more than speculative.

Finally, Plaintiff argues that "[i]f the structural problems caused by Defendant go uncorrected, Orion faces the danger of losing its business." Mot. at 12. Defendant contends that Plaintiff has not shown that it actually risks losing its business, and that the loss of Plaintiff's business would be a "purely monetary injury." Opp. at 8 (citing Colorado River Indian Tribes v. Town of Parker, 776 F.2d 846, 850-51 (9th Cir. 1985).

The Court finds that Plaintiff has shown sufficient evidence that its business would be threatened with extinction in the absence of injunctive relief. At trial, Orion presented evidence, without objection from Defendant, that if Defendant continues its anticompetitive conduct, Orion would go out of business. *See, e.g.*, Trial Tr. at 1771:21-23 (Q. And do you have any concerns about what will happen to Orion in the event that you don't receive that relief? A. They're going to kill us.); *id.* at 2499:24-2500:2 (discussing Defendant's lack of objection to evidence of Plaintiff's financial distress). This evidence is sufficient to show that **[*10]** Plaintiff faces the threat of going out of business. *See* hiQ Labs, Inc. v. LinkedIn Corp., 938 F.3d 985, 993 (9th Cir. 2019) (finding "ample support" for the asserting that the survival of the plaintiff's business was threatened absent an injunction, where the plaintiff's CEO made statements that without injunctive relief, the business would have to "lay off most if not all its employees, and shutter its operations.").

The threat to Plaintiff's business is sufficient to establish irreparable harm. Am. Passage Media Corp. v. Cass Commc'ns, Inc., 750 F.2d 1470, 1474 (9th Cir. 1985) ("The threat of being driven out of business is sufficient to establish irreparable harm."). "[T]he loss of . . . an ongoing business representing many years of effort and the livelihood of its . . . owners, constitutes irreparable harm. What plaintiff stands to lose cannot be fully compensated by subsequent monetary damages." hiQ Labs, Inc., 938 F.3d at 993 (quoting Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co. of New York, Inc., 749 F.2d 124, 125-26 (2d Cir. 1984) (per curiam)). Defendant cites Colorado River Indian Tribes to support its argument that the loss of business would be a purely monetary injury. That case is inapposite. In that case, the plaintiff did not face the threat of being driven out of business, but rather the threat of loss of income due to a tax increase. Colorado River Indian Tribes, 776 F.2d at 851.

ii. Balance of Hardships

In determining whether to grant Plaintiff's motion for a permanent injunction, **[*11]** the Court also considers the balance of the hardships to the parties. Taleff v. Sw. Airlines Co., 828 F. Supp. 2d 1118, 1123 (N.D. Cal. 2011), *aff'd*, 554 F. App'x 598 (9th Cir. 2014). When considering injunctive relief, "courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) (quoting Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987)).

Plaintiff argues that it "will continue to suffer from the effects of Defendant's continuing unlawful behavior, as well as the structural damage Defendant inflicted on the U.S. telescope market, absent the requested relief." Mot. at 13-14. Plaintiff argues that in contrast, the proposed injunction would impose no hardship on Defendant. *Ibid.* In fact, the relief requested—specifically, selling products to Meade and to Plaintiff on non-discriminatory terms—would be profitable for Defendant. *Ibid.* Defendant does not address this factor directly. In arguing that the proposed injunction is overbroad, however, Defendant argues that the injunction would significantly burden the "everyday functions of its business." Opp. at 6.

As discussed above, Plaintiff stands to lose its business if Defendant's misconduct continues. The primary potential burden that Defendant raises is that it would be unable to communicate with one of **[*12]** its customers, Celestron. The Court addresses this concern in Part C below. In comparison to the potential harm to Plaintiff, the potential burden on Defendant's business operations as a result of the injunction ordered herein is slight. Thus, the Court finds that the balance of hardships tilts in favor of Plaintiff.

iii. Public Interest

"Whereas the balance of equities focuses on the parties, '[t]he public interest inquiry primarily addresses impact on non-parties rather than parties,' and takes into consideration 'the public consequences in employing the extraordinary remedy of injunction.'" *hiQ Labs, Inc., 938 F.3d at 1004* (citing *Bernhardt v. Los Angeles Cty., 339 F.3d 920, 931-32 (9th Cir. 2003))*. "By its very nature, the determination that [a defendant] has violated the Sherman Act and that 'the wrongs are ongoing or likely to recur' is a finding that an injunction is in the public interest because it will restrain the defendant from further anticompetitive conduct." *Qualcomm Inc., 411 F. Supp. 3d at 813* (citing *F.T.C. v. Evans Prod. Co., 775 F.2d 1084, 1087 (9th Cir. 1985))*.

In this case, the jury found that Defendant violated *Sections 1* and *2* of the Sherman Act and *Section 5* of the Clayton Act. As discussed in Part (i) above, Defendant's refusal to supply Meade is likely to cause over-concentration of the telescope market. Injunctive relief is necessary to protect the market from over-concentration **[*13]** by preventing Defendant from further violating antitrust laws. The Court, therefore, finds that it is in the public interest to issue an injunction prohibiting Defendant from engaging in conduct previously found to violate the law. *See* *California v. American Stores Co., 495 U.S. 271, 284, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)* ("We have recognized when construing *§ 16* that it was enacted not merely to provide private relief, but . . . to serve as well the high purpose of enforcing the antitrust laws.").

Because the Court finds that Plaintiff has established the prerequisites for injunctive relief, the Court concludes that a permanent injunction is warranted under *Section 16* of the Clayton Act.

B. Plaintiff's Request for Entry of Judgment On UCL Claim

Plaintiff's third cause of action in its amended complaint alleges that Defendant violated California's Unfair Competition Law ("UCL"). First Am. Compl. ¶¶ 139-141. Before trial, the parties agreed that the claim would not be tried before the jury and that the Court should rule on the claim following the jury verdict. Joint Pretrial Conference Statement, Dkt. No. 331, at 20-21 ("The parties agree that Orion's claim under [the UCL] is an equitable claim that should be tried to the bench and not the jury. The parties also agree that the Court should **[*14]** rule on Orion's UCL claim after the jury has returned its verdict."). Plaintiff now seeks judgment and relief on this claim. Defendant did not raise any arguments in opposition.

"The UCL broadly prohibits 'any unlawful, unfair or fraudulent business act or practice.'" *Alvarez v. Chevron Corp., 656 F.3d 925, 933 (9th Cir. 2011)*; quoting *Cal. Bus. & Prof. Code § 17200*). "By proscribing any unlawful business practice, [the UCL] borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal.4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)* (citation and internal quotation marks omitted). Thus, the "unlawful" prong of the statute prohibits "anything that can properly be called a business practice and that at the same time is forbidden by law." *Ibid.*

"[I]n a case where legal claims are tried by a jury and equitable claims are tried by a judge, and the claims are 'based on the same facts,' in deciding the equitable claims 'the *Seventh Amendment* requires the trial judge to follow the jury's implicit or explicit factual determinations.'" *Los Angeles Police Protective League v. Gates, 995 F.2d 1469, 1473 (9th Cir. 1993)* (quoting *Miller v. Fairchild Indus., 885 F.2d 498, 507 (9th Cir. 1989)*, *cert. denied*, *494 U.S. 1056, 110 S. Ct. 1524, 108 L. Ed. 2d 764 (1990))*. The jury in this case concluded that Defendant violated the Sherman Act *Sections 1* and *2* as well as the Clayton Act *Section 7*. The jury's findings as to Defendant's violations of law are sufficient to demonstrate that Defendant's conduct **[*15]** was "unlawful" under the UCL. *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress, 214 F. Supp. 3d 808, 836 (N.D. Cal. 2016)* ("[B]ecause I conclude that plaintiffs have adequately alleged violations of other federal and state laws, plaintiffs have adequately pleaded the basis for an unlawful UCL claim.") *aff'd*, *890 F.3d 828 (9th Cir. 2018)*, *amended*, *897 F.3d 1224 (9th Cir. 2018)*, and *aff'd*, *735 F. App'x 241 (9th Cir. 2018)*.

Plaintiff has adequately proven its UCL claim and the Court will enter judgment in favor of Plaintiff. The UCL empowers a court to issue injunctions for violations of the UCL. *Cal. Bus. & Prof. Code § 17203*. The standard for injunctive relief under the UCL is less demanding than the standard under *Section 16*. *See* *Haas Automation, Inc. v. Denny, No. 12-cv-4779 (CBM), 2014 U.S. Dist. LEXIS 89860, 2014 WL 2966989, at *9 (C.D. Cal. Jul. 1, 2014)* (stating that under the UCL, plaintiff need only show "the elements of a cause of action involving the wrongful act sought to be enjoined and . . . the grounds for equitable relief, such as, inadequacy of the remedy at law.") (quoting *City of S. Pasadena v. Dep't of Transp., 29 Cal. App. 4th 1280, 1293, 35 Cal. Rptr. 2d 113 (1994))*. The Court finds that injunctive relief is warranted under the UCL for the reasons discussed in Part A above.

C. The Scope of the Injunction

The Supreme Court instructs "that a remedies decree in an antitrust case must seek to 'unfetter a market from anticompetitive conduct,' to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain **[*16]** no practices likely to result in monopolization in the future.'" *United States v. Microsoft Corp., 253 F.3d 34, 103, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (quoting *Ford Motor Co. v. United States, 405 U.S. 562, 577, 92 S. Ct. 1142, 31 L. Ed. 2d 492 (1972)*, and *United States v. United Shoe Mach. Corp., 391 U.S. 244, 250, 88 S. Ct. 1496, 20 L. Ed. 2d 562 (1968))*; *see also* *United States v. U.S. Gypsum Co., 340 U.S. 76, 88, 71 S. Ct. 160, 95 L. Ed. 89, 1951 Dec. Comm'r Pat. 580 (1950)* (an antitrust remedy must, "so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance"). Thus, it is "entirely appropriate" for a court to order an injunction "beyond a simple proscription against the precise conduct previously pursued." *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 698, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. The relevant question is "whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct." *Ibid.*; *accord* *Fed. Trade Comm'n v. Grant Connect, LLC, 763 F.3d 1094, 1105 (9th Cir. 2014)*.

District courts are "clothed with large discretion to fit the decree to the special needs of the individual case." *Ford, 405 U.S. at 573* (internal quotations omitted); *see also* *Zenith Radio Corp., 395 U.S. at 131 (1969)* ("*Section 16* should be construed and applied . . . with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'") (quoting *Hecht Co. v. Bowles, 321 U.S. 321, 329-330, 64 S. Ct. 587, 88 L. Ed. 754 (1944))*; *California ex rel. Lockyer, 575 F.3d at 1020* ("In determining the scope of an injunction, a district court has broad latitude, and it must balance the equities between the parties and give due regard to the public interest.") (quoting *Geertson Seed Farms v. Johanns, 570 F.3d 1130, 1136 (9th Cir.2009))*.

Plaintiff requests an **[*17]** order requiring Defendant to:

1. Supply Meade at non-discriminatory (*i.e.*, most-favored-customer) terms for five years;
2. Supply Orion at non-discriminatory terms for five years;
3. Refrain from communicating with Synta about the prices of telescopes and accessories;

4. Refrain from sharing customer information with Synta, including but not limited to statistics about which products Defendant's customers are buying, how much Defendant is charging for those products, and the volume of purchases from Defendant;
5. Refrain from communicating with Synta about which products Defendant and Synta will manufacture; and
6. Refrain from participating in any internal meetings or strategy sessions in which any representative from a competitor, including David Shen or any employee of Synta, is in attendance.

Mot. at 10. The Court considers each request in turn.

Plaintiff requests that Defendant be ordered to supply both Meade and Orion at non-discriminatory terms for a period of five years. Defendant argues that the Court may not impose an injunction forcing it to do business with any entity or dictate the terms of any business transaction. Opp. at 4. Defendant cites *Verizon Communications Inc. v. Law Offices* ***[*18]*** *of Curtis V. Trinko, LLP ("Trinko")* in support of this argument. *540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. In *Trinko*, the Supreme Court considered whether the plaintiff had stated a claim under *Section 2* of the Sherman Act for refusing to deal with competitors. *Trinko* did not address whether and to what extent a mandatory injunction may be appropriate to remedy an actual violation of law.

In cases that did involve injunctive relief, the Supreme Court has repeatedly "upheld injunctions issued pursuant to *§ 16* regardless of whether they were mandatory or prohibitory in character." *American Stores Co., 495 U.S. at 283-84 (1990)* (affirming district court's power to grant divestiture by requiring defendant to sell certain assets); *see also* *Zenith Radio Corp., 395 U.S. at 129-33* (reinstating injunction that required defendants to withdraw from patent pools); *Silver v. New York Stock Exchange, 373 U.S. 341, 345, 365, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963)* (reinstating judgment for defendants in suit to compel installation of wire services); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1200-01, 1208-09 (9th Cir.1975)* (affirming an injunction enjoining defendant from "refusing to sell [products] to any qualified exporters" and providing a formula for determining the price of those products), *cert. denied*, *425 U.S. 959, 96 S. Ct. 1741, 48 L. Ed. 2d 204 (1976)*.

Defendant also argues that the word "non-discriminatory" renders the relief impermissibly vague and that enforcement of such a term would require extensive oversight by the Court. Opp. at 2. As Plaintiff points **[*19]** out, the Ninth Circuit expressly approved an injunction using the term "non-discriminatory" in *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997)* (explaining that "requiring nondiscriminatory pricing" was necessary to end the defendant's monopoly). Plaintiff specifies that the term "non-discriminatory" means that "Defendant should only be able to charge Meade and Orion the same price it charges to Celestron and its other customers." Reply, Dkt. No. 608, at 7. The Court finds that this explanation gives Defendant adequate notice of what the Court intends to require. *Fed. R. Civ. Proc. 65(d)(1)*; *E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1297 (9th Cir. 1992)* ("Injunctions are not set aside under *Rule 65(d)* unless they are so vague that they have no reasonably specific meaning.").

The Court concludes that requiring Defendant to supply Plaintiff and Meade at non-discriminatory terms for a period of five years is a reasonable method of remedying the harm to Plaintiff caused by Defendant's attempted monopolization and of ensuring that Defendant's violations of ***antitrust law*** do not recur. *See* *Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 698* (District Courts are "empowered to fashion appropriate restraints on [a defendant's] future activities both to avoid a recurrence of the violation and to eliminate its consequences."); *see also* *Bresgal v. Brock, 843 F.2d 1163, 1170-71 (9th Cir. 1987)* ("[A]n injunction is not necessarily made over-broad **[*20]** by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled.").

Plaintiff next requests that Defendant be ordered to refrain from communicating with "Synta" about the prices of telescopes and accessories and about which products Defendant and Synta will manufacture. Similarly, Plaintiff requests that Defendant be ordered to refrain from sharing customer information with Synta, including information about which products customers are buying at what price and in what volume. Defendant argues that each of these proposed orders would impermissibly limit lawful conversations with its customer, Celestron, and force Defendant to "completely re-alter its business operations." Opp. at 5. For example, Defendant argues that prohibiting it from communicating with Synta about the prices of telescopes and accessories "would effectively mean Defendant can never again conduct business with Celestron." Opp. at 6.

Defendant's argument hinges on the fact that Plaintiff's proposed order would prevent Defendant from communicating with Celestron. The Court agrees with **[*21]** Defendant that prohibiting communications between Defendant and its primary customer, Celestron, would burden lawful conduct unrelated to the underlying offense. *See* *E. & J. Gallo Winery, 967 F.2d at 1297* (courts "must insure that [an injunction] is tailored to eliminate only the specific harm alleged."). Neither party clearly defines which of the many entities involved in this case are included when they reference "Synta." The Court will order Defendant to refrain from communicating about the topics outlined below with Suzhou Synta Optical Technology Co. Ltd ("Suzhou Synta") and Synta Technology Corp. ("Synta Tech") only, so as to not unduly restrain Defendant's communications with Celestron.

The Court also shares Defendant's concern that the topics about which it would be prevented from communicating are overbroad. Plaintiff presented evidence at trial that Defendant engaged in improper communications with certain Synta entities regarding the price of telescopes and accessories, customer information, and planned production, among other topics. Nevertheless, the Court can also imagine communications between Defendant and its competitors about the price or sale of products that would be entirely lawful. For the sake of **[*22]** clarity, the Court will enjoin this activity only to the extent it violates, or contributes to a violation of, antitrust laws.

Finally, the Court finds Plaintiff's final request—that Defendant refrain from "internal meetings or strategy sessions in which any representative from a competitor . . . is in attendance"—to be overbroad. Mot. at 10. While the jury found evidence of a conspiracy between Defendant and Synta, there was no evidence to suggest that Defendant participated in any conspiracy or unlawful activity with other competitors. The Court finds that Defendant should only be restrained from communicating with the competitors for which Plaintiff presented evidence of conspiracy. Moreover, as Defendant points out, the relief requested is unclear as to what constitutes an "internal meeting or strategy session." Opp. at 6. While Defendant should be prohibited from discussing internal business strategy with certain competitors, the Court finds that this result can be achieved by limiting communications instead of meetings.

III. Conclusion and Order

Based on the foregoing reasons, Plaintiff's motion for a permanent injunction and judgment on its UCL claim is **GRANTED**. Pursuant to *Federal Rule of Civil Procedure 65(d)*, **IT IS HEREBY [*23] ORDERED** as follows:

1. Defendant shall supply Meade at non-discriminatory terms for five years;
2. Defendant shall supply Orion at non-discriminatory terms for five years;
3. Defendant shall refrain from communicating with Suzhou Synta and Synta Tech, about the following, to the extent such communication violates, or contributes to the violation of, antitrust laws:
    a. the prices of telescopes and accessories;
    b. customer information, including but not limited to statistics about which products Defendant's customers are buying, how much Defendant is charging for those products, and the volume of purchases from Defendant;
    c. which products Defendant or Synta will manufacture; and
    d. Defendant's or Synta's internal business strategy.

This Court shall retain jurisdiction over any and all issues arising from or related to the enforcement of this permanent injunction, the implementation of this Order or the interpretation of this Order.

Because this Order represents a final resolution of all the claims against Defendant Ningbo Sunny, the Court will enter Final Judgment. The parties are ordered to submit joint status reports every six months regarding the progress of the related bankruptcy proceedings **[*24]** against defendants Sunny Optics and Meade.

IT IS SO ORDERED.

Dated: April 9, 2020

/s/ Edward J. Davila

EDWARD J. DAVILA

United States District Judge

End of Document

Somaxon Pharms., Inc. v. Actavis Elizabeth LLC

United States District Court for the District of Delaware

April 9, 2020, Decided; April 9, 2020, Filed

Civil Action No. 10-1100-RGA-MPT

Reporter

2020 U.S. Dist. LEXIS 67939 *; 2020 WL 1903171

SOMAXON PHARMACEUTICALS, INC., and PROCOM ONE INC., Plaintiffs, v. ACTAVIS ELIZABETH LLC et al., Defendants.

Subsequent History: Adopted by, in part, Objection overruled by, Motion denied by *Somaxon Pharmacuticals, Inc. v. Actavis Elizabeth LLC, 2020 U.S. Dist. LEXIS 111908, 2020 WL 3470471 (D. Del., June 24, 2020)*

Appeal dismissed by *Somaxon Pharms., Inc. v. Mylan Inc., 2021 U.S. App. LEXIS 2397, 2021 WL 248019 (Fed. Cir., Jan. 13, 2021)*

Related proceeding at, Magistrate's recommendation at *Mylan Inc. v. Somaxon Pharms., Inc., 2022 U.S. Dist. LEXIS 192959 (D.N.J., Sept. 30, 2022)*

Core Terms

generic, License, launch, patent, no-AG, parties, manufacturer, settlement agreement, brand, anticompetitive, Recommendation, invalidation, semi-exclusive, infringement, settlement, compete, doxepin, retroactively, tablets, anti trust law, Pharmaceuticals, hydrochloride, non-monetary, antitrust, reasons

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For Actavis Elizabeth LLC, Counter Claimant: Dominick T. Gattuso, LEAD ATTORNEY, Heyman Enerio Gattuso & Hirzel LLP, Wilmington, DE; Christine E. Duh, PRO HAC VICE; Emily R. Whelan.

For Somaxon Pharmaceuticals Inc., Counter Defendant: Lisa J. Pirozzolo, PRO HAC VICE.

Judges: Sherry R. Fallon, United States Magistrate Judge.

Opinion by: Sherry R. Fallon

Opinion

REPORT AND RECOMMENDATION

I. INTRODUCTION

Presently before the court in this Hatch-Waxman patent infringement action is the motion of defendants and counterclaim plaintiffs Mylan Pharmaceuticals Inc. and Mylan Inc. (collectively, "Mylan") to enforce the Settlement and License Agreement dated July 17, 2012 (the "Agreement"), **[*2]** which was entered into between Mylan and plaintiffs and counterclaim defendants Somaxon Pharmaceuticals, Inc. ("Somaxon") and ProCom One, Inc. ("ProCom").[1] (D.I. 290) For the following reasons, I recommend that the court GRANT Mylan's motion to enforce the Agreement.

II. BACKGROUND

Somaxon was the holder of approved New Drug Application ("NDA") No. 22-036 for Silenor00AE; doxepin hydrochloride tablets in 3 mg and 6 mg doses. (D.I. 20 at ¶ 28) Silenor00AE; is used to treat insomnia characterized by difficulties with sleep maintenance. (D.I. 1 at ¶ 23) Silenor00AE; is covered by a number of patents listed in the Orange Book, including United States Patent No. 6,211,229 ("the '229 patent"), entitled "Treatment of Transient and Short Term Insomnia," and United States Patent No. 7,915,307 ("the '307 patent"), entitled "Methods of Improving the Pharmacokinetics of Doxepin." (D.I. 1 at ¶ 25) Somaxon had an exclusive license to the '229 and '307 patents. (D.I. 20 at ¶ 40)

On November 2, 2010, Mylan notified Somaxon and ProCom that it had submitted an Abbreviated New Drug Application ("ANDA") with a paragraph IV certification for the '229 patent, among others. (D.I. 20 at ¶¶ 45-48; D.I. 1 at ¶ 28) By filing the ANDA, Mylan indicated its intent to market, manufacture, and sell a generic version of Silenor00AE; before the expiration **[*3]** of the '229 patent. (D.I. 1 at ¶ 28) In response, Somaxon and ProCom sued Mylan for infringement of the '229 patent on December 15, 2010. (D.I. 1) Somaxon separately sued Mylan for infringement of the '307 patent on June 28, 2011. (C.A. No. 11-571-RGA, D.I. 1)

On July 17, 2012, the parties executed the Agreement, which awarded Mylan the semiexclusive right to sell an authorized generic version of Silenor00AE; 3 mg and 6 mg doxepin hydrochloride for a period of 180 days beginning on January 1, 2020 (the "AG License Initial Period"). (D.I. 292, Ex. 1 at § 5.1(a)) Mylan's rights under Section 5.1(a) of the Agreement are "semi-exclusive" because Somaxon and ProCom "may grant one (1) additional License for the AG License Initial Period to a product that is AB rated to Silenor 3 mg and 6 mg doxepin hydrochloride tablets, but such product shall not be an Authorized Generic Product." (*Id.*) Actavis was granted the right to launch the AB-rated generic version of Silenor00AE; beginning on January 1, 2020, and the record reflects that Actavis' generic product is currently on the market.[2] (D.I. 303 at ¶ 18; 3/3/2020 Tr. at 6:4-14)

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[1] The briefing and other filings related to the pending motion can be found at D.I. 291, D.I. 292, D.I. 302, D.I. 303, D.I. 304, and D.I. 306.

[2] An AB-rated drug is a generic drug certified by the FDA to be bioequivalent to the branded drug, and it must have the same form, dosage, and strength as the branded drug. *See* *Abbott Labs. v. Teva Pharms. USA, Inc., 432 F. Supp. 2d 408, 415 (D. Del. 2006)*. In contrast, an authorized generic drug is a branded drug that is marketed, sold, and distributed "under a different labeling, packaging, . . . product code, labeler code, trade name, or trade mark than the listed drug." *21 U.S.C. § 355(t)(3)(B)*; *see also* *In re Zetia (Ezetimibe) Antitrust Litig., 2019 U.S. Dist. LEXIS 59469, 2019 WL 1397228, at *14 (E.D. Va. Feb. 6, 2019)*, *report and recommendation adopted*, *400 F. Supp. 3d 418 (E.D. Va. 2019)* (explaining that authorized generic drugs are approved under the brand's NDA, whereas AB-rated generic drugs are approved under a competitor's separate ANDA). The 180-day generic exclusivity period awarded to the first ANDA filer under the Hatch-Waxman Act does not prevent a brand manufacturer from launching an authorized generic product or licensing its product to another company to sell an authorized generic to compete with the ANDA product during the exclusivity period. *See* *21 U.S.C. § 355(j)(5)(B)(iv)*; *In re Loestrin 24 Fe Antitrust Litig., 814 F.3d 538, 543 (1st Cir. 2016)* ("[T]he generic manufacturer may still face competition from a generic version of the drug produced by the brand manufacturer, also known as an authorized generic ('AG'), at any time, including during the exclusivity period.").

Following the execution of the Agreement, the Supreme Court **[*4]** issued its decision in *FTC v. Actavis, Inc.*, which changed the legal landscape regarding the enforceability of reverse payments in Hatch-Waxman-related settlement agreements. *570 U.S. 136, 141, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*. The Supreme Court explained that a reverse payment settlement arises when "A, the plaintiff, pays money to defendant B purely so B will give up the patent fight." *Id. at 152*. The Supreme Court observed that, in such a scenario, "a party with no claim for damages (something that is usually true of a paragraph IV litigation defendant) walks away with money simply so it will stay away from the patentee's market." *Id.* The Supreme Court held that reverse payments violate principles of ***antitrust law*** when they seek to prevent competition: "If the basic reason is a desire to maintain and to share patent-generated monopoly profits, then, in the absence of some other justification, the antitrust laws are likely to forbid the arrangement." *Id. at 158*.

The Third Circuit subsequently extended the Supreme Court's ruling in *FTC v. Actavis* to non-monetary reverse payments. *See, e.g.,* *In re Lipitor Antitrust Litig., 868 F.3d 231, 252 (3d Cir. 2017)*; *King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp., 791 F.3d 388, 403 (3d Cir. 2015)*, *cert. denied*, *137 S. Ct. 446, 196 L. Ed. 2d 328 (2016)*. Specifically, the Third Circuit held that a brand-name manufacturer's promise not to produce an authorized generic to compete with the generic **[*5]** manufacturer amounted to a non-monetary reverse payment equivalent to the anticompetitive reverse payment at issue in *FTC v. Actavis* because the arrangement had the effect of maintaining supracompetitive prices in the market. *King Drug Co., 791 F.3d at 409-10* ("[A] no-AG agreement, when it represents an unexplained large transfer of value from the patent holder to the alleged infringer, may be subject to antitrust scrutiny under the rule of reason."). The Third Circuit characterized such agreements not as an exercise of the right to grant licenses, but rather as "a right to use valuable licensing in such a way as to induce a patent challenger's delay." *Id. at 406*.

In December 2012, Pernix Therapeutics Holdings, Inc. ("Pernix") entered into an agreement to acquire Somaxon. The acquisition was consummated in March 2013. (D.I. 292, Ex. 2) Pernix filed for Chapter 11 bankruptcy in February 2019. In April 2019, Pernix entered into an amended asset purchase agreement ("APA") with Currax Holdings, LLC. (D.I. 292, Ex. 3 at 6) Pursuant to the APA, Currax Pharmaceuticals LLC, Currax Holdings LLC, and Currax Holdings USA LLC (collectively, "Currax") became Somaxon's successors-in-interest to the Silenor00AE; NDA, the '229 and '307 patents', other patents **[*6]** listed in the Orange Book for Silenor00AE;, and the Agreement. (D.I. 292, Ex. 4 at ¶¶ 15-23; Ex. 5)

In October 2019, Currax informed Mylan of its plan to launch its own AG product on or before January 1, 2020. (D.I. 303 at ¶¶ 4, 14) Currax, questioned the enforceability of the Agreement regarding Silenor00AE;, arguing that the Agreement raised antitrust issues. (*Id.* at ¶¶ 12-14) On December 16, 2019, Currax and/or its subsidiary, Macoven Pharmaceuticals, L.L.C. ("Macoven"), began marketing doxepin hydrochloride 3 mg and 6 mg oral tablets at a wholesale acquisition cost ("WAC") of $349.20 per package of 30 tablets. (D.I. 292, Ex. 6) Mylan learned of Macoven's marketing activity on December 20, 2019 and filed the pending motion to enforce the Agreement three days later. (D.I. 290)

III. LEGAL STANDARD

A district court has jurisdiction to enforce a settlement agreement in a case pending before it. *See* *Hobbs & Co. v. Am. Inv'rs Mgmt., Inc., 576 F.2d 29, 33 & n.7 (3d Cir. 1978)*; *Leonard v. Univ. of Del., 204 F. Supp. 2d 784, 786 (D. Del. 2002)*. A motion to enforce a settlement agreement closely resembles a motion for summary judgment and employs a similar standard of review. *See* *Tiernan v. Devoe, 923 F.2d 1024, 1031-32 (3d Cir. 1991)*; *Parker-Hannifin Corp. v. Schlegel Elec. Materials, Inc., 589 F. Supp. 2d 457, 461 (D. Del. 2008)*. Therefore, the court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the **[*7]** motion." *Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995)*. When material facts are in dispute, the court should hold an evidentiary hearing before enforcing the settlement agreement. *See* *Tiernan, 923 F.2d at 1031*. Principles of contract law govern the enforcement of settlement agreements. *See* *Jacob's Limousine Transportation, Inc. v. City of Newark, 688 F. App'x 150, 151 (3d Cir. 2017)*; *Parker-Hannifin Corp. v. Schlegel Elec. Materials, Inc., 589 F. Supp. 2d 457, 461 (D. Del. 2008)*. If the court determines that the nonmovant breached a duty created by a binding agreement and the breach caused the movant to suffer damages, the court must grant the motion to enforce. *See Sheet Metal Workers Int'l Ass'n Local Union No. 27, AFL-CIO v. E.P. Donnelly, Inc., 737 F.3d 879, 900 (3d Cir. 2013)*. The moving party bears the burden of proving by a preponderance of the evidence that the nonmoving party breached a duty under the terms of the Agreement. *Jacob's Limousine, 688 F. App'x at 153 n.2*.

IV. ANALYSIS

As a preliminary matter, the parties do not dispute that this court has jurisdiction to resolve the pending motion to enforce the Agreement in accordance with the Consent Judgment and Dismissal Order, which provides that "[t]his Court retains jurisdiction over the parties for purposes of enforcing this Order." (D.I. 234 at 2)

A. Enforceability of the Agreement

1. Existence and enforceability of a no-AG provision

Currax alleges that Section 5.1(a) of the Agreement is not enforceable because it contains a "no-authorized generic" ("no-AG") term that is anticompetitive and unlawful under the antitrust laws. (D.I. 302 at 9-14) Mylan **[*8]** challenges Currax's characterization of Section 5.1(a) as a no-AG provision because the provision explicitly allows Mylan to launch an authorized generic in addition to the permitted third-party launch of an AB-rated licensed generic of Silenor00AE; to compete with Mylan's authorized generic and the brand drug. (D.I. 306 at 1-2, 4-5)

Section 5.1(a) of the Agreement does not contain a no-AG provision because it expressly permits Mylan to market an authorized generic with the brand company's permission: "Plaintiff hereby grants to Mylan . . . a semi-exclusive . . . license under the Licensed Patents, to offer for sale and sell the Mylan Authorized Generic Product." (D.I. 292, Ex. 1 at § 5.1(a)) The Third Circuit has defined a no-AG agreement as "a brand-name manufacturer's promise not to produce an authorized generic to compete with the generic manufacturer" during the 180-day exclusivity period guaranteed to the first-filing generic manufacturer under the Hatch-Waxman Act. *In re Lipitor Antitrust Litig., 868 F.3d 231, 252 (3d Cir. 2017)*; *see King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp., 791 F.3d 388, 393 (3d Cir. 2015)*, *cert. denied*, *137 S. Ct. 446, 196 L. Ed. 2d 328 (2016)*. But in this case, Currax licensed Mylan to produce an authorized generic to compete with Actavis' AB-rated generic product during the 180-day generic exclusivity period:

> [B]y semi-exclusive, it is meant that Plaintiffs may grant **[*9]** one (1) additional License for the AG License Initial Period to a product that is AB rated to Silenor 3 mg and 6 mg doxepin hydrochloride tablets, but such product shall not be an Authorized Generic Product. For the further avoidance of doubt, Plaintiffs and their Affiliates shall not, and shall not license, encourage, or otherwise authorize any Third Party to, offer for sale, market, or sell an Authorized Generic Product before or during the AG License Period."

(D.I. 292, Ex. 1 at § 5.1(a); D.I. 303 at ¶ 18) According to the Federal Trade Commission, Currax's license to Mylan to produce the authorized generic does not change the resulting product to something other than an authorized generic: "An authorized generic may be marketed by the brand name drug company, or another company with the brand company's permission." *In re Impax Labs., Inc.*, 2019 WL 1552939, at *3 n.5 (F.T.C. Mar. 28, 2019). Because Section 5.1(a) authorizes Mylan to manufacture and sell an authorized generic to compete with Actavis' AB-rated generic product during the 180-day exclusivity period, the provision lacks the key features of a no-AG clause.

Regardless, the relevant case authorities do not support Currax's position that Section 5.1(a) contains an illegal non-monetary reverse payment on its face. (D.I. 302 at 11) **[*10]** Courts have recognized that a no-AG term may constitute a non-monetary reverse payment subject to scrutiny under the antitrust laws. *See King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp., 791 F.3d 388, 411 (3d Cir. 2015)* (observing that a no-AG promise may amount to a non-monetary reverse payment if restrictions on authorized generic competition are exchanged for settlement of litigation to eliminate the risk of invalidation or noninfringement).[3] But these courts have declined to reach a final determination of the illegality of a no-AG clause prior to conducting the fact-intensive "rule of reason" analysis to assess whether the reverse payment will result in anticompetitive harm.[4] *See* id. at 412 ("The Court does not foreclose other justifications, and we need not decide today what those other justifications might be."); In re Zetia Ezetimibe Antitrust Litig., 2019 U.S. Dist. LEXIS 59469, 2019 WL 1397228, at *13, 20 (E.D. Va. Feb. 6, 2019) ("[A]pplication of a per se rule would appear to preclude a mechanism for even examining the Defendants' proffered justifications for [reverse payment] settlement;" therefore, rule of reason analysis should apply); In re Aggrenox Antitrust Litig., 94 F. Supp. 3d 224, 245 (D. Conn. 2015) (observing that a reverse payment settlement, "under *Actavis*, is not *ipso facto* unlawful" and may have procompetitive justifications). The Supreme Court made clear that "the likelihood of a reverse payment bringing about anticompetitive effects depends **[*11]** on its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification." Actavis, 570 U.S. at 159.

The Third Circuit has held that, "to prove anticompetitive effects, the plaintiff must prove payment for delay, or, in other words, payment to prevent the risk of competition." *See* King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp., 791 F.3d 388, 412 (3d Cir. 2015), *cert. denied*, *137 S. Ct. 446, 196 L. Ed. 2d 328 (2016)*. But Currax offers no support for its position that enforcement of Section 5.1(a) would lead to anticompetitive harm. In its briefing on the issue, Currax identifies the anticompetitive harm as "Mylan's attempt to remove a competitor from the market."[5] (D.I. 302 at 9) Currax further explains that "Currax would be agreeing with its horizontal competitor, Mylan, not to launch a product Currax has a right to sell." (*Id.* at 11) But Section 5.1(a) of the Agreement does not remove a competitor from the market. In fact, Section 5.1(a) permits competition among Currax's branded product, Mylan's authorized generic product, and Actavis' AB-rated generic product during the 180-day exclusivity period. Section 5.1(a)'s reallocation of Currax's right to market an authorized generic product to Mylan does not amount to a suppression **[*12]** of the right to market an authorized generic product, and it has no demonstrated negative impact on competition during the exclusivity period.

Currax does not dispute the fact that most of the no-AG cases it cites involved only one generic drug competing in the market against the brand-name drug during the 180-day exclusivity period. *See* In re Loestrin 24 Fe Antitrust

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[3] Currax addressed the Third Circuit's decision in *King Drug Co.* in its briefing as follows: "The Third Circuit found that a settlement agreement in which a generic manufacturer is awarded an exclusive license to launch an authorized generic product functions as an illegal reverse payment—withholding valid competition to delay generic entry." (D.I. 302 at 11) This statement is inaccurate. First, the Third Circuit did not find the no-AG term to be an illegal reverse payment under the antitrust laws. Instead, the Third Circuit held that the pleading adequately alleged facts to support the survival of the allegation at the pleading stage. King Drug Co., 791 F.3d at 409 ("We believe plaintiffs' allegations, and the plausible inferences that can be drawn from them, are sufficient to state a rule-of-reason claim under *Twombly* and *Iqbal* on the ground that GSK sought to induce Teva to delay its entry into the lamotrigine tablet market by way of an unjustified no-AG agreement."). Second, the no-AG provision in the settlement agreement authorized Teva to launch a generic, as opposed to an authorized generic as suggested by Currax—the purpose of the no-AG clause was to prohibit the launch of an authorized generic during Teva's 180 days of generic exclusivity. Id. at 393-94 ("They agreed Teva would end its challenge to GSK's patent in exchange for early entry into the $50 million annual lamotrigine chewables market and GSK's commitment not to produce its own, 'authorized generic' version of Lamictal tablets for the market alleged to be worth $2 billion annually."). Third, although the brand manufacturer characterized the no-AG agreement as an "exclusive license," the Third Circuit declined to adopt this characterization: "We do not believe the no-AG agreement was in fact an 'exclusive' license. However, since the issue of whether such agreement is an exclusive license is not necessary for our decision here, we will leave its determination for another day." Id. at 406 n.27.

[4] In the context of reverse payments, courts performing the rule of reason analysis must consider "antitrust factors such as likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances, such as here those related to patents." FTC v. Actavis, 133 S. Ct. at 2231.

[5] Currax does not address the other forms of competitive harm that may arise from a no-AG provision in a settlement agreement, such as avoidance of the risk of patent invalidation or a finding of noninfringement, or an extended monopoly for the brand company if the generic company's entry date is later than the entry date the generic company would have otherwise accepted. King Drug Co., 791 F.3d at 405 (quoting Actavis, 133 S. Ct. at 2236).

Litig., 814 F.3d at 546 (Warner agreed not to market, supply, or license an authorized generic version of Loestrin 24 during Watson's generic exclusivity period); In re Zetia Ezetimibe Antitrust Litig., 2019 U.S. Dist. LEXIS 59469, 2019 WL 1397228, at *8 (Merck agreed to delay launching an authorized generic version of Zetia during Glenmark's exclusivity period); FWK Holdings, 2017 U.S. Dist. LEXIS 224737, 2017 WL 11449668, at *3 (Actavis agreed to delay the entry of its generic in exchange for Shire's functional agreement not to launch an authorized generic version of Intuniv during the exclusivity period); In re Opana ER Antitrust Litig., 162 F. Supp. 3d at 713 (Endo agreed not to launch an authorized generic version of Opana ER during Impax's generic exclusivity period); In re Niaspan Antitrust Litig., 42 F. Supp. 3d at 744 (Kos agreed not to launch an authorized generic version of Niaspan during Barr's generic exclusivity period); Teikoku Pharma, 74 F. Supp. 3d at 1070 (Endo/Teikoku agreed not to release an authorized generic to compete with Watson's generic during the exclusivity period). In these cases, "[t]he **[*13]** no-AG agreement transfers the profits the patentee would have made from its authorized generic to the settling generic—plus potentially more, in the form of higher prices, because there will now be a generic monopoly instead of a generic duopoly." King Drug Co., 791 F.3d at 405. In contrast, Section 5.1(a) expressly permits Mylan to launch an authorized generic to compete with Actavis' AB-rated generic and Currax's brand-name version of Silenor00AE;. (D.I. 292, Ex. 1 at § 5.1(a)) The "generic duopoly" is preserved, and there can be no concern that "the patentee seeks to induce the generic challenger to abandon its claim with a share of its monopoly profits that would otherwise be lost in the competitive market." Actavis, 133 S. Ct. at 2235. This reallocation of the right to market an authorized generic product, as opposed to a suppression of the right to market an authorized generic product, does not reduce competition during the exclusivity period.

Relying on the District of Connecticut's decision in *In re Aggrenox Antitrust Litigation*, counsel for Currax suggests that an agreement not to license a third generic product may constitute an anticompetitive no-AG agreement even if the brand maintains its right to sell an authorized generic and the settlement agreement **[*14]** licenses a generic product. (3/3/2020 Tr. at 25:3-23) Currax represents that *In re Aggrenox* involved a situation in which the generic company was awarded a license to launch a generic, but the settlement agreement also gave brand manufacturer Boehringer the right to launch an authorized generic through its generic subsidiary, Roxane.[6] (*Id.*) In fact, the defendants disputed the issue of whether Boehringer had the right to launch an authorized generic during the 180-day generic exclusivity period: "First, and quite notably, the defendants do not agree among themselves whether the challenged settlement agreement actually does prevent Boehringer from introducing an authorized generic: by Boehringer's interpretation, it does not; but by Barr's reckoning it does." In re Aggrenox Antitrust Litig., 94 F. Supp. 3d at 244.

Ultimately, the court held, "I need not determine how who is correct by ruling on the construction of the agreement, but the plaintiffs allege that there is such a provision and that it is very valuable, and at least on the latter point the defendants clearly agree." *Id.* The focus of the court's decision in *In re Aggrenox* was on whether the reverse payment was made to avoid the risk of patent invalidation. Id. at 243, 245 (analyzing a reverse payment of $4

[6] Currax represents that Roxane did, in fact, launch an authorized generic product during the 180-day exclusivity period: "And in fact, it did that. It actually did launch an authorized generic through the relevant time period. And the parties briefed that." (3/3/2020 Tr. at 25:14-17) The briefing in the case is heavily redacted, and the court was unable to substantiate the launch of an authorized generic by Roxane during the exclusivity period. The operative complaint suggests that Boehringer declined to launch an authorized generic because of the settlement agreement:

> On information and belief, BI has launched at least four authorized generics between 1999 and 2012. On information and belief, in at least two of those instances, BI launched an authorized generic through its subsidiary Roxane Laboratories, Inc. On information and belief, these two launches were not the result of the settlement of patent litigation involving the presumed FTF. On information and belief, BI would have launched an **[*15]** authorized generic version of Aggrenox upon market entry by Barr/Teva in the absence of the anticompetitive agreement here.

(D. Conn. C.A. No. 3:14-md-2516, D.I. 97 at ¶ 71; *see also* D.I. 194 at 15 ("Had Barr not accepted the payments and delayed entry, it would have faced stiff competition from Boehringer's authorized generic version of Aggrenox and six months later from other generic entrants."); D.I. 149 at 47 (arguing that "BI retained the freedom to introduce an AG through its generic affiliate Roxane," without suggesting that Roxane in fact launched an authorized generic during the exclusivity period)). Regardless, the court did not acknowledge the existence of two competing generics in its decision.

million cash plus over $120 million in royalties in addition to non-cash consideration). The court explained that, if the brand manufacturer avoids the invalidation of weak patents by entering into a settlement agreement, it can extend its monopoly by paying the generic manufacturer to delay the generic's market entry. *Id. at 234*. Thus, the inquiry focuses on the avoidance of patent invalidation by the brand manufacturer:

> The plaintiffs do not appear to allege that "no-authorized generic" agreements are *per se* unlawful, nor that any individual feature of the settlement agreement would have constituted an antitrust violation as **[*16]** part of some other agreement. Rather, they allege that Boehringer gave much more than it got in the settlement agreement; and under *Actavis*, that can constitute an antitrust violation if it did so in order to avoid the risk of patent invalidation.

Id. at 245. In contrast, the only anticompetitive harm alleged by Currax on the present motion is the alleged reduction in the number of generic competitors during the exclusivity period. (3/3/2020 Tr. at 21:4-6; 26:19-23) For the reasons previously discussed, there is no such restriction on competition in the present case.

Having recommended that Section 5.1(a) is enforceable because it does not fit the definition of a no-AG clause and it has not been shown to reduce competition, the court need not reach the question of severability under Section 12.4 of the Agreement, which provides that the remainder of the Agreement "will be valid and enforceable to the fullest extent permitted by applicable law" even if one provision is "held to be invalid or unenforceable." (D.I. 292, Ex. 1 at § 12.4)

2. California reverse payment legislation

Currax also contends that Section 5.1(a) of the Agreement is invalid and unenforceable because California law now prohibits no-AG restraints in reverse payment settlements. **[*17]** (D.I. 302 at 14) California's new legislation regarding reverse payment settlements, which went into effect on January 1, 2020, provides that

> an agreement resolving or settling, on a final or interim basis, a patent infringement claim, in connection with the sale of a pharmaceutical product, shall be presumed to have anticompetitive effects and shall be in violation of this section if both of the following apply:
> (A) A nonreference drug filer receives anything of value from another company asserting patent infringement, including, but not limited to, an exclusive license or a promise that the brand company will not launch an authorized generic version of its brand drug.
> (B) The nonreference drug filer agrees to limit or forego research, development, manufacturing, marketing, or sales of the nonreference drug filer's product for any period of time.

Cal. Health & Safety Code § 134002(a)(1) (West 2020). *Section 134002* does not render Section 5.1(a) of the Agreement invalid or unenforceable for at least three reasons.

First, Currax has not shown that the statute applies retroactively. "In California, [i]t is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the **[*18]** legislative intent." *Gadda v. State Bar of Calif., 511 F.3d 933, 937 (9th Cir. 2007)* (quoting *Aetna Cas. & Sur. Co. v. Indus. Accident Comm'n, 30 Cal.2d 388, 182 P.2d 159 (Cal. 1947)* (internal quotation marks omitted)); *see also* *Evangelatos v. Superior Court, 44 Cal. 3d 1188, 246 Cal. Rptr. 629, 642, 753 P.2d 585 (Cal. 1988)* ("[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application."). Neither the text of the statute nor the legislative history suggests that *Section 134002* was intended to apply retroactively. To date, no California state or federal case authorities have issued applying the statute retroactively. Because the parties executed the Agreement on July 17, 2012, and the statute did not go into effect until January 1, 2020, *Section 134002* does not invalidate Section 5.1(a) of the Agreement.

Second, *Section 134002(e)(4)* provides that "[a]n action to enforce a cause of action for a violation of this section shall be commenced within four years after the cause of action accrued." The parties executed the Agreement on

July 17, 2012, and the statute did not go into effect until January 1, 2020. There can be no dispute that the four-year statute of limitations under the statute has expired in this case.

Third, *Section 134002(e)(1)(B)* provides that "[a]ny penalty . . .shall accrue only to the State of California and shall be recovered in a **[*19]** civil action brought by the Attorney General in its own name . . . against any party to an agreement that violates this section." Consequently, Currax may not invoke the statute in this litigation because there is no private right of action under the California statute.

B. Material Breach

The parties do not dispute that Currax marketed and offered for sale another authorized generic product during the AG License Initial Period: "Currax has made its authorized generic ('AG') version of its Silenor00AE; product, consisting of doxepin tablets in 3 and 6 mg dosage amounts, available to customers." (D.I. 303 at ¶¶ 1-3) Moreover, the parties do not dispute that Currax's conduct violates Section 5.1(a) of the Agreement, which grants Mylan a "semiexclusive" license to market and sell its authorized generic product without competition from another authorized generic. (D.I. 292, Ex. 1 at § 5.1(a)) Section 5.1(a) of the Agreement expressly prohibits the award of a license for another authorized generic product before or during the AG License Initial Period. (*Id.*)

Mylan contends that Currax's marketing and sale of its authorized generic of Silenor00AE; amounts to a material breach of Section 5.1(a) of the Agreement because Mylan negotiated to obtain **[*20]** 180 days of semi-exclusivity to market and sell its authorized generic, as evidenced by contemporaneous press releases. (D.I. 291 at 10-11; D.I. 306 at 3) In response, Currax challenges Mylan's assertion that the 180-day term of generic semi-exclusivity is similar to the statutory exclusivity period for generics in the absence of the Agreement, noting that ANDA filers are not entitled to 180 days of generic exclusivity when they settle their patent cases and launch under a license from the patent holder. (D.I. 302 at 15) Even if Mylan could establish that Section 5.1(a) is material to the Agreement, Currax contends that this would confirm the term was a reverse transfer of considerable value from the patentee to the alleged infringer, rendering it void and unenforceable under the antitrust laws. (*Id.*)

The record before the court supports a finding that the semi-exclusivity provision of Section 5.1(a) is material to the Agreement. Mylan negotiated for the right to market and sell an authorized generic during Actavis' generic exclusivity period without competition from Currax's authorized generic. (3/3/2020 Tr. at 15:16-24) The press releases accompanying the Agreement confirm that Mylan's rights under Section 5.1(a) were material **[*21]** to its execution of the Agreement. (D.I. 292, Ex. 1 at Ex. B)

C. Harm Resulting from Breach

In its briefing, Mylan contends that it is entitled to monetary damages in the form of lost revenues, loss of market share, price erosion, and loss of customer goodwill as a result of Currax's breach of the Agreement. (D.I. 291 at 11) Mylan represents that it is also entitled to specific performance of the Agreement and, accordingly, Currax should be required to pull its Silenor00AE; AG product off the market. (D.I. 306 at 10) At oral argument, Mylan limited its present request to specific performance of the Agreement to stop Currax's unauthorized sales of its authorized generic product and reserved its right to seek monetary compensation at a later time. (3/3/2020 Tr. at 13:5-15; 18:1-11)

I recommend that the court grant Mylan's request for specific performance of the Agreement and order Currax to cease sales of its authorized generic product for the duration of the AG License Initial Period. For the reasons previously stated, Currax breached Section 5.1(a) in a manner that deprived Mylan of a material benefit of the Agreement.

V. CONCLUSION

For the foregoing reasons, I recommend that the court GRANT Mylan's **[*22]** motion to enforce the Agreement and order Currax to cease sales of its authorized generic product for the duration of the AG License Initial Period. (D.I. 290)

Given that the court has relied upon material that technically remains under seal, the court is releasing this Report and Recommendation under seal, pending review by the parties. In the unlikely event that the parties believe that certain material in this Report and Recommendation should be redacted, the parties shall jointly submit a proposed redacted version by no later than **April 16, 2020**, for review by the court, along with a motion supported by a declaration that includes a clear, factually detailed explanation as to why disclosure of any proposed redacted material would "work a clearly defined and serious injury to the party seeking closure." *See In re Avandia Mktg., Sales Practices & Prods. Liab. Litig., 924 F.3d 662, 672 (3d Cir. 2019)* (quoting *Miller v. Ind. Hosp., 16 F.3d 549, 551 (3d Cir. 1994)* (internal quotation marks omitted)). If the parties do not file a proposed redacted version and corresponding motion, or if the court determines the motion lacks a meritorious basis, the documents will be unsealed within thirty (30) days of the date the Report and Recommendation issued.

This Report and Recommendation is filed pursuant to *28 U.S.C. § 636(b)(1)(B)*, *Fed. R. Civ. P. 72(b)(1)*, and *D. Del. LR 72.1*. The parties may serve **[*23]** and file specific written objections within fourteen (14) days after being served with a copy of this Report and Recommendation. *Fed. R. Civ. P. 72(b)(2)*. The objection and responses to the objections are limited to ten (10) pages each. The failure of a party to object to legal conclusions may result in the loss of the right to de novo review in the District Court. *See Sincavage v. Barnhart, 171 F. App'x 924, 925 n.1 (3d Cir. 2006)*; *Henderson v. Carlson, 812 F.2d 874, 878-79 (3d Cir. 1987)*.

The parties are directed to the court's Standing Order For Objections Filed Under *Fed. R. Civ. P. 72*, dated October 9, 2013, a copy of which is available on the court's website, http://www.ded.uscourts.gov.

Dated: April 9, 2020

/s/ Sherry R. Fallon

Sherry R. Fallon

United States Magistrate Judge

Virgin Enters. v. Virginic LLC

United States District Court for the District of Wyoming

April 10, 2020, Decided; April 10, 2020, Filed

Case No. 19-CV-0220-F

Reporter
2020 U.S. Dist. LEXIS 63580 *; 2020 U.S.P.Q.2D (BNA) 10388; 2020 WL 1845232

VIRGIN ENTERPRISES LIMITED, Plaintiff, vs. VIRGINIC LLC, et al., Defendants.

Prior History: *Virgin Enter. Ltd. v. Virgin LLC, 2019 U.S. Dist. LEXIS 246099, 2019 WL 13222758 (D. Wyo., Dec. 30, 2019)*

Core Terms

affirmative defense, trademark, antitrust, infringement, defenses, argues, discovery, asserts, trademark infringement, counterclaim, allegations, innocent, baseless, misuse, pled, antitrust violation, motion to strike, necessary party, proceedings, courts, rights, cases, marks, motion to dismiss, anti trust law, stricken, succeed, join, amended complaint, reservation

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For Virginic LLC, Virginic Labs LLC, Paramount Labs 77 LLC, Defendant: Clyde William Hutchins, Jr, LEAD ATTORNEY, HARMONY LAW LLC, Ft. Collins, CO.

For Virginic LLC, Counter Claimant: Clyde William Hutchins, Jr, LEAD ATTORNEY, HARMONY LAW LLC, Ft. Collins, CO.

Judges: NANCY D. FREUDENTHAL, UNITED STATES DISTRICT JUDGE.

Opinion by: NANCY D. FREUDENTHAL

Opinion

ORDER ON PLAINTIFF'S MOTION (DOC. 30) TO STRIKE SEVERAL AFFIRMATIVE DEFENSES OF DEFENDANT VIRGINIC LLC

Pursuant to *Federal Rule of Civil Procedure 12(f)*, Plaintiff Virgin Enterprises Limited ("Plaintiff") moves to strike the majority of what Defendant Virginic LLC ("Virginic") pleads as affirmative defenses in its answer and counterclaims (doc. 27): nos. 1-4, 6-12, 15, 16, 18, 20, and 23-26. In response, Virginic withdrew its affirmative defenses nos. 6, 8, 20 and 23. It otherwise opposes the motion. Doc. 32. Plaintiff did not reply. As follows, the Court grants the motion in part and denies **[*2]** in part.

I. Pleading Standards for Defenses and Standards for Rule 12(f) Motions.

"The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Fed. R. Civ. P. 12(f). Plaintiff argues the challenged affirmative defenses are insufficient defenses.

> Rule 8 prescribes the rules of pleading. Defenses are subject to three provisions with[in] Rule 8: 1) the defense must be stated "in short and plain terms" (Rule 8(b)(1)(A)); 2) "any avoidance or affirmative defense" must be affirmatively stated (Rule 8(c)(1)); and 3) the defense "must be simple, concise, and direct" (Rule 8(d)(1)).

Michaud v. Greenberg & Sada, P.C., No. 11-CV-01015-RPM-MEH, 2011 U.S. Dist. LEXIS 77521, 2011 WL 2885952, at *2 (D. Colo. July 18, 2011). Thus, "[a]n affirmative defense is insufficient if, as a matter of law, the defense cannot succeed under any circumstance." *Id.* (citing Unger v. U.S. West, Inc., 889 F. Supp. 419 (D. Colo. 1995)). *See also* Sinclair Wyo. Refinery Co. v. A&B Builders, Ltd, No. 15-CV-91-ABJ, 2018 U.S. Dist. LEXIS 226760, 2018 WL 4677793, at *5 (D. Wyo. Jan. 23, 2018), *recon. denied*, 2018 U.S. Dist. LEXIS 231392 , 2018 WL 4697067 (D. Wyo. Apr. 3, 2018).

The Tenth Circuit has not ruled whether to change course and instead apply the plausibility standards of Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) to affirmative defenses. Many courts within the Tenth Circuit have declined to do so. *See, e.g.,* Dorato v. Smith, 163 F. Supp. 3d 837, 882 (D.N.M. 2015) Cooper v. City of Alva, No. CIV-19-148-G, 2019 U.S. Dist. LEXIS 189027, 2019 WL 5653217, at *1, n.1 (W.D. Okla. Oct. 31, 2019); Michaud, 2011 U.S. Dist. LEXIS 77521, 2011 WL 2885952.

Given the relatively lenient standards for pleading defenses, motions to strike "are generally disfavored, but **[*3]** within [the] sound discretion of the court. A motion to strike seeks a drastic remedy. ... They are rarely granted. ... If there is any doubt whether the pleading should be stricken, it should be resolved in favor of the non-moving party." Sinclair Wyoming, 2018 U.S. Dist. LEXIS 226760, 2018 WL 4677793, at *5 (citations and internal quotation marks omitted). *See also* Michaud, 2011 U.S. Dist. LEXIS 77521, 2011 WL 2885952, at *2 (applying same standard).

> The purpose of Rule 12(f) is to save time and expenses that would be spent litigating issues that will not affect the outcome of the case. United States v. Shell Oil Co., 605 F. Supp. 1064, 1085 (D. Colo. 1985). ... Wright and Miller have recognized that motions to strike pleadings under Rule 12(f) should generally be denied[,] * * * often being considered purely cosmetic or "time wasters."

Hockaday v. Aries Logistics, Inc, No. 14-CV-260-J, 2015 WL 13752620, at *2 (D. Wyo. Aug. 20, 2015) (citing 5C C. Wright & A. Miller, *Federal Practice & Procedure Civil* § 1382 (3d. ed. 2004)).

II. Analysis

A. Affirmative Defense No. 1: Failure to State a Claim

Virginic's first affirmative defense asserts that the amended complaint fails to state a claim for relief. Plaintiff takes issue with this defense because it is not actually an affirmative defense but rather a defense that should be presented in a motion to dismiss, not an answer. Although this is an ordinary, general denial and not one of the defenses that Rule 8(c) requires to **[*4]** be pled affirmatively, pleadings in this district frequently state it as a defense or affirmative defense. "Although some courts will strike denials or other theories that have been mislabeled as affirmative defenses, the Court concludes the better practice is not [to] do so unless the moving party demonstrates prejudice." *Fed. Trade Comm'n v. Affiliate Strategies, Inc.*, No. 09-4104-JAR, 2010 WL 11470103, at *7 (D. Kan. June 8, 2010) (footnote omitted). Plaintiff does not identify how having this general denial pled as an affirmative defense would add breadth to discovery or otherwise prejudice Plaintiff. The Court declines to strike the first affirmative defense.

B. Affirmative Defense No. 2: Fair, Nominative or Descriptive Use

Virginic's second affirmative defense asserts the "doctrines of fair use, nominative fair use, and/or descriptive use." Plaintiff argues:

> The fair use defense "permits the use of a name or term, other than as a trademark, that is descriptive and is used fairly and in good faith only to describe the goods." *Beer Nuts, Inc. v. Clover Club Foods Co., 711 F.2d 934, 937 (10th Cir. 1983)* (emphasis in original). However, this defense is "not available if the alleged descriptive use is in fact a trademark use." *Id.* A "trademark use" is use of a term "to identify the source of [a producer's] goods **[*5]** to the public and to distinguish those goods from others." *Id. at 938*; *see also Sara Lee Corp. v. Sycamore Family Bakery Inc., 2:09CV523DAK, 2009 U.S. Dist. LEXIS 100554, 2009 WL 3617564, at *4 (D. Utah Oct. 27, 2009)*. Here, there is no genuine dispute that Virginic uses the VIRGINIC Mark as a trademark, and not "fairly and in good faith only to describe the goods."

Doc. 30. In response, Virginic argues "Plaintiff's contentions with regard to this defense get into the merits of the case" and "[t]here have been allegations raised in the pleadings that the Virginic mark was used in ways beyond the trademark." Doc. 32.

The federal rules permit pleading inconsistently in the alternative. This applies not only to claims but also to defenses. *Fed. R. Civ. P. 8(d)(3)*. Giving reasonable inferences to Virginic, it appears to plead in the alternative that "Virginic" is lawful as a trademark and if it is not, then its use of the word is lawful because it is merely descriptive. Plaintiff does not cite any examples of a court determining the substantive issues raised by its argument on a *Rule 12(f)* motion. *Beer Nuts* was on appeal after a bench trial; *Sara Lee* ruled on a motion for preliminary injunction. The issues raised by these doctrines are not appropriate for resolving on a motion to strike in this case. The **[*6]** Court declines to strike this defense.

C. Affirmative Defense No. 3: Innocent Infringement

The third affirmative defense asserts innocent infringement. Plaintiff argues:

> It is well-settled that trademark infringement is a strict liability offense, and the "innocent infringer" defense is unrelated to liability and instead goes to reducing an award of statutory damages (if at all). *See, e.g., Taubman Co. v. Webfeats, 319 F.3d 770, 775 (6th Cir. 2003)* ("[T]he *Lanham Act* is a strict liability statute."); *Spin Master Ltd. v. Alan Yuan's Store, 325 F. Supp. 3d 413, 421 (S.D.N.Y. 2018)* ("Because the Lanham Act is a strict liability statute, a registrant need not prove knowledge or intent in order to establish liability."); *Live Face on Web, LLC v. Natchez Bd. of Realtors, Inc., 5:17-CV-122-DCB-MTP, 2018 U.S. Dist. LEXIS 38711, 2018 WL 1247880, at *3 (S.D. Miss. Mar. 9, 2018)* ("The affirmative defense of innocent infringement cannot succeed under any set of facts because it is not, in fact, an affirmative defense to infringement liability."). Thus, Virginic's "innocent infringer" defense is not an affirmative defense and there is no set of circumstances in which Virginic's Third Affirmative Defense would bar Virgin's claims.

Doc. 30. In response, Virginic argues in relevant part

> The question of innocent infringement goes to the relief that Plaintiff is seeking. Plaintiff requests relief under *15 U.S.C. § 1117* including all of Virginic's **[*7]** profits, Plaintiff's damages, costs of the action, and attorney's fees. See First Amended Complaint, [Doc. No. 19] prayer for relief, ¶¶ 7 & 9. Plaintiff also asserts a claim under *Wyo. Stat. Ann. § 40-1-115*. First Amended Complaint, Count V.

Doc. 32. Of the cases that Plaintiff cites, only *Live Face* struck an innocent infringer affirmative defense on a *Rule 12(f)* motion. It did so because it deemed this was not an affirmative defense to copyright infringement liability, as it only went to statutory damages. *Live Face* also found that as an ordinary defense, innocent infringement was irrelevant because the plaintiff sought only actual damages.

There is little consensus among the circuits on whether innocent infringement is an affirmative defense. *See, e.g., K. Hansotia & Co. Inc. v. Einalem LLC, No. 0:19-CV-60191-UU, 2019 U.S. Dist. LEXIS 226108, 2019 WL 7708241, at *3 (S.D. Fla. May 13, 2019)*. A sister court within this circuit assumes innocent infringement is an affirmative defense to copyright infringement. *See, e.g., Home Design Servs., Inc. v. Starwood Const., Inc., 801 F. Supp. 2d 1111, 1120 (D. Colo. 2011)*; *Home Design Servs., Inc. v. Trumble, No. 09-CV-00964-WYD-CBS, 2011 U.S. Dist. LEXIS 23031, 2011 WL 843900, at *2 (D. Colo. Mar. 8, 2011)* ("Given that a cautious pleader will often label an argument as an affirmative defense, there is no reason to strike such a denial where the other side is not prejudiced by any redundancy.").

Here, Plaintiff recognizes in its motion **[*8]** that the "innocent infringer" defense applies to statutory damages for trademark infringement. *See also Spin Master Ltd. v. Alan Yuan's Store, 325 F. Supp. 3d 413, 425, n.4 (S.D.N.Y. 2018)* (noting trademark law has adopted a multi-factor analysis from copyright law for determining statutory damages). That a defense only goes to damages does not appear to disqualify it from being an affirmative defense. The Tenth Circuit, for instance, recognizes failure to mitigate damages as an affirmative defense, despite it being a defense only as to damages. *See, e.g., F.D.I.C. v. Oldenburg, 38 F.3d 1119, 1121-22 (10th Cir. 1994)*. In addition, unlike *Live Face*, Plaintiff does not specify whether it seeks only actual damages and not statutory damages. The Court declines to strike this defense.[1]

D. Affirmative Defense No. 4: Trademark Misuse and Unclean Hands, Including Antitrust Violations

Virginic's fourth affirmative defense asserts "doctrines of trademark misuse and unclean hands, including Plaintiff's use of its purported trademarks as instruments of, or in aid of, violations of the antitrust laws." Plaintiff does not seek to strike the trademark misuse and unclean hands defense generally, but only the antitrust portion of this defense.

At the outset, the Court notes the antitrust defense to trademark infringement is largely recognized as **[*9]** more theoretical than actual. It is a defense to the exclusive right to use an "incontestable mark," if "the mark has been or is being used to violate the antitrust laws of the United States." *15 U.S.C. § 1115(b)(7)*. But according to *McCarthy on Trademarks and Unfair Competition*,

> in no final reported decision involving trademark infringement has a court actually refused to enforce a trademark because it was used in violation of ***antitrust law***. Similarly, in private litigation, the courts have refused to invoke the sanction of forfeiture of a trademark as a remedy for an antitrust violation.

6 *McCarthy on Trademarks and Unfair Competition* § 31:91 (5th ed.) (notes omitted). *See also* 1 *Antitrust Adviser* § 6:12, Trademark Misuse (5th ed.) ("in almost every reported instance where the antitrust misuse of a trademark has been raised as a defense, it has been rejected"); *Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56-57 (2d Cir. 1997)* (citing *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 298 F. Supp. 1309, 1314 (S.D.N.Y. 1969)*, *aff'd in relevant part*, *433 F.2d 686 (2d Cir. 1970))*.

Here, Plaintiff argues two theories for striking the antitrust defense. First, Plaintiff asserts that Virginic lacks standing for such a defense, citing the above section of *McCarthy on Trademarks and Unfair Competition*. The treatise notes that "where the party allegedly infringing a mark is not a licensee and has not been **[*10]** injured by trademark license restrictions allegedly in violation of the antitrust laws, then that party has no standing to assert an antitrust misuse defense," citing *Central Ben. Mut. Ins. Co. v. Blue Cross & Blue Shield Ass'n, 711 F. Supp. 1423, 1434 (S.D. Ohio 1989)*, *aff'd*, *1992 U.S. App. LEXIS 34838 (6th Cir. Dec. 29, 1992)*.

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[1] Virginic also argues that the innocent infringer defense is allowed pursuant to *15 U.S.C. § 1114(2)*, where "an infringer or violator is engaged solely in the business of printing the mark or violating matter for others and establishes that he or she was an innocent infringer or innocent violator." In that circumstance, the owner of the mark is only entitled to an injunction. But Virginic does not appear to assert in its pleading or brief that it was solely printing the Virginic mark or violating matter for others. This argument is not persuasive.

However, in *Central Benefits* the alleged antitrust violation was in the trademark holder's requirements for licensees. The party asserting the defense in that case was not a licensee, so it lacked standing to raise this as a defense. Here, Virginic states its antitrust defense generically. Its response brief argues that Plaintiff's conduct in violation of ***antitrust law*** "includes" civil litigation and trademark proceedings (U.S. and U.K.). Virginic concludes "[t]he Plaintiff's actions are much larger than simply a single lawsuit and, in the aggregate, show a pattern of commercial abuse against Virginic that rises to the level of antitrust activity." Doc. 32. Thus, the issue here is not a lack of standing — Virginic alleges it has suffered harm from at least Plaintiff's resort to legal protections for its trademarks.

The primary issue with Virginic's antitrust defense is that although Virginic argues it encompasses a "larger pattern" of commercial abuse, the only conduct Virginic actually identifies is Plaintiff's **[*11]** civil litigation and trademark proceedings. Under the *Noerr-Pennington* doctrine, resort to legal protections is immune from antitrust liability unless it is a sham, *i.e.*, "objectively baseless." *Cardtoons, L.C. v. Major League Baseball Players Ass'n, 208 F.3d 885, 889-90 (10th Cir. 2000)*; *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*. Plaintiff argues the Court can and should determine now that its claims are not objectively baseless. Plaintiff cites *1-800Contacts, Inc. v. Mem'l Eye, P.A., 2:08-CV-983 TS, 2010 U.S. Dist. LEXIS 23972, 2010 WL 988524, at *1 (D. Utah Mar. 15, 2010)* as striking antitrust-based affirmative defenses because the trademark infringement claim was not objectively baseless.

As *1-800Contacts* concisely states,

> The *Noerr—Pennington* Doctrine is based on both the *Sherman Act* and the right to petition the government. "In recognition of this right, the United States Supreme Court has held that ... organizations are immune from liability under antitrust laws for actions constituting petitions to the government." The Doctrine, therefore, "immunizes from antitrust liability bona fide lobbying and litigation efforts." However, if the litigation is a "sham" there is no immunity. "[L]itigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless." If the litigation is not objectively baseless, it can not **[*12]** be a "sham" regardless of the subjective intent. "To ascertain baselessness, a court must consider whether the litigant had 'probable cause to initiate the legal action.'"

*2010 U.S. Dist. LEXIS 23972, 2010 WL 988524, at *2* (notes omitted).

Plaintiff argues that it brought this action to protect its trademark rights in its VIRGIN Marks. Although Virginic's counterclaims seek to preclude Plaintiff from retaining and enforcing Plaintiff's trademark rights on personal products in the United States, Virginic does not dispute that when Plaintiff filed the complaint (and to the present day), Plaintiff owned the U.S. trademark rights in the VIRGIN marks alleged. Virginic disputes that it is liable on any of Plaintiff's claims, but it does not dispute that it is involved in the conduct that Plaintiff alleges is infringing and otherwise unlawful. The Court also recently denied the motion to dismiss Plaintiff's claims brought by two of the other Defendants. Plaintiff's action against Virginic is not objectively baseless.

In its response, Virginic argues it needs unspecified discovery to show Plaintiff's action is objectively baseless. Virginic does not attempt to explain why discovery would be necessary on this issue. Based on Plaintiff's undisputed **[*13]** allegations noted above, there is no discovery that could show Plaintiff's litigation and trademark proceedings were objectively baseless. In short, the antitrust defense fails as to Plaintiff's action in this Court.

Plaintiff did not specifically address why its *United Kingdom* litigation or the trademark proceedings in both countries were not shams. However, Plaintiff alleges (in both its original and amended complaints) that it won in opposing Virginic's U.K. trademark application and in the U.K. litigation that followed the administrative decision. Plaintiff further alleges that it has filed an opposition to Virginic's U.S. trademark application, which remains pending. The only other trademark proceedings alleged by either Plaintiff or Virginic are the proceedings in which it registered the VIRGIN trademarks at issue on cosmetics and other personal products. In its counterclaims, Virginic asserts Plaintiff abandoned these marks and committed fraud on the U.S. Patent & Trademark Office ("PTO"). But Virginic does not attempt to explain in either its answer or its response brief how Plaintiff's conduct before either the U.K.

trademark office or the PTO with respect to the trademarks **[*14]** at issue was objectively baseless, such that any of those proceedings also violated ***antitrust law***. For this reason, the antitrust defense fails regarding the U.K. litigation and the U.K. and U.S. trademark proceedings as well.[2]

As for allegedly anticompetitive conduct outside of Plaintiff's petitioning activity, Virginic argues that it needs discovery on this issue before the Court should rule on the antitrust defense. If Virginic had brought an antitrust counterclaim, this would not be a sufficient explanation to survive a motion to dismiss under *Twombly*. However, this being an affirmative defense, Virginic was not required to plead facts in support. As the Court notes above, the Tenth Circuit has not yet ruled whether affirmative defenses should be subject to the same plausibility standard as *Twombly* and *Iqbal* require for claims. All that is generally required for a defense to survive a motion to strike is that it could succeed in some circumstance.

Here, the antitrust defense could succeed in *some* theoretical circumstance of direct, competitive harm to Virginic involving the marks at issue but outside of petitioning activity — of which it is purportedly unaware without **[*15]** discovery from Plaintiff. The defense is supported by existing law, albeit slim.

> Since denial of a plaintiff's exclusive right to the use of his trademark is not essential to the restoration of competition, it is not enough merely to prove that merchandise bearing a trademark, however valuable the trademark, has been used in furtherance of antitrust violations. If this is all that were required, any antitrust violation in the distribution of such merchandise would result in a forfeiture of the trademark with a consequent unnecessary frustration of the policy underlying trademark enforcement. An essential element of the antitrust misuse defense in a trademark case is proof that the mark itself has been the basic and fundamental vehicle required and used to accomplish the violation.
>
> *Although the burden of establishing such a direct misuse is a heavy one, it is not insuperable*. For instance, in *Phi Delta Theta Fraternity v. J. A. Buchroeder & Co., 251 F. Supp. 968 (W.D. Mo. 1966)*, it was claimed that after a conspiracy between fraternities and others to monopolize the market in fraternity jewelry had failed, and the conspiracy could not be enforced against independent jewelry manufacturers and dealers, the fraternities began to register their insignia as trademarks for the **[*16]** very purpose of eliminating independent competition, and the court quite properly and understandably concluded that, if these allegations were proven, the trademarks were used as a causal instrumentality to violate the antitrust laws.

Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena, 298 F. Supp. 1309, 1315 (S.D.N.Y. 1969), *modified on other grounds sub nom. Carl Zeiss Stiftung v. VEB Carl Zeiss Jena, 433 F.2d 686 (2d Cir. 1970)* (emphasis added). It bears noting that *Zeiss* found on summary judgment that the antitrust defense failed on the evidence. *Id.*

Courts that have struck the antitrust defense in trademark cases have generally done so because the alleged anticompetitive conduct did not directly use the mark as the vehicle for competitive harm. *See, e.g.*, 6 *McCarthy on Trademarks and Unfair Competition* § 31:91, n.6; *Microsoft Corp. v. Sales Int'l LLC*, No. 1:06-CV-1672-ODE, 2007 WL 9702354, at *8 (N.D. Ga. Jan. 23, 2007). In cases that decline to strike the defense, it appears the defendant generally either pled facts in support (at least to identify what sort of antitrust violation it was alleging) or presented evidence in opposing the motion to strike. For instance, in *Estee Lauder, Inc. v. Fragrance Counter, Inc., 189 F.R.D. 269 (S.D.N.Y. 1999)*, the court declined to strike an antitrust defense because the defendant "provided evidence to support allegations that Plaintiffs have attempted—independently of this lawsuit—to block TFC's participation in the sale of Plaintiffs' **[*17]** products. While the evidence provided is, at best, inconclusive, it suggests the possibility that Plaintiffs are directly attempting to misuse their trademarks for anticompetitive purposes." *Id. at 273*. The court found these were questions to decide only after discovery and on the merits.

Here, Virginic's argument in support of its antitrust defense is just as generic as its pleading. Despite the defense being limited to only direct use of the marks at issue to competitively and directly harm Virginic (*see, e.g., Zeiss*;), Virginic did not present any evidence of anticompetitive conduct. It did not even suggest what kind of

[2] Neither side cites any authority that the *Noerr-Pennington* doctrine would not apply to Plaintiff's petitioning activity outside of the United States.

anticompetitive conduct Plaintiff has allegedly engaged in with the marks at issue. Virginic just says Plaintiff has engaged in a larger pattern of commercial abuse against Virginic, and it needs discovery to determine whether any of it violates the antitrust laws. This is the merest of threads on which to hang an assertion of antitrust violations, even if pled as a defense.

> [I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery ... but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated **[*18]** over 20 years ago in *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528, n. 17, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983)*, *"a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."*
> * * *
>
> It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," *post*, at 1975, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.

Twombly, 550 U.S. at 558-59 (emphasis added).

Particularly in the context of a trademark infringement case, there is little or no reason to require an antitrust *counterclaim* to be factually plausible, but allow an antitrust *defense* to proceed without identifying any facts — or even what kind of antitrust violation is alleged. The distinction between counterclaims and affirmative defenses is not always clear. *See, e.g., Adidas Am., Inc. v. Payless Shoesource, Inc., 529 F. Supp. 2d 1215, 1260 (D. Or. 2007)*, *recon. denied*, *540 F. Supp. 2d 1176 (D. Or. 2008)* (antitrust raised as both affirmative defense and counterclaim in trademark infringement case; because the defenses and counterclaims were based on the same factual and legal arguments, the court found both failed for lack of pleading the elements of the antitrust statute asserted). As **[*19]** *Rule 8(c)* recognizes, if a party "mistakenly designates" a counterclaim as a defense, "the court must, if justice requires, treat the pleading as though it were correctly designated." *Fed. R. Civ. P. 8(c)(2)*.[3]

There appears to be a paucity of analysis regarding the appropriate pleading standard for the antitrust defense to trademark infringement. Courts within the Tenth Circuit that decline to extend *Twombly* to affirmative defenses do not appear to address that question with respect to an antitrust defense. The Court has also found no reported cases directly on point outside this circuit. Two cases lend some support for requiring the antitrust defense to trademark infringement to be plausible. In *Rayette-Faberge, Inc v. Riverton Labs., Inc., No. 66 CIV. 2133, 1968 U.S. Dist. LEXIS 12226, 1968 WL 8434, 160 U.S.P.Q. 221 (S.D.N.Y. Dec. 4, 1968)*, the court noted:

> On August 8, 1968, in what may well have been an excessive concern to avoid substantial determinations rested upon mere pleading errors, I denied plaintiff's motion to dismiss a counterclaim and to strike a defense assertedly grounded in the antitrust laws. * * *
>
> *While the answer itself could have been thought to expose this [factual] deficiency on its face, it is now convincingly demonstrated that the antitrust "defense" lacks any suggestion ... that the trademark on which plaintiff sues "has been or is being* ***[*20]*** *used to violate the antitrust laws * * *."* *15 U.S.C. § 1115(b)(7)*. ... [D]efendants attempt in this defense to assert vague, conclusory charges of antitrust misbehavior by the plaintiff. Pressed to make these charges more concrete, defendants have been forced to reveal that they have no basis for charging [it].

*1968 U.S. Dist. LEXIS 12226, [WL] at *1* (emphasis added).

In *Critter Control, Inc. v. Young, No. 3:13-0695, 2014 U.S. Dist. LEXIS 126960, 2014 WL 4411666, at *12 (M.D. Tenn. Sept. 8, 2014)*, *rec. adopted in relevant part*, *2014 U.S. Dist. LEXIS 138346, 2014 WL 4960948 (M.D. Tenn.*

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[3] Neither party asserts that Virginic mistakenly pled antitrust as a defense instead of a counterclaim. The Court relies on *Rule 8(c)(2)* only as analogous support here.

Sept. 30, 2014), the court reasoned that a trademark owner was entitled to summary judgment on its trademark claim, despite the defendant "rais[ing] the specter of an antitrust defense."

> *The Defendant has not set out a viable antitrust defense*, let alone supported such a defense with evidence that the Plaintiff has used its protected mark for improper antitrust purposes. In essence, all the Defendant has asserted is that the Plaintiff has vigorously sought to protect its rights in its protected mark. However, the good faith enforcement by the plaintiff of its trademark rights does not constitute an antitrust violation or a trademark misuse. See *Alberto—Culver Co. v. Andrea Dumon, Inc., 466 F.2d 705, 711 (7th Cir. 1972)*.

*Critter Control, 2014 U.S. Dist. LEXIS 126960, 2014 WL 4411666 at *12* (emphasis added).

In light of (a) the narrowness of the antitrust defense to trademark infringement, (b) its high potential to embroil the parties in greatly broadened **[*21]** discovery, and (c) there being no logical reason to allow a party to avoid all plausibility requirements simply by denominating this as a defense instead of a counterclaim — the Court concludes the antitrust defense to trademark infringement must be plausible before it can proceed to discovery.[4] In both its answer and its response brief, Virginic's antitrust defense is devoid of fact allegations regarding how Plaintiff has allegedly used its marks at issue outside of petitioning activities in violation of antitrust laws. It does not even suggest what type of anticompetitive conduct is allegedly involved. The antitrust defense is insufficient and is stricken from Virginic's fourth affirmative defense. The remainder of the fourth affirmative defense is not stricken. This ruling does not preclude Virginic from timely moving to amend its answer if it later has factual grounds to assert a plausible antitrust defense or counterclaim.

E. Affirmative Defense No. 7: Failure to Join Necessary Parties

The seventh affirmative defense asserts failure to join necessary parties. Plaintiff argues this is not a defense to trademark infringement, citing *Malibu Media, LLC v. Batz, 12—CV—01953, 2013 U.S. Dist. LEXIS 69052, 2013 WL 2120412, at *4 (D. Colo. Apr. 5, 2013)* **[*22]** , *rec. adopted*, *2013 U.S. Dist. LEXIS 69049, 2013 WL 2115236 (D. Colo. May 15, 2013)* (striking defense in copyright infringement case). Plaintiff further argues that *Rule 19* does not require naming all joint tortfeasors in the same action, citing *Temple v. Synthes Corp., Ltd., 498 U.S. 5, 7, 111 S. Ct. 315, 112 L. Ed. 2d 263 (1990)*.

In its response brief, Virginic cites no authorities in support but argues this "defense would include third parties that are necessary to resolve these claims, depending upon what is shown through discovery and development of the evidence in this case. This amounts to contributory negligence, which is a listed affirmative defense under *Rule 8*." Doc. 32. But Virginic did not plead contributory negligence in this affirmative defense; it pled a failure to join a necessary party. Virginic also points to Plaintiff's other claims and argues failure to join a necessary party is a defense to unfair competition, etc., but this ignores Plaintiff's point that in any kind of tort or tort-like claim, joint tortfeasors are not necessary parties.

Rule 12 recognizes the failure to join a necessary party under *Rule 19* ("Required Joinder of Parties) as a defense. *Fed. R. Civ. P. 12(b)(7)*. However, if the defense cannot succeed in any circumstance based on the type of claims, it should be stricken. Here,

> [t]he question of who must be joined as defendants in patent, copyright, **[*23]** and trademark suits for infringement ... is fairly easy to answer. A suit for infringement may be analogized to other tort actions; all infringers are jointly and severally liable. Thus, plaintiff may choose whom to sue and is not required to join all infringers in a single action.

Ohio State Univ. v. Teespring, Inc., No. 2:14-CV-397, 2015 WL 13016358, at *2 (S.D. Ohio Apr. 13, 2015) (quoting 7 Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure* § 1614 (3d ed. 2001),

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[4] The Court does not imply that *Twombly* and *Iqbal's* plausibility standards should otherwise apply to affirmative defenses.

footnotes omitted). In *Teespring*, a trademark owner sued only the company operating the website that encouraged third-parties to create and sell t-shirts, some of which the plaintiff alleged were infringing its trademarks. The actual sellers of the infringing goods were not named, and in denying the defendant's motion to dismiss, the court found they were not necessary parties. Several cases find a trademark owner a necessary party in infringement actions, but the Court has seen no reported cases finding another alleged infringer is a necessary party. All of Plaintiff's claims against Virginic are either trademark infringement or tort-like. The seventh affirmative defense would not succeed in any circumstance, and it is therefore stricken. This **[*24]** does not preclude Virginic from filing a motion, after conferral, if it later identifies a non-party whom it believes is a necessary party under *Rule 19* consistent with the analysis above.

F. Affirmative Defenses Nos. 9, 11, 12, 15, 16 and 18: Denials or Affirmative Defenses?

Plaintiff argues these affirmative defenses "are mere denials of Virgin's claims and do not constitute defenses," let alone affirmative defenses. Doc. 30. These defenses assert Virginic "is not jointly or severally liable" (Ninth); Virgin "does not have valid enforceable rights in its purported trademarks" (Eleventh); Virgin "lacks standing required to assert some or all of its claims" (Twelfth); Virginic "is not liable for the conduct of any of its current or former employees or agents ... [who] acted outside the scope of their authority" (Fifteenth); Virginic is not liable for the acts of any other third party (Sixteenth); and Virgin's injuries were caused by "intervening causes ... unrelated to the alleged conduct" of Virginic (Eighteenth). Plaintiff characterizes these as arguments on the merits of the amended complaint against Virginic that should not be stated as affirmative defenses. In response, Virginic disagrees **[*25]** and argues these are affirmative defenses because "they raise legal bases for Virginic to avoid liability even if Plaintiff can prove its claims."

The parties' dispute regarding whether these defenses should be pled affirmatively returns to a long-running question that the drafters of *Rule 8(c)* had hoped to short-circuit.

> *Rule 8(c)*, which according to the Note prepared by the Advisory Committee on Civil Rules was modelled after the then existing English and New York provisions, differs from both the common law and code practice in that it makes no attempt to define the concept of affirmative defense. Rather, it obligates a defendant to plead affirmatively any of the nineteen listed defenses he or she wishes to assert; this is necessary even though some of them were not considered to be pleas by way of confession and avoidance at common law. By this technique, *Rule 8(c) represents a conscious effort by the draftsmen of the federal rules to avoid controversy over the question of what technically constitutes an "affirmative defense"* and at the same time make it clear that certain regularly occurring matters must be set forth affirmatively before they will be considered by the district court to be part of the case. **[*26]**

5 Wright & Miller, *Federal Practice & Procedure Civil* § 1270 (3d ed.) (notes omitted; emphasis added).

Since the adoption of *Rule 8(c)*, courts have at times found its approach unsatisfactory and sought to define what an affirmative defense is, once and for all. Plaintiff cites for instance *United States v. Portillo-Madrid, 292 F. App'x 746 (10th Cir. 2008)*. In that case,

> In *Dixon v. United States, 548 U.S. 1, 8, 126 S. Ct. 2437, 165 L. Ed. 2d 299 ... (2006)*, the Supreme Court refers to duress as an affirmative defense and states the common law rule that "the burden of proving affirmative defenses—indeed, all circumstances of justification, excuse or alleviation—rest[s] on the defendant." (internal quotation and alteration omitted). Duress is an affirmative defense, see Black's Law Dictionary (8th ed. 2004) (defining affirmative defense as: "A defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true."), although the cases tend to refer to it alternately as an affirmative defense or simply a defense.

Id. at 747 n.1. But as *Rule 8(c)*'s approach suggests, the concept remains fluid.

> Some courts have defined an affirmative defense as a defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's claim, even if all allegations in the complaint **[*27]** are true. Other courts have defined an affirmative defense as one that will defeat the plaintiff's claim if it is accepted by the district court or the jury.

Affiliate Strategies, 2010 WL 11470103, at *7 (notes omitted).

However, the distinction between ordinary and affirmative defenses is only important in determining whether a defendant waived a defense by not pleading it affirmatively. The distinction is otherwise unimportant, unless a plaintiff can show prejudice in having other matters pled as though they were affirmative defenses. Plaintiff cites no authority, and the Court is also not aware of any, that precludes a defendant from affirmatively pleading other matters beyond those that *Rule 8(c)* requires, so long as it does not run afoul of *Rule 8*'s requirement of simplicity and concision.

Turning to the specific "affirmative defenses" Plaintiff challenges in this group, Virginic does plead denials as affirmative defenses. This is perhaps inartful and lengthens the answer without adding real substance. However, Plaintiff does not point to any prejudice it will suffer from these denials being pled as though they were affirmative defenses. Because the Court does not wish to encourage motions to strike of this type, the Court declines to strike **[*28]** the ninth, eleventh, twelfth, fifteenth, sixteenth and eighteenth affirmative defenses.

G. Affirmative Defenses Nos. 10, 25 and 26: Fair Notice?

Plaintiff addresses these defenses together as failing to give fair notice. Virginic's tenth affirmative defense asserts that "Plaintiff seeks relief that is not legally cognizable or otherwise equitable as against Defendant." The twenty-fifth affirmative defense "incorporates by reference any defenses applicable to [Virginic] that are asserted or to be asserted by any other Defendant to the First Amended Complaint as if fully set forth herein to the extent Defendant may share in such defense." The twenty-sixth affirmative defense

> reserves and asserts all affirmative and other defenses available under any applicable federal or state law. Defendant presently has insufficient knowledge or information upon which to form a belief as to whether it may have other, as yet unstated, affirmative defenses available. Therefore, Defendant reserve[s] their right to assert additional defenses, counterclaims, crossclaims, and third-party claims in the event that discovery indicates that such additional defenses or claims would be appropriate.

In support of striking **[*29]** these reservation-of-rights as defenses, Plaintiff cites *Lane v. Page, 272 F.R.D. 581, 601 (D.N.M. 2011)* and *Nootbaar v. Alderwoods, Inc., CIV-19-110-D, 2019 U.S. Dist. LEXIS 130766, 2019 WL 3558182, at *4 (W.D. Okla. Aug. 5, 2019)* ("*Rule 15*, rather than a reservation of rights, governs Defendant's ability to add defenses through amendment of a pleading."). In response, Virginic argues that it "understands that the Court will set deadlines for amendment of the pleadings. Virginic's intention with these defenses is to indicate its lack of waiver of adding additional affirmative defenses, including ones asserted by other parties. Striking this largely boilerplate language is unnecessary as it causes no prejudice to Plaintiff."

The tenth affirmative defense appears duplicative, and the twenty-fifth and twenty-sixth are not defenses but reservations of rights. However, the Court declines to strike them for the same reasons Judge Browning stated in later backing away from his decision in *Lane* to strike such:

> The Court affirms its conclusion in *Lane v. Page* that "'[a] reservation of unpled defenses is not a defense of any kind, much less an affirmative one.'" *272 F.R.D. at 601* (quoting *Mission Bay Ski & Bike, 2009 Bankr. LEXIS 2495, at *5, 2009 WL 2913438*). It is not. Where a defendant reserves unpled defences yet also agrees to comply with *rule 15*, however, a motion to strike may be inappropriate. In such a case, **[*30]** the Court cannot conclude that "'under no set of circumstances'" would the reservation of unpled defenses prevail. *Friends of Santa Fe Cty. v. LAC Minerals, Inc., 892 F. Supp. at 1343* (citations omitted). At least in the circumstances of this case, where Corizon Health and Dr. Sisneros have agreed to comply with *rule 15* and

> where there are no other alleged defects with the Corizon Answer, the Court will deny a motion to strike a reservation of unpled affirmative defenses.

*Tavasci v. Cambron, No. CIV 16-0461 JB/LF, 2016 U.S. Dist. LEXIS 147398, 2016 WL 6405896, at *18 (D.N.M. Oct. 25, 2016)*. Given Virginic's agreement to comply with *Rule 15* regarding any new defenses it wishes to argue, these defenses do not appear to prejudice Plaintiff. The Court does not wish to encourage motions of this type because "[a] motion to strike a reservation of defenses does not advance the ball of litigation." *Tanner v. McMurray, 429 F. Supp. 3d 1047, 2019 WL 4740940, at *50-51 (D.N.M. Sept. 27, 2019)*.

H. Affirmative Defense No. 24: Improper, Unfair or Inequitable Venue

Virginic's twenty-fourth affirmative defense asserts improper venue "or there are circumstances that make the prosecution and defense of this action in this forum unfair, inequitable, and inappropriate." Plaintiff argues "venue in this District is proper because the exercise of general personal jurisdiction is appropriate, among other reasons." See *28 U.S.C. § 1391*. Virginic responds **[*31]** that "[t]he defense of improper venue must be asserted in the initial responsive pleading or in a motion to dismiss. Otherwise, it is waived." Doc. 32 (citing *Linde Boc Process Plants LLC v. Boldt Co.*, No. 05-CV-0191-CVE-PJC, 2005 U.S. Dist. LEXIS 54009, at *2-3 (N.D. Okla. July 22, 2005)).

Improper venue is a defense that must be pled in the answer or a motion to dismiss. *Fed. R. Civ. P. 12(h)(1)*. Virginic did not admit Plaintiff's assertion of venue. Doc. 27 Answer ¶ 19. Normally, improper venue is more efficiently raised by a defendant asserting it in a motion to dismiss or motion for judgment on the pleadings. The defense can be waived by conduct. *Thompson v. United States, 312 F.2d 516, 519 (10th Cir. 1962)*. It is of such a character that a defendant should not delay in seeking its resolution. *Cf.*, *Fed. R. Civ. P. 12(h)* 1966 Advisory Committee Note.

The Court is a proper venue under *28 U.S.C. § 1391(b)(3)*. Plaintiff alleges it has personal jurisdiction over Virginic, Virginic Labs, LLC and Paramount 77 Labs, LLC, and none of those Defendants have moved to dismiss to dispute personal jurisdiction. The alleged conduct is nationwide. Plaintiff alleges the other two defendants (Berenika Maciejewicz and Virginic PL Sp z o.o.) are not residents or citizens of this district, and it is unclear at this point whether Virginic, Virginic Labs and Paramount would all be subject to personal **[*32]** jurisdiction in the district where Ms. Maciejewicz is alleged to maintain at least part-time residency (California), "there is no district in which an action may otherwise be brought as provided in this section" *28 U.S.C. § 1391(b)(3)*. The improper venue defense therefore cannot succeed in any circumstance, and it is stricken from the twenty-fourth affirmative defense.

Plaintiff does not appear to challenge the remainder of the twenty-fourth affirmative defense, which asserts "circumstances that make the prosecution and defense of this action in this forum unfair, inequitable, and inappropriate." While it is unnecessary to plead a more convenient forum (*28 U.S.C. § 1404*) or the other doctrines regarding the forum when foreign defendants are involved as affirmative defenses, Plaintiff shows no prejudice in these being pled as such. This part of the twenty-fourth affirmative defense is not stricken.

III. Conclusion

Plaintiff's motion (doc. 30) to strike affirmative defenses is GRANTED IN PART and DENIED IN PART consistent with the foregoing.

IT IS SO ORDERED this 10th day of April, 2020.

/s/ Nancy D. Freudenthal

NANCY D. FREUDENTHAL

UNITED STATES DISTRICT JUDGE

End of Document

Chandler v. Phoenix Servs.

United States District Court for the Northern District of Texas, Wichita Falls Division

April 13, 2020, Decided; April 13, 2020, Filed

Civil Action No. 7:19-cv-00014-O

Reporter

2020 U.S. Dist. LEXIS 63779 *; 2020-1 Trade Cas. (CCH) P81,180; 2020 U.S.P.Q.2D (BNA) 10342; 2020 WL 1848047

RONALD CHANDLER, et al., Plaintiffs, v. PHOENIX SERVICES, et al., Defendants.

Subsequent History: Transferred by *Chandler v. Phoenix Servs. LLC, 1 F.4th 1013, 2021 U.S. App. LEXIS 17239 (Fed. Cir., June 10, 2021)*

Affirmed by *Chandler v. Phoenix Servs., L.L.C., 2022 U.S. App. LEXIS 22638 (5th Cir. Tex., Aug. 15, 2022)*

Prior History: *Chandler v. Phoenix Servs. LLC, 2019 U.S. Dist. LEXIS 226909, 2019 WL 7859567 (N.D. Tex., July 22, 2019)*

Core Terms

patent, damages, monopolization, Heating, antitrust, Defendants', inequitable conduct, cease-and-desist, limitations period, enterprise, sham, patent-infringement, subsidiary, concealed, toll, statute of limitations, injurious act, infringement, non-licensed, customers, summary judgment, Sherman Act, licensee, anticompetitive conduct, fracking, fraudulent concealment, ascertainable, website, substantial evidence, allegations

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Judges: Reed C. O'Connor, UNITED STATES DISTRICT JUDGE.

Opinion by: Reed C. O'Connor

Opinion

MEMORANDUM OPINION AND ORDER

Before the Court are Plaintiffs Ronald Chandler's, Chandler Manufacturing, LLC's, Newco Enterprises, LLC's, and Supertherm Heating Services, LLC's (collectively, the "Chandler Plaintiffs") Motion for Partial Summary Judgment, Brief in Support, and Appendix in Support (ECF Nos. 61-63), filed February 13, 2020; Defendants Phoenix Services, LLC's and Mark H. Fisher's (collectively, the "Phoenix Defendants") Response, Brief in Support, and Appendix in Support (ECF Nos. 67-69), filed March 5, 2020; and the Chandler Plaintiffs' Reply (ECF No. 73), filed

March 14, 2020. Also before the Court are the Phoenix Defendants' Motion for Summary Judgment, Brief in Support, and Appendix **[*2]** in Support (ECF Nos. 64-66), filed February 14, 2020; the Chandler Plaintiffs' Response, Brief in Support, and Appendix in Support (ECF Nos. 70-72), filed March 6, 2020; and the Phoenix Defendants' Reply and Appendix in Support (ECF Nos. 74-75), filed March 20, 2020. Having considered the motions, briefing, and applicable law, the Court **DENIES** the Chandler Plaintiffs' Motion for Partial Summary Judgment and **GRANTS** the Phoenix Defendants' Motion for Summary Judgment.[1]

The Chandler Plaintiffs do not have standing to bring their claims against the Phoenix Defendants. Moreover, the Chandler Plaintiffs' claims are barred by the Clayton Act's four-year statute of limitations, and no exception applies to toll the limitations period. Finally, the Chandler Plaintiffs cannot establish Phoenix's or Fisher's liability for HOTF's allegedly anticompetitive conduct. Accordingly, the Chandler Plaintiffs' claims for *Walker Process* fraud and sham patent litigation are **DISMISSED with prejudice**.

I. FACTUAL BACKGROUND

After years of litigation regarding the validity and enforcement of United States Patent No. 8,171,993 (the "'993 Patent"), the Federal Circuit affirmed the District of North Dakota's finding that the '993 Patent is unenforceable due to **[*3]** patent owner Heat On-The-Fly's ("HOTF") inequitable conduct. *See* *Energy Heating, LLC v. Heat On-The-Fly, LLC, 889 F.3d 1291 (Fed. Cir. 2018)*. Relying on the Federal Circuit's ruling, the Chandler Plaintiffs then brought *Walker Process* fraud and sham patent litigation claims against the Phoenix Defendants. *See* First Am. Compl., ECF No. 23. The Chandler Plaintiffs allege that Phoenix and Fisher—HOTF's parent company and CEO, respectively—are liable for HOTF's and their own unlawful attempts to exploit the '993 Patent and unlawfully gain monopoly power. *See id.* To adjudicate the parties' cross motions for summary judgment, the Court must first return to "'the heart' of both this antitrust litigation . . . and several related patent-infringement suits"—the acquisition and enforcement of the '993 Patent. *Chandler v. Phoenix Servs., LLC, 419 F. Supp. 3d 972, 977 (N.D. Tex. 2019)* (quoting First. Am. Compl. ¶ 11, ECF No. 23).

A. HOTF Acquisition and Enforcement of the '993 Patent

In 2006, HOTF founder Ransom Mark Hefley created a fracking[2] process to heat water "on demand or inline" or, as HOTF puts it, to heat water "on-the-fly." First Am. Compl. ¶ 11, ECF No. 23. HOTF began using the process on

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[1] Were the Court to reach the third and most contested *Sherman Act* element—dangerous probability of achieving monopoly power—it would deny both the Chandler Plaintiffs' and Phoenix Defendants' motions for summary judgment. Based on the differing market analyses of former HOTF employee James Cole ("Cole") and economic expert Allan Jacobs, a jury would need to determine whether the market was susceptible to monopolization and, if so, whether there was a dangerous probability that HOTF would unlawfully achieve market power. *Compare* Pls.' App. Supp. Mot. Partial Summ. J. 22-29, ECF No. 63, *with* Defs.' App. Supp. Mot. Summ. J. 162-88, ECF No. 66. However, due to the Chandler Plaintiffs' lack of standing, failure to file their claims within the Clayton Act's statute of limitations, and inability to establish Phoenix's corporate liability and Fisher's individual liability, the Court need not reach the merits of the Chandler Plaintiffs' antitrust claims.

[2] In previous orders, the Court has adopted the parties' use of "frac" and "fracking" as the abbreviated forms of "fracture" and "fracturing." *See, e.g.*, Mem. Op. & Order, ECF No. 44; Mem. Op. & Order, ECF No. 52. Upon further research, the Court adopts the alternative spelling of "frack." Though "frac" is more common among industry experts, most scientists and academics now use "frack." Jason Lavis, *Fracking Vs Fracing — The End of the Debate*?, DRILLERS.COM (Aug. 22, 2017), https://drillers.com/fracking-vs-fracing-end-debate/. And most persuasively, dictionaries uniformly recognize "frack" but not "frac." *See, e.g.*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/frac (stating that "the word ['frac'] isn't in the dictionary," and suggesting "frack" as an alternative); MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/frack ("The word *fracking* (sometimes spelled *fraccing* or *fracing*, particularly by those in the gas and oil industries) was created by shortening 'fracturing.' The addition of the 'k' brings the word into conformity with the inflected forms of similar English words ending in a vowel plus 'c,' such as *shellacking, panicking*, and *frolicking*."). Adopting the dictionary definition, the Court now uses "frack" except when quoting the parties.

fracking jobs Hefley claimed were "experimental." Pls.' App. Supp. Resp. 17, ECF No. 72. When, on September 18, 2009, Hefley filed an application to patent his "Water Heating Apparatus **[*4]** for Continuous Heated Water Flow and Method for Use in Hydraulic Fracturing," Defs.' App. Supp. Resp. 155, ECF No. 69, Hefley knew he was required to "file within one year" of inventing the process, Pls.' App. Supp. Resp. 14, ECF No. 72. *See also* 35 U.S.C. § 102. Yet, when Hefley filed the first application for the '993 Patent, he failed to disclose the sixty-one frack jobs completed more than a year earlier. *See* Defs.' Br. Supp. Mot. Summ. J. 2, ECF No 65 (citing First Am. Compl. P 11, ECF No. 23); Pls.' App. Supp. Resp. 9, 14, ECF No. 72. On May 8, 2012, the United States Patent and Trademark Office ("USPTO") approved and issued the '993 Patent. Defs.' App. Supp. Resp. 155, ECF No. 69.

During September and October of 2013, HOTF determined that at least seventeen companies were using the patented process without obtaining licenses. Pls.' App. Supp. Mot. Partial Summ. J. 80-113, ECF No. 63. HOTF sent these non-licensed companies cease-and-desist letters stating that HOTF "received information that certain water heating contractors providing water heating services **[*5]** and equipment to [the companies] may be infringing the '993 Patent" and "ask[ing] that [the companies] undertake the necessary steps to ensure that any possible infringement by [their] water heating contractors or subcontractors ceases." Defs.' App. Supp. Mot. Summ. J. 43, ECF No. 66.

Hess Corporation ("Hess"), Supertherm's largest customer, received one such letter. *Id.* Hess informed Supertherm of the letter and continued to hire Supertherm to perform in-line frack water-heating jobs. *Id.* at 55, 117, 208. But Hess also hired two to three additional non-licensed vendors and gradually decreased its work with Supertherm. Pls.' App. Supp. Resp. 329, ECF No. 72. Supertherm was eager to make up the lost business, but it declined to perform jobs for new clients due to fear of potential patent-infringement litigation. *Id.* at 331. Supertherm went out of business in May of 2016, stating "[a] general business decline in that area ma[de] it impossible to justify keeping the office open." Defs.' App. Supp. Mot. Summ. J. 233, ECF No. 66.

B. Phoenix's Purchase of HOTF and Continued Enforcement of the '993 Patent

On January 31, 2014, nearly two years after the '993 Patent issued, Phoenix acquired HOTF. *Id.* at 6. HOTF became a subsidiary of Phoenix Consolidated Oilfield **[*6]** Services, LLC ("Phoenix Consolidated"), which is fully owned by Phoenix. *Id.* at 2. As a Phoenix subsidiary, HOTF is a member-managed limited liability company, meaning "the Board of Directors can direct the business and affairs of, and make decisions for" HOTF. Pls.' Br. Supp. Resp. 138, ECF No. 72. Fisher has remained the head of all three companies, and he and Danny Shurden ("Shurden"), the vice president of Phoenix, are the only two remaining officers of HOTF. Defs.' App. Supp. Mot. Summ. J. 4, ECF No. 66. Thus, though "Heat On-The-Fly legally still exists, . . . it's controlled by Phoenix Services." Pls.' Br. Supp. Mot. Partial Summ. J. 11, ECF No. 62 (emphasis omitted) (quoting Pls.' App. Supp. Mot. Partial Summ. J. 132, ECF No. 63). Phoenix's, Phoenix Consolidated's, and HOTF's finances are all encompassed by a single financial statement. Pls.' App. Supp. Mot. Partial Summ. J. 177, ECF No. 72. Phoenix Consolidated funds HOTF—including by paying its attorneys' fees—because HOTF "has always been [in] a negative cash position" since the acquisition. *Id.* at 88.

Under HOTF's new structure and leadership, HOTF and Phoenix employees continued discussions about the enforcement and validity of the '993 Patent. On **[*7]** February 8, 2014, Fisher emailed one of HOTF's licensees to suggest "having a meeting to discuss the near future of HOTF" and assuring the licensee, "we think very highly of the value of the Patent, and plan to enforce it vigorously." Pls.' Br. Supp. Mot. Partial Summ. J. 8, ECF No. 62 (citing Pls.' App. Supp. Mot. Partial Summ. J. 58-60, ECF No. 63). He signed the email, "Mark Fisher CEO Phoenix Services, LLC." *Id.* During his deposition, Fisher stated that he would "certainly" try to capture the highest market share possible. *Id.* at 9 (quoting Pls.' App. Supp. Mot. Partial Summ. J. 61, ECF No. 63).

On March 10, 2014, a licensee complained to Fisher, Shurden, Cole, and the HOTF attorneys about several non-licensed companies infringing the '993 Patent. Pls.' App. Supp. Resp. 78, ECF No. 72. "Other heating providers . . . have no regard for the patent," the licensee wrote. *Id.* The licensee claimed its non-licensed competitors were "ruining the frac water heating business and . . . making [licensees] look like [they we]re gouging [their] customers when [they] charge[d] standard market rates." *Id.* Given the licensee was "losing work from customers who use[d non-licensed competitors]," the licensee worried **[*8]** that "the longer this [went] on the harder it w[ould] be to get that work back." *Id.*

The patent litigation also continued under Phoenix's ownership. On July 14, 2014, HOTF filed a counterclaim in *Newco Enterprises, LLC v. Super Heaters North Dakota, LLC*, 7:14-CVCase 87-O [hereinafter *Newco*], alleging that Chandler and Newco had "been actively and knowingly inducing infringement of the 993 Patent" by their customers. Defs.' App. Supp. Mot. Summ. J. 46, ECF No. 66. On October 24, 2014, the *Energy Heating* plaintiffs sought to amend their complaint—adding, for the first time, a claim that the '993 Patent was unenforceable due to Hefley's and HOTF's inequitable conduct. *Id.* at 118-29. HOTF also added claims for patent infringement against Energy Heating and against Supertherm in December 2014. *Newco*, 7:14-CV-87-O; *Energy Heating*, 4:13-CV-10-RRE-ARS.

Even after the Federal Circuit affirmed the '993 Patent's invalidity, HOTF and Phoenix continued to assert the '993 Patent. "The website of Phoenix Services, LLC, incorporated a logo for 'Heat On The Fly®' that referred to [the '993 Patent] . . . from in or around February 2018 through approximately January 29, 2019." Pls.' App. Supp. Mot. Partial Summ. J. 27, ECF No. 72; *see also* Defs.' App. Supp. Mot. Summ. **[*9]** J. 149-52, ECF No. 66 (website screenshots). And the *Newco* patent-infringement claims remain stayed but pending in this Court.

II. LEGAL STANDARD

A. Summary Judgment

The Court may grant summary judgment where the pleadings and evidence show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. Summary judgment is not "a disfavored procedural shortcut," but rather an "integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

"[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A genuine dispute as to any material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The movant must inform the court of the basis of its motion and demonstrate from the record that no genuine dispute as to any material fact exists. *See Celotex, 477 U.S. at 323*. "The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim." *Ragas v. Tenn. Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998)*.

When reviewing the evidence on a motion for summary judgment, courts must **[*10]** resolve all reasonable doubts and draw all reasonable inferences in the light most favorable to the non-movant. *See Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988)*. The court cannot make a credibility determination in light of conflicting evidence or competing inferences. *Anderson, 477 U.S. at 255*. If there appears to be some support for disputed allegations, such that "reasonable minds could differ as to the import of the evidence," the court must deny the motion. *Id. at 250*.

B. The Sherman Antitrust Act

1. Standing

"Standing to pursue an antitrust suit exists only if a plaintiff shows: 1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit." *Sanger Ins. Agency v. HUB Int'l, Ltd., 802 F.3d 732, 737 (5th Cir. 2015)* (internal citation omitted). "Although the question of causation is generally a factual question for the jury, a court should direct a verdict where the plaintiff has failed to present substantial evidence that defendant's illegal practices were a material cause of plaintiff's injuries." *Taylor Publ'g Co. v. Jostens, Inc., 216 F.3d 465, 485 (5th Cir. 2000)* [hereinafter *Taylor*] (internal citation omitted). "Though jury inferences of causation are in some cases permissible, 'the required causal link must be proved as a matter of fact with **[*11]** a fair degree of certainty.'" *El Aguila Food Prods., Inc. v. Gruma Corp., 131 F. App'x 450, 454 (5th Cir. 2005)* [hereinafter *El Aguila*] (quoting *Alabama v. Blue Bird Body Co., 573 F.2d 309, 317 (5th Cir. 1978))*. This is "especially so" when plaintiffs are damaged by other "salient factors distinct from the challenged conduct." *Id.*

2. Statute of Limitations

Under the *Clayton Act*'s statute of limitations, an antitrust plaintiff must file its complaint within four years of the date the cause of action accrued. *See* *15 U.S.C. § 15(b)*; *Bell v. Dow Chem. Co., 847 F.2d 1179, 1186 (5th Cir. 1988)*. The date of accrual is factual; therefore, to prevail on summary judgment, a defendant must establish there is no genuine issue regarding when the statute of limitations accrued. *In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1170 (5th Cir. 1979)*.

The Fifth Circuit recognizes three exceptions to toll the Sherman Act's statute of limitations: (1) fraudulent concealment; (2) damages not initially ascertainable; and (3) continuing violation. *See id.*; *Kaiser Alum. & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1051 (5th Cir. 1982)* [hereinafter *Kaiser*]. To demonstrate a defendant's fraudulent concealment, "an antitrust plaintiff must show that the defendants concealed the conduct complained of, and that [it] failed, despite the exercise of due diligence on [its] part, to discover the facts that form the basis of [its] claim." *In re Beef Indus. Antitrust Litig., 600 F.2d at 1169*. To prove that damages are not ascertainable, plaintiffs must prove that both the *existence* and the *amount* of damages are uncertain. *See* *Delta Produce, L.P. v. H.E. Butt Grocery Co., No. SA-12-CA-353, 2013 WL 12121118, at *4 (W.D. Tex. Jan. 17, 2013)* **[*12]** . And to invoke a continuing violation, a new injurious act must occur and its damages must be recoverable. *See* *Zenith Radio Corp. v. Hazeltine Res., Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)* [hereinafter *Zenith*].

3. *Walker Process* Patent Fraud

To establish antitrust liability based on the unlawful enforcement of a patent, a claimant must either (1) "prove that the asserted patent was obtained through knowing and willful fraud within the meaning of *Walker Process*," or (2) "demonstrate that the infringement suit was a mere sham." *In re Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1326 (Fed. Cir. 2000)* (internal citation omitted). The Supreme Court in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corporation, 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)* established that "the enforcement of a patent procured by fraud on the Patent Office may be violative of *[§] 2* of the Sherman Act." *Id. at 174*. To succeed on a *Walker Process* claim, a plaintiff must prove two elements: (1) "the antitrust-defendant obtained the patent by knowing and willful fraud on the patent office and maintained and enforced that patent with knowledge of the fraudulent procurement" and (2) the plaintiff can satisfy "all other elements necessary to establish a Sherman Act monopolization claim." *TransWeb, LLC v. 3M Innovative Props. Co., 812 F.3d 1295, 1306 (Fed. Cir. 2016)*. As to the first element, the Supreme Court "made clear that the invalidity of the patent [i]s not sufficient; a **[*13]** showing of intentional fraud in its procurement [i]s required." *Ritz Camera & Image, LLC v. SanDisk Corp., 700 F.3d 503, 506 (Fed. Cir. 2012)*. As to the second, "the Court incorporated the rules of ***antitrust law*** generally. As Justice Harlan stated in his concurring opinion, 'as to this class of improper patent monopolies, antitrust remedies should be allowed room for full play.'" *Id.* (citing *Walker Process, 382 U.S. at 180* (Harlan, J., concurring)).

Under *§ 2* of the Sherman Act, a defendant may be liable for monopolization, attempt to monopolize, or conspiracy to monopolize. *15 U.S.C. § 2*. When the plaintiff alleges monopolization, a court must "focus on the harm done, in the form of a monopolization which the defendant willfully creates or maintains," but when a plaintiff alleges attempted monopolization, the court must instead "focus on the harm that potentially *might* have been caused by the conduct in light of the state of the market." *Taylor, 216 F.3d at 474* (emphasis added). "[T]o demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. "The first element considers the conduct, the second looks to the motivation behind the conduct, and the third **[*14]** looks to the defendant's market power and commensurate ability to lessen or destroy competition in that market." *Taylor, 216 F.3d at 474* (internal citation omitted). When the third, "dangerous probability" element is at issue, "courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market." *Spectrum Sports, 506 U.S. at 456*.

4. Sham Patent Litigation

A plaintiff may also base its claim for antitrust liability on an allegation that defendant engaged in sham patent litigation. *Cf.* *Tyco Healthcare Grp. LP v. Mut. Pharm. Co., Inc., 762 F.3d 1338, 1343 (Fed. Cir. 2014)* (noting that while, "[a] party is ordinarily exempt from antitrust liability for bringing a lawsuit against a competitor . . . [t]here is a recognized exception . . . for 'sham litigation'" (internal citation omitted)). Indeed, ***antitrust law*** precludes a purported patent owner from "bringing suit to enforce a patent with knowledge that the patent is invalid or not infringed" when "the litigation is conducted for anti-competitive purposes." *C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1368 (Fed Cir. 1998)*. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc. (PRE), 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*, the Supreme Court established the two-part test for "sham" litigation: "(1) the lawsuit must be objectively meritless such that 'no reasonable litigant could expect success on the merits' and (2) it must be found that 'the baseless **[*15]** lawsuit conceals "an attempt to interfere directly with the business relationships of a competitor."'" *C.R. Bard, 157 F.3d at 1368* (quoting *PRE, 508 U.S. at 60*). Because "[f]raud in the procurement of a patent is governed by *Walker Process* . . . the complainant 'must still prove a substantive antitrust violation.'" *Id.* (quoting *PRE, 508 U.S. at 61*).

III. ANALYSIS

A. Standing

The Chandler Plaintiffs have failed to present substantial evidence that HOTF's or the Phoenix Defendants' own alleged antitrust violations were a material cause of Supertherm's business losses. Accordingly, they do not have standing to pursue their *Walker Process* and sham litigation claims for lost-profit damages.

"Standing to pursue an antitrust suit exists only if a plaintiff shows: 1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit." *Sanger Ins. Agency, 802 F.3d at 737* (internal citation omitted). The Phoenix Defendants raise only the first issue, claiming the Chandler Plaintiffs cannot prove that HOTF's unlawful conduct caused Supertherm to gradually lose business from its largest customer and eventually go out of business.

"Although the question **[*16]** of causation is generally a factual question for the jury, a court should direct a verdict where the plaintiff has failed to present substantial evidence that the defendant's illegal practices were a material cause of plaintiff's injuries." *Taylor, 216 F.3d at 485* (internal citation omitted); *see also* *H & B Equipment Co. v. International Harvester Co., 577 F.2d 239, 246 (5th Cir. 1978)* ("To succeed, an antitrust plaintiff must show the defendants' wrongful actions materially contributed to an injury to the plaintiff's business, and must provide some indication of the amount of damage done."). In some instances, the jury can infer facts to establish causation, but "the required causal link must be proved as a matter of fact with a fair degree of certainty." *Blue Bird Body Co., 573 F.2d at 317*. This is "especially so" when plaintiffs are damaged by other "salient factors distinct from the challenged conduct." *El Aguila, 131 F. App'x at 454* (requiring more when there was "increased competition" and the plaintiffs refused to mitigate damages); *see also* *Taylor, 216 F.3d at 485* (holding that the plaintiff "had to establish a tighter connection between the behavior and the damages" because the plaintiff "concededly also lost customers (i.e., suffered damage)" for reasons unrelated to the antitrust violation). And "[w]hen the fact of injury is in issue, the isolated self-serving statements **[*17]** of a plaintiff's corporate officers may not provide substantial evidence upon which a jury can rely." *H&B, 577 F.2d at 247* (internal citation omitted).

In September 2013, HOTF sent a cease-and-desist letter to Hess, implying that Supertherm, its only in-line frack water-heating provider, was violating the '993 Patent. Defs.' App. Supp. Mot. Summ. J. 43, ECF No. 66. Hess immediately told Supertherm about the cease-and-desist letter; but following a brief conversation, Hess and the Chandler Plaintiffs never again discussed the letter or the '993 Patent. *Id.* at 55-69, 207-08. Over the next three years, Hess gradually reduced its work with Supertherm and hired other non-licensed vendors to complete some of its frack jobs. Pls.' App. Supp. Resp. 326-31, ECF No. 72. But Hess never hired HOTF or any of its licensees. Defs.' App. Supp. Mot. Summ. J. 147, ECF No. 66. Supertherm "tr[ied] to replace the business from Amerada Hess with other customers," but due to the cease-and-desist letter to Hess and pending lawsuits against other non-licensed companies, Supertherm was "'scared' and 'hiding in the shadows.'" Pls.' Br. Supp. Resp. 21, ECF No. 71 (citing Pls.' App. Supp. Resp. 326-27, 330-31, ECF No. 72). This fear allegedly led Supertherm to decline business **[*18]** from other prospective in-line fracking customers. *Id.*

After the District of North Dakota concluded that the '993 Patent was unenforceable due to inequitable conduct, neither Supertherm nor the other Chandler Plaintiffs reached out to Hess to ask for more work. Defs.' App. Supp. Mot. Summ. J. 66-67, ECF No. 66. And by the end of 2015 and beginning of 2016, the market for oil bottomed out. *See id.* at 58, 217-18, 224-25, 231-32. In 2016, Supertherm ceased operations and sent out a memorandum stating that it was shutting down due to lack of business in the field. *Id.* at 57, 233.

The Chandler Plaintiffs provide evidence that HOTF sent Hess a cease-and-desist letter in 2013 and that Supertherm went out of business in 2016, but they do not provide evidence of any "causal link." *Blue Bird Body Co., 573 F.2d at 317*. If Hess was in fact influenced by the cease-and-desist letter, it would have stopped working with Supertherm and instead hired HOTF or a licensee authorized to use the patented process. It did neither. Instead, it defied HOTF's instructions—continuing to work with Supertherm and hiring other non-licensed vendors. Moreover, though Supertherm's manager testified he was scared to complete fracking projects for new customers, a plaintiff's deposition testimony cannot be the **[*19]** sole piece of "substantial evidence." *See H&B, 577 F.2d at 247* (internal citation omitted) ("When the fact of injury is at issue, the isolated self-serving statements of a plaintiff's corporate officers may not provide substantial evidence upon which a jury can rely."). Because Supertherm was also damaged by "salient factors distinct from the challenged conduct," *El Aguila, 131 F. App'x at 454*—namely, the fluctuating oil market and increase in competition among non-licensed fracking providers—the Chandler Plaintiffs must "establish a tighter connection between the behavior and the damages," *Taylor, 216 F.3d at 485*. Viewing the evidence in the light most favorable to the Chandler Plaintiffs, they are unable to establish the necessary causal connection.

Without proving HOTF's cease-and-desist letter caused Supertherm's monetary damages, the Chandler Plaintiffs cannot satisfy the standing elements with regard to their claims for lost profits. Accordingly, the Court holds that the Chandler Plaintiffs lack standing to pursue these claims. Nevertheless, the Chandler Plaintiffs do have standing to pursue their *Walker Process* and sham patent litigation claims for fees expended in defending against HOTF's patent-infringement claims.

B. Statute of Limitations

Pursuant **[*20]** to the Clayton Act's four-year statute of limitations, the Chandler Plaintiffs must present evidence sufficient to prove either (1) a specific injurious act occurred within four years of the suit's inception or (2) an exception applies to toll the limitations period. *See 15 U.S.C. § 15(b)*; *Bell, 847 F.2d at 1186*. At the summary-judgment stage, the Phoenix Defendants must prove there is no genuine issue of material fact regarding the date of accrual. *In re Beef Indus. Antitrust Litig., 600 F.2d at 1170*. If the Phoenix Defendants meet this initial burden, the burden shifts to the Chandler Plaintiffs to establish the applicability of a tolling doctrine. *See id.* Because the Chandler Plaintiffs' filed this suit on January 29, 2019, they must present evidence of a specific injurious act that the Phoenix Defendants or HOTF took on or after January 29, 2015. The Phoenix Defendants have established that the only two allegedly injurious acts occurred outside the limitations period, and the Chandler Plaintiffs have not established that an exception tolls the limitations period. Thus, the Chandler Plaintiffs' *Walker Process* fraud and sham patent litigation claims are barred as untimely.

1. Acts Within the Limitations Period

In their First Amended Complaint, the Chandler Plaintiffs pleaded **[*21]** three allegedly injurious acts: (1) HOTF's sending a cease-and-desist letter to Supertherm's largest customer, (2) HOTF's assertion of patent-infringement claims against the Chandler Plaintiffs, and (3) Phoenix's advertisement of the '993 Patent on its website. The first two actions occurred outside the limitations period, and the third is not actionable.

On September 13, 2013, HOTF sent Hess a cease-and-desist letter, ordering the company to "undertake the necessary steps to ensure that any possible infringement by [its] water heating contractors or subcontractors ceases." Defs.' App. Supp. Mot. Summ. J. 43, ECF No. 66. HOTF sent this letter—as well as the cease-and-desist letters to the other sixteen non-licensed vendors—more than four years before the Chandler Plaintiffs filed this suit. *Id.* at 80-113. "[A] newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action." *TCA Bldg. Co. Nw. Res. Co., 861 F. Supp. 1366, 1377 (S.D. Tex. 1994)* (quoting *Poster Exch. v. Nat'l Screen Serv. Corp., 517 F.2d 117, 128 (5th Cir. 1975))*. In this case, though the Chandler Plaintiffs allege the letter continued to harm Supertherm, the gradual decline in work is merely an "inertial consequence." *Id.* The injurious action **[*22]** itself occurred on September 13, 2013, when Hess received the letter and began decreasing its business to Supertherm.

Then, on July 18, 2014, HOTF filed patent-infringement claims against Newco and Chandler. Defs.' App. Supp. Mot. Summ. J. 46-47, ECF No. 66. HOTF added a claim against Supertherm on December 22, 2014. *Newco*, 7:14-CV-87-O. "Any injury . . . resulting from the continued prosecution [of the lawsuit] relates back to the initial decision to file." *Al George, Inc. v. Envirotech Corp., 939 F.2d 1271, 1274 (5th Cir. 1991)* (internal citation omitted); *see also Internet Corporativo S.A. de C.V. v. Bus. Software All., Inc., No. Civ.A.H-04-2322, 2004 U.S. Dist. LEXIS 29024, 2004 WL 3331843, at *5* ("The Fifth Circuit has specifically addressed the accrual of a cause of action based on allegations that the filing and prosecution of litigation violated the antitrust laws, rejecting the application of the continuing violation exception." (citing *Al George, 939 F.2d 1271*)). Thus, any injuries stemming from the litigation occurred on July 18, 2014 and December 22, 2014, when HOTF filed the patent-infringement claims against the Chandler Plaintiffs.

Finally, from January 2018 to January 2019, the Phoenix Defendants posted the HOTF logo in association with the '993 Patent on the Phoenix website. Pls.' App. Supp. Resp. 27, ECF No. 72. Unlike the first two actions, this action did occur within the limitations period. However, **[*23]** the Chandler Plaintiffs present no claim nor other evidence showing they were injured by the website. Rather, Supertherm CFO and the Chandler Plaintiffs' *Rule 30(b)(6)* designee Reanna Chandler Jones admitted that the Chandler Plaintiffs were *not* injured by the Phoenix Defendants' website. Defs.' App. Supp. Mot. Summ. J. 49-51, ECF No. 66. Because the action did not injure any plaintiff, it too may not be used as a specific act for purposes of the statute of limitations. *See Rx.com v. Medco Health Sol., Inc., 322 F. App'x 394, 396 (5th Cir. 2009)*.

2. Tolling the Limitations Period

Both alleged injuries occurred outside the limitations period, so the Chandler Plaintiffs must show that one of three exceptions applies to toll the statute of limitations. The Chandler Plaintiffs argue that each of the Fifth Circuit's three exceptions applies: (1) fraudulent concealment; (2) damages not initially ascertainable; and (3) continuing violation. Pls.' Br. Supp. Resp. 1-26, ECF No. 71 (citing *In re Beef Indus. Antitrust Litig., 600 F.2d at 1169*; *Kaiser, 677 F.2d at 1051*). Each argument fails.

a. *Fraudulent Concealment*

"Fraudulent concealment tolls the Clayton Act's statute of limitations." *In re Beef Indus. Antitrust Litig., 600 F.2d at 1169*. To avail itself of the fraudulent-concealment exception, "an antitrust plaintiff must show that the defendants concealed the conduct complained of, and that [it] failed, **[*24]** despite the exercise of due diligence on [its] part, to discover the facts that form the basis of [its] claim." *Id.* The Chandler Plaintiffs may be able to prove that the Phoenix Defendants actively concealed HOTF's conduct, but the Chandler Plaintiffs cannot prove that they did not discover the facts that form the basis of their claims.

The Phoenix Defendants argue that the Chandler Plaintiffs may not raise the fraudulent-concealment argument because they did not plead the defense nor facts to support application of the defense. Defs.' Br. Supp. Mot. Summ. J. 8, ECF No. 65. The Chandler Plaintiffs need not have pleaded the defense, but they did need to plead the fraudulent facts with particularity. *See* FED. R. CIV. P. 9(b); Colonial Penn. Ins. Co. v. Market Planners Ins. Agency, 1 F.3d 374, 376 & n.2 (5th Cir. 1993); *Levels v. Merlino, 969 F. Supp. 2d 704, 721 (N.D. Tex. 2013)*. The Chandler Plaintiffs only pleaded two relevant and potentially fraudulent facts with particularity: (1) the '993 Patent inventor's failure to "disclose any of the 61 frac jobs to the Patent Trademark Office ('PTO') during prosecution as potential on-sale or public uses of the invention that might have triggered the on-sale bar," and (2) HOTF's threatening of the Chandler Plaintiffs' customers via cease-and-desist letters. First Am. Compl. ¶¶ 12, 14, ECF No. 23.

The Chandler Plaintiffs argue **[*25]** that the Federal Circuit's holding that "the '993 Patent is unenforceable due to inequitable conduct, and that the infringement claim was asserted in bad faith . . . is ample evidence of acts by Defendants to conceal this *antitrust* cause of action, not merely an action based on inequitable conduct." Pls.' Br. Supp. Resp. 8, ECF No. 71. They also argue "there is further documentary evidence that the fraudulent nature of the patent prosecution and the subsequent enforcement of the '993 Patent was expressly concealed by HOTF and its lawyers." *Id.* The record evidence does suggest HOTF and its attorneys knew of and actively concealed the prior use from the USPTO. *See* Pls.' App. Supp. Resp. 16-18, 21, 24, 573-81, 588-91, 597, ECF No. 72. And though the Phoenix Defendants differentiate between concealment from plaintiffs and concealment from third parties, Defs.' Reply 3, ECF No. 74, Fifth Circuit case law does not make this distinction. *See, e.g.,* State of Texas v. Allan Constr. Co., Inc., 851 F.2d 1526, 1529 (5th Cir. 1988) [hereinafter *Allan Construction*] (discussing affirmative acts of fraudulent concealment generally, not just as to the plaintiffs). Thus, a jury could find that this act constitutes an "affirmative act[] of concealment." *Id.* (internal citation omitted).

However, the **[*26]** Chandler Plaintiffs cannot show that they did not and could not discover the actionable conduct through due diligence. Throughout the litigation, the Chandler Plaintiffs' counsel was in regular communication with patent-plaintiff Energy Heating's counsel. *See* Defs.' App. Supp. Mot. Summ. J. 131, ECF No. 66 (stating Energy Heating's counsel "was involved in very similar litigation and so it was helpful to talk to him about what he was experiencing in that litigation."). "Plaintiffs' privilege log shows extensive communications with Energy Heating's counsel," including "53 emails alone starting in starting in early September, right before Energy Heating sought to amend its complaint." Defs.' Br. Supp. Mot. Summ. J. 9-10, ECF No. 65 (internal emphasis omitted) (citing Defs.' App. Supp. Mot. Summ. J. 132-33, ECF No. 66).

On December 4, 2014, Energy Heating amended its complaint to add the inequitable-conduct claim. It listed "[s]pecific invalidating prior art public use and on-sale projects" as its invalidity contentions. *Id.* at 10 (quoting Defs.' App. Supp. Mot. Summ. J. 136, ECF No. 66). Given the Chandler Plaintiffs' knowledge of the *Energy Heating* litigation and their interactions with counsel, **[*27]** the Chandler Plaintiffs are presumed to be aware of the contents of the amended complaint and, therefore, aware of the actionable conduct. *Cf.* Allan Constr., 851 F.2d at 1533 (presuming the plaintiffs had knowledge of the basis for claims asserted in "a nearly identical antitrust claim against the same defendants[, which] had been filed several years earlier in California"). But even without the presumption of knowledge, the Chandler Plaintiffs would be unable to invoke the fraudulent-concealment exception because they have not and cannot prove they "failed, *despite the exercise of due diligence* on [their] part, to discover the facts that form the basis of [their] claim[s]." In re Beef Indus. Antitrust Litig., 600 F.2d at 1169 (emphasis added).

Moreover, were the Court to accept the Chandler Plaintiffs' contention that they were unaware of the actionable conduct until the District of North Dakota issued its inequitable-conduct ruling, a key concession would still undercut their fraudulent-concealment argument. In their Response to the Phoenix Defendants' Motion for Summary Judgment, the Chandler Plaintiffs state they "*agree* with Defendants that actual notice of facts to support a *Walker Process* fraud claim did not arise as to either Plaintiffs or Defendants . . . **[*28]** until January 2016 when the District Court made its inequitable conduct finding." Pls.' Br. Supp. Resp. 15, ECF No. 71 (emphasis in original). If the Phoenix Defendants did not know of their actionable conduct until the district court found it unlawful, they would not have the ability to fraudulently conceal it.

Finally, within their fraudulent-concealment argument, the Chandler Plaintiffs make two arguments based on fairness. First, they contend "[t]here is at least a triable issue of fact as to the reasonableness of tolling the statute of limitations as to Plaintiffs based on fraudulent concealment to further investigate a complex antitrust claim based on *Walker Process* fraud and sham litigation." *Id.* at 16. The Chandler Plaintiffs note they filed suit on January 29, 2019—only four years and about five weeks after HOTF filed the patent-infringement suit—and they argue a jury should consider whether Supertherm, "an unsophisticated 'Mom and Pop' family-run oilfield manufacturing and services business in Wichita Falls, Texas . . . exercised sufficient due diligence as to both the *Walker Process* patent fraud claim and the sham patent litigation claim." *Id.* But they do not cite a single case in **[*29]** support of this argument, and they do not tie "reasonableness" to fraud. The Chandler Plaintiffs also argue that "[a]dequate notice to Plaintiffs of facts necessary to support an *antitrust* claim is a far more complex issue than even just the already complex issue of an inequitable conduct counterclaim." *Id.* (emphasis in original). They discuss details about the market share covered by the '993 Patent, which they did not discover until 2016. *See id.* at 17-19. But this argument also fails for two reasons. First, there is no indication that the Phoenix Defendants "fraudulently concealed" details regarding their engagement with the market or market power. And second, even if they did, the Chandler Plaintiffs did not plead this at all—much less with the particularity required under *Rule 9(b)*. *See generally* First Am. Compl., ECF No. 23

Each of the Chandler Plaintiffs' arguments regarding fraudulent concealment is unavailing. Thus, this exception does not toll the statute of limitations.

b. *Damages Not Yet Ascertainable*

The Chandler Plaintiffs also contend the statute of limitations should be tolled because their damages were not ascertainable when HOTF sent Plaintiff Supertherm its cease-and-desist letter and when HOTF filed **[*30]** its patent-infringement claims against the Chandler Plaintiffs. *See* Pls.' Br. Supp. Resp. 20-22, ECF No. 71. They argue "Supertherm's damage claim thus did not accrue until the damages could be ascertained, which began in May, 2016 with the failure of the business." *Id.* at 22. But while Supertherm could not have known the exact amount of lost profits, it did know of their existence.

Antitrust plaintiffs may recover both past and future damages. *See* *Zenith, 401 U.S. at 338*. "The fact that the act may inflict damages in the future, as opposed to at the time the acts are committed, does not prevent the cause of action from accruing." *Astoria Entm't, Inc. v. Edwards, 159 F. Supp. 2d 303, 316 (E.D. La. 2001)* (quoting Julian O. van Kalinowski, Peter Sullivan & Maureen McGuirl, 8 ANTITRUST LAWS AND TRADE, § 162.02[1], at 162-5 (citations omitted)). Rather, to prove that damages are not ascertainable, plaintiffs must prove that both the *existence* and the *amount* of damages are uncertain. *See* *Delta Produce, L.P., 2013 WL 12121118, at *4*.

The Chandler Plaintiffs knew they were financially damaged as soon as Hess reduced its business with Supertherm. Thus, they knew damages existed well before January 2015, even if they did not yet know the monetary amount. In *Delta Produce*, the Western District of Texas considered nearly identical facts and concluded **[*31]** the damages-not-initially-ascertainable exception did not apply. *2013 WL 12121118, at *4* ("While the amount of damages may have been speculative, the injury itself, assuming Delta's allegations are true, was not. Delta alleges that it first sustained injury in 2002, when it was prevented from selling products to an HEB competitor. Thus, Delta's cause of action under Section One of the Sherman Act is barred by limitations."). The Phoenix Defendants argue this Court should do the same, as "[u]nder Plaintiffs' theory, if Supertherm has never gone out of business, Plaintiffs could wait to file suit indefinitely, always alleging that their damages were 'not ascertainable' because its business was ongoing." Defs.' Reply 10-11, ECF No. 74.

The Court finds the *Delta Produce* court's holding and the Phoenix Defendants' reasoning persuasive. Accordingly, the damages-not-yet-ascertainable exception does not apply.

c. *Continuing Violation*

Finally, the Chandler Plaintiffs also argue the continuing-violation exception applies. They state that "[t]he key question is whether some injurious act actually occurred during the limitations period." Pls.' Br. Supp. Resp. 22, ECF No. 71 (quoting *Eurotec Vertical Flight Sols., LLC v. Safran Helicopter Engines S.A.S., No. 3:15-CV-3454, 2019 U.S. Dist. LEXIS 129084, [WL] at *14 (N.D. Tex. Aug. 1, 2019)* (emphasis omitted)). **[*32]** And they contend "[t]he answer to this question for purposes of HOTF's conduct is 'yes' for two reasons: (1) HOTF filed a Response to the USPTO on April 13, 2015 in a reexamination proceeding . . . and (2) in February, 2018 through January 29, 2019, Defendant Phoenix Services modified its website to reference the '993 Patent and offer licensing." *Id.* at 22-23. However, these acts do not constitute continuing violations.

There are two restrictions to the continuing-violation exception, both of which foreclose its application here. First, the act must actually injure the plaintiffs. *See* [*Edwards, 159 F. Supp. 2d at 316*]() ("The key to this exception is that plaintiff itself, not some other third party, was injured by the continuing conspiratorial conduct."). Second, plaintiffs can only recover damages caused by the new act; the new act does not revive old damages occurring before the limitations period. *See* [*Zenith, 401 U.S. at 338*]() ("In the context of a continuing conspiracy to violate the antitrust laws, . . . each time plaintiff is injured by an act of the defendants, a cause of action accrues to him to recover those damages *caused by that act* and that, as to **[*33]** *those* damages, the statute of limitations runs from the commission of the act." (emphasis added)).

The Chandler Plaintiffs pleaded three allegedly injurious acts: (1) HOTF's sending the cease-and-desist letter to Hess, (2) HOTF filing patent-infringement claims against the Chandler Plaintiffs, and (3) Phoenix advertising the '993 Patent on its website. *See* Am. Compl. ¶¶ 14, 15, 19, ECF No. 23. As discussed, the first two indisputably occurred before the limitations period and the Chandler Plaintiffs were not injured by the third. *See supra* Section III.B.1. The only potentially injurious act occurring within the limitations period is HOTF's response to the USPTO. But the Chandler Plaintiffs did not plead the response in their Amended Complaint. *See generally* First Am. Compl., ECF No. 23. In fact, "[t]his is a brand new allegation." Defs.' Reply 14, ECF No. 74. And regardless, "[t]here is no evidence . . . that this document caused any injury to the Plaintiffs. None of the Plaintiffs' deposition witnesses cited the reexamination as causing injury to the Plaintiffs, instead pointing solely [to] the cease and desist letter and litigation filings." *Id.* So, even if the Court did find that the response **[*34]** constituted a violation, it could not revive the actual damages—all of which allegedly stem from the cease-and-desist letter and patent-infringement claims. *See* [*Zenith, 401 U.S. at 338*]().

Thus, the continuing-violation exception also does not apply to toll the statute of limitations. Because none of the three exceptions applies, the Sherman Act's four-year statute of limitations bars the Chandler Plaintiffs *Walker Process* fraud and sham patent litigation claims.

C. The Phoenix Defendants' Liability for HOTF's Conduct

Even if the Chandler Plaintiffs had standing and their claims were not barred by the statute of limitations, the Court would grant summary judgment in favor of the Phoenix Defendants because neither Phoenix nor Fisher may be held liable for HOTF's alleged antitrust violations. The Chandler Plaintiffs admit that they "*agree* with Defendants that actual notice of facts to support a *Walker Process* fraud claim did not arise as to either Plaintiffs or Defendants . . . until January 2016 when the District Court made its inequitable conduct finding." Pls.' Br. Supp. Resp. 15, ECF No. 71 (emphasis in original). Given this concession, Phoenix and Fisher cannot be held liable under the applicable single-enterprise **[*35]** and the corporate-officer standards of liability.

1. <u>Single-Enterprise Liability</u>

Whether a parent may be liable for the attempted monopolization of its subsidiary is an issue of first impression in the Fifth Circuit. Accordingly, the Court looks to the single-enterprise-liability standard advanced by the Ninth Circuit and the Tenth Circuit—the only two federal circuits to have addressed the issue. [*Arandell Corp. v. Centerpoint Energy Servs., 900 F.3d 623 (9th Cir. 2018)*](); [*Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 847 F.3d 1221 (10th Cir. 2017)*]() [hereinafter *Lenox*]. The Court finds the *Arandell Corp.* and *Lenox* opinions persuasive and, in adopting their approach, concludes that Phoenix may not be held liable for HOTF's allegedly anticompetitive conduct.

Both circuits' opinions rely on the Supreme Court's opinion in [*Copperweld Corporation v. Independence Tube Corporation, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*](). In *Copperweld*, the Supreme Court concluded that a parent cannot conspire with its subsidiary in violation of *§ 1* of the Sherman Act. *Id. at 771-72*. The Supreme Court reasoned:

> [T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of *§ 1* of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, **[*36]** but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder.

Id. "For these reasons, the Court held that 'the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise.'" *Lenox, 847 F.3d at 1233* (quoting *Copperweld, 467 U.S. at 771*). In the context of conspiracy claims, several courts have "held that affiliated entities which must be treated as a single enterprise for purposes of *§ 1* also must be treated as a single enterprise for purposes of *§ 2*." *Id. at 1235* (collecting cases).

The Tenth Circuit was the first circuit court to address whether *Copperweld*'s reasoning also applies to *§ 2* Sherman Act claims for monopolization or attempted monopolization. *See generally id.* "[A]lthough *Copperweld* did not expressly reach this issue, [the Tenth Circuit] conclude[d] *Copperweld*'s reasoning necessarily denounces [the defendants'] belief that [the plaintiff] could directly establish its non-conspiracy *§ 2* claims only by proving that '*specific* Defendants' independently satisfied each necessary element of the claims." *Id. at 1236* (emphasis in original). Rather, the court **[*37]** reasoned, "in a single-enterprise situation, it is the affiliated corporations' collective conduct—i.e., the conduct of the *enterprise* they jointly compose—that matters; it is the *enterprise* which must be shown to satisfy the elements of a monopolization or attempted monopolization claim." *Id.* (emphasis in original) (citing 7 Phillip E. Arreda & Herbert Hovencamp, ***Antitrust Law*** ¶ 1464g, at 227 (3d ed. 2008) ("[A] single entity can violate *§ 2* if the prerequisites of monopolization or attempted monopolization are met.")). "To hold otherwise—to require that each affiliated defendant independently satisfy every element in order to be held liable—would be difficult to justify . . . in part because the enterprise they form 'is fully subject to *§ 2* of the Sherman Act.'" *Id.* (quoting *Copperweld, 467 U.S. at 776-77*). And rejection of the single-enterprise theory "would all but eviscerate the statute with respect to sophisticated competitors," like Phoenix. *Id.* "So long as a corporation spreads its anticompetitive scheme over multiple subsidiaries, such that no one entity met all the requirements for individual antitrust liability, it could unlawfully monopolize with impunity." *Id.* The Tenth Circuit says "*Copperweld* forecloses **[*38]** this result." *Id.*

The Ninth Circuit became the second circuit to address the issue, and it agreed with the Tenth Circuit's interpretation of *Copperweld. See* *Arandell Corp., 900 F.3d 623 (Bea, J.)*. The Ninth Circuit noted that "Supreme Court precedent establishes that 'a parent and a wholly owned subsidiary *always* have a "unity of purpose"' and thus act as a 'single enterprise' whenever they engage in 'coordinated activity.'" *Id. at 625* (citing *Copperweld, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628*). The court further reasoned that "[i]t would be inconsistent to insist" that, though the parent and subsidiary "'always' share a 'unity of purpose,'" one can nevertheless escape liability "by disavowing the anticompetitive intent of the other, even where the two acted together." *Id. at 631-32*. Accordingly, Judge Bea, writing for the unanimous panel, concluded that "*Copperweld* supports the following rule: A wholly owned subsidiary that engages in coordinated activity in furtherance of the anticompetitive scheme of its parent and/or commonly owned affiliates is deemed to engage in such coordinated activity with the purpose of the single 'economic unit' of which it is a part." *Id. at 632*.

The Phoenix Defendants do not address *Copperweld, Lenox*, or *Arandell Corp.*. Rather, they claim that "[b]ecause the Fifth Circuit **[*39]** has not recognized a single enterprise theory of antitrust liability, the Plaintiffs' claims against Phoenix are not viable." Defs.' Br. Supp. Resp. 5, ECF No. 68. And they reference, without explanation, the Texas Supreme Court's rejection of the theory in the context of tort claims. *Id.* (citing *SSP Partners v. Gladstrong Invest. (USA) Corp., 275 S.W.3d 444 (Tex. 2008))*. Given that both *Walker Process* and sham patent litigation are federal claims, and that the only two federal circuits to review the issue have endorsed the single-enterprise theory under like circumstances, the Phoenix Defendants' reliance on a state supreme court provides a weak refutation. Thus, the Court follows the Ninth and Tenth Circuit's lead and applies the single-enterprise theory of liability.

But the Court must also determine how to apply this theory—an issue that the appellate courts did not resolve. It is well established that a parent cannot be held liable for the anticompetitive conduct of its subsidiary "merely by virtue of its place in the same corporate family." Lenox, 847 F.3d at 1237. Indeed, "*Copperweld* 'held that only "the coordinated activity" of [related entities] must be viewed as that of a single enterprise.'" *Id.* (quoting Copperweld, 467 U.S. at 771). Thus, a plaintiff is "still required to come forward with evidence **[*40]** that each defendant independently participated in the enterprise's scheme, to justify holding that defendant liable as part of the enterprise." *Id.* But how involved must the parent-defendant be?

In *Lenox*, after observing that no circuit had "provided a clear answer to the question of what level of involvement is sufficient to meet that burden," the Tenth Circuit looked to two district court cases, in which the courts concluded that, "[w]hen the parent controls, dictates or encourages the subsidiary's anticompetitive conduct, the parent engages in sufficient independent conduct to be held directly liable as a single enterprise with the subsidiary under the Sherman Act." Id. at 1237-38 (quoting Climax Molybdenum Co. v. Molychem, LLC, 414 F. Supp. 2d 1007, 1012 (D. Colo. 2005) (quoting Nobody in Particular Presents, Inc. v. Clear Channels Comm'cns, Inc., 311 F. Supp. 2d 1048, 1071 (D. Colo. 2004) [hereinafter *Nobody in Particular*])). Because the Tenth Circuit could resolve the issue on other grounds, it left the issue's "resolution for another day . . . [and] express[ed] no opinion" on the test. Id. at 1239. Given this is still "uncharted territory at the federal circuit level," the Court applies the Colorado district courts' "control, dictates or encourages" test. *Id.* (internal citations omitted).

This brings the Court back to the Chandler Plaintiffs' concession, that "actual notice of facts to support **[*41]** a *Walker Process* fraud claim did not arise as to either Plaintiffs or Defendants . . . until January 2016 when the District Court made its inequitable conduct finding." Pls.' Br. Supp. Resp. 15, ECF No. 71. The Chandler Plaintiffs argue that HOTF's inequitable conduct also satisfies the first two Sherman Act elements. Pls.' Br. Supp. Mot. Partial Summ. J. 4-5, ECF No. 62 (citing TransWeb, LLC, 812 F.3d at 1307). The Phoenix Defendants concede that when "the party that engaged in inequitable conduct is the same party that subsequently asserts the patent, it makes sense to hold that the inequitable conduct finding also established the 'anticompetitive conduct' and 'specific intent to monopolize' requirements." Defs.' Br. Supp. Resp. 19, ECF No. 68. Here, however, HOTF engaged in the inequitable conduct, but the Chandler Plaintiffs intend to hold Phoenix liable for asserting the patent.

To be liable for its subsidiary's conduct, a parent must engage in "coordinated activity," Copperweld, 467 U.S. at 771, to "purposely advance the very same scheme . . . for an illegal, anticompetitive purpose," Arandell Corp., 900 F.3d at 631. Without knowledge that HOTF was engaging in inequitable conduct when it sent the seventeen cease-and-desist letters and filed several patent-infringement **[*42]** claims against non-licensed competitors, Phoenix could not have purposely "control[led], dictate[d] or encourage[d]" HOTF's anticompetitive conduct by continuing to enforce the '993 Patent. Nobody in Particular, 311 F. Supp. 2d at 1071. Contra id. at 1069 ("To conclude that a parent can direct and require anticompetitive conduct of its subsidiaries, like any principal directing the conduct of an agent, and then escape antitrust liability by hiding behind the separate corporation is counterintuitive."). And the Chandler Plaintiffs provide no evidence that Phoenix shared HOTF's "intention of monopolizing the relevant market." Climax Molybdenum Co., 414 F. Supp. 2d at 1013. Thus, given Phoenix's lack of knowledge, intent, and involvement in HOTF's injurious acts, Phoenix may not be held liable as part of a single enterprise.

2. Individual Liability

For similar reasons, Fisher also cannot be held liable for HOTF's anticompetitive conduct. In its Memorandum Opinion and Order denying Defendants' Motion to Dismiss, the Court addressed the issue of Fisher's potential individual liability. Chandler, 419 F. Supp. 3d at 986-89. There, the Court applied the reasoning from MVConnect, LLC v. Recovery Database Network, Inc., No. 3:10-CV-1948, 2011 U.S. Dist. LEXIS 161409, 2011 WL 13128799 (N.D. Tex. May 27, 2011). In *MVConnect*, this Court held that "a corporate officer or director can be held personally liable for damages arising **[*43]** out of an anti-trust violation where he participated in the unlawful acts, or where he acquiesced or ratified the actions of other officers or agents of the corporation which were in violation of the anti-trust law." 2011 U.S. Dist. LEXIS 161409, [WL] at *10. The "essential principle" necessary to hold a director or officer individually liable for a company's alleged violation is the director's or officer's "direct, personal participation." *Id.* Accordingly, to survive a motion to dismiss a claim for individual liability based on an antitrust violation, a plaintiff must plead "factual allegations of some sort of conscious wrongdoing by [an] officer on the corporation's behalf" and that the officer had "some direct role" in the alleged violation. *2011 U.S. Dist. LEXIS 161409, [WL] at *9* (citing *In re Morrison, 555 F.3d 473, 481 (5th Cir. 2009)*; *Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 174 (5th Cir. 1985))*.

Applying this standard at the *Rule 12(b)(6)* stage, the Court the found that "the Chandler Plaintiffs ha[d] pleaded facts sufficient to allege that Fisher had a direct role in the attempted monopolization and a specific intent to monopolize the in-line frac water-heating market." *Chandler, 419 F. Supp. 3d at 988*. But this only applied to Fisher's actions on behalf of HOTF. *See* *id. at 988-89*. Though the Chandler Plaintiffs also contended that Fisher should be held liable for his acts on behalf of Phoenix, the Court dismissed the **[*44]** claim because the Chandler Plaintiffs presented only a "mere suggestion of what Fisher *likely knew* or *should have known*—not a factual allegation regarding his 'direct role.'" *Id.* (emphasis in original) (quoting *MVConnect, 2011 U.S. Dist. LEXIS 161409, 2011 WL 13128799, at *9)*.

Now, at the *Rule 56* stage, the Court must consider whether the summary-judgment evidence creates a genuine issue of fact regarding whether Fisher had a direct role in HOTF's attempted monopolization. The Chandler Plaintiffs claim there is "no genuine issue of material fact that Mark Fisher had the requisite 'direct role' and 'conscious wrongdoing' in the enforcement of the '993 Patent against Plaintiff Supertherm as an attempted monopolization." Pls.' Br. Supp. Mot. Partial Summ. J. 25, ECF No. 62. The Phoenix Defendants respond that "there is substantial evidence in the record that Fisher did not know or have reason to know when he authorized the patent infringement claims against Plaintiffs that the '993 Patent was unenforceable due to inequitable conduct." Defs.' Br. Supp. Resp. 24, ECF No. 68.

Just as the Chandler Plaintiffs' concession that the Phoenix Defendants did not have "actual notice of facts to support a *Walker Process* fraud claim . . . until January 2016 when the District Court made its inequitable **[*45]** conduct finding" negates Phoenix's corporate liability, it also negates Fisher's individual liability for his actions on behalf of HOTF. Pls.' Br. Supp. Resp. 15, ECF No. 71. The Chandler Plaintiffs list several ways in which Fisher participated in the enforcement of the '993 Patent after Phoenix acquired HOTF. *See* Pls.' Br. Supp. Mot. Partial Summ. J. 23-25, ECF No. 62. But given that the only two potentially injurious actions—HOTF's sending Hess a cease-and-desist letter and HOTF suing the Chandler Plaintiffs for patent infringement—occurred before the District of North Dakota's ruling, Fisher did not previously have the requisite knowledge to engage in "conscious wrongdoing." *MVConnect, 2011 U.S. Dist. LEXIS 161409, 2011 WL 13128799, at *9*. Arguably, Fisher could have consciously engaged in continuing the *Newco* litigation on behalf of HOTF, but given that the case has been stayed since 2015, the Chandler Plaintiffs should not have expended fees on litigation since the District of North Dakota's ruling. *See* 7:14-CV-87-O. Accordingly, because Fisher also did not have the requisite knowledge, intent, and direct involvement in HOTF's alleged anticompetitive injurious acts, Fisher also cannot be held liable for his role as an HOTF corporate officer.

IV. CONCLUSION [*46]

Due to the Chandler Plaintiffs' lack of standing to bring antitrust claims for lost-profit damages, failure to file suit within the four-year limitations period, and inability to establish Phoenix's corporate liability and Fisher's individual liability, the Chandler Plaintiffs may not proceed on the merits of their *Walker Process* and sham patent litigation claims. Accordingly, the Court **DENIES** the Chandler Plaintiffs' Motion for Partial Summary Judgment and **GRANTS** the Phoenix Defendants' Motion for Summary Judgment. The Chandler Plaintiffs' claims are **DISMISSED with prejudice**.

SO ORDERED on this **13th day** of **April, 2020**.

/s/ Reed O'Connor

Reed O'Connor

UNITED STATES DISTRICT JUDGE

In re Cal. Bail Bond Antitrust Litig.

United States District Court for the Northern District of California

April 13, 2020, Decided; April 13, 2020, Filed

Case No. 19-cv-00717-JST

Reporter
2020 U.S. Dist. LEXIS 92836 *; 2020-1 Trade Cas. (CCH) P81,183

IN RE CALIFORNIA BAIL BOND ANTITRUST LITIGATION. This Document Relates To: ALL ACTIONS

Subsequent History: Stay denied by *In re Cal. Bail Bond Antitrust Litig., 2020 U.S. Dist. LEXIS 252289 (N.D. Cal., Dec. 10, 2020)*

Dismissed by, in part, Motion denied by, in part, Sanctions disallowed by *In re Cal. Bail Bond Antitrust Litig., 2021 U.S. Dist. LEXIS 21091, 2021 WL 456627 (N.D. Cal., Jan. 5, 2021)*

Core Terms

rebates, bail bond, allegations, conspiracy, surety, bail, rates, premiums, judicial notice, Defendants', premium rate, bail agent, motion to dismiss, insurer, Cartwright Act, Sherman Act, meetings, antitrust, filed rate doctrine, anti trust law, factors, alleged conspiracy, fraudulent concealment, insurance business, discounting, purchasers, discovery, website, conspired, prices

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Judges: JON S. TIGAR, United States District Judge.

Opinion by: JON S. TIGAR

Opinion

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS

Re: ECF No. 56, 58

Plaintiffs Shonetta Crain and Kira Serna have filed a putative class action complaint against various **[*6]** members of the California bail bonds industry, alleging that Defendants have conspired to artificially inflate the price of bail bonds in California. Consolidated Amended Class Action Complaint ("CAC"), ECF No. 46. Defendants have filed a motion to dismiss the CAC. ECF No. 56. A subset of Defendants have filed an additional motion to dismiss the claims against them. ECF No. 58.

The Court will grant in party and deny in part both motions.

I. BACKGROUND

A. Factual Background

Plaintiffs bring this action against 28 members of the California bail bonds industry. As set forth in the operative complaint, Crain purchased a bail bond from Defendant All-Pro Bail Bonds Inc. ("All-Pro") in 2016 to secure the pretrial release of a relative. CAC ¶ 11. The bond was underwritten by Defendant Bankers Insurance Company. *Id.* Serna purchased a bail bond from Defendant Two Jinn, Inc. ("Two Jinn") in 2016 to secure her own pretrial release. *Id.* ¶ 12. That bond was underwritten by Defendant Seaview Insurance Company. *Id.*

Plaintiffs allege that they paid inflated prices for these bonds due to a conspiracy by Defendants to fix the price of bail bonds in California. They name four categories of defendants: (1) **[*7]** eighteen surety companies, who underwrite bail bonds sold by bail agents;[1] (2) two bail agencies, whose agents sell bail bonds to customers; (3) three bail agent associations, nonprofit trade associations for the bail industry; and (4) two individuals who have served as executives for various Defendant organizations. *Id.* ¶¶ 13-45. They bring the action on behalf of themselves as well as a putative class of individuals who "paid for part or all of a commercial bail bond premium in connection with a California state court criminal proceeding" between February 24, 2004 and the present. *Id.* ¶ 47.

For the purposes of these motions to dismiss, the Court adopts the following factual allegations from the CAC. Most criminal arrestees in California have the right to seek and post bail for their release. *Id.* ¶ 56. Many arrestees (or their friends or family members) who cannot afford bail purchase bail bonds to obtain pretrial release. *Id.* ¶ 57. Bail agents charge purchasers a non-refundable premium to post a bond with the court. *Id.* If the defendant attends all court dates, the bond is exonerated and the bail agency is released from liability. *Id.* If the defendant does not show up to court, the **[*8]** bond is theoretically forfeited to the court, though Plaintiffs allege that this rarely happens — both that defendants rarely "jump bail" and that, even when they do, bail agencies are usually released from their

[1] Plaintiffs stipulated to the dismissal without prejudice of surety Defendant Crum & Forster Indemnity Company on July 15, 2019. ECF No. 55.

obligation to pay. *Id.* ¶ 63. Regardless, the purchaser does not receive any of her premium back, even if charges are dropped or never filed. *Id.* ¶ 58.

Bail agencies contract with sureties, who underwrite the bonds. *Id.* ¶ 91. Sureties collect a portion of the premiums paid by purchasers while bail agents take a commission. *Pacific Bonding Corp. v. John Garamendi*, No. GIC815786, at *3 (Cal. Super. Ct. Feb. 24, 2004) (ECF No. 57-2).[2] California law requires sureties to submit proposed premium rates to the California Department of Insurance ("CDI"). *Cal. Ins. Code § 1861.05*. CDI approves the rates unless they are "excessive, inadequate, unfairly discriminatory" or otherwise unlawful. *Id.* Once CDI has approved a premium rate, a surety must charge that rate. *Id.*

Bail agents, however, are permitted to offer customers rebates on bail bonds. CAC ¶ 67. Rebates are discounts to purchasers that come out of the bail agent's commission. ECF No. 57-2 at 5. In 1988, California voters passed Proposition **[*9]** 103, which allowed insurers to offer rebates on insurance products, to encourage competition in insurance markets. CAC ¶ 66; *Cal. Ins. Code § 750(d)*; *see also* *Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 841, 258 Cal. Rptr. 161, 771 P.2d 1247 (1989)* (noting that Proposition 103 "repeals laws that . . . prohibit rebates to consumers"); *Schmidt v. Found. Health, 35 Cal. App. 4th 1702, 1711, 42 Cal. Rptr. 2d 172 (1995)* (noting that "rebating by insurance brokers [has been] permissible since the passage of Proposition 103"). In 2004, a California Superior Court made clear that Proposition 103 extended to bail bonds, and enjoined CDI from enforcing a bail bond anti-rebating regulation (*§ 2054.4 of Title 10 California Code of Regulations*). *Pacific Bonding Corp.*, No. GIC815786 (ECF No. 57-2). From that point forward, bail agents were free to lawfully discount bail bond prices below the maximum rates sureties submitted to CDI. CAC ¶ 67. CDI points its website visitors to the *Pacific Bonding* decision, noting that "to become more competitive, a bail agent may choose to negotiate a lower fee by rebating, as allowed by Proposition 103." *Id.; see also* ECF No. 57-3 at 4.[3]

Plaintiffs allege a conspiracy by sureties, bail agencies, bail industry associations, and two individual Defendants "to keep default premium rates fixed at 10%, advertise them as legal minimums, and prevent discounting or rebating **[*10]** as much as possible." CAC ¶ 65. These allegations can be sorted into two categories: (1) the fixing of premium rates, and (2) the prevention of rebating.

As for the first category, Plaintiffs allege that the surety Defendants have "nearly uniformly filed for a default premium rate of 10 percent of the posted bond, with an 8 percent maximum for consumers who meet enumerated and nearly identical criteria (*e.g.*, veterans, homeowners, union members, government employees, or certain arrestees represented by a private lawyer)." *Id.* ¶ 61; *see also id.* ¶ 140(b). In effect, Plaintiffs allege that the surety Defendants have fixed the maximum price of bail bonds.

The second category of allegations is much broader. Plaintiffs allege that, despite knowing since 2004 that rebating was allowed, "Defendants have agreed to advertise only the default Maximum Rate, to conceal their ability to charge a lower effective rate through rebating, and generally to refrain from offering competitive rebates." *Id.* ¶ 68. They also allege that Defendants have "misrepresent[ed] that rebating or discounting is unlawful" and "intimidate[] competitors" into not offering rebates, often through retaliation. *Id.* ¶¶ 69-70, **[*11]** 104. The Court will discuss specific examples of the alleged behavior where relevant below. For now, it notes that these allegations amount to a claim that Defendants have also fixed the minimum price of bail bonds.

B. Procedural Background

Plaintiffs filed a class action complaint against Defendants in Alameda County Superior Court on January 29, 2019. No. 19-cv-01265-JST, ECF No. 1. Defendants removed the action to this district on March 8. *Id.* On March 19, the

[2] As discussed below, the Court takes judicial notice of the California Superior Court's unpublished decision in *Pacific Bonding*. *See* ECF No. 57-2.

[3] The Court also takes judicial notice of two pages on the CDI website, discussed below. *See* ECF Nos. 57-3, 57-4.

Court related Plaintiffs' case to a similar case brought by a different plaintiff. ECF No. 14. The Court consolidated the cases pursuant to *Federal Rule of Civil Procedure 42(a)* on May 1, ECF No. 29, and appointed interim class counsel on June 3, ECF No. 44. On June 13, Plaintiffs filed a consolidated amended class action complaint ("CAC"), ECF No. 46, which the Court ruled shall relate back to January 29, 2019, the date Plaintiffs filed their first complaint in state court, ECF No. 29. The CAC brings claims for violations of (1) *Section 1* of the *Sherman Act*, *15 U.S.C. § 1*; (2) the *Cartwright Act, Cal. Bus. & Prof. Code § 16720*; and (3) *California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, et seq.* CAC ¶¶ 126-55.

On July 15, 2019, Defendants filed a joint motion to dismiss the CAC, ECF No. 56, along with a related request for judicial **[*12]** notice, ECF No. 57. The same day, a subset of Defendants filed a consolidated motion to dismiss the CAC. ECF No. 58. Plaintiffs filed a single opposition responding to both motions, ECF No. 68, as well as an accompanying request for judicial notice, ECF No. 66. Defendants filed two separate replies. ECF Nos. 72, 74. The Court has stayed discovery pending resolution of these motions. ECF No. 64.

II. JURISDICTION

This Court has subject-matter jurisdiction pursuant to *15 U.S.C. §§ 15* and *26* and *28 U.S.C. §§ 1337* and *1367*.

III. REQUESTS FOR JUDICIAL NOTICE

Before turning to the merits, the Court addresses the parties' requests for judicial notice. "Generally, district courts may not consider material outside the pleadings when assessing the sufficiency of a complaint under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*." *Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 998 (9th Cir. 2018)*. Judicial notice provides an exception to this rule. *Id.*

Pursuant to *Federal Rule of Evidence 201(b)*, "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)*. If a fact is not subject to reasonable dispute, the court "must take judicial notice if a party requests it **[*13]** and the court is supplied with the necessary information." *Id. 201(c)(2)*. The Ninth Circuit has cautioned, however, that courts must be wary that the "use of extrinsic documents to resolve competing theories against the complaint risks premature dismissals of plausible claims that may turn out to be valid after discovery." *Khoja, 899 F.3d at 998*. Accordingly, "a court cannot take judicial notice of disputed facts contained in . . . public records," when, for instance, "there is a reasonable dispute as to what the [record] establishes." *Id. at 999, 1001*.

A. Defendants' Requests

Defendants' first request for judicial notice, which is unopposed, is for the *Pacific Bonding Corp.* decision. ECF No. 57 at 3. The Court grants this request. *See U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992)* (taking judicial notice of "proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue") (citation omitted). The Court also grants Defendants' unopposed request for judicial notice of the definition of "loss ratio" on Investopedia.com, a publicly available website. ECF No. 57 at 4; *see Terraza v. Safeway Inc., 241 F. Supp. 3d 1057, 1067 (N.D. Cal. 2017)*.

Defendants next request judicial notice for two different pages on the CDI website, one of which Plaintiffs cite in the CAC. **[*14]** ECF No. 57 at 4; CAC ¶ 108. The web pages themselves are judicially noticeable as a general matter. *See Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998-99 (9th Cir. 2010)* (taking judicial notice of information "made publicly available by government entities" online, where "neither party disputes the authenticity of the web sites or the accuracy of the information displayed therein"). The parties do not currently dispute the accuracy of the information therein. ECF No. 65 at 2. The Court therefore grants notice of the two web pages, though it will limit that notice to the existence of the pages should any dispute over the facts therein arise in the future. Likewise, it grants judicial notice of the existence of the CDI report regarding Defendant Danielson National Insurance Company, *see* ECF No. 57 at 5, but not of its content, the accuracy of which Plaintiffs dispute, ECF No. 65 at 3.

B. Plaintiffs' Requests

Plaintiffs request judicial notice of six documents currently or formerly available on publicly accessible websites. ECF No. 66 at 4-6. They support their request as follows:

> Plaintiffs request that the Court judicially notice these materials in response to Defendants' assertion in their motion that some of the quoted statements are taken out of **[*15]** context and/or represent only the personal opinions of the author. *See, e.g.*, Dkt. 56 at ECF 34. Judicial notice of the materials will allow the Court to consider the context of the statements. Defendants do not contend that any of the statements or documents in which they appear are inauthentic.

ECF No. 66 at 4. Defendants do not dispute the authenticity of these documents, ECF No. 75 at 2, but they do dispute the accuracy of the statements therein, *id.*; ECF No. 73 at 3.

The Court starts by observing that a document is not judicially noticeable "simply because it appears on a publicly available website." *Rollins v. Dignity Health, 338 F. Supp. 3d 1025, 1032 (N.D. Cal. 2018)*. Plaintiffs are correct, however, that Defendants attack Plaintiffs' use of the quoted statements in the CAC, *e.g.*, ECF No. 56 at 34; ECF No. 58 at 16, and so the Court grants judicial notice based on the incorporation by reference doctrine. The Court also notes, however, that Plaintiffs do not discuss many of these judicially noticed exhibits in their brief, so it is unclear why Plaintiffs requested judicial notice in the first place. Where Plaintiffs failed to discuss a document in their brief, the Court has not considered it.

Plaintiffs also seek judicial notice pursuant to Rule **[*16]** of *Evidence 201(b)* of the *Antitrust Guidelines for the Insurance Industry* issued by the State of California Department of Justice in March 1990. ECF No. 66 at 6. They argue that "[c]ourts in this circuit have taken judicial notice of similar advisory documents from the California Attorney General's office," citing *Call v. Badgley, 254 F. Supp. 3d 1051, 1061 & n.5 (N.D. Cal. 2017)*. Defendants oppose judicial notice on the grounds that "the contents of Exhibit 7 [the *Guidelines*], a 29 year old document, do not constitute an 'adjudicative fact.'" ECF No. 73.

Neither side's brief is of much help to the Court on this point. *Call* is inapposite because, in that case, no party objected to judicial notice. Nor is Defendants' argument helpful, given that the contents of the *Guidelines* are not a "fact." Ultimately, however, the dispute is beside the point. A party may cite guidelines promulgated by the California Attorney General as non-binding legal authority without resorting to the use of judicial notice. *See, e.g., People v. Jackson, 210 Cal. App. 4th 525, 536 n.2, 148 Cal. Rptr. 3d 375 (2012)*; *People v. Solis, 217 Cal. App. 4th 51, 57, 158 Cal. Rptr. 3d 34 (2013)*. As to this document, the request is therefore denied as moot.

Lastly, the Court grants Plaintiffs' request to judicially notice an excerpt from a CDI rate review file, which they cite as an example of the savings clause CDI uses in its disposition **[*17]** of rate filings. ECF No. 66 at 6; ECF No. 68 at 36. Defendants do not oppose this request. ECF No. 73 n.1.

IV. LEGAL STANDARD

A. *Federal Rule of Civil Procedure 12(b)(1)*

"If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." *Fed. R. Civ. P. 12(h)(3)*. A defendant may raise the defense of lack of subject matter jurisdiction by motion pursuant to

Federal Rule of Civil Procedure 12(b)(1). The party asserting subject matter jurisdiction bears the burden of establishing it. *Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)*.

B. *Federal Rule of Civil Procedure 12(b)(6)*

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)*. Dismissal under *Federal Rule of Civil Procedure 12(b)(6)* "is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008)*. A complaint need not contain detailed factual allegations, but facts pleaded by a plaintiff must be "enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable **[*18]** for the misconduct alleged." *Id.* While this standard is not a probability requirement, "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks and citation omitted). In determining whether a plaintiff has met this plausibility standard, a court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable" to the plaintiff. *Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005)*.

V. DISCUSSION

A. Immunity Defenses

Defendants make a number of arguments that the alleged conduct is immune from antitrust review. The defenses largely boil down to the same proposition: that Defendants cannot be liable for fixing the price of bail bonds when California law requires them to submit proposed premium rates to CDI and charge only the approved premiums. While this argument does shield Defendants' submission of proposed premium rates from Sherman Act review, it misses the point. Plaintiffs allege not just that Defendants conspired to fix the premium rates approved by CDI, but also that they conspired to prevent rebates, effectively setting a minimum **[*19]** price for bail bonds in California.

Defendants contend that CDI sets "both a ceiling and a floor" for bail bond premiums and that Plaintiffs "obfuscate premiums (what the CAC fundamentally claims were fixed through the supposed conspiracy) with the agents' right to rebate purchasers some portion of their commission." ECF No. 72 at 9-10. It is true that when an agent offers a rebate, the savings to the customer comes out of his commission, not the premium. ECF No. 57-2 at 5. It is also true that Plaintiffs sometimes incorrectly refer to the alleged rebate agreement as the fixing of premiums. *See, e.g.*, CAC ¶ 127 (accusing Defendants of "the fixing of commercial bail bond premiums sold to Plaintiffs and members of the Class . . . by restraining competition in . . . the offering of rebates or discounts from the maximum filed rate"). But Plaintiffs' core argument is that this agreement has "had the purpose and effect of fixing or inflating bail bond *prices* in California." *Id.* at ¶¶ 128, 141 (emphasis added). Had Defendants not conspired to prevent the offering of rebates, Plaintiffs argue, customers would be paying less for bail bonds. The Court finds any obfuscation between premiums and **[*20]** prices semantic and will treat Plaintiffs' rebating arguments as an allegation that Defendants have conspired to set a minimum price for bail bonds.

And while California law does set *maximum* prices for bail bonds, Proposition 103 and *Pacific Bonding Corp.* eliminated any argument that it also sets *minimum* prices. Defendants do not dispute this. *See, e.g.*, ECF No. 72 at 11. Instead, they dismiss Plaintiffs' theory "that the Defendants agreed to prohibit 3200+ agents from offering purchasers some cash back" as a "narrow claim." *Id.; see also id.* at 7 n.2. Narrow or not, however, this claim is not barred by Defendants' immunity defenses.

1. McCarran-Ferguson Act

Defendants first argue that Plaintiffs' Sherman Act claim is barred by the *McCarran-Ferguson Act*, which exempts from federal antitrust laws "the business of insurance, but only to the extent that such business is regulated by the state, and does not involve a boycott, coercion or intimidation." *Feinstein v. Nettleship Co. of Los Angeles, 714 F.2d 928, 931 (9th Cir. 1983)*. "[E]xemptions from the antitrust laws must be construed narrowly." *Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 126, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982)*.

Courts consider three factors in determining whether something is "the business of insurance": "(1) whether the practice has the effect of transferring or spreading the policyholders' **[*21]** risks; (2) whether the practice is an integral part of the policy relationship between the insurer and insured; and (3) whether the practice is limited to entities within the insurance industry." *Feinstein, 714 F.2d at 931* (citing *Pireno, 458 U.S. at 129*). "[T]he primary characteristic of the business of insurance is the transferring or spreading of risk." *Id.* "Provided the risk spreading factor is present, the business of insurance is not limited to traditionally recognized areas of insurance." *Id.*

In *Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 211, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979)*, the Supreme Court held that an agreement between a health insurer and pharmacies on how much to charge insured customers was not "the business of insurance" because it did not have to do with spreading risk. Rather, it was a mere "cost-savings arrangement[]" between the insurer and a third party. *Id.* The Court distinguished this agreement from the "cooperative ratemaking efforts" that the drafters of the *McCarran-Ferguson Act* intended to exempt from antitrust laws. *Id. at 221*. Similarly, the *Pireno* Court found that an agreement between a chiropractic trade association and an insurance company to fix the prices of chiropractic services "was logically and temporally unconnected to the transfer of risk accomplished by [the defendant's] insurance **[*22]** policies." *458 U.S. at 130*. Following this reasoning, the Ninth Circuit has held that an agreement between a medical association and a medical malpractice insurer to only cover doctors who were members of the association *was* "the business of insurance" because it was "demonstrably related to the allocation and spreading of risk" by "defin[ing] a pool of insureds over which risk is spread." *Feinstein, 714 F.2d at 932*.

As explained above, Plaintiffs allege that Defendants have violated the Sherman Act by "the fixing of commercial bail bond premiums sold to Plaintiffs and members of the Class . . . by restraining competition" in (1) "decisions on what maximum default rates to file," CAC ¶ 127, and (2) "the offering of rebates or discounts from the maximum filed rate," *id.* The first category of activity seems at first glance like the kind of "cooperative ratemaking" that the *McCarran-Ferguson Act* intended to exempt from antitrust scrutiny. *See* *Royal Drug, 440 U.S. at 225 n.32* ("It is clear from the legislative history [of the *McCarran-Ferguson Act*] that the fixing of rates is the 'business of insurance.'"). However, Plaintiffs are targeting not the actual filing of rates but the alleged agreement beforehand concerning what rates to file. Plaintiffs argue that **[*23]** this collusive pre-filing activity is not the business of insurance.

While the argument has common-sense appeal, Plaintiffs cite no authority directly supporting it. Plaintiffs' principal case on this point is *Perry v. Fidelity Union Life Insurance Co., 606 F.2d 468 (5th Cir. 1979)*. The *Perry* court did say that in determining whether something constituted the business of insurance, "the appropriate focus is thus the nature of the activity itself, not the type of business that is conducting it." *Id. at 470*. But the facts of that case were different than the ones at issue here. *Perry* held that the *McCarran-Ferguson Act* did not apply to financing plans that an insurance company offered to help purchasers pay their premiums because "financing activity is purely ancillary to the insurance relationship between the insurance company and the policyholder." *606 F.2d at 470*. The court pointed out that the insurance company was playing "two distinct roles": "On the one hand, the company is an insurer, the purchaser an insured; but on the other hand, the company is a creditor, the purchaser a debtor. The former relationship constitutes the 'business of insurance,' while the latter does not." *Id.*

Here, unlike in *Perry*, Plaintiffs are challenging conduct that is interconnected with the filing **[*24]** of premium rates. In addition, *Perry* was issued before *Pireno* and does not apply its "business-of-insurance" framework. Applying that framework here, the alleged agreement to file uniform rates appears to meet the first two *Pireno* factors because the setting of premium rates is essential to the "transferring or spreading" of risk between the insurer and insured and is "an integral part of the policy relationship" between them. *Pireno, 458 U.S. at 129*; *see also In re Workers' Compensation Ins. Antitrust Litig., 867 F.2d 1552, 1556-57 (8th Cir. 1989)* (finding that alleged "fixing of rates . . . whether by private or by state-approved rate setting, is integral to the price charged to policy holders and to the contractual relationship with the insured"). And because only surety companies file proposed rates to CDI, the alleged activity is also "limited to entities within the insurance industry." *Pireno, 458 U.S. at 129*. Based on these authorities, the Court concludes that Defendants' alleged agreements regarding which rates to submit constitutes the business of insurance for purposes of the *McCarran-Ferguson Act*.

In order for the conduct to fall within McCarran-Ferguson, however, it must also be "regulated by the state" and "not involve a boycott, coercion or intimidation." *Feinstein, 714 F.2d at 933*. Plaintiffs' allegations satisfy this prong **[*25]** as well. As for the regulation requirement, "[i]t is not necessary to point to a state statute which gives express approval to a particular practice; rather, it is sufficient that a state regulatory scheme possess jurisdiction over the challenged practice." *Id. at 933* (holding that California's "extensive regulatory scheme with jurisdiction over all rating practices of insurers," including the medical malpractice insurer defendants, clearly satisfied this requirement). Like the insurance practices at issue in *Feinstein*, the issuance of bail bonds in California is subject to an "extensive regulatory scheme." *Id.; see Cal. Ins. Code §1860 et seq.* And the CAC does not allege any "boycott, coercion, or intimidation" within the meaning of the *McCarran-Ferguson Act*. Accordingly, the Court finds that Plaintiffs' Sherman Act claim that Defendants conspired to submit uniform maximum rates to CDI is barred by the *McCarran-Ferguson Act*. Defendants' motion to dismiss is granted as to this portion of Plaintiffs' Sherman Act claim. Because Plaintiffs cannot amend their complaint to resolve this issue, this dismissal is with prejudice.

The second category of alleged activity, however — an alleged agreement not to rebate — does not meet **[*26]** the *Royal Drug* and *Pireno* requirements for McCarran-Ferguson Act immunity. First, the Court fails to see how an agreement not to rebate, when that rebate comes out of the agent's commission rather than the premium, has to do with spreading the risk that a defendant will jump bail. Defendants claim that this alleged practice "relates to risk evaluation," but they do not even attempt to explain how. ECF No. 72 at 8. When asked about this argument at the hearing, Defendants referred to several cases that do not employ the *Royal Drug*/*Pireno* framework and are thus not on point.[4] ECF No. 76. The Court can only conclude that, like the "cost-savings arrangement[]" in *Royal Drug*, the alleged anti-rebating practices serve the purpose of maximizing profits rather than spreading risk. Because the first *Pireno* factor is not met, the Court need not proceed to the other factors. Plaintiffs' Sherman Act claim regarding the alleged agreement not to rebate, including Defendants' alleged misrepresentation of their ability to do so, is thus not barred by the *McCarran-Ferguson Act*.

2. State Action Doctrine

Defendants make largely the same points in arguing that Plaintiffs' Sherman Act **[*27]** claim is barred by the state action doctrine, which "provides generally that the antitrust laws do not apply to action by a state operating in its sovereign capacity, or to private conduct approved and supervised by the state as a matter of state policy." William

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[4] Defendants cite *Buckman v. American Bankers Insurance Co. of Florida, 924 F. Supp. 1156, 1157 (S.D. Fla. 1996)*, which held that posting a bail bond is "the business of insurance." ECF No. 56 at 21; ECF No. 72 at 8. But this holding relies solely on Florida law's definition of "surety insurance" and does not consider any of the *Pireno* factors. *Buckman, 924 F. Supp. at 1157*. Defendants' assertion that "courts give heavy weight to a state's determination that an activity constitutes the 'business of insurance,'" ECF No. 72 at 8, is premised on Fifth Circuit law before the Supreme Court decided *Royal Drug*. *See Buckman, 924 F. Supp. at 1157* (citing *Royal Drug Co., Inc. v. Grp. Life & Health Ins. Co., 556 F.2d 1375, 1384 (5th Cir.1977)*). Equally unhelpful is *Groves v. City of Los Angeles, 40 Cal. 2d 751, 753, 256 P.2d 309 (1953)*, which does not even mention the *McCarran-Ferguson Act*.

C. Holmes & Melissa Mangiaracina, ***Antitrust Law*** *Handbook* § 8:7 (2018). "[S]tate action immunity derives from principles of federalism: Certain actions of the state that restrict competition are immunized from federal ***antitrust law***." *Snake River Valley Elec. Ass'n v. PacifiCorp, 357 F.3d 1042, 1047 (9th Cir. 2004)*. The test for state action immunity is "that the challenged restraint must (1) reflect a clearly articulated state policy that permits the anti-competitive conduct and (2) that the permitted anti-competitive activities are actively supervised by the state." *Id. at 1047-48*.

Defendants' state action arguments regarding the alleged agreement not to rebate fail for the same reasons they did under the *McCarran-Ferguson Act*. Defendants' argument that the "uniformity in bail bond pricing that Plaintiffs challenge flows directly from the Department's statutorily-mandated rate-setting process," ECF No. 56 at 21, again conflates Defendants' obligation to offer fixed premiums with their ability to offer rebates. Claiming that **[*28]** the latter is foreclosed by the CDI rate-setting process is an attempt to cast a "gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*. The state action doctrine does not bar Plaintiffs' claims of minimum price fixing.

3. Filed Rate Doctrine

Defendants argue that Plaintiffs' Sherman Act and Cartwright Act claims are barred by the filed rate doctrine. ECF No. 56 at 22. Because the Court has concluded that Plaintiffs' Sherman Act claim regarding submission of uniform premium rates to CDI is barred by the *McCarran-Ferguson Act*, it need not address Defendants' argument that it is also barred by the filed rate doctrine. As for Plaintiffs' Sherman Act and Cartwright Act claims regarding rebating, Defendants concede that they are not barred by this doctrine. ECF No. 72 at 11. That leaves only Plaintiffs' Cartwright Act claim regarding maximum premium rates.

"The filed rate doctrine and associated principles of federal preemption bar challenges under state law and federal antitrust laws to rates set by federal agencies." *E. & J. Gallo Winery v. EnCana Corp., 503 F.3d 1027, 1033 (9th Cir. 2007)*. "At its most basic, the filed rate doctrine provides that state law, and some federal law (e.g. ***antitrust law***), may not be used to **[*29]** invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question." *Wah Chang v. Duke Energy Trading & Mktg., LLC, 507 F.3d 1222, 1225 (9th Cir. 2007)* (quoting *Transmission Agency of N. Cal. v. Sierra Pac. Power Co., 295 F.3d 918, 929-30 (9th Cir. 2002)*). "[C]ourts have [also] concluded that the 'rationales underlying the filed rate doctrine apply equally strongly to regulation by state agencies.'" *Blaylock v. First Am. Title Ins. Co., 504 F. Supp. 2d 1091, 1100 (W.D. Wash. 2007)* (quoting *Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 20 (2d Cir. 1994)*). "Many courts, both state and federal, have concluded that the doctrine bars . . . challenges to rates set by state agencies regulating insurance premiums." *Id. at 1100*.

Here, the parties dispute whether the doctrine applies to challenges to insurance rates approved by CDI. Plaintiffs rely on *Cellular Plus, Inc. v. Superior Court, 14 Cal. App. 4th 1224, 1241-42, 18 Cal. Rptr. 2d 308 (Cal. Ct. App. 1993)*, which declined to adopt the filed rate doctrine for Cartwright Act claims challenging rates approved by the California Public Utilities Commission. *See also* *Fogel v. Farmers Grp., Inc., 160 Cal. App. 4th 1403, 1418, 74 Cal. Rptr. 3d 61 (Cal. Ct. App. 2008)* (holding that the filed rate doctrine did not apply to California insurance laws because, unlike in federal cases establishing the doctrine, California insurers "are allowed to rebate excess premiums to their policyholders"). The Ninth Circuit has deferred to this approach, rejecting an argument that the filed rate doctrine barred a Cartwright Act claim challenging milk prices set by a California agency. *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 992 (9th Cir. 2000)* ("Whether damages can be awarded to the injured parties **[*30]** is a matter of state law. California has held, in contrast to federal law, that no filed rate doctrine exists as a bar."). The California Department of Justice's *Antitrust Guidelines* also echo this approach, noting that "[t]he filed rate doctrine does not apply to insurance rates in California." ECF No. 67-7 at 38-39.

Defendants, however, rely heavily on *MacKay v. Superior Court, 188 Cal. App. 4th 1427, 1449, 115 Cal. Rptr. 3d 893 (Cal. Ct. App. 2010)*, which disagreed with *Fogel* "to the extent that it rejected the application of the filed rate doctrine to California insurance rates." Defendants claim that "the California Court of Appeals has unequivocally held that the filed rate doctrine bars suits like this one." ECF No. 56 at 23 (*citing MacKay, 188 Cal. App. 4th at 1448*). The Court is not convinced by this argument. *MacKay*'s passing reference to the filed rate doctrine is dicta; that court based its decision on statutory grounds. Because Defendants provide no other authority for the proposition that the filed rate doctrine bars a Cartwright Act claim challenging California insurance rates, the Court denies the motion to dismiss Plaintiffs' Cartwright Act claim on these grounds.

4. Exclusive Jurisdiction of CDI

Defendants also contend that Plaintiffs' California claims are barred by the California Insurance Code, **[*31]** which "vests exclusive jurisdiction over the setting of bail bond premium rates with CDI." ECF No. 56 at 24. Two provisions of the code are relevant here: (1) *Section 1860.1*, which states that "[n]o act done, action taken or agreement made pursuant to the authority conferred by this chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this State heretofore or hereafter enacted which does not specifically refer to insurance," *Cal. Ins. Code § 1860.1*, and (2) *Section 1861.03(a)*, which provides that "[t]he business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to . . . the antitrust and unfair business practices laws," *id. § 1861.03(a)*.

In order to resolve the "apparent contradiction" between these provisions, the *MacKay* court explored their legislative history. *188 Cal. App. 4th at 1442*. In 1947, in the wake of a Supreme Court decision holding that insurance was subject to federal ***antitrust law***, the California legislature enacted *Section 1860.1* as part of the *McBride-Grunsky Act* "in order to immunize insurers from antitrust laws." *Id. at 1444*. The *McBride-Grunsky Act* included a provision "permitting insurers to act in concert." *Id. at 1445*. In 1988, however, California voters passed Proposition **[*32]** 103, which "was intended to eliminate insurers' exemption from antitrust laws." *Id. at 1447*. Among other things, Proposition 103 repealed the portion of the *McBride-Grunsky Act* "permitting insurers to act in concert." *Id. at 1445-46*. That proposition, however, left *Section 1860.1* in place. *Id. at 1446*. The *MacKay* court concluded that *Section 1860.1* should thus be read narrowly, to "exempt[] from other California laws acts done and actions taken pursuant to the ratemaking authority conferred by the ratemaking chapter, including the charging of a preapproved rate." *Id. at 1443* (emphasis omitted). The court stressed that the provision "does not extend to insurer conduct *not* taken pursuant to that authority." *Id. at 1449*.

Defendants rightly note that the key question in determining whether CDI has exclusive jurisdiction over Plaintiffs' California claims is whether the "CAC challenges the reasonableness of Defendants' approved rates." ECF No. 56 at 25. But Plaintiffs' claims do no such thing. The first category of conduct that Plaintiffs identify — the alleged agreement to submit identical premium rates to CDI — is exactly the type of concerted insurer conduct that California law once immunized but that Proposition 103 subjected to antitrust scrutiny. And the second category **[*33]** of conduct — the alleged agreement not to offer rebates — has nothing to do with the reasonableness of the approved premium rates. Because neither of these agreements were authorized by the ratemaking authority as laid out in *MacKay*, *Section 1860.1* poses no bar to Plaintiffs' remaining claims.

5. The *Noerr-Pennington* Doctrine

Defendants also argue that the *Noerr-Pennington* doctrine bars Plaintiffs' Cartwright Act claim "that Defendants conspired to secure the Department's approval of a uniform rate."[5] ECF No. 56 at 25. "[T]he *Noerr-Pennington* doctrine . . . places certain '[j]oint efforts to influence public officials' beyond the reach of the antitrust laws." *F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 627, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)* (citing *Mine Workers v. Pennington, 381 U.S. 657, 670, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)* and *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*). While the doctrine originated in

[5] Defendants do not argue that *Noerr-Pennington* bars Plaintiffs' rebating claims.

the Sherman Act context, it applies to the Cartwright Act as well. *See* Blank v. Kirwan, 39 Cal. 3d 311, 322, 216 Cal. Rptr. 718, 703 P.2d 58 (1985).

In *Noerr*, the Court held that the Sherman Act did not apply to an anti-trucking publicity campaign staged by a group of railroads insofar as it was designed to "foster the adoption and retention of laws and law enforcement practices destructive of the trucking business . . . ." *Id. at 129*. The Court distinguished this sort of "attempt to persuade the legislature or the executive to take particular action with respect to **[*34]** a law that would produce a restraint or a monopoly" from "the agreements traditionally condemned by § 1 of the Act," such as "price-fixing agreements, boycotts, market-division agreements, and other similar arrangements." *Id. at 136*. Summarizing part of the *Noerr* holding in *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)* (emphasis added), the Court noted that "where, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is 'incidental' to a *valid* effort to influence governmental action."

Plaintiffs do not allege that Defendants jointly lobbied the California legislature to set certain premium rates, or that they staged a misleading but lawful publicity campaign intended to obtain a legislative or regulatory result.[6] They allege that Defendants covertly conspired to submit identical rates to CDI, the very type of "price-fixing agreement[]" that the *Noerr* Court emphasized was still subject to Sherman Act scrutiny. *365 U.S. at 136*; *see also* *Allied Tube, 486 U.S. at 503* ("If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental **[*35]** ratemaking or price supports."). Because this arrangement is not a "valid effort to influence governmental action," *Allied Tube, 486 U.S. at 499*, the *Noerr-Pennington* doctrine does not bar Plaintiffs' Cartwright Act claim.

In sum, the portion of Plaintiffs' Sherman Act claim relating to submission of uniform premium rates to CDI is barred by the McCarran-Ferguson Act, but the rebating portion of their Sherman Act claim and the entirety of their Cartwright Act and UCL claims are not barred by any of the argued immunity defenses. The Court now turns to Defendants' 12(b)(6) arguments regarding these claims.

B. Antitrust Conspiracy Claim

Defendants next argue that the CAC fails to state claims under the Sherman and Cartwright Acts. Because the Cartwright Act was modeled after the Sherman Act, the Court's analysis addresses both statutes together pursuant to federal ***antitrust law***. *See, e.g.,* *County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)*.

1. Legal Standard

Section one of the Sherman Act prohibits any contract, combination, or conspiracy constituting an "unreasonable restraint" of trade. *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. In order to state a Section 1 claim, antitrust plaintiffs must claim more than parallel conduct and a conclusory allegation of agreement. "Without more, parallel conduct does not suggest **[*36]** conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Twombly, 550 U.S. at 556-57*. Allegations of parallel conduct must thus "be placed in a context that raises a suggestion of a preceding agreement." *Id. at 557*.

The Ninth Circuit "has distinguished permissible parallel conduct from impermissible conspiracy by looking for certain 'plus factors.'" *In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1194 (9th Cir. 2015)*.

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[6] Plaintiffs' allegations regarding misleading advertising relate only to their rebating claims — essentially, that Defendants misled consumers into thinking that they were not legally permitted to offer rebates.

"Whereas parallel conduct is as consistent with independent action as with conspiracy, plus factors are economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action." *Id.* (citing *Twombly, 550 U.S. at 557 n.4*). "If pleaded, they can place parallel conduct 'in a context that raises a suggestion of preceding agreement.'" *Id.* (quoting *Twombly, 550 U.S. at 557*).

When the court evaluates whether a plaintiff has plausibly alleged an antitrust conspiracy, a "co-conspirator need not know of the existence or identity of the other members of the conspiracy or the full extent of the conspiracy." *In re High-Tech Employee Antitrust Litig., 856 F. Supp. 2d 1103, 1118 (N.D. Cal. 2012)* (citing *Beltz Travel Serv. Inc. v. Int'l Air Transp. Ass'n, 620 F.2d 1360, 1366-67 (9th Cir. 1980)*); *see also Beltz, 620 F.2d at 1367* ("Participation by each conspirator in every detail in the execution of the conspiracy is unnecessary to establish liability, for each conspirator may be performing different **[*37]** tasks to bring about the desired result."). Nor should courts indulge antitrust defendants who move to dismiss by "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each . . . ." *High-Tech Employee, 856 F. Supp. 2d at 1118* (quoting *Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*). "[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole . . . ." *Id.*

2. Sufficiency of Allegations

Plaintiffs do not plead direct evidence of a conspiracy. Instead, they allege that Defendants engaged in parallel conduct that, viewed in the context of various plus factors, "raises a suggestion of a preceding agreement." *Twombly, 550 U.S. at 556*. As discussed above, Plaintiffs allege two main types of parallel conduct: (1) filing uniform maximum premium rates with CDI, *see* CAC ¶¶ 61, 140(b), and (2) declining to offer (or encouraging or instructing agents to decline to offer) rebates on bail bonds, along with various activities designed to prevent rebating, *see id.* ¶¶ 140(c)-(f), 149. While the Court has already dismissed Plaintiffs' Sherman Act claim as it relates to the uniform filing allegations, these allegations are still relevant to Plaintiffs' Cartwright Act claim. The **[*38]** Court therefore considers both categories of parallel conduct.

As for the first, Plaintiffs allege that the surety Defendants "have nearly uniformly filed for a default premium rate of 10 percent of the posted bond, with an 8 percent maximum for consumers who meet enumerated and nearly identical criteria . . . ." *Id.* ¶ 61; *see also id.* ¶ 115 ("Despite the emergence of market pressures and sureties' knowledge of their ability to rebate, the sureties have largely stayed the course with their rates. With limited exceptions, the default rate for sureties in California remains 10%."); *id.* ¶ 120 ("sureties in California have filed for the same Maximum Rate, offered under nearly identical conditions (including the standard Fully Earned Term)"); *id.* ¶ 140(b). They also allege that Aladdin (another name for Two Jinn, *id.* ¶ 38) "uses the SAA as a justification for setting its standard rate, and has said in its CDI filings that '[t]he standard rate is based on Surety Association of America (SAA) pricing.'" *Id.* ¶ 74. These facts, taken together, sufficiently allege that Defendants engaged in parallel conduct by filing for uniform premium rates.

As for the second category, Plaintiffs allege that **[*39]** since 2004, when the *Pacific Bonding Corp.* decision and CDI clarified that Proposition 103 permits bail agents to offer rebates "to become more competitive," Defendants have "generally" declined to do so. CAC ¶¶ 67-68. They also allege that Defendants uniformly "advertise only the default Maximum Rate, to conceal their ability to charge a lower effective rate through rebating," "misrepresent[] that rebating or discounting is unlawful," and "intimidate[] competitors to toe the line" when it comes to rebating. *Id.* ¶¶ 68-69. Defendants argue that these allegations are conclusory because Plaintiffs offer "no facts about rebating, such as statistics on the frequency of rebating or even whether Plaintiffs themselves sought or received rebates." ECF No. 56 at 31. They also note that the statements Plaintiffs provide as examples of misleading advertising "were made by bail agents who are not Defendants." *Id.*

As for the first criticism, Plaintiffs admittedly allege very little in terms of actual rebating practices. The CAC's only allegation that Defendants do not in fact offer rebates is its statement that Defendants "generally . . . refrain from offering competitive rebates." CAC ¶ 68. Plaintiffs **[*40]** note that Defendant California Bail Agents Association ("CBAA") "maintains information regarding premiums charged that Defendants and their agents can use to detect and prevent premium discounting," *id.* ¶ 84, though Plaintiffs presumably do not have access to this information. They also note that "[w]ith limited exceptions, the default rate for sureties in California remains 10%." *Id.* ¶ 115. It is unclear, however, whether this "default rate" refers to the CDI-approved premium rate or the rate actually charged by bail agents, taking any rebates (or lack thereof) into account. If Plaintiffs' parallel conduct claims depended solely on allegations of actual rebating practices, these statements might not be enough to state a claim. But the alleged conspiracy hinges just as much on Plaintiffs' allegations of uniform premium rate filing and misrepresentation regarding Defendants' ability to offer rebates.

And Plaintiffs provide multiple examples of such misrepresentations, including two statements made by Defendants. *See id.* ¶ 73 (citing statements on the website of Defendant Aladdin Bail Bonds, also known as Two Jinn); *id.* ¶ 83 (citing statements on the website of Defendant CBAA). They also **[*41]** provide examples of allegedly misleading representations by bail agencies who contract with Defendant sureties. *See id.* ¶ 93 (citing statement by Quick Bail Bonds Covina, which contracts with Defendant surety AIA); *id.* ¶ 94 (citing statement by Padilla Bail Bonds, a representative of Defendant surety Lexington National Insurance); *id.* ¶ 95 (citing statements by 888 Bail Bonds, a representative of Defendant sureties Allegheny Casualty Company and International Fidelity Insurance Company). In addition, Plaintiffs cite statements by members of the bail industry who are not named as Defendants. *See id.* ¶ 88 (citing an "industry-sponsored, privately-run bail agent training course[]" that included the line, "the right answer on the test: no rebates"); *id.* ¶ 90 (citing passage from e-book that Defendant CBAA "advises is an essential starting point for all bail agents"); *id.* ¶¶ 96-100 (citing statements by bail agencies with no purported connection to Defendants). Taken together, these allegations suffice to show parallel conduct in the form of similarly allegedly misleading statements about Defendants' ability to offer rebates.[7]

While Plaintiffs provide a number of statements by Defendants **[*42]** or bail agents in contractual relationships with Defendants, the statements by non-Defendant members of the bail industry also help state a conspiracy claim. "Under *Twombly*, parallel conduct, such as competitors adopting similar policies around the same time in response to similar market conditions, may constitute circumstantial evidence of anticompetitive behavior." *Musical Instruments, 798 F.3d at 1193*. Plaintiffs allege a price-fixing conspiracy throughout the California bail bonds industry. Allegations that members of this industry "adopt[ed] similar policies around the same time in response to similar market conditions" establish parallel conduct for the purpose of *Twombly*. *Id.*

Of course, where Plaintiffs name a particular industry member as a Defendant, they must allege sufficient facts about that Defendant's role in the conspiracy to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly, 550 U.S. at 555* (citation and quotation omitted). But that is a separate question from whether Plaintiffs have alleged enough parallel conduct to describe the conspiracy as a whole.

Having identified allegations of parallel conduct, the Court now turns to whether Plaintiffs have alleged plus factors that **[*43]** are "largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action." *Musical Instruments, 798 F.3d at 1194*. Plus factors that courts have found, taken in context, tend to suggest conspiracy include: participation in trade associations that provide "opportunities to exchange information or make agreements," *In re Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008)*; public statements by defendants that could be construed as "invitations to agree," *In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 1116 (N.D. Cal. 2008)*; and factors suggesting a "market susceptible to conspiratorial price-fixing," such as high barriers to entry, waning demand, and saturation, *In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 577 (M.D. Pa. 2009)*.

Plaintiffs allege all three of these plus factors. The CAC alleges that the industry association Defendants "host meetings that have provided opportunities for Defendants to maintain and enforce the conspiracy," CAC ¶ 80, and gives examples of meetings that included all three association Defendants, *id.* ¶¶ 81, 86. It also cites numerous statements by individual Defendants that could plausibly be interpreted as inviting cooperation to prevent rebating. *See, e.g., id.* ¶ 78 (predicting that "if left unchecked, rampant premium discounting will result in the end of the bail bond business as we know it, to be replaced by a new model that properly reflects the **[*44]** proper balance of risk

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[7] The Court addresses whether these allegations are adequate as to particular Defendants in Section V.B.3.

and reward" and urging members of the bail industry "to recognize the serious nature of the threats to our industry and work collectively to repel them"); *id.* ¶ 79 (urging bail agents to "recogniz[e] and alert[] all to the impending attack [on the industry]. When you [agents] become aware of a situation, please contact us so that we may assess the depth of the threat and work alongside of you to craft an appropriate response."). The CAC additionally alleges market factors that create a susceptibility to price fixing, such as increasing supply and waning demand, *id.* ¶ 111-14, as well as regulatory and networking barriers to entry, *id.* ¶ 116. Lastly, the CAC alleges market factors that suggest the presence of price fixing, such as an unusually low loss ratio, *id.* ¶ 63, and competition on factors other than price, such as marketing and credit terms, *id.* ¶¶ 118-19.

Taken together with Plaintiffs' allegations of uniform filing and parallel decisions not to offer rebates and to misrepresent the availability of discounts, these factors "raise[] a suggestion of a preceding agreement." *Twombly, 550 U.S. at 556*.

3. Specific Allegations About Defendants

Defendants also argue that Plaintiffs fail **[*45]** to allege sufficient facts about how each Defendant "joined or participated" in the alleged conspiracy. ECF No. 56 at 27. A subset of Defendants, some of whom the CAC names only in the caption and list of parties, make similar arguments in a separate motion to dismiss. ECF No. 58.

To survive a motion to dismiss, a complaint alleging an antitrust conspiracy "must allege that each individual defendant joined the conspiracy and played some role in it because, at the heart of an antitrust conspiracy is an agreement and a conscious decision by each defendant to join it." *TFT-LCD, 586 F. Supp. 2d at 1117* (citation omitted). The complaint "need not plead each defendant's involvement in the alleged conspiracy in elaborate detail, but must simply include allegations specific to each defendant alleging that defendant's role in the alleged conspiracy." *Id.*

The *TFT-LCD* court followed this rule in dismissing horizontal price-fixing claims against particular corporate entities where the complaint included only "general allegations as to all defendants, to 'Japanese defendants,' or to a single corporate entity such as 'Hitachi.'" *Id.* The plaintiffs amended their complaints to add detail about "numerous illicit conspiratorial communications **[*46]** between and among defendants"; "facts of the guilty pleas entered by four defendants for fixing prices of TFT-LCD"; "specific information about the group and bilateral meetings by which the alleged price-fixing conspiracy was effectuated," including "the structure and content of these meetings, as well as the types of employees who attended the meetings"; details of "bilateral discussions between various defendants . . . [that] took the form of in-person meetings, telephone calls, e-mails and instant messages"; and information about "which types of meetings the defendants and co-conspirators participated in," including in some instances "more detail such as the year of a meeting and other meeting participants." *TFT-LCD, 599 F. Supp. 2d 1179, 1184 (N.D. Cal. 2009)*. The court held that the amended complaints sufficiently alleged each defendant's participation in the conspiracy, despite defendants' objection that they "still [did] not differentiate between related corporate entities." *Id. at 1184-85*.

Plaintiffs cite *In re Cathode Ray Tube (CRT) Antitrust Litigation*, in which the district court "permitted other plaintiffs to proceed not with detailed, defendant-by-defendant allegations but with more general — but still plausible — contentions that each **[*47]** defendant participated in the alleged conspiracy." ECF No. 68 at 24 (citing *No. C-07-5944-SC, 2013 U.S. Dist. LEXIS 141115, 2013 WL 5425183, at *2 (N.D. Cal. Sept. 26, 2013)*). However, the plaintiffs who were allowed to proceed in that litigation had alleged far more specific facts about each defendant than Plaintiffs have here. The *CRT* complaints contained "allegations concerning specific Defendants' participation in the alleged unlawful meetings and agreements," including the estimated number of meetings each defendant participated in, what sorts of agreements were reached, and in some cases what types of employees had represented defendants at the meetings. *CRT, 738 F. Supp. 2d 1011, 1019-22 (N.D. Cal. 2010)*.

Bearing this analysis in mind, the Court now turns to particular defendants or categories of defendants.

a. Surety Defendants

Plaintiffs make many allegations about the surety Defendants as a group: that they have agreed not to compete on the price of bail bonds and to file uniform rates with CDI, CAC ¶¶ 61, 120, directed their agents not to compete on price, used industry associations and bail education courses to enforce this agreement, and retaliated against agents who have offered rebates, *see, e.g., id.* ¶ 71. They provide sample language from a contract between a surety and a bail agency, though they do **[*48]** not say which ones. *Id.* ¶ 92. They also make some allegations related to particular surety Defendants, for example, citing allegedly misleading statements by bail agencies, some of whom they allege are contractually connected to certain Defendant sureties. *Id.* ¶¶ 93-95. They also quote statements by executives of certain surety Defendants. *See, e.g., id.* ¶¶ 75-79, 80, 87, 104, 106.

These claims, however, do not sufficiently allege each surety Defendant's "role in the alleged conspiracy." *TFT-LCD, 586 F. Supp. 2d at 1117*; *see also* *In re TFT-LCD (Flat Panel) Antitrust Litig., Nos. M 07-1827 SI, C 09-5609 SI, 2010 U.S. Dist. LEXIS 64930, 2010 WL 2629728, at *6-7 (N.D. Cal. June 29, 2010)* (dismissing claim against particular defendant where the complaint alleged only its "corporate status," that it "manufactured, sold, and/or distributed LCDs to other purchasers," and that it "participated in the conspiracy"). This is especially true for the 17 surety Defendants who are mentioned by name only in the caption and in the list of parties. ECF No. at 13-14. However, since Plaintiffs' opposition does not attempt to distinguish between these Defendants and those for whom the CAC includes additional allegations, *see* ECF No. 68 at 24-26, the Court dismisses the claims against all surety Defendants with leave **[*49]** to amend.

b. Bail Agency Defendants

Plaintiffs name two bail agency Defendants in their complaint: Two Jinn and All-Pro. CAC ¶¶ 37-38. The CAC alleges that Two Jinn, which also does business as Aladdin Bail Bonds, sold Plaintiff Serna a bail bond and that it is "[a]t the center of the conspiracy." *Id.* ¶¶ 12, 38, 72-74. It also alleges that Aladdin representatives attended a trade association meeting in November 2011 but says nothing about what occurred at that meeting. *Id.* ¶ 86. Lastly, the CAC cites a statement on Defendant Aladdin's website claiming that "Aladdin Bail Bonds is authorized to offer an 8% rate in addition to the standard 10%. Nobody has lower prices than Aladdin." *Id.* ¶ 73. These allegations are insufficient to allege liability on the part of Two Jinn. A firm cannot enter a conspiracy merely by selling a bail bond, and the law is well-settled that attending a trade association meeting, without more, is not evidence of participation in a conspiracy. *See, e.g.,* *Jones v. Micron Tech. Inc., 400 F. Supp. 3d 897, 918 (N.D. Cal. 2019)* ("Membership in associations and attendance at trade meetings presents nothing more than an opportunity to collude, and an opportunity, without more, is insufficient to state a claim under *§ 1*." (footnote and citation **[*50]** omitted)); *In re Cal. Title Ins. Antitrust Litig., No. C 08-01341 JSW, 2009 U.S. Dist. LEXIS 43323, 2009 WL 1458025, at *5 (N.D. Cal. May 21, 2009)* ("If such meetings occurred, Plaintiffs do not set forth facts about where or when those meetings took place, or whether the Defendants communicated with one another in advance of or after the meetings."); *In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1023 (N.D. Cal. 2007)* ("Attendance at industry trade shows and events is presumed legitimate and is not a basis from which to infer a conspiracy, without more. . . . [T]here are no allegations that representatives from ATI and Nvidia actually met or spoke with one another during those widely-attended conferences. Here, plaintiffs have pleaded no facts indicating that defendants' attendance at trade shows and conferences was part of a conspiracy."). Aladdin's statement about its rates, while potentially somewhat misleading as the rates it is "authorized" to charge, also is not evidence of agreement. Finally, as for the naked allegation that Two Jinn was the "center" of the conspiracy, simply saying it does not make it so. *See* *Dietrick v. Securitas Sec. Servs. USA, Inc., 50 F. Supp. 3d 1265, 1276 (N.D. Cal. 2014)* (recalling Abraham Lincoln's aphorism that "calling a tail a leg doesn't make it one." (citation omitted)). Plaintiffs' claim against Two Jinn is dismissed with leave to amend.

The claim against All-Pro is even thinner. **[*51]** The only allegation against that firm is that it sold Plaintiff Crain an allegedly inflated bail bond. *Id.* ¶ 11. Plaintiffs' opposition brief claims that the CAC alleges that All-Pro failed to offer

Crain a rebate, ECF No. 68 at 26, but the CAC does not in fact make that allegation. Plaintiffs' claim against All-Pro is thus dismissed with leave to amend.

c. Industry Association Defendants

The CAC names three bail agent association Defendants: American Bail Coalition, Inc. ("ABC"), CBAA, and Golden State Bail Agents Association ("GSBAA"). CAC ¶¶ 40-42. The CAC alleges that the surety Defendants use all three association Defendants "as tools for enforcing their price-fixing cartel." *Id.* ¶ 71. It alleges that the association Defendants "host meetings that have provided opportunities for Defendants to maintain and enforce the conspiracy," *id.* ¶ 80, and gives examples of meetings that included all three association Defendants, *id.* ¶¶ 81, 86. Once again, however, the question is whether the CAC provides enough information regarding each individual defendant.

As to defendant CBAA, it does. The CAC alleges that CBAA "maintains information regarding premiums charged that Defendants and their agents **[*52]** can use to detect and prevent premium discounting." *Id.* ¶ 84. It notes that CBAA maintains a web page for consumers called "How Bail Bonds Works." *Id.* ¶ 83. CBAA there poses the question, "Are there any restrictions on how high my bail can be?," and gives the allegedly misleading answer that "Bail agents representing a company must charge the same, filed rates," without disclosing that agents are allowed to rebate. *Id.* The CAC states that CBAA promotes a book called "Bail Bonds 101," which includes the following advice about dealing with customers:

> [T]he caller may be shopping to see what fees you charge, but always keep in mind that your state DOI regulates the fees for bail bonds and if a competitor offers a lower percentage fee, they WILL make up the point or two somewhere in the transaction. In California, the only time you might lower the fee to 8%, which is 2% less than the standard 10%, is if you are working with a referral from an attorney.

Id. ¶¶ 89-90. These allegations provide the "something more" sufficient to allege CBAA's participation in the asserted conspiracy.

The allegations against ABC and GSBAA, by contrast, are inadequate. The only specific allegation concerning ABC **[*53]** relates to a statement made by a former — not current — executive director. *Id.* ¶ 104. And there are no specific allegations concerning GSBAA whatsoever.

Accordingly, the motion to dismiss claims against CBAA is denied. The motion to dismiss on behalf of ABC and GSBAA is granted with leave to amend.

d. Individual Defendants

The CAC names two individual Defendants: (1) Jerry Watson, vice president of the AIA[8] and senior counsel and board member of industry association Defendant ABC, *id.* ¶ 44, and (2) William B. Carmichael, president and CEO of Defendant American Surety Company ("ASC") and former president and executive director, as well as current chairman, of Defendant ABC, *id.* ¶ 45. The CAC alleges that both Watson and Carmichael "directly participated in" the alleged conspiracy and "approved and ratified the conduct of" AIA's member sureties and ASC, respectively, and that they both approved and ratified the conduct of ABC. *Id.* ¶¶ 44-45.

The CAC also cites multiple statements by each individual Defendant that it alleges demonstrate the existence of, and their participation in, a conspiracy. As for Watson, the CAC alleges that he made statements about the bail industry's low loss ratio **[*54]** as well as its shrinking demand and rising supply, *id.* ¶¶ 63, 111, and that he "derided

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[8] The CAC makes several references to "Defendant AIA," CAC ¶¶ 63, 75, which it elsewhere describes as "the nation's largest bail surety administrator," of which three other surety Defendants are members, *id.* ¶¶ 14, 17, 25. The CAC does not name AIA in its list of parties or in its caption, however, so the Court is unclear as to whether AIA is in fact a separate named Defendant. Plaintiffs are instructed to clarify this inconsistency in any future amended complaint.

'price-cutting' as a 'cancer'" in an article on AIA's website, *id.* ¶ 75. As for Carmichael, the CAC cites a statement he made on behalf of Defendant ASC noting "the important role a surety must play in protecting our markets," i*d*. ¶ 80 (emphasis omitted), as well as one demonstrating his opposition to rebating, *id.* ¶ 106. *See also id.* ¶ 77 (Carmichael statement referencing a "cohesive band of agents and companies" who play "vital roles . . . in the protection and betterment of our markets"); *id.* ¶ 78 (Carmichael statement predicting that "if left unchecked, rampant premium discounting will result in the end of the bail bond business as we know it, to be replaced by a new model that properly reflects the proper balance of risk and reward" and urging members of the bail industry "to recognize the serious nature of the threats to our industry and work collectively to repel them"); *id.* ¶ 79 (Carmichael statement urging bail agents to "recogniz[e] and alert[] all to the impending attack [on the industry]. When you [agents] become aware of a situation, please contact us so that we may assess the depth **[*55]** of the threat and work alongside of you to craft an appropriate response.").

Individuals may be liable for the antitrust violations of their employers if they have directly participated in or knowingly approved or ratified "inherently wrongful" conduct. *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., Ltd., 467 F. Supp. 841, 852-53 (N.D. Cal. 1979)*, *aff'd sub nom. Murphy Tugboat Co. v. Crowley, 658 F.2d 1256 (9th Cir. 1981)*. Plaintiffs allege both that Watson and Carmichael directly participated in the alleged conspiracy and that they approved and ratified of anticompetitive conduct by AIA's member sureties, ASC, and ABC — specifically, their alleged agreement not to rebate and to misrepresent their ability to do so. Because the allegations in the CAC sufficiently make this claim as to both Watson and Carmichael, the Court denies their motion to dismiss Plaintiffs' claims against them.

C. UCL Claim

The CAC alleges UCL violations based on a predicate Cartwright Act violation as well as conduct that is "otherwise unfair, unconscionable, unlawful, and fraudulent," CAC ¶¶ 153-54, though Plaintiffs' opposition brief argues a UCL claim based only on predicate violations of the *Sherman* and *Cartwright Acts*, ECF No. 68 at 29. Because Plaintiffs have sufficiently stated Sherman and Cartwright Act claims as to certain Defendants, they have sufficiently **[*56]** stated a UCL claim as to those Defendants. The Court therefore grants Defendants' motions to dismiss the UCL claim as to the surety Defendants, the bail agency Defendants, ABC, and GSBAA, and denies them as to CBAA and the individual Defendants.

D. Statutes of Limitations

Defendants also argue that Plaintiffs' pre-2015 claims are barred by the four-year statute of limitations on antitrust and UCL claims. ECF No. 56 at 38. "The burden of alleging facts which would give rise to tolling falls upon the plaintiff." *Hinton v. NMI Pac. Enters., 5 F.3d 391, 395 (9th Cir. 1993)*. However, because resolving tolling disputes is a fact-intensive process, statute of limitations defenses "may not be raised by motion to dismiss" unless they include "no disputed issues of fact." *Scott v. Kuhlmann, 746 F.2d 1377, 1378 (9th Cir. 1984)* (citing 5 Charles Alan Wright & Arthur R. Miller, *Fed. Practice & Proc.*, § 1277 (3d ed. 2019)).

Plaintiffs argue that the statutes should be tolled under the fraudulent concealment, discovery, equitable estoppel, and continuing violation doctrines. ECF No. 68 at 39-44.

1. Fraudulent Concealment and Equitable Estoppel

For fraudulent concealment, a plaintiff must plead facts alleging that (1) the defendant "affirmatively misled it," (2) the plaintiff "had neither actual nor constructive knowledge **[*57]** of the facts giving rise to its claim," and (3) the plaintiff acted diligently "in trying to uncover those facts." *Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1060 (9th Cir. 2012)* (quoting *Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc., 858 F.2d 499, 502 (9th Cir. 1988)*). "Fraudulent concealment tolling must be pled with particularity under *Fed. R. Civ. P. 9(b)*." *In re Ford Tailgate Litig., No. 11-CV-2953-RS, 2014 U.S. Dist. LEXIS 32287, 2014 WL 1007066, at *8 (N.D. Cal. Mar. 12, 2014)*, *order corrected on* *denial of reconsideration*, *No. 11-CV-2953-RS, 2014 U.S. Dist. LEXIS 199411, 2014 WL 12649204 (N.D. Cal. Apr. 15, 2014)*. Because the equitable estoppel doctrine is interconnected with fraudulent concealment, *see* *Lukovsky v. City and County of San Francisco, 535 F.3d 1044, 1051 (9th Cir. 2008)*, the Court will assess these arguments together.

Plaintiffs have adequately alleged that Defendants "affirmatively misled" them as to whether they could obtain lower prices for bail bonds. *See, e.g.*, CAC ¶ 73 (citing statement on Defendant Aladdin's website claiming that "Aladdin Bail Bonds is authorized to offer an 8% rate in addition to the standard 10%. Nobody has lower prices than Aladdin."); *id.* ¶ 83 (citing statement on Defendant CBAA's website claiming that "[b]ail agents representing a company must charge the same, filed rates"); *id.* ¶ 95 (citing statement "on behalf of [bail agency's] sureties, including Defendants Allegheny Casualty Company and International Fidelity Insurance Company," that "[a]ny agent offering bail at 5% in the State of California is simply acting illegally or deceptively," and alleging that the statement was posted on **[*58]** the agency's website "continuously since at least October 2013"); *id.* ¶ 104-06 (alleging that Defendants retaliated against bail agents who offered rebates); *id.* ¶¶ 124-25 (alleging fraudulent concealment). Defendants argue that these statements are truthful and are not "'above and beyond' facts establishing the alleged conspiracy itself." ECF No. 56 (citing *In re Animation Workers Antitrust Litig., 87 F. Supp. 3d 1195, 1215 (N.D. Cal. 2015)*). But the defendants in *Animation Workers* were alleged to have "discussed the conspiracy in small in-person group meetings, avoided memorializing the scheme in writing, and attempted to keep the conspiracy secret from Plaintiffs," which the court held was passive concealment rather than "affirmative attempts to mislead 'above and beyond' the existence of the conspiracy itself." *87 F. Supp. 3d at 1215*. Here, the CAC alleges that Defendants have not only conspired to fix the price of bail bonds, but have taken affirmative steps to conceal this conspiracy from purchasers by misrepresenting their ability to offer rebates. These allegations are sufficient to allege the first prong of fraudulent concealment.

As for the second, Defendants argue that the statements Plaintiffs allege were affirmatively misleading gave Plaintiffs "constructive knowledge and inquiry **[*59]** notice of the alleged conspiracy." ECF No. 72 at 20. Given the questions of fact around where the statements were made and how a reasonable person in Plaintiffs' shoes would have interpreted them, the Court cannot hold on a motion to dismiss that they provided constructive knowledge. *See* *Lundy v. Union Carbide Corp., 695 F.2d 394, 397 (9th Cir. 1982)* (constructive knowledge is normally a question of fact for the jury). The same is true of whether the Plaintiffs acted diligently to uncover the conspiracy. *See* *In re Rubber Chemicals Antitrust Litig., 504 F. Supp. 2d 777, 789 (N.D. Cal. 2007)* ("As many courts have noted in the antitrust conspiracy context, it is generally inappropriate to resolve the fact-intensive allegations of fraudulent concealment at the motion to dismiss stage, particularly where the proof relating to the extent of the fraudulent concealment is alleged to be largely in the hands of the alleged conspirators."). The Court thus holds that Plaintiffs have pled facts to allege fraudulent concealment.

2. Discovery

Plaintiffs' argument that the discovery rule tolled the Sherman Act statute of limitations is barred as a matter of law because "the U.S. Supreme Court and Ninth Circuit have clearly held that claims under the *Sherman Act* are subject to an injury rule, rather than a discovery rule." *Animation Workers, 87 F. Supp. 3d at 1209*.

It is less clear whether **[*60]** the discovery rule applies to Cartwright Act and UCL claims. The California Supreme Court has rejected the theory that, because Sherman Act claims are not subject to the discovery rule, the same must be true of Cartwright Act claims. *Aryeh v. Canon Bus. Solutions, Inc., 55 Cal. 4th 1185, 1194-95, 151 Cal. Rptr. 3d 827, 292 P.3d 871 (2013)* ("Interpretations of federal ***antitrust law*** are at most instructive, not conclusive, when construing the *Cartwright Act* . . . ."). Defendants cite no case holding the converse. *See* ECF No. 72 at 21 (citing *Hexcel, 681 F.3d at 1060*, which discusses only fraudulent concealment, not the discovery rule, and *Ryan v. Microsoft Corp., 147 F. Supp. 3d 868, 893 (N.D. Cal. 2015)*, which discusses the discovery rule only in the context of UCL claims).

As for UCL claims, the California Supreme Court has held that they are subject to the same accrual rules as "any other statute": while the injury rule is the default, the discovery rule applies "precisely to the extent the preconditions for [its] application are met . . . ." *Aryeh, 55 Cal. 4th at 1196*; *but see* *Animation Workers, 87 F. Supp. 3d at 1211* (describing *Aryeh* as explaining that "the discovery rule might be appropriate for misrepresentation or fraud claims, but not in unfair competition claims"). The Court thus cannot hold that Plaintiffs' discovery rule argument as to their Cartwright Act and UCL claims is barred as a matter of law.

The discovery rule in California **[*61]** requires the plaintiff to plead facts "which show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence . . . . However, mere conclusory assertions that delay in discovery was reasonable are insufficient." *In re Conseco Ins. Co., No. C-05-04726 RMW, 2008 U.S. Dist. LEXIS 111497, 2008 WL 4544441, at *8 (N.D. Cal. Sept. 30, 2008)* (internal citations omitted); *see also* *Asghari v. Volkswagen Grp. of Am., Inc., 42 F. Supp. 3d 1306, 1320-21 (C.D. Cal. 2013)*. To invoke the discovery rule, each Plaintiff must allege the time and manner by which she discovered the cause of action. *See* *Philips v. Ford Motor Co., No. 14-CV-02989-LHK, 2015 U.S. Dist. LEXIS 88937, 2015 WL 4111448, at *7 (N.D. Cal. July 7, 2015)*; *In re Conseco, 2008 U.S. Dist. LEXIS 111497, 2008 WL 4544441, at *9* (citing *Community Cause v. Boatwright, 124 Cal. App. 3d 888, 900, 177 Cal. Rptr. 657 (Cal. Ct. App. 1981)*). Relatedly, each Plaintiff must also show that she acted reasonably and diligently. *Plumlee v. Pfizer, Inc., No. 13-CV-00414-LHK, 2014 U.S. Dist. LEXIS 121634, 2014 WL 4275519, at *6 (N.D. Cal. Aug. 29, 2014)*, *aff'd*, *664 F. App'x 651 (9th Cir. 2016)*.

Plaintiffs here allege the time of discovery ("no earlier than January 2, 2019," CAC ¶ 124) and the inability to have made discovery earlier despite reasonable diligence ("Plaintiffs and the Class also lacked the specialized economic and industry knowledge necessary to discover the conspiracy sooner despite the exercise of reasonable due diligence," *id.*). Plaintiffs do not, however, allege the manner of discovery. Should they wish to rely on this argument in the future, they should amend the complaint **[*62]** accordingly. *See* *Gerstle v. Am. Honda Motor Co., No. 16-cv-04384-JST, 2017 U.S. Dist. LEXIS 100580, 2017 WL 2797810, at *7 (N.D. Cal. June 28, 2017)*.

3. Continuing Violation

The continuing violation doctrine holds that, "[i]n the context of a continuing conspiracy to violate the antitrust laws, . . . each time a plaintiff is injured by an act of the defendant[ ] a cause of action accrues to him to recover the damages caused by that act." *Solo v. SD-3C LLC, 751 F.3d 1081, 1086 (9th Cir. 2014)* (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*). The statute of limitations restarts with each "new overt act that: (1) is 'new and independent ... [and] not merely a reaffirmation of a previous act,' and (2) 'inflict[s] new and accumulating injury on the plaintiff.'" *Id.* (quoting *Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 238 (9th Cir. 1987)*). "[E]ach time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs from the date of the act." *Id.* (citing *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* and *Hennegan v. Pacifico Creative Serv., Inc., 787 F.2d 1299, 1301 (9th Cir. 1986)*).

The CAC alleges that "Plaintiffs and Class members have been forced to pay inflated bail bond premiums." CAC ¶¶ 128, 141. Under this theory, each sale of a bail bond that was artificially inflated as a result of the alleged conspiracy thus constitutes an overt act restarting the statute of limitations. Because Plaintiffs have alleged that bail bonds are continuously **[*63]** sold in California, *see, e.g., id.* ¶¶ 3, 114, they have sufficiently alleged continuing violations for the purposes of tolling.

4. Danielson National Insurance Company

Defendant Danielson National Insurance Company ("DNIC") makes an additional argument that, because it "exited the bail bond industry prior to the limitations period," all claims against it should be dismissed. ECF No. 58 at 23-24. Because Plaintiffs argue that their claims against DNIC are timely under the fraudulent concealment and discovery doctrines, ECF No. 68 at 44, and because withdrawal from a conspiracy is an affirmative defense, *TFT-LCD, 820 F. Supp. 2d 1055, 1060 (N.D. Cal. 2011)*, the application of which Plaintiffs dispute, Danielson's motion on this point is also denied.

CONCLUSION

For the foregoing reasons, the Court grants Defendants' joint motion to dismiss Plaintiffs' Sherman Act claim regarding the filing of uniform premium rates. This claim is dismissed with prejudice. The Court denies the motion as to Plaintiffs' Sherman and Cartwright Act claims regarding rebating, their Cartwright Act claim regarding uniform rate filing, and their UCL claim. As for the consolidated motion to dismiss the claims against certain Defendants, the Court grants the motion to **[*64]** dismiss all claims as to the surety Defendants, the bail agency Defendants, ABC, and GSBAA, with leave to amend, and denies it as to CBAA and the individual Defendants. Lastly, the Court denies the motion to dismiss Plaintiffs' pre-2015 claims.

Plaintiffs may file an amended complaint within 30 days of this order that addresses the deficiencies identified herein.

IT IS SO ORDERED.

Dated: April 13, 2020

/s/ Jon S. Tigar

JON S. TIGAR

United States District Judge

Prudential Locations, LLC v. Gagnon

Intermediate Court of Appeals of Hawai'i

April 15, 2020, Decided; April 15, 2020, Electronically Filed

NO. CAAP-16-0000890 and CAAP-17-0000216

Reporter

2020 Haw. App. LEXIS 126 *; 146 Haw. 239; 461 P.3d 30

PRUDENTIAL LOCATIONS, LLC, Plaintiff-Appellant, v. LORNA GAGNON, PRESTIGE REALTY GROUP LIMITED LIABILITY COMPANY, Defendants/Cross-Claim Defendants-Appellees, and RE/MAX LLC, LORRAINE CLAWSON, Defendants/Cross-Claimants/Third-Party Plaintiffs-Appellees, and KEVIN TENGAN, Third-Party Defendant-Appellee, and DOES 1-15, Defendants and PRUDENTIAL LOCATIONS, LLC, Plaintiff-Appellant, v. LORNA GAGNON, PRESTIGE REALTY GROUP LIMITED LIABILITY COMPANY, Defendants/Cross-Claim Defendants-Appellees, and RE/MAX LLC, LORRAINE CLAWSON, Defendants/Cross-Claimants/Third-Party Plaintiffs-Appellees, and KEVIN TENGAN, Third-Party Defendant-Appellee, and DOES 1-15, Defendants

Notice: MEMORANDUM OPINIONS OF THIS COURT DO NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED. SEE HAWAI'I RULES OF APPELLATE PROCEDURE FOR GUIDELINES RESTRICTING PUBLICATION AND CITATION OF MEMORANDUM OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE HAWAII REPORTER.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Subsequent History: Writ of certiorari dismissed, Without prejudice *Prudential Locations, LLC v. Gagnon, 2020 Haw. LEXIS 119, 2020 WL 2569716 (Haw., May 21, 2020)*

Motion dismissed by *Prudential Locations, LLC v. Gagnon, 2020 Haw. App. LEXIS 277, 2020 WL 3887990 (Haw. Ct. App., July 10, 2020)*

Writ of certiorari granted *Prudential Locations, LLC v. Gagnon, 2020 Haw. LEXIS 265, 2020 WL 5258306 (Haw., Sept. 3, 2020)*

Vacated by, in part, Affirmed by, in part, Remanded by *Prudential Locations, LLC v. Gagnon, 2022 Haw. LEXIS 24, 2022 WL 482601 (Haw., Feb. 17, 2022)*

Vacated by, in part, Affirmed by, in part, Remanded by *Prudential Locations, LLC v. Gagnon, 2022 Haw. LEXIS 58 (Haw., Apr. 1, 2022)*

Prior History: [*1] APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT. CIVIL NO. 13-1-2328.

Prudential Locations, LLC v. Sakamoto, 2016 Haw. LEXIS 256, 2016 WL 6135497 (Haw., Oct. 21, 2016)

Core Terms

Non-Compete, summary judgment, attorney's fees, Non-Solicitation, discovery, costs, sales, salesperson, covenants, parties, broker, amended complaint, motion for leave, franchise, renewed, notice, orders, unfair

LexisNexis® Headnotes

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

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

HN1[] Summary Judgment, Entitlement as Matter of Law

On review of a summary judgment proceeding, the standard to be applied by an appellate court is identical to that employed by the trial court. This means that the inferences to be drawn from the underlying facts alleged in the materials (such as depositions, answers to interrogatories, admissions and affidavits) considered by the court in making its determination must be viewed in the light most favorable to the party opposing the motion. Further, in considering the validity of the granting of summary judgment under *Haw. R. Civ. P. 56(c)*, the appellate court must determine whether any genuine issue as to a material fact was raised and, if not raised, whether the moving party was entitled to judgment as a matter of law.

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

Governments > Legislation > Interpretation

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition

HN2[] Trade Practices & Unfair Competition, State Regulation

As a general rule, any contract that is in restraint of trade or commerce, is illegal. *Haw. Rev. Stat. § 480-4(a)*. *Haw. Rev. Stat. § 480-4* is a remedial statute, and as such should be liberally construed to suppress the perceived evil and advance the enacted remedy. However, *Haw. Rev. Stat. § 480-4(c)* contains exceptions to the general rule. Exceptions or exclusions to a remedial law are narrowly construed.

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

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition

HN3[] Trade Practices & Unfair Competition, State Regulation

The Hawaii Supreme Court has concluded that the exceptions listed in *Haw. Rev. Stat. § 480-4(c)* are not exclusive. Rather, restrictive covenants should be evaluated, in much the same way that federal courts would, in Section 1 Sherman Act Cases, analyze such covenants. Thus, the court adopted federal case analysis which applied a rule of reason test to determine the validity of restrictive covenants, which in turn considered three factors: Generally courts will find a restrictive covenant not reasonable, and therefore invalid, if: (i) it is greater than required for the protection of the person for whose benefit it is imposed; (ii) it imposes undue hardship on the person restricted; or (iii) its benefit to the covenantee is outweighed by injury to the public. This reasonableness analysis is done by the court, as a matter of law.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Customers of Former Employer

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN4[] **Trade Secrets & Unfair Competition, Customers of Former Employer**

Non-solicitation agreements can be lawful even under statutes which forbid non-compete covenants. A non-solicitation clause is not a per se violation of federal ***antitrust law***.

Counsel: On the briefs: Paul Alston, Kristin L. Holland, John Rhee, (Alston Hunt Floyd & Ing) for Plaintiff-Appellant.

Matt A. Tsukazaki for Defendants-Appellees Lorna Gagnon & Prestige Realty Group, LLC.

Duane R. Miyashiro (Cox, Wootton, Lerner, Griffin, & Hansen) and William J. Kelly (Kelly & Walker) for Defendants-Appellees RE/MAX, LLC and Lorraine Clawson.

Judges: By: Ginoza, Chief Judge, Fujise and Hiraoka, JJ.

Opinion

MEMORANDUM OPINION

I.

In this consolidated appeal,[1] Plaintiff-Appellant Prudential Locations LLC (**Locations**), appeals from the following orders entered by the First Circuit Court (**Circuit Court**):[2]

In CAAP-16-0000890,

(1) the August 25, 2016 "Findings of Fact, Conclusions of Law, and Order [(**FFCLO)**] Denying [Locations's] Motion for Partial Summary Judgment [(**MPSJ**)] Against [Defendant-Appellee] Lorna Gagnon [(**Gagnon**)]";

(2) the August 25, 2016 "[FFCLO] Granting Defendants [Appellees Gagnon] and Prestige Realty Group Limited Liability Company's [(**Prestige**)] Cross-Motion for Summary Judgment [(**XMSJ**)] on the First Amended Complaint of [Locations]";

(3) the August 25, 2016 "[FFCLO] Granting [Defendants-Appellees RE/MAX LLC (**RE/MAX**)] and **[*2]** Lorraine Clawson's [(**Clawson**)] [XMSJ] Against [Locations]";

(4) the November 1, 2016 "Order Denying [Locations's] Motion for Leave to File Second Amended Complaint" (**SAC**);

(5) the November 7, 2016 "Order Granting Defendant [RE/MAX's] Motion for Protective Order as to the Deposition of Tim Burns [(**Burns**)] Noticed for September 14, 2016, Filed September 2, 2016";

(6) the November 15, 2016 "Order Denying [Locations's] Motion to Compel";[3]

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[1] On May 2, 2017, this court consolidated CAAP-17-0000216 into CAAP-16-0000890.

[2] The Honorable Karl K. Sakamoto presided. The Honorable Virginia Lea Crandall entered an order addressing the renewed motion for attorneys' fees and costs and Final Judgment.

[3] The order also denied Locations's Hawai'i Rules of Civil Procedure (**HRCP**) *Rule 56(f)* request for discovery continuance.

(7) the December 9, 2016 Judgment;

(8) the December 28, 2016 "Order Granting in Part and Denying in Part [Gagnon and Prestige's] Motion for Award of Attorney's Fees and Costs [(**MFC**)] Against [Locations]"; and

(9) the December 28, 2016 "Order Denying [RE/MAX and Clawson's] Motion to Recover Attorneys' Fees and Costs Pursuant to [Hawaii Revised Statutes (**HRS**)] §§ 607-9, 607-14, and 607-14.5".
In CAAP-17-0000216, Locations appealed from
(1) the March 3, 2017 "Order Granting in Part and Denying in Part [RE/MAX and Clawson's] Renewed Motion for Award of Attorneys' Fees and Costs Against [Locations]"; and
(2) the March 22 2017 "Final Judgment".

Locations contends that the Circuit Court erroneously determined that the Agreement Not to Compete (**Non-Compete Clause**) contained as Paragraph 3 of the Confidentiality **[*3]** and Non-Competition Agreement (**CNA**) signed by Gagnon was invalid and unenforceable; improperly denied Locations leave to file a second amended complaint; abused its discretion in denying discovery; and abused its discretion in awarding attorneys' fees to RE/MAX and Clawson.

II.

A.

Locations is a real estate brokerage firm in Hawai'i. Gagnon started working in real estate in 1989, as a sales person, in New Hampshire. In 1999 she became a licensed real estate broker. From 2003 to 2008, Gagnon owned and operated a RE/MAX franchise in New Hampshire. Gagnon and her five children moved to Hawai'i from New Hampshire on July 1, 2008.

Locations offered and Gagnon accepted a "Sales Coach" position by letter dated August 6, 2008. As a Sales Coach, Gagnon mentored and monitored Locations's agents' engagement with the company, discussed Locations's agents' plans for business and personal challenges and assisted Locations's agents' growth as real estate sales professionals by developing sales skills, role playing, and setting sales goals and ways to achieve those goals. On August 8, 2008, Gagnon signed the CNA[4] that is at issue here.

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[4] CONFIDENTIALITY AND NON-COMPETITION AGREEMENT

THIS CONFIDENTIALITY AND NON-COMPETITION AGREEMENT (the "Agreement"), **[*4]** is made and entered into as of the date set forth below, by and between Prudential Locations Real Estate LLC, a [Hawai'i] limited liability company, the employer described below ("Company") and the employee described below ("Employee").

1. <u>Recitals</u>.

1.1 The primary business of the Company is to provide real estate brokerage and/or property management services in the State of [Hawai'i], hereinafter collectively referred to as the "Business".

1.2 The Business involves confidential and proprietary information and procedures and trade secrets of the Company and its subsidiaries, and such Information is a special, valuable and unique asset of the Business.

1.3 Employee is employed by the Company and will have access to such confidential and proprietary information, procedures and trade secrets of the Company.

1.4 Employee, in consideration of future employment, agrees to enter into this Agreement for the protection of the Business.

NOW, THEREFORE, the parties hereto, intending to be legally bound hereby, do promise and agree as follows:

On June 28, 2013, Gagnon submitted a resignation letter to Locations's Executive Vice President of Sales, Scott

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2. Confidentiality and Proprietary Rights. Employee acknowledges and agrees that he or she will have access to confidential and proprietary information and procedures **[*5]** and trade secrets of the Company and its subsidiaries, and that such information is a special, valuable and unique asset of the business of the Company and its subsidiaries. Employee further acknowledges and agrees that such confidential and proprietary Information and procedures and trade secrets belonging exclusively to the Company includes, without limitation, the following: (i) any information which is not generally known to the public which was or is used, developed, made or obtained by the Company or any of its subsidiaries or which otherwise came into possession of the Company or any of its subsidiaries or which relates to the Company or any of its subsidiaries, (ii) all memoranda, files, books, papers, letters, drawings, documents, formulas, specifications, investigations, and other processes data, and all copies thereof and therefrom, in any way relating to the Company or any of its subsidiaries, whether used, developed, made or obtained by the Company or any of its subsidiaries or which otherwise came into the possession of the Company or any of its subsidiaries; (iii) all information related to clients and customers, including without limitation, clients and customer lists, **[*6]** the identities of existing, past and prospective clients and customers, prices charged or proposed to be charged to any existing, past or prospective client or customer, client or customer contacts, special customer requirements, and all related information; (iv) sales and marketing strategies, plans, materials and techniques, research and development information, trade secrets and other know-how or other information pertaining to the financial condition, business, research and development or prospects of the Company or any of its subsidiaries; and (v) patterns, devices, compilations of information, copyrightable material and technical information, if any, in any way relating to the Company or any of its subsidiaries (hereinafter collectively referred to as the "Confidential Information").

2.1 Restriction on Use of Confidential Information. Employee agrees that, except in performance of duties under an employment arrangement with the Company, Employee **shall not** directly or indirectly, at any time or place, during his or her employment and at anytime after Employee ceases to be an employee for any reason whatsoever, use for his or her own benefit or for the benefit of any third party, **[*7]** or disclose to any third party, any Confidential Information acquired by reason of his or her status as an employee or former employee of the Company, including without limitation, Confidential Information belonging or relating to the Company or Its subsidiaries, affiliates and customers. Employee agrees that the duration, geographic area and scope of this provision is reasonably necessary for the protection of the Company and does not and will not impose undue hardship on Employee.

3. Agreement Not To Compete. Employee agrees that Employee shall not, directly or indirectly, within the State of [Hawai'i] where the Company conducts or has conducted business, during his or her employment and for a period of one (1) year after Employee ceases to be an employee for any reason whatsoever, (i) represent, furnish consulting services to, be employed by, or engage or participate in the same or similar business or businesses conducted by the Company, including without limitation, the Business, or perform services for third parties which are generally comparable or competitive with those performed by the Company with respect to the Business ("Comparable Services"), (ii) own or operate, or become **[*8]** proprietor, partner, principal, agent, consultant, employee, trustee, director, officer, stockholder or Investor, of any person, firm or business which engages or participates in the same or similar business or businesses conducted by the Company, including without limitation, the Business, or which performs Comparable Services, (iii) engage in any activity or conduct adverse to the Business or interests of the Company, or (iv) induce or encourage any other persons employed or affiliated with the Company to terminate their relationship with the Company. Notwithstanding the foregoing, Company agrees that the Employee may, independently or as an employee or independent contractor of an existing real estate brokerage company act as a real estate salesperson or broker/salesperson, and such conduct shall not constitute a violation of this paragraph (the "Permitted Activities"). Permitted Activities however shall not include (i) Employee's formation of a real estate brokerage company with other real estate salesperson(s), (ii) Employee's solicitation of other persons employed or affiliated with the Company.

4. Remedies of Company. Employee and Company hereby acknowledge and agree that the **[*9]** duration, scope and geographic area applicable to the restrictions set forth in this Agreement are fair, reasonable and necessary, and represent the area in which the goodwill associated with the conduct of the Business has been or will be developed by the Company. It is the intent of the parties that the provisions of this Agreement shall be enforced to the fullest extent permissible under the laws and public policies of the State of [Hawai'i]. Employee and Company agree that (i} a monetary remedy for a breach of this Agreement will be inadequate, and will be impracticable and extremely difficult to prove, and further agrees that such a breach would cause the Company irreparable harm, and that the Company shall be entitled to temporary and permanent injunctive relief without the necessity of proving actual damages, and (ii) the Company shall be entitled to such injunctive relief, including temporary restraining orders, preliminary injunctions and permanent injunctions, without the necessity of posting bond or other undertaking in connection therewith.

Higashi (**Higashi**). Gagnon's **[*10]** letter stated that her last day of employment would be July 3, 2013. According to Gagnon, she discussed her resignation with Higashi, who asked her to remain with Locations until August 15, 2013.

At some point in time, Gagnon and Clawson began discussing Gagnon opening a new RE/MAX franchise in Hawai'i. On July 3, 2013, Gagnon formally acknowledged receipt of a RE/MAX franchise disclosure document as a prospective RE/MAX franchisee.

On July 15, 2013, Gagnon and Kevin Tengan, who was the manager of Locations's technology department, entered into a RE/MAX franchise partnership agreement. On July 18, 2013, Gagnon, as registered agent and organizer, submitted Prestige's articles of organization to the Hawai'i Department of Commerce and Consumer Affairs (**DCCA**). On July 22, 2013, Gagnon, as a managing member of Prestige, submitted to DCCA an Application for Registration of Trade Name. Several days later, Tengan purchased several domain names for Prestige to develop websites for Oahu and Maui. On August 8, 2013, Gagnon and Tengan executed a RE/MAX franchise agreement.

On August 13, 2013, Gagnon informed Higashi that Sherri Au (**Au**), a Locations agent who had been one of Gagnon's mentees, was **[*11]** terminating her agency relationship with Locations. Gagnon's last day at Locations was August 15, 2013. On August 26, 2013, the Real Estate Commission of DCCA issued to Prestige a Notice of Licensure, authorizing "RE/MAX Prestige" to act as a real estate broker, effective August 15, 2013. Au was listed as the Principal Broker for Prestige in the application for licensure submitted on August 15, 2013. On September 1, 2013, Prestige opened its sole office in Hawai'i Kai.

B.

On August 23, 2013, Locations filed a complaint against Gagnon and Prestige, alleging breach of the CNA and tortious interference with contract by forming Prestige and encouraging others to leave Locations. On May 23, 2014, Locations filed its First Amended Complaint (**FAC**), which added tortious interference with contract claims against RE/MAX and Clawson.

On August 7, 2015, Locations filed a motion for leave to file the SAC to add an unfair method of competition claim against RE/MAX. On October 22, 2015, RE/MAX and Clawson filed their answer and cross-claim against Gagnon and Prestige.[5]

Following discovery, the parties filed MPSJs: on December 22, 2014, Locations filed an MPSJ against RE/MAX and Clawson for a determination **[*12]** that they tortiously interfered with Gagnon and Locations's CNA;[6] on November 17, 2015, Locations filed an MPSJ against Gagnon seeking enforcement of the Non-Compete Clause, a finding that she was in breach of the Non-Compete Clause, and damages; on July 11, 2016, Gagnon and Prestige filed their XMSJ for a determination that the Non-Compete Clause was invalid and unreasonable and that the Non-Solicitation Clause did not apply to agents or independent contractors; and on July 15, 2016, RE/MAX and Clawson filed a XMSJ for a determination that there was no tortious interference with Gagnon's CNA. At the hearing on August 3, 2016, the Circuit Court took these matters under advisement.

On August 23, 2016, Locations filed a notice of taking deposition upon oral examination of Burns (to whom Clawson reported) for September 14, 2016, in Merrillville, Indiana.

On August 25, 2016, the Circuit Court issued the FFCLOs. The court ruled that the Non-Compete Clause was illegal and unenforceable as a matter of law, and that the Non-Solicitation Clause was an illegal restraint on trade or

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(Emphasis in original).

[5] RE/MAX and Clawson also filed a third-party complaint against Tengan, which was later dismissed by stipulation.

[6] This motion was denied on March 2, 2015 but has not been included in this appeal.

commerce.[7] Locations then filed a motion to compel RE/MAX and Clawson to produce discovery and to produce for deposition Burns, Garrett Matthews (a RE/MAX consultant), and *HRCP Rule 30(b)(6)*[8] designated witness(es).

On September 2, 2016, RE/MAX filed a motion **[*13]** for protective order, arguing that after the Circuit Court's ruling on the MPSJs and XMSJs, no claim remained against RE/MAX and Locations's motion for leave to file a SAC to add an unfair method of competition claim against RE/MAX had not been decided, making discovery on this claim moot.

On November 1, 2016, the Circuit Court denied Plaintiff's motion for leave to file the SAC, explaining that the proposed SAC sought to reassert and relitigate claims identical to those asserted in the FAC, all of which had been dispositively adjudicated through the FFCLOs and, as a result, no claims or parties remained. As Locations's proposed claim for unfair method of competition against RE/MAX was predicated on the validity of the CNA between Locations and Gagnon and having already determined that the Non-Compete Clause was not reasonable and invalid and unenforceable, the Circuit Court ruled that any attempt to add an unfair method of competition claim would be futile and thus, moot.

On November 7, 2016, the Circuit Court granted RE/MAX's motion for protective order and consequently denied Locations's motion to compel.

On November 18, 2016, Gagnon and Prestige filed a MFC. RE/MAX and Clawson filed a MFC pursuant **[*14]** to *HRS §§ 607-9*, *607-14* and *607-14.5*.[9]

Judgment in favor of Defendants Gagnon, Prestige, RE/MAX, and Clawson and against Locations on all claims was entered on December 9, 2016.

On December 28, 2016, the Circuit Court denied without prejudice RE/MAX and Clawson's MFC. The court agreed that they were entitled to reasonable attorneys' fees pursuant to *HRS § 607-14* because the tortious interference claims asserted against them were derived from the breach of contract action against Gagnon and Prestige. However, the court found the requested amount was excessive and unreasonable, and there was insufficient evidence to establish that Locations's claims were frivolous under *HRS § 607-14.5*. The Circuit Court granted in part and denied in part Gagnon and Prestige's MFC, due to, *inter alia*, insufficient evidence to establish that Locations's claims were frivolous under *HRS § 607-14.5*.

Locations filed a timely notice of appeal from the Judgment on December 29, 2016.

On January 9, 2017, RE/MAX and Clawson filed a renewed MFC. A Final Judgment was entered on March 22, 2017, which incorporated the December 9, 2016 Judgment, the December 28, 2016 orders on fees and costs, and added a March 3, 2017 order granting in part and denying in part RE/MAX and Clawson's renewed **[*15]** request for fees and costs.

On March 23, 2017, Locations filed a notice of appeal from the March 22, 2017 Final Judgment.

III.

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[7] On September 8, 2016, seeking to vacate the FFCLOs, Locations filed a petition for writ of mandamus against Judge Sakamoto, which the Hawai'i Supreme Court denied.

[8] ***HRCP Rule 30(b)(6)*** covers subpoenas to persons designated by an organization to testify as to matters known or reasonably available to the organization.

[9] *HRS § 607-9* provides for taxable costs; *HRS § 607-14* provides for attorneys' fees to the prevailing party in all actions (1) in the nature of assumpsit, (2) on a promissory note, and (3) contract in writing, not to exceed 25 percent of the judgment; *HRS § 607-14.5* provides for attorneys' fees and costs to be paid by either party upon the court's specific finding that all or a portion of the party's claim or defense was frivolous.

Locations asserts that the Circuit Court:

(A) erred in granting summary judgment against Locations in ruling that the Non-Compete Clause: (1) is greater than required for the protection of Locations and that Locations lacks a legitimate interest in enforcing it; (2) imposes an undue hardship on Gagnon; (3) the harm to the public is outweighed by the benefit; and (4) the clause did not fit any of the exceptions listed in *HRS §480-4(c)* (Supp. 2019)[10] and is an illegal restraint on trade or commerce;

(B) erred in determining that all non-solicitation clauses are *per se* against public policy and illegal under *HRS § 480-4*;

(C) abused its discretion: (1) in delaying decision on Locations's motion for leave to file SAC over fourteen months and then denying it after ruling against Locations on summary judgment; (2) refusing to consider Locations's motions to compel; (3) instructing the parties that it would rule on the validity of the Non-Compete Clause on summary judgment prior to allowing discovery of RE/MAX; (4) granting RE/MAX's motion for protective order; (5) considering RE/MAX's untimely renewed MFC; (6) ruling that RE/MAX, **[*16]** who is the target of a tort claim, is entitled to attorney's fees under *HRS § 607-14*; (7) awarding uncapped attorney's fees to Defendants; and (8) denying Locations's *HRCP Rule 56(f)* request.

IV.

A. The Motions for Summary Judgment to Determine the Validity and Enforceability of the Non-Compete Clause

1.

In this case, the parties' motions for summary judgment turned on a single, legal determination: Whether the Non-Compete Clause was reasonable and enforceable, or whether it was an illegal restraint on trade, prohibited by *HRS § 480-4*.[11]

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[10] *HRS §480-4(c)* is set forth infra p. 10 n.11.

[11] *HRS § 480-4(a) through (c)* provides:

> ***§480-4*** **Combinations in restraint of trade**, **price-fixing [*17] and limitation of production prohibited**. (a) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the State, or in any section of this State is illegal.
>
> (b) Without limiting the generality of *subsection (a)*, no person, exclusive of members of a single business entity consisting of a sole proprietorship, partnership, trust, or corporation, shall agree, combine, or conspire with any other person or persons, or enter into, become a member of, or participate in, any understanding, arrangement, pool, or trust, to do, directly or indirectly, any of the following acts, in the State or any section of the State:
>
> (1) Fix, control, or maintain the price of any commodity;
>
> (2) Limit, control, or discontinue, the production, manufacture, or sale of any commodity for the purpose or with the result of fixing, controlling or maintaining its price;
>
> (3) Fix, control, or maintain, any standard of quality of any commodity for the purpose or with the result of fixing, controlling, or maintaining its price;

> *HN1*[] On review of a summary judgment proceeding, the standard to be applied by this court is identical to that employed by the trial court. Wright & Miller, Federal Practice and Procedure: Civil § 2716. This means that "the inferences to be drawn from the underlying facts alleged in the materials (such as depositions, answers to interrogatories, admissions and affidavits) considered by the court in making its determination must be viewed in the light most favorable to the party opposing the motion." *Gum v. Nakamura, 57 Haw. 39, 549 P.2d 471 (1976)*; *Aku v. Lewis, 52 Haw. 366, 477 P.2d 162 (1970)*; *Abraham v. S. E. Onorato Garages, 50 Haw. 628, 50 Haw. 639, 446 P.2d 821 (1968)*. Further, in considering the validity of the granting of summary judgment under *H.R.C.P. Rule 56(c)*, the appellate court must determine whether any genuine issue as to a material fact was raised and, if not raised, whether the moving party was entitled to judgment as a matter of law. *Abrahm v. Onorato Garages, supra.*

Technicolor, Inc. v. Traeger, 57 Haw. 113, 118-19, 551 P.2d 163, 168 (1976) (ellipsis omitted).

The Non-Compete Clause was part of the CNA drafted by Locations and signed by Gagnon, as a condition of her employment with Locations. As quoted, *supra* at n.4, the Non-Compete Clause forbade Gagnon, for one year after her employment with Locations ceased, in the State of Hawai'i, from performing the Business[12] or "Comparable Services"[13] of Locations for third parties; having virtually any relationship with a "person, firm or business" engaged in the same or similar Business or Comparable Services of Locations; engaging in any conduct adverse to Locations's interests; or inducing or encouraging anyone employed or affiliated with Locations to terminate their relationship with Locations. However, the Non-Compete Clause explicitly allowed Gagnon to act as a real estate salesperson or broker/salesperson for an existing company, so long as she did not form a brokerage company with other real estate salespersons or solicit other persons from Locations. **[*20]** Id.

HN2[] As a general rule, and as pertinent here, any contract that is in restraint of trade or commerce, is illegal. *HRS § 480-4(a)*. *HRS § 480-4* is a remedial statute, *Cieri v. Leticia Query Realty, Inc., 80 Hawai'i 54, 68, 905 P.2d 29, 43 (1995)*, and as such "should be liberally construed to suppress the perceived evil and advance the enacted remedy." *Kalima v. State, 111 Hawai'i 84, 100, 137 P.3d 990, 1006 (2006)* (internal quotation marks omitted).

> > (4) Refuse to deal with any other person or persons for the purpose of effecting any of the acts described in *paragraphs (1) to (3)*.
>
> (c) Notwithstanding *subsection (b)* and without limiting the **[*18]** application of *subsection (a)*, it shall be lawful for a person to enter into any of the following restrictive covenants or agreements ancillary to a legitimate purpose not violative of this chapter, unless the effect thereof may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State:
>
> > (1) A covenant or agreement by the transferor of a business not to compete within a reasonable area and within a reasonable period of time in connection with the sale of the business;
> >
> > (2) A covenant or agreement between partners not to compete with the partnership within a reasonable area and for a reasonable period of time upon the withdrawal of a partner from the partnership;
> >
> > (3) A covenant or agreement of the lessee to be restricted in the use of the leased premises to certain business or agricultural uses, or covenant or agreement of the lessee to be restricted in the use of the leased premises to certain business uses and of the lessor to be restricted in the use of premises reasonably proximate to any such leased premises to certain business uses;
> >
> > (4) A covenant or agreement by an employee or agent not to use the trade secrets of the employer or principal **[*19]** in competition with the employee's or agent's employer or principal, during the term of the agency or thereafter, or after the termination of employment, within such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent.

[12] Defined in the CNA as "real estate brokerage and/or property management services."

[13] Defined in the Non-Compete Clause as services "which are generally comparable or competitive with those performed by [Locations] with respect to the Business."

However, *HRS 480-4(c)* contains exceptions to the general rule. See n.11 *supra*. "Exceptions or exclusions to a remedial law are narrowly construed." *73 Am. Jur. 2d Statutes § 176*.

HN3[] In *Technicolor*, relying primarily on the legislative history of *HRS § 480-4*,[14] the Hawai'i Supreme Court concluded that the exceptions listed in *HRS § 480-4(c)* were not exclusive. Rather, restrictive covenants should be evaluated, "in much the same way that federal courts would, in *Section 1*[] Sherman Act Cases,[15] analyze such covenants." *Technicolor, 57 Haw. at 121-22, 551 P.2d at 170*. Thus, the Technicolor court adopted federal case analysis which applied a "rule of reason" test to determine the validity of restrictive covenants, which in turn considered three factors:

> Generally courts will find a restrictive covenant "not reasonable", and therefore invalid, if:
>
> > (i) it is greater than required for the protection of the person for whose benefit it is imposed; (ii) it imposes undue hardship on the person restricted; **or** (iii) its benefit to the covenantee **[*21]** is outweighed by injury to the public. . . .
>
> This "reasonableness analysis" is done by the court, as a matter of law[.]

Technicolor, 57 Haw. at 122, 551 P.2d at 170 (citation omitted, emphasis added).

2.

Taking these concepts in hand, we review the Non-Compete Clause at issue here.

The Non-Compete Clause prevents Gagnon from engaging in the types of business or services as that of Locations for third parties, for the duration of her employment through one year after leaving Locations, in the State of Hawai'i. Such an agreement not to compete is generally considered a restraint on trade which is prohibited by *HRS § 480-4* unless it qualifies for an exception under *HRS § 480-4(c)*, or it is considered "reasonable" as determined by the court. See *Technicolor, 57 Haw. at 120-22, 551 P.2d at 169-70* (the "'reasonableness analysis' is done by the court, as a matter of law.").

We conclude that the Non-Complete Clause is reasonable. First, it is not "greater than required for the protection" of Locations. Its geographical scope is limited to the State of Hawai'i, and then only where Locations conducts, or has conducted, business. Its one-year duration is no longer than other such covenants approved by Hawai'i courts. See *The 7's Enters. v. Rosario, 111 Hawai'i 484, 486, 143 P.3d 23, 25 (2006)* (three years); *Technicolor, 57 Haw. at 115, 551 P.2d at 166* (three years); see also *Merrill Lynch, Pierce, Fenner & Smith v. McClafferty, 287 F. Supp. 2d 1244 (D. Haw. 2003)* (one-year restriction was valid under Hawai'i law); *UARCO Inc. v. Lam, 18 F. Supp. 2d 1116 (D. Haw. 1998)* (two-year restriction was valid **[*22]** under Hawai'i law). Most importantly, the breadth of the services prohibited, which initially appears co-terminus with the services provided by Locations, was limited as it did not prevent Gagnon from acting as a real estate salesperson or broker/salesperson in Hawai'i, independently or as an employee or independent contractor for an existing real estate firm.

The Non-Compete Clause does not impose undue hardship. Gagnon was not prevented from earning a living -- as an independent broker/salesperson or an independent contractor for an established real estate firm -- from real estate sales or brokerage, beginning immediately after leaving Locations, so long as she did not solicit others affiliated with Locations.

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[14] See Conf Comm. Report No. 16 on H.B. 27, reprinted in 1961 House Journal at 1067, 1075 (advising that comparable provisions of federal antitrust laws would guide the interpretation and application in light of the economic and business conditions in this State).

[15] The Sherman Antitrust Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal[.]" ***Ch. 647, 26 Stat. 209 (1890)***, as amended, *15 U.S.C. § 1 (1970)*.

Finally, the benefit to Locations does not appear to be outweighed by injury to the public. The terms of the Non-Compete Clause do not deprive the public of Gagnon's services and expertise.

B. The Non-Solicitation Clause Is Valid

Locations argues that the Circuit Court erred in ruling the "Non-Solicitation Clause" contained within the Non-Compete Clause was illegal.

As quoted above, *supra* at n.4, Gagnon was prohibited, without exception, from inducing or encouraging persons employed or affiliated with Locations to terminate their association with Locations. ***HN4***[] Non-solicitation agreements can be lawful **[*23]** even under statutes which forbid non-compete covenants. 3 R. Callmann on Unfair Competition, Trademarks & Monopolies § 16.44 (4th ed. 1983). A non-solicitation clause is not a *per se* violation of federal ***antitrust law***, id. (citing *Aydin Corp. v. Loral Corp., 718 F.2d 897 (9th Cir. 1983))*.

In any event, under *Technicolor*, the non-solicitation clause is reasonable. Like the Non-Compete Clause, its geographic and temporal terms are no more than the anticompetitive provisions evaluated in other Hawai'i cases. Nor does the benefit of the Non-Solicitation Clause to Locations appear to deprive the public of these employees' or associates' services or expertise, which remain available to the public for the time they maintain their relationship with Locations, or if they choose to leave Locations without being solicited by Gagnon.

Thus, we conclude that the anti-solicitation clause was not prohibited by *HRS § 480-4*.

V.

For the foregoing reasons, we vacate the findings of fact, conclusions of law, and orders on the parties' motions for summary judgment, and remand this case to the Circuit Court for further proceedings. Because we hold that the CNA is valid and enforceable, the defendants are no longer the prevailing parties and we vacate the orders granting the defendants' respective motions for attorneys' fees and costs, without **[*24]** prejudice to any party moving for an award of attorneys' fees and/or costs at the appropriate time. We vacate the order denying Locations's motion to file a second amended complaint, without expressing any opinion on whether such a motion should be granted if renewed on remand. We vacate the discovery orders, without expressing any opinion on what discovery should be allowed or not allowed on remand.

DATED: Honolulu, Hawai'i, April 15, 2020.

/s/ Lisa M. Ginoza

Chief Judge

/s/ Alexa D.M. Fujise

Associate Judge

/s/ Keith K. Hiraoka

Associate Judge

Mt. Crest SRL, LLC v. Anheuser-Busch InBEV SA/NV

United States District Court for the Western District of Wisconsin

April 24, 2020, Decided; April 24, 2020, Filed

17-cv-595-jdp

Reporter

456 F. Supp. 3d 1059 *; 2020 U.S. Dist. LEXIS 72843 **; 2020-1 Trade Cas. (CCH) P81,195; 2020 WL 1974209

MOUNTAIN CREST SRL, LLC, Plaintiff, v. ANHEUSER-BUSCH InBEV SA/NV, individually and as successor to InBev SA/NV and Interbrew S.A. and MOLSON COORS BREWING COMPANY, individually and as successor to Molson Canada Inc., Defendants.

Prior History: *Mt. Crest SRL, LLC v. Anheuser-Busch InBEV SA/NV, 2018 U.S. Dist. LEXIS 83471, 2018 WL 2247224 (W.D. Wis., May 16, 2018)*

Core Terms

beer, defendants', boycott, group boycott, six-pack, allegations, court of appeals, Sherman Act, subsidiaries, act of state doctrine, anticompetitive, causation, practices, antitrust, immunity, antitrust violation, quotation, marks, restraint of trade, antitrust claim, reconsideration, conspiracy, brewers, sales, cooperative, challenges, marketing, motion to dismiss, unjust enrichment, Breweries

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Judges: JAMES D. PETERSON, District Judge.

Opinion by: JAMES D. PETERSON

Opinion

[*1062] OPINION and ORDER

Plaintiff Mountain Crest SRL, LLC, which owns and operates Minhas Brewery in Monroe, Wisconsin, is suing defendants Anheuser-Busch Imbrue SA/NV (ABI) and Molson **[**2]** Coors Brewing Company (Molson Coors) for alleged anticompetitive behavior in Ontario, Canada. The case is now on remand after the Court of Appeals for the Seventh Circuit affirmed in part and reversed in part the judgment dismissing all of Mountain Crest's claims. *See* *Mountain Crest SRL, LLC v. Anheuser-Busch InBev SA/NV, 937 F.3d 1067 (7th Cir. 2019)*.

This court dismissed the case under the act of state doctrine, which prohibits federal courts from invalidating the public acts of a foreign government. The court understood Mountain Crest's challenge to be limited to the so-called "six-pack rule," which prohibits some Ontario liquor stores **[*1063]** from selling larger packs of beer or offering discounts for buying multiple six-packs.[1] Because the six-pack rule is embodied in Ontario law, Liquor Control Act, R.S.O. 1990, c. L.18, § 10(3) (Can.), the act of state doctrine required dismissal.

The court of appeals agreed that the act of state doctrine required dismissal of Mountain Crest's challenge to the six-pack rule. But the court concluded that Mountain Crest was also challenging other conduct not implicated by the act of state doctrine. The court did not determine whether the other challenges should proceed but instead directed "the district court [to] address these claims in due **[**3]** course." *Id. at 1086*.

Now defendants have filed a new motion to dismiss all of the claims remanded by the court of appeals. Dkt. 75. For its part, Mountain Crest moves for reconsideration of the decision that its challenge to the six-pack rule is barred by the act of state doctrine, contending that a new bill by the Ontario legislature undermines that decision. Dkt. 73.

The court isn't persuaded that the bill cited by Mountain Crest requires reconsideration of the holding regarding the six-pack rule, so the court will deny Mountain Crest's motion. As for defendants' motion to dismiss, the court concludes that Mountain Crest hasn't stated a claim upon which relief may be granted. Some of Mountain Crest's claims arise out of injuries caused by the Ontario government's conduct, not defendants' conduct. And the remaining claims relate to conduct by an Ontario cooperative that is not a party to this case. Although Mountain Crest includes conclusory allegations in its complaint that defendants were involved in a conspiracy to control the cooperative to harm American beer exporters, conclusory allegations are not enough to state a claim, especially in a complex lawsuit involving alleged antitrust violations. **[**4]** So the court will grant defendants' motion to dismiss.

BACKGROUND

A full summary of Mountain Crest's allegations may be found in the court of appeals's decision, *Mountain Crest, 937 F.3d at 1069-77*, and in this court's decision granting defendants' original motion to dismiss, Dkt. 60, at 2-9, so only a brief overview of factual and regulatory background is provided here.

Under Ontario law, there are only two places that an individual may purchase beer for off-site consumption in Ontario: (1) stores operated by the Liquor Control Board of Ontario (LCBO); and (2) The Beer Store, which is operated by Brewers Retail Inc. (BRI). The LCBO is a government agency that regulates liquor sales. BRI is a cooperative of Ontario brewers. The primary members of BRI are Labatt Breweries of Canada and Molson Inc. (Canada), which each own 49 percent of the cooperative. Labatt is a subsidiary of defendant ABI and Molson is a subsidiary of defendant Molson Coors.

The LCBO controls the sale and delivery of beer at BRI stores and establishes specific terms and conditions related to the operation of such stores. When the Beer Store and an LCBO store are in the same community, their inventories differ. LCBO "ordinary" stores sell wine and spirits **[**5]** as well as beer in packages of six or fewer; the Beer Store may sell larger packages of beer. This arrangement was reflected in a 2000 agreement between BRI and LCBO and is now codified in a 2015 Ontario law.

[*1064] Mountain Crest entered the Ontario beer market in 2009. Since then, Mountain Crest alleges that its ability to sell its beer in Ontario has been unfairly restricted, both at LCBO stores and at the Beer Store. As for the LCBO, Mountain Crest says that the six-pack rule is harmful, especially to a "value beer" such as Mountain Crest, because it prevents Mountain Crest from offering discounts on purchases for larger quantities of beer. Mountain Crest says

[1] *See* Dkt. 60, at 10 n.3 ("[B]oth sides have assumed in their briefing that Mountain Crest's claims under the Sherman Act are limited to restrictions on selling larger packs of beer and pack-up pricing, so the court has made the same assumption.").

that defendants are responsible for the six-pack rule because they pressured the LCBO into adopting the rule, using tactics that are prohibited under ***antitrust law***. As for the Beer Store, Mountain Crest says that the stores are stocked and laid out in a way that discriminates against Mountain Crest and other American brands not owned by defendants.

MOTION FOR RECONSIDERATION

Mountain Crest seeks reconsideration of the portion of this court's decision that was affirmed by the court of appeals. Dkt. 73. Specifically, Mountain Crest says **[**6]** that the act of state doctrine has no application to this case in light of a bill passed by the Ontario legislature in June 2019.

The parties disagree about whether Mountain Crest is entitled to a consideration of the merits of its motion. Mountain Crest cites footnote 78 of the court of appeals's decision, in which the court declined to consider any effect that the bill might have, stating instead that "the most expeditious manner of evaluating this development is to permit the district court to address it on remand." *Mountain Crest, 937 F.3d at 1085*. Defendants don't directly address footnote 78, but they contend that Mountain Crest must still meet the requirements of either *Rule 59* or *Rule 60 of the Federal Rules of Civil Procedure* if it wants to disturb the judgment. *Rule 59* motions must be brought within 28 days of entering judgment, and *Rule 60* motions must be brought within one year or "within a reasonable time," depending on which provision is at issue. Defendants contend that Mountain Crest has failed to meet any of those deadlines.

Rule 59 and *Rule 60* apply only to final judgments. After the court of appeals remanded the case, "the earlier final judgment became interlocutory. What had been a judgment on all claims in the case became a judgment on only some claims. And without a *Rule 54* certification, **[**7]** that judgment was not final." *Carmody v. Bd. of Trustees of Univ. of Illinois, 893 F.3d 397, 408 (7th Cir. 2018)*. So the court need not determine whether Mountain Crest's motion complied with the time limits in *Rule 59* or *Rule 60*. Rather, the more appropriate question is whether reconsideration is permitted by the mandate rule and the law of the case doctrine, which "prohibit a district court from revisiting on remand any issues expressly or impliedly decided on appeal." *United States v. Fox, 783 F. App'x 630, 632 (7th Cir. 2019)*. In this case, the court of appeals did decide that the act of state doctrine precluded some of Mountain Crest's claims. But footnote 78 appears to give this court permission to consider the June 2019 bill, so that is what the court will do. *See also* *Carmody, 893 F.3d at 408* ("[T]he law-of-the-case doctrine may yield if an intervening change in the law, or some other special circumstance, warrants reexamining the claim." (internal quotation marks omitted)).

Mountain Crest attached a copy of the bill to its motion. Dkt. 73-1. The bill "enacted an amendment to the Liquor Control Act terminating the 2015 Agreement," but "[t]he effective date of the termination is to be announced by the province's Lieutenant Governor" and "this date has not yet been announced." *Mountain Crest, 937 F.3d at 1077*.

The court is not persuaded that a bill that has not been given legal effect **[**8]** is **[*1065]** enough to require a different result in this case. The court of appeals described the act of state doctrine as "a judicial rule that generally forbids an American court to question the act of a foreign sovereign that is lawful under that sovereign's laws." *Id. at 1080* (internal quotation marks omitted). The court articulated a two-part test for determining whether the doctrine applied in this case: (1) "whether the six-pack rule is attributable to the government of Ontario for the purposes of the act of state doctrine"; and (2) "whether a decision in Mountain Crest's favor would invalidate those acts." *Id. at 1083*. The court concluded that the answer to both questions was "yes."

The June 2019 bill, even once it takes effect, does not change the answer to either question. The six-pack rule is still attributable to the government of Ontario and a decision in Mountain Crest's favor would still invalidate acts of the Ontario government. Mountain Crest doesn't argue otherwise, and it doesn't point to any portion of the court of appeals's decision that is undermined by the bill. The court will deny Mountain Crest's motion for reconsideration.

MOTION TO DISMISS

Mountain Crest is raising claims under *Section 1* and *Section 2* of the **[**9]** Sherman Act as well as a claim for unjust enrichment under Wisconsin common law. *Section 1* applies to conspiracies in restraint of trade. *15 U.S.C. § 1*. *Section 2* applies to monopolies. *15 U.S.C. § 2*. Although *§ 1* and *§ 2* are criminal laws, "any person . . . injured in his business or property" because of a violation of those laws may bring a civil action. *15 U.S.C. § 15(a)*.

The court of appeals identified two types of conduct alleged in the complaint that are not barred by the act of state doctrine: (1) "antecedent and allegedly deliberate acts to bring about the six-pack rule"; and (2) "a pattern of other marketing and distribution practices that . . . disfavor[ed] American products, including Mountain Crest's product." *Mountain Crest, 937 F.3d at 1086*. Defendants' motion to dismiss challenges Mountain's Crest's claims based on both types of conduct.[2]

A. Acts leading up to the six-pack rule

The court of appeals identified three acts discussed in the complaint related to alleged attempts to promote the six-pack rule. First, Labatt Breweries of Canada and Molson Inc. (Canada) pressured the LCBO through a group boycott, restricting the supply of beer to the LCBO. Second, Anheuser-Busch and Molson Coors threatened **[*1066]** to sue the LCBO under the North American **[**10]** Free Trade Agreement. Third, BRI offered small ownership stakes to all Ontario-based brewers to dissuade them from opposing the six-pack rule. Although defendants seek dismissal of all three claims, Mountain Crest discusses only the group boycott in its opposition brief, so the court will assume that Mountain Crest has abandoned any challenges based on defendants' threat to sue or offer of ownership stakes.[3]

The court of appeals described the alleged boycott as follows: "Labatt and Molson refused to supply additional six packs of beer beyond what the LCBO already had, to provide packages of their beer in cases larger than a six pack, or to provide any beer in cans." *Mountain Crest, 937 F.3d at 1073*. Defendants' arguments for dismissing the group boycott claim focus on the LCBO's involvement: the boycott doesn't give rise to an antitrust claim against defendants because the boycott did not harm Mountain Crest, and the only alleged indirect harm—the six-pack rule—was imposed by the LCBO and the Ontario government, not defendants. Defendants rely on several related doctrines to make this argument.

1. *Noerr-Pennington* doctrine

Defendants invoke the *Noerr-Pennington* doctrine, which "extends absolute immunity under the antitrust **[**11]** laws to businesses and other associations when they join together to petition legislative bodies, administrative agencies, or courts for action that may have anticompetitive effects." *Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 841 (7th Cir. 2011)* (internal quotation marks and citations omitted).[4] Because Mountain Crest is alleging

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[2] In addition to challenging the merits of Mountain Crest's claims, defendants raise secondary and relatively brief arguments about whether the United States is the proper forum for this case under the doctrines of comity and forum non conveniens. But defendants' comity argument rests entirely on a test that neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has adopted. *See* *In re Vitamin C Antitrust Litig., 837 F.3d 175, 183 (2d Cir. 2016)*, *vacated and remanded sub nom.* *Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865 201 L. Ed. 2d 225 (2018)*. And defendants' forum non conveniens argument is not well developed. So the court concludes that defendants have not satisfied their "heavy burden" to show that Mountain Crest should have filed this case in Canada rather than in Mountain Crest's home district. *See* *In re Factor VIII or IX Concentrate Blood Products Litigation, 484 F.3d 951, 955-56 (7th Cir. 2007)* ("[W]hen the plaintiff has sued in his or her home forum, there is a strong presumption in favor of that choice. Under those circumstances, a defendant invoking forum non conveniens bears a heavy burden in opposing the plaintiff's chosen forum." (internal quotation marks, citations, and alterations omitted)).

[3] Even if Mountain Crest hadn't abandoned those aspects of its claim, the court would conclude that they fail for the same reasons as the challenge to the group boycott.

that defendants were using the boycott to influence the LCBO, defendants say that they are entitled to immunity under *Noerr-Pennington*.

Mountain Crest says that *Noerr-Pennington* doesn't apply when a defendant's conduct is a group boycott, citing *Federal Trade Commission. v. Superior Court Trial Lawyers Association, 493 U.S. 411, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990)* (*SCTLA*). Mountain Crest is right, but only to a point.

In *SCTLA*, an association of criminal defense lawyers refused to represent any more clients for the District of Columbia until the district enacted legislation that increased the lawyers' compensation. The federal government sued, contending that the association's conduct was a group boycott that qualified as a restraint of trade. The Supreme Court agreed and rejected the association's assertion of immunity under *Noerr-Pennington*. The Court explained that *Noerr-Pennington* applies when "the alleged restraint of trade was the intended *consequence* of public action;" it does not apply when a "boycott was the *means* by which [the **[**12]** defendants] sought to obtain favorable legislation." *Id. at 424-25*. Applying that principle to the case before it, the Court observed that "[t]he restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even **[*1067]** if no legislation had been enacted." *Id. at 425*.

SCTLA makes it clear that defendants aren't entitled to immunity for a claim based on harm caused by the alleged boycott itself. The Court of Appeals for the First Circuit has stated the rule succinctly: "private actors who conduct an economic boycott violate the Sherman Act and may be held responsible for direct marketplace injury caused by the boycott, even if the boycotters' ultimate goal is to obtain favorable state action." *Sandy River Nursing Care v. Aetna Cas., 985 F.2d 1138, 1142 (1st Cir. 1993)*. So if Mountain Crest could point to an injury caused by the boycott, it could seek damages for the boycott. But Mountain Crest hasn't done that. After all, the alleged boycott wasn't against Mountain Crest, it was against the LCBO. And the boycott involved defendants withholding their *own* products from the LCBO, not Mountain Crest's products. Mountain Crest identifies no way it suffered as a result of that alleged conduct. If anything, limiting **[**13]** the supply of defendants' beer would give Mountain Crest an opportunity to sell more beer to the LCBO.

As the court of appeals recognized, Mountain Crest's challenge to the boycott "raise[s] significant questions of causality." *Mountain Crest, 937 F.3d at 1086*. Mountain Crest's theory is not that it was harmed directly by the boycott but that the boycott induced the LCBO to enact the six-pack rule, which limited Mountain Crest's sales by preventing it from providing discounts for higher-volume sales. But Mountain Crest can't challenge the six-pack rule directly because of the act of state doctrine. So the question is whether Mountain Crest can maintain an antitrust claim based on an alleged group boycott that caused it no direct harm but that Mountain Crest says set off a chain of events that hurt Mountain Crest's sales in Ontario.

SCTLA provides little guidance in answering that question because there were no issues of causation in that case. The plaintiff was representing the interests of the District of Columbia, which was directly harmed by the group boycott. Other cases more similar to this one suggest that a private defendant cannot be held liable for an alleged antitrust violation when the harm was caused directly **[**14]** by the government, even if the defendant "improperly" influenced the government. In that situation, the government's conduct is a supervening cause that breaks the link between the defendant and any injury the plaintiff suffered. *See* *Associated Bodywork & Massage Professionals v. Am. Massage Therapy Ass'n, 897 F. Supp. 1116, 1120 (N.D. Ill. 1995)* ("Although Defendant may have encouraged the legislatures' actions, the choice to enact massage therapy regulations constituted an independent governmental choice, comprising a supervening 'cause,' and breaking the link between Defendant's actions and any injury Plaintiff may have suffered."); 1A Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** § 202c (4th ed. 2015).

Sandy River Nursing Care is a good example. In that case, the plaintiffs alleged that a group of insurance companies used a group boycott to coerce the state legislature into allowing them to charge higher rates for

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[4] The doctrine gets its name from two Supreme Court cases that applied it, *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*, and *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*.

workers' compensation insurance. When a group of employers sued the insurers for antitrust violations, the court concluded that the boycott was a restraint of trade and that *Noerr-Pennington* did not provide immunity for the boycott. But, as in this case, the plaintiffs in *Sandy River Nursing Care* weren't claiming damages for the boycott itself. *985 F.2d at 1143*. Rather, they contended that the boycott **[**15]** coerced the state legislature into allowing **[*1068]** higher rates, which the defendants then imposed. The court rejected that claim, holding that the legislation was an act of the legislature, not the insurers. The court also rejected the argument that the higher rates could be attributed to the insurers because they used "unlawful activity to coerce the favorable legislation," reasoning that the legislature's motive was irrelevant. *Id. at 1144*.

Sandy River Nursing Care is not identical to this case because the court relied on the principle that the "Sherman Act d[oes] not apply to anticompetitive restraints imposed by the States 'as an act of government.'" *Id.* (quoting *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991))*. But that principle, which is called "state action immunity," is similar to the act of state doctrine. Both doctrines rest on the principle that the Sherman Act doesn't reach conduct of a sovereign, whether domestic or foreign. The important point is the same: there is no liability under the Sherman Act when the "only anticompetitive injuries that [the plaintiff] complains of are the direct result of governmental action." *Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 17 F.3d 295, 300-01 (9th Cir. 1994)*.

This is not simply an issue of immunity. Rather, it is a basic question of causation. *See* Arreda & Hovenkamp ¶201a **[**16]** ("Setting aside the Constitution and the substantive meaning of the statute, when the anticompetitive harm results from the government action . . . then the government itself becomes the 'cause' of action."). The court in *Sessions Tank* recognized this. Allowing parties to assert antitrust claims for private conduct alleged to have caused the government to impose a restraint of trade "would entail deconstructing the decision-making process to ascertain what factors prompted the various governmental bodies to erect the anticompetitive barriers at issue." *Id. at 301*.

In this case, the deconstruction process would be complicated by an additional factor. Specifically, when Mountain Crest entered the Ontario market in 2009, it had already been nine years since the LCBO had officially adopted the six-pack rule in the 2000 agreement.[5] And Mountain Crest doesn't contend that defendants can be held liable for anything that happened before 2000. So this is not a situation in which the plaintiff is alleging that a group boycott caused the government to *adopt* an anticompetitive policy. In other words, Mountain Crest's theory is not that defendants' alleged group boycott caused any change in government policy; **[**17]** rather, Mountain Crest's theory is that the boycott persuaded the Ontario government to retain a policy that had already been in place for nearly a decade, if not longer. *See Hughes v. Liquor Control Bd. of Ontario*, 2018 CarswellOnt 3969, para. 157 (Can. Ont. S.C.J.) (WL) ("The LCBO would have needed the Provincial Government's approval to change this status quo, and the Government refused to grant such approval."). This makes the alleged causal connection between defendants' conduct and Mountain Crest's harm even more attenuated than in other cases involving the *Noerr-Pennington* doctrine.

[*1069] So Mountain Crest is correct that the *Noerr-Pennington* doctrine does not provide unequivocal support to defendants because, under *SCTLA*, a group boycott against the government is not entitled to immunity. But, as the other cases and authorities cited above demonstrate, *Noerr-Pennington* is about more than simply immunizing protected conduct. It is also a recognition of both the evidentiary and policy-based reasons for limiting antitrust liability when anticompetitive harm is the direct result of government action. Applying those reasons to the facts **[**18]** of this case supports a conclusion that Mountain Crest cannot maintain an antitrust claim against defendants based on the group boycott. But the court need not rest its decision on *Noerr-Pennington* because there are other causation doctrines that point to the same result.

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[5] In fact, as noted in one of the attachments to Mountain Crest's complaint, even in 2000, the LCBO recognized that the six-pack rule was "[c]onsistent with historical practice." Dkt. 49-14. *See also Hughes v. Liquor Control Bd. of Ontario*, 2018 CarswellOnt 3969, para. 157 (Can. Ont. S.C.J.) (WL) *aff'd* 145 O.R.3d 401 (Can. Ont. C.A.). ("The 2000 Beer Framework Agreement did not change much in the way that the LCBO and Brewers Retail each operated. . . . Both before and after the Agreement was adopted, government policy precluded the LCBO from selling 12-packs and 24-packs at Ordinary Stores.").

2. Other causation doctrines

Apart from their reliance on *Noerr-Pennington*, defendants say that there are three other causation-related problems for any antitrust claim based on the group boycott: (1) Mountain Crest's injury is not "fairly traceable" to defendants' conduct, as required by Article III of the Constitution; (2) Mountain Crest has not satisfied the requirements for an "antitrust injury," as required for its claims under both *§ 1* and *§ 2* of the Sherman Act; and (3) Mountain Crest has not satisfied the requirement in the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), *15 U.S.C. § 6a*, to allege a "direct" injury on domestic export commerce.

Defendants' first argument is about constitutional standing, which requires the litigant to show that he has suffered a concrete and particularized injury that is fairly traceable to the defendants' conduct and is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. Defendants rely on the proposition that **[**19]** the plaintiff's injury is not fairly traceable to the defendant if the injury is "the result of the independent action of some third party not before the court." *Id.* (internal quotation marks and alterations omitted). Defendants say that Mountain Crest's injury is the result of the LCBO, not defendants, so Mountain Crest doesn't have standing. Mountain Crest doesn't respond to this argument in its opposition brief; it doesn't address constitutional standing at all. That could be reason enough to dismiss this claim. *Kirksey v. R.J. Reynolds Tobacco Co., 168 F.3d 1039, 1041 (7th Cir. 1999)* ("If [courts] are given plausible reasons for dismissing a complaint, they are not going to do the plaintiff's research and try to discover whether there might be something to say against the defendants' reasoning.").

Having said that, the causation requirement for standing is fairly liberal; it doesn't require a showing of proximate cause. *See* *Bennett v. Spear, 520 U.S. 154, 169, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)* ("While . . . it does not suffice if the injury complained of is the result of the independent action of some third party not before the court, that does not exclude injury produced by determinative or coercive effect upon the action of someone else." (internal quotation marks and alterations omitted)). But even if the court assumes **[**20]** that Mountain Crest has standing to sue, that doesn't mean it meets the requirements to sue under the Sherman Act. *See* *McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., Inc., 937 F.3d 1056, 1063 (7th Cir. 2019)* (concluding that plaintiffs had standing but failed to prove causation under the Sherman Act).

Two causation requirements for antitrust claims are relevant to this analysis. **[*1070]** First, "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action," so courts have required "the plaintiff [to] demonstrate[] [a] direct link between the alleged antitrust violation and the claimed antitrust injury." *Id. at 1064* (internal quotation marks omitted). For example, in *McGarry and McGarry*, the court held that the plaintiff could not bring a claim under the Sherman Act because its alleged injury was "entirely derivative" of the injury of a third party, who the court said was "a more appropriate person to pursue the claim." Defendants make the same argument in this case, contending that Mountain Crest's injury is derivative of the injury to the LCBO, so the LCBO, as the target of the alleged group boycott, is the proper plaintiff, if any.

Second, the FTAIA imposes additional limits on Sherman Act claims that are based on anticompetitive conduct **[**21]** in a foreign country. For the purpose of this case, Mountain Crest must show that the group boycott had a "direct, substantial, and reasonably foreseeable effect" on exports from the United States. *15 U.S.C. § 6a(1)(B)*. "Direct" in this context means "proximate cause." *Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 856-57 (7th Cir. 2012)*. "Just as tort law cuts off recovery for those whose injuries are too remote from the cause of an injury, so does the FTAIA exclude from the Sherman Act foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce." *Id. at 857*. Defendants contend that the LCBO's six-pack rule, not the group boycott, was the proximate cause of the harm alleged by Mountain Crest in this case.

Again, Mountain Crest doesn't meaningfully respond to defendants' arguments on causation. It says that defendants committed "myriad" antitrust violations that were "independent of Ontario's regulatory scheme," Dkt. 85, at 23, but it doesn't explain how the group boycott harmed it other than as a barrier to removing the six-pack rule.

Mountain Crest also relies on United States v. Sisal Sales Corp., 274 U.S. 268, 47 S. Ct. 592, 71 L. Ed. 1042 (1927), for the proposition that defendants are not "absolve[d]" simply because "they were assisted by an act of state." Dkt. 85, at 23. But Mountain Crest is conflating issues. The court **[**22]** of appeals relied on *Sisal Sales* to hold that the act of state doctrine does not "bar an antitrust complaint where defendants took deliberate acts to bring about forbidden results simply because the anticompetitive conspiracy was aided by discriminatory legislation." Mountain Crest, 937 F.3d at 1085-86 (internal quotation marks and alterations omitted). This principle would allow Mountain Crest to bring a claim for an antitrust injury caused by the alleged group boycott. But Sisal Sales isn't about causation, and the facts of that case aren't helpful for Mountain Crest. The alleged harm in that case was a monopoly controlled by the defendant; the "discriminatory legislation" facilitated defendants' conduct but was not a direct cause of the harm.

Mountain Crest's only discussion in its brief of a "direct effect" is a reference to past litigation by Miller Brewing Company against Molson Coors, but Mountain Crest doesn't explain how that litigation is connected to the group boycott or to its own injuries.

The bottom line is that Mountain Crest hasn't pointed to any direct harm it suffered as the result of the group boycott. So the court will dismiss this claim with prejudice.

B. Marketing and distribution practices

Neither **[**23]** Mountain Crest's brief nor its complaint enumerates the marketing **[*1071]** and distribution practices it is challenging. But it doesn't take issue with the list provided by defendants: (1) BRI's failure to stock Mountain Crest's beer in sufficient quantities; (2) BRI's decision to give the store's top selling beers a more prominent display; (3) BRI's decision to discontinue its practice of allowing brewers to pay for in-store advertisements; (4) the layout of BRI's stores; and (5) fees charged to brewers by BRI. The court understands Mountain Crest to be challenging these practices under both § 1 and § 2 of the Sherman Act as restraints on trade and an attempt to create a monopoly.

Causation does not appear to be a problem with these challenged practices. Mountain Crest alleges that it was directly harmed, either through loss of sales, or, in the case of fees, as a result of direct payments. Defendants challenge these claims on numerous grounds, some of which apply only to a subset of the claims.[6] But a problem common to all of the claims is that Mountain Crest hasn't identified any participation by *defendants* in the alleged practices.

All of these claims relate to practices of BRI, a cooperative of **[**24]** Ontario brewers, not defendants. Mountain Crest alleges that BRI is controlled by Labatt Breweries of Canada and Molson Inc. (Canada), but even if BRI's conduct could be imputed to Labatt and Molson, those are Canadian subsidiaries of defendants. And it is well established that parent companies generally cannot be held liable for the conduct of their subsidiaries. *See* Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 820 (7th Cir. 2015) ("[C]orporate formalities should be respected unless one of the recognized justifications for piercing the veil, or otherwise deeming a parent and a subsidiary one, is present."); IDS Life Ins. Co. v. SunAmerica Life Ins. Co., 136 F.3d 537, 540 (7th Cir. 1998) ("Parents of wholly owned subsidiaries necessarily control, direct, and supervise the subsidiaries to some extent, but unless there is a basis for piercing the corporate veil and thus attributing the subsidiaries' torts to the parent, the parent is not liable for those torts.").

Mountain Crest devotes half of a page to its argument that it has "pled facts which directly implicate the named defendants." Dkt. 85, at 28. But instead of explaining how it has done that, it simply refers the court to "rows [of]

[6] For example, defendants say that BRI is an integrated joint venture, so it is "incapable" of engaging in a conspiracy; Mountain Crest has failed to define the relevant market; Mountain Crest hasn't identified an agreement that is "per se" illegal; a joint monopolization claim is not cognizable under § 2 of the Sherman Act; and the complaint includes no facts showing an intent to monopolize. Dkt. 76, at 34-42.

citations" in the complaint without elaboration. *Id* (citing ¶¶ 25-26, 79, 82-84, 86-88, 90, 98, 110-112, 118, 130, 142-145, ¶ 147-50, 152-154, **[**25]** 160, 162, 166, 168, 177-178, 180-183, 187, 192-195, 197-98, 201-03, 206, 210, 213). "It is not the job of this court to develop arguments" for the parties. *Fabriko Acquisition Corp. v. Prokos, 536 F.3d 605, 609 (7th Cir. 2008)*. *See also McKevitt v. Pallasch,* *339 F.3d 530, 533 (7th Cir. 2003)* (string cite unaccompanied by explanation not sufficient to preserve argument). In their opening brief, defendants went through the allegations in the complaint, explaining why they believed that the allegations weren't sufficient to show defendants' involvement. To support a contrary view, Mountain Crest must do more than direct defendants and the court to review the 93-page complaint again.

In any event, the paragraphs cited by Mountain Crest do not tie defendants to the alleged marketing and distribution **[*1072]** practices, let alone identify an agreement between defendants to adopt those practices. Rather, the vast majority of the allegations relate to attempts to influence the LCBO or the decision to offer ownership interests in the BRI to smaller Ontario breweries. Mountain Crest doesn't point to any allegations describing a conspiracy between defendants directing BRI to understock certain brands, to change the layout of its stores, or to charge importers a discriminatory fee.

Mountain Crest does cite some allegations about **[**26]** defendants' involvement that are broad enough to include the marketing and distribution practices. For example, Mountain Crest alleges that executives for defendants "conspired . . . to continue and enforce the restraints on U.S. export sales to Ontario," Dkt. 49, ¶ 160, "worked closely . . . on maintaining their price fixing and market allocation restraints to limit competing brewers' ability to export beer to Ontario," *id.*, ¶ 181, and "conspired to continue and enforce the restraints, "*id.*, ¶ 187. But those allegations are so broad and conclusory that they cannot be accepted as true.

It is well established that legal conclusions are not enough to satisfy federal pleading standards. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). "[A] complaint must be dismissed unless it contains a plausible claim." *Bank of Am., N.A. v. Knight, 725 F.3d 815, 818 (7th Cir. 2013)*. This means that the complaint "must actually suggest that the plaintiff has a right to relief, by providing allegations that raise a right to relief above the speculative level." *Windy City Metal Fabricators & Supply, Inc. v. CIT Technical Financing Services, Inc., 536 F.3d 663, 667-68 (7th Cir. 2008)* (internal quotation marks omitted).

Courts apply the plausibility requirement with added rigor in the context of complex cases: "[t]he **[**27]** required level of factual specificity rises with the complexity of the claim." *McCauley v. City of Chicago, 671 F.3d 611, 616-17 (7th Cir. 2011)*. This is in part because of the added burdens associated with defending a complex claim. *Stark Trading v. Falconbridge Ltd., 552 F.3d 568, 574 (7th Cir. 2009)* ("[T]he complaint in a complex case must, to avert dismissal for failure to state a claim, include sufficient allegations to enable a judgment that the claim has enough possible merit to warrant the protracted litigation likely to ensue from denying a motion to dismiss."); *Limestone Dev. Corp. v. Vill. of Lemont, Ill., 520 F.3d 797, 802-03* (7th Cir. 2008 ("[A] defendant should not be forced to undergo costly discovery unless the complaint contains enough detail, factual or argumentative, to indicate that the plaintiff has a substantial case."). Conspiracy allegations are also reviewed carefully because they are so easy to allege and so hard to prove. *See* *Cooney v. Rossiter, 583 F.3d 967, 970-71 (7th Cir. 2009)*. Even at the pleading stage, it is "essential to show that a particular defendant joined the conspiracy and knew of its scope." *Knight, 725 F.3d at 818*.

It was an antitrust case that gave rise to the plausibility requirement. *See* *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In *Twombly*, the Court could not have been clearer: "a bare assertion of conspiracy will not suffice." *Id. at 556*. Because that is all that Mountain Crest offers in this case, it has not stated a plausible claim.

Mountain Crest identifies **[**28]** two other theories in its complaint for holding defendants liable. First, Mountain Crest invokes **[*1073]** the concept of "enterprise liability," under which parents and subsidiaries can be viewed as a single "enterprise" for the purpose of antitrust violations. But Mountain Crest doesn't respond to defendants' argument that no court has recognized such a theory under the Sherman Act, and Mountain Crest doesn't explain in its brief why the court should adopt the theory in this case. Second, Mountain Crest refers to "single-factor piercing" of the corporate veil, Dkt. 49, ¶ 237, without explaining what that means. But Mountain Crest doesn't attempt to defend that theory in its brief. Instead, it insists that "none of [its] allegations are aimed at any of Defendants' subsidiaries." Dkt. 85, at 28. So the court concludes that Mountain Crest has abandoned both of these theories, and the court declines to consider them.

When a plaintiff fails to plead adequate facts, the general rule is that a plaintiff should have at least one opportunity to amend its complaint. But Mountain Crest has already amended its complaint twice. *See* Dkt. 30 and Dkt. 49. It did not ask for leave to amend its complaint after **[**29]** the remand, and it does not request leave to amend now. Under these circumstances, the court sees no reason to give Mountain Crest leave to replead. *See Alarm Detection Sys., Inc. v. Vill. of Schaumburg, 930 F.3d 812, 829 (7th Cir. 2019)* (plaintiffs "have never requested leave to amend," so "[t]hey . . . waived any right to replead"). The court will dismiss these claims with prejudice.

C. Unjust enrichment

This leaves Mountain Crest's claim for unjust enrichment under Wisconsin common law. That claim has three elements: (1) the plaintiff conferred a benefit upon the defendant; (2) the defendant had an appreciation or knowledge of the benefit; and (3) the defendant accepted or retained the benefit under circumstances making it inequitable for the defendant to retain the benefit without payment of its value. *Buckett v. Jante, 2009 WI App 55, ¶ 10, 316 Wis. 2d 804, 812, 767 N.W.2d 376, 380*. Mountain Crest alleges that it conferred a benefit on "defendants" by paying listing fees to BRI and that it would be inequitable to allow defendants to keep the fees because of the alleged restraints of trade alleged in the complaint.

Defendants contend that the unjust enrichment claim must be dismissed if the antitrust claims are dismissed because the alleged antitrust violations are Mountain Crest's only basis for contending that defendants were unjustly enriched. **[**30]** Mountain Crest doesn't respond to this argument. In any event, the fees at issue in this claim went to BRI, not defendants, so defendants are not a proper party. *See State Mech. Servs., LLC v. NES Equip. Servs. Corp., No. 17-cv-5950, 2018 U.S. Dist. LEXIS 80584, 2018 WL 2193248, at *5 (N.D. Ill. May 14, 2018)* (plaintiff may not sue parent company for benefit conferred on subsidiary). The court will dismiss this claim as well.

D. Conclusion

The allegations in the complaint make it clear that Mountain Crest's claims relate solely to events in Canada and conduct by Canadian entities that are not before this court. The alleged group boycott by defendants did not cause Mountain Crest any harm. Rather, the harm Mountain Crest is complaining about is the direct result of decisions by the Ontario government. And the marketing and distribution policies at the Beer Store were put in place by BRI, which is controlled by defendants' subsidiaries, not defendants. So Mountain Crest has sued the wrong parties.

Mountain Crest may have had good reasons for not bringing claims against a foreign provincial government, an Ontario **[*1074]** cooperative, and defendants' Canadian subsidiaries. But whatever substantive or procedural barriers those claims would have faced, it does not give Mountain **[**31]** Crest a cause of action against defendants. Mountain Crest hasn't plausibly alleged that defendants caused it any harm, so the court will dismiss the complaint with prejudice.

ORDER

IT IS ORDERED that:

1. Plaintiff Mountain Crest SRL, LLC's motion for reconsideration, Dkt. 73, is DENIED.
2. The motion to dismiss filed by defendants Anheuser-Busch InBev SA/NV and Molson Coors Brewing Compan, Dkt. 76, is GRANTED, and this case is DISMISSED with prejudice.
3. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered April 24, 2020.

BY THE COURT:

/s/ JAMES D. PETERSON

District Judge

LexisNexis

Simon & Simon, PC v. Align Tech., Inc.

United States District Court for the District of Delaware

April 24, 2020, Decided; April 24, 2020, Filed

C.A. No. 19-506 (LPS)

Reporter
2020 U.S. Dist. LEXIS 72499 *; 2020 WL 1975139

SIMON AND SIMON, PC d/b/a CITY SMILES, Plaintiff, v. ALIGN TECHNOLOGY, INC., Defendant.

Prior History: Simon & Simon v. Align Tech., Inc., 2019 U.S. Dist. LEXIS 178125 (D. Del., Oct. 15, 2019)

Core Terms

Align, scanner, iTero, anticompetitive conduct, anticompetitive, monopoly, antitrust, bundled, dental, discounts, scans, allegations, leveraging, rival, monopolization, manufacturers, termination, orders, competitors, digital, prices, impression, Recommendation, patient's, parties, fails, teeth, motion to dismiss, general rule, circumstances

Counsel: **[*1]** For Simon and Simon, PC, individually and on behalf of all others similarly situated, doing business as, City Smiles, Plaintiff: Jessica Zeldin, LEAD ATTORNEY, Andrews & Springer LLC, Wilmington, DE; Daniel E. Rubenstein, PRO HAC VICE; Daniel J. Walker, PRO HAC VICE; Eric L. Cramer, PRO HAC VICE; John D. Radice, PRO HAC VICE; Rishi Raithatha, PRO HAC VICE.

For Align Technology, Inc., Defendant: Abigail H. Wald, PRO HAC VICE; Grant N. Margeson, PRO HAC VICE; Nathan Roger Hoeschen, Shaw Keller LLP, Wilmington, DE; Noah B. Pinegar, PRO HAC VICE; Thomas Brown, PRO HAC VICE; Thomas A. Counts, PRO HAC VICE.

Judges: Honorable Jennifer L. Hall, United States Magistrate Judge.

Opinion by: Jennifer L. Hall

Opinion

REPORT AND RECOMMENDATION

This is an antitrust case. Plaintiff Simon and Simon, PC d/b/a City Smiles ("City Smiles" or "Plaintiff") filed this class action suit against Defendant Align Technology, Inc. ("Align" or "Defendant") on March 14, 2019, alleging violations of *Section 2 of the Sherman Act, 15 U.S.C. § 2*. (D.I. 1.) Align sells the Invisalign system, an orthodontic treatment for straightening teeth without metal braces. It involves the use of custom-made, plastic dental aligners. To make the aligners, Align requires a dental professional **[*2]** to obtain an impression of the patient's teeth and transmit that impression to Align. One way to take an impression is with a digital intraoral scanner. In September 2015, Align introduced a scanner called the iTero Element, which can be used to order Invisalign from Align. City Smiles purchased Align's iTero Element scanner in December 2016 and has prescribed Invisalign to its patients.

Pending before the Court is Align's motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* or, in the alternative, to transfer the case to the Northern District of California. (D.I. 6.) Because City Smiles has failed to allege acts that—taken individually or together— constitute anticompetitive conduct, I recommend that Align's motion to dismiss be GRANTED.[1]

I. BACKGROUND[2]

Defendant Align is a Delaware corporation that sells Invisalign, a system of clear plastic aligners for straightening teeth. (D.I. 1 ¶¶ 31, 40.) As of September 2018, Invisalign's share of the United States aligner market was over 80%. (*Id.* ¶ 41.)

Invisalign aligners are custom made and must be obtained from dental professionals, who order them from Align. (*Id.* ¶¶ 43-45.) To order Invisalign, a dental professional must send an impression of a patient's **[*3]** teeth to Align. (*Id.* ¶¶ 50-51.) In 2015, Align introduced the iTero Element digital intraoral scanner, which can be used to obtain a digital impression for ordering aligners. (*Id.* ¶¶ 49-50.) The iTero Element scanner is another market leader, accounting for over 80% of the scanner market in the United States in 2017. (*Id.* ¶ 71.) Non-party 3Shape Trios A/S is a Danish corporation that produces the Trios, another digital intraoral scanner that can be used to order aligners. (*Id.* ¶¶ 32, 53.) 3Shape started selling the Trios in the United States in 2012. (*Id.* ¶ 48.)

Plaintiff City Smiles is a dental practice in Chicago, Illinois that prescribes aligners to its patients. (*Id.* ¶ 30.) City Smiles purchased an iTero Element scanner from Align in 2016 and purchased Invisalign for multiple patients between 2015 and 2018. (*Id.*)

The Complaint takes issue with two categories of conduct by Align that, Plaintiff contends, amount to an anticompetitive scheme to monopolize both the scanner and the aligner markets. The first relates to the criteria under which Align accepts orders for Invisalign. (*Id.* ¶ 80.) A dental professional can order Invisalign by sending Align a physical impression of a patient's **[*4]** teeth, for example, by creating a silicone mold. The Complaint alleges that silicone molds "are burdensome and inefficient and not an acceptable substitute for a proper Scanner." (*Id.* ¶ 68.)

Alternatively, a dental professional can order Invisalign by using the iTero Element scanner and sending Align a digital impression. (*Id.* ¶ 52.) For a fifteen-month period in 2016 to 2018, Align also accepted digital scans sent directly from 3Shape's Trios scanners, pursuant to an agreement between Align and 3Shape (the "Interoperability Agreement").[3] (*Id.* ¶¶ 55-56, 58, 64-65.) Pursuant to the Interoperability Agreement, Trios scanners were used to place over 40,000 Invisalign orders. (*Id.* ¶ 56.) In January 2018, shortly after Align filed four patent infringement

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[1] On October 15, 2019, I issued a Report and Recommendation recommending that the Court grant Defendant's motion to dismiss. (D.I. 17.) In my Report and Recommendation, I cited a decision from the Northern District of Illinois, *Viamedia, Inc. v. Comcast Corp., No. 16-5486, 2017 U.S. Dist. LEXIS 24213, 2017 WL 698681, at *5-6 (N.D. Ill. Feb. 22, 2017)*. Plaintiff filed an objection to my Report and Recommendation (D.I. 18) and Defendant responded (D.I. 20).

On February 24, 2020, after I issued my original Report and Recommendation, the Seventh Circuit reversed the district court's decision in *Viamedia. 951 F.3d 429 (7th Cir. 2020)*. On March 9, 2020, Chief Judge Stark referred proceedings on Defendant's motion to dismiss back to me "to evaluate the impact, if any, of the Seventh Circuit's decision in *Viamedia*" before he "address[ed] the pending motion and objections to the Report and Recommendation." (D.I. 25.) On March 10, 2020, I requested supplemental briefing regarding *Viamedia*. Plaintiff filed a brief on March 27, 2020 (D.I. 26), and Defendant filed a brief on April 9, 2020 (D.I. 28). Having reviewed the parties' briefs, I now issue a revised Report and Recommendation. My recommendation to GRANT Defendant's motion to dismiss remains the same.

[2] I assume the facts alleged in the Complaint to be true for purposes of resolving this motion. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

[3] 3Shape sold the Trios scanner in the United States for approximately four years without an Interoperability Agreement with Align. (*See* D.I. 1 ¶¶ 48, 55.)

lawsuits against 3Shape relating to the Trios scanner, Align terminated the Interoperability Agreement and stopped accepting scans sent directly from Trios scanners. (*Id.* ¶ 16; *see* Nos. 17-1646, -1647, -1648, -1649 (D. Del.).)

Align also accepts digital scans from scanners made by two other manufacturers: 3M's True Definition and Dentsply Sirona's CEREC Omnicam. (D.I. 1 ¶¶ 50, 57, 94-95.) According to the Complaint, however, those scanners **[*5]** are designed to scan individual teeth and are unsuitable for making aligners. (*Id.*) Thus, according to the Complaint, a scanner is the only "acceptable" way to order aligners, and Align's iTero Element and 3Shape's Trios are the only "suitable" scanners. (*Id.* ¶ 68.) Since Align no longer accepts Invisalign orders from Trios scanners, the only "viable" way to order Invisalign-brand aligners is to use Align's iTero Element. (*Id.*)

The second category of challenged conduct relates to the design of the iTero Element. (*Id.* ¶ 81.) Align designed the iTero Element with the capability to send digital scans directly to Align for orders of Invisalign. (*Id.* ¶ 52.) The iTero Element cannot send scans directly to Align's competitors in the aligner market. If a dental professional wants to send a scan taken by the iTero Element to another aligner manufacturer, the dental professional must pay a fee to Align to convert the scan into another format. (*Id.*) The Complaint does not provide any further information about the fees.

According to City Smiles, those two categories of conduct by Align—(1) Align's refusal to accept scans from the Trios scanner for Invisalign orders and (2) the design of Align's **[*6]** scanner— operate as "a de facto bundle by making it impracticable for Dental Practices to sell Invisalign without an iTero Scanner, or for Dental Practices with an iTero Scanner to sell other Aligners." (*Id.* ¶¶ 103, 107, 117.) City Smiles alleges that Align's actions have harmed competition in the scanner and aligner markets, "resulting in higher prices, reduced competition, and reduced product choice." (*Id.* ¶¶ 82-83.) According to City Smiles, it was injured as a direct result of its purchase of an iTero Element scanner in 2016 and the numerous Invisalign orders it made between 2015 and 2018, all at "artificially inflated" prices. (*Id.* ¶¶ 10, 30.)

City Smiles' Complaint sets forth the following claims: monopolization of the clear aligner market under *Section 2 of the Sherman Act*, *15 U.S.C. § 2* (Count 1); and monopolization of the market for scanners for orthodontic treatment under *Section 2 of the Sherman Act* (Count 2). (*Id.* ¶¶ 104-123.) City Smiles seeks treble damages and injunctive relief under *Sections 4* and *16 of the Clayton Act*, respectively. (*Id.*)

Align filed the pending motion to dismiss on April 5, 2019 (D.I. 6), and the parties completed the briefing on May 10, 2019. (D.I. 7, 12, 13.) Align requested oral argument **[*7]** (D.I. 14), and I heard oral argument on August 1, 2019. ("Tr. __".) At the Court's request, City Smiles filed a supplemental brief on March 27, 2020 (D.I. 26), and Align filed a supplemental brief on April 9, 2020 (D.I. 28).

II. LEGAL STANDARDS

A defendant may move to dismiss a complaint under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is plausible on its face when the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A possibility of relief is not enough. *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly, 550 U.S. at 557*). In determining the sufficiency of the complaint under the plausibility standard, all "well-pleaded facts" are assumed to be true, but legal conclusions are not. *Id. at 679*.

"[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, **[*8]** this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly, 550 U.S. at 558* (internal marks omitted). "Antitrust claims in particular must be reviewed carefully at the pleading stage because false condemnation of competitive conduct threatens to 'chill the very conduct the antitrust laws are designed to protect.'" *In re Keurig Green Mt. Single-serve Coffee Antitrust Litig., 383 F. Supp. 3d 187, 218 (S.D.N.Y. 2019)* (quoting *Verizon Commc'ns., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004))*. However, the same *Twombly* plausibility standard applies. *W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 98 (3d Cir. 2010)* ("[I]t is inappropriate to apply Twombly's plausibility standard with extra bite in antitrust and other complex cases.").

III. DISCUSSION

Section 2 of the Sherman Act, *15 U.S.C. § 2*, makes it unlawful to "monopolize" or "attempt to monopolize."[4] It does not prohibit monopolies. Indeed, the possession of monopoly power is not only legal, "it is an important element of the free-market system." *Trinko, 540 U.S. at 407* ("The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth.").

A *Section 2* plaintiff must therefore do more than just prove a monopoly. To succeed on a monopolization claim, the plaintiff must demonstrate both (1) the defendant's possession of monopoly power in a relevant **[*9]** market and (2) anticompetitive conduct. *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007)*. A private plaintiff (as opposed to a government plaintiff) must also demonstrate that it suffered injuries caused by the defendant's anticompetitive conduct. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 281 (3d Cir. 2012)*.

Align argues that the Complaint fails to plausibly allege anticompetitive conduct. I agree.

Anticompetitive conduct is "generally defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits." *Broadcom, 501 F.3d at 308*. On the other hand, "[c]onduct that merely harms competitors, . . . while not harming the competitive process itself, is not anticompetitive." *Id.*; *W. Penn, 627 F.3d at 108* ("The line between anticompetitive conduct and vigorous competition is sometimes blurry, but distinguishing between the two is critical, because the Sherman Act 'directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.'" (quoting *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*.

"'Anticompetitive conduct can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties.'" *LePage's Inc. v. 3M, 324 F.3d 141, 152 (3d Cir. 2003)* (quoting *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087, 331 U.S. App. D.C. 226 (D.C. Cir. 1998))*. Examples of agreements that may constitute anticompetitive conduct under **[*10]** *Section 2* include conspiracies to exclude a rival, *W. Penn, 627 F.3d at 109*, exclusive dealing arrangements, *United States v. Dentsply, 399 F.3d 181, 187 (3d Cir. 2005)*, and tying agreements, *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 483, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*.

As a general rule, however, "purely unilateral conduct does not run afoul of *section 2* — 'businesses are free to choose' whether or not to do business with others and free to assign what prices they hope to secure for their own products." *Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072 (10th Cir. 2013)* (citing *Pac. Bell Tel. Co. v. linkLine Commc'ns, 555 U.S. 438, 448, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009))*; *see also* *Trinko, 540 U.S. at 408* ("[A]s a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will

[4] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." *15 U.S.C. § 2*.

deal.'" (quoting *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919))*; *Broadcom, 501 F.3d at 316* ("A firm is generally under no obligation to cooperate with its rivals.").

But general rules generally have exceptions, and the rule protecting unilateral conduct does too. One exception is predatory pricing. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-23, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*. A more controversial exception (albeit one recognized in the Third Circuit) is bundled discounts. *LePage's, 324 F.3d at 154-58*. Another is antitrust duty to deal. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600-01, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. Courts also recognize that deceptive or bad faith conduct can be anticompetitive. *See* *Broadcom, 501 F.3d at 314* (patentee's deception of a standards setting organization can be anticompetitive); *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* ("*PRE*") (sham litigation can be anticompetitive). **[*11]** There are legal rules that govern the application of each of these exceptions.

As explained above, the Complaint in this case sets forth two categories of conduct that, City Smiles alleges, are anticompetitive: (1) Align's refusal to accept Invisalign aligner orders sent from 3Shape's Trios scanner and (2) Align's design of its iTero scanner (to make it easier and cheaper to order Invisalign aligners than aligners made by its competitors). For the reasons set forth below, I agree with Align that those actions do not constitute actionable anticompetitive conduct, viewed either alone or together.

A. Refusal to Accept Scans from 3Shape's Trios

As explained above, a firm generally has no duty to cooperate with its rivals. Firms can usually choose to do business with their rivals or they can choose not to, and they can change their minds. *See* *linkLine, 555 U.S. at 448* ("As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing."); *Christy Sports, LLC v. Deer Valley Resort Co., Ltd., 555 F.3d 1188, 1198 (10th Cir. 2009)* ("The antitrust laws should not be allowed to stifle a business's ability to experiment in how it operates, nor forbid it to change course upon discovering a preferable path."); *Olympia Equipment Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 376 (7th Cir. 1986)* ("If a monopolist **[*12]** does extend a helping hand, though not required to do so, and later withdraws it as happened in this case, does he incur antitrust liability? We think not."). Thus, the mere termination of a contract with a rival does not constitute anticompetitive conduct. *See, e.g.,* *In re Adderall XR Antitrust Litig., 754 F.3d 128, 135 (2d Cir. 2014)* ("The mere existence of a contractual duty to supply goods does not by itself give rise to an antitrust 'duty to deal.'"); *Insight Equity A.P. X, LP v. Transitions Optical, Inc., No. 10-635, 2016 U.S. Dist. LEXIS 85751, 2016 WL 3610155, at *13 (D. Del. July 1, 2016)*.

Here, Plaintiff challenges Align's termination of the Interoperability Agreement with 3Shape. If there is any requirement that Align cooperate with 3Shape, it must fall under the narrow refusal to deal doctrine created by the Supreme Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. In that case, the plaintiff and defendant ski operators had previously cooperated to offer joint passes to both companies' mountains, until the defendant terminated the arrangement. *Id. at 587-95*. When the plaintiff tried to recreate the multi-mountain pass by offering to pay the defendant market price for its tickets, the defendant refused. *Id. at 593-94*.

The Supreme Court affirmed a jury verdict finding that the defendant's termination of the arrangement was anticompetitive and violated *Section 2*. While *Aspen* could be interpreted **[*13]** to require a competitor to continue to engage in a pre-existing course of dealing once it starts, the Supreme Court has since held that *Aspen* "is at or near the outer boundary of *§ 2* liability." *Trinko, 540 U.S. at 409*. To proceed under the limited duty to deal exception created by *Aspen*, not only must the plaintiff show a pre-existing business relationship with the defendant, the circumstances surrounding the termination of that relationship must "suggest[] a willingness to forsake shortterm profits to achieve an anticompetitive end." *Trinko, 540 U.S. at 409*.

In *Aspen*, the circumstances suggested that the preexisting joint ticket arrangement was profitable for the defendant, and the defendant was unwilling to renew the ticket even if compensated at its own retail price. *472 U.S. at 589-94*; *Trinko, 540 U.S. at 409*. Those facts permitted an inference that the defendant acted solely to reduce the value of the plaintiff's ski mountain and force it to sell. *Trinko, 540 U.S. at 409*. In other words, the defendant's conduct was "irrational but for its anticompetitive effect." *Novell, 731 F.3d at 1075*; *see also* Areeda & Hovencamp, ***Antitrust Law*** ¶ 772d3 (Supp. 2019) ("[B]efore a unilateral refusal to deal is unlawful under *§ 2*, the refusal must be 'irrational' in the sense that the defendant sacrificed an opportunity to make a profitable **[*14]** sale only because of the adverse impact the refusal would have on a rival.").

Limiting antitrust scrutiny of refusals to deal to circumstances where the defendant's conduct is economically irrational is potentially underinclusive, *i.e.*, it may allow some refusals to deal to evade antitrust scrutiny even when they actually have anticompetitive effects. *See* *Novell, 731 F.3d at 1073, 1076*. But the Supreme Court has concluded that the benefits of expanding the refusal to deal doctrine do not outweigh the costs, including (1) the risk of false positives, which may harm innovation, (2) the risk of collusion between companies forced to deal, (3) the inability of courts to supervise the terms and conditions of forced dealing, and (4) the absence of fair notice to business people. *linkLine, 555 U.S. at 452-453*; *Trinko, 540 U.S. at 408, 414*; *see also* *Novell, 731 F.3d at 1076* ("If the [refusal to deal] doctrine fails to capture every nuance, if it must err still to some slight degree, perhaps it is better that it should err on the side of firm independence—given its demonstrated value to the competitive process and consumer welfare—than on the other side where we face the risk of inducing collusion and inviting judicial central planning.").

Because companies are generally free to choose with whom **[*15]** they deal, the only path forward for Plaintiff's allegations about Align's termination of the Interoperability Agreement is under the refusal to deal doctrine. But Plaintiff's allegations lack the essential feature of an anticompetitive refusal to deal. Assuming the Interoperability Agreement was profitable for Align (as alleged in the Complaint), that does not by itself lead to a plausible inference that Align's termination of the agreement was economically irrational but for its tendency to eliminate competition, as required by *Aspen*. Rather, Align's conduct, as alleged, is also consistent with an inference that Align wanted to increase sales of its own scanner. *See* *Novell, 731 F.3d at 1075, 1077* (explaining that a firm may choose to withdraw from a profitable course of dealing for procompetitive reasons, such as when a firm desires "to pursue an innovative replacement product of its own," and that courts should look at profits across business lines to determine if conduct is economically irrational).

To plead an antitrust refusal to deal, the Complaint must contain allegations plausibly suggesting that the defendant's conduct made no economic sense but for its anticompetitive purpose. *See* *Novell, 731 F.3d at 1075*. Here, the Complaint **[*16]** itself reveals an alternative, procompetitive explanation for Align's refusal to deal with 3Shape, and there is no allegation (conclusory, plausible, or otherwise) that Align's conduct made no economic sense across the aligner and scanner markets.[56]*Id.*

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[5] My original Report and Recommendation cited as authority *Viamedia, Inc. v. Comcast Corp., No. 16-5486, 2017 U.S. Dist. LEXIS 24213, 2017 WL 698681, at *5-6 (N.D. Ill. Feb. 22, 2017)* and *VBR Tours, LLC v. Nat'l R.R. Passenger Corp., No. 14-804, 2015 U.S. Dist. LEXIS 130455, 2015 WL 5693735, at *9 (N.D. Ill. Sept. 28, 2015)*. The district court's decision in *Viamedia* was subsequently reversed by the Seventh Circuit on appeal and, in light of that decision, it is debatable whether *VBR Tours* would have come out the same way.

As mentioned above, *see supra* note 1, the parties filed supplemental briefs addressing the impact, if any, of the Seventh Circuit's decision in *Viamedia*. Not surprisingly, City Smiles argues that I should reconsider my earlier recommendation to dismiss the Complaint. It argues that the "no economic sense" test requires a balancing of anticompetitive and procompetitive effects, which the Seventh Circuit suggested was inappropriate at the pleading stage. *See* *Viamedia, 951 F.3d at 462*. Align, on the other hand, points out that the Seventh Circuit's opinion expressly refrained from delineating a new pleading standard for refusal to deal cases. *See* *id. at 463*. Align further argues that the Seventh Circuit's decision relied on similarities between the complaint in that case and the relevant facts from *Aspen Skiing, see* *Viamedia, 951 F.3d at 458-463*, and that those similarities are absent here. Align also points out that the Seventh Circuit's decision did not challenge the applicability of the "no economic sense" test to refusal to deal cases. *Id. at 461-62*.

Having carefully considered the Seventh Circuit's decision in *Viamedia*, I do not think it would change the outcome here even if it were binding on this Court (which it is not). To start with, it would be inconsistent with the Supreme Court's decision in *Trinko* to hold that a plaintiff can proceed with a refusal to deal claim merely by pleading the defendant's market power and an

Because the Complaint does not plausibly allege circumstances invoking the refusal to deal doctrine, Align's

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exclusionary effect resulting from its refusal to deal. 540 U.S. at 409 (dismissing refusal to deal claim because it lacked features present in *Aspen Skiing*). Something more is required.

The Seventh Circuit's *Viamedia* decision did not attempt to define the precise contours of an adequately pleaded refusal to deal claim. While it did not define the minimum necessary, it did hold that pleading "some of the key anticompetitive characteristics" of *Aspen Skiing* was sufficient. *See* 951 F.3d at 462 ("To the extent that refusal-to-deal claims require more at the pleading stage, it is enough to allege plausibly that the refusal to deal has some of the key anticompetitive characteristics identified in *Aspen Skiing*.").

In this case, unlike in *Viamedia*, the Complaint fails to allege certain key aspects of *Aspen Skiing*. For example, unlike in *Aspen Skiing* and *Viamedia* where the terminated business relationships had been ongoing for years and the termination was alleged to result in financial losses to the defendants, 3Shape and Align's business relationship only lasted 15 months and there is no allegation that the termination resulted in losses across Align's business lines. There is also no allegation that Align refused to sell any product to 3Shape at retail price, as in *Aspen Skiing* and *Viamedia*.

Moreover, no one in this case seriously disputes that, to ultimately succeed on a refusal to deal claim, a plaintiff must prove that the defendant's conduct was irrational but for its anticompetitive effect, *i.e.*, that it made no economic sense but for its tendency to lessen competition. That requirement has been endorsed not only by the Supreme Court, *see* Aspen Skiing, 472 U.S. at 597; Trinko, 540 U.S. at 409, but also by circuit courts, *see, e.g.,* Novell, 731 F.3d at 1074-75, the United States Department of Justice, *see, e.g.*, Brief for the United States as Amicus Curiae in Support of Neither Party, Viamedia, Inc. v. Comcast Corp., No. 18-2852, 2018 WL 5919386, at *11-16 (7th Cir. Nov. 8, 2018), and other leading authorities. *See* Areeda & Hovencamp, ***Antitrust Law*** ¶ 772d3 (Supp. 2019); Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 Antitrust L.J. 413, 414 (2006). I do not read the Seventh Circuit's *Viamedia* decision to the contrary. And, given that to succeed on a refusal to deal claim a plaintiff must ultimately prove that a defendant's conduct was irrational but for its anticompetitive effect, a plaintiff must also allege facts in its complaint making such a claim plausible. *Cf.* Comcast Corporation v. National Association of African American-Owned Media, 140 S. Ct. 1009, 1014, 206 L. Ed. 2d 356 (2020) ("[T]o determine what the plaintiff must plausibly allege at the outset of a lawsuit, we usually ask what the plaintiff must prove in the trial at its end.").

In my view, the most significant difference between this case and *Viamedia* is that the complaint in that case expressly alleged that the defendant's conduct was "irrational but for its anticompetitive effect" and contained factual allegations to back it up. 951 F.3d at 463. As the Seventh Circuit summarized:

> In a section of the First Amended Complaint entitled '*Comcast's Refusal to Deal with Viamedia is Irrational But for its Anticompetitive Effects*,' [Plaintiff] Viamedia walked through the long-term course of dealing prior to [Defendant] Comcast's conduct; the subsequent degradation of the value of the cooperative Interconnects; *the financial losses suffered by Comcast itself*, as well as by Viamedia and Comcast's competitor MVPDs; Comcast's willingness to offer Interconnect-only access in other markets where it did face competition; *and the fact that "[t]here are no procompetitive justifications" to be achieved by [Comcast's] conduct* ***[*17]*** given that there were "no material administrability problems in allowing Viamedia to participate in Interconnects" on behalf of its MVPD customers.

Id. (emphases added).

Here, in contrast, City Smiles did not allege that Align's conduct was irrational but for its anticompetitive effect. Nor did it allege facts that would suggest the same, for example, that Align suffered financial losses across business lines. City Smiles only alleges that Align lost profits in one of two relevant product lines. (D.I. 1 ¶¶ 16, 78.) That is not enough. *See* Novell, 731 F.3d at 1075, 1077 (holding that courts must look at profits across business lines to determine if conduct is economically irrational). Insofar as City Smiles contends that it can prevail on its refusal to deal claim with a showing that Align suffered a loss in only one product line, it is wrong as a matter of law. And there is no reason to let a legally deficient claim proceed past the pleading stage.

I am mindful of the Seventh Circuit's admonition that it is inappropriate to weigh procompetitive justifications proffered by the defendant against anticompetitive harms at the pleading stage. Viamedia, 951 F.3d at 460, 462. But I do not consider any procompetitive justifications offered by Align, nor do I balance procompetitive justifications against anticompetitive harms. Rather, I consider whether City Smiles' own allegations plausibly allege that Align's termination of the interoperability agreement was irrational but for its anticompetitive purpose. I conclude that they do not.

termination of the agreement with 3Shape by itself is not anticompetitive.

B. Design of the iTero Element scanner

The second category of conduct alleged to be anticompetitive relates to Align's introduction of its iTero Element scanner in 2015. Plaintiff takes issue with the design of Align's iTero Element scanner, which is capable of sending scans directly to Align. If a dental professional desires to send a scan taken by the iTero Element to one of Align's competitors, the dental professional must take additional steps and pay a fee to Align. In essence, Plaintiff contends that Align should have designed its scanner to make it easier and cheaper for dental professionals to order scans from Align's competitors.

That is just another refusal to deal claim. Plaintiff is asking Align to deal with its rivals in the aligner market by designing its iTero Element scanner to send them business on favorable terms, namely, (1) directly **[*18]** from the scanner and (2) without charge to the user. However, as already explained, "[a]s a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *linkLine, 555 U.S. at 448*.

Once again, the only path forward for 3Shape is under the refusal to deal doctrine set forth in *Aspen Skiing*. But the Complaint here fails to plausibly allege the first requirement of *Aspen*: "a preexisting voluntary and presumably profitable course of dealing between the monopolist and the rival." *Novell, 731 F.3d at 1074*. Align never had a deal with its rivals in the aligner market governing the terms and conditions under which the iTero Element could be used to send them business.[7]

Absent a duty to deal, ***antitrust law*** does not require a firm to lend its competitors a helping hand. *See Novell, 731 F.3d at 1072*. Align's design of its iTero Element scanner by itself does not constitute anticompetitive conduct.

C. Scheme of Anticompetitive Conduct

Plaintiff next contends that, even though Align's acts viewed individually may not be anticompetitive, as a whole they amount to a scheme of anticompetitive conduct cognizable under *Section 2*. (D.I. 1 ¶¶ 8, 11, 13; D.I. 13 at n.20; Tr. 17-29.) I disagree. **[*19]**

Plaintiff cites no case for the novel proposition that a defendant may incur antitrust liability for unilaterally refusing to deal in two markets under circumstances where it has no antitrust duty to deal in either market. And I am unaware of any. Rather, as I explained in my Report and Recommendation in *3Shape Trios A/S v. Align Technology, Inc.*,

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[6] Perhaps recognizing the difficulty in proceeding under the refusal to deal doctrine, City Smiles tries to recast Align's termination of the Interoperability Agreement as a design change to Align's manufacturing process. (D.I. 12 at 15.) That does not change the analysis. Whatever you want to call it, the result was that Align quit accepting orders for Invisalign from 3Shape's Trios scanner. That makes this a refusal to deal case, and City Smiles cannot evade refusal to deal doctrine simply by calling the conduct another name. *See Novell, 731 F.3d at 1079* ("Whether one chooses to call a monopolist's refusal to deal with a rival an act or omission, interference or withdrawal of assistance, the substance is the same and it must be analyzed under the traditional [refusal to deal] test . . . .").

[7] The Complaint does not allege that the design of Align's iTero Element scanner has ever changed. The Court is therefore not confronted with an allegation of anticompetitive product redesign.

Nor does this case concern the interoperability or integration of complementary products in two markets, as was at issue in *United States v. Microsoft. 253 F.3d 34, 64-67, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (assessing antitrust consequences relating to the interoperability of browser and operating system under circumstances where the defendant's products were distributed together and could not be disaggregated). Unlike the product markets at issue in *Microsoft*, intraoral scanners and aligners are sold independently, can be used independently, and don't interact with each other in operation.

plaintiffs proceeding under an anticompetitive scheme theory must plead at least one instance of conduct that is not protected from antitrust scrutiny. *2019 U.S. Dist. LEXIS 137982, 2019 WL 3824209, at *10-12 (D. Del. Aug. 15, 2019)*, *adopted by* *2019 U.S. Dist. LEXIS 165242, 2019 WL 4686614 (D. Del. Sept. 26, 2019)*; *see also* Eatoni Ergonomics, Inc. v. Research in Motion Corp., 486 Fed. App'x 186, 191 (2d Cir. 2012) (affirming dismissal of an antitrust claim; "[b]ecause these alleged instances of misconduct are not independently anti-competitive, we conclude that they are not cumulatively anti-competitive either"); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-md-02503-DJC, 2015 U.S. Dist. LEXIS 125999, 2015 WL 5458570, at *12 (D. Mass. Sept. 16, 2015)* (concluding that a complaint failed to state a *Section 2* claim under an "overarching scheme" theory when none of the alleged conduct was independently anticompetitive); *In re Lipitor Antitrust Litig., No. 13-2389, 2013 U.S. Dist. LEXIS 126468, 2013 WL 4780496, *23 (D.N.J. Sept. 5, 2013)* ("Having already determined that all of the specific allegations of conduct in violation of *Section 2* . . . are meritless and insufficient to state a claim for relief, the Court finds that a claim based on the purported 'combined' impact of Plaintiffs' **[*20]** claims is also without merit.").

Plaintiff's two wrong refusal to deal claims do not make a right. Plaintiff's characterization of Align's otherwise non-actionable refusals to deal as a "scheme" do not save its claims.

D. "Bundling"

Plaintiff nevertheless alleges that Align's conduct, viewed together, amounts to anticompetitive "bundling." (*See* D.I. 1 ¶¶ 77, 99-103.) I disagree.

The Third Circuit (but not the Supreme Court) has recognized a bundled discount exception to the general rule protecting above-cost (*i.e.*, non-predatory) price discounts from antitrust scrutiny. A bundled discount is when a firm sells a bundle of goods for a lower price than the seller charges for the goods purchased individually. *LePage's, 324 F.3d at 154-157*; *Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 405 (3d Cir. 2016)* ("[A] bundling arrangement generally involves discounted rebates or prices for the purchase of multiple products."). In *LePage's*, the Third Circuit held that bundled discounts can constitute anticompetitive conduct when the effect of the discounts is to "foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer." *Id. at 155*. The *LePage's* standard for bundled discounts has not been **[*21]** adopted by any other Circuit, and it has not been expanded in the Third Circuit. *See Cascade Health Solutions v. Peacehealth, 515 F.3d 883, 894-903, 908-09 (9th Cir. 2008)* (discussing the controversy over *LePage's*). The Third Circuit has instructed courts to interpret *LePage's* narrowly in light of more recent Supreme Court precedent. *ZF Meritor, 696 F.3d at 274 n.11*; *see also* *Eisai, 821 F.3d at 405-406* (rejecting novel bundling theory based on a bundle of different types of demand as opposed to a bundled discount for multiple products).

The Complaint in this case does not allege that Align offered bundled discounts, *i.e.*, that it offered discounts to customers who purchased both scanners and aligners. The Complaint alleges that Align charged "inflated" prices on both aligners and scanners. (D.I. 1 ¶¶ 2, 18, 103.) *LePage's* is thus inapposite.

Plaintiff acknowledges that *LePage's* is distinguishable because it involves price discounts, but it argues (in a footnote) that the conduct here "is even more plainly harmful because the customer gets no discount with the bundle and, instead, faces a penalty for breaking the bundle." (D.I. 12 at 17 n.27.) I disagree on the facts and the law. As for the facts, the Complaint does not allege that iTero Element owners paid a penalty for ordering aligners from other manufacturers. The Complaint **[*22]** alleges that Align only charged a fee if a dental professional wanted Align to convert a scan made by the iTero Element. Dental professionals who owned iTero Element scanners could order other manufacturers' aligners without paying a fee by using another scanner or by using silicone molds. Conversely, dental professionals without an iTero Element scanner could order Invisalign by using silicone molds or by purchasing one of the other scanners able to order Invisalign.

As for the law, even if I were to analyze Align's conduct under the standard set forth in *LePage's*, the facts alleged do not plausibly suggest that Align's charging of file conversion fees operated to foreclose other aligner manufacturers from the market. For example, there is no suggestion in the Complaint that the fee was so high that a rival aligner manufacturer couldn't offset it with a price discount. In other words, the facts do not plausibly suggest that rival aligner manufacturers could not make a "comparable offer." *LePage's, 324 F.3d at 155*.

The Third Circuit has instructed lower courts not to extend *LePage's*, and I see no basis to do so on the allegations here. Plaintiff's characterization of Align's conduct as "bundling" does not save **[*23]** its claims.

E. Monopoly Leveraging

Plaintiff also attempts to proceed on a monopoly leveraging theory. A monopoly leveraging claim is a *Section 2* monopolization claim or attempted monopolization claim involving conduct in more than one market. To succeed, a plaintiff must demonstrate "that a party has a monopoly in one area, uses unlawful acts to leverage that monopoly into another area, and achieves or is likely to achieve that second monopoly." *IQVIA Inc. v. Veeva Systems, Inc., No. 17-cv-177, 2018 U.S. Dist. LEXIS 171456, 2018 WL 4815547, at *4 (D.N.J. Oct. 3, 2018)*.

Monopoly leveraging, however, is not a standalone theory of liability under *Section 2*. *See* *Trinko, 540 U.S. 398 at 415 n.4, 124 S. Ct. 872, 157 L. Ed. 2d 823* (rejecting standalone monopoly leveraging claim); *Daisy Mountain Fire Dist. v. Microsoft Corp., 547 F. Supp. 2d 475, 487 (D. Md. 2008)* ("The Supreme Court has held that monopoly leveraging does not provide a basis for recovery distinct from a monopolization claim."). Nor does pleading monopoly leveraging relieve a party's obligation to allege anticompetitive conduct. *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1222 (10th Cir. 2009)* ("*Trinko* further emphasized that, '[i]n any event, leveraging [like, we might add, any other *Section 2* claim'] presupposes anticompetitive conduct,' rather than providing an excuse for establishing such conduct." (quoting *Trinko, 540 U.S. at 415 n.4*)); *Vesta Corp. v. Amdocs Mgmt. Ltd., 129 F. Supp. 3d 1012, 1035 (D. Ore. 2015)* ("The Supreme Court has established that a claim for monopoly leveraging 'presupposes anticompetitive conduct.' That is, **[*24]** there must be some other conduct that is actionable for Plaintiff's claim to be cognizable." (internal citation omitted)).

The cases relied on by Plaintiff are distinguishable because they involved independent allegations of anticompetitive conduct (in addition to leveraging). *IQVIA Inc., No. 17-cv-177, 2018 U.S. Dist. LEXIS 171456, 2018 WL 4815547, at *1-2* (refusal to deal); *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co., 953 F. Supp. 617 (E.D. Pa. 1997)* (exclusive dealing); *Hewlett-Packard Co. v. Arch Assocs. Corp., 908 F. Supp. 265 (E. D. Pa. 1995)* (refusal to deal). As explained above, the Complaint here does not allege any anticompetitive conduct. Plaintiff's monopoly leveraging claim must therefore fail. *See, e.g.,* *Vesta Corp., 129 F. Supp. 3d at 1035* (concluding that the "monopoly leveraging claim fails for the same reasons as Plaintiff's other antitrust claims fail—Plaintiff fails to allege anticompetitive conduct").

As 3Shape's failure to plead anticompetitive conduct fully supports granting Align's motion to dismiss,[8] the Court need not decide whether the other grounds raised by Align (lack of standing[9] and failure to allege relevant product markets) would also support dismissal.[10]

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[8] In the alternative, Align sought transfer of the case to the Northern District of California. (D.I. 7.) Because I recommend that the case be dismissed, I do not address Align's transfer arguments. *See* Tr. 15 (Align's agreement that dismissal in lieu of transfer is appropriate).

[9] Antitrust standing is a prudential limitation. As it does not affect subject matter jurisdiction, there is no requirement that the Court consider it at this time. *See* *Shionogi Pharma, Inc. v. Mylan, Inc., No. 10-1077, 2011 U.S. Dist. LEXIS 58774, 2011 WL 2174499, *3 (D. Del. May 26, 2011)* (dismissing *Section 2* claim for failure to state a claim without addressing the parties' dispute over antitrust standing).

[10] Plaintiff's Complaint also alleged a class. The Court need not address class certification before dismissing the case. *See, e.g.,* *Donnenfeld v. Petro Home Servs., No. 16-882, 2017 U.S. Dist. LEXIS 43945, 2017 WL 1250992, at *6 (D.N.J. Mar. 24, 2017)* ("[B]ecause the Court is dismissing the Complaint, the Court will not consider Defendants' arguments regarding class certification at this time.").

IV. CONCLUSION

For the reasons set forth above, City Smiles' Complaint fails to plausibly allege anticompetitive conduct, a required element of monopolization under *Section 2* of the Sherman Act. I recommend that Align's motion be GRANTED, **[*25]** that the Complaint be DISMISSED without prejudice, and that City Smiles be granted leave to amend the Complaint within 21 days.[11]

This Report and Recommendation is filed pursuant to *28 U.S.C. § 636(b)(1)(B)*, *(C)*, *Federal Rule of Civil Procedure 72(b)(1)*, and District of Delaware *Local Rule 72.1*. Any objections to the Report and Recommendation shall be filed within fourteen days and limited to ten pages. Any response shall be filed within fourteen days thereafter and limited to ten pages. The failure of a party to object to legal conclusions may result in the loss of the right to *de novo* review in the district court.

The parties are directed to the Court's "Standing Order for Objections Filed Under *Fed. R. Civ. P. 72*," dated October 9, 2013, a copy of which can be found on the Court's website.

Dated: April 24, 2020

/s/ Jennifer L. Hall

Honorable Jennifer L. Hall

United States Magistrate Judge

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[11] Align requests that the Complaint be dismissed without leave to amend because any amendment would be futile. However, it is not clear on this limited record that amendment would necessarily be futile. *See* *Alston v. Parker, 363 F.3d 229, 235-36 (3d Cir. 2004)* (holding that leave to amend should be granted "unless a curative amendment would be inequitable, futile, or untimely").

LexisNexis

Turner v. McDonald's USA, LLC

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

April 24, 2020, Decided; April 24, 2020, Filed

No. 19 C 5524

Reporter
2020 U.S. Dist. LEXIS 78435 *; 2020-1 Trade Cas. (CCH) P81,196

STEPHANIE TURNER, Plaintiff, v. McDONALD'S USA, LLC, and McDONALD'S CORP., Defendants.

Prior History: *Deslandes v. McDonald's USA, LLC, 2018 U.S. Dist. LEXIS 105260 (N.D. Ill., June 25, 2018)*

Core Terms

wages, depressed, alleges, antitrust, no-hire, statute of limitations, defendants', employees, buyers', cartel, prices, affirmative defense, anti trust law, anticompetitive, damages

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Judges: JORGE L. ALONSO, United States District Judge.

Opinion by: JORGE L. ALONSO

Opinion

ORDER

Defendants' motion [27] to dismiss is denied.

STATEMENT

In this case, which is consolidated with *Deslandes v. McDonald's, USA, LLC*, case no. 17-cv-4857, plaintiff Stephanie Turner (like plaintiff Leinani Deslandes before her) alleges that defendants violated the Sherman Act by agreeing with franchisees not to hire each other's employees or each other's former employees for a period of six months after employment. (Familiarity with the allegations in *Deslandes* and with the Court's decisions in that case is assumed. The Court does not include the detailed allegations here, because defendants do not move to dismiss this case for failure to state a claim.) Plaintiff alleges that the no-hire clause caused her wages to be depressed such that she was paid less than she would have been paid absent the no-hire clause in the franchise agreements.

In their motion to dismiss, defendants argue that plaintiff lacks Article III standing as well as antitrust standing and that plaintiff's claim is barred by the statute of limitations.

A. Article III standing

Defendants first argue that plaintiff lacks standing under Article III. Article III of the United States Constitution limits a **[*3]** federal court's jurisdiction to "Cases" and "Controversies," and "the irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. To have standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S.Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)* (citations omitted). A plaintiff must establish standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan, 504 U.S. at 561*. Thus, here, at the pleadings stage, allegations will suffice.

In this case, plaintiff alleges she "suffered reduced wages" due to the no-hire clause. (Compl. ¶ 18). She alleges that the "fact that she could not even apply [for other positions at other McDonald's restaurants] also contributed to downward pressure on her own wages at the McOpCo, as she could not use a competing offer to negotiate better wages[.]" (Compl. ¶ 66). She alleges the restraints "constrained competition" among McDonald's restaurants and "caused her wages to be depressed during her employment." (Compl. ¶ 71).

Defendants argue that plaintiff suffered no injury in fact, but the Court does not agree. Defendants **[*4]** argue that plaintiff cannot have been injured by the no-hire clause unless she applied for and was rejected on account of the no-hire policy. The argument misses the point of plaintiff's alleged injury: plaintiff alleges she suffered depressed wages, which is to say the wages she was actually paid were less than the wages she would have been paid absent the allegedly-unlawful no-hire policy. The loss of those wages is an injury in fact. *See Reiter v. Sonotone Corp., 442 U.S. 330, 342, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)* ("where petitioner alleges a wrongful deprivation of her money . . . by reason of respondents' anticompetitive behavior, she has alleged an injury in her 'property' under *§ 4* [of the *Clayton Act*]"); *see also Milwaukee Police Assoc. v. Flynn, 863 F.3d 636, 639 (7th Cir. 2017)* ("concrete financial injuries, namely deprivation of wages . . . are prototypical injuries for the purposes of Article III standing.").[1]

Plaintiff's claim is akin to a supplier who sells at a reduced price due to the anti-competitive behavior of a cartel of buyers. The Seventh Circuit has held "farmers who sold soybeans at allegedly depressed prices suffered injury sufficient to confer standing under Article III." *Sanner v. Board of Trade of City of Chi., 62 F.3d 918, 924 (7th Cir. 1995)* ("The fact of a sale at an allegedly depressed price establishes discernable injury in a manner in which a failure to sell cannot."). **[*5]** Here, plaintiff alleges she sold her labor at an allegedly depressed price, and that is sufficient allegation of injury in fact.

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[1] That plaintiff may never be able to prove the quantity of such damages does not mean she has not suffered injury in fact. *See Blue Cross and Blue Shield United of Wis. v. Marshfield Clinic, 152 F.3d 588, 594 (7th Cir. 1998)* ("We are not saying that Blue Cross did not in fact lose any money as a result of the division of markets. . . . [T]here is . . . , and here critically, a difference between an actual and a quantifiable harm and also between a quantifiable and a quantified harm—and only the last supports an award of damages.").

Next, defendants argue that depressed wages cannot confer standing in this case, because such depressed wages are not fairly traceable to the alleged antitrust violation. Defendants argue that other factors, such as the unemployment rate, might have suppressed her wages and that plaintiff's allegation that the depressed wages were caused by the no-hire agreement is not plausible. Again, the Court disagrees. Plaintiff's causation allegations are plausible due to basic principles of economics: if fewer employers compete for the same number of employees, wages will be lower than if a greater number of employers are competing for those employees.[2] In addition, "[f]actual disputes over the relative market significance" of the no-hire agreement versus other factors "should not be resolved on a motion to dismiss." *Sanner, 62 F.3d at 926*. Plaintiff has alleged an injury that is fairly traceable to defendants' alleged antitrust violation.

Thus, this Court agrees with courts that have concluded plaintiffs have standing to pursue antitrust claims based on no-hire agreements **[*6]** when they allege their wages were depressed by such agreements. *Blanton v. Domino's Pizza Franchising, LLC, Case No. 18-13207, 2019 U.S. Dist. LEXIS 87737, 2019 WL 2247731 at *3-4 (E.D. Mich. May 24, 2019)* ("[Plaintiff] says that his own wages were depressed. . . . He asserts that his depressed wages were a direct result of the allegedly unlawful no-hire agreement . . . The Court finds that [plaintiff] has sufficiently alleged standing."); *see also* *Butler v. Jimmy John's Franchise, LLC, 331 F. Supp.3d 786, 793-94 (S.D. Ill. 2018)*.

In sum, plaintiff has adequately alleged standing by alleging the no-hire agreement depressed her wages. Whether she can *prove* that is a question for another day.

B. Antitrust standing

Defendants also state that plaintiff has not alleged antitrust injury. The Court disagrees.

In addition to injury in fact, a plaintiff asserting an antitrust claim "must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' act unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. The Supreme Court went on to explain that "[t]he injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick, 429 U.S. at 489*. Thus, in *Brunswick*, the plaintiffs could not recover as damages additional profits they might have earned had their competitors gone out of business. The Supreme Court explained:

> At base, **[*7]** [plaintiffs] complain that by acquiring the failing centers [defendant] preserved competition, thereby depriving [plaintiffs] of the benefits of increased concentration. The damages [plaintiffs] obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for 'the protection of competition not competitors.' *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. It is inimical to the purposes of these laws to award damages for the type of injury claimed here.

Brunswick, 429 U.S. at 488. Thus, antitrust injury requires injury to competition.

Here, plaintiff has alleged injury to competition, namely the injury of depressed prices (wages) to sellers (employees) due to anticompetitive behavior of buyers (employers). The Seventh Circuit has explained why this type of injury is an injury to competition:

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[2] Defendants argue that plaintiff's allegation that the no-hire clause depressed her wages is not plausible in light of the Court's conclusion in *Deslandes* that Deslandes had not stated a claim for a *per se* violation of the antitrust laws. The Court disagrees. The reason Deslandes had not alleged a *per se* violation was *not* that a no-hire agreement would be unlikely to depress wages but rather that the no-hire agreement was ancillary to an agreement that was procompetitive in that it enhanced the output of hamburgers.

> Just as a sellers' cartel enables the charging of monopoly prices, a buyers' cartel enables the charging of monopsony prices; and monopoly and monopsony are symmetrical distortions of competition from an economic standpoint.

Vogel v. American Soc. of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984); *cf.* *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)* (sugar beet suppliers had antitrust claim for price-fixing against sugar beet refiners); *see also* *Omnicare, Inc. v. UnitedHealth Group, Inc., 524 F. Supp.2d 1031, 1040 (N.D. Ill. 2007)* ("In a buyer's conspiracy case, a seller sufficiently **[*8]** alleges antitrust injury by pleading that it has received excessively low prices from members of the buyers' cartel.").

Accordingly, plaintiff has alleged antitrust injury in this case. *See* *Hunter v. Booz Allen Hamilton, Inc., 418 F. Supp.3d 214, 223 (S.D. Ohio 2019)* ("Plaintiffs alleged that the no-poach agreements . . . 'did in fact suppress wages, benefit[s], and other aspects of compensation and eliminate competition.' As such, Plaintiffs have pleaded . . . an injury of the type the antitrust laws were intended to prevent[.]"); *In re: Papa John's Employee and Franchisee Employee Antitrust Litigation, Case No. 18-cv-825, 2019 U.S. Dist. LEXIS 181298, 2019 WL 5386484 at *9 (W.D. Ky. Oct. 21, 2019)* ("Plaintiffs also sufficiently plead antitrust injury. Plaintiffs contend that the No-Hire provision is an agreement not to compete for labor and that the agreement had the purpose and effect of depressing wages and diminishing employment opportunities."); *In re: High-Tech Employee Antitrust Litigation, 856 F. Supp.2d 1103, 1123 (N.D. Cal. 2012)* ("In alleging that Defendants conspired to fix salaries at artificially low levels, Plaintiffs have alleged 'an example of the type of injury the antitrust laws are meant to protect against.'") (citation omitted); Phillip E. Areeda & Herbert Hovencamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application*, ¶ 352a (3rd and 4th Editions, 2018 Cum. Supp. 2010-2017) ("Employees **[*9]** may challenge antitrust violations that are premised on restraining the employment market . . . Standing for employees thus parallels that for 'suppliers' generally[.]").

C. Statute of limitations

Finally, defendants argue that plaintiff's claim is barred by the four-year statute of limitations applicable to antitrust claims. *15 U.S.C. § 15b* ("Any action to enforce any cause of action under *section 15*, *15a*, or *15c* of this title shall be forever barred unless commenced within four years after the cause of action accrued."). Defendants' theory is that plaintiff's cause of action accrued no later than 2009 or 2010, when she alleges she first learned about the no-hire clause. (Compl. ¶ 66) ("In or around 2009 or 2010 . . . [plaintiff's] supervisor at the McOpCo restaurant told her she could not be hired at a franchise-owned McDonalds' without a release unless she first stopped working at the McOpCo for six months. The supervisor also informed [plaintiff] that the franchisee would not be permitted to speak with her without a release from the McOpCo.").

Failure to comply with a statute of limitations is an affirmative defense. *See* *United States Gypsum Co. v. Indiana Gas Co., Inc., 350 F.3d 623, 626 (7th Cir. 2003)*; *Fed.R.Civ.P. 8(c)(1)*. A plaintiff need not plead around an affirmative defense, and the Court may not dismiss **[*10]** on the basis of an affirmative defense unless the plaintiff alleges, and thus admits, the elements of the affirmative defense. *Chicago Bldg. Design, P.C. v. Mongolian House, Inc., 770 F.3d 610, 613-14 (7th Cir. 2014)*; *United States Gypsum, 350 F.3d at 626*. Here, plaintiff's allegations do not establish that her claim is time-barred.

"The period of limitations for antitrust litigation runs from the most recent injury caused by the defendants' activities rather than from the violation's inception." *Xechem, Inc. v. Bristol-Myers Squibb Co., 372 F.3d 899, 902 (7th Cir. 2004)* (citing *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971))*. In *Zenith Radio*, the Supreme Court said "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and . . . as to those damages the statute of limitations runs from the commission of the act." *Zenith Radio, 401 U.S. at 338*. In *Xechem*, the Seventh Circuit cited *Klehr v. A.O. Smith Corp., 521 U.S. 179, 188-191, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* as "describing how this approach works[.]" *Xechem, 372 F.3d at 902*. In *Klehr*, the Supreme Court explained:

> ***Antitrust law*** provides that, in the case of a 'continuing violation,' say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, 'each overt act that is part of the violation and that injures plaintiff,' *e.g., each sale to the plaintiff, 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier* ***[*11]*** *times.*' But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.

Klehr, 521 U.S. at 189 (emphasis added) (citations omitted). In other words, in a sellers' cartel, each additional sale is an injury that starts the statute of limitations for that injury, and, in a buyers' cartel, each purchase is an injury that starts the statute of limitations for that injury. Analogously, in this case, each time plaintiff was paid a depressed wage for her labor, she was injured and the four-year statute of limitations for that injury began.[3]

Here, plaintiff alleges that she was paid a depressed wage for her labor as recently as September 2018. (Compl. ¶¶ 70-71). She filed her complaint on August 15, 2019. Plaintiff has not alleged (and thus admitted) the ingredients of defendants' statute-of-limitations affirmative defense, and the Court will not dismiss her claim on statute-of-limitations grounds.

For all of these reasons, defendants' motion to dismiss is denied.

ENTERED: April 24, 2020

SO ORDERED.

/s/ Jorge L. Alonso

JORGE L. ALONSO

United States District Judge

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[3] This does not mean a plaintiff can recover for depressed wages that were paid to her more than four years before filing suit. *See* *Klehr, 521 U.S. at 189* ("But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.").

First Priority Emergency Vehicles, Inc. v. REV Ambulance Grp. Orlando, Inc.

United States District Court for the District of New Jersey

April 28, 2020, Decided; April 28, 2020, Filed

Case No. 3:18-cv-9805-BRM-DEA

Reporter
2020 U.S. Dist. LEXIS 74170 *; 2020-1 Trade Cas. (CCH) P81,201; 2020 WL 2029344

FIRST PRIORITY EMERGENCY VEHICLES, INC., Plaintiff, v. REV AMBULANCE GROUP ORLANDO, INC., d/b/a MCCOY MILLER EMERGENCY VEHICLES, MARQUE EMERGENCY VEHICLES, and ROAD RESCUE EMERGENCY VEHICLES, Defendant.

Notice: NOT FOR PUBLICATION

Prior History: *First Priority Emergency Vehicles, Inc. v. REV Ambulance Grp. Orlando, Inc., 2019 U.S. Dist. LEXIS 126616 (D.N.J., July 30, 2019)*

Core Terms

ambulances, motion to dismiss, interchangeable, relevant market, antitrust, factual allegations, allegations, purchasers, buy, substitutes, consumers, customers, encompass

Counsel: **[*1]** For FIRST PRIORITY EMERGENCY VEHICLES, INC., Plaintiff: THOMAS N. RYAN, LEAD ATTORNEY, LADDEY, CLARK & RYAN, LLP, SPARTA, NJ.

For REV AMBULANCE GROUP ORLANDO, INC., doing business as, MCCOY MILLER EMERGENCY VEHICLES, MARQUE EMERGENCY VEHICLES, ROAD RESCUE EMERGENCY VEHICLES, Defendants: DOUGLAS ROBERT WEIDER, LEAD ATTORNEY, GREENBERG TRAURIG, LLP, FLORHAM PARK, NJ.

Judges: HON. BRIAN R. MARTINOTTI, UNITED STATES DISTRICT JUDGE.

Opinion by: BRIAN R. MARTINOTTI

Opinion

MARTINOTTI, DISTRICT JUDGE

Before this Court is a Motion to Dismiss filed by Defendant REV Ambulance Group Orlando, Inc. d/b/a McCoy Miller Emergency Vehicles, Marque Emergency Vehicles, and Road Rescue Emergency Vehicles ("REV" or "Defendant") seeking to dismiss Plaintiff First Priority Emergency Vehicles, Inc.'s ("First Priority" or "Plaintiff") Second Amended Complaint ("SAC") pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (ECF No. 35.) First Priority filed an Opposition to Defendants' Motion to Dismiss (ECF No. 38.) Having reviewed the submissions filed in connection with the motion and having declined to hold oral argument pursuant to *Federal Rule of Civil Procedure 78(b)*, for the reasons set forth below and for good cause appearing, Defendant's Motion to Dismiss is **GRANTED**.

I. BACKGROUND[1]

A. Factual Background

For the **[*2]** purposes of this Motion to Dismiss, the Court accepts the factual allegations in the Amended Complaint as true and draws all inferences in the light most favorable to the plaintiff. *See* *Phillips v. Cty. of Allegheny, 515 F.3d 224, 228 (3d Cir. 2008)*. Furthermore, the Court also considers any "document *integral to or explicitly relied upon* in the complaint." *In re Burlington Coat Factory Secs. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997)* (quoting *Shaw v. Dig. Equip. Corp., 82 F.3d 1194, 1220 (1st Cir. 1996))*.

First Priority is a New Jersey corporation with its principal place of business in Manchester, New Jersey. (ECF No. 34 ¶ 6.) REV is a Florida corporation with its principal place of business in Florida. (*Id.* ¶ 7.) REV does business under a variety of names, including McCoy Miller Emergency Vehicles ("McCoy Miller"), Marque Emergency Vehicles ("Marque"), Road Rescue Emergency Vehicles ("Road Rescue"), and Wheeled Coach Vehicles ("Wheeled Coach"), among others. (*Id.*)

B. Procedural History

On May 29, 2018, First Priority filed a Complaint (the "Complaint") against REV asserting causes of action for violations of the NJFPA, breach of contract and of the implied covenant of good faith and fair dealing, and violations of state and federal ***antitrust law***. (ECF No. 1.) On November 9, 2018, First Priority filed an Amended Complaint (the "Amended Complaint"). (ECF No. 17.) On July 30, 2019, this **[*3]** Court issued an opinion (the "July 30, 2019 Opinion") granting REV's Motion to Dismiss Counts One, Five, Six, Seven, Eight, Nine and Ten of the Amended Complaint, denying REV's Motion to Dismiss Count Two of the Complaint, and granting First Priority's Cross-Motion for Leave to Amend the Amended Complaint. (ECF No. 31.)

On August 30, 2019, First Priority filed the SAC asserting breach of contract and the implied covenant of good faith and fair dealing (Count One), violation of *Section 1 of the Sherman Act*, *15 U.S.C. § 1* (Count Two), violations of *Section 2 of the Sherman Act*, *15 U.S.C. § 2* (Counts Three and Four), violation of the *Clayton Act, 15 U.S.C. § 14* (Count Five), and violation of New Jersey Antitrust Laws (Count Six) . (ECF No. 34.) On September 13, 2019, REV filed a Motion to Dismiss all Antitrust Counts (Counts Two through Six) in the SAC. (ECF No. 35.) On October 9, 2019, First Priority filed an Opposition to the Motion to Dismiss. (ECF No. 38.) On October 14, 2019, REV filed a Reply Brief to First Priority's Opposition. (ECF No. 39.)

II. LEGAL STANDARD

In deciding a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a district court is "required to accept as true all factual allegations in the complaint and draw all inferences in the facts alleged **[*4]** in the light most favorable to the [plaintiff]." *Phillips v. Cty. of Allegheny, 515 F.3d 224, 228 (3d Cir. 2008)*. "[A] complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citations omitted). However, the plaintiff's "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Id.* (citing *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986))*. A court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan, 478 U.S. at 286*. Instead, assuming the factual allegations in the complaint are true, those

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[1] The Court writes for the parties and assumes familiarity with the facts. For a detailed account of the relevant facts, refer to this Court's July 30, 2019 Opinion on Defendants' Motion to Dismiss Plaintiffs' Amended Complaint. (ECF No. 31.)

"[f]actual allegations must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing Twombly, 550 U.S. at 570). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged." *Id.* This "plausibility standard" requires the complaint allege "more than a sheer possibility that a defendant has acted unlawfully," but it "is not akin to a probability requirement.'" *Id.* (quoting Twombly, 550 U.S. at 556). "Detailed **[*5]** factual allegations" are not required, but "more than an unadorned, the defendant-harmed-me accusation" must be pled; it must include "factual enhancements" and not just conclusory statements or a recitation of the elements of a cause of action. *Id.* (citing Twombly, 550 U.S. at 555, 557).

"Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" Id. at 679 (quoting Fed. R. Civ. P. 8(a)(2)). However, courts are "not compelled to accept 'unsupported conclusions and unwarranted inferences,'" Baraka v. McGreevey, 481 F.3d 187, 195 (3d Cir. 2007) (quoting Schuylkill Energy Res. Inc. v. Pa. Power & Light Co., 113 F.3d 405, 417 (3d Cir. 1997)), nor "a legal conclusion couched as a factual allegation." Papasan, 478 U.S. at 286.

While, as a general rule, the court may not consider anything beyond the four corners of the complaint on a motion to dismiss pursuant to Rule 12(b)(6), the Third Circuit has held that "a court may consider certain narrowly defined types of material without converting the motion to dismiss [to one for summary judgment pursuant to Rule 56]." In re Rockefeller Ctr. Props. Sec. Litig., 184 F.3d 280, 287 (3d Cir. 1999). Specifically, courts may consider **[*6]** any "document *integral to or explicitly relied upon* in the complaint." Burlington Coat Factory, 114 F.3d at 1426 (quoting Shaw, 82 F.3d at 1220).

III. Decision

REV contends each of First Priority's antitrust claims—Counts Two (15 U.S.C. § 1), Three (15 U.S.C. § 2-attempt to monopolize), Four (15 U.S.C. § 2-monopolization), Five (15 U.S.C. § 14), and Six (New Jersey State antitrust violations, N.J. Stat. Ann. § 56:9, et seq.)—because First Priority has not met its burden of alleging a relevant market. (ECF No. 35-1 at 3-6.) First Priority argues the allegations in its SAC "adequately distinguish[] between the role of used verses new ambulances in the subject market, which provides legal basis for excluding old and new ambulances as interchangeable substitutes by consumers." (ECF No. 38 at 3.)

In antitrust actions, plaintiffs have the "burden of defining the relevant market." Queen City Pizza v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997) (citing Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 726 (3d Cir. 1991)).[2] "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." Id. at 436 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 375, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)). Furthermore, the test for determining interchangeability of use is not "reasonably interchangeable by a particular plaintiff, but 'commodities reasonably interchangeable by consumers for the same purpose.'" Id. at 436 (quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)). The relevant market is legally insufficient, **[*7]** and thus dismissal is appropriate, when a plaintiff "fails to define its proposed relevant market with reference to the

[2] Importantly, the Third Circuit has also held that although defining a proper market can be a fact intensive inquiry requiring discovery, *see* Eastman Kodak Co. v. Image Tech. Servs, Inc., 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992), there is no "*per se* prohibition against dismissal of antitrust claims for failure to plead a relevant market under Fed. R. Civ. P. 12(b)(6)." Queen City, 124 F.3d at 436.

rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor." *Id. at 436* (citing *TV Commc'ns Network, Inc. v. Turner Network Television, 964 F.2d 1022, 1025 (10th Cir. 1992))*. The New Jersey Antitrust Act has incorporated the "reasonable interchangeability" standard applicable to federal antitrust claims by virtue of statute. *See* *N.J. Stat. Ann. § 56:9-18* (stating that the *New Jersey Antitrust Act* "shall be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws of those states which enact it").

In the July 30, 2019 Opinion, this Court dismissed First Priority's antitrust claims because the relevant market in the Amended Complaint did "not encompass all reasonably interchangeable substitutes, nor [did] it adequately distinguish between the role of used verses new ambulances in the subject market." (ECF No. 31 at 20.) In the SAC, First Priority attempts to fix these deficiencies by offering **[*8]** the following:

> 78. The ambulance market as alleged by Plaintiff herein is defined, in part, based on the concepts of reasonable interchangeability, substitutability and cross-elasticity of demand. Consumers of the ambulances I the ambulance market shop for only new ambulances, not old or used ambulances. In this regard, 85-90% of consumers of new ambulances fall into three general categories as set forth below. Customers in each of these customer classes do not view used or older ambulances to be reasonably interchangeable with new ambulances, which comprise the ambulance market alleged in this case.
> 79. Volunteer ambulance purchasers ("VAPs") are funded through donation and/or municipal contributions. These customers buy and consider buying only new ambulances, not used ambulances. VAPs will extend the time between purchase of new ambulances rather than purchase used ambulances. Also, VAPs buy new ambulances in order to avoid accepting the liability associated with purchasing used ambulances without warranty or unknown vehicle maintenance or history.
> 80. Municipal ambulance purchasers ("MAPs") are funded thru [
>
> (sic] municipal contributions and billing. MAPs include fire department EMSs **[*9]** and may include some County organizations. MAPs in the normal course purchase new ambulances, not old or used ones. MAPs will extend the time between purchases of new ambulances rather than purchase used ambulances. Also, MAPs buy new ambulances in order to avoid accepting the liability associated with purchasing used ambulances without warranty or unknown vehicle maintenance or history.
> 81. Hospital-based ambulance purchasers ("HAPs") are hospital funded purchasing entities. HAPs almost always (over 90% of the time) purchase only new, not used ambulances. In the small number of cases that HAPs might use older ambulances, this is usually upon their takeover of municipal/volunteer territory for use in that territory only. Further, frequently when bidding on contracts HAPs required to provide new or 'like new' vehicles as part of the contract.
>
> 82. In sum, VAPs, MAPs, and HAPs primarily buy new ambulance vehicles with a few exceptions. The separation is based in large measure on the lack of any warranty of a used vehicle, the unknown history of a used vehicle's use and the known fact that ambulance use of a vehicle is extremely rigorous and hard on the chassis systems (brakes, suspension, **[*10]** engine) that become a reputational and financial liability. In addition, most bids and contracts require the purchase of new ambulances.
> 83. Although not part of the ambulance market as defined in this case, there exist some consumers that do not usually buy new ambulances, but do buy older or used ambulances as the rule. These customers are ambulance entities that service contracts though nursing homes and care centers and bid on a lowest acceptable price basis. These customers do not compete with VAPs, MAPs and HAPs for the purchase of new ambulances; instead, they compete with other such entities that need to survive financially based on non-market based Medicare/Medicaid reimbursements.

(ECF No. 34 ¶¶ 78-83.)

REV contends the above allegations do not "create a plausible relevant market." (ECF No. 35-1 at 2-4.) In so arguing, REV notes the SAC—like the Amended Complaint—continues to limit the relevant market to newly manufactured ambulances while continuing to admit the presence of used ambulances in the market "substantially impact[ed] the ability to sell new ambulances. (*Id.* at 4 (citing ECF No. 34 ¶¶ 73, 57).) As such, First Priority "cannot plausibly allege that its relevant market encompasses **[*11]** all interchangeable substitute products." (ECF No. 39 at 2.)

Indeed, the relevant market proposed in the SAC remains insufficient as a matter of law. As was the flaw with the relevant market in the Amended Complaint, the relevant market here does not encompass all reasonably interchangeable substitutes. While First Priority's new allegations (ECF No. 34 ¶¶ 78-83) distinguish between the role of new and used ambulances, these allegations are insufficient to demonstrate used ambulances are not reasonably interchangeable substitutes.

Further, in its Opposition, First Priority mischaracterized its own allegations. In responding to Rev's arguments, First Priority contends used ambulances should not be included in the proposed product market because there was a "very rare and unique occurrence of one period where a glut caused *some* intermarket impact." (ECF No. 38 at 9 (emphasis added).) However, by First Priority's own admission, they could not meet their contractual sales goals because the large number of used ambulances on the market *substantially impacted*" its ability to sell to ambulances. (ECF No. 34 ¶ 57 (emphasis added).)

Therefore, for the same reasons this Court set forth in its July **[*12]** 30, 2019 Opinion, First Priority's proposed relevant market fails as a matter of law. By not including used ambulances that "substantially impact[ed] the ability to sell new ambulances," the relevant market does not encompass all reasonably interchangeable substitutes. Accordingly, REV's Motion to Dismiss Counts Two, Three, Four, Five, and Six of the SAC is **GRANTED**.

IV. Conclusion

For the reasons set forth above, REV's Motion to Dismiss is **GRANTED**.

Date: April 28, 2020

/s/ Brian R. Martinotti

HON. BRIAN R. MARTINOTTI

United States District Judge

ORDER

THIS MATTER is opened to this Court by Defendant REV Ambulance Group Orlando, Inc.'s d/b/a McCoy Miller Emergency Vehicles, Marque Emergency Vehicles, and Road Rescue Emergency Vehicles' ("REV") Motion to Dismiss the antitrust claims in Plaintiff First Priority Emergency Vehicles, Inc.'s ("First Priority") Second Amended Complaint ("SAC") pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (ECF No. 35.) First Priority opposed REV's Motion to Dismiss (ECF No. 38.)Having reviewed the submissions filed in connection with the motion and having declined to hold oral argument pursuant to *Federal Rule of Civil Procedure 78(b)*, for the reasons set forth in the accompanying Opinion and for good cause shown,

IT IS on this 28th **[*13]** day of 2020,

ORDERED that REV's Motion to Dismiss is **GRANTED** with respect to Counts Two, Three, Four, Five, and Six.

/s/ Brian R. Martinotti

HON. BRIAN R. MARTINOTTI

United States District Judge

Richardson v. All. Residential Co.

United States District Court for the District of Maryland

April 29, 2020, Decided; April 29, 2020, Filed

Civil Action No. ELH-18-1114

Reporter
2020 U.S. Dist. LEXIS 75285 *; 2020 WL 2061512

CHRISTINA RICHARDSON, et al., Plaintiffs v. ALLIANCE RESIDENTIAL COMPANY, Defendant.

Prior History: Richardson v. All. Residential Co., 2020 U.S. Dist. LEXIS 17842 (D. Md., Feb. 4, 2020)

Core Terms

overtime, imputed, overtime work, Memorandum, unpaid, policies, apparent authority, agency principles, summary judgment, forty hour, Reconsider, deposition, instruct, courts, overtime hours, prior approval, work overtime, conversation, plaintiffs', timekeeping, supervised, clock, genuine dispute, employees, recorded, cases, actual authority, material fact, work hours, timesheets

Counsel: **[*1]** For Christina Richardson, Gordon Clark, Plaintiffs: Philip B Zipin, Zipin, Amster & Greenberg, LLC, Silver Spring, MD.

For Alliance Residential Company, Defendant: Thomas P Dowd, LEAD ATTORNEY, Littler Mendelson PC, Washington, DC; Eunju Park, Littler Mendelson, P.C., Washington, DC.

Judges: Ellen L. Hollander, United States District Judge.

Opinion by: Ellen L. Hollander

Opinion

MEMORANDUM OPINION

Plaintiffs Christina Richardson and Gordon Clark filed suit against their former employer, defendant Alliance Residential Company ("Alliance" or the "Company"). ECF 1. They alleged violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., and corresponding provisions under Maryland law. *See* Md. Code (2016 Repl. Vol., 2017 Supp.), § 3-401 et seq. of the Labor & Employment Article. Following discovery, plaintiffs moved for partial summary judgment. ECF 28. In a Memorandum Opinion (ECF 40) and Order (ECF 41) of February 4, 2020, I denied plaintiffs' motion.

Alliance has filed a motion (ECF 42) seeking "an Order clarifying and/or reconsidering one of the findings/conclusions contained" in the Court's Memorandum Opinion. *Id.* at 1. Specifically, the Company seeks to clarify whether the Memorandum Opinion forecloses it from arguing at trial that it lacked knowledge that Mr. **[*2]** Clark worked overtime, without pay. *See id.* at 1-2. If so, Alliance asks the Court to revisit its ruling. *Id.* at 4. The Company's motion is supported by a memorandum of law. ECF 42-1 (collectively, the "Motion" or "Motion to Reconsider"). Plaintiff opposes the Motion (ECF 43), and Alliance has replied. ECF 44.

No hearing is necessary to resolve the Motion to Reconsider. *See* *Local Rule 105.6*. For the reasons that follow, I shall grant the Motion in part and deny it in part.

I. Background

A. Factual Background[1]

Alliance, a property management company, manages an 82-unit apartment building located on East Saratoga Street in Baltimore (the "Property"). ECF 3 (Answer), ¶ 4; *see also Our Company*, ALLIANCE RESIDENTIAL COMPANY, http://www.allresco.com/ (last visited Jan. 23, 2020). An on-site "business manager" oversees the Property's day-to-day operations, such as marketing and leasing, collecting rent, managing on-site staff, and interfacing with residents. ECF 28-1 (Elizabeth Karl Deposition) at 23, Tr. 7, 9. Generally, the business manager reports to a "regional manager," who, in turn, is supervised by a "regional vice president." *Id.* at 23, Tr. 7.

Ms. Richardson served as the Property's business manager from April 18, 2016 to November 1, 2017. ECF 28-1 (Richardson Answers to Interrogatories) at 60, No. 2. When **[*3]** Ms. Richardson began working at Alliance, the Company lacked a regional manager. As a result, Ms. Richardson was supervised by regional vice president Elizabeth Karl. ECF 28-1 at 23, Tr. 8. In December 2016, Alliance hired Sarah Malone as a regional manager. As of that time, Ms. Malone supervised Ms. Richardson until Ms. Richardson left employment with Alliance. *Id.*; *see also* ECF 28-1 at 60, No. 2.

Mr. Clark worked as the Property's on-site service supervisor from approximately October 2016 to October 2017. ECF 28-1 (Clark Answers to Interrogatories) at 71, No. 2; *see also* ECF 28-3 (Clark Deposition) at 110, Tr. 12; *id.* at 115, Tr. 32. Employed as an hourly worker, Mr. Clark's regular hours were Monday through Friday from 8:00 a.m. to 4:00 p.m. ECF 28-1 at 81, No. 2; ECF 29-1 (Clark Deposition) at 4, Tr. 67.[2] Mr. Clark was supervised by Ms. Richardson throughout his time at Alliance. ECF 28-1 (Alliance Admissions) at 82, No. 6; *see also* ECF 28-1 at 25, Tr. 16. Per the Company's policy, Ms. Richardson, as Mr. Clark's direct supervisor, was responsible for approving Mr. Clark's overtime work. ECF 28-1 at 33, Tr. 46.

When Alliance hired Ms. Richardson and Mr. Clark, it provided them with a copy of its Associate Handbook (the "Handbook"). ECF 28-2 at 6, Tr. 20-21; ECF 29-1 at 3-4, Tr. 65-66. Plaintiffs agreed **[*4]** to read the Handbook and become familiar with its provisions. *Id.* The Handbook advised employees that federal and state law require accurate timekeeping, and that Alliance had implemented timekeeping procedures for employees to record and submit accurate time records. *See* ECF 36-1 (Alliance Handbook) at 27. The Handbook stated, in part, *id.*:

> **Accurate Time**. Accurately recording time worked is the responsibility of every Associate. Federal and state laws require the Company to keep an accurate record of time worked in order to calculate Associate pay and benefits. Time worked is all the time actually spent on the job performing assigned duties. Associates are expected to regularly arrive at work on time, ready to work. Associates will be disciplined for excessive and/or unexcused absences. Non-exempt Associates should accurately record the time they begin and end their work, as well as the beginning and ending time of each meal period. They also should record the beginning and ending time of any split shift or departure from work for personal reasons.

Further, the Handbook contained a section titled "**OVERTIME PAY FOR NON-EXEMPT ASSOCIATES**." *Id.* at 57 (emphasis in original). The section provided, *id.*:

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[1] The facts underlying this dispute are set forth in the Memorandum Opinion of February 4, 2020. ECF 40. Those facts are incorporated herein. The facts presented in this Memorandum Opinion are limited to those pertinent to the Motion to Reconsider.

[2] At his deposition, Mr. Clark testified that he believed that his work schedule did not include a break for lunch. ECF 29-1 at 4, Tr. 67-68. Although not entirely clear, it appears that Ms. Richardson received an unpaid lunch break. ECF 28-2 at 8, Tr. 29.

a. **Prior Approval** **[*5]** . Non-exempt Associates may be required to work overtime at their Supervisor's request. All overtime requires the prior approval of the Associate's Supervisor or Manager. Associates who work overtime without prior approval will be paid in accordance with the law, however, may be subject to disciplinary action up to and included termination for violating the prior approval requirement.

b. **Record All Hours Worked**. If your position is classified as non-exempt, you must record all hours worked. Working off the clock is prohibited, and no manager has the authority to require any Associate to do so. Any Associate who works off the clock or any manager that requests an Associate work off the clock may be subject to disciplinary action up to and including termination.

c. **Miscellaneous**. To respect each Associate's personal schedule, every effort will be made to minimize unwanted overtime. However, business demands are such that overtime may be required as a condition of employment. The company pays overtime in accordance with applicable federal and state laws. "Hours worked" does not include paid time off for holidays, vacation, illness, inclement weather, jury duty or bereavement.

Mr. Clark acknowledged **[*6]** at his deposition that he had read the Handbook. ECF 29-1 at 7, Tr. 78-79; *see id.* at 3-4, Tr. 65-57. When asked if he "understood that it was the company's policy that 'working off the clock is prohibited and no manager has the authority to require an associate to do so,'" Mr. Clark responded: "Yeah. I mean, its—it says it here." *Id.* at Tr. 79.

According to plaintiffs, Ms. Malone met with Ms. Richardson in February 2017, and instructed Ms. Richardson not to record more than forty hours of work per week. *See* ECF 28-2 at 16, Tr. 16; *see id.* at 18, Tr. 18. Ms. Richardson testified at her deposition that Ms. Malone said: "[Alliance] didn't have any money right now to pay overtime, my hours that I could get paid for were 9:00 to 5:00, but my job description expectations did not change." *Id.* at 25, Tr. 97; *see also id.* at 26, Tr. 100 ("[S]he stated that I could only basically get paid from 9:00 to 5:00, but my expectations and me being on call, none of that was changing."). Further, Ms. Richardson testified that she knew Ms. Malone's directive violated Alliance's policies. *Id.* at 29, Tr. 112. But, she did not report the conversation to Ms. Karl or to the Company's human resources department because she was worried that doing so could **[*7]** lead to her termination. *Id.* at 29, Tr. 112-13; *see also id.* at 30, Tr. 115.

Shortly after Ms. Richardson met with Ms. Malone in February 2017, Ms. Richardson spoke with Mr. Clark. ECF 28-2 at 13, Tr. 49; *see* ECF 29-1 at 14-15, Tr. 106-113. According to Mr. Clark, Ms. Richardson indicated that she had just talked to Ms. Malone. ECF 29-1 at 14, Tr. 109. Both Ms. Richardson and Mr. Clark testified that Ms. Richardson then told Mr. Clark that he could not record more than 40 hours of work per week on his timecard. ECF 28-2 at 13, Tr. 48; ECF 29-1 at 15, Tr. 110, 113. Mr. Clark testified that he became upset and walked away from Ms. Richardson, ending the conversation. ECF 29-1 at 16, Tr. 114. Mr. Clark never spoke directly with Ms. Malone about his overtime work. *Id.* at 13, Tr. 105.

Mr. Clark maintains that when Ms. Karl supervised Ms. Richardson, Mr. Clark would record time for work occurring outside of his regular hours when he considered it a "major" task, such as a repair that took an hour or more to complete. ECF 29-1 at 12, Tr. 98; *see id.* at 19, Tr. 128-29. In contrast, he did not record "minor" tasks that took 15-20 minutes or less, such as assisting a resident who was locked out of an apartment. *Id.* at 12, Tr. 98-100.

Following **[*8]** Mr. Clark's conversation with Ms. Richardson, Mr. Clark claims that he worked 50 hours per week: 40 regular hours between Monday and Friday and an additional 10 hours of overtime work on the evenings or weekends. ECF 28-1 at 71, No. 2. However, Mr. Clark admitted during his deposition that he did not change how he recorded his hours after talking to Ms. Richardson. That is, he continued to record hours outside of his regular schedule for "major" tasks, but not for minor tasks. ECF 29-1 at 19, Tr. 129; *see also id.* at 12, Tr. 98-101.

Mr. Clark resigned from Alliance in October 2017, and Ms. Richardson left on November 1, 2017. ECF 28-1 at 60, No. 2. Mr. Clark seeks $14,944.20 for the ten hours of overtime that he alleges he worked each week, without compensation, from February 1, 2017 to October 27, 2017. ECF 28-1 at 76, No. 10. Ms. Richardson seeks compensation for 51.5 hours of overtime pay for a period of 36 weeks. *See* ECF 28-1 at 76, No. 10; ECF 28-2 at 48, Tr. 189. The Motion implicates the Court's ruling only as to Mr. Clark.

B. Procedural History

Plaintiffs filed suit on April 17, 2018. ECF 1. On July 20, 2018, after defendants answered the Complaint, the Court issued a Scheduling Order. **[*9]** ECF 8. It set, *inter alia*, a deadline of December 17, 2018 to complete discovery, and January 29, 2019, as the deadline for filing dispositive pretrial motions. *Id.* Following several extensions, dispositive motions were due by June 11, 2019. *See* ECF 27.

On that date, plaintiffs moved for partial summary judgment, asserting, *inter alia*, that there was no genuine dispute of material fact and that Alliance was liable to plaintiffs for unpaid overtime hours. ECF 28. The motion was supported by several hundred pages of exhibits. *See* ECF 28-1 at 21-120; ECF 29-1; ECF 30-1; ECF 31-1. As to the FLSA, plaintiffs argued that Alliance violated the FLSA because "Plaintiffs' supervisors knew that Plaintiffs were working overtime hours but failed to ensure that the hours were recorded properly or take affirmative action to stop them from doing so." ECF 28-1 at 6. With respect to Mr. Clark, plaintiffs asserted that "there is no question Alliance was aware he was working overtime hours," given that Ms. Richardson, Mr. Clark's supervisor, "instructed him to work [overtime] hours, and told him that he would not be paid for them and that he should not record the time." ECF 28-1 at 10.

Alliance filed an **[*10]** opposition to the motion and submitted its own exhibits. ECF 34; ECF 35; ECF 36. The Company asserted that Mr. Clark was not entitled to summary judgment "because the evidence demonstrates that he did not have an objectively reasonable basis for concluding that Christina Richardson had actual authority or apparent authority to instruct him to work off the clock." ECF 34 at 35. Ms. Richardson lacked actual authority, Alliance contended, because the Handbook was clear that a supervisor could not instruct a subordinate to perform unrecorded work. *Id.* And, Ms. Richardson lacked apparent authority, according to Alliance, because Mr. Clark had read the Handbook and knew Alliance's policies. *Id.*

As indicated, I denied plaintiffs' motion in a Memorandum Opinion (ECF 40) and Order (ECF 41) of February 4, 2020. Of relevance here, I rejected Alliance's "contention that it is insulated from liability [as to Mr. Clark] because Ms. Richardson lacked actual or apparent authority to instruct Mr. Clark to manipulate his timesheets." ECF 40 at 26. I explained: "'Knowledge may be imputed to the employer when its supervisors or management encourage[] artificially low reporting.'" *Id.* (internal quotation **[*11]** marks omitted) (quoting *Bailey v. TitleMax of Ga., Inc., 776 F.3d 797, 803-04 (11th Cir. 2015))*.

The case of *Brennan v. General Motors Acceptance Corp., 482 F.2d 825 (5th Cir. 1973)*, was "instructive" on this point. ECF 40 at 26. I stated, *id.* 26-27:

> There, the district court found that the employer was liable under the FLSA because, although the employer's upper echelon management encouraged accurate timekeeping, the plaintiffs' immediate supervisors directed them to perform off-the-clock work. *Id. at 827*. The employer appealed, arguing that it could not have violated the FLSA because it had no knowledge of the unreported overtime. *Id.* But, the former Fifth Circuit rejected that argument, reasoning that the employer "cannot disclaim knowledge when certain segments of its management squelched truthful responses." *Id. at 828*. The court concluded that "[b]ecause the immediate supervisors were primarily responsible for the employees' failing to report all overtime, . . . they may have had actual knowledge of the unreported overtime." *Id. at 828*. "At the very least,' the court explained, "[the employer] had constructive knowledge, for they had the opportunity to get truthful overtime reports but opted to encourage artificially low reporting instead." Accordingly, the court ruled that the district court did not err in finding that the employer had knowledge of the plaintiffs' **[*12]** overtime. *Id. at 827*.

In light of *Brennan* and analogous cases, I concluded that Ms. Richardson's knowledge of Mr. Clark's overtime work was imputable to Alliance. *Id.* at 28. I reasoned, *id.*:

> Here, there is no dispute that Ms. Richardson acted as Mr. Clark's direct supervisor for the entirety of his employment at Alliance. ECF 28-1 at 82, No. 6. Therefore, pursuant to the Handbook, Ms. Richardson was responsible for setting Mr. Clark's hours and for authorizing his overtime hours. *Id.* at No. 8; *see also* ECF 36-1 at 57. Both Ms. Richardson and Mr. Clark testified that Ms. Richardson informed Mr. Clark that he would not be compensated for overtime work. *See* ECF 28-2 at 13, Tr. 49; ECF 29-1 at 14-15, Tr. 106-113. And, Ms. Malone admits that she never checked with Mr. Gordon to determine the accuracy of his timekeeping sheets. ECF 28-3 at 24. Therefore, there is no genuine dispute of fact that Alliance had actual or constructive notice that Mr. Clark was working uncompensated overtime.

Nonetheless, I found that Mr. Clark was not entitled to summary judgment "because there is a genuine issue of fact concerning the number of hours of work that he performed but for which he was not paid." ECF 40 at 28. Accordingly, **[*13]** I denied plaintiffs' summary judgment motion as to Mr. Clark. *See* ECF 41.

The Motion to Reconsider followed on February 18, 2020. ECF 42.

II. Standards of Review

Although Alliance cites only *Local Rule 105.10* in its Motion, a motion to reconsider an interlocutory order such as one denying summary judgment is governed by *Rule 54(b) of the Federal Rules of Civil Procedure*. *See* *U.S. Tobacco Coop., Inc. v. Big S. Wholesale of Va., LLC, 899 F.3d 236, 256 (4th Cir. 2018)*; *Carlson v. Bos. Sci. Corp., 856 F.3d 320, 325 (4th Cir. 2017)*; *Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 514-15 (4th Cir. 2003)*.[3] Under *Rule 54(b)*, any order "that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."

The Fourth Circuit has distinguished between *Rule 54(b)* and *Rule 59(e)*, which governs reconsideration of final judgments, explaining that *Rule 54(b)* "involves broader flexibility" to account for new facts and arguments as the litigation unfolds. *See* *Carlson, 856 F.3d at 325*; *Am. Canoe Ass'n, 326 F.3d at 514-15*. However, the Fourth Circuit has admonished that "the discretion afforded by *Rule 54(b)* 'is not limitless,'" and the Court has "'cabined revision pursuant to *Rule 54(b)* by treating interlocutory rulings as law of the case.'" *Tobacco Coop., 899 F.3d at 256* (quoting *Carlson, 856 F.3d at 325*).

The law of the case doctrine "generally provides that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" **[*14]** *Musacchio v. United States, __ U.S. __, 136 S. Ct. 709, 716, 193 L. Ed. 2d 639 (2016)* (quoting *Pepper v. United States, 562 U.S. 476, 506, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011))*; *accord* *Arizona v. California, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)*; *Graves v. Lioi, 930 F.3d 307, 318 (4th Cir. 2019)*; *Carlson, 856 F.3d at 325*; *TFWS, Inc. v. Franchot, 572 F.3d 186, 191 (4th Cir. 2009)*. The doctrine's effect is to bar a party from resurrecting issues that were previously decided or "'decided by necessary implication.'" *United States v. Lentz, 524 F.3d 501, 528 (4th Cir. 2008)* (quoting *Sejman v. Warner-Lambert Co., Inc., 845 F.2d 66, 69 (4th Cir. 1988))*. In so doing, the law of the case doctrine advances the interests of efficiency, judicial economy, and finality. *See* *Christianson v. Colt Indus. Oper. Corp., 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)* (observing that the doctrine safeguards the "efficiency of the judicial process by protecting against the agitation of settled issues"); *United States v. Philip Morris USA Inc., 801 F.3d 250, 257, 419 U.S. App. D.C. 273 (D.C. Cir. 2015)* (noting that the law of the case "reflects the understanding that 'inconsistency is the antithesis of the rule of law'") (citation and alteration omitted).

When applied to a court's prior interlocutory rulings, the law of the case doctrine "is not an 'inexorable command' but rather a prudent judicial response to the public policy favoring an end to litigation." *Sejman, 845 F.2d at 68*

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[3] Plaintiffs filed the Motion pursuant to *Local Rule 105.10*. With exceptions not applicable here, *Local Rule 105.10* provides that "any motion to reconsider any order issued by the Court shall be filed with the Clerk not later than fourteen (14) days after entry of the order." There is no contention here that the Motion is untimely.

(citation omitted). Accordingly, the Fourth Circuit has instructed that a court should revise an interlocutory order only to account for "'(1) a subsequent trial producing substantially different evidence; (2) a change in applicable law; or (3) clear error causing manifest injustice.'" *Tobacco Coop., 899 F.3d at 256* (quoting *Carlson, 856 F.3d at 325*). In this setting, the Fourth Circuit has colorfully explained that to be clearly erroneous the decision cannot **[*15]** be "'just maybe or probably wrong; it must . . . strike [the court] as wrong with the force of a five-week-old, unrefrigerated dead fish.'" *TFWS, Inc., 572 F.3d at 194* (first alteration in original) (citation omitted). In short, the decision must be "'dead wrong.'" *Id.* (citation omitted).

III. Discussion

Alliance assigns no error to the Court's Order denying summary judgment to Mr. Clark with respect to his FLSA claim. Nor does the Company quarrel with the Court's determination that there is a genuine dispute of material fact as to whether Mr. Clark performed unpaid overtime work and, if so, how many hours he worked. Rather, Alliance takes issue with the Court's analysis in the Memorandum Opinion concerning the Company's knowledge of Mr. Clark's uncompensated work. ECF 42 at 1-2.

In particular, Alliance contends that it is "unclear" whether the Court has precluded it from arguing at trial that Ms. Richardson's knowledge of Mr. Clark's unpaid work is not imputable to the Company because Ms. Richardson had no authority to direct Mr. Clark to underreport his hours. ECF 42-1 at 6. If the answer is "yes," *i.e.*, if the Company is foreclosed from making that argument, then the Company urges the Court to set aside that **[*16]** ruling. *See id.* at 9-13. According to Alliance, it should be able to argue to a jury that because the Handbook stripped Ms. Richardson of authority to instruct Mr. Clark to work off the clock, and because Mr. Clark knew Ms. Richardson lacked such authority, Ms. Richardson's knowledge of Mr. Clark's unpaid overtime cannot be imputed to the Company. *See id.*

In plaintiffs' view, "[t]here is nothing to clarify or reconsider." ECF 43 at 2. They argue that Ms. Richardson had actual authority over Mr. Clark's hours, and that Mr. Clark understood Ms. Richardson merely to be conveying Ms. Malone's directive. *Id.* at 1-2. Therefore, plaintiffs maintain that it is "uncontested" that "Ms. Richardson had knowledge of Mr. Clark's overtime hours worked, which knowledge is imputed to Defendant." *Id.* at 2.

To start, in the Memorandum Opinion, I squarely rejected the Company's reliance on agency principles. In my view, the Memorandum Opinion was clear: "Defendant's contention that it is insulated from liability because Ms. Richardson lacked actual or apparent authority to instruct Mr. Clark to manipulate his timesheets is not persuasive." ECF 40 at 26. I explained that courts have consistently held that where a supervisor encourages **[*17]** subordinates to falsify their time records, the supervisor's knowledge of unpaid work is imputable to the employer. *See id.* That was the case here, I observed, because, "pursuant to the Handbook, Ms. Richardson was responsible for setting Mr. Clark's hours and for authorizing his overtime hours" and "[b]oth Ms. Richardson and Mr. Clark testified that Ms. Richardson informed Mr. Clark that he would not be compensated for overtime work." *Id.* at 28.

Therefore, I found that "there is no genuine dispute of fact that Alliance had actual or constructive notice that Mr. Clark was working uncompensated overtime." *Id.* In this respect, the Memorandum Opinion needs no clarification. Accordingly, I turn to consider whether to revise my conclusion that Alliance in fact knew of Mr. Clark's unpaid work.

There is no claim of an intervening change in the law, and no presentation of new evidence, Therefore, I must determine whether my analysis amounted to clear error causing manifest injustice. *See Henslee v. Union Planters Nat. Bank & Tr. Co., 335 U.S. 595, 600, 69 S. Ct. 290, 93 L. Ed. 259, 1949-1 C.B. 223 (1949)* (Frankfurter, J., dissenting) ("Wisdom too often never comes, and so one ought not to reject it merely because it comes late.").

The FLSA provides that "no employer shall employ" a covered employee in excess of forty **[*18]** hours in a given week unless the employee is paid at "a rate not less than one and one-half times the regular rate at which he is employed" for each additional hour worked. *29 U.S.C. § 207(a)(1)*; *see Encino Motorcars, LLC v. Navarro, __ U.S. __, 136 S. Ct. 2117, 2121, 195 L. Ed. 2d 382 (2016)*; *U.S. Dep't of Labor v. Fire & Safety Investigation Consulting Servs., LLC, 915 F.3d 277, 280 (4th Cir. 2019)*. To "employ" is defined in the FLSA as "to suffer or permit to work." *29 U.S.C. § 203(g)*. The employer's knowledge of the work is an element of a FLSA claim that the plaintiff must establish to recover. *See* Bailey v. Cty. of Georgetown, 94 F.3d 152, 157 (4th Cir. 1996); Pforr v. Food Lion, Inc., 851 F.2d 106, 108 (4th Cir. 1988); Davis v. Food Lion, 792 F.2d 1274 (4th Cir. 1986).

The broad definition of "employ" places the onus on the employer to "exercise its control and see that the work is not performed if it does not want it to be performed." 29 C.F.R. § 785.13. Thus, employers must "pay for all work they know about, even if they did not ask for the work, even if they did not want the work done, and even if they had a rule against doing the work." Allen v. City of Chicago, 865 F.3d 936, 938 (7th Cir. 2017); *see also* Chao v. Gotham Registry, Inc., 514 F.3d 280, 288 (2d Cir. 2008) (collecting cases). Conversely, the law "'stops short of requiring the employer to pay for work it did not know about, and had no reason to know about.'" Allen, 865 F.3d at 938 (citation omitted). In other words, an employer is liable under the FLSA only if it had actual or constructive knowledge of the employee's overtime work. *Id.*

In assessing whether a plaintiff has met his burden, courts have regularly found that a supervisor's knowledge of the plaintiff's overtime **[*19]** work is imputable to the employer. *See* ECF 40 at 26-27 (collecting cases). For example, in Allen v. Board of Public Education, 495 F.3d 1306 (11th Cir. 2007), the Eleventh Circuit held that several plaintiffs had raised a genuine issue of material fact as to the employer's actual knowledge of unpaid work where their supervisor told them that they could not be paid overtime but observed them working beyond their scheduled hours. Id. at 1319. Similarly, in Kuebel v. Black & Decker, 643 F.3d 352 (2d Cir. 2011), the Second Circuit found the plaintiff had raised a genuine issue of fact as to the employer's knowledge where he testified, *inter alia*, that supervisors instructed him not to record more than forty hours per week. Id. at 356-57, 365. Notably, the employers in these cases implemented policies to promote compliance with the FLSA. *See, e.g.*, Kuebel, 643 F.3d at 356 (requiring employees to accurately record their hours and encouraging employees to report violations of company policies).

Alliance concedes that the decisions are "similar" in that the employers in those cases had policies requiring accurate timekeeping. ECF 42-1 at 11. But, the Company seeks to distinguish this case, asserting that "none of the employers in the precedent decisions had policies in place that expressly deprived supervisors of the authority to instruct an employee to not **[*20]** record all overtime hours." *Id.* As a result, "none of these cases discuss the legal doctrine of actual/apparent authority." *Id.* In contrast, the Company maintains that "Alliance not only has demonstrated that it denied this authority to its managers, Alliance also has demonstrated that Mr. Clark knew about this limitation on authority, and he understood it." *Id.* It follows, Alliance contends, that a jury should decide whether Ms. Richardson's knowledge can be imputed to the Company, given that she exceeded the scope of her authority when she instructed Mr. Clark to undercount his hours. *See id.* at 13.

It is true that federal statutes are ordinarily read against a backdrop of common law agency principles. *See* Krakauer v. Dish Network, LLC, 925 F.3d 643, 659 (4th Cir. 2019) (assuming that "federal statutes are written with familiar common law agency principles in mind"); *see, e.g.*, Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 136 S. Ct. 663, 674, 193 L. Ed. 2d 571 (2016) (applying "federal common-law principles of agency" to the Telephone Consumer Protection Act); Vance Ball State Univ., 570 U.S. 421, 428, 133 S. Ct. 2434, 186 L. Ed. 2d 565 (2013) (Title VII); Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 444-45, 123 S. Ct. 1673, 155 L. Ed. 2d 615 (2003) (ADA); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1993) (ERISA); Am. Soc. of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 567, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982) (***antitrust law***). Yet, because "'federal statutes are generally intended to have uniform nationwide application,'" courts apply a "federal rule of agency," not state law. Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989) (citation omitted). For guidance, courts turn to the Restatement of Agency. *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 755, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) **[*21]** (describing the Restatement as a "useful beginning point for a discussion of general agency principles"); Hodgin v. UTC Fire & Sec. Ams. Corp., 885 F.3d 243, 252 (4th Cir. 2018) (observing that "courts have traditionally looked to the Restatement of Agency" to derive a federal common law of agency).

Under traditional principles of agency law, the agent acts as a representative of the principal, who, in turn, has the right to control the agent's actions. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006). An agency relationship can arise in one of two ways: actual or apparent authority. A principal confers actual authority on an agent when "the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." *Id.* § 2.01. An agency relationship predicated on apparent authority is formed "when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Id.* § 2.03.

As a result of the agency relationship, the legal consequences of an agent's actions are attributable to the principal when the agent acts within the scope of his or her authority. *Id.* § 7.04 cmt. b; *see, e.g.*, Meyer v. Holley, 537 U.S. 280, 285, 123 S. Ct. 824, 154 L. Ed. 2d 753 (2003) (discussing applicability of vicariously liability principles to Fair Housing Act) **[*22]** . The rule "creates incentives for a principal to choose agents carefully and to use care in delegating functions to them." *RESTATEMENT, supra, § 5.03 cmt. b*.

According to the Restatement, an employee "acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control." *Id.* § 7.07. In contrast, an "employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer." *Id.* Notably, the Restatement teaches that "conduct is not outside the scope of employment merely because an employee disregards the employer's instructions." *Id.* cmt. c. For instance, if a delivery company directs its employee to transport a package with instructions to drive the speed limit and the employee speeds resulting in an accident, the company is nonetheless liable because the employee's conduct "is compatible with acting in an assigned role to do an assigned task." *Id.*

Generally, where the agent acquires information in furtherance of the agent-principal relationship, that knowledge is deemed known by the principal. *Id.* § 5.03; *see, e.g.*, Am. Sur. Co. v. Pauly, 170 U.S. 133, 153, 18 S. Ct. 552, 42 L. Ed. 977 (1898) ("It is the rule that the **[*23]** knowledge of the agent is the knowledge of his principal . . . ."). The Restatement, however, imposes two limitations on the imputation principle. First, "[t]he scope of an agent's duties delimits the content of knowledge that is imputed to the principal." *RESTATEMENT, supra, § 5.03*. Thus, an agent's knowledge that he "acted or intends to act in a manner unauthorized by the principal is not imputed to the principal." *Id.* Similarly, an agent's knowledge is "not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person." *Id.* § 5.04. Second, even if knowledge lies within the scope of an employee's duties, it is imputed to the principal only if material to the agent's duties. *Id.* Stated differently, the employee's knowledge of a fact may be imputed to the employer only if it is of import to the agent's duties.

Although neither party addresses the applicability of agency principles to the FLSA, the Supreme Court has instructed that "'[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.'" *United States v. Bestfoods, 524 U.S. 51, 63, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998)* (alteration in *Bestfoods*) (quoting *United States v. Texas, 507 U.S. 529, 534, 113 S. Ct. 1631, 123 L. Ed. 2d 245 (1993)*). Therefore, **[*24]** a federal statute will not displace traditional agency principles absent clear indication from Congress. *See, e.g.*, *In re Crescent City Estates, LLC, 588 F.3d 822, 826 (4th Cir. 2009)* (finding that fee-shifting provision in removal statute clearly replaced the American Rule); *DiFelice v. U.S. Airways, Inc., 397 F. Supp. 2d 758, 780 (E.D. Va. 2005)* (concluding that ERISA supplanted traditional agency principles because it directly addresses the liability of a fiduciary to plan members).

The FLSA is silent with regard to agency principles; it evinces no congressional intent to supersede agency common law. And, notably, other courts have applied the rules of agency to the FLSA, albeit in circumstances different from those presented here. *See* *Arriaga v. Fla. Pac. Farms, LLC, 305 F.3d 1228, 1244-45 (11th Cir. 2002)* (concluding that the FLSA did not require farm owners to reimburse farmworkers for fees charged by recruiters where the allegations failed to support the creation of apparent authority between the farm owners and recruiters); *see also* *Ulloa v. Fancy Farms, Inc., 762 F. App'x 859, 866 (11th Cir. 2019)*. Accordingly, Alliance is correct that the FLSA does not supersede agency common law.

To be sure, the existence of an agent-principal relationship and the scope of an agent's authority are factual questions and so are ordinarily within the purview of the factfinder. *See, e.g.*, *Ashland Facility Operations, LLC v. NLRB, 701 F.3d 983 (4th Cir. 2012)* (citing *Metco Prods., Inc. v. NLRB, 884 F.2d 156, 159 (4th Cir. 1989)*). Here, however, it is undisputed that Alliance delegated to Ms. Richardson **[*25]** the authority to supervise Mr. Clark, which included the extent of any overtime he worked.

The Handbook states: "All overtime requires the prior approval of the Associate's Supervisor or Manager." ECF 36-1 at 57. Indeed, the Handbook warns: "Associates who work overtime without prior approval . . . may be subject to disciplinary action up to and included termination for violating the prior approval requirement." *Id.* Moreover, Ms. Karl acknowledged during her deposition that, according to Company policy, Mr. Clark would check with Ms. Richardson, not with her or Ms. Malone, for approval to work more than forty hours in a week. ECF 28-1 at 33, Tr. 46. Thus, there can be no dispute that Ms. Richardson had actual authority to manage Mr. Clark's hours, including the decision to permit Mr. Clark to work overtime.

Alliance disputes the conclusion that Ms. Richardson's knowledge can be imputed to it, insisting that the Handbook deprived Ms. Richardson of the authority to require Mr. Clark to falsify his timesheets, and Mr. Clark knew that such a command contravened Company policy. *See* ECF 42-1 at 7. Certainly, Alliance is correct that, pursuant to the Handbook, Ms. Richardson's alleged conduct **[*26]** violated its policies. *See* 36-1 at 57 (stating that "[w]orking off the clock is prohibited, and no manager has the authority to require any Associate to do so"). But, Alliance misses the proverbial forest for the trees. Whether Ms. Richardson's knowledge of Mr. Clark's unpaid work is imputable to Alliance turns on whether Ms. Richardson had authority over Mr. Clark's hours generally, not her authority specifically to direct Mr. Clark to work-off-the-clock.

It is illustrative to consider two hypothetical scenarios. First, imagine that Ms. Richardson tells Mr. Clark not to record his hours and he listens, but Ms. Richardson and Mr. Clark are similarly situated peers, not supervisor and subordinate. In that circumstance, Ms. Richardson is not an agent of Alliance with respect to Mr. Clark's hours; she can neither limit him to forty hours of work nor order him to work in excess of forty hours. Consequently, her knowledge of Mr. Clark's unpaid labor would not be imputable to the Company. In another scenario, Ms. Richardson, as Mr. Clark's supervisor, learns that Mr. Clark is consistently working unrecorded overtime and makes no effort to stop him from doing so, nor does she ensure the accuracy **[*27]** of his timesheets. In that circumstance, Ms. Richardson's knowledge is plainly imputable to the Company: Alliance delegated control of Mr. Clark's hours to Ms. Richardson and so Ms. Richardson's knowledge of Mr. Clark's overtime is within the scope of her authority. That is so even if she never discussed overtime with Mr. Clark. In sum, Ms. Richardson's authority to order Mr. Clark to work-off-the-clock is immaterial; what matters is her authority to control Mr. Clark's work hours.

Notably, Alliance has not cited a FLSA decision that supports its position that where supervisors act in violation of the employer's policies, their conduct is not imputable. Nor has the Court uncovered such a case. To the contrary, those courts that have considered the issue focus on whether the knowledgeable individual was a manager, not the precise scope of his or her authority. *See, e.g.*, *Bailey v. TitleMax of Ga., Inc., 776 F. 3d 797, 802 (11th Cir. 2015)* ("Knowledge may be imputed to the employer when its supervisors or management 'encourage artificially low reporting.'") (alteration and citation omitted); *Kuebel, 643 F.3d at 363-64* (observing that plaintiff asserted that "managers instructed him not to record more than forty hours per week" and that "it was [defendant], through its managers, **[*28]** that caused the inaccuracies in his timesheets"); *Allen, 495 F.3d at 1316* (finding genuine issue as to knowledge where employee's "supervisor told her that she could not be paid overtime, but observed her working beyond her scheduled hours"); *Forrester v. Roth's I.G.A. Foodliner, Inc., 646 F.2d 413, 414 (9th Cir. 1981)* ("any official" of the employer); *Brennan, 482 F. 2d at 828* ("immediate supervisor," or "management").

Moreover, Alliance's position is irreconcilable with the FLSA's capacious definition of "employ," which imposes on an employer a non-delegable duty to prevent unwanted work. *See* *Chao v. Gotham Registry, Inc., 514 F.3d 280, 288 (2d Cir. 2008)* ("An employer who has knowledge that an employee is working, and who does not desire the work be done, has a duty to make every effort to prevent its performance."); *Reich v. Dep't of Conservation & Nat. Res., 28 F.3d 1076, 1082 (11th Cir. 1994)* ("The reason an employee continues to work beyond his shift is immaterial; if the employer knows or has reason to believe that the employee continues to work, the additional hours must be counted."); *Forrester, 646 F.2d at 414* (holding that an employer "cannot stand idly by and allow an employee to perform overtime work without proper compensation").

And, Alliance's position is at odds with Department of Labor regulations, which make manifest that policies alone are insufficient to insulate an employer from FLSA liability. *See* 29 C.F.R. § 785.13 ("The mere promulgation of a rule against [unwanted] **[*29]** work is not enough. Management has the power to enforce the rule and must make every effort to do so."). Alliance offers no sound basis to distinguish its policy prohibiting management to order off-the-clock work from others, such as requiring employees to obtain preapproval to perform overtime, which courts have concluded does not discharge an employer's duty to account for all overtime work. *See* *Chao, 514 F.3d at 288-90*; *Reich, 28 F.3d at 1084*. Indeed, allowing Alliance to hide behind its Handbook would threaten to eviscerate the FLSA, as it would enable employers unofficially to pressure employees not to record overtime through management, but then defeat ensuing claims on the ground that its supervisors acted ultra vires.

However, after again combing through the parties' submissions, I am satisfied that there is a genuine dispute of material fact as to whether Ms. Richardson knew that Mr. Clark was not accurately recording his hours.

Ms. Richardson and Mr. Clark both testified that Ms. Richardson told Mr. Clark that he could not record more than forty hours per week, regardless of how much he actually worked. ECF 29-1 at 15, Tr. 110, 113. Further, Ms. Richardson testified that she knew Mr. Clark continued to work overtime following **[*30]** the conversation. *See* ECF 28-2 at 13, Tr. 48-49 (Ms. Richardson testifying that Mr. Clark "just worked the hours he needed to work without knowing that he could get paid for them").

On the other hand, in Alliance's opposition to plaintiff's motion for partial summary judgment (ECF 34), the Company challenged whether the conversation between Ms. Richardson and Mr. Clark in fact occurred, positing that the consistency of Mr. Clark's timekeeping practices throughout his employment at Alliance could lead a jury to "reasonably conclude that Richardson gave no instruction to Clark to not record more than 40 hours of work in a week." *Id.* at 37; *see* ECF 29-1 at 19, Tr. 129 (admission of Mr. Clark during his deposition that his timekeeping practices remained unchanged following his conversation with Ms. Richardson).[4]

The dispute turns on credibility. Accordingly, it must be decided by the fact finder, not the court on summary judgment. *See* *Wilson v. Prince George's Cty., 893 F.3d 213, 218-19 (4th Cir. 2018)*; *Black & Decker Corp. v. United States, 436 F.3d 431, 442 (4th Cir. 2006)*.

In sum, there is no dispute that Alliance charged Ms. Richardson with supervising Mr. Clark, including his work hours. Therefore, under settled agency principles, Ms. Richardson's knowledge of Mr. Clark's unpaid overtime is attributable to Alliance *if*, in fact, she **[*31]** had such knowledge. Thus, plaintiffs must prove at trial that Ms. Richardson knew that Mr. Clark was working unpaid overtime. It is for the jury to decide whether Ms. Richardson had knowledge of Mr. Clark's overtime work.

IV. Conclusion

For the foregoing reasons, I shall grant the Motion to Reconsider (ECF 42) in part and deny it in part. An Order follows, consistent with this Memorandum Opinion.

Date: April 29, 2020

/s/ Ellen L. Hollander

United States District Judge

ORDER

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[4] Although the Company's contention is found only in the last sentence of the lengthy brief's penultimate page, it suffices to raise the issue of whether Ms. Richardson spoke with Mr. Clark's concerning his overtime.

For the reasons set forth in the accompanying Memorandum Opinion, it is this 29th day of April, 2020, by the United States District Court for the District of Maryland, **ORDERED**:

1) Defendant's Motion to Reconsider (ECF 42) is GRANTED in part and DENIED in part as follows:

a. The Court finds, based on undisputed facts, that Ms. Richardson had authority over Mr. Clark's overtime hours;

b. The Court finds that there is a genuine dispute of material fact as to whether Ms. Richardson had knowledge of Mr. Clark's overtime hours;

c. At trial, plaintiffs must prove that Ms. Richardson knew of Mr. Clark's overtime work in order for such knowledge to be imputed to Alliance; and

2) Counsel shall advise the Court by **May 18, 2020**, as to **[*32]** whether the parties wish to participate in a settlement conference before a magistrate judge.

/s/ Ellen Lipton Hollander

United States District Judge

End of Document

Nationwide Biweekly Administration, Inc. v. Superior Court

Supreme Court of California

April 30, 2020, Opinion Filed

S250047

Reporter

9 Cal. 5th 279 *; 462 P.3d 461 **; 261 Cal. Rptr. 3d 713 ***; 2020 Cal. LEXIS 2751 ****

NATIONWIDE BIWEEKLY ADMINISTRATION, INC., et al., Petitioners, v. THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent; THE PEOPLE, Real Party in Interest.

Subsequent History: Reported at *Nationwide Biweekly Administration, Inc. v. Superior Court, 2020 Cal. LEXIS 3154 (Cal., Apr. 30, 2020)*

Writ denied by, Remanded by *Nationwide Biweekly Admin. v. Superior Court of Alameda, 2020 Cal. App. Unpub. LEXIS 4402 (Cal. App. 1st Dist., July 14, 2020)*

Prior History: [**1]** First Appellate District, Division One, A150264. Alameda County Superior Court, RG15770490.

Nationwide Biweekly Administration, Inc. v. Superior Court, 24 Cal. App. 5th 438, 234 Cal. Rptr. 3d 468, 2018 Cal. App. LEXIS 541, 2018 WL 2947922 (June 13, 2018)

Core Terms

civil penalty, equitable, jury trial, cause of action, advertising, injunctive relief, right to a jury trial, consumer, unfair, cases, misleading, gist, common law, decisions, business practice, endorsements, trial court, unfair competition, restitution, injunction, civil action, deceptive, practices, remedies, provisions, violates, factors, equitable issues, equitable relief, court of equity

LexisNexis® Headnotes

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN1[] **Jury Trials, Right to Jury Trial**

Under California law, the right to a jury trial in a civil action may be afforded either by statute or by the California Constitution. As a general matter, the California Legislature has authority to grant the parties in a civil action the right to a jury trial by statute, either when the Legislature establishes a new cause of action or with respect to a cause of action that rests on the common law or a constitutional provision. Given the Legislature's broad general legislative authority under the California Constitution and in the absence of any constitutional prohibition, the

Legislature may extend the right to a jury trial to instances in which the state constitutional jury trial provision does not itself mandate a right to a jury trial. But even when the language and legislative history of a statute indicate that the Legislature intended that a cause of action established by the statute is to be tried by the court rather than a jury, if the California constitutional jury trial provision itself guarantees a right to a jury trial in such a cause of action, the Constitution prevails and a jury trial cannot be denied.

Civil Procedure > Remedies > Injunctions

Civil Procedure > Preliminary Considerations > Equity > Relief

***HN2*[]** **Remedies, Injunctions**

Actions seeking injunctive relief are equitable in nature.

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

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

Torts > Business Torts > Unfair Business Practices > Remedies

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

The language of *Bus. & Prof. Code, § 17206, subd. (b)*, clearly indicates that the amount of civil penalties is intended to be determined by the court.

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

Torts > Business Torts > Unfair Business Practices > Elements

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

***HN4*[]** **Deceptive & Unfair Trade Practices, State Regulation**

The exceedingly broad and general language that the Legislature incorporated in California's unfair competition law, *Bus. & Prof. Code, § 17200 et seq.*, to define the business practices that are proscribed by the statute — in the original language, "unfair or fraudulent business practice and unfair, untrue, or misleading advertising" — was adopted with the specific understanding that this broad language would be applied by a court of equity in determining whether a challenged business practice violated the statutory prohibition.

Civil Procedure > ... > Equity > Maxims > Remedy Principle

***HN5*[]** **Maxims, Remedy Principle**

When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent to frustrate its consummation because the scheme is an original one. There is a maxim as old as law that there can be no right without a remedy, and in searching for a precise precedent, an equity court must not lose sight, not only of its power, but of its duty to arrive at a just solution of the problem.

Civil Procedure > Preliminary Considerations > Equity

HN6[] **Preliminary Considerations, Equity**

Equity is much more elastic and capable of expansion and extension to new cases than the common law. Its very central principles, its foundation upon the eternal verities of right and justice, its resting upon the truths of morality rather than arbitrary customs and rigid dogmas, necessarily gave it this character of flexibility, and permitted its doctrines to be enlarged so as to embrace new cases as they constantly arose. It has, therefore, as an essential part of its nature, a capacity of orderly and regular growth, — a growth not arbitrary, according to the will of individual judges, but in the direction of its already settled principles. It is ever reaching out and expanding its doctrines so as to cover new facts and relations, but still without any break or change in the principles or doctrines themselves. The tradition and heredity of the flexible equitable powers of the modern trial judge derive from the role of the trained and experienced chancellor and depend upon skills and wisdom acquired through years of study, training and experience which are not susceptible of adequate transmission through instructions to a lay jury.

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

Torts > Business Torts > Unfair Business Practices

Governments > Courts > Judicial Precedent

HN7[] **Deceptive & Unfair Trade Practices, State Regulation**

In view of the similarity of language and obvious identity of purpose of *15 U.S.C. § 45(a)* and *Bus. & Prof. Code, § 17200*, decisions of the federal courts on the subject of unfair competition are more than ordinarily persuasive.

Torts > Business Torts > Unfair Business Practices > Elements

HN8[] **Unfair Business Practices, Elements**

Any finding of unfairness to competitors under *Bus. & Prof. Code, § 17200*, must be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. Thus, when a plaintiff who claims to have suffered injury from a direct competitor's unfair act or practice invokes *§ 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

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

Torts > Business Torts > Unfair Business Practices > Elements

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

It is clear from both the language and nature of the test for unfairness to competitors under *Bus. & Prof. Code, § 17200* — that is, whether the challenged business practice threatens an incipient violation of an ***antitrust law*** or violates the policy or spirit of one of those laws — that such a standard is one that may reasonably be applied only by a court. This standard is too indeterminate to be adequately conveyed by jury instructions or applied by a jury.

This test is limited to the context of an action by a competitor alleging anticompetitive practices and does not apply to actions by consumers or by competitors alleging other kinds of violations of California's unfair competition law, *Bus. & Prof. Code, § 17200 et seq.*

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

Torts > Business Torts > Unfair Business Practices > Elements

Governments > State & Territorial Governments > Claims By & Against

***HN10*[]** **Jury Trials, Province of Court & Jury**

Both (1) the fact that the cause of action under California's unfair competition law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, originated solely as an action to enjoin an unfair or misleading business practice — an equitable action triable only by a court and not a jury — and (2) the fact that the broad and general standard of unfair competition that was incorporated into the statute contemplated that the standard would be applied by a court exercising its traditional, flexible equitable authority rather than by a jury, support the conclusion that the Legislature, in enacting the UCL, intended that a cause of action under the UCL would be tried by the court and not a jury, even when the government seeks civil penalties as well as injunctive relief.

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

Torts > Business Torts > Unfair Business Practices > Elements

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

***HN11*[]** **Deceptive & Unfair Trade Practices, State Regulation**

The nature of the principal issue presented in a great many actions under California's unfair competition law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, supports the conclusion that such causes of action were intended to be decided by the court rather than a jury. Such cases often concern a nuanced and qualitative determination regarding whether a business practice should properly be considered unfair or deceptive within the meaning of the UCL. This type of qualitative determination — often requiring the consideration of a variety of factors or circumstances identified in prior cases in California or other jurisdictions or in administrative guidelines developed by the Federal Trade Commission or other consumer protection administrative agencies — is the type of decision that has traditionally been viewed as the province of courts rather than juries. Moreover, the overarching legislative concern in enacting the UCL is to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition, an objective that is inconsistent with the unavoidable delays and increased costs inherent in a jury, as compared to a court, trial.

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

Torts > Business Torts > Unfair Business Practices

Governments > State & Territorial Governments > Claims By & Against

***HN12*[]** **Jury Trials, Province of Court & Jury**

The Legislature intended that a cause of action under California's unfair competition law, *Bus. & Prof. Code, § 17200 et seq.* — including an action brought by the government that seeks both injunctive relief and civil penalties — is to be tried by the court rather than by a jury.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

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

HN13[] **False Advertising, State Regulation**

California's false advertising law (FAL), *Bus. & Prof. Code, § 17500 et seq.*, has been accurately described as the major California legislation designed to protect consumers from false or deceptive advertising. The procedures set forth in the FAL and in California's unfair competition law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, are in many respects parallel to one another, and the UCL specifically provides that any practice that violates the FAL is also prohibited by the UCL.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

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

Civil Procedure > Preliminary Considerations > Equity > Relief

HN14[] **False Advertising, State Regulation**

In the absence of a restriction as to the power of the trial court to order restitution, a court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the status quo ante as nearly as may be achieved. In an action by the California Attorney General under *Bus. & Prof. Code, § 17535*, a trial court has the inherent power to order, as a form of ancillary relief, that the defendants make or offer to make restitution to the customers found to have been defrauded. A civil action under California's false advertising law (*Bus. & Prof. Code, § 17500 et seq.*) is an equitable action triable to the court.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

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

HN15[] **False Advertising, State Regulation**

The California Attorney General has only one cause of action against a defendant for violating *Bus. & Prof. Code, § 17500*, but the amount of civil penalties which may be imposed under *Bus. & Prof. Code, § 17536*, is dependent upon the number of violations committed by a defendant. Because the cause of action for violating *§ 17500* is an equitable action, the clear implication is that even when the Attorney General or a district attorney seeks civil penalties as well as injunctive relief in such an action, the action under California's false advertising law (FAL), *Bus. & Prof. Code, § 17500 et seq.*, remains an equitable action, and, as such, is to be tried by the court, rather than by a jury. The amount of civil penalties under the FAL is to be determined by the court, not by a jury.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

HN16[] **False Advertising, State Regulation**

Like the choice of the term "unfair" in California's unfair competition law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, the governing substantive standard of California's false advertising law (FAL), *Bus. & Prof. Code, § 17500 et seq.* — prohibiting advertising that is "untrue or misleading" (*§ 17500*) — is set forth in broad and open-ended language that is intended to permit a court of equity to reach any novel or creative scheme of false or misleading advertising that a deceptive business may devise. The FAL prohibits not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public. Thus, to state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

HN17[] **False Advertising, State Regulation**

The broad reach and scope of the "untrue or misleading" standard of California's false advertising law (FAL), *Bus. & Prof. Code, § 17500 et seq.*, is often framed in language (whether members of the public are likely to be deceived) that is not, on its face, beyond the ken of a jury. As employed in the FAL (as well as in California's unfair competition law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, however, a determination that advertising poses a sufficient risk or tendency to deceive or confuse the public may potentially result in an injunctive order prohibiting what may be a common and widely utilized advertising, labeling, or promotional practice. In the FAL and UCL settings, this standard — whether members of the public are likely to be deceived — has been understood to call for the exercise of the type of equitable discretion and judgment traditionally employed by a court of equity.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

HN18[] **False Advertising, State Regulation**

The crucial issue in cases under California's false advertising law (FAL), *Bus. & Prof. Code, § 17500 et seq.*, does not typically involve the type of ordinary factfinding assigned to a jury, but rather calls for an equitable judgment to determine whether an often undisputed advertising or promotional practice presents a sufficient tendency to deceive or confuse the public so as to support invocation of the FAL's remedies. As the breadth of the cases arising under the FAL attests, this determination calls for consideration of a wide variety of factors that prior cases and past administrative experience have shown may render an affirmative statement (or a failure to disclose) in a product label, packaging, or in other advertising or promotional practices misleading in a particular context. Given the capacity of the FAL's standard to be applied expansively to encompass all of the novel ways in which advertising or promotional material may be misleading, it is important that trial courts are required to set forth their reasoning for a determination that the FAL has been violated so that a body of precedent can evolve to inform businesses of advertising practices they must avoid.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Antitrust & Trade Law > Consumer Protection > False Advertising > US Federal Trade Commission

HN19[] **False Advertising, State Regulation**

The complexities and nuances that are often involved in the determination whether an advertisement should properly be considered untrue or misleading for purposes of California's false advertising law, *Bus. & Prof. Code, §*

17500 et seq., are often ameliorated by judicial reference to the relevant guidelines developed by the U.S. Federal Trade Commission (FTC) regarding deceptive advertising. The great variety and complexity of contexts in which the potentially misleading nature of advertising may arise and must be evaluated can be gleaned from a simple listing of the numerous guidelines that the FTC has published relating to deceptive advertising.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

HN20[] False Advertising, State Regulation

The determination whether an advertising or promotional practice should properly be found untrue or misleading within the meaning of California's false advertising law, Bus. & Prof. Code, § 17500 et seq., depends upon the exercise of the type of equitable discretion and judgment typically employed by a court of equity.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

HN21[] False Advertising, State Regulation

Decisions under California's false advertising law, Bus. & Prof. Code, § 17500 et seq., have made clear the propriety and importance of a court's exercise of its equitable authority not only in determining whether an advertisement is untrue or misleading, but also in determining (1) the number of violations for which a defendant may properly be held responsible; and (2) the reasonable amount of civil penalties to be imposed for each violation.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

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

Governments > State & Territorial Governments > Claims By & Against

HN22[] False Advertising, State Regulation

The Legislature intended that the civil cause of action embodied in California's false advertising law (FAL), Bus. & Prof. Code, § 17500 et seq., would be tried by a court of equity rather than by a jury in all FAL actions, including instances in which the California Attorney General or another governmental entity seeks civil penalties for a violation of the FAL as well as injunctive relief.

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN23[] Fundamental Rights, Trial by Jury in Civil Actions

Cal. Const., art. I, § 16 — the jury trial provision — states in part that trial by jury is an inviolate right and shall be secured to all. This provision was intended to preserve the right to a civil jury as it existed at common law in 1850 when the jury trial provision was first incorporated into the California Constitution. The right to trial by jury guaranteed by the California Constitution is the right as it existed at common law at the time the Constitution was adopted. It is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution. The California Constitution essentially preserves the right to a jury in those actions in which there was a right to a jury trial at common law at the time the Constitution was first adopted.

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN24[] **Right to Jury Trial, Actions in Equity**

As a general matter, the California Constitution affords a right to a jury trial in common law actions at law that were triable by a jury in 1850, but not in suits in equity that were not triable by a jury in 1850. In applying this test, the cases have explained that the form or title of a statutory cause of action is not controlling and that if the substance of the cause of action is one that would have been triable by a jury at common law, there is a right to a jury trial even if the statute's designation might suggest that it is an equitable proceeding. In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case — the gist of the action. A jury trial must be granted where the gist of the action is legal, where the action is in reality cognizable at law.

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN25[] **Fundamental Rights, Trial by Jury in Civil Actions**

The constitutional right of trial by jury is not to be narrowly construed. It is not limited strictly to those cases in which it existed before the adoption of the California Constitution but is extended to cases of like nature as may afterwards arise.

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN26[] **Right to Jury Trial, Actions in Equity**

When the legal and equitable causes of action or issues presented in a case are severable, a party retains the right to a jury trial of the severable legal issues and a court trial of the severable equitable issues.

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN27[] **Right to Jury Trial, Actions in Equity**

When severable legal and equitable causes of action or issues are present in a single proceeding, the trial court generally has authority to determine in what order the matters should be heard, and if the equitable issue is tried by the court first and if the court's resolution of that issue determines a matter that would otherwise be resolved by a jury with regard to the legal claim or issue, the court's resolution of the matter will generally be binding and may leave nothing for a jury to resolve. And although a trial court retains discretion regarding the order in which the issues should be tried, the governing California cases express a preference that the equitable issues be tried first. This general "equity first preference" is a long standing feature of California law and has always been viewed as fully compatible with the right to jury trial embodied in the California Constitution.

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN28[] **Right to Jury Trial, Actions in Equity**

Unlike proceedings in which multiple legal and equitable causes or issues are severable, when a cause of action involves legal and equitable aspects that are not severable California decisions have relied upon the gist of the action standard in determining whether the action should be considered legal or equitable for purposes of the constitutional jury trial issue. Although the legal or equitable nature of a cause of action ordinarily is determined by the mode of relief to be afforded, the prayer for relief in a particular case is not conclusive and the fact that damages is one of a full range of possible remedies does not guarantee the right to a jury.

Civil Procedure > Remedies > Damages > Monetary Damages

HN29[] **Damages, Monetary Damages**

The general rule is that monetary relief is a legal remedy, and an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

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

HN30[] **False Advertising, State Regulation**

In light of the particular nature of the civil causes of action authorized by California's unfair competition law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, and California's false advertising law (FAL), *Bus. & Prof. Code, § 17500 et seq.*, the gist of a civil action under the UCL and FAL is equitable rather than legal in nature. Such causes of action are equitable either when brought by a private party seeking only an injunction, restitution, or other equitable relief or when brought by the California Attorney General, a district attorney, or other governmental official seeking not only injunctive relief and restitution but also civil penalties. Accordingly, there is no right to a jury trial in such actions under the California Constitution.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Governments > Courts > Common Law

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

HN31[] **False Advertising, State Regulation**

The statutory causes of action established by California's unfair competition law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, and California's false advertising law (FAL), *Bus. & Prof. Code, § 17500 et seq.*, are not of like nature or of the same class as any common law right of action. The UCL and FAL were enacted for the specific purpose of creating new rights and remedies that were not available at common law. The statutes deliberately broaden the types of business practices that can properly be found to constitute unfair competition and eliminate a number of elements that were required in common law actions for fraud. Furthermore, when the Legislature adopted the civil penalty provisions of the UCL and FAL, permitting government officials, and government officials alone, to seek civil penalties along with injunctive or other equitable relief in the civil actions such officials bring under the UCL and FAL, the causes of action under the UCL and FAL continued to constitute causes of action that were not of like nature or of the same class as any common law action.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Civil Procedure > Preliminary Considerations > Equity > Relief

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

HN32[] **False Advertising, State Regulation**

The legal and equitable aspects of actions brought under California's unfair competition law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, and California's false advertising law (FAL), *Bus. & Prof. Code, § 17500 et seq.*, are nonseverable not only because the determination whether a defendant's alleged conduct constitutes a violation of the statute provides the basis for all of the relief authorized by the statutes, but also because the amount of civil penalties that would be appropriate may well depend on the equitable remedies, including restitution, that are or are not imposed. With respect to the application of the gist of the action standard, the gist of the civil causes of action authorized by the UCL and FAL must properly be considered equitable, rather than legal, in nature. The bulk of the remedies provided for in the statutes — injunctive relief, restitution, and other clearly equitable remedies such as the appointment of a receiver — are clearly equitable in nature. As the legislative history of both the UCL and FAL make clear, the primary objective of both statutes is preventive, authorizing the exercise of broad equitable authority to protect consumers from unfair or deceptive business practices and advertising.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Governments > State & Territorial Governments > Claims By & Against

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

HN33[] **False Advertising, State Regulation**

Although California's unfair competition law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, and California's false advertising law (FAL), *Bus. & Prof. Code, § 17500 et seq.*, authorize in actions brought by the California Attorney General, a district attorney, or other government officials (but not private parties), the imposition of civil penalties — a type of remedy that in some contexts is properly considered legal in nature — the UCL and FAL statutes specify that in assessing the amount of the civil penalty to be imposed under these statutes, the court is afforded broad discretion to consider a nonexclusive list of factors that include the relative seriousness of the defendant's conduct and the potential deterrent effect of such penalties, the type of qualitative evaluation and weighing of a variety of factors that is typically undertaken by a court and not a jury. *Bus. & Prof. Code, §§ 17206*, *17536*. The civil penalties that may be awarded under the UCL and FAL, unlike the classic legal remedy of damages, are noncompensatory in nature; they require no showing of actual harm to consumers and are not based on the amount of losses incurred by the targets of unfair practices or misleading advertising.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Torts > Business Torts > Unfair Business Practices > Remedies

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

HN34[] **False Advertising, State Regulation**

Although civil penalties under California's unfair competition law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, and California's false advertising law (FAL), *Bus. & Prof. Code, § 17500 et seq.*, may have a punitive or deterrent aspect, their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives. The focus of both statutory schemes is preventative. And the civil penalties obtained by the government in actions under the UCL and FAL are to be utilized for the enforcement of the statutes in question. The expansive and broadly worded substantive standards that are to be applied in determining whether a challenged business practice or advertising is properly considered violative of the UCL or FAL call for the exercise of the flexibility and judicial expertise and experience that was traditionally applied by a court of equity. Particularly in light of the equitable nature of the substantive standards that apply in UCL and FAL actions — both in actions brought by private parties and by government officials — the gist of the civil causes of action authorized by the UCL and FAL must properly be considered equitable in nature.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

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

HN35[] **False Advertising, State Regulation**

Under the California Constitution, there is no right to a jury trial in a cause of action under California's unfair competition law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, and California's false advertising law (FAL), *Bus. & Prof. Code, § 17500 et seq.*, including when the action is brought by a government official and seeks both injunctive relief and civil penalties. This conclusion does not deprive a defendant in a UCL or FAL action of any constitutional right afforded by the jury trial provision of the California Constitution. That constitutional provision grants the right to jury trial in actions of like nature or of the same class in which a jury trial was provided at common law in 1850, when the jury trial provision of the California Constitution was first adopted. The consumer protection actions authorized in the UCL and FAL are not of like nature or of the same class as an action that was triable by jury at common law. In actions like those under the UCL and FAL, in which the equitable and legal aspects are nonseverable, there is no constitutional right to a jury trial when the gist of the action is equitable rather than legal. In sum, there is no right to a jury trial under the California Constitution in a cause of action under the UCL or FAL, including an action in which civil penalties as well as an injunction or other equitable relief are sought.

Constitutional Law > State Constitutional Operation

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN36[] **Constitutional Law, State Constitutional Operation**

The federal civil jury trial provision of the Seventh *Amendment, U.S. Const., 7th* Amend., applies only to civil trials in federal court; federal decisions explicitly hold that the civil jury trial provision of the Seventh Amendment does not apply to state court proceedings. Instead, the right to jury trial in state court proceedings is governed by the provisions and judicial interpretation of each state's own constitutional jury trial provision.

Constitutional Law > State Constitutional Operation

Governments > Courts > Judicial Precedent

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN37[] **Constitutional Law, State Constitutional Operation**

In California, the constitutional right to a civil jury trial under the California Constitution is entirely independent of the federal constitutional civil jury trial right under the Seventh Amendment, as indicated in *Cal. Const., art. I, § 24*, and California cases have not hesitated to decline to follow the federal interpretation of the Seventh Amendment when the federal interpretation has been found inconsistent with a proper reading of the California provision.

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN38[] **Right to Jury Trial, Actions in Equity**

When the legal and equitable aspects are severable, there is a preference for trying the equitable issues first. If common facts are resolved in a manner that obviates the need to try the legal issue, there is no right under the California Constitution to have the legal issues submitted to the jury. In cases in which a cause of action contains nonseverable legal and equitable aspects, California cases undertake a qualitative, holistic analysis of the action in its entirety to determine whether the gist of the action is legal or equitable, that is, whether the legal or equitable aspects predominate.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

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

HN39[] **False Advertising, State Regulation**

In causes of action under California's unfair competition law, *Bus. & Prof. Code, § 17200 et seq.*, and California's false advertising law, *Bus. & Prof. Code, § 17500 et seq.*, seeking injunctive relief and civil penalties, the gist of the actions is equitable, and there is no right to a jury trial in such actions under California law either as a statutory or constitutional matter.

Headnotes/Summary

Summary
[*279] CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court granted the People's motion to strike a jury demand as to causes of action under California's unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) and California's false advertising law (FAL) (*Bus. & Prof. Code, § 17500 et seq.*) in which both civil penalties and injunctive relief were sought. (Superior Court of Alameda County, No. RG15770490, George Hernandez, Jr., Judge.) The Court of Appeal, First Dist., Div. One, No. A150264, granted mandate relief.

The Supreme Court reversed the judgment of the Court of Appeal and remanded. The court held that there is no state constitutional right to a jury trial (*Cal. Const., art. I, § 16*) for causes of action under the UCL and the FAL because the gist of these causes of action is equitable and they differ significantly from actions triable by jury at common law. The Legislature intended that the causes of action be tried by the court even when the government seeks both civil penalties and injunctive relief because the UCL and the FAL provide for the exercise of broad equitable authority to protect consumers. Federal case law under *U.S. Const., 7th Amend.*, did not apply because California's civil jury trial right, construed independently (*Cal. Const., art. I, § 24*), requires a different analysis. (Opinion by Cantil-Sakauye, C. J., with Chin, Corrigan, and Groban, JJ., concurring. Concurring opinion by Kruger, J., with Liu and Cuéllar, JJ., concurring (see p. 334).)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

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

Jury § 7—Right to Jury Trial—Civil Cases—California Constitution and Statutes.

Under California law, the right to a jury trial in a civil action may be afforded either by statute or by the California Constitution. As a general matter, the California Legislature has authority to grant the parties in a civil action the right to a jury trial by statute, either **[*280]** when the Legislature establishes a new cause of action or with respect to a cause of action that rests on the common law or a constitutional provision. Given the Legislature's broad general legislative authority under the California Constitution and in the absence of any constitutional prohibition, the Legislature may extend the right to a jury trial to instances in which the state constitutional jury trial provision does not itself mandate a right to a jury trial. But even when the language and legislative history of a statute indicate that the Legislature intended that a cause of action established by the statute is to be tried by the court rather than by a jury, if the California constitutional jury trial provision itself guarantees a right to a jury trial in such a cause of action, the Constitution prevails and a jury trial cannot be denied.

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

Equity § 5—Scope and Types of Relief—Injunctive Relief.

Actions seeking injunctive relief are equitable in nature.

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

Unfair Competition § 10—Actions—Civil Penalties—Amount—Determination by Court.

The language of *Bus. & Prof. Code, § 17206, subd. (b)*, clearly indicates that the amount of civil penalties is intended to be determined by the court.

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

Unfair Competition § 4—Acts Constituting—Unfair Business Practices—Determination by Court.

The exceedingly broad and general language that the Legislature incorporated in California's unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*) to define the business practices that are proscribed by the statute—in the original language, “unfair or fraudulent business practice and unfair, untrue, or misleading advertising”—was adopted with the specific understanding that this broad language would be applied by a court of equity in determining whether a challenged business practice violated the statutory prohibition.

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

Equity § 6—Principles and Maxims—No Right Without Remedy.

When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent to frustrate its consummation because the scheme is an original one. There is a maxim as old as law that there can be no right without a remedy, and in searching for a precise precedent, an equity court must not lose sight, not only of its power, but of its duty to arrive at a just solution of the problem.

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

Equity § 1—Flexibility and Expansion.

Equity is much more elastic and capable of expansion and extension to new cases than the common law. Its very central principles, its foundation upon the eternal verities of right and justice, its resting upon the truths of morality rather than upon **[*281]** arbitrary customs and rigid dogmas, necessarily gave it this character of flexibility, and permitted its doctrines to be enlarged so as to embrace new cases as they constantly arose. It has, therefore, as an essential part of its nature, a capacity of orderly and regular growth—a growth not arbitrary, according to the will of individual judges— but in the direction of its already settled principles. It is ever reaching out and expanding its doctrines so as to cover new facts and relations, but still without any break or change in the principles or doctrines themselves. The tradition and heredity of the flexible equitable powers of the modern trial judge derive from the role of the trained and experienced chancellor and depend upon skills and wisdom acquired through years of study, training and experience which are not susceptible of adequate transmission through instructions to a lay jury.

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

Unfair Competition § 4—Acts Constituting—Federal Decisions as Persuasive Authority.

In view of the similarity of language and obvious identity of purpose of *15 U.S.C. § 45(a)* and *Bus. & Prof. Code, § 17200*, federal court decisions on the subject of unfair competition are more than ordinarily persuasive but not controlling.

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

Unfair Competition § 4—Acts Constituting—Unfair Business Practices—Harm to Competition.

Any finding of unfairness to competitors under *Bus. & Prof. Code, § 17200*, must be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. Thus, when a plaintiff who claims to have suffered injury from a direct competitor's unfair act or practice invokes *§ 17200*, the word “unfair” in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

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

Unfair Competition § 4—Acts Constituting—Unfair Business Practices—Harm to Competition—Determination by Court.

It is clear from both the language and nature of the test for unfairness to competitors under *Bus. & Prof. Code, § 17200*—that is, whether the challenged business practice threatens an incipient violation of an ***antitrust law*** or violates the policy or spirit of one of those laws—that such a standard is one that may reasonably be applied only by a court. This standard is too indeterminate to be adequately conveyed by jury instructions or applied by a jury. This test is limited to the context of an action by a competitor alleging anticompetitive practices and does not apply to actions by consumers or by competitors alleging other kinds of violations of California's unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*).

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

Unfair Competition § 8—Actions—Equitable Nature—Court Trial—Government Action Seeking Civil Penalties and Injunction.

Both (1) the fact that the cause of action under California's unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) originated solely as an action to enjoin an unfair or misleading business practice—an equitable action triable only by a court and not a jury—and (2) the fact that the broad and general standard of unfair competition that was incorporated into the statute contemplated that the standard would be applied by a court exercising its traditional, flexible equitable authority rather than by a jury, support the conclusion that the Legislature, in enacting the UCL, intended that a cause of action under the UCL would be tried by the court and not a jury, even when the government seeks civil penalties as well as injunctive relief.

***CA(11)*[] (11)**

Unfair Competition § 4—Acts Constituting—Unfair Business Practices—Determination by Court.

The nature of the principal issue presented in a great many actions under California's unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) supports the conclusion that such causes of action were intended to be decided by the court rather than a jury. Such cases often concern a nuanced and qualitative determination regarding whether a business practice should properly be considered unfair or deceptive within the meaning of the UCL. This type of qualitative determination—often requiring the consideration of a variety of factors or circumstances identified in prior cases in California or other jurisdictions or in administrative guidelines developed by the Federal Trade Commission or other consumer protection administrative agencies—is the type of decision that has traditionally been viewed as the province of courts rather than juries. Moreover, the overarching legislative concern in enacting the UCL is to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition, an objective that is inconsistent with the unavoidable delays and increased costs inherent in a jury, as compared to a court, trial.

***CA(12)*[] (12)**

Unfair Competition § 8—Actions—Court Trial—Government Action Seeking Civil Penalties and Injunction.

The Legislature intended that a cause of action under California's unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*)—including an action brought by the government that seeks both injunctive relief and civil penalties—is to be tried by the court rather than by a jury.

***CA(13)*[] (13)**

Advertising § 7—False Advertising—Procedures and Prohibitions.

California's false advertising law (FAL) (*Bus. & Prof. Code, § 17500 et seq.*) has been accurately described as the major California legislation designed to protect consumers from false or deceptive advertising. The **[*283]** procedures set forth in the FAL and in California's unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*), are in many respects parallel to one another, and the UCL specifically provides that any practice that violates the FAL is also prohibited by the UCL.

CA(14)[] **(14)**

Advertising § 9—False Advertising—Equitable Action Tried by Court—Power to Order Restitution.

In the absence of a restriction as to the power of the trial court to order restitution, a court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the status quo ante as nearly as may be achieved. In an action by the California Attorney General under *Bus. & Prof. Code, § 17535*, a trial court has the inherent power to order, as a form of ancillary relief, that the defendants make or offer to make restitution to the customers found to have been defrauded. A civil action under California's false advertising law (*Bus. & Prof. Code, § 17500 et seq.*) is an equitable action triable to the court.

CA(15)[] **(15)**

Advertising § 9—False Advertising—Equitable Action Tried by Court—Government Action Seeking Civil Penalties and Injunction.

The California Attorney General has only one cause of action against a defendant for violating *Bus. & Prof. Code, § 17500*, but the amount of civil penalties which may be imposed under *Bus. & Prof. Code, § 17536*, is dependent upon the number of violations committed by a defendant. Because the cause of action for violating *§ 17500* is an equitable action, the clear implication is that even when the Attorney General or a district attorney seeks civil penalties as well as injunctive relief in such an action, the action under California's false advertising law (FAL) (*Bus. & Prof. Code, § 17500 et seq.*) remains an equitable action, and, as such, is to be tried by the court, rather than by a jury. The amount of civil penalties under the FAL is to be determined by the court, not by a jury.

CA(16)[] **(16)**

Advertising § 8—False Advertising—What Constitutes—Untrue or Misleading Advertising.

Like the choice of the term “unfair” in California's unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*), the governing substantive standard of California's false advertising law (FAL) (*Bus. & Prof. Code, § 17500 et seq.*)—prohibiting advertising that is “untrue or misleading” (*§ 17500*)—is set forth in broad and open-ended language that is intended to permit a court of equity to reach any novel or creative scheme of false or misleading advertising that a deceptive business may devise. The FAL prohibits not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public. Thus, to state a claim under **[*284]** either the UCL or the FAL, based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived.

CA(17)[] **(17)**

Advertising § 8—False Advertising—What Constitutes—Untrue or Misleading Advertising—Equitable Nature of Determination.

The broad reach and scope of the "untrue or misleading" standard of California's false advertising law (FAL) (*Bus. & Prof. Code, § 17500 et seq.*) is often framed in language (whether members of the public are likely to be deceived) that is not, on its face, beyond the ken of a jury. As employed in the FAL (as well as in California's unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*)), however, a determination that advertising poses a sufficient risk or tendency to deceive or confuse the public may potentially result in an injunctive order prohibiting what may be a common and widely utilized advertising, labeling, or promotional practice. In the FAL and the UCL settings, this standard—whether members of the public are likely to be deceived—has been understood to call for the exercise of the type of equitable discretion and judgment traditionally employed by a court of equity.

CA(18)[] **(18)**

Advertising § 8—False Advertising—What Constitutes—Untrue or Misleading Advertising—Equitable Nature of Determination.

The crucial issue in cases under California's false advertising law (FAL) (*Bus. & Prof. Code, § 17500 et seq.*) does not typically involve the type of ordinary factfinding assigned to a jury, but rather calls for an equitable judgment to determine whether an often undisputed advertising or promotional practice presents a sufficient tendency to deceive or confuse the public so as to support invocation of the FAL's remedies. As the breadth of the cases arising under the FAL attests, this determination calls for consideration of a wide variety of factors that prior cases and past administrative experience have shown may render an affirmative statement (or a failure to disclose) in a product label, packaging, or in other advertising or promotional practices misleading in a particular context. Given the capacity of the FAL's standard to be applied expansively to encompass all of the novel ways in which advertising or promotional material may be misleading, it is important that trial courts are required to set forth their reasoning for a determination that the FAL has been violated so that a body of precedent can evolve to inform businesses of advertising practices they must avoid.

CA(19)[] **(19)**

Advertising § 8—False Advertising—What Constitutes—Untrue or Misleading Advertising—Reference to Federal Guidelines.

The complexities and nuances that are often involved in the determination whether an advertisement should properly be considered untrue or misleading for **[*285]** purposes of California's false advertising law (*Bus. & Prof. Code, § 17500 et seq.*) are often ameliorated by judicial reference to the relevant guidelines developed by the Federal Trade Commission (FTC) regarding deceptive advertising. The great variety and complexity of contexts in which the potentially misleading nature of advertising may arise and must be evaluated can be gleaned from a simple listing of the numerous guidelines that the FTC has published relating to deceptive advertising.

CA(20)[] **(20)**

Advertising § 8—False Advertising—What Constitutes—Untrue or Misleading Advertising—Equitable Nature of Determination.

The determination whether an advertising or promotional practice should properly be found untrue or misleading within the meaning of California's false advertising law (*Bus. & Prof. Code, § 17500 et seq.*) depends upon the exercise of the type of equitable discretion and judgment typically employed by a court of equity.

CA(21)[] **(21)**

Advertising § 9—False Advertising—Civil Penalties and Number of Violations—Equitable Nature of Determination.

Decisions under California's false advertising law (*Bus. & Prof. Code, § 17500 et seq.*) have made clear the propriety and importance of a court's exercise of its equitable authority not only in determining whether an advertisement is untrue or misleading, but also in determining (1) the number of violations for which a defendant may properly be held responsible; and (2) the reasonable amount of civil penalties to be imposed for each violation.

CA(22)[] **(22)**

Advertising § 7—False Advertising—Equitable Action Tried by Court—Government Action Seeking Civil Penalties and Injunction.

The Legislature intended that the civil cause of action embodied in California's false advertising law (FAL) (*Bus. & Prof. Code, § 17500 et seq.*) would be tried by a court of equity rather than by a jury in all FAL actions, including instances in which the California Attorney General or another governmental entity seeks civil penalties for a violation of the FAL as well as injunctive relief.

CA(23)[] **(23)**

Jury § 7—Right to Jury Trial—Civil Cases—California Constitution.

Cal. Const., art. I, § 16—the jury trial provision—states in part that trial by jury is an inviolate right and shall be secured to all. This provision was intended to preserve the right to a civil jury as it existed at common law in 1850 when the jury trial provision was first incorporated into the California Constitution. The right to trial by jury guaranteed by the California Constitution is the right as it existed at common law at the time the Constitution was adopted. It is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a **[*286]** purely historical question, a fact which is to be ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution. The California Constitution essentially preserves the right to a jury in those actions in which there was a right to a jury trial at common law at the time the Constitution was first adopted.

CA(24)[] **(24)**

Jury § 7—Right to Jury Trial—Civil Cases—California Constitution—Actions Triable by Jury at Common Law.

As a general matter, the California Constitution affords a right to a jury trial in common law actions at law that were triable by a jury in 1850, but not in suits in equity that were not triable by a jury in 1850. In applying this test, the cases have explained that the form or title of a statutory cause of action is not controlling and that if the substance of the cause of action is one that would have been triable by a jury at common law, there is a right to a jury trial even if the statute's designation might suggest that it is an equitable proceeding. In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the gist of the action. A jury trial must be granted where the gist of the action is legal, where the action is in reality cognizable at law.

CA(25)[] **(25)**

Jury § 7—Right to Jury Trial—Civil Cases—California Constitution.

The constitutional right of trial by jury is not to be narrowly construed. It is not limited strictly to those cases in which it existed before the adoption of the California Constitution but is extended to cases of like nature as may afterwards arise.

CA(26)[] **(26)**

Jury § 7—Right to Jury Trial—Civil Cases—Severable Legal and Equitable Issues.

When the legal and equitable causes of action or issues presented in a case are severable, a party retains the right to a jury trial of the severable legal issues and a court trial of the severable equitable issues.

CA(27)[] **(27)**

Jury § 7—Right to Jury Trial—Civil Cases—Severable Legal and Equitable Issues.

When severable legal and equitable causes of action or issues are present in a single proceeding, the trial court generally has authority to determine in what order the matters should be heard, and if the equitable issue is tried by the court first and if the court's resolution of that issue determines a matter that would otherwise be resolved by a jury with regard to the legal claim or issue, the court's resolution of the matter will generally be binding and may leave nothing for a jury to **[*287]** resolve. And although a trial court retains discretion regarding the order in which the issues should be tried, the governing California cases express a preference that the equitable issues be tried first. This general "equity first preference" is a long standing feature of California law and has always been viewed as fully compatible with the right to jury trial embodied in the California Constitution.

CA(28)[] **(28)**

Jury § 10—Right to Jury Trial—Determining Nature of Civil Action—Legal and Equitable Issues Not Severable—Gist of Action and Mode of Relief.

Unlike proceedings in which multiple legal and equitable causes or issues are severable, when a cause of action involves legal and equitable aspects that are not severable California decisions have relied upon the gist of the action standard in determining whether the action should be considered legal or equitable for purposes of the constitutional jury trial issue. Although the legal or equitable nature of a cause of action ordinarily is determined by the mode of relief to be afforded, the prayer for relief in a particular case is not conclusive and the fact that damages is one of a full range of possible remedies does not guarantee the right to a jury.

CA(29)[] **(29)**

Damages § 1—Statutory—Purposes Associated with Legal Relief.

The general rule is that monetary relief is a legal remedy, and an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment.

CA(30)[] **(30)**

Jury § 7—Right to Jury Trial—Civil Cases—Unfair Competition and False Advertising—California Constitution.

In light of the particular nature of the civil causes of action authorized by California's unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) and California's false advertising law (FAL) (*Bus. & Prof. Code, § 17500 et seq.*), the gist of a civil action under the UCL and the FAL is equitable rather than legal in nature. Such causes of action are equitable either when brought by a private party seeking only an injunction, restitution, or other equitable relief or when brought by the California Attorney General, a district attorney, or other governmental official seeking not only injunctive relief and restitution but also civil penalties. Accordingly, there is no right to a jury trial in such actions under the California Constitution.

CA(31)[] **(31)**

Equity § 4—Grounds and Subjects of Relief—Unfair Competition and False Advertising.

The statutory causes of action established by California's unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) and California's false advertising law (FAL) (*Bus. & Prof. Code, § 17500 et seq.*) are not of like nature or of the same class as any **[*288]** common law right of action. The UCL and the FAL were enacted for the specific purpose of creating new rights and remedies that were not available at common law. The statutes deliberately broaden the types of business practices that can properly be found to constitute unfair competition and eliminate a number of elements that were required in common law actions for fraud. Furthermore, when the Legislature adopted the civil penalty provisions of the UCL and the FAL, permitting government officials, and government officials alone, to seek civil penalties along with injunctive or other equitable relief in the civil actions such officials bring under the UCL and the FAL, the causes of action under the UCL and the FAL continued to constitute causes of action that were not of like nature or of the same class as any common law action.

CA(32)[] **(32)**

Equity § 4—Grounds and Subjects of Relief—Unfair Competition and False Advertising.

The legal and equitable aspects of actions brought under California's unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) and California's false advertising law (FAL) (*Bus. & Prof. Code, § 17500 et seq.*) are nonseverable not only because the determination whether a defendant's alleged conduct constitutes a violation of the statute provides the basis for all of the relief authorized by the statutes, but also because the amount of civil penalties that would be appropriate may well depend on the equitable remedies, including restitution, that are or are not imposed. With respect to the application of the gist of the action standard, the gist of the civil causes of action authorized by the UCL and the FAL must properly be considered equitable, rather than legal, in nature. The bulk of the remedies provided for in the statutes—injunctive relief, restitution, and other clearly equitable remedies such as the appointment of a receiver—are clearly equitable in nature. As the legislative history of both the UCL and the FAL make clear, the primary objective of both statutes is preventive, authorizing the exercise of broad equitable authority to protect consumers from unfair or deceptive business practices and advertising.

CA(33)[] **(33)**

Equity § 5—Scope and Types of Relief—Civil Penalties—Unfair Competition and False Advertising.

Although California's unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) and false advertising law (FAL) (*Bus. & Prof. Code, § 17500 et seq.*) authorize in actions brought by the California Attorney General, a district attorney, or other government officials (but not private parties), the imposition of civil penalties—a type of remedy that in some contexts is properly considered legal in nature—the UCL and the FAL statutes specify that in assessing the amount of the civil penalty to be imposed under these statutes, the court is afforded broad discretion to consider a nonexclusive list of factors that include the relative seriousness of the defendant's conduct and the potential deterrent effect of such penalties, the type of qualitative **[*289]** evaluation and weighing of a variety of factors that is typically undertaken by a court and not a jury (*Bus. & Prof. Code, §§ 17206*, *17536*). The civil penalties that may be awarded under the UCL and the FAL, unlike the classic legal remedy of damages, are noncompensatory in nature; they require no showing of actual harm to consumers and are not based on the amount of losses incurred by the targets of unfair practices or misleading advertising.

CA(34)[] **(34)**

Equity § 4—Grounds and Subjects of Relief—Unfair Competition and False Advertising.

Although civil penalties under California's unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) and California's false advertising law (FAL) (*Bus. & Prof. Code, § 17500 et seq.*) may have a punitive or deterrent aspect, their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives. The focus of both statutory schemes is preventative. And the civil penalties obtained by the government in actions under the UCL and the FAL are to be utilized for the enforcement of the statutes in question. The expansive and broadly worded substantive standards that are to be applied in determining whether a challenged business practice or advertising is properly considered violative of the UCL or the FAL call for the exercise of the flexibility and judicial expertise and experience that was traditionally applied by a court of equity. Particularly in light of the equitable nature of the substantive standards that apply in UCL and the FAL actions—both in actions brought by private parties and by government officials—the gist of the civil causes of action authorized by the UCL and FAL must properly be considered equitable in nature.

CA(35)[] **(35)**

Jury § 7—Right to Jury Trial—Civil Cases—Unfair Competition and False Advertising—California Constitution.

Under the California Constitution, there is no right to a jury trial in a cause of action under California's unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) and California's false advertising law (FAL) (*Bus. & Prof. Code, § 17500 et seq.*), including when the action is brought by a government official and seeks both injunctive relief and civil penalties. This conclusion does not deprive a defendant in a UCL or FAL action of any constitutional right afforded by the jury trial provision of the California Constitution. That constitutional provision grants the right to jury trial in actions of like nature or of the same class in which a jury trial was provided at common law in 1850, when the jury trial provision of the California Constitution was first adopted. The consumer protection actions authorized in the UCL and the FAL are not of like nature or of the same class as an action that was triable by jury at common law. In actions like those under the UCL and the FAL, in which the equitable and legal aspects are nonseverable, there is no constitutional right to a **[*290]** jury trial when the gist of the action is equitable rather than legal. In sum, there is no right to a jury trial under the California Constitution in a cause of action under the UCL or the FAL, including an action in which civil penalties as well as an injunction or other equitable relief are sought.

CA(36)[] **(36)**

Jury § 7—Right to Jury Trial—Civil Cases—Federal Constitution—Applicability.

The federal civil jury trial provision of *U.S. Const., 7th Amend.*, applies only to civil trials in federal court; federal decisions explicitly hold that the civil jury trial provision of the *U.S. Const., 7th Amend.*, does not apply to state court proceedings. Instead, the right to jury trial in state court proceedings is governed by the provisions and judicial interpretation of each state's own constitutional jury trial provision.

CA(37)[] **(37)**

Jury § 7—Right to Jury Trial—Civil Cases—California Constitution—Independent of Federal Constitutional Civil Jury Trial Right.

In California, the constitutional right to a civil jury trial under the California Constitution is entirely independent of the federal constitutional civil jury trial right under *U.S. Const., 7th Amend.* (*Cal. Const., art. I, § 24*), and California cases have not hesitated to decline to follow the federal interpretation of the *U.S. Const., 7th Amend.,* when the federal interpretation has been found inconsistent with a proper reading of the California provision.

CA(38)[] **(38)**

Jury § 7—Right to Jury Trial—Civil Cases—Severable and Nonseverable Legal and Equitable Issues.

When the legal and equitable aspects are severable, there is a preference for trying the equitable issues first. If common facts are resolved in a manner that obviates the need to try the legal issue, there is no right under the California Constitution to have the legal issues submitted to the jury. In cases in which a cause of action contains nonseverable legal and equitable aspects, California cases undertake a qualitative, holistic analysis of the action in its entirety to determine whether the gist of the action is legal or equitable, that is, whether the legal or equitable aspects predominate.

CA(39)[] **(39)**

Jury § 7—Right to Jury Trial—Civil Cases—Unfair Competition and False Advertising.

In causes of action under California's unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*) and California's false advertising law (*Bus. & Prof. Code, § 17500 et seq.*) seeking injunctive relief and civil penalties, the gist of the actions is equitable, and there is no right to a jury trial in such actions under California law either as a statutory or constitutional matter. An appellate judgment **[*291]** holding that a company had a right to a jury trial under the California Constitution in such actions thus had to be reversed and the matter remanded.

[Cal. Forms of Pleading and Practice (2020) ch. 322, Juries and Jury Selection, § 322.13; 2 Kiesel et al., Matthew Bender Practice Guide: Cal. Pretrial Civil Procedure (2020) § 23.38; 7 Witkin, Summary of Cal. Law (11th ed. 2017) Constitutional Law, § 238; 7 Witkin, Cal. Procedure (5th ed. 2008) Trial, §§ 59, 60, 68, 91, 108; 13 Witkin, Summary of Cal. Law (11th ed. 2017) Equity, §§ 117, 141.]

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Judges: Opinion by Cantil-Sakauye, C. J., with Chin, Corrigan, and Groban, JJ., concurring. Concurring opinion by Kruger, J., with Liu, and Cuéllar, JJ., concurring.

Opinion by: Cantil-Sakauye, C. J.

Opinion

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[464]** **CANTIL-SAKAUYE, C. J.**—Under two of California's most prominent consumer protection statutes—the unfair competition law (UCL)[1] and the false advertising law (FAL)[2]—the Attorney General or local prosecuting authorities may bring a civil action against a business that has allegedly engaged in an unfair, unlawful or deceptive business act or practice or false or misleading advertising and may obtain civil penalties as well as injunctive relief and restitution in such an action. In this case we must decide whether, when the government seeks civil penalties as well an injunction or other equitable remedies under those statutes, the causes of action are to be tried by the court (that is, the trial judge) or, instead, by a jury.

For more than 45 years, a uniform line of California Court of Appeal decisions has **[***717]** held that such causes of action under the UCL and the FAL are to be tried by the court rather than by a jury. In the current writ proceeding **[****3]** in this case, however, the Court of Appeal, relying primarily on a decision of the United States Supreme Court applying the civil jury trial provision of the *Seventh Amendment to the federal Constitution*—*Tull v. United States (1987) 481 U.S. 412 [95 L.Ed.2d 365, 107 S.Ct. 1831]* (*Tull*)—disagreed with the earlier line of decisions and held that the jury trial provision of the California Constitution should be interpreted to require a jury trial in any action brought under the UCL or the FAL in which the government seeks civil penalties in addition to injunctive or other equitable relief. We granted review to resolve the conflict in the Court of Appeal decisions.

For the reasons discussed hereafter, we conclude that the causes of action established by the UCL and the FAL at issue here are equitable in nature and are properly tried by the court rather than a jury. As we explain, the legislative history and underlying purpose of the statutory provisions in question demonstrate that these very broadly worded consumer protection statutes were fashioned to permit courts to utilize their traditional flexible equitable authority, tempered by judicial experience and familiarity with the treatment of analogous business practices in this and other jurisdictions, in evaluating whether a challenged business act or practice **[****4]** or advertising should properly be considered impermissible under these statutory provisions.

With regard to petitioners' constitutional claim, it is firmly established that California's constitutional jury trial provision preserves the right to jury trial **[*293]** in civil actions comparable to those *legal* causes of action in which the right to jury trial existed at the time of the first Constitution's adoption in 1850 and does not apply to causes of action that are *equitable* in nature. At early common law, “legal” causes of action (or “actions at law”) typically involved lawsuits in which the plaintiff sought to recover money damages to compensate for an injury caused, for example, by the defendant's breach of contract or tortious conduct, whereas “equitable” causes of action (or “suits in equity”) sought relief that was unavailable in actions at law, such as an injunction to prohibit ongoing or future misconduct or an order requiring a defendant to provide specific performance or disgorge ill-gotten gains. The consumer protection statutory causes of action at issue here are quite different from any early common law cause of action that was in existence at the time the civil jury trial provision **[****5]** of the California **[**465]** Constitution was first adopted. Given the nature of the substantive standard to be applied and the remedies afforded by the statutes, we conclude that the gist of both the UCL and FAL causes of action at issue here is equitable and consequently such actions are properly tried by the court rather than by a jury.

As further explained, the United States Supreme Court decision in *Tull, supra, 481 U.S. 412*, relied upon by the Court of Appeal below, does not govern this case for a variety of reasons. To begin with, the *Tull* decision rests

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[1] The unfair competition law is set forth at *Business and Professions Code section 17200 et seq.* Although the Legislature has not given an official name to these statutory provisions, the legislation has generally been referred to as the unfair competition law, and we will refer to this statute as the UCL. (See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 169, fn. 2 [83 Cal. Rptr. 2d 548, 973 P.2d 527]* (*Cel-Tech*).)

[2] The FAL is set forth at *Business and Professions Code section 17500 et seq.*

upon the federal high court's interpretation of the civil jury trial provision of the *Seventh Amendment to the federal Constitution*, and that court's decisions explicitly hold that the *Seventh Amendment* applies only to *federal court* proceedings, not *state court* proceedings. The constitutional right to jury trial in *state court* civil proceedings is governed only by the civil jury trial provisions of each individual state's own state constitution. In several important respects, California decisions have construed the civil jury trial provision of the California Constitution in a manner differently **[***718]** from how the federal high court has interpreted the federal civil jury trial provision. These differences are significant in this **[****6]** context and serve to distinguish the *Tull* decision from this case. Second, unlike the broad, flexible standards embodied in the two consumer protection statutes at issue in this case, there is no indication that the relevant substantive statutory standard at issue in *Tull* called for the exercise of a court's traditional equitable authority and discretion in determining whether a violation of the statute had occurred. Accordingly, the court in *Tull* had no occasion to determine how the federal constitutional civil jury trial provision should be interpreted or applied in such a setting.

Because the nature of the substantive statutory standards and remedies embodied in the civil causes of action under the UCL and the FAL establish the equitable nature of the actions, we limit the holding in this case to the UCL and FAL setting and express no opinion regarding how the state constitutional jury trial right applies to other statutory causes of action that authorize both injunctive relief and civil penalties.

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I. Facts and Proceedings Below

Petitioners Nationwide Biweekly Administration, Inc., Loan Payment Administration LLC, and Daniel S. Lipsky, the alleged alter ego, principal and sole shareholder **[****7]** of both entities (hereafter collectively referred to as Nationwide) operated a debt payment service in California and other states. Nationwide's program claimed to save debtors money through a process in which the debtor would reduce the amount of interest owed over the life of a loan by having the debtor accelerate the repayment of the debt through an extra monthly payment each year. Under the program, a debtor would pay to Nationwide one-half the debtor's ordinary monthly loan payment every two weeks (biweekly) rather than one full payment once a month, resulting in an extra month's payment each year (26 half-payments equal 13 full payments), and Nationwide would in turn pay those amounts to the debtor's lender. Nationwide advertised its services statewide, mostly through direct mailers to consumers with outstanding residential mortgages, and through followup telephone conversations with consumers who responded to the mailers.

In May 2015, the district attorneys of four counties, acting on behalf of the People, filed a civil complaint alleging that Nationwide had violated the UCL and the FAL by, among other things, employing business practices that: (1) misleadingly implied that Nationwide **[****8]** was affiliated with the consumer's lender; (2) disguised the amount that Nationwide's services actually cost by failing to fully and adequately disclose the amount, payment schedule, and effect of Nationwide's fees; and (3) overstated the amount of savings a consumer could reasonably expect to receive through Nationwide's services.[3] The complaint **[**466]** also stated that Nationwide's practices have been the subject of numerous consumer complaints and regulatory and law enforcement activities around the country, including an action brought by the federal Consumer Financial Protection Bureau (CFPB).[4]

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[3] As initially filed, the complaint also alleged that Nationwide's practices violated the Check Sellers, Bill Payers and Proraters Law (*Fin. Code, § 12200 et seq.*) and asserted causes of action under that statute. While this case was pending before this court, those causes of action were dismissed as part of a larger settlement between the Department of Business Oversight and Nationwide. The underlying action now rests solely on the causes of action under the UCL and the FAL set forth in the complaint.

[4] In the action brought by the CFPB, the federal district court, after a seven-day bench trial, found that although some of the claims advanced by the CFPB were not meritorious, Nationwide had made a variety of misleading statements in its marketing materials. The court imposed injunctive relief and civil penalties of more than $7 million against Nationwide based on that misleading conduct. (*Consumer Financial Protection Bureau v. Nationwide Biweekly Administration, Inc. (N.D.Cal., Sept. 8,*

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[*719]** The complaint's prayer for relief requested that the court (1) issue an injunction prohibiting the business practices found to violate the provisions of the UCL or the FAL, (2) order restitution of all money wrongfully acquired by Nationwide from California consumers in violation of the UCL and the FAL, and (3) impose civil penalties up to $2,500 for each violation of the UCL or the FAL found by the court.[5]

In its amended answer to the complaint, Nationwide demanded a jury trial "on all issues so triable," and the People, in response, **[****9]** filed a motion to strike the jury demand "based on well settled law that this is an equity action requiring a court trial." After briefing, the trial court granted the People's motion to strike the jury demand.

Nationwide then filed a petition for writ of mandate in the Court of Appeal, challenging the trial court's ruling striking the jury demand. After the Court of Appeal initially summarily denied the writ petition, this court granted Nationwide's petition for review and retransferred the matter to the Court of Appeal with directions to issue an order requiring the People to show cause why Nationwide does not have a right to jury trial when the government seeks the civil penalties authorized under the UCL and the FAL.

After briefing and argument, the Court of Appeal held that under *article I, section 16 of the California Constitution*—the jury trial provision—Nationwide has a right to a jury trial in this matter and that the trial court erred in striking the jury demand. (*Nationwide Biweekly Administration, Inc. v. Superior Court (2018) 24 Cal.App.5th 438 [234 Cal. Rptr. 3d 468]* (*Nationwide Biweekly*).) The Court of Appeal, relying heavily on the reasoning of the United States Supreme Court's decision in *Tull, supra, 481 U.S. 412*, concluded that because the People are seeking civil penalties as well as injunctive relief and restitution, the "gist" of the People's **[****10]** UCL and FAL causes of action against Nationwide should properly be considered legal rather than equitable, "giving rise to a right to a jury trial" under *article I, section 16*. (*Nationwide Biweekly, supra, 24 Cal.App.5th at p. 442*.) At the same time, the Court of Appeal, again following the approach adopted by the United States Supreme Court in *Tull*, held that Nationwide's jury trial right is limited to the issue of liability—that is, to whether Nationwide's business practices violated the **[*296]** provisions of the UCL or the FAL—and **[***720]** does not extend to the issue of remedy, including the amount of civil penalties to be imposed. (*Nationwide Biweekly, at p. 456*.)

In the course of its opinion, the Court of Appeal rejected the People's contention that there is "'an unbroken line of appellate decisions finding no right to a jury trial [under the California Constitution] in UCL or FAL actions … where the People sought penalties'" **[**467]** (*Nationwide Biweekly, supra, 24 Cal.App.5th at p. 457*), finding instead that most of the cases relied upon by the People held only that such actions under the UCL and the FAL were not criminal in nature and thus that the jury trial provision of the *Sixth Amendment of the federal Constitution* did not apply to such actions. (*Nationwide Biweekly, at pp. 457–459*.) Although the Court of Appeal acknowledged that at least one appellate court decision—*People v. Bhakta (2008) 162 Cal.App.4th 973 [76 Cal.Rptr.3d 421]*—clearly held that the gist of an action under the UCL **[****11]** is equitable in nature and that there is no right to a jury trial in such an action under the California constitutional jury trial provision, the Court of Appeal disagreed with that decision's analysis and declined to follow its holding. (*Nationwide Biweekly, supra, 24 Cal.App.5th at pp. 459–460*.) In addition, the Court of Appeal questioned the validity of another appellate court decision relied upon by the People—*DiPirro v. Bondo Corp. (2007) 153 Cal.App.4th 150 [62 Cal. Rptr. 3d 722]* (*DiPirro*)—which held that there is no right to a jury trial in an action seeking injunctive relief, restitution, and civil penalties under the *Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Saf. Code, § 25249.5 et seq.)* (commonly known as Prop. 65).

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*2017, No. 15-cv-02106-RS) 2017 WL 3948396, pp. *6–*9, *12–*13*.) Both parties filed appeals from the district court's decision, that are pending in the United States Court of Appeals for the Ninth Circuit. (Case Nos. 18-15431 & 18-15887, filed Mar. 15, 2018, & May 10, 2018.)

[5] In the answer brief filed in this court, Nationwide claims that the government seeks to impose "over $19.25 *billion* in civil penalties." The complaint, however, seeks no specific amount in penalties, and, as explained hereafter, the applicable statutes and case law grant trial courts broad, but not unlimited, discretion to impose penalties in a reasonable amount (up to $2,500 per violation) in light of the nature and severity of an offending business's conduct. (*Post*, at pp. 299, 307, 313.) The answer's hyperbole in this regard does not advance its legal argument.

The Court of Appeal found that the *DiPirro* decision had not adequately analyzed the United States Supreme Court's reasoning in *Tull*. (*Nationwide Biweekly, supra, 24 Cal.App.5th at pp. 461–463*.)

Accordingly, the Court of Appeal concluded that a writ of mandate should issue, directing the trial court to vacate its order striking Nationwide's request for jury trial and to grant a jury trial on all issues except the amount of any statutory penalties to be awarded. (*Nationwide Biweekly, supra, 24 Cal.App.5th at p. 463*.)

We granted the People's petition for review to determine whether there is a right to a jury trial in a UCL or FAL action brought by the government when the government seeks civil penalties as well as injunctive **[****12]** relief and restitution.

II. General Principles Regarding the Right to Jury Trial in Civil Cases Under California Law

CA(1)[] **(1)** As this court recently explained in *Shaw v. Superior Court (2017) 2 Cal.5th 983 [216 Cal. Rptr. 3d 643, 393 P.3d 98]* (*Shaw*): ***HN1***[] "Under California **[*297]** law, the right to a jury trial in a civil action may be afforded either by statute or by the California Constitution. … [¶] … [¶] As a general matter, the California Legislature has authority to grant the parties in a civil action the right to a jury trial by statute, either when the Legislature establishes a new cause of action or with respect to a cause of action that rests on the common law or a constitutional provision. [Citations.] Given the Legislature's broad general legislative authority under the California Constitution and in the absence of any constitutional prohibition [citations], the Legislature may extend the right to a jury trial to instances in which the state constitutional jury trial provision does not itself mandate a right to a jury trial. [¶] … But even when the language and legislative history of a statute **[***721]** indicate that the Legislature intended that a cause of action established by the statute is to be tried by the court rather than by a jury, if the California constitutional jury trial **[****13]** provision itself guarantees a right to a jury trial in such a cause of action, the Constitution prevails and a jury trial cannot be denied." (*2 Cal.5th at pp. 993–994*, fns. omitted.)

III. Is There a *Statutory* Right to Jury Trial Under Either the UCL or the FAL When the Government Seeks Civil Penalties as Well as Injunctive Relief?

Neither the UCL nor the FAL explicitly addresses the question whether the causes of action created by the two statutes—both of which authorize the government to seek civil penalties as well as injunctive relief and restitution—are to be tried by the court or by a jury. As we shall see, however, the legislative history and legislative purpose of both statutes convincingly establish that the Legislature intended that such causes of action under these statutes would be tried by the court, exercising the traditional flexible discretion **[**468]** and judicial expertise of a court of equity, and not by a jury, including when civil penalties as well as injunctive relief and restitution are sought.

A. *The UCL*

CA(2)[] **(2)** Prior to 1933, former *section 3369 of the Civil Code* provided simply that "[n]either specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance, nor to enforce a penalty or forfeiture in **[****14]** any case." The current provisions of the UCL—set forth in *Business and Professions Code section 17200 et seq.*—derive from a 1933 amendment of *Civil Code former section 3369*. (Stats. 1933, ch. 953, § 1, p. 2482.) The 1933 amendment broadened the exception in the statute to include "unfair competition" as well as "nuisance" (Civ. Code, former *§ 3369, subd. (1)*) and added additional subdivisions that: (a) provided that "[a]ny person performing or proposing to perform an act of unfair competition within this State *may be* ***[*298]*** *enjoined* in any court of competent jurisdiction" (*id., subd. (2)*, italics added); (b) defined "unfair competition" as used in the statute to "mean and include *unfair or fraudulent business practice and unfair, untrue or misleading advertising*" (*id.,* *subd. (3)*, italics added);[6] and (c) authorized actions for injunction under the statute to be brought "by the Attorney General or any district attorney in this State in the name of the people of the State of California" or by "any board, officer, … corporation or … person acting for the interests of itself, its members or the general public" (*Civ. Code, former § 3369, subd. (5)*). Because the unfair competition cause of action established by the 1933 amendment of former *section 3369* authorized the government (as well as private **[****15]** parties) to seek only injunctive relief, there is no question that the civil cause of action created in 1933 was equitable in nature and, as such, was intended to be tried by the court and not a jury. (See 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 126, p. 205 [***HN2***[] "Actions seeking injunctive relief are, of course, equitable in nature"].) Nationwide does not suggest otherwise.

In 1972, as part of a legislative measure that expanded the reach of former *section 3369 of the Civil Code* **[***722]** to include "deceptive," as well as "unfair," "untrue," or "misleading," advertising (Stats. 1972, ch. 1084, § 1, p. 2020), the Legislature added former *section 3370.1 to the Civil Code*, authorizing the Attorney General or any district attorney (but not private parties) to seek and obtain, in addition to injunctive relief, "a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation" of former *section 3369* (Stats. 1972, ch. 1084, § 2, p. 2021 [enacting Assem. Bill No. 1937 (1971–1972 Reg. Sess.)]). The 1972 legislation was proposed by the Attorney General and district attorneys who were charged with enforcing the prohibition on unfair competition embodied in former *section 3369*. In support of the legislation, the proponents maintained that "[i]t is **[****16]** our experience that an injunction without a civil penalty is not a deterrent to future consumer fraud abuses." (Atty. Gen. Evelle J. Younger, letter to Sen. Alfred H. Song re Assem. Bill No. 1937 (1971–1972 Reg. Sess.) July 13, 1972.) A legislative committee analysis of the proposed bill after its final amendment set forth the purpose of the legislation as intended to "[p]ermit the Attorney General and a district attorney to collect civil penalties in addition to either specific or preventive relief in actions they commence to enjoin acts of unfair competition," explaining that "[i]t is felt that the allowance of civil penalties, in addition to the requested injunctive relief, will provide a sufficient deterrent to the resumption of these unlawful practices." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1937 (1971–1972 Reg. Sess.) as amended May **[*299]** 25, 1972, pp. 1, 2.) There is no indication in the legislative history of the 1972 enactment that the Legislature, in providing an additional remedy that could be sought in actions under former *section 3369* to enjoin acts of unfair competition, intended to transform such actions from ones that were to be tried by the court into actions **[**469]** that were **[****17]** to be tried by a jury. Civil actions under the UCL that were filed by private parties, in which only injunctive relief was authorized, continued to be tried by the court.

CA(3)[] **(3)** In 1977, the Legislature moved the relevant sections of the Civil Code embodying the UCL into the Business and Professions Code at *sections 17200 to 17206*. (Stats. 1977, ch. 299, § 1, p. 1202.) Former *section 3370.1 of the Civil Code*—the section authorizing the Attorney General or a district attorney to seek civil penalties as well as injunctive relief—was moved to *Business and Professions Code section 17206*. In 1992, the Legislature added *subdivision (b) to Business and Professions Code section 17206*, which provides in relevant part that "[i]n assessing the amount of the civil penalty, *the court* shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth." (Stats. 1992, ch. 430, § 4, pp. 1707, 1708, italics added.) Nothing in these further amendments suggests that in an action under the UCL in **[****18]** which the government seeks civil penalties as well as injunctive or other equitable relief, the Legislature intended that the action would be tried by a jury rather than by the trial court, and ***HN3***[] the language of *Business and Professions Code section 17206, subdivision (b)* clearly indicates that the amount of civil penalties is intended to be determined by the court.[7]

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[6] The 1933 amendment also defined "unfair competition" to include any violation of the then-existing provisions of *Penal Code former sections 654a*, *654b*, or *654c*, all of which prohibited different specific forms of false advertising. (Stats. 1933, ch. 953, § 1, p. 2482 [*Civ. Code, former § 3369, subd. (3)*].)

[7] In the statewide election held in November 2004, the voters approved Proposition 64, an initiative statute that restricted the kinds of private plaintiffs that may seek an injunction or other equitable relief under the UCL or the FAL (*Bus. & Prof. Code, §§*

CA(4)[] **(4)** **[***723]** The factors just discussed—namely (1) the origin of the government's cause of action under the UCL as an action simply to enjoin an unfair business practice and (2) the language of the statutory provision relating to the awarding of civil penalties in such an action—clearly support the conclusion that the Legislature, in enacting the UCL, intended to create an equitable, rather than a legal, cause of action. Furthermore, from the statute's inception, California decisions interpreting and applying both the provisions of former *section 3369 of the Penal Code* and its current counterparts have explained that *HN4*[] the **[*300]** exceedingly broad and general language that the Legislature incorporated in the statute to define the business practices that are proscribed by the statute—in the original language, "unfair or fraudulent business practice and unfair, untrue, or misleading advertising"—was adopted with the specific understanding **[****19]** that this broad language would be applied *by a court of equity* in determining whether a challenged business practice violated the statutory prohibition.

CA(5)[] **(5)** For example, in *Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94 [101 Cal. Rptr. 745, 496 P.2d 817]* (*Barquis*)—one of this court's seminal decisions applying the UCL—we emphasized that past cases under the statute "have frequently noted that the section was intentionally framed in its broad, sweeping language, precisely to enable *judicial tribunals* to deal with the innumerable '"new schemes which the fertility of man's invention would contrive."'" (*Barquis, at p. 112*, italics added.) Quoting from *American Philatelic Soc. v. Claibourne (1935) 3 Cal.2d 689, 698–699 [46 P.2d 135]*—one of the earliest decisions discussing the appropriate reach of the broad language of the statute at issue—*Barquis* observed: *HN5*[] "'When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, *a court of equity* is not impotent to frustrate its consummation because the scheme is an original one. There is a maxim as old as law that there can be no right without a remedy, and in searching for a precise precedent, *an equity court* must not lose sight, not only of its power, but of its duty to arrive at a just **[**470]** solution of the problem.'" (*Barquis, supra, 7 Cal.3d at p. 112*, italics added.)

CA(6)[] **(6)** The objective that the Legislature sought to accomplish **[****20]** through its adoption of the broad standard embodied in the UCL fits perfectly with the role historically exercised by a court of equity. As Pomeroy explained in his classic treatise on equity jurisprudence: *HN6*[] "[Equity is] much more elastic and capable of expansion and extension to new cases than the common law. Its very central principles, its foundation upon the eternal verities of right and justice, its resting upon the truths of morality rather than upon arbitrary customs and rigid dogmas, necessarily gave it this character of flexibility, and permitted its doctrines to be enlarged so as to embrace new cases as they constantly arose. It has, therefore, as an essential part of its nature, a capacity of orderly and regular growth—a growth not arbitrary, according to the will of individual judges—but in the direction of its already settled principles. **[***724]** It is ever reaching out and expanding its doctrines so as to cover new facts and relations, but still without any break or change in the principles or doctrines themselves." (1 Pomeroy, Equity Jurisprudence (5th ed. 1941) § 59, p. 76.) As the Court of Appeal observed in *A-C Co. v. Security Pacific Nat. Bank (1985) 173 Cal.App.3d 462, 473 [219 Cal. Rptr. 62]*: "The tradition and heredity of the flexible equitable powers of the modern **[****21]** trial judge derive from the role of the trained and experienced chancellor and depend upon **[*301]** skills and wisdom acquired through years of study, training and experience which are not susceptible of adequate transmission through instructions to a lay jury."[8]

17203, *17204*, *17535*) and provided that the revenue from the civil penalties imposed under the UCL or the FAL may be used only by the Attorney General and local public prosecutors for the enforcement of consumer protection laws. (*Bus. & Prof. Code, §§ 17206, subd. (c)*, *17536, subd. (c)*.) The changes effectuated by Proposition 64 have no direct bearing on the issue before us.

[8] The very broad consumer protective language set forth in the UCL closely tracks the broad language that Congress embodied in the *Federal Trade Commission Act (15 U.S.C. § 41 et seq.)* to reach business practices that were not specifically forbidden by the common law or other statutes. (See *15 U.S.C. § 45(a)* ["Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce" are declared unlawful]; see generally Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition* (1962) 7 Vill. L.Rev. 517, 525–542.) California decisions have long recognized the close relationship between the language of the UCL and the Federal Trade Commission Act. (See, e.g., *People ex rel. Mosk v. National Research Co. (1962) 201 Cal.App.2d 765, 772–773 [20 Cal. Rptr. 516]*.)

The United States Supreme Court, in discussing the Federal Trade Commission's exercise of its authority to determine whether a trade practice is "unfair" under the *Federal Trade Commission Act* in *FTC v. Sperry & Hutchinson Co. (1972) 405 U.S. 233,* Over the more than 80-year history of the UCL, scores of decisions of both this court and the Courts of Appeal have uniformly recognized that the cause of action established by this statute is equitable in nature. (See, e.g., *Solus Industrial Innovations, LLC v. Superior Court (2018) 4 Cal.5th 316, 340 [228 Cal. Rptr. 3d 406, 410 P.3d 32]* [the UCL "'provides an *equitable* means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices'" (italics added & omitted)]; *Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1144 [131 Cal. Rptr. 2d 29, 63 P.3d 937]* ["A UCL action is equitable in nature; damages cannot be recovered. … Civil penalties may be assessed in public unfair competition actions, but the law contains no criminal provisions" (citation omitted)].)

In *Cel-Tech, supra, 20 Cal.4th 163*, our court addressed questions arising from the expansive scope of the language of the UCL in a case in which the plaintiff cell phone vendor challenged the business practices of the defendant competitor cell phone **[****22]** company as unfair under the UCL. In that case, the plaintiff contended that the defendant had assertedly taken improper advantage of its privileged position as one of only two cell phone companies licensed to provide cellular service in the Los Angeles area when it engaged in the practice of selling **[**471]** cell phones to its cellular service customers at below cost. In *Cel-Tech*, we noted that our court had not yet defined the term "unfair" as used in the UCL and determined that although two Court of **[*302]** Appeal decisions **[***725]** had attempted such a definition,[9] the suggested definitions in those appellate decisions were "too amorphous and provide too little guidance to courts and businesses." (*Cel-Tech, at p. 185*.)

CA(7)[] **(7)** Thereafter, in devising "a more precise test for determining what is unfair under the unfair competition law," the court in *Cel-Tech* "turn[ed] for guidance to the jurisprudence arising under the 'parallel' [citation] *section 5 of the Federal Trade Commission Act (15 U.S.C. § 45(a)*)," observing that ***HN7***[] "'[i]n view of the similarity of language and obvious identity of purpose of the two statutes, decisions of the federal court on the subject are more than ordinarily persuasive.'" (*Cel-Tech, supra, 20 Cal.4th at p. 185*.) ***CA(8)***[] **(8)** After describing a number of federal high court decisions **[****23]** considering the types of practices that would be considered "'unfair methods of competition'" between competitors under *section 5 of the Federal Trade Commission Act (FTC Act)* (*Cel-Tech, at p. 186*)—federal decisions that the *Cel-Tech* court emphasized it considered persuasive but not "controlling or determinative" (*id. at p. 186, fn. 11*)—the court in *Cel-Tech* concluded that "to guide courts and the business community adequately and to promote consumer protection, ***HN8***[] we must require that any finding of unfairness to competitors under [*Business and Professions Code] section 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. We thus adopt the following test: *When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200 [(the relevant provision of the UCL)], the word 'unfair' in that section means conduct that threatens an incipient violation of an **antitrust law**, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition*" (*20 Cal.4th at pp. 186–187*, italics added).

HN9[] ***CA(9)***[] **(9)** It is clear from both the language and nature of the test adopted in *Cel-Tech*—that is, whether the challenged business practice **[****24]** "threatens an incipient violation of an ***antitrust law***" or "violates the policy or spirit of one of those laws"—that such a standard is one that may reasonably be applied only by a court. (*Cel-Tech, supra, 20 Cal.4th at p. 187*.) This standard is too indeterminate to be adequately conveyed by jury instructions or applied by a jury. Indeed, the *Cel-Tech* court's detailed description of the analysis that would have to be undertaken on remand of that case in determining whether the challenged practice meets the test of unfairness

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244 [31 L.Ed.2d 170, 92 S.Ct. 898], concluded that "legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, *like a court of equity*, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of antitrust laws." (Italics added.)

[9] See *People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal.App.3d 509, 530 [206 Cal. Rptr. 164]*, which stated that "an 'unfair' business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," and *State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal.App.4th 1093, 1104 [53 Cal. Rptr. 2d 229]*, which declared that in determining whether a business practice is unfair "'the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim.'"

adopted in *Cel-Tech* **[*303]** makes it clear that our opinion in that case recognized that the test was to be applied by the trial court and not a jury. (See *Cel-Tech, supra, 20 Cal.4th at pp. 188–191*; cf. *F. T. C. v. Motion Picture Adv. Co. (1953) 344 U.S. 392, 396 [97 L.Ed. 426, 73 S.Ct. 361]* ["The point where a method of competition becomes 'unfair' … will often turn on the exigencies of a particular situation, trade **[***726]** practices, or the practical requirements of the business in question"].)

The court in *Cel-Tech* explicitly noted that the case before it involved "an action by a competitor alleging anticompetitive practices" and emphasized that the specific test adopted in that decision was limited to that context and did not apply to "actions by consumers or by competitors alleging other kinds of violations of the unfair competition **[****25]** law." (*Cel-Tech, supra, 20 Cal.4th at p. 187,* ***[**472]*** *fn. 12*.) Subsequent to the decision in *Cel-Tech*, our court has not addressed the question whether in actions under the UCL brought on behalf of consumers rather than competitors, the term "unfair" in the UCL needs to be similarly defined in a more prescribed standard or test, and, if so, what that test should be. In the years since *Cel-Tech*, a split of authority has developed in the Courts of Appeal with regard to the proper test for determining whether a business practice is unfair under the UCL in consumer cases, with appellate decisions adopting three different tests for determining unfairness in the consumer context. (See, e.g., *Zhang v. Superior Court (2013) 57 Cal.4th 364, 380, fn. 9 [159 Cal. Rptr. 3d 672, 304 P.3d 163]* [describing split of authority].)[10] The issue of the proper test for defining the term "unfair" as used in **[*304]** the UCL in the consumer context is not raised in the present case, and we have no occasion to address it here. Nonetheless, we note that all the tests that have been proposed in the appellate court decisions are ones that, like the test adopted in *Cel-Tech*, can reasonably be applied only by courts, rather than by juries.

CA(10)[] **(10)** Accordingly, ***HN10***[] both (1) the fact that the cause of action under the UCL originated solely as an action to enjoin an **[****26]** unfair or misleading business practice—an equitable action triable only by a court and not a jury—and (2) the fact that the broad and general standard of unfair competition that was incorporated into the statute contemplated **[***727]** that the standard would be applied by a court exercising its traditional, flexible equitable authority rather than by a jury, support the conclusion that the Legislature, in enacting the UCL, intended that a cause of action under the UCL would be tried by the court and not a jury, even when the government seeks civil penalties as well as injunctive relief.

CA(11)[] **(11)** We note that ***HN11***[] the nature of the principal issue presented in a great many UCL actions additionally supports the conclusion that such causes of action were intended to be decided by the court rather than

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[10] One line of Court of Appeal decisions has held that a balancing test, which the *Cel-Tech* court declined to adopt in the competitor context (see *Cel-Tech, supra, 20 Cal.4th at pp. 184–185*), should nonetheless be applied in the consumer context, under which the determination whether a business practice is unfair to consumers """involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim."'" (*Smith v. State Farm Mutual Automobile Ins. Co. (2001) 93 Cal.App.4th 700, 718 [113 Cal. Rptr. 2d 399]*; see, e.g., *Ticconi v. Blue Shield of California Life & Health Ins. Co. (2008) 160 Cal.App.4th 528, 539 [72 Cal. Rptr. 3d 888]*; cf. *FTC v. Sperry & Hutchinson Co., supra, 405 U.S. 233, 244–245, fn. 5* [quoting with approval similar test adopted by FTC in 1964 for determining unfairness under *§ 5 of the FTC Act]*.)

A second line of Court of Appeal decisions has adopted what has been termed a "tethering test," requiring that "the public policy which is a predicate to [a consumer unfair competition action under the "unfair" prong of the UCL] must be 'tethered' to specific constitutional, statutory or regulatory provisions" in a manner similar to which *Cel-Tech* requires a competitor's cause of action to be tethered to the antitrust laws. (*Gregory v. Albertson's, Inc. (2002) 104 Cal.App.4th 845, 854 [128 Cal. Rptr. 2d 389]*; see, e.g., *Scripps Clinic v. Superior Court (2003) 108 Cal.App.4th 917, 940 [134 Cal. Rptr. 2d 101]*.)

A third line of Court of Appeal cases has adopted the three-part definition of unfairness applied under section 5 of the FTC Act since 1980, namely that: "(1) The consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." (*Camacho v. Automobile Club of Southern California (2006) 142 Cal.App.4th 1394, 1403 [48 Cal. Rptr. 3d 770]*; see, e.g., *Rubenstein v. The Gap, Inc. (2017) 14 Cal.App.5th 870, 880 [222 Cal. Rptr. 3d 397]*.) This test has sometimes been termed the "*section 5* test."

a jury. A cursory review of the numerous UCL actions that have been brought in recent years (see Stern, Cal. Practice Guide: *Bus. & Prof. Code § 17200* Practice (The Rutter Group 2019) ¶ 3:131, pp. 3-39 to 3-44 [describing 41 recent UCL cases]) reveals that such cases often concern a nuanced and qualitative determination regarding whether a business practice should properly be considered unfair or deceptive within the meaning of the UCL. (See, **[****27]** e.g., *Klein v. Chevron U.S.A., Inc. (2012) 202 Cal.App.4th 1342, 1376–1382 [137 Cal. Rptr. 3d 293]* [considering whether failing to sell temperature-adjusted motor fuel or to **[**473]** disclose the effect of temperature increases on the volume of fuel sold could constitute an unfair or fraudulent business practice]; *Jolley v. Chase Home Finance, LLC (2013) 213 Cal.App.4th 872, 907–908 [153 Cal. Rptr. 3d 546]* [considering whether bank's practice of "dual tracking"—agreeing to a loan modification while continuing to pursue foreclosure—could constitute an unfair or fraudulent business practice].) This type of qualitative determination—often requiring the consideration of a variety of factors or circumstances identified in prior cases in California or other jurisdictions or in administrative guidelines developed by the Federal Trade Commission or other consumer protection administrative agencies—is the type of decision that has traditionally been viewed as the province of courts rather than juries.
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Moreover, we have emphasized that "'the overarching legislative concern [in enacting the UCL is] to provide a *streamlined* procedure for the prevention of ongoing or threatened acts of unfair competition'" (*Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4th 163, 173–174 [96 Cal. Rptr. 2d 518, 999 P.2d 706]*), an objective that is inconsistent with the unavoidable delays and increased costs inherent in a jury, as compared to a court, trial. Furthermore, having a court, rather than **[****28]** a jury, decide the question whether a business practice is properly considered unfair or deceptive for purposes of the UCL has the additional significant benefit—for both defendants and plaintiffs—of facilitating appellate review of that determination, because a trial court, unlike a jury, is required to provide, upon request of any party, "a statement of decision explaining the factual and legal basis for its decision." (*Code Civ. Proc., § 632*.) And having appellate courts in the position in which they can adequately review trial courts' evaluations of the validity of business practices under the UCL, in turn, promotes the creation of a cumulative body of precedent that improves the consistency of future determinations under the UCL and provides needed guidance to companies in the formulation of their business practices.

CA(12)[] **(12)** In sum, for all of the foregoing reasons, we believe that it is clear that ***HN12***[] the Legislature intended that a cause of action under the UCL—including an action brought by the government that seeks both injunctive relief and civil penalties—is to be tried by the court rather than by a jury.

B. *The FAL*

HN13[] ***CA(13)***[] **(13)** The FAL (*Bus. & Prof. Code, § 17500 et seq.*) has been accurately described as "the **[***728]** major California legislation designed **[****29]** to protect consumers from false or deceptive advertising." (*People v. Superior Court (Olson) (1979) 96 Cal.App.3d 181, 190 [157 Cal. Rptr. 628]*.) The procedures set forth in the FAL and the UCL are in many respects parallel to one another, and the UCL specifically provides that any practice that violates the FAL is also prohibited by the UCL. (See *Bus. & Prof. Code, § 17200*.)

The original version of the FAL creating a civil cause of action was enacted in 1941. (Stats. 1941, ch. 63, § 1, pp. 727–729 [enacting *Bus. & Prof. Code, §§ 17500–17535*].)[11] The statute broadly prohibited false or misleading **[*306]** advertising, declaring that it is unlawful for any person or business to make or distribute any

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[11] The FAL traces its origin to the 1915 version of former *section 654a of the Penal Code* (Stats. 1915, ch. 634, § 1, pp. 1252–1253), which, in turn, was based upon a model false advertising statute that was first proposed in 1911 in *Printer's Ink* magazine, an advertising journal. (See Note, *The Regulation of Advertising* (1956) 56 Colum. L.Rev. 1018, 1058; Note, *Enforcing California's False Advertising Law: A Guide to Adjudication* (1974) 25 Hastings L.J. 1105, 1106.) The 1911 model statute proposed to make it a misdemeanor to publish an advertisement containing "'any assertion, representation or statement of fact which is untrue, deceptive or misleading'" and was quite stringent, omitting any requirement that the advertiser be shown to have intended to deceive or to know the improper character of the advertisement. (Note, *The Regulation of Advertising, supra*, 56 Colum. L.Rev. at pp. 1058–1059 & fn. 245.) In adopting the statute in California in 1915, however, the Legislature added a scienter requirement, requiring a showing that the advertiser knew or, in the exercise of reasonable care, should have known of the false, deceptive or misleading character of the advertisement. (Stats. 1915, ch. 634, § 1, pp. 1252–1253.)

statement to induce the public to enter into a transaction "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, **[**474]** to be untrue or misleading." (*Bus. & Prof. Code, § 17500*.) Like the civil cause of action authorized by the original version of the UCL, the FAL, as originally enacted, explicitly authorized only injunctive relief (*Bus. & Prof. Code, former § 17535*), permitting civil actions for injunction under the act to be prosecuted by the Attorney General or any district attorney on behalf of the People, and also "by any [entity or] person acting for the interests of itself, its members or the general public." (*Ibid.*) Because **[****30]** the civil action established by the 1941 legislation authorized only injunctive relief, it is clear that, as originally enacted, a civil action under the FAL, like that under the UCL as originally enacted, was equitable in nature and was intended to be tried by a court and not a jury. Again, Nationwide does not argue otherwise.

In 1965, the Legislature added *Business and Professions Code section 17536* to the FAL, authorizing the Attorney General or a district attorney, but not a private party, to seek a civil penalty not to exceed $2,500 for each violation of the FAL. (Stats. 1965, ch. 827, § 1, pp. 2419–2420.) The enactment of *section 17536* as part of the FAL in 1965 predated the enactment in 1972 of the comparable provision of the UCL, discussed above, authorizing the Attorney General or a district attorney to seek civil penalties as well as injunctive relief in an action under the UCL. (See, *ante*, pp. 297–298.) As with the comparable provision of the UCL, the legislative history of the 1965 enactment of *section 17536* indicates that the legislation was introduced at the request of the Attorney General to provide an additional remedy in actions **[****31]** to enjoin fraudulent sales schemes. (See Assemblyman George E. Danielson, letter to Gov. Edmund G. Brown, June 14, 1965 [urging approval of 1965 bill introduced by Danielson].) Nothing in the legislative history of the 1965 enactment indicates any legislative **[***729]** intent to change the nature of a civil action under the FAL from an equitable action that is tried to the court to one that is tried by a jury. As under the UCL, actions under the FAL that were filed by private parties, in which injunctive relief was the prescribed remedy, continued to be tried by the court, not a jury.

In *People v. Superior Court (Jayhill Corp.) (1973) 9 Cal.3d 283 [107 Cal. Rptr. 192, 507 P.2d 1400]* (*Jayhill*), this court addressed a number of **[*307]** issues arising in a civil action filed by the Attorney General under the FAL in which the Attorney General sought injunctive relief, restitution and civil penalties for alleged false and misleading advertising engaged in by door-to-door encyclopedia salespersons. The trial court had permitted the action to go forward with respect to injunctive relief but had struck all other forms of relief.

CA(14)[] **(14)** On appeal, the court in *Jayhill* first addressed the question of the availability of restitution in an FAL action under *Business and Professions Code section 17535*. At the time the complaint in *Jayhill* was filed, *section 17535* provided **[****32]** simply "that false or misleading advertising 'may be enjoined' in an action by the Attorney General, but was silent as to the power of the trial court to order restitution in such a proceeding." (*Jayhill, supra, 9 Cal.3d at p. 286*.) Relying on the general principle that ***HN14***[] "[i]n the absence of such a restriction *a court of equity* may exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the *status quo ante* as nearly as may be achieved," the *Jayhill* court held that "in an action by the Attorney General under *section 17535* a trial court has the inherent power to order, as a form of ancillary relief, that the defendants make or offer to make restitution to the customers found to have been defrauded." (*Ibid.,* first italics added.)[12] Thus, the court in *Jayhill* clearly recognized that a civil action under the FAL is an equitable action triable to the court.

[475]** ***CA(15)***[] **(15)** In *Jayhill, supra, 9 Cal.3d 283*, this court also addressed a separate issue concerning the application of *Business and Professions Code section 17536*, the provision of the FAL authorizing the trial court to impose civil penalties in a civil action under the FAL. We found that the trial court in that case had erred in determining that "'each claim for penalty is a separate **[****33]** cause of action'" which must be separately stated, concluding instead that "[*t*]*he Attorney General has only one cause of action against a particular defendant for violating section 17500; for this he seeks several forms of relief, including the civil penalty of $2,500 set forth in*

[12] After the trial court ruling but prior to our decision in *Jayhill*, the Legislature had explicitly amended *Business and Professions Code section 17535* to authorize the court to order restitution as well as injunctive relief. (Stats. 1972, ch. 244, § 1, p. 494.) In *Jayhill*, the court found that in light of its legislative history, the 1972 amendment was not intended "to create a new power in the trial court but simply to clarify existing law on the point." (*Jayhill, supra, 9 Cal.3d at p. 287, fn. 1*.)

section 17536. Since multiple victims are involved he prays for a penalty for each violation, but this does not elevate each violation to a separate cause of action. … We hold that **HN15**[] the Attorney General has only one cause of action against a defendant for violating section 17500, but that the amount of civil penalties which may be imposed under section 17536 is dependent upon the number of 'violations' committed by a defendant." (9 Cal.3d at p. 288, italics added.) Because, as **[*308]** we have seen, the court in *Jayhill* had already **[***730]** explained that the cause of action for violating section 17500 is an equitable action (Jayhill, at p. 286), the clear implication of the decision in *Jayhill* is that even when the Attorney General or a district attorney seeks civil penalties as well as injunctive relief in such an action, the action under the FAL remains an equitable action, and, as such, is to be tried by the court, rather than by a jury.

In 1992, Business and Professions Code section 17536 was amended to provide that "[i]n assessing the amount of the civil penalty, **[****34]** *the court* shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth." (Stats. 1992, ch. 430, § 5, pp. 1708, 1709, italics added.) This wording directly tracks the language that was added to section 17206 of the UCL in the same 1992 legislation. (See, *ante*, p. 299.) Again, this terminology makes it clear that the Legislature intended that the amount of civil penalties under the FAL is to be determined by the court, not by a jury.

As with respect to the UCL, past decisions of both this court and the Courts of Appeal have consistently described the civil cause of action authorized by the FAL as an equitable action that is to be tried by the court rather than a jury, including when the action is one brought by a government attorney and seeks civil penalties as well as injunctive relief. (See, e.g., Jayhill, supra, 9 Cal.3d at p. 286; Fletcher v. Security Pacific National Bank (1979) 23 Cal.3d 442, 452 [153 Cal. Rptr. 28, 591 P.2d 51] ["the basic equitable principles underlying [Business and Professions Code] section 17535 arm the trial court with broad **[****35]** discretionary power … '… to accomplish complete justice between the parties'"]; People v. Overstock.com, Inc. (2017) 12 Cal.App.5th 1064, 1091 [219 Cal. Rptr. 3d 65] (*Overstock.com*) [the ""equitable …" … "… remedial power granted under [the UCL and the FAL] is extraordinarily broad"" (citation omitted)].)

HN16[] **CA(16)**[] **(16)** Like the choice of the term "unfair" in the UCL, the governing substantive standard of the FAL—prohibiting advertising that is "untrue or *misleading*" (Bus. & Prof. Code, § 17500, italics added)—is set forth in broad and open-ended language that is intended to permit a court of equity to reach any novel or creative scheme of false or misleading advertising that a deceptive business may devise. (See, e.g., Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 320 [120 Cal. Rptr. 3d 741, 246 P.3d 877]; Overstock.com, supra, 12 Cal.App.5th 1064, 1091 ["'"Probably because false advertising and unfair business practices can take many forms, the **[*309]** Legislature has given the courts the power to fashion remedies to prevent their 'use or employment' in whatever context they may occur"'"].) As this court explained in Kasky v. Nike, Inc. (2002) 27 Cal.4th 939 [119 Cal. Rptr. 2d 296, 45 P.3d 243], the FAL prohibits "'not **[**476]** only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.' [Citation.] Thus, to state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, 'it **[****36]** is necessary only to show that "members of the public are likely to be deceived."'" (Kasky, at p. 951, quoting Leoni v. State Bar (1985) 39 Cal.3d 609, 626 [217 Cal. Rptr. 423, 704 P.2d 183] and Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 211 [197 Cal. Rptr. 783, 673 P.2d 660] (*Com. on Children's Television*).)[13]

CA(17)[] **(17)** **[***731]** It is true that **HN17**[] the broad reach and scope of the FAL's untrue or misleading standard is often framed in language (whether members of the public are likely to be deceived) that is not, on its face, beyond the ken of a jury. As employed in the FAL (as well as in the UCL), however, a determination that advertising poses a sufficient risk or tendency to deceive or confuse the public may potentially result in an injunctive

[13] As noted above (*ante*, p. 297), the UCL contains an overlapping prohibition of impermissible advertising, barring, in addition to "any unlawful, unfair or fraudulent business act or practice," any "unfair, deceptive, untrue or misleading advertising." (Bus. & Prof. Code, § 17200.)

order prohibiting what may be a common and widely utilized advertising, labeling, or promotional practice. (See, e.g., *Chern v. Bank of America (1976) 15 Cal.3d 866, 875–876 [127 Cal. Rptr. 110, 544 P.2d 1310]* [challenge to common bank practice of calculating interest rate advertised as "'per annum'" on the basis of a 360-day year]; *Com. on Children's Television, supra, 35 Cal.3d 197, 205–215, 222–223* [challenge to children's television advertising representing that breakfast foods with high sugar content are "'healthful and nutritious,'" and labeling such foods ""cereals"" rather than "'candy breakfasts'"].) In the FAL and UCL settings, this standard—whether members of the public are likely to be deceived—has been understood to call for the exercise of the type of equitable discretion **[****37]** and judgment traditionally employed by a court of equity. ***CA(18)***[] **(18)** As in the case of the UCL, ***HN18***[] the crucial issue in cases under the FAL does not typically involve the type of ordinary factfinding assigned to a jury, but rather calls for an equitable judgment to determine whether an often undisputed advertising or promotional practice presents a sufficient tendency to deceive or confuse the public so as to support invocation of the FAL's remedies. As the breadth of the cases arising under the FAL attests, this determination calls for consideration of a wide variety of factors that prior cases and past administrative experience have shown may render an affirmative statement (or a failure to disclose) in a product label, packaging, **[*310]** or in other advertising or promotional practices misleading in a particular context.[14] And, again as in the UCL context (see *ante*, pp. 304–305), given the capacity of the FAL's standard to be applied expansively to encompass all of the novel ways in which advertising or promotional material may be misleading, it is important that trial courts are required to set forth their reasoning for a determination that the FAL has been violated so that a body of precedent can evolve to **[****38]** inform businesses of advertising practices they must avoid.

In *Brady v. Bayer Corp. (2018) 26 Cal.App.5th 1156 [237 Cal. Rptr. 3d 683]*, for example, the Court of Appeal determined that the One A Day label on a bottle of gummy vitamins that required, in "miniscule" instructions on the back of the label (*id. at p. 1159*), that *two* gummies be taken daily to provide the recommended daily vitamin dosage was sufficiently potentially misleading to support **[***732]** a cause of action for violation of the FAL. The *Brady* court pointed out that despite the well understood traditional meaning of the One A Day brand, consumers who take one gummy a day "end up receiving only half the daily vitamin coverage **[**477]** they think they are getting." (*Brady, at p. 1160*.) In the course of its opinion, the *Brady* court discussed at some length a number of factors that past decisions had considered and balanced in determining whether a product label could be found sufficiently misleading to violate the FAL, including "common sense," the factual context in which literally true or literally false statements are made, the degree to which back-of-the-label qualifiers ameliorate any tendency to mislead, and the tendency of particular brand names to mislead. (*Brady, at pp. 1165–1174*.) Considering these factors **[****39]** as a whole, the *Brady* court found that the One A Day label had a sufficient "'capacity, likelihood or tendency to deceive or confuse the public'" to support a cause of action under the FAL. (*Brady, at p. 1173*.)

As a further example, in *Day v. AT & T Corp. (1998) 63 Cal.App.4th 325 [74 Cal. Rptr. 2d 55]*, the Court of Appeal determined that although the defendant phone company's policy of rounding up charges for phone calls longer than a minute to the next full minute was permissible under the "filed rate" doctrine, the failure of the packaging of defendant's prepaid phone cards to disclose this rounding-up practice was sufficiently misleading to violate the FAL. In reaching this conclusion, the *Day* court considered but distinguished two earlier out-of-state decisions that had rejected a claim by ordinary phone subscribers that a telephone company's failure to disclose the rounding-up practice was misleading. The court relied on the fact that unlike ordinary phone bills that disclosed to consumers that all phone calls were **[*311]** charged for full minutes, "[t]he phone cards in question, whose outer packagings do not reveal the practice of rounding up, are *prepaid.* A consumer cannot read any materials provided by the carrier with the card *before* buying the card, which will advise **[****40]** him or her of the practice. Based on the advertising a consumer will not know that whole minutes are being credited for each fraction of a minute until the card has been used." (*Day, at p. 334*.) Under these circumstances, the *Day* court concluded "that the practices alleged here were likely to mislead, confuse or deceive members of the public." (*Ibid.*)

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[14] For a general discussion of the numerous and complex factors and considerations that may affect the determination whether advertising should properly be viewed as deceptive or misleading, see *Developments in the Law—Deceptive Advertising* (1967) 80 Harv. L.Rev. 1005, 1038–1063.

And in *Overstock.com, supra, 12 Cal.App.5th 1064*, the Court of Appeal upheld a trial court finding that the defendant online bargain retailer had violated the FAL through its online advertising practices. The defendant had used a number of different methods to indicate the purported bargain nature of its prices. At first, its advertisements displayed a "list price" that was shown stricken through, along with the retailer's own lower price and the difference that the consumer would assertedly save. Later, the advertisements changed "list price" to "'Compare at,'" and thereafter, to "Compare." The evidence at trial showed, however, that (1) the defendant failed to have a reliable procedure in place to verify that the comparator prices were realistic and (2) that the prices being compared frequently were not for the same or similar item. In affirming the trial court's finding that the challenged **[****41]** advertising was false or misleading within the meaning of the FAL, the *Overstock.com* court relied in part on the Federal Trade Commission (FTC) Guides Against Deceptive Pricing (16 C.F.R. § 233 (2019)). (*Overstock.com, supra, 12 Cal.App.5th at p. 1081*.) That FTC guide sets forth in considerable detail the numerous ways in **[***733]** which advertised pricing practices may be misleading or deceptive. (See *16 C.F.R. §§ 233.1–233.5 (2019)*.) Specifically with respect to retail value comparisons, the guide provides that the advertiser "should be reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the article are being made in the area—that is, a sufficient number of sales so that a consumer would consider a reduction from the price to represent a genuine bargain or saving" and also that the compared merchandise is "of essentially similar quality and obtainable in the area." (*16 C.F.R. § 233.2(a)*, *(c) (2019)*.)

CA(19)[] **(19)** The Court of Appeal decision in *Overstock.com* illustrates that, as with the determination whether a business practice is unfair within the meaning of the UCL, ***HN19***[] the complexities and nuances that are often involved **[**478]** in the determination whether an advertisement should properly be considered untrue or misleading for purposes **[****42]** of the FAL are often ameliorated by judicial reference to the relevant guidelines developed by the FTC regarding deceptive advertising. (See generally Stern, Cal. Practice Guide: *Bus. & Prof. Code § 17200* Practice, *supra*, ¶¶ 4:46-4:80.4, pp. 4-14 to 4-32.) The great variety and complexity of contexts in which the potentially misleading nature **[*312]** of advertising may arise and must be evaluated can be gleaned from a simple listing of the numerous guidelines, in addition to the Guides Against Deceptive Pricing relied upon in *Overstock*, that the FTC has published relating to deceptive advertising. (See Guides Against Bait Advertising [*16 C.F.R. §§ 238.0–238.4 (2019)*]; Guides for the Advertising of Warranties and Guarantees [*16 C.F.R. §§ 239.1–239.5 (2019)*]; Guides for Advertising Allowances and Other Merchandising Payments and Services [*16 C.F.R. §§ 240.1–240.15 (2019)*]; Guide Concerning Use of the Word "Free" and Similar Representations [*16 C.F.R. § 251.1(a)–(i) (2019)*]; Guides for Private Vocational and Distance Education Schools [*16 C.F.R. §§ 254.0–254.7 (2019)*]; Guides Concerning Use of Endorsements and Testimonials in Advertising [*16 C.F.R. §§ 255.0–255.5 (2019)*]; Guide Concerning Fuel Economy Advertising for New Automobiles [*16 C.F.R. §§ 259.1–259.4 (2019)*]; Guides for the Use of Environmental Marketing Claims [*16 C.F.R. §§ 260.1–260.17 (2019)*].)

And a brief look at just one of these FTC guidelines **[****43]** —the Guides Concerning Use of Endorsements and Testimonials in Advertising—provides a good indication of the type of equitable consideration and evaluation of a substantial variety of factors that often goes into the determination whether advertising is properly considered untrue or misleading for purposes of the FAL. The guide on endorsements declares, for example, that "[e]ndorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser," and that "[a]n advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented. An advertiser may satisfy this obligation by securing the endorser's views at reasonable intervals where reasonableness will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors' products, and the advertiser's contract commitments." (*16 C.F.R. § 255.1(a)*, *(b) (2019)*.) This FTC guide also distinguishes between advertising that uses "consumer endorsements" and advertising that uses "expert endorsements." (*Id.*, *§§ 255.2*, *255.3 (2019)*.) With **[****44]** respect to consumer endorsements, the guide provides in part: "An advertisement employing endorsements by one or more **[***734]** consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, *i.e.*, without using endorsements." (*Id.*, *§ 255.2(a) (2019)*.) With respect to expert endorsements, the guide requires that "the endorser's qualifications must in fact give the endorser the expertise that he or she is represented as possessing with respect to the endorsement," **[*313]** and that "the endorsement must be supported by an actual exercise of that expertise in evaluating product features or characteristics with respect to which he or she is expert and which are relevant to an ordinary consumer's use of or experience with the product and are available to the ordinary consumer. This evaluation **[****45]** must have included an examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement." (*Id.*, § 255.3(a), (b) (2019).) Further, the guide provides with respect to all endorsers that "[w]hen there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by **[**479]** the audience), such connection must be fully disclosed." (*Id.*, § 255.5 (2019).) Finally, the guide discusses numerous hypothetical examples that further explain the guide's provisions. (See *id.*, §§ 255.1–255.5 (2019).)

CA(20)[] **(20)** Thus, as past FAL decisions and the numerous FTC guidelines indicate, ***HN20***[] the determination whether an advertising or promotional practice should properly be found untrue or misleading within the meaning of the FAL depends upon the exercise of the type of equitable discretion and judgment typically employed by a court of equity. Federal cases examining whether an advertising practice is sufficiently deceptive to violate analogous federal consumer protection statutes **[****46]** also support this conclusion. (See, e.g., *FTC v. Colgate-Palmolive Co. (1965) 380 U.S. 374, 385–392 [13 L.Ed.2d 904, 85 S.Ct. 1035]* [discussing competing considerations involved in determining whether an undisclosed televised mockup of a product demonstration could properly be found to constitute deceptive advertising even if the underlying product claim was true]; *FTC v. Mary Carter Paint Co. (1965) 382 U.S. 46, 47–48 [15 L.Ed.2d 128, 86 S.Ct. 219]* [upholding FTC finding that advertisement offering a free can of paint if the consumer bought a can of the same paint at the advertised price was deceptive when the manufacturer never sold single cans of paint, even if the advertised price was a fair price for a single can of comparable paint]; *FTC v. Direct Marketing Concepts, Inc. (D.Mass. 2008) 569 F.Supp.2d 285, 298–299* [discussing numerous factors to be considered in determining whether an advertiser had sufficient "substantiation for the representation prior to making it in an advertisement" so as to render the advertisement nondeceptive].)[15]

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CA(21)[] **(21)** **[***735]** Furthermore, past ***HN21***[] FAL decisions also make clear the propriety and importance of a court's exercise of its equitable authority not only in determining whether an advertisement is untrue or misleading, but also in determining (1) the number of violations for which a defendant may properly be held responsible (see, e.g., *Jayhill, supra, 9 Cal.3d 283, 288–289*; *Overstock.com, supra, 12 Cal.App.5th 1064, 1087–1088*; *People v. JTH Tax, Inc. (2013) 212 Cal.App.4th 1219, 1249–1255 [151 Cal. Rptr. 3d 728]*; *People ex rel. Kennedy v. Beaumont Investment, Ltd. (2003) 111 Cal.App.4th 102, 127–130 [3 Cal. Rptr. 3d 429]* (*Beaumont Investment*); *People v. Toomey (1984) 157 Cal.App.3d 1, 22–23 [203 Cal. Rptr. 642]*; *People v. Superior Court (Olson), supra, 96 Cal.App.3d 181, 197–198*), and (2) the reasonable amount of **[****47]** civil penalties to be imposed for each violation. (See, e.g., *Overstock.com, supra, 12 Cal.App.5th at pp. 1087–1091*; *Beaumont Investment, supra, 111 Cal.App.4th at pp. 130–131*; *People v. First Federal Credit Corp. (2002) 104 Cal.App.4th 721, 733–734 [128 Cal. Rptr. 2d 542]*.)

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[15] At oral argument, counsel for Nationwide suggested that in federal court juries often decide such questions in actions under the FTC Act in which civil penalties are sought. Under the FTC Act, however, civil penalties may be sought only for a defendant's violation of a prior cease and desist order (*15 U.S.C. § 45(l)*, *(m)(1)(B)*) or for a defendant's knowing violation of a specific trade regulation rule (*15 U.S.C. § 45(m)(1)(A)*). Although federal courts have held that there is a right to a jury trial in such actions, the jury in such actions does not determine whether the practice is unfair or deceptive within the meaning of the *FTC Act*, but rather determines only whether the defendant violated the existing cease and desist order or the specific trade regulation rule. (See, e.g., *U.S. v. J.B. Williams Co. (2d Cir. 1974) 498 F.2d 414, 421–430*; *U.S. v. Dish Network, LLC (C.D.Ill. 2010) 754 F.Supp.2d 1002, 1003–1004*; see also *15 U.S.C. § 45(m)(2)* [providing that when the cease and desist order was not issued against the particular defendant from whom civil penalties are sought, upon request "*the court* shall … review the determination of law made by the Commission … that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of *subsection (a)*" (italics added)].)

CA(22)[] **(22)** In sum, in light of the language and legislative history of the FAL and the relevant judicial precedent, we believe it is clear that, as with the UCL, HN22[] the Legislature intended that the civil cause of action embodied in the FAL would be tried by a court of equity rather than by a jury in all FAL actions, including instances in which the Attorney General or another governmental entity seeks civil penalties for a violation of the FAL as well as injunctive relief.

[**480] IV. Under the California Constitution, Is There a *Constitutional* Right to Jury Trial in a UCL or FAL Action When the People Seek Both Injunctive Relief and Civil Penalties?

As already noted, in our recent decision in *Shaw*, we explained that "even when the language and legislative history of a statute indicate that the Legislature intended that a cause of action established by the statute is to be tried by the court rather than by a jury, if the California constitutional jury trial provision itself guarantees a right to a jury trial in such a cause of action, the Constitution prevails and a jury trial cannot be denied." (*Shaw, supra, 2 Cal.5th at p. 994*.) Thus, we turn to the question whether, **[****48]** notwithstanding the Legislature's intent that such actions be tried by the court rather than a jury, **[*315]** the jury trial provision of the California Constitution itself guarantees a right to jury trial in an action brought by the People under the UCL or the FAL that seeks both injunctive relief and civil penalties.

A. *General California Constitutional Jury Trial Principles*

HN23[] CA(23)[] **(23)** *Article I, section 16 of the California Constitution*—the jury trial provision— **[***736]** states in relevant part that "[t]rial by jury is an inviolate right and shall be secured to all … ." From the outset of our state's history, our courts have explained that this provision was intended *to preserve* the right to a civil jury as it existed at common law in 1850 when the jury trial provision was first incorporated into the California Constitution. (See, e.g., *Cassidy v. Sullivan (1883) 64 Cal. 266 [28 P. 234]*; *Koppikus v. State Capitol Comm'rs (1860) 16 Cal. 248, 253–255*.) As this court observed in *People v. One 1941 Chevrolet Coupe (1951) 37 Cal.2d 283 [231 P.2d 832]* (*One 1941 Chevrolet Coupe*): "'The right to trial by jury guaranteed by the Constitution is the right as it existed at common law at the time the Constitution was adopted. … It is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. **[****49]** The right is the historical right enjoyed at the time it was guaranteed by the Constitution.'" (*Id. at pp. 286–287*, citation & fn. omitted.) "Our state Constitution essentially *preserves* the right to a jury in those actions in which there was a right to a jury trial at common law at the time the Constitution was first adopted." (*Crouchman v. Superior Court (1988) 45 Cal.3d 1167, 1175 [248 Cal. Rptr. 626, 755 P.2d 1075]*.)

CA(24)[] **(24)** Pursuant to this historical approach, HN24[] as a general matter the California Constitution affords a right to a jury trial in common law actions at law that were triable by a jury in 1850, but not in suits in equity that were not triable by a jury in 1850. (*C & K Engineering Contractors v. Amber Steel Co. (1978) 23 Cal.3d 1, 8–9 [151 Cal. Rptr. 323, 587 P.2d 1136]* (*C & K Engineering*).) In applying this test, our cases have explained that the *form* or *title* of a statutory cause of action is not controlling and that if the *substance* of the cause of action is one that would have been triable by a jury at common law, there is a right to a jury trial even if the statute's designation might suggest that it is an equitable proceeding. (See, e.g., *One 1941 Chevrolet Coupe, supra, 37 Cal.2d at p. 299*.) "'In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the gist of the action. A jury trial must **[****50]** be granted where the gist of the action is legal, where the action is in reality cognizable at law.'" (*Ibid.*) In the *One 1941 Chevrolet Coupe* decision, for example, the court held that the gist of the action at issue in that case—a civil lawsuit by **[*316]** the government seeking forfeiture of an automobile that was allegedly used to illegally transport a prohibited drug—was legal because at common law a similar cause of action for forfeiture of otherwise lawful property that was allegedly used for unlawful purposes was triable by a jury in a court of law. (*Id. at pp. 297–300*.) The court ruled that the fact that the statutory provision authorizing the cause of action designated the forfeiture action as a "'special proceeding'" did not change the legal nature of the action. (*Id. at p. 299*.)

[481]** ***CA(25)***[] **(25)** The court in *One 1941 Chevrolet Coupe, supra, 37 Cal.2d 283*, further explained that the fact that the statute under which the forfeiture proceeding in that case was brought was enacted after the adoption of the California Constitution did not in itself bring the statutory cause of action outside the guarantee of the constitutional jury trial provision. The court observed in this regard: ***HN25***[] "'The constitutional right of trial by jury is not to be narrowly construed. It is not limited **[****51]** strictly to those cases in which it existed before **[***737]** the adoption of the Constitution but is extended to cases of like nature as may afterwards arise. It embraces cases of the same class thereafter arising.'" (*One 1941 Chevrolet Coupe, at p. 300*.) In explaining why the lawsuit at issue was of "'like nature'" or "'the same class'" as the common law action at law, the court stated: "'At common law, prior to the adoption of the Constitution, a party against whom the forfeiture of property used in violation of law (then a carriage, wagon, horse or mule, now usually an automobile), was sought to be enforced was entitled to a trial by jury. Consequently such right exists now.'" (*Ibid.*; see also *Franchise Tax Bd. v. Superior Court (2011) 51 Cal.4th 1006, 1012 [125 Cal. Rptr. 3d 158, 252 P.3d 450]* ["We look to whether a claim arising under a modern statute is 'of like nature' or 'of the same class' as a common law right of action"].)

In a case like *One 1941 Chevrolet Coupe* that involves a single cause of action that at common law in 1850 was triable only by a jury, or conversely a case involving a single cause of action that at common law was triable only by the court (see, e.g., *People v. Englebrecht (2001) 88 Cal.App.4th 1236, 1245 [106 Cal. Rptr. 2d 738]* [action for injunctive relief to abate a nuisance]), the determination whether the gist of the action in question **[****52]** is legal or equitable is relatively straightforward. When a case involves multiple causes of action or multiple issues, some of which are legal in nature and would have been triable by a jury at common law and some of which are equitable in nature and would have been triable by the court at common law, the analysis is somewhat more complex.

B. *Cases Involving Severable Legal and Equitable Issues*

HN26[] ***CA(26)***[] **(26)** When the legal and equitable causes of action or issues presented in a case are severable, past California decisions establish that a party retains the **[*317]** right to a jury trial of the severable legal issues and a court trial of the severable equitable issues. (See, e.g., *Connell v. Bowes (1942) 19 Cal.2d 870, 871 [123 P.2d 456]* ["It is now established in this state … that if a complaint states two complete rights of action, one legal and one equitable, a jury trial may be obtained upon the issues raised by the legal cause"]; see generally 7 Witkin, Cal. Procedure, *supra*, Trial, § 86, p. 113 ["Where the action is of a hybrid character, raising both legal and equitable issues, a party is entitled to a jury trial of the severable legal issues"].)

CA(27)[] **(27)** At the same time, California decisions have also repeatedly held that ***HN27***[] when severable legal and equitable causes of action or issues are present in **[****53]** a single proceeding, the trial court generally has authority to determine in what order the matters should be heard, and if the equitable issue is tried by the court first and if the court's resolution of that issue determines a matter that would otherwise be resolved by a jury with regard to the legal claim or issue, the court's resolution of the matter will generally be binding and may leave nothing for a jury to resolve. (See, e.g., *Raedeke v. Gibraltar Sav. & Loan Assn. (1974) 10 Cal.3d 665, 671 [111 Cal.Rptr. 693, 517 P.2d 1157]* (*Raedeke*) ["It is well established that, in a case involving both legal and equitable issues, the trial court may proceed to try the equitable issues first, without a jury … , and that if the court's determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury"].) And although a trial court retains discretion regarding the order in which the issues should be tried, the governing California cases express a preference that the equitable issues be tried first. (See, e.g., *Orange County Water Dist. v. Alcoa Global Fasteners, Inc. (2017) 12 Cal.App.5th 252, 355 [219 Cal. Rptr. 3d 474]* [citing cases].) **[***738]** This general "equity first preference" is a long standing feature of California law and has always been viewed as fully compatible **[**482]** with the right to jury trial embodied in the California Constitution. (See, **[****54]** e.g., *Raedeke, supra, 10 Cal.3d at pp. 670–671*;[16] *Connell v. Bowes, supra, 19 Cal.2d 870, 872*; *Thomson v. Thomson (1936) 7 Cal.2d 671, 682–683 [62 P.2d 358]*; *Angus v. Craven (1901) 132 Cal. 691, 699 [64 P. 1091]* (conc. opn. of

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[16] In *Raedeke* itself, the court, after confirming the existence and validity of the "equity first preference," held that a plaintiff who brings an action presenting both legal and equitable issues can avoid the potential loss of a jury trial on common issues by electing to forgo the equitable claim and thus removing the equitable issues from the case. (See *Raedeke, supra, 10 Cal.3d at pp. 671–672*.)

Henshaw, J.); Swasey v. Adair (1891) 88 Cal. 179, 180 [25 P. 1119]; Fish v. Benson (1886) 71 Cal. 428, 433–435 [12 P. 454]; Lestrade v. Barth (1862) 19 Cal. 660, 671–672.)[17]

[*318]

C. *Cases Involving Nonseverable Legal and Equitable Issues*

HN28[] **CA(28)**[] **(28)** Unlike proceedings in which multiple legal and equitable causes or issues are severable, when a cause of action involves legal and equitable aspects that are not severable California decisions have relied upon "the gist of the action" standard in determining whether the action should be considered legal or equitable for purposes of the constitutional jury trial issue. (See, e.g., C & K Engineering, supra, 23 Cal.3d 1, 9–11 [in action seeking damages for breach of contract ("in form an action at law") but relying solely on "the equitable doctrine of promissory estoppel," court concluded "[t]he 'gist' of such an action is equitable"]; Central Laborers' Pension Fund v. McAfee, Inc. (2017) 17 Cal.App.5th 292, 344–350 [225 Cal. Rptr. 3d 249] [in action by shareholders seeking money damages for breach of corporate directors' and officers' breach of fiduciary duty, court concluded that the gist of the action was equitable]; Interactive Multimedia Artists, Inc. v. Superior Court (1998) 62 Cal.App.4th 1546, 1552–1556 [73 Cal. Rptr. 2d 462] [in action seeking money damages for breach of a trustee's fiduciary duty, court held that the gist of the action was equitable when, under the applicable Delaware law, the determination of whether a breach occurred turned on a multifactor "'entire fairness test'" that required the application **[****55]** of equitable principles in "weighing various considerations **[***739]** in order to reach a just result"]; Martin v. County of Los Angeles (1996) 51 Cal.App.4th 688, 695–697 [59 Cal. Rptr. 2d 303] [although a tort defendant's claim for "equitable indemnity" seeking recovery of money damages for the proportional fault of a cotortfeasor involved application of equitable principles, court concluded the gist of the claim was legal because ascertaining the relative fault of cotortfeasors for equitable indemnity "'involves determinations of rights and liabilities traditionally arising in common law suits for negligence'"].) In our decision in *C & K Engineering*, we noted that "[a]lthough we have said that 'the legal or equitable nature of a cause of action ordinarily is determined by the mode of relief to be afforded' … , the prayer for relief in a particular case is not conclusive" and "'[t]he fact that damages is one of a full range of possible remedies does not guarantee … the right to a jury.'" (C & K Engineering, at p. 9, citations omitted.)

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[483]** Two Court of Appeal decisions that have grappled with the proper characterization of an action as legal or equitable involved statutory causes of action, like those at issue in the present case, in which both equitable and legal relief may be awarded.

In the first case, **[****56]** Southern Pac. Transportation Co. v. Superior Court (1976) 58 Cal.App.3d 433 [129 Cal. Rptr. 912] (*Southern Pac. Transportation*), the plaintiffs, who claimed that they had made improvements to real property in the good faith belief that they were the owners of the property, brought the underlying action against the true owner of the property seeking damages as good faith improvers of the property. The action was brought pursuant to a recently enacted "good faith improver" statutory scheme (Code Civ. Proc., §§ 871.1–871.7) that authorized a good faith improver of real property to bring an independent civil cause of action for relief. (*Id.*, § 871.3.) The legislation provided that in such an action the court, under appropriate circumstances, "may … effect such an adjustment of the rights, equities, and interests of the good faith improver, the owner of the land, and other

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[17] Contrary to the implication of the Court of Appeal decision below (see Nationwide Biweekly, supra, 24 Cal.App.5th at p. 456), this court's recent decision in Shaw, supra, 2 Cal.5th 983 did not purport to abrogate or change this state's well-established "equity first preference" doctrine. In *Shaw*, we interpreted one provision of the statute before the court—Health and Safety Code section 1278.5, subdivision (m), which provided that nothing in the new legislation "abrogate[s] or limit[s] any other theory of liability or remedy otherwise available at law"—as preserving in full a plaintiff's complementary cause of action under Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167 [164 Cal. Rptr. 839, 610 P.2d 1330], including the plaintiff's right to obtain a jury resolution of the *Tameny* claim. (Shaw, supra, 2 Cal.5th at p. 1006.) *Shaw* did not purport to overrule or disapprove the numerous California decisions cited above that have applied the "equity first preference" doctrine for more than a century.

Because in this case the equitable and legal aspects of the UCL and FAL actions are nonseverable and because Nationwide has not questioned the continued vitality of the "equity first preference" doctrine, we have no occasion to consider whether there is any reason to reevaluate this doctrine or to determine its proper application in a particular context.

interested parties … as is consistent with substantial justice to the parties under the circumstances of the particular case." (*Id.*, § 871.5.)

The question before the Court of Appeal in *Southern Pac. Transportation* was whether the plaintiffs had a right to a jury trial in their action against the owner. The plaintiffs claimed that because their complaint sought only money damages from the landowner, the action was one at law in which they had a right to **[****57]** a jury trial. The Court of Appeal rejected the plaintiffs' contention. After noting that the right to a jury trial under the California Constitution is the right "existing at common law at the time the Constitution was adopted" (Southern Pac. Transportation, supra, 58 Cal.App.3d at p. 436), the court explained: "Because the provisions of [Code of Civil Procedure] sections 871.1–871.7 have no counterpart in English law, classification of the action as either legal or equitable depends upon characterization of the nature of the relief sought. Although [the plaintiffs] assert that they seek damages only, by bringing an action under section 871.3, they have invited the court to 'effect such an adjustment of the rights, equities, and interests' of the parties as is consistent with substantial justice. (§ 871.5.) 'Under this section, the court has considerable discretion to select appropriate relief from the full range of equitable and legal remedies.' (Legislative Committee Comment—Assembly, to § 871.5.)" (Southern Pac. Transportation, supra, 58 Cal.App.3d at p. 437.)

[*740]** The Court of Appeal continued: "The fact that damages is one of a full range of possible remedies does not guarantee [the plaintiffs] the right to a jury for their good faith improver action. We recognize that where a complaint raises both legal and equitable issues, a jury trial may be obtained upon the issues **[****58]** raised by the legal cause. [Citation.] Here, however, there is **[*320]** no possibility of severing the legal from the equitable. The trier of fact must determine whether to quiet title in the improver on the condition he pay to the landowner the value of the unimproved land, or whether and in what amount, to award damages to the improver, or whether to require a completely different form of relief. [Citation.] Such a determination is not susceptible of division into one component to be resolved by the court and another component to be determined by a jury. Only one decision can be made, and it must make a proper adjustment of the 'rights, equities, and interests' of all the parties involved." (Southern Pac. Transportation, supra, 58 Cal.App.3d at pp. 437–438.)

Under these circumstances the *Southern Pac. Transportation* court concluded: "Because of the wide range of equitable and legal relief authorized by Code of Civil Procedure section 871.5, it would be an impossible task for a jury to determine the appropriate relief and to resolve the rights, equities, and interests of all of the parties. … We have concluded, therefore, that it is the function of the court and not the jury to be the trier of fact in a good faith improver action." (Southern Pac. Transportation, supra, 58 Cal.App.3d at p. 438.)

In this court's subsequent decision in C & K Engineering, supra, 23 Cal.3d 1, we specifically **[****59]** cited **[**484]** and discussed the *Southern Pac. Transportation* decision with approval, quoting at some length the Court of Appeal's reasoning in that case. (C & K Engineering, supra, 23 Cal.3d at p. 11.)

In the second case, DiPirro, supra, 153 Cal.App.4th 150, the Court of Appeal addressed whether there is a right to a jury trial in an action seeking enforcement of the provisions of the Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Saf. Code, §§ 25249.5–25249.13), a legislative measure adopted by the voters through the initiative process and most commonly known as Proposition 65.[18] That measure—which generally prohibits businesses from (1) knowingly discharging chemicals known to cause cancer or reproductive toxicity into any source of drinking water (Health & Saf. Code, § 25249.5) or (2) knowingly exposing any individual to such chemicals without first giving clear and reasonable warning (*id.*, § 25249.6)—authorizes government officials and, under specified circumstances, private persons, to bring a cause of action seeking injunctive relief and civil penalties against any person who violates the statute. (*Id.*, **[*321]** § 25249.7.) Like the UCL and the FAL,

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[18] The legislation was adopted by the voters at the November 4, 1986 General Election. The Legislature has amended relevant provisions of the act on numerous occasions since its inception. (See Stats. 1999, ch. 599, § 1, p. 4297; Stats. 2001, ch. 578, § 1, p. 4748; Stats. 2002, ch. 323, § 1, p. 1265; Stats. 2003, ch. 62, § 185, p. 500; Stats. 2013, ch. 581, § 1; Stats. 2014, ch. 71, § 90; Stats. 2014, ch. 828, § 1; Stats 2017, ch. 510, § 1.) For convenience, we shall refer to the legislation in its current form as Proposition 65.

Proposition 65 provides that once a statutory violation is found, the court may issue an injunction and shall impose a civil penalty not to exceed $2,500 per day for each violation (*Health & Saf. Code, § 25249.7, subds. (a)*, *(b)(1)*), and, again **[****60]** like the UCL **[***741]** and the FAL, Proposition 65 sets forth a list of multiple factors, including "[a]ny other factor that justice may require," that the court is to consider in determining the amount of the civil penalties to be imposed. (*Health & Saf. Code, § 25249.7, subd. (b)(2)(G)*.)[19] Because the determination whether a statutory violation has been established itself triggers the availability of both injunctive relief and civil penalties, the equitable and legal aspects of the action are not severable.

In deciding whether the plaintiff had a right to a jury trial in the civil action authorized by Proposition 65, the *DiPirro* court examined the statutory scheme as a whole to determine whether the gist of the action was legal or equitable. (*DiPirro, supra, 153 Cal.App.4th at pp. 180–184*.) In concluding that the legislation is "thoroughly infused with equitable principles that must be considered and adjudicated in an enforcement action" (*id. at p. 180*), the court relied in part on the fact that "Proposition 65 is '"a remedial statute intended to protect the public"'" (*ibid.*), along with its determination that the remedies authorized by the act were primarily equitable in nature, including injunctive relief to prevent the sale of offending products that lack the required warning. (*Id. at p. 180*; see *id. at p. 181*.)

CA(29)[] **(29)** The *DiPirro* court **[****61]** acknowledged that Proposition 65 also authorized an award of civil penalties (*DiPirro, supra, 153 Cal.App.4th at p. 181*) and explicitly recognized ***HN29***[] "'the "general rule"' that monetary relief is a legal remedy, 'and an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment.'" (*Id. at p. 182*.) The Court of Appeal pointed out, however, **[**485]** that the civil penalties that are authorized by Proposition 65 are to be determined by a highly discretionary consideration of multiple factors "that do not primarily take into account any harm suffered by the plaintiff … [and are] the kind of calculation traditionally performed by judges rather than a jury … ." (*DiPirro, **[*322]** at p. 182*, citation & fn. omitted.) Emphasizing that [proposition 65] "is informational and preventative rather than compensatory in its nature and function" (*ibid.*) and that "[t]he primary right to bring an action for civil penalties pursuant to [proposition 65] is … given to the state rather than individuals seeking compensation" (*id. at p. 183*), the *DiPirro* court determined that "the statutory remedies afforded by [proposition 65], including civil penalties, are not damages at law, but instead constitute equitable relief appropriate and incidental to enforcement of the Act, **[****62]** which do not entitle the plaintiff to a jury trial" (*id. at p. 184*).

D. *Application of Constitutional Principles to UCL and FAL Actions*

CA(30)[] **(30)** As we shall explain, ***HN30***[] in light of the particular nature of the civil causes of action **[***742]** authorized by the UCL and the FAL, we conclude that the gist of a civil action under the UCL and the FAL is equitable rather than legal in nature. Such causes of action are equitable either when brought by a private party seeking only an injunction, restitution, or other equitable relief or when brought by the Attorney General, a district attorney, or other governmental official seeking not only injunctive relief and restitution but also civil penalties. Accordingly, we conclude that there is no right to a jury trial in such actions under the California Constitution.

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[19] *Health & Safety Code section 25249.7, subdivision (b)(2)* provides in full: "In assessing the amount of a civil penalty for a violation of this chapter, the court shall consider all of the following:

"(A) The nature and extent of the violation.

"(B) The number of, and severity of, the violations.

"(C) The economic effect of the penalty on the violator.

"(D) Whether the violator took good faith measures to comply with this chapter and the time these measures were taken.

"(E) The willfulness of the violator's misconduct.

"(F) The deterrent effect that the imposition of the penalty would have on both the violator and the regulated community as a whole.

"(G) Any other factor that justice may require."

CA(31)[] **(31)** To begin with, HN31[] the statutory causes of action established by the UCL and the FAL are clearly not of like nature or of the same class as any common law right of action. (Cf. One 1941 Chevrolet Coupe, supra, 37 Cal.2d 283, 300.) As the leading treatise on California's consumer protection statutes explains, under the common law only a business adversely affected by trademark or trade name infringement by a business competitor could file an action for unfair competition against the **[****63]** competitor and such an action could be brought only as a suit in equity. (See Stern, Cal. Practice Guide: Bus. & Prof. Code § 17200 Practice, *supra*, ¶ 2:1, p. 2-1.) "At common law, deceived consumers had no claim for unfair competition. This made little sense, since ultimately it is the consumer who is harmed by a business that passes off goods or services as genuine, or as those of another. … No matter; consumers were left without a claim or remedy. This was the era of *caveat emptor* [that is, let the buyer beware]." (*Id.*, ¶ 2:3, p. 2-1.)

The UCL and the FAL were enacted for the specific purpose of creating new rights and remedies that were not available at common law. (See, e.g., Bank of the West v. Superior Court (1992) 2 Cal.4th 1254, 1263–1264 [10 Cal. Rptr. 2d 538, 833 P.2d 545].) The statutes deliberately broaden the types of business practices that can properly be found to constitute unfair competition (see, e.g., Barquis, supra, 7 Cal.3d at p. 112), and eliminate a number of elements that were required in common law actions for fraud (see, e.g., In re **[*323]** Tobacco II Cases (2009) 46 Cal.4th 298, 312 [93 Cal. Rptr. 3d 559, 207 P.3d 20]; Com. on Children's Television, supra, 35 Cal.3d 197, 211). The statutes explicitly authorize government officials and injured private individuals to obtain injunctive relief to prevent a business from continuing to use the practice to the detriment of other consumers and to obtain restitution and other clearly equitable relief. (Bus. & Prof. Code, §§ 17203, 17204.) Such causes of action for unfair competition **[****64]** that authorize injunctive relief against unfair or deceptive business practices had no close or analogous counterpart at common law.

Furthermore, when the Legislature adopted the civil penalty provisions of the UCL and the FAL in 1972 and 1965 respectively, permitting government officials, and government officials alone, to seek civil penalties along with injunctive or other equitable relief in the civil actions such officials bring under the UCL and the FAL (see Jayhill, supra, 9 Cal.3d at p. 288), the causes of action under the UCL and the FAL continued to constitute causes of **[**486]** action that were not of like nature or of the same class as any common law action. Prior to 1850, early English law embodied numerous statutes imposing civil penalties for a variety of specifically delineated impermissible business practices—like using false weights and measures in the sale of a product or failing to pay the appropriate excise taxes due—that were enforced by the government through a civil action in the Court of **[***743]** Exchequer in which a jury was available. (See One 1941 Chevrolet Coupe, supra, 37 Cal.2d at pp. 295–296 & fn. 15.) We are unaware, however, of any early English statute that defined the business conduct proscribed by the statute in the type of broad and sweeping language adopted **[****65]** in the UCL and the FAL, which was specifically intended to reach novel but offensive business practices that were not encompassed by more specific statutory prohibitions. (See, e.g., Barquis, supra, 7 Cal.3d at p. 112.) Furthermore, the early English statutes generally set forth a specific amount of civil penalty that was to be imposed for each violation; again, we are aware of no such statute that required the amount of the civil penalty to be determined by a consideration of multiple factors comparable to those set out in the relevant provisions of the UCL and the FAL. (Bus. & Prof. Code, §§ 17206, subd. (b), 17536, subd. (b).) Finally, and perhaps most significantly, unlike the UCL and the FAL, none of the early English statutes authorized a prosecuting official to seek and obtain, *in the same action*, a civil penalty and an injunction that would explicitly restrain the business from committing the prohibited conduct in the future.[20]

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[20] In his seminal article on the right to civil jury trial, Professor Fleming James observed that, at common law, when a plaintiff was seeking to obtain both injunctive relief and civil penalties for a defendant's alleged statutory violation, the plaintiff would have been required to bring two separate actions—one in equity and one in law. As Professor James explained: "B's violation of A's statutory right … might entitle A to an injunction, to compensatory damages, and to a penalty. The right to any relief would turn on whether B violated the statute. A might get a determination of that issue without a jury in an equity suit, seeking an injunction and perhaps compensatory damages as incidental to an injunction. Or he might get such determination in an action at law for damages or for the penalty. Since equity refused to enforce a penalty and the law would not give an injunction, two suits would be required for complete relief. A had the choice which to bring first. And the first determination of the common issue (violation *vel non*) would bind the parties in the second action. The plaintiff then had the power to choose the mode of trial of the common issue, and he could so exercise it as to leave no room for judicial discretion." (James, *Right to a Jury Trial in Civil*

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Accordingly, in the absence of a comparable common law counterpart, in deciding whether there is a right to a jury trial under the California Constitution, we must look to the statutory scheme as a whole to determine whether the gist of a cause of action under the UCL or the FAL seeking both injunctive relief **[****66]** and civil penalties is legal or equitable.

For nearly a half century, Court of Appeal decisions have explicitly and uniformly held that actions under the UCL and the FAL are equitable in nature and are to be tried by the court and not by a jury, including when the remedies sought are civil penalties as well as injunctive or other equitable relief. (See, e.g., *People v. Witzerman (1972) 29 Cal.App.3d 169, 176–177 [105 Cal. Rptr. 284]* (*Witzerman*); *People v. Bestline Products, Inc. (1976) 61 Cal.App.3d 879, 915–916 [132 Cal. Rptr. 767]*; *People v. First Federal Credit Corp., supra, 104 Cal.App.4th 721, 732–733*; *People v. Bhakta, supra, 162 Cal.App.4th 973, 977–979*; *People ex rel. Feuer v. Superior Court (Cahuenga's the Spot) (2015) 234 Cal.App.4th 1360, 1384 [184 Cal. Rptr. 3d 809]*.) Although this court has not previously **[***744]** been directly asked to decide this issue itself, we note that as recently as 2015, in *Quesada v. Herb Thyme Farms, Inc. (2015) 62 Cal.4th 298 [195 Cal. Rptr. 3d 505, 361 P.3d 868]*, our court, in responding to the defendant's concern that the plaintiff's false advertising and unfair competition claims in that case "would be evaluated by a lay jury applying a nebulous 'reasonable consumer' standard," stated that **[**487]** "these claims are decided by a judge, not a jury." (*Id. at p. 322*, citing *Hodge v. Superior Court (2006) 145 Cal.App.4th 278, 284–285 [51 Cal. Rptr. 3d 519]* [action brought by private plaintiff seeking equitable relief] and *Witzerman, supra, 29 Cal.App.3d 169, 176–177* [action brought by public official seeking injunctive relief and civil penalties].)

The Court of Appeal decision under review here was the first appellate decision to reach a contrary conclusion. Although the Court of Appeal suggested that the numerous prior Court of Appeal decisions cited above were either not on point or did not **[****67]** fully analyze the jury trial issue (*Nationwide Biweekly, supra, 24 Cal.App.5th at p. 457*), our review of those **[*325]** appellate court decisions does not support the Court of Appeal's characterization of those decisions. Those prior decisions, contrary to the Court of Appeal's suggestion, directly analyze the question whether there is a right to a jury trial in such actions under the California Constitution and conclude that there is no state constitutional right to a jury trial in such actions.

The 1972 decision in *Witzerman, supra, 29 Cal.App.3d 169*—the initial decision in this line of cases—demonstrates this point. *Witzerman* was an enforcement action brought by the Attorney General under the FAL seeking both injunctive relief and civil penalties. After noting that the defendants' jury trial claim relied on both the federal and state constitutional jury trial rights, the court initially addressed the state constitutional claim and rejected the defendants' argument that the trial court's denial of a jury trial was improper under the California Constitution because the issues to be tried were assertedly legal rather than equitable in nature. (*Witzerman, at p. 176*.) The court in *Witzerman* explained: "Assuming, without so deciding, that the civil penalties sought represent legal rather than equitable **[****68]** relief, we do not believe that in this case such issues could have been severed from the equitable ones. The same alleged misconduct on the part of appellants was the basis for both types of relief sought by the People. (Cf. *Jaffe v. Albertson Co. [(1966)] 243 Cal.App.2d 592, 610 [53 Cal.Rptr. 25]*.) Under these circumstances trial to the court of the People's case for injunctive relief disposed of as well the People's case for relief by way of civil penalties. (Cf. *Veale v. Piercy [(1962)] 206 Cal.App.2d 557, 562–563 [24 Cal.Rptr. 91]*.)" (*Witzerman, supra, 29 Cal.App.3d at pp. 176–177*.) Contrary to the Court of Appeal's critique below, only after rejecting the defendants' state constitutional jury trial claim did the court in *Witzerman* turn to and reject the defendants' federal *Sixth Amendment* claim. (*Witzerman, at p. 177*.)

Although the *Witzerman* decision directly addressed and rejected the defendant's state constitutional jury trial claim, it is not clear that the decision applied the proper mode of analysis. After correctly observing that the equitable and legal aspects of the FAL action before it were nonseverable, the court did not explicitly apply the "gist of the action"

Actions (1963) 72 Yale L.J. 655, 671–672, fns. omitted.) Thus, as a general matter, at common law when a plaintiff sought both injunctive relief and civil penalties based upon a business's alleged violation of a statute, the business was by no means guaranteed that the question whether it violated the statute would be determined by a jury rather than by a court.

test but instead appears to have applied the "equity first preference" doctrine. (Witzerman, supra, 29 Cal.App.3d at pp. 176–177.) **[***745]** Nonetheless, we conclude that the Witzerman court reached the correct result.

CA(32)[] **(32)** All parties before us agree that the legal and equitable aspects of **[****69]** the UCL and FAL actions at issue are nonseverable and that the gist of the action standard applies. **HN32**[] The legal and equitable aspects of these actions are nonseverable not only because, as the *Witzerman* court indicated (Witzerman, supra, 29 Cal.App.3d at pp. 176–177), the determination whether a defendant's alleged conduct constitutes a violation of the statute provides the basis **[*326]** for all of the relief authorized by the statutes, but also because the amount of civil penalties that would be appropriate may well depend on the equitable remedies, including restitution, that are or are not imposed. (See, e.g., Overstock.com, supra, 12 Cal.App.5th 1064, 1088–1089; People ex rel. Harris v. Sarpas (2014) 225 Cal.App.4th 1539, 1567 [172 Cal. Rptr. 3d 25].)

With respect to the application of the gist of the action standard, our independent analysis of the UCL and the FAL causes of action as **[**488]** a whole convinces us that the gist of the civil causes of action authorized by the UCL and the FAL must properly be considered equitable, rather than legal, in nature.

To begin with, the bulk of the remedies provided for in the statutes—injunctive relief, restitution, and other clearly equitable remedies such as the appointment of a receiver (see Bus. & Prof. Code, §§ 17203, 17535)—are clearly equitable in nature. As the legislative history of both the UCL and the FAL make clear, the primary objective of both statutes is preventive, **[****70]** authorizing the exercise of broad equitable authority to protect consumers from unfair or deceptive business practices and advertising.

CA(33)[] **(33)** Second, **HN33**[] although the statutes also authorize in actions brought by the Attorney General, a district attorney, or other government officials (but not private parties), the imposition of civil penalties—a type of remedy that in some contexts is properly considered legal in nature—the UCL and the FAL statutes specify that in assessing the amount of the civil penalty to be imposed under these statutes, the court is afforded broad discretion to consider a nonexclusive list of factors that include the relative seriousness of the defendant's conduct and the potential deterrent effect of such penalties, the type of qualitative evaluation and weighing of a variety of factors that is typically undertaken by a court and not a jury. (Bus. & Prof. Code, §§ 17206, 17536.) Notably, the civil penalties that may be awarded under the UCL and the FAL, unlike the classic legal remedy of damages, are noncompensatory in nature; they require no showing of actual harm to consumers and are not based on the amount of losses incurred by the targets of unfair practices or misleading advertising. **CA(34)**[] **(34)** Like the civil penalties **[****71]** at issue in Kizer v. County of San Mateo (1991) 53 Cal.3d 139, 147–148 [279 Cal. Rptr. 318, 806 P.2d 1353], **HN34**[] although the civil penalties under the UCL and the FAL "may have a punitive or deterrent aspect, their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives. … The focus of [both] statutory scheme[s] is *preventative*." (Kizer, at p. 147–148, citations omitted.) And like the civil penalties in *Kizer* (id. at p. 147), the civil penalties obtained by the government in actions under the UCL and the FAL are to be utilized for the enforcement of the statutes in question. (See Bus. & Prof. Code, §§ 17206, subd. (c), 17536, subd. (c).)

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CA(35)[] **(35)** **[***746]** Finally, as discussed above (*ante*, pp. 299–303, 308–313), the expansive and broadly worded substantive standards that are to be applied in determining whether a challenged business practice or advertising is properly considered violative of the UCL or the FAL call for the exercise of the flexibility and judicial expertise and experience that was traditionally applied by a court of equity. Particularly in light of the equitable nature of the substantive standards that apply in UCL and FAL actions—both in actions brought by private parties and by government officials—we conclude that the gist of the civil causes of action authorized by the UCL and the FAL must properly be considered **[****72]** equitable in nature. Accordingly, we conclude that **HN35**[] under the California Constitution, there is no right to a jury trial in a cause of action under the UCL and the FAL, including when the action is brought by a government official and seeks both injunctive relief and civil penalties.

We emphasize that this conclusion does not deprive a defendant in a UCL or FAL action of any constitutional right afforded by the jury trial provision of the California Constitution. As we have explained (*ante*, pp. 315–316), that constitutional provision grants the right to jury trial in actions "'of like nature'" "'or of the same class'" in which a jury trial was provided at common law in 1850, when the jury trial provision of the California Constitution was first adopted. (*One 1941 Chevrolet Coupe, supra, 37 Cal.2d 283, 300*.) The consumer protection actions authorized in the UCL and the FAL are not of like nature or of the same class as an action that was triable by jury at common law. In actions like those under the UCL and the FAL, in which the equitable and legal aspects are nonseverable, there is no constitutional right **[**489]** to a jury trial when, as here, the gist of the action is equitable rather than legal.

In sum, we conclude that there is no right to a jury trial **[****73]** under the California Constitution in a cause of action under the UCL or the FAL, including an action in which civil penalties as well as an injunction or other equitable relief are sought. Because our conclusion rests in significant part on the fact that the substantive standards embodied in the UCL and the FAL contemplate the exercise of the type of equitable discretion and judgment traditionally applied by a court of equity, we have no occasion in this case to decide how the California constitutional jury trial provision applies to other statutory causes of action that authorize both injunctive relief and civil penalties.[21]

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[*747]** E. *Inapplicability of* Tull

As already noted, in reaching a contrary conclusion, the Court of Appeal relied heavily upon the United States Supreme Court's decision in *Tull, supra, 481 U.S. 412*. As we explain, for a variety of reasons we conclude that the Court of Appeal's reliance upon *Tull* was unwarranted.

Tull involved a civil action filed by the federal government against a real estate developer, alleging that the developer had dumped fill on wetlands without a permit in violation of the *federal Clean Water Act. (33 U.S.C. § 1251 et seq.*) As authorized by that act, the government sought both injunctive relief (*id.*, *§ 1319(b)*) and **[****74]** civil penalties (*id.*, *§ 1319(d)*). The court in *Tull* observed, however, that at the time the complaint in that case was filed the developer had sold most of the properties in question to a third party, and "[i]njunctive relief was therefore impractical except with regard to a small portion of the land." (*Tull, supra, 481 U.S. at p. 415*.) After denying the developer's demand for a jury trial, the trial court conducted a 15-day bench trial, concluded that the property on which the defendant had admittedly dumped fill constituted "wetlands" within the meaning of the federal statute, and ultimately imposed injunctive relief and civil penalties on the defendant.

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[21] In concluding that the gist of the causes of action created by the UCL and the FAL is equitable even when civil penalties as well as injunctive relief are sought, we have relied on the specific attributes of the California UCL and FAL statutes, as well as the established understanding of the scope of the California constitutional jury trial provision.

Every other state has adopted consumer protection legislation somewhat comparable to the UCL and the FAL. (See, e.g., Stern, Cal. Practice Guide: *Bus. & Prof. Code § 17200* Practice, *supra*, ¶¶ 2:54-2:62, pp. 2-22 to 2-24; Nat. Consumer Law Center, Unfair and Deceptive Acts and Practices (9th ed. 2016) § 1.1., p. 1.) Although the numerous unfair or deceptive practice statutes in other jurisdictions differ from the California statutes in a variety of respects, we note that a substantial majority of other state courts that have addressed the question whether there is a right to a jury trial in civil actions brought under those states' unfair or deceptive practice laws have concluded that there is no right to a jury trial in such actions. (See *Nunley v. State (Ala. 1993) 628 So.2d 619, 621–622*; *People v. Shifrin (2014) 2014 COA 14 [342 P.3d 506, 512–513]*; *Associated Investment Co. Limited Partnership v. Williams Associates IV (1994) 230 Conn. 148 [645 A.2d 505, 508–512]*; *Martin v. Heinold Commodities (1994) 163 Ill.2d 33 [205 Ill.Dec. 443, 643 N.E.2d 734, 753]*; *Nei v. Burley (1983) 388 Mass. 307 [446 N.E.2d 674, 678–679]*; *State by Humphrey v. Alpine Air Products, Inc. (Minn.Ct.App. 1992) 490 N.W.2d 888, 895*; *State ex rel. Douglas v. Schroeder (1986) 222 Neb. 473 [384 N.W.2d 626, 629–630]*; *State v. State Credit Assn. (1983) 33 Wn.App. 617 [657 P.2d 327, 330]*.) Several states have reached a contrary conclusion, but none of those cases involved a statute that created a cause of action in which both injunctive relief as well as damages or civil penalties could be obtained. (See *Robinson v. McDougal (1988) 62 Ohio App.3d 253 [575 N.E.2d 469, 474]*; *State v. Credit Bureau of Loredo, Inc. (Tex. 1975) 530 S.W.2d 288, 290–292*; *State v. Abbott Laboratories (2012) 2012 WI 62 [341 Wis.2d 510, 816 N.W.2d 145, 156–159]*.) (See generally Annot., Constitutional Right to Jury Trial in Cause of Action Under State Unfair or Deceptive Trade Practices Law (1997) 54 A.L.R.5th 631.)

On appeal, the United States Supreme Court reversed, concluding that the developer was entitled to a jury trial under the *Seventh Amendment to the federal Constitution*. (*Tull, supra, 481 U.S. at pp. 417–425*.) The court in *Tull* acknowledged that a proceeding under the Clean Water Act seeking both injunctive relief and civil penalties is analogous to two different common law causes of action—an action to abate a nuisance in which there was no right to **[*329]** a jury trial and an action in debt to impose a civil penalty in which there was a right to a jury trial. (*Tull, at pp. 420–421*). **[**490]** However, the court concluded that it need not decide which common law action was the closer historical **[****75]** analog, because prior Supreme Court precedent established that "characterizing the relief sought is '[m]ore important' than finding a precisely analogous common-law cause of action in determining whether the *Seventh Amendment* guarantees a jury trial." (*Id. at p. 421*, citing *Curtis v. Loether (1974) 415 U.S. 189, 196 [39 L.Ed.2d 260, 94 S.Ct. 1005]*.)

Thereafter, in discussing the relief sought in the action, the court in *Tull* focused primarily on the civil penalties that had been sought and obtained in the action, emphasizing that "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law" (*Tull, supra, 481 U.S. at p. 422*) in which a jury trial was available. Although the government had also sought and obtained injunctive relief in the action, the *Tull* court observed that under the applicable federal statute the government was free to seek an equitable remedy independent **[***748]** of legal relief (*id. at p. 425*) and further explained that prior federal decisions established that "if a 'legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as "incidental" to the equitable relief sought'" (*ibid.*, citing *Curtis v. Loether, supra, 415 U.S. at p. 196, fn. 11*). (See also, e.g., *Ross v. Bernhard (1970) 396 U.S. 531, 537–538 [24 L.Ed.2d 729, 90 S.Ct. 733]* ["where equitable and **[****76]** legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims"]; *Dairy Queen v. Wood (1962) 369 U.S. 469, 473 [8 L.Ed.2d 44, 82 S.Ct. 894]* [requiring "that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury" "whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not"]; *Beacon Theatres v. Westover (1959) 359 U.S. 500, 510–511 [3 L.Ed.2d 988, 79 S.Ct. 948]* ["only under the most imperative circumstances … can the right to a jury trial of legal issues be lost through prior determination of equitable claims" (fn. omitted)].) Thus, because prior federal decisions had interpreted the *Seventh Amendment* generally to require a jury trial whenever a legal claim is joined with an equitable claim, the court in *Tull* held that, for *Seventh Amendment* purposes, the fact that the government sought civil penalties in the action before it was itself sufficient to conclude that the developer had "a constitutional right to a jury trial to determine his liability on the legal claims." (*Tull, supra, 481 U.S. at p. 425*.)[22]

[*330]

CA(36)[] **(36)** For a number of reasons, we conclude that the Court of Appeal erred in relying **[****77]** upon the *Tull* decision. First and most fundamentally, the decision in *Tull* rested exclusively on the United States Supreme Court's interpretation of the right to civil jury trial embodied in the *Seventh Amendment to the United States Constitution*. ***HN36***[] The federal civil jury trial provision of the *Seventh Amendment* applies only to civil trials in *federal court*; federal decisions explicitly hold that the civil jury trial provision of the *Seventh Amendment* does not apply to *state court proceedings*. (See, e.g., *Osborn v. Haley (2007) 549 U.S. 225, 252, fn. 17 [166 L.Ed.2d 819, 127 S.Ct. 881]*; *Gasperini v. Center For Humanities, Inc. (1996) 518 U.S. 415, 432 [135 L.Ed.2d 659, 116 S.Ct. 2211]*; *Curtis v. Loether, supra, 415 U.S. at p. 192, fn. 6*; **[**491]** *Minn. & St. Louis R. R. v. Bombolis (1916) 241 U.S. 211, 217–223 [60 L.Ed. 961, 36 S.Ct. 595]*.) Instead, the right to jury trial in state court proceedings is

[22] Although the court in *Tull* held that the *Seventh Amendment* granted the developer a right to a jury trial on the issue of *liability*, the majority went on to hold that the *Seventh Amendment* did not require a jury trial on *the amount of civil penalties*. The majority explained that because "highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act" and "[t]hese are the kinds of calculations traditionally performed by judges," "the *Seventh Amendment* does not require a jury trial for that purpose in a civil action." (*Tull, supra, 481 U.S. at p. 427*.)

Justice Scalia, joined by Justice Stevens, dissented from the latter holding, objecting that by fashioning a civil action in which liability but not the amount of damages is to be decided by a jury, "the Court creates a form of civil adjudication I have never encountered." (*Tull, supra, 481 U.S. at p. 428* (dis. opn. of Scalia, J.).)

governed by the provisions and **[***749]** judicial interpretation of each state's own constitutional jury trial provision.[23]

HN37[] ***CA(37)***[] **(37)** In California, the constitutional right to a civil jury trial under the California Constitution is entirely independent of the federal constitutional civil jury trial right under the *Seventh Amendment* (*Cal. Const., art. I, § 24*), and past California cases have not hesitated to decline to follow the federal interpretation of the *Seventh Amendment* when the federal interpretation has been found inconsistent with a proper reading of the California provision. (See, e.g., *Jehl v. Southern Pacific Co. (1967) 66 Cal.2d 821, 835 & fn. 17 [59 Cal. Rptr. 276, 427 P.2d 988]*; *Rankin v. Frebank Co. (1975) 47 Cal.App.3d 75, 91–92 [121 Cal. Rptr. 348]*.) The *Tull* decision rested on several points in **[*331]** which the federal interpretation of the *Seventh Amendment* departs from California's interpretation of the California jury trial **[****78]** provision.

CA(38)[] **(38)** Initially, unlike actions under the UCL and the FAL in which the equitable (injunctive relief) and legal (criminal penalties) nature of the available remedies are unquestionably *nonseverable* features of a single cause of action (see *Jayhill, supra, 9 Cal.3d at p. 288*), in *Tull* the court held that under the applicable Clean Water Act, the equitable (injunctive relief) and legal (criminal penalties) remedies were *severable*. (See *Tull, supra, 481 U.S. at p. 425* ["[T]he Government was free to seek an equitable remedy in addition to, or independent of, legal relief. *Section 1319* [the relevant provision of the *Clean Water Act*] does not intertwine equitable relief with the imposition of civil penalties. Instead each kind of relief is separably authorized in a separate and distinct statutory provision. *Subsection (b)*, providing injunctive relief, is independent of *subsection (d)*, which provides only for civil penalties."].) And the *Tull* court went on to rely on the severable nature of the claims at issue in finding that the issue of liability was to be tried by a jury rather than by the court, because federal decisions dictate that in cases involving severable legal and equitable issues, the legal issues should be tried prior to the equitable issues. (*Tull, supra, 481 U.S. at p. 425* ["In such **[****79]** a situation, if a 'legal claim is joined with an equitable claim, the right to jury trial on the legal claim … remains intact.' … Thus, petitioner has a constitutional right to a jury trial to determine his liability on the legal claims"].) By contrast, as noted above, the governing California decisions hold that ***HN38***[] when the legal and equitable aspects are severable, there is a preference for trying the equitable issues first and that if common facts are resolved in a manner that obviates the need to try the legal issue, there is no right under the California Constitution to have the legal issues submitted to the jury. (See *ante*, p. 315; *Hoopes v. Dolan (2008) 168 Cal.App.4th 146, 156–158 [85 Cal. Rptr. 3d 337]* [discussing difference in California and federal rules]; see also Hamilton, *Federalism and the State Civil Jury Rights* (2013) *65 Stan. L.Rev. 851, 864–865, 869–870* [same].) **[***750]** Thus, the conclusion reached in *Tull* under the *Seventh Amendment* is not necessarily the same result as would follow under California law.

[492]** Moreover, the *Tull* court's analysis of the jury trial question also demonstrates a second difference between the interpretation and application of the federal and state constitutional civil jury trial provisions. As we have explained, in cases in which a cause of action contains nonseverable **[****80]** legal and equitable aspects, California cases undertake a qualitative, holistic analysis of the action in its entirety to determine whether the gist of the action is legal or equitable, that is, whether the legal or equitable aspects predominate. (See **[*332]** *ante*, pp. 317–321.)[24] In *Tull*, by contrast, the court, in determining that under the *Seventh Amendment* there is a right to a

[23] We note that since the decision in *Tull*, a number of state courts, in interpreting and applying their own state constitutional civil jury trial provisions, have concluded, unlike the *Tull* decision, that there is no right to a jury trial in statutory causes of action authorizing both injunctive relief and civil penalties. (See, e.g., *State ex rel. Darwin v. Arnett (2014) 235 Ariz. 239 [330 P.3d 996, 1002]*; *Commissioner of Environmental Protection v. Connecticut Building Wrecking Co. (1993) 227 Conn. 175 [629 A.2d 1116, 1121–1123]*; *Dept. of Environmental Protection v. Emerson (Me. 1992) 616 A.2d 1268, 1271*; *Dept. of Environmental Quality v. Morley (2015) 314 Mich.App. 306 [885 N.W.2d 892, 897]*; *State v. Irving Oil Corp. (2008) 183 Vt. 386 [955 A.2d 1098, 1106–1108]*; ***State v. Evergreen Freedom Foundation (2002) 111 Wn.App. 586 [49 P.3d 894, 908–909]***.) A few states that have traditionally looked to the *Seventh Amendment* in interpreting their own state jury trial provision have followed *Tull*. (See, e.g., *Dept. of Revenue v. Printing House (Fla. 1994) 644 So.2d 498, 500–501*; *Bendick v. Cambio (R.I. 1989) 558 A.2d 941, 943–944*.)

jury trial for the statutory cause of action for civil penalties at issue in that case, relied primarily on its determination that the civil penalties in question were intended, at least in part, to be punitive in nature, which in the court's view was apparently sufficient to render the action legal in nature and require a jury trial. (*Tull, supra, 481 U.S. at pp. 422–424*.) In reaching this conclusion, however, the *Tull* court did not take into account a number of nonseverable equitable aspects of the action for civil penalties at issue there. Thus, the court does not appear to have thought it at all significant that the civil penalties were also intended in part to further the equitable purpose of **[***751]** restitution. (*Ibid.*) Moreover, and significantly, the court did not consider that, unlike actions for civil penalties at common law that typically provided a specific and fixed **[****81]** penalty for each violation, the civil penalties authorized by the statutory cause of action at issue in that case were to be determined by the equitable weighing and balancing of a number of factors similar to the list of factors set forth in the UCL and the FAL (see *Tull, supra, 481 U.S. at pp. 422–423, fn. 8*)—a determination that the *Tull* court itself recognized was more appropriate for a court than a jury. (*Id. at p. 427*.) Thus, rather than determining whether **[*333]** the statutory cause of action for civil penalties at issue should be characterized as legal or equitable by considering *all* of the legal and equitable aspects of that cause of action holistically, the *Tull* court somewhat artificially severed the cause of action for civil penalties into two parts—one that the court held is to be decided by a jury and one that is to be decided by the court—creating a novel type of cause of action that, as Justice Scalia's dissent in *Tull* pointed out, was unknown at common law. (*Id. at pp. 427–428* (dis. opn. of Scalia, J.).) As *Tull* demonstrates, in applying the *Seventh Amendment* federal courts generally have not applied the **[**493]** type of holistic gist of the action standard that California decisions have utilized in applying California's constitutional jury trial provision, and thus the **[****82]** *Tull* decision is distinguishable from the case before us on this ground as well.

Finally, in addition to the differences attributable to disparate interpretations of the federal and state constitutional civil jury trial provisions, the decision in *Tull* is distinguishable from the present case in yet another significant respect. Unlike the relevant broadly worded and expansive substantive standards embodied in the UCL and the FAL—which, as we have explained, call for the exercise of the type of equitable discretion and judgment traditionally employed by a court of equity—under the statute at issue in *Tull*, the question of liability turned simply on the question whether the defendant had, without a permit, deposited fill into an area constituting “wetlands” within the meaning of the Clean Water Act. (*Tull, supra, 481 U.S. at pp. 414–415*.) The parties in *Tull* apparently did not dispute that the substantive statutory standard of liability at issue in that case involved the type of factual determination that in other contexts has traditionally been made by juries. Accordingly, the court in *Tull* had no occasion to decide whether a jury trial is constitutionally required **[****83]** under the *Seventh Amendment* *whenever* a statute permits the recovery of civil penalties, even when the applicable substantive statutory standard clearly

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[24] California is by no means alone in employing a holistic, qualitative standard for determining whether an action involving both legal and equitable aspects should be characterized as legal or equitable for purposes of an applicable constitutional jury trial provision. (See, e.g., *Miller v. Carnation Co. (1973) 33 Colo.App. 62 [516 P.2d 661, 663]* [“Where there are legal and equitable claims joined in the complaint the court must determine whether the basic thrust of the action is equitable or legal in nature”]; *Commissioner of Environmental Protection v. Connecticut Building Wrecking Co., supra, 629 A.2d 1116, 1121* [“In a case that involves both legal and equitable claims, ‘“whether the right to a jury trial attaches depends upon the relative importance of the two types of claims”’”]; *Shaner v. Horizon Bancorp. (1989) 116 N.J. 433 [561 A.2d 1130, 1139]* [“we have eschewed a focus solely on the remedy sought and have espoused a more eclectic view of the standards that serve to characterize the essential nature of a cause of action in giving meaning and scope to the right to a jury trial conferred by *article I, paragraph 9 of the New Jersey Constitution*”]; ***Insurance Financial Services, Inc. v. South Carolina Ins. Co. (1978) 271 S.C. 289 [247 S.E.2d 315, 318]*** [“Since the appellant has prayed for money damages in addition to seeking equitable relief, characterization of the action as equitable or legal depends on the appellant's ‘main purpose’ in bringing the action”]; *Norback v. Bd. of Directors of Church Extension Society (1934) 84 Utah 506 [37 P.2d 339, 345]* [“If the issues are legal or the major issues legal, either party is entitled upon proper demand to a jury trial; but, if the issues are equitable or the major issues to be resolved by an application of equity, the legal issues being merely subsidiary, the action should be regarded as equitable and the rules of equity apply”]; *Brown v. Safeway Stores (1980) 94 Wn.2d 359 [617 P.2d 704, 709]* [“In determining whether a case is primarily equitable in nature or is an action at law, the trial court is accorded wide discretion [which] should be exercised with reference to a variety of factors including, but not necessarily limited to, [seven factors set forth in an earlier Washington decision]”]; *Hyatt Bros. ex rel. Hyatt v. Hyatt (Wyo. 1989) 769 P.2d 329, 333* [“the right to a jury trial in cases involving mixed issues of law and equity [is] resolved by examining the entire pleadings and all the issues raised to determine whether the action is *primarily legal in nature* or *primarily equitable in nature*”].)

contemplates the exercise of equitable judicial discretion and judgment. We note in this regard that when the court in *Tull* addressed a substantive standard as to which the exercise of such equitable discretion was contemplated—that is, in assessing the *amount* of civil penalties to be imposed through "highly discretionary calculations that take into account multiple factors … traditionally performed by judges" (*Tull, at p. 427*)—the *Tull* court found that the trial court could properly resolve that matter without violating the federal constitutional civil jury trial right. (*Ibid.*)

Because of the significant differences in the manner in which the federal and California constitutional civil jury trial provisions have been interpreted and applied and because the court in *Tull* did not address a statutory standard, like those involved in the UCL and the FAL, which contemplates the exercise **[*334]** of the type of equitable discretion typically undertaken by a court of equity, we conclude that the Court **[***752]** of Appeal's reliance upon the *Tull* decision was misplaced.[25]

V. Conclusion

CA(39)[] **(39)** For **[****84]** the reasons set forth above, we conclude that ***HN39***[] in causes of action under the UCL or the FAL seeking injunctive relief and civil penalties, the gist of the actions is equitable, and there is no right to a jury trial in such actions under California law either as a statutory or constitutional matter. Given the specific attributes of the UCL and the FAL discussed above, we have no occasion to determine whether there is a right to a jury trial in other settings in which the government seeks injunctive relief and civil penalties under other statutes authorizing those remedies.

The judgment of the Court of Appeal, holding that Nationwide has a right to a jury trial under the California Constitution in such actions, is reversed and the matter is remanded to the Court of Appeal for further proceedings consistent with this opinion.

Chin, J., Corrigan, J., and Groban, J., concurred.

Concur by: KRUGER, J.

Concur

[494]** **KRUGER, J.,** Concurring.—I concur in the judgment. I agree with the majority that *article I, section 16 of the California Constitution* does not guarantee a jury trial in this action for equitable relief and civil penalties under the unfair competition law (UCL; *Bus. & Prof. Code, § 17200 et seq.*) and the false advertising law (FAL; *Bus. & Prof. Code, § 17500 et seq.*). But I arrive at that conclusion by a somewhat different—and narrower—path.

As the majority **[****85]** notes, California courts have assumed for decades that the UCL and the FAL create causes of action that are equitable in character and thus must be tried to a judge rather than a jury. This assumption only makes sense, since, at their inception, the only remedy under both statutes was injunctive relief, the quintessential equitable remedy. Even today, only equitable remedies are available to private parties who bring UCL and FAL actions. (*Bus. & Prof. Code, §§ 17203* [injunction and restitution as remedies for UCL violation], *17535* [same for FAL].)
[*335]

[25] In its answer brief filed in this court, Nationwide maintains that if this court rejects its state constitutional claim, we should address the question whether it has a right to a jury trial under the *Sixth* or *Seventh Amendment to the United States Constitution* and should hold, notwithstanding the absence of federal decisional support, that it has a right to jury trial in a state court action under those federal provisions. The Court of Appeal did not address these issues, neither the petition for review nor any answer to the petition raised these issues, and thus we decline to address those issues. (See *Cal. Rules of Court, rule 8.516(b)(1)*.)

But many years after the statutes were first passed, the Legislature authorized certain public officials—including, primarily, the Attorney General and district attorneys—to seek civil penalties as well as injunctive relief. (*Bus. & Prof. Code, §§ 17206 [UCL]*, *17536 [FAL]*.) This development has called into question the courts' long-held assumption about the availability of jury trial. That is because government actions seeking civil penalties, generally speaking, sound in law rather than equity and thus carry with them a constitutional right of jury trial under both the *Seventh Amendment to the United States Constitution* (applicable in federal courts) and *article I, section 16 of the California Constitution* (applicable in state courts). (*Tull v. United States (1987) 481 U.S. 412, 420 [95 L.Ed.2d 365, 107 S.Ct. 1831]* (*Tull*); *People v. One 1941 Chevrolet Coupe (1951) 37 Cal.2d 283, 295 & fn. 15 [231 P.2d 832]*.)

[*753]** It is not uncommon for the Legislature to enact a statutory **[****86]** cause of action that has some equitable features and some legal features. Our case law instructs that in such cases, we are to determine which feature predominates in defining its essential character—which, in the distinctive terminology of our precedents, represents the "gist" of the action. (*People v. One 1941 Chevrolet Coupe, supra, 37 Cal.2d at p. 299*; *C & K Engineering Contractors v. Amber Steel Co. (1978) 23 Cal.3d 1, 9 [151 Cal. Rptr. 323, 587 P.2d 1136]*.) If the gist is legal, then the parties are constitutionally entitled to a jury. If the gist is equitable, then they are not.[1]

Our cases also instruct that the nature of the remedies sought is an important—if not necessarily controlling—consideration in this analysis. (*C & K Engineering Contractors v. Amber Steel Co., supra, 23 Cal.3d at p. 9*.) In **[*336]** some cases where plaintiffs seek both equitable and legal remedies, courts have determined whether jury trial is available by comparing the relative **[**495]** significance of the two kinds of remedies. Where the government asks for massive penalties and only very minor injunctive restrictions on the defendant—or, conversely for highly burdensome injunctive orders and only nominal penalties—one form of relief might be deemed incidental to the other and the jury trial right recognized, or not, accordingly. (Cf. *Tull, supra, 481 U.S. at pp. 424–425* [where relief "would be limited primarily to civil penalties, since petitioner had **[****87]** already sold most of the properties at issue[, the] potential penalty of $22 million hardly can be considered incidental to the modest equitable relief sought" (citation omitted)].)

But that is not this case. The present case comes to us in an early procedural posture—on a motion to strike the jury trial demand from defendant's answer—and the parties dispute both the size of potential penalties and the significance of the injunctive relief sought. It does not appear possible here to characterize either form of relief as clearly predominant over, or incidental to, the other. We must therefore look more broadly at the bases for liability alleged in the complaint and the relationships between these causes of action **[***754]** and between the liability and remedy issues presented.

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[1] Despite what the term "gist" might otherwise call to mind, the aim of this inquiry is not to identify a single essential element at the action's theoretical core. We instead try to understand how the statutory cause of action, considered as a whole, relates to the historical division between law and equity, the goal being to place the cause of action appropriately among its possible historical analogues.

I do not believe federal law differs a great deal on this basic point. Though the majority reads *Tull* as establishing a strict rule that the plea for a legal remedy carries a jury trial right notwithstanding any other substantial equitable characteristics the action might have (maj. opn., *ante*, at pp. 330–331), I do not read *Tull* this way. The high court's case law has long made clear that the federal jury trial inquiry turns on a holistic examination of both "the nature of the action and of the remedy sought"—a rule *Tull* cited without signaling any intent to depart from it. (*Tull, supra, 481 U.S. at p. 417*; see also *id. at p. 422, fn. 6* ["Our search is for a single historical analog, taking into consideration the nature of the cause of action and the remedy as two important factors."]; accord, e.g., *Feltner v. Columbia Pictures Television, Inc. (1998) 523 U.S. 340, 348 [140 L.Ed.2d 438, 118 S.Ct. 1279]* [*7th Amend. to the U.S. Const*. intended to apply to actions "'in which legal *rights* were to be ascertained and determined'" (italics omitted & added)].)

In any event, *Tull* is distinguishable from this case on other, more case-specific grounds, which I discuss later in this opinion. We need not rely here on any broad generalizations about how, if at all, the federal approach to the civil jury right differs from California's.

Taking this broader look at the UCL, I agree with the majority that the gist of the statutory action is equitable.[2] Whatever type of relief a government plaintiff might seek in a particular case, liability under the UCL inherently rests on equitable considerations—considerations of a sort that only the trial court can effectively weigh and determine. (Maj. opn., *ante*, at pp. 301–303.) The central provision of the UCL, Business and Professions Code section 17200, prohibits "unfair competition," **[****88]** which it defines to include "unfair" business practices. Determining what is unfair calls on courts to exercise the sort of flexible discretion that characterized the courts of equity—a kind of judgment that juries have not historically made, nor are well suited to make. It is hard to imagine drafting jury instructions, for example, to embody the "unfairness" test enunciated in Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 187 [83 Cal. Rptr. 2d 548, 973 P.2d 527], which refers to "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit" of those laws. **[*337]**

The liability determinations at issue in *Tull* were of a different character. The question was whether the defendant had, without a permit, dumped fill into an area constituting "wetlands" within the meaning of the Clean Water Act. (*Tull, supra, 481 U.S. at pp. 414–415*.) The statutory rules governing this determination were certainly complicated and technical. (See *33 U.S.C. § 1344(f)*; *33 C.F.R. § 328.3(b) (2019)*.) But they did not call on the decision maker's equitable discretion, and no one in *Tull*, including the court, disputed that this was the type of factual determination that has traditionally been made by juries in otherwise appropriate cases. Indeed, the Clean Water Act also provides for criminal penalties for willful or negligent **[****89]** violations (*33 U.S.C. § 1319(c)*)—which means that in some set of Clean Water Act cases, the relevant factual disputes are, of necessity, resolved by juries. *Tull* is thus distinguishable from this case by the nature of the liability decision there, which required only the determination of the historical facts and the application of legal standards to those facts—tasks central to the traditional role of trial juries—in contrast to the balancing of interests typically called for in assessing liability under the UCL.

But here is where my analysis differs from the majority's: While UCL liability can readily **[**496]** be characterized as dependent on equitable considerations, I do not believe the same can be said of liability under the FAL. To be sure, the FAL, much like the UCL, is broadly written: The statute is designed to encompass any novel scheme for misleading the public. (Maj. opn., *ante*, at p. 308.) The statute makes claims relatively easy to prove, compared to common law fraud, by employing a negligence standard **[***755]** and omitting the elements of reliance and injury; the plaintiff need show only that the challenged advertisement or promotion is likely to mislead members of the public. (*Kasky v. Nike, Inc. (2002) 27 Cal.4th 939, 951 [119 Cal. Rptr. 2d 296, 45 P.3d 243]*.)[3] But at least by its text, **[****90]** the FAL does not create a standard of liability that depends on the exercise of a court's equitable judgment. No balancing of harms and benefits or weighing of the parties' and public interests are involved in determining liability; no equitable principles like laches or unclean hands come into play. Rather, as other state courts have observed in evaluating similar laws, the FAL in significant respects resembles the common law cause of action for negligent misrepresentation, a species of the tort of deceit. (See *Bily v. Arthur Young & Co. (1992) 3 Cal.4th 370, 407* ***[*338]*** *[11 Cal. Rptr. 2d 51, 834 P.2d 745]*; cf. *State v. Abbott Laboratories (2012) 341 Wis.2d 510, 533 [816 N.W.2d 145, 156]* [holding that Wisconsin's Deceptive Trade Practices Act, as "an essential

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[2] The majority discusses the equitable character of the UCL and the FAL in detail only in part III of the opinion, which addresses *statutory* jury trial rights. The majority concludes there that in enacting and amending both statutes, "the legislative history and legislative purpose of both statutes convincingly establish that the Legislature intended that such causes of action under these statutes would be tried by the court, exercising the traditional flexible discretion and judicial expertise of a court of equity … ." (Maj. opn., *ante*, at p. 297.) In its constitutional analysis, the majority simply cross-references this discussion. (*Id.* at p. 326.) Readers should not be confused, however, by this organizational choice: The Legislature's intent does not control whether there is a constitutional right to jury trial. (See *id.* at p. 314.)

[3] *Business and Professions Code section 17500* defines the scope of false advertising liability: "It is unlawful for any person … with intent directly or indirectly to dispose of real or personal property or to perform services … to make or disseminate or cause to be made or disseminated before the public … any statement, concerning that real or personal property or those services … which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person … to so make … any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised."

counterpart to the common law claim of 'cheating,'" carries a right to jury trial].) Though the FAL requires only a misleading advertisement, not necessarily one containing express falsehoods, the same is true for tortious deceit in California. (*Universal By-Products, Inc. v. City of Modesto (1974) 43 Cal.App.3d 145, 151 [117 Cal. Rptr. 525]* ["A misrepresentation need not be express but may be implied by or inferred from the circumstances."]; *Sullivan v. Helbing (1924) 66 Cal.App. 478, 483 [226 P. 803]* ["Fraudulent representations may consist of half-truths calculated to deceive. Thus a representation literally true is actionable if used to create an impression substantially false."].) At least considered in isolation, then, nothing about the nature **[****91]** of liability determination under the FAL suggests it sits beyond the scope of the jury right.

In characterizing the nature of the FAL action as equitable, the majority emphasizes that appellate courts analyzing FAL liability have discussed a "variety of factors" relevant to whether a particular advertisement is misleading. (Maj. opn., *ante*, at p. 309.) These appellate discussions, though, tell us little about the legal or equitable character of FAL liability. The issues before the appellate courts were ones of legal sufficiency: whether allegations of misleading advertising were sufficient to survive demurrer (*Brady v. Bayer Corp. (2018) 26 Cal.App.5th 1156 [237 Cal. Rptr. 3d 683]*; *Day v. AT & T Corp. (1998) 63 Cal.App.4th 325 [74 Cal. Rptr. 2d 55]*) or whether substantial evidence supported a trial court's finding of an FAL violation (*People v. Overstock.com, Inc. (2017) 12 Cal.App.5th 1064 [219 Cal. Rptr. 3d 65]* (*Overstock.com*)). In answering these questions, the courts did cite a number of factual considerations that supported the complaint's or evidentiary showing's sufficiency, but those factual discussions are not particularly suggestive of an inherently equitable approach to FAL liability. What the appellate courts did in these cases does not differ in any meaningful way from what courts do when they review evidentiary sufficiency questions in cases involving **[***756]** causes of action that are tried to juries, such **[****92]** as common law fraud. (See, e.g., *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 393 [46 Cal. Rptr. 3d 668, 139 P.3d 56]* [in suit for fraudulent inducement to enter into at-will employment contract, evidence was **[**497]** insufficient to show reliance where employment offer did not specifically guarantee the plaintiff "would be employed there so long as his work was satisfactory or that he could be fired only for good cause" or contain any other "promises of long-term employment"]; *AREI II Cases (2013) 216 Cal.App.4th 1004, 1022 [157 Cal. Rptr. 3d 368]* [detailing several "facts and circumstances that permit a reasonable inference" defendant participated in fraud].) Indeed, even in criminal cases tried to juries, appellate decisions on sufficiency of evidence often articulate a number of factual considerations to guide the analysis. (See, e.g., *People v. Banks (2015) 61 **[*339]** Cal.4th 788, 804–811 [189 Cal. Rptr. 3d 208, 351 P.3d 330]* [detailed analysis of sufficiency of evidence to show major participation in felony and reckless indifference to human life]; *People v. Koontz (2002) 27 Cal.4th 1041, 1081–1082 [119 Cal. Rptr. 2d 859, 46 P.3d 335]* [discussing three nonexclusive factors relevant to sufficiency of evidence for premeditation and deliberation].)

None of the cases the majority cites discusses the possibility of a jury trial when civil penalties are sought. Indeed, the only case in which the issue could have arisen is *Overstock.com*—the only action brought by a public plaintiff entitled to seek civil penalties—but it **[****93]** was not raised there. Nor do any of the cases hold or state that determining an FAL violation requires weighing competing interests, applying equitable doctrines such as laches, estoppel, or unclean hands, or balancing the harms and benefits of a requested remedy. Indeed, the considerations discussed in the opinions appear fairly typical of issues that, in a jury trial, might be used by the jury to resolve the question of liability under the FAL: the inability of consumers to learn the terms of a prepaid phone card before buying the card (*Day v. AT & T Corp., supra, 63 Cal.App.4th at p. 334*); the application of "common sense" (*Brady v. Bayer Corp., supra, 26 Cal.App.5th at p. 1165*); the possibility that a brand name by itself would mislead consumers (*id. at p. 1170*); and the likelihood a consumer would understand "'Compare at'" in an advertisement boasting of a low price to refer to another seller's price for the same item (*Overstock.com, supra, 12 Cal.App.5th at p. 1081*).

The *Overstock.com* court did cite as consistent with its own analysis a regulation of the Federal Trade Commission (FTC), part of the agency's Guides Against Deceptive Pricing (FTC Guides), stating that price comparisons to other merchandise can be "'useful and legitimate'" when the comparison items are of essentially similar quality and are obtainable in the area. (*Overstock.com, supra, 12 Cal.App.5th at p. 1081* **[****94]** , quoting *16 C.F.R. § 233.2(c) (2017)*.) The majority holds this up as an example of how "the complexities and nuances" of FAL liability "are often ameliorated by judicial reference to the relevant guidelines developed by the FTC regarding deceptive advertising."

(Maj. opn., *ante*, at p. 311, citing Stern, Cal. Practice Guide: Bus. & Prof. Code § 17200 Practice (The Rutter Group 2019) ¶¶ 4:46–4:80.4, pp. 4-14 to 4-32.)

This overstates the significance of the FTC Guides to the question before us. For one thing, the link between the FTC Guides and liability under the FAL appears rather tenuous. The FTC Guides are not comprehensive or definitive regulations even **[***757]** for interpreting the FTC Act, and certainly nothing suggests they were intended, or have functioned, to define deceptive practices **[*340]** for purposes of state law.[4] In any event, while the FTC **[**498]** Guides offer guidance on what sort of practices will be considered deceptive, none of this guidance appears to turn on the application of equitable judgment. For example, the Guides Concerning Use of Endorsements and Testimonials in Advertising, which the majority describes as illustrating the type of "equitable consideration" that goes into an FAL liability determination (maj. opn., *ante*, at p. 312), covers such questions as when **[****95]** an advertiser should confirm that the endorser's views have not changed (16 C.F.R. § 255.1(b) (2020)) and what kind of substantiation must support the claims of effectiveness implied by a consumer endorsement (*id.*, § 255.2(a), (b) (2020)). The FTC Guides illustrate the potential factual complexity of deceptive advertising claims, but they do not support the majority's conclusion that deciding the merits of an FAL claim "depends upon the exercise of the type of equitable discretion and judgment typically employed by a court of equity." (Maj. opn., *ante*, at p. 313.)[5]

The majority also argues that because of the FAL's potential breadth, it is important that the FAL liability standard be administered by trial courts, which can "set forth their reasoning for a determination that the FAL has been violated so that a body of precedent can evolve to inform businesses of advertising practices they must avoid." (Maj. opn., *ante*, at p. 310.) As an argument for cabining the scope of the constitutional jury trial right, I find this reasoning unpersuasive. Binding precedent is made only by appellate courts, and an appellate decision on sufficiency of the evidence fills out the precedential picture **[****96]** regardless of whether trial was to a jury or to the bench. And while it might be thought desirable from some points of view to have all FAL actions heard by judges, the same might be said for any number of civil causes of action. Defendants in insurance bad faith cases, for example, might well prefer bench trials and could argue that they, too, need a body of precedent to guide their actions. But they get such precedential guidance from **[*341]** appellate decisions on legal issues. (E.g., *Wilson v. 21st Century Ins. Co. (2007) 42 Cal.4th 713, 721–726 [68 Cal. Rptr. 3d 746, 171 P.3d 1082]* [propriety of summary judgment].) It would not be consistent with the constitutional **[***758]** mandate that trial by jury "is an inviolate right and shall be secured to all" (*Cal. Const., art. I, § 16*) for us to pick out categories of civil actions that, because they sometimes raise complicated factual issues or implicate common business decisions, we regard as more suitable for trial to the court.

In the end, however, while it seems to me the majority comes up short in its effort to show that FAL claims implicate inherently equitable judgment uniquely suited to a court, I agree that the present action was nonetheless predominantly equitable in character.

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[4] The FTC Guides on testimonials and endorsements, for example, simply "provide the basis for voluntary compliance with the law by advertisers and endorsers." (*16 C.F.R. § 255.0(a) (2020)*; see also *id.*, *§ 260.1(a) (2019)* [Guides on environmental claims "help marketers avoid making environmental marketing claims that are unfair or deceptive," but "do not operate to bind the FTC or the public."]; *FTC v. Mary Carter Paint Co. (1965) 382 U.S. 46, 47–48 [15 L.Ed.2d 128, 86 S.Ct. 219]* ["These, of course, were guides, not fixed rules as such, and were designed to inform businessmen of the factors which would guide Commission decision."].) And while the Stern treatise describes some of the FTC Guides as potentially relevant to FAL liability, it gives no examples of their use by courts for this purpose and does not describe such use as common. (See Stern, Cal. Practice Guide: *Bus. & Prof. Code § 17200* Practice, *supra*, ¶¶ 4:46, 4:72, 4:80.2–4:80.4, pp. 4-14, 4-32.)

[5] The same is true of the cited federal decisions upholding FTC findings of deceptiveness (maj. opn., *ante*, at p. 313), such as *FTC v. Colgate-Palmolive Co. (1965) 380 U.S. 374, 384–390 [13 L.Ed.2d 904, 85 S.Ct. 1035]* and *FTC v. Mary Carter Paint Co., supra, 382 U.S. at pages 47* to 48: They may show that deceptiveness can be factually complicated, but not that it depends on application of equitable principles.

First, as the majority explains, even if liability for civil penalties is **[****97]** deemed a legal question, the amount of such penalties under the UCL and the FAL is decided by the court on an equitable basis, along with questions of injunctive relief and appropriate restitution. (Maj. opn., *ante*, at p. 326 ["[T]he UCL and the FAL statutes specify that in assessing the amount of the civil penalty to be imposed under these statutes, the court is afforded broad discretion to consider a nonexclusive list of factors that include the relative seriousness of the defendant's conduct and the potential deterrent effect of such penalties, the type of qualitative evaluation and weighing of a variety of factors that is typically undertaken by a court and not a jury. (*Bus. & Prof. Code, §§ 17206*, *17536*.)"].) The parties do not dispute that even if the request for civil penalties triggered a jury trial right, the right would extend only to the trial on liability; the ultimate amount of any penalties awarded would be decided by the court. Such an arrangement is not unprecedented (see *Tull, supra, 481 U.S. at pp. 425–427*), but this allocation of remedial authority **[**499]** does diminish the practical importance of the jury's factfinding role and, in my view, strains the idea that the gist of the action is predominantly legal.

Second, and equally important, the causes **[****98]** of action under the UCL and the FAL are inherently intertwined. This is because "unfair" competition under the UCL expressly includes "any act prohibited by" the FAL (*Bus. & Prof. Code, § 17200*), meaning that every violation of the FAL is therefore also a violation of the UCL. When, as here, allegedly deceptive conduct is pleaded as a violation of both statutes, the same liability questions that a jury would decide for purposes of the FAL would be decided by the court for purposes of the UCL. And while it might be theoretically possible to separate out the UCL claims that depend on equitable principles from those that do not, in practice the effort to keep the claims separate would be bound to collapse, since each UCL cause of action in a complaint is not necessarily limited to a single type of conduct or a single legal theory of liability.

[*342]

In these circumstances, trying liability under the FAL to the jury, while the rest of the action was decided by the court, would create procedural complications without significant benefit to the defendant demanding jury trial. Because the FAL and the UCL are intertwined in this manner, a trial court that considered the defendant's advertising deceptive could impose liability **[****99]** under the UCL before even putting the FAL liability question to the jury. (See maj. opn., *ante*, at p. 317 [trial court has discretion as to order of trying severable legal and equitable issue].) The court could then exercise its equitable judgment to impose both injunctive relief and substantial civil penalties for the UCL violation, regardless of the jury's view as to FAL liability. In other words, although every found violation of the FAL triggers civil penalties under the UCL, the inverse is **[***759]** not true; a jury's finding of no FAL liability would not preclude a judge from awarding substantial civil penalties under the UCL. Because of the way these intertwined causes of action relate when the same conduct is at issue, the jury's verdict does not ultimately determine whether civil penalties are imposed.

Plaintiffs here seek a traditionally legal remedy, civil penalties, along with the equitable remedies of injunction and restitution. They also plead causes of action under the FAL, for which liability appears to rest on factual determinations rather than equitable judgment, as well as the UCL. But in the end, the equitable facets of this action predominate over the legal ones. The amount **[****100]** of any civil penalties would be determined by the trial court on the basis of equitable principles, allowing the court to all but nullify any jury finding of an FAL violation. What is more, the court could effectively override any jury decision *against* FAL liability by imposing liability for the same conduct under the UCL before the FAL issue is ever tried, then awarding plaintiffs injunctive relief and penalties for that violation. For these reasons, I agree with the majority that the action is predominantly equitable in nature.

Liu, J., and Cuéllar, J., concurred.

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Oliver v. Am. Express Co.

United States District Court for the Eastern District of New York

April 30, 2020, Decided; April 30, 2020, Filed

19-CV-566 (NGG) (SMG)

Reporter

2020 U.S. Dist. LEXIS 76688 *; 2020-1 Trade Cas. (CCH) P81,211

ANTHONY OLIVER, TERRY GAYLE QUINTON, SHAWN O'KEEFE, ANDREW AMEND, SUSAN BURDETTE, GIANNA VALDES, DAVID MOSKOWITZ, ZACHARY DRAPER, NATE THAYER and MICHAEL THOMAS REID on behalf of themselves and all others similarly situated, Plaintiffs, -against- AMERICAN EXPRESS COMPANY and AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part *Oliver v. Am. Express Co., 2021 U.S. Dist. LEXIS 13135, 2021 WL 242150 (E.D.N.Y., Jan. 25, 2021)*

Motion granted by, in part, Motion denied by, in part *Oliver v. Am. Express Co., 2021 U.S. Dist. LEXIS 19578, 2021 WL 386749 (E.D.N.Y., Feb. 1, 2021)*

Motion denied by *Oliver v. Am. Express Co., 2022 U.S. Dist. LEXIS 149681, 2022 WL 3366312 (E.D.N.Y., Aug. 12, 2022)*

Motion granted by, in part, Motion denied by, in part *Oliver v. Am. Express Co., 2023 U.S. Dist. LEXIS 119283 (E.D.N.Y., July 11, 2023)*

Core Terms

merchant, Plaintiffs', Anti-Steering, antitrust, consumers, card, factors, anti trust law, networks, credit card, allegations, resident, purchasers, competitors, indirect, damages, redressability, traceability, cardholders, speculative, Non-Amex, two-sided, steering, parties, antitrust violation, named plaintiff, anticompetitive, provisions, customers, argues

LexisNexis® Headnotes

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

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

Under *Fed. R. Civ. P. 12(b)(1)*, a district court should dismiss a case when it lacks statutory or constitutional power to adjudicate it. In reviewing a motion to dismiss under *Rule 12(b)(1)*, the court must accept all material factual allegations in the complaint as true, but should not draw argumentative inferences favorable to the party asserting jurisdiction. The court may refer to evidence outside the pleadings. Evidentiary matter may be presented by affidavit or otherwise under a Rule 12(b)(1) motion. The plaintiff bears the burden of showing, by a preponderance of the evidence, that the court has subject matter jurisdiction over its claims.

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

HN2[] Motions to Dismiss, Failure to State Claim

To survive a Fed. R. Civ. P. 12(b)(6) motion, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A complaint must contain facts that do more than present a sheer possibility that a defendant has acted unlawfully. To decide Defendants' motion to dismiss, the court will accept all factual allegations in the complaint as true and draw all reasonable inferences in Plaintiffs' favor. However, the court will identify pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. The court must then evaluate the well-pleaded factual allegations and determine whether they plausibly give rise to an entitlement to relief. This plausibility analysis does not impose a probability requirement at the pleading stage, but requires the complaint to provide enough fact to raise a reasonable expectation that discovery will reveal evidence of illegality.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Constitutional Law > The Judiciary > Case or Controversy > Standing

HN3[] Remedies, Injunctions

Section 16 of the Clayton Act entitles any person, firm, corporation, or association to sue for injunctive relief against threatened loss or damage by a violation of the antitrust laws. 15 U.S.C.S. § 26. At the pleading stage, an antitrust plaintiff must show both constitutional standing and antitrust standing.

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN4[] Standing, Elements

To satisfy the irreducible constitutional minimum of Article III standing, a plaintiff must demonstrate (1) an injury in fact, (2) a causal connection between the injury and complained-of conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. The second and third requirements of standing, causation and redressability, require a plaintiff to demonstrate that the injury-in-fact she suffers is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable decision.

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN5[] Standing, Elements

The traceability requirement for Article III standing means that the plaintiff must demonstrate a causal nexus between the defendant's conduct and the injury. The requirement that a complaint allege an injury that is fairly traceable to defendants' conduct for the purposes of constitutional standing is a lesser burden than the requirement that it show proximate cause. Thus, a plaintiff does not lack standing simply by virtue of the indirectness of his or her injury. Plaintiffs' injury would satisfy the fairly traceable requirement if they had alleged all the links in the chain of causation. This lesser burden as between traceability and proximate cause is particularly true at the pleading stage. Accordingly, the fact that there is an intervening cause of the plaintiff's injury may foreclose a finding of proximate cause but is not necessarily a basis for finding that the injury is not fairly traceable to the acts of the defendant.

Antitrust & Trade Law > Procedural Matters

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN6[] Antitrust & Trade Law, Procedural Matters

Some assumptions are acceptable at the pleading stage to meet the traceability requirement for Article III standing, especially in the antitrust context. Allegations of economic harm based on standard principles of supply and demand are routinely credited by courts in a variety of contexts. Antitrust cases often involve tracing a cost increase through several levels of a chain of distribution.

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN7[] Standing, Elements

The third and final requirement for Article III standing is redressability. The redressability inquiry focuses on whether the injury that a plaintiff alleges is likely to be redressed through the litigation. To satisfy the redressability requirement, a plaintiff must establish that it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit. Importantly, the redressability prong does not require that court-ordered relief completely redress all injury, and it is not a demand for mathematical certainty, As the Second Circuit recently explained, redressability is an issue that is closely related to the question of causation. When the injury alleged is caused by the illegal conduct, in many instances (at least where continuation of the illegal conduct will continue to cause harm), the cessation of the illegal conduct will be likely to at least diminish further instance of the injury.

Antitrust & Trade Law > Procedural Matters

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

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

HN8[] Antitrust & Trade Law, Procedural Matters

At the motion to dismiss stage, a private antitrust plaintiff must plausibly allege (a) that it suffered a special kind of antitrust injury, and (b) that it is a suitable plaintiff to pursue the alleged antitrust violation and thus is an efficient enforcer of the antitrust laws. As the Second Circuit has explained: The efficient enforcer inquiry turns on: (1) whether the violation was a direct or remote cause of the injury; (2) whether there is an identifiable class of other persons whose self-interest would normally lead them to sue for the violation; (3) whether the injury was speculative; and (4) whether there is a risk that other plaintiffs would be entitled to recover duplicative damages or that damages would be difficult to apportion among possible victims of the antitrust injury. These factors reflect a concern about whether the putative plaintiff is a proper party to perform the office of a private attorney general and thereby vindicate the public interest in antitrust enforcement. These four factors need not be given equal weight, and the relevant significance of each factor will depend on the circumstances of the particular case.

Antitrust & Trade Law > Procedural Matters

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

HN9[] **Antitrust & Trade Law, Procedural Matters**

Directness in the antitrust context means close in the chain of causation. The overall inquiry is akin to proximate cause in tort law—plaintiffs may not be too remote so as to avoid duplicative recovery and limitlessly increase the universe of potential plaintiffs. As a general matter, those entities most directly injured by anticompetitive conduct are customers or competitors of the defendant. Nonetheless, a plaintiff who is not a customer or competitor may suffer a direct injury if it is a participant in the very market directly distorted by the antitrust violation and its injury is inextricably intertwined with the injury the defendants sought to inflict. To assess the plausibility of a putative plaintiff's claim to antitrust injury as being inextricably intertwined with the injury the defendants ultimately sought to inflict, the court must ask whether the plaintiff was manipulated or utilized by defendant as a fulcrum, conduit, or market force to injure competitors or participants in the relevant product and geographical markets.

Antitrust & Trade Law > Procedural Matters

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

HN10[] **Antitrust & Trade Law, Procedural Matters**

The second efficient-enforcer factor recognizes that not every victim of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced. This is particularly relevant where multiple sets of plaintiffs have sued the defendant over the same alleged antitrust violations.

Antitrust & Trade Law > Procedural Matters

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

HN11[] **Antitrust & Trade Law, Procedural Matters**

The existence of only highly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement. At the same time, some degree of uncertainty stems from the nature of ***antitrust law***. Impediments to reaching a reliable damages estimate often flow from the nature and complexity of the alleged antitrust violation.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Antitrust & Trade Law > Procedural Matters

HN12[] **Remedies, Injunctions**

Because standing under *15 U.S.C.S. § 16* raises no threat of multiple lawsuits or duplicative recoveries, some of the factors other than antitrust injury that are appropriate to a determination of standing under § 4 are not relevant under *§ 16*.

Civil Procedure > ... > Class Actions > Class Members > Named Members

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN13[] **Class Members, Named Members**

As long as the named plaintiffs have standing to sue the named defendants, any concern about whether it is proper for a class to include out-of-state, nonparty class members with claims subject to different state laws is a question of predominance under *Fed. R. Civ. P. 23(b)(3)* not a question of adjudicatory competence under Article III.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN14[] **Federal & State Interrelationships, Erie Doctrine**

A federal court adjudicating state law looks to the state's decisional law, as well as to its constitution and statutes. When the state law is unsettled, the court is obligated to carefully predict how the state's highest court would resolve the uncertainty or ambiguity. The court must give the fullest weight to the pronouncements of the state's highest court while giving proper regard to the rulings of the state's lower courts.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

Governments > Courts > Judicial Precedent

HN15[] **Attempts to Monopolize, State Regulation**

New York's Donnelly Act prohibits every contract, agreement, arrangement or combination whereby competition may be restrained. *N.Y. Gen. Bus. Law § 340(1)*. The New York Court of Appeals has noted that the Donnelly Act should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language, or the legislative history justify such a result.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Governments > Courts > Judicial Precedent

HN16[] **Federal & State Interrelationships, Erie Doctrine**

A federal court's view that a state appellate court decision is wrongly decided (or would lead to results with which the federal court would disagree) is not grounds for the federal court to ignore the state court's ruling.

Antitrust & Trade Law > Procedural Matters

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships

HN17[] **Antitrust & Trade Law, Procedural Matters**

A harmonization provision in a state's antitrust statute does not require a state's Supreme Court to find that state ***antitrust law*** must be analyzed under the federal standard. That is particularly true where the harmonization provision finds that federal law is merely persuasive.

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

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

HN18[] **State Regulation, Claims**

The Tennessee Trade Practices Act (TTPA) prohibits anti-competitive conduct which tends to lessen full and free competition in the importation or sale of articles imported into this state or which tend to advance, reduce, or control the price or the cost to the producer or the consumer of any such product. *Tenn. Code Ann. § 47-25-101*. The TTPA provides a civil remedy to any person who is injured or damaged by such arrangement. § 47-25-106. The Tennessee Supreme Court has held that this includes claims brought by indirect purchasers.

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

HN19[] **Trade Practices & Unfair Competition, State Regulation**

The Tennessee Trade Practices Act (TTPA) lacks a mandatory harmonization clause requiring consistency between interpretation of the TTPA and interpretations of federal antitrust laws.

Constitutional Law > The Judiciary > Case or Controversy > Standing

HN20[] **Case or Controversy, Standing**

A party has standing to sue under Tennessee law when it meets the minimum constitutional requirements of standing under federal law.

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

HN21[] **Trade Practices & Unfair Competition, State Regulation**

The Tennessee Trade Practices Act's use of "control" includes the ability to exercise a restraining or directing influence over something.

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

HN22[] **State Regulation, Claims**

Under California law, where a plaintiff fails to state an antitrust claim, and where an unfair competition claim is based upon the same allegations, such state claims are properly dismissed.

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

HN23[] **Deceptive & Unfair Trade Practices, State Regulation**

Mass. Gen. Laws ch. 93A (CBPA) provides a cause of action for any person who has been injured by another person's use or employment of any unfair method of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. CBPA, § 2, § 9(1).

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

HN24[] **Deceptive & Unfair Trade Practices, State Regulation**

The Massachusetts Consumer and Business Protection Act is to be construed broadly in light of its goals of protecting Massachusetts consumers, regardless of whether Plaintiffs have standing under either federal or state antitrust laws.

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

HN25[] **Deceptive & Unfair Trade Practices, State Regulation**

A Massachusetts Consumer and Business Protection Act plaintiff must allege a connection between plaintiff and defendant, even if it is an indirect one.

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

HN26[] **Deceptive & Unfair Trade Practices, State Regulation**

New Mexico's Unfair Practices Act (NMUPA) provides that unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful. *N.M. Stat. Ann. § 57-12-3*. The NMUPA defines unconscionable trade practice as: an act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment: (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) results in a gross disparity between the value received by a person and the price paid. *N.M. Stat. Ann. § 57-12-2(E)*.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Choice of Law

HN27[] **Federal & State Interrelationships, Choice of Law**

Implied consent is sufficient to establish choice of law.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN28[] **Types of Contracts, Quasi Contracts**

The New York Court of Appeals has held that while a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment, the connection between the defendant and the plaintiff must not be too attenuated. Plaintiffs must allege direct dealings or an actual, substantive relationship with defendants.

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For American Express Company, American Express Travel Related Services Company, Inc., Defendants: Peter T. Barbur, LEAD ATTORNEY, Cravath Swaine Moore LLP, Ny, NY USA; Evan R. Chesler, Cravath, Swaine & Moore, **[*2]** New York, NY USA; Rory Ann Leraris, Cravath Swaine & Moore LLP, New York, NY USA.

Judges: NICHOLAS G. GARAUFIS, United States District Judge.

Opinion by: NICHOLAS G. GARAUFIS

Opinion

NICHOLAS G. GARAUFIS, United States District Judge.

This is a putative class action brought against Defendants American Express Company and American Express Travel Related Services Company, Inc. (together, "Amex"). Plaintiffs, consumers who made purchases using a non-Amex electronic form of payment, challenge the non-discrimination provisions contained in Amex's contracts with merchants who accept its cards (the "Anti-Steering Rules"). (Compl. (Dkt. 1) ¶ 1.) Currently before the court is Amex's motion to dismiss the complaint under *Federal Rules of Civil Procedure 12(b)(1)* and *12(b)(6)*. (Mot. to Dismiss ("Mot.") (Dkt. 37).) For the following reasons, Amex's motion is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

This action challenges Amex's Anti-Steering Rules. (Compl. ¶ 1.) Plaintiffs allege that Amex's Anti-Steering Rules unreasonably restrain trade in the two-sided market for credit- and charge-card transactions ("credit card transactions") because they: "(i) increase two-sided credit card transaction prices to supracompetitive levels; (ii) result in fewer credit card transactions **[*3]** than would occur but-for the restraints; and (iii) raise consumer retail prices on goods and services purchased throughout the country by Plaintiffs and the Class." (*Id.* ¶ 3.)

The Anti-Steering Rules have been the subject of much litigation. That background—including the procedural history of relevant cases, the workings of the credit-card market in general, and Amex's platform in particular, etc.—has been discussed at great length in this court's previous opinions. *See* *In re Am. Exp. Anti-Steering Rules Antitrust Litig., 433 F. Supp. 3d 395, 2020 U.S. Dist. LEXIS 7095, 2020 WL 227425, at *2-4 (E.D.N.Y. 2020)* (*"Non-Amex Merchants"*);[1]*In re Am. Exp. Anti-Steering Rules Antitrust Litig., 361 F. Supp. 3d 324, 331-33 (E.D.N.Y. 2019)*; *In re Am. Exp. Anti-Steering Rules Antitrust Litig., No. 11-MD-2221 (NGG), 2016 U.S. Dist. LEXIS 3332,*

[1] When quoting cases, unless otherwise noted, all citations and quotation marks are omitted and all alterations are adopted.

2016 WL 748089, at *1-4 (E.D.N.Y. Jan. 7, 2016); United States v. Am. Exp. Co. ("U.S. v. Amex"), 88 F. Supp. 3d 143, 149-67 (E.D.N.Y. 2015), *rev'd* 838 F.3d 179 (2d Cir. 2016), *aff'd sub nom*. Ohio v. Am. Exp. Co. ("Ohio"), 138 S. Ct. 2274, 201 L. Ed. 2d 678 (2017). The background necessary to introduce and decide the instant motion is laid out below.

A. The Parties

This action is brought by ten named Plaintiffs: (1) Anthony Oliver, a resident of California; (2) Terry Gayle Quinton, a resident of Tennessee; (3) Shawn O'Keefe, a resident of North Carolina; (4) Andrew Amend, a resident of Kansas; (5) Susan Burdette, a resident of New Mexico; (6) Gianna Valdes, a resident of New York; (7) David Moskowitz, a resident of Oregon; (8) Zachary Draper, a resident of Nevada; (9) Nate Thayer, a resident **[*4]** of Massachusetts; and (10) Michael Thomas Reid, a resident of Florida (collectively, "Plaintiffs"). Plaintiffs bring this action on their own behalf and, pursuant to *Federal Rule of Civil Procedure 23(b)(2)*, on behalf of a proposed "Nationwide Class" defined as:

> All persons or entities residing in the United States that do not have an Amex card and who use an electronic form of payment to purchase goods or services from merchants which accept Amex, Visa, Mastercard and/or Discover credit or charge cards.
>
> Excluded from the Class are Defendants, their parent companies, subsidiaries, agents and affiliates, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

(Compl. ¶ 137.) Plaintiffs also bring this action pursuant to *Rule 23(a)* and *23(b)(3)* on behalf of thirty-two separate statewide damage classes asserting claims for damages under the antitrust statutes or consumer protection statutes and the law of unjust enrichment of thirty-two jurisdictions: Alabama, Arizona, California, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, **[*5]** Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin (collectively, the "State Damages Classes"). (*Id.* ¶ 138.) Like the Nationwide Class, the State Damages Classes are made up of individual consumers who do not have an Amex card and who used any electronic form of payment to purchase a product from a merchant that accepted Amex, Visa, Mastercard, or Discover credit or charge cards. (*Id.* ¶ 139.)

Defendant American Express Company is a New York Corporation. (*Id.* ¶ 22.) Defendant American Express Travel Related Services Company, Inc. is a New York Corporation, with its principal place of business in New York, New York. (*Id.* ¶ 23.) It is a wholly owned subsidiary of American Express Company. (*Id.*)

B. The Relevant Market

Plaintiffs assert that the relevant geographic market is "the United States, including each of the States." (*Id.* ¶ 71.) The relevant product market is "the market for two-sided general purpose credit and charge card transactions." (*Id.* ¶ 72.)

C. Factual Allegations

1. The Credit Card Industry

Amex is one of four significant competitors in the nationwide credit card market. (*Id.* ¶ 36.) The others are Visa, Mastercard, and Discover. (*Id.*) According **[*6]** to Plaintiffs, the market shares of these four companies as of 2013 were Visa 45%, Amex 26.4%, MasterCard 23.3%, and Discover 5.3%. (*Id.*; *see* Ohio, 138 S. Ct. at 2282.) The market is also constrained by high barriers to entry; in fact, there has not been a successful entry into the market since Discover in 1985. (*Id.* ¶ 38.)

Credit card companies provide services both to cardholders, who use the cards to purchase goods and services, and to merchants, who accept those cards as payment in exchange for goods and services. These credit card companies thus operate a two-sided platform, offering services to two, distinct groups (merchants and consumers) and facilitating transactions between them. *See* *Ohio, 138 S. Ct. at 2280*. Credit card companies need to make a sale to both sides of the market to succeed; after all, "no credit-card transaction can occur unless both the merchant and the cardholder agree to use the same credit-card network." *Id.; (see also* Compl. ¶¶ 45-47). Amex offers services directly to both merchants and consumers. (Compl. ¶ 40.)

As Plaintiffs allege, "when a consumer uses a credit or charge card, the merchant's point of sale terminal relays a record of the transaction to the card's network." (*Id.* ¶ 48.) The network then **[*7]** pays, or facilitates the payment of, money for that transaction to the merchant, consisting of the purchase price charged to the customer minus the fee that network or bank charges merchants (the "merchant fee"). (*Id.*) Consumers may also pay fees to use their credit cards and get rewards for making purchases with a particular card. (*Id.* ¶ 49.) Unlike its competitors, who charge variable merchant fees depending on the particular card the individual consumer is using, Amex "charg[es] a single merchant fee for all of [its] various credit and charge cards." (*Id.* ¶ 52.) Amex sets its merchant fee pricing by industry segments, and, in general, its merchant fees are higher than those of its competitors. (*Id.* ¶¶ 53, 69.) Plaintiffs further allege that, in contrast to its competitors, "the vast majority of Amex's revenue comes from merchant fees." (*Id.*¶ 55.)

2. The Anti-Steering Rules

The target of this litigation is a provision in the Card Acceptance Agreement ("CAA"), known as the Anti-Steering Rules, to which all merchants who accept Amex cards must agree. Pursuant to the Anti-Steering Rules, Merchants may not:

- indicate or imply that they prefer, directly or indirectly, any Other Payment **[*8]** Products over [Amex] Card[s];
- try to dissuade cardholders from using [their Amex] Card;
- criticize or mischaracterize [the Amex] Card or any of [Amex's] services or programs;
- try to persuade or prompt cardholders to use any Other Payment Products or any other method of payment (e.g., payment by check);
- impose any restriction, conditions, or disadvantages when the Card is accepted that are not imposed equally on all Other Payment Products, except for ACH funds transfer, cash, and checks;
- engage in activities that harm [Amex's] business or the American Express Brand (or both);
- or promote any Other Payment Products (except the Merchant's own private label card that they issue for use solely at their establishments) more actively than the Merchant promotes [Amex's] Card.

(*Id.* ¶ 78.)

3. Harm to Plaintiffs

Plaintiffs allege that the "intended and actual result of Amex's Anti-Steering Rules is near-total insulation from price competition amongst Amex, Visa, Mastercard, and Discover in the fees charged to merchants." (*Id.* ¶ 83.) This is because the Anti-Steering Rules prevent merchants from encouraging customers to use non-Amex cards, even where another card is less expensive for the merchant **[*9]** to accept. (*Id.*) In turn, any incentive for Visa, Mastercard, and Discover "to compete with Amex *or with one another* on the level of merchant fees" is removed. (*Id.*) Absent the Anti-Steering Rules, merchants could—and would—use "a number of different procompetitive steering devices to encourage cardholders to use a lower- cost credit card." (*Id.* ¶ 84.) This steering, Plaintiffs allege, would have many procompetitive virtues, including: "fostering horizontal competition between the four [credit card] networks; driving supra-competitive prices to merchants and two-sided [credit card] transaction prices down to a competitive level by letting market forces, not Amex's restraints, determine the price; and increasing the number of credit and charge card transactions in the relevant markets." (*Id.* ¶ 85.) Plaintiffs allege that the Anti-Steering Rules have stifled this competition and have caused and continue to cause higher credit card transaction prices, a lower volume of overall credit card transactions, and higher consumer retail prices on goods and services purchased throughout the country. (*Id.* ¶ 94.)

Plaintiffs allege that the Anti-Steering Rules do not just insulate Amex from competition, **[*10]** but also result in higher merchant fees charged by Visa, Mastercard, and Discover as well. (*Id.* ¶ 107.) This is because "[a]bsent merchant steering, a credit card provider cannot expect to receive any competitive benefit for offering a price below that of its competitors." (*Id.* ¶ 110.) As a result, Visa, Mastercard, and Discover have all raised their merchant fees. (*Id.* ¶¶ 70, 116, 117.) And, with steering in place, the total number of credit card transactions, and the volume of those transactions, would also increase. (*Id.* ¶¶ 121-124.)

Plaintiffs allege that without the Anti-Steering Rules, merchants, seeking cost savings, would steer customers to other credit card networks because Amex's merchant fees are generally the highest. That steering would motivate competition between all credit card networks to lower merchant fees in an attempt to convince merchants to steer customers to their network. That market competition would drive down the costs merchants paid to credit card networks. As a result, instead of passing along higher merchant fees as higher retail costs, merchants would pass on these merchant fee cost-savings in the form of lower retail prices "on everything, to every consumer." **[*11]** (Compl. ¶ 127.) Instead, with the Anti-Steering Rules in place, "[h]arm to Plaintiffs and class members occurs at the time of each retail purchase from all [credit card]-accepting merchants in every State." (*See generally id.* ¶¶ 125-129.)

D. Procedural History

Plaintiffs Oliver, O'Keefe, Valdes, Amend, Burdette, Reid, and Draper previously brought claims for relief in this court against Amex based on the same facts and circumstances as alleged herein. These actions were consolidated under *Jaynes et al. v. Am. Ex. et al.*, 15-CV-1598 (E.D.N.Y. July 7, 2015). After the Second Circuit's decision in *U.S. v. Amex*, the parties executed a tolling agreement, in which Plaintiffs agreed to dismiss their claims against Amex without prejudice with the right to re-file those claims within sixty days after all rights of appeal in *U.S. v. Amex* were exhausted. Plaintiffs subsequently filed their complaint in this action on January 29, 2019. (Compl.) On July 24, 2019, Amex filed a fully briefed motion to dismiss the complaint. (*See* Amex Mem. in Supp. of Mot. ("Mem.") (Dkt. 38); Pls. Mem. in Opp. to Mot. ("Opp.") (Dkt. 40); Amex Reply in Supp. of Mot ("Reply.") (Dkt. 32).)

II. LEGAL STANDARD

A. Rule12(b)(1) [*12]

HN1[] Under *Rule 12(b)(1)*, a district court should dismiss a case when it "lacks statutory or constitutional power to adjudicate it." *Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)*. In reviewing a motion to dismiss under *Rule 12(b)(1)*, the court must accept all material factual allegations in the complaint as true, but should not draw "argumentative inferences favorable to the party asserting jurisdiction." *Atl. Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd., 968 F.2d 196, 198 (2d Cir. 1992)* (citing *Norton v. Larney, 266 U.S. 511, 515, 45 S. Ct. 145, 69 L. Ed. 413 (1925))*. The court may refer to evidence outside the pleadings. *See* *Makarova, 201 F. 3d at 113* (citing *Kamen v. American Tel. & Tel. Co., 791 F. 2d 1006, 1011 (2d Cir. 1986)* (stating that "evidentiary matter may be presented by affidavit or otherwise" under a *Rule 12(b)(1)* motion)). The plaintiff bears the burden of showing, by a preponderance of the evidence, that the court has subject matter jurisdiction over its claims. *See id.*

B. *Rule 12(b)(6)*

HN2[] To survive a *Rule 12(b)(6)* motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A complaint must contain facts that do more than present a "sheer possibility that a defendant has acted unlawfully." *Iqbal, 556 U.S. at 678*. To decide Defendants' motion to dismiss, the court "will accept all factual allegations in the [c]omplaint as true and draw all reasonable inferences in [Plaintiffs'] favor." *L-7 Designs, Inc. v. Old Navy, LLC, 647 F.3d 419, 429 (2d Cir. 2011)*. However, the court will "identify[] pleadings that, because they are no more **[*13]** than conclusions, are not entitled to the assumption of truth." *Iqbal, 556 U.S. at 679*. The court must then evaluate the "well-pleaded factual allegations" and "determine whether they plausibly give rise to an entitlement to relief." *Iqbal, 556 U.S. at 679*. This plausibility analysis "does not impose a probability requirement at the pleading stage," but requires the complaint to provide "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegality." *Arista Records, LLC v. Doe 3, 604 F.3d 110, 120 (2d Cir. 2010)* (quoting *Twombly, 550 U.S. at 556*).

III. DISCUSSION

A. Federal Claims

HN3[] *Section 16* of the Clayton Act entitles "[a]ny person, firm, corporation, or association" to sue for injunctive relief "against threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26*. At the pleading stage, "[a]n antitrust plaintiff must show both constitutional standing and antitrust standing." *Gelboim v. Bank of Am. Corp., 823 F.3d 759, 770 (2d Cir. 2016)*; *see also* *Eastman Kodak Co. v. Henry Bath LLC, 936 F.3d 86, 94 (2d Cir. 2019)*. Amex claims that Plaintiffs have not met either burden.

1. Article III Standing

HN4[] To satisfy the "irreducible constitutional minimum" of Article III standing, a plaintiff must demonstrate (1) an "injury in fact," (2) a "causal connection" between the injury and complained-of conduct, and (3) a likelihood "that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. The second and third requirements of **[*14]** standing, "causation" and "redressability," require a plaintiff to demonstrate that the "injury-in-fact" she suffers is "fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)*.

a. Injury in Fact

Plaintiffs' adequately allege an injury-in-fact: that they "pa[y] more for goods and/or services purchased from merchants . . . than they otherwise would and will pay in the absence of Amex's restraints." (Compl. ¶ 152.) Amex does not dispute that this type of economic harm is sufficient for the purposes of standing.

b. Traceability

A more difficult question concerns whether Plaintiffs' respective injuries are "fairly traceable" to Amex's Anti-Steering Rules. ***HN5***[] "The traceability requirement for Article III standing means that the plaintiff must demonstrate a causal nexus between the defendant's conduct and the injury." *Rothstein v. UBS AG, 708 F.3d 82, 91 (2d Cir. 2013)*. *Rothestein* explained that "[t]he requirement that a complaint allege an injury that is fairly traceable to defendants' conduct for the purposes of constitutional standing is a lesser burden than the requirement that it show proximate cause." *Id. at 92*. Thus, a plaintiff "does not lack standing simply by virtue of the indirectness of **[*15]** his or her injury." *Heldman v. Sobol, 962 F.2d 148, 156 (2d Cir. 1992)*; *see also id.* ("[P]laintiffs' injury would satisfy the fairly traceable requirement if they had alleged all the links in the chain of causation."). This "lesser burden" as between traceability and proximate cause is "particularly [true] at the pleading stage." *Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309, 346 (2d Cir. 2009)*, *rev'd on other grounds*, *564 U.S. 410, 131 S. Ct. 2527, 180 L. Ed. 2d 435 (2011)*. Accordingly, "the fact that there is an intervening cause of the plaintiff's injury may foreclose a finding of proximate cause but is not necessarily a basis for finding that the injury is not 'fairly traceable' to the acts of the defendant." *Rothstein, 708 F.3d at 92*.

Here, Plaintiffs meet this low burden. Plaintiffs allege that, absent the Anti-Steering Rules, merchants would steer customers to the credit card networks that charged merchants the lowest merchant fee. This would precipitate price competition between credit card companies on the merchant side of the transaction, *i.e.* incentivize credit card networks to lower their merchant fees to attract merchant business. Those lower fees would lead to increased savings for merchants, a portion of which they would pass on in the form of lower retail prices to Plaintiffs.

Accepting these allegations as true, Plaintiffs have met their "relatively modest" **[*16]** burden to demonstrate traceability. Plaintiffs' allegations rely on certain basic economic assumptions about supply and demand: that, for instance, credit card networks would respond to merchant demand for lower fees and that merchants would respond to consumer demand for lower prices and pass on a certain amount of savings. While raising potential proximate cause problems, ***HN6***[] such assumptions are acceptable at the pleading stage to meet the traceability requirement, especially in the antitrust context. *See* *Adams v. Watson, 10 F.3d 915, 923 (1st Cir. 1993)* (allegations of economic harm "based on standard principles of supply and demand" are "routinely credited by courts in a variety of contexts"); *Ill. Brick Co. v. Illinois, 431 U.S. 720, 758, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)* (Brennan, J., dissenting) (noting that antitrust cases often involve "tracing a cost increase through several levels of a chain of distribution").

The court finds the reasoning in *Osborn v. Visa* persuasive. *797 F.3d 1057, 418 U.S. App. D.C. 193 (D.C. Cir. 2015)*. In *Osborn*, users and operators of independent automatized teller machines ("ATMs") brought suit against Visa, Mastercard, and certain affiliated banks alleging anticompetitive schemes for pricing ATM access fees. *Osborn, 797 F.3d at 1060*. When a cardholder uses an independent ATM, two fees are paid: (1) the cardholder's bank pays an "interchange" fee to the **[*17]** ATM; and (2) the ATM pays a network fee to the ATM network (operated by, among other companies, Visa and Mastercard) that connects the ATM to the cardholder's bank. *Id. at 1060-61*. The difference between those two fees (the "net interchange fee") represents a portion of the ATM operator's profit. In addition to the net interchange fee collected each time a consumer uses an ATM, ATM operators also collect revenue from ATM access fees which are paid directly by the cardholder. *Id.* In *Osborn*, plaintiffs alleged that Visa and Mastercard generally charged relatively higher network fees (meaning the net interchange fee for the ATM operator would be lower) while competing networks charged comparatively lower network fees (meaning that the net interchange fee for the ATM operator would be greater). *Id.*

Visa and Mastercard imposed non-discrimination provisions as conditions for ATM operators to access their network. *Id.* These provisions provided that "no ATM operator may charge customers whose transactions are processed on Visa or Mastercard networks a greater access fee than that charged to any customer whose transaction is processed on an alternative ATM network." *Id. at 1061*. As the court explained, these "anti-steering" **[*18]** provisions meant that "operators cannot say to cardholders: 'We will charge you $ 2.00 for a MasterCard or Visa transaction, but if you [use a lower-cost card], we will charge you only $ 1.75.'" *Id.* Plaintiffs alleged that these non-discrimination provisions prevented independent ATM operators from incentivizing cardholders to choose and use cards "that are most efficient and less costly than either Visa or Mastercard's." *Id.*

Particularly relevant to the present motion, the court in *Osborn* described the theory of harm of the plaintiff-consumers (who, unlike the ATM operators, were themselves not subject to the non-discrimination provisions) as follows:

> The consumers' theory of harm complements that of the operators. The consumers allege that they pay inflated access fees when they visit ATMs. They believe that the Access Fee Rules inhibit competition in both the network services market and the market for ATM access fees. But for the [nondiscrimination provisions], some ATM operators would offer discounted access fees for cards linked to lower-cost ATM networks, and this discounting would create downward pressure on access fees generally.

Id. at 1064. Rejecting the district court's determination **[*19]** that plaintiffs' allegations constituted an "attenuated, speculative chain of events that relies on numerous independent actors . . . that fails both because of uncertainty of several individual links and because of the number of speculative links that must hold for the chain to connect the challenged acts to the asserted particularized injury," the court held plaintiffs had standing, emphasizing that "[a] *Rule 12(b)(1)* motion . . . is not the occasion for evaluating the empirical accuracy of an economic theory." *Id. at*

1064-65. To the contrary, because "the economic facts alleged by the Plaintiffs are specific [and] plausible . . . they pass muster for standing purposes at the pleadings stage." Id. at 1066.

Osborn's logic applies here. Relying on the same basic economic assumptions regarding competition and supply and demand as the consumer-plaintiffs in *Osborn*, Plaintiffs here allege specific facts supporting the causal link between Amex's Anti-Steering Rules and their economic harm. According to Plaintiffs, Amex's Anti-Steering rules insulate both Amex and its competitors from competition on fees charged to merchants. (Compl. ¶¶ 82-84.) Plaintiffs allege that between 2012 and 2015, because of a lack of incentive to compete **[*20]** on the merchant side of the market, Visa and Mastercard merchant fees have grown an average of 8.5% per year and that Visa announced a further fee increase in October 2018. (*Id.* ¶ 117.) At the same time, Plaintiffs allege that Amex raised its merchant fees on twenty separate occasions between 2005 and 2010 without losing any appreciable market share. (*Id.* ¶ 104.) Plaintiffs also highlight Discover's experience with its "low-cost pricing strategy" in the late 1990s, in which Discover sought to "capture market share from disgruntled merchants" by "provid[ing] a low-priced network for credit card services." (*Id.* ¶ 108.) However, the Anti-Steering Rules prevented significant market share from shifting to Discover,[2] and Discover "began raising discount rates in order to align itself with its competitors"; today, Discover's merchant fees are "similar to those offered by Visa and Mastercard." (*Id.* ¶¶ 108-109.) Finally, Plaintiffs allege that increased competition would lead to lower merchant fees and savings for merchants, and that "merchants will pass-on cost saving from reduced merchant fees in the form of lower retail prices." (*Id.* ¶ 127.) Taken together, these allegations plausibly state **[*21]** the necessary causal connection between Amex's Anti-Steering Rules and Plaintiffs' injury required for traceability under Article III at the pleading stage.

c. Redressability

HN7[] The third and final requirement for Article III standing is redressability. Amex focuses its argument on this prong, arguing that "because Plaintiffs' alleged multiple-step theory of causation depends on the actions of multiple third-party payment networks as well as merchants, it is entirely speculative that any relief that could be awarded in this case against Amex would redress the injury alleged." (Mem. at 5-6.) The court disagrees.

The redressability inquiry "focuses . . . on whether the injury that a plaintiff alleges is likely to be redressed through the litigation." *Sprint Comms. Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 286-87, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008)*. To satisfy the redressability requirement, a plaintiff must establish that "it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit." *Id. at 273-74* (citing *Lujan, 504 U.S. at 560-61*). Importantly, the redressability prong does not require that court-ordered relief completely redress all injury, s*ee* *Knight First Amendment Inst. at Columba Univ. v. Trump, 302 F. Supp. 3d 541, 561 (S.D.N.Y. 2018)*, and it "is not a demand for mathematical certainty," *Mhany Mgmt., Inc. v. County of Nassau, 819 F. 3d 581, 602 (2d Cir. 2016)*. As the Second Circuit recently explained, **[*22]** redressability is "an issue that is closely related to the question of causation." *Citizens for Responsibility and Ethics in Washington v. Trump, 939 F.3d 131, 147 (2d Cir. 2019)* ("*CREW*"). "When the injury alleged is caused by the illegal conduct, in many instances (at least where continuation of the illegal conduct will continue to cause harm), the cessation of the illegal conduct will be likely to at least diminish further instance of the injury." *Id.*

The principle announced in *CREW* applies with full force here. Because Plaintiffs' have adequately plead causation (for the purposes of standing at the pleadings stage), it follows that the "cessation of the illegal conduct"—Amex's Anti-Steering Rules—will "at least diminish further instance of the injury"—higher retail prices paid by Plaintiffs. That cessation could be achieved by the injunction Plaintiffs seek. Amex argues that Plaintiffs' injury would not be diminished by such an injunction "because the relationship between the [Anti-Steering Rules] and the price Plaintiffs pay for goods and services is so tenuous." (Mem. at 6.) While Amex frames this argument in terms of redressability, it really is one of traceability—*i.e.* the causal relationship between the injury and the conduct is too speculative and

[2] Not to mention that, as perhaps one of the clearest signs of the anti-competitive nature of the credit card market, there "has been no successful entry into the [credit card] market since Discover in 1985"—more than three decades ago. (Compl. ¶ 38.)

attenuated. Yet, as **[*23]** explained above, Plaintiffs have adequately pleaded traceability for the purposes of Article III standing, and Amex's argument therefore fails.

Accordingly, the court holds that Plaintiffs have Article III standing.

2. Antitrust Standing

Amex next argues that Individual Plaintiffs and the putative Nationwide Class lack antitrust standing to pursue their claims. ***HN8***[] At the motion to dismiss stage, "a private antitrust plaintiff must plausibly allege (a) that it suffered a special kind of antitrust injury, and (b) that it is a suitable plaintiff to pursue the alleged antitrust violation and thus is an efficient enforcer of the antitrust laws." *In re London Silver Fixing, Ltd., Antitrust Litig., 213 F. Supp. 3d 530, 549 (S.D.N.Y. 2016)*. Because the court finds that Plaintiffs are not efficient enforcers of the ***antitrust law***, it will not address whether they have plausibly alleged antitrust injury.

As the Second Circuit has explained:

> The efficient enforcer inquiry turns on: (1) whether the violation was a direct or remote cause of the injury; (2) whether there is an identifiable class of other persons whose self-interest would normally lead them to sue for the violation; (3) whether the injury was speculative; and (4) whether there is a risk that other plaintiffs would be entitled to **[*24]** recover duplicative damages or that damages would be difficult to apportion among possible victims of the antitrust injury.

Gelboim, 823 F. 3d at 772; *see also Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters ("AGC")*, *459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (the "*AGC* factors"). "[These] factors reflect a concern about whether the putative plaintiff is a proper party to perform the office of a private attorney general and thereby vindicate the public interest in antitrust enforcement." *Gelboim, 823 F. 3d at 780*. "These four factors need not be given equal weight," and "the relevant significance of each factor will depend on the circumstances of the particular case." *IQ Dental Supply Inc. v. Henry Schein, Inc., 924 F. 3d 57, 65 (2d. Cir. 2019)*.

This court recently applied the *AGC* factors to determine that a class of merchants who did not accept Amex (the "Non-Amex Class") were not efficient enforcers to challenge Amex's Anti-Steering Rules. *See Non-Amex Merchants, 433 F. Supp. 3d 395, 2020 U.S. Dist. LEXIS 7095, 2020 WL 227425, at *6-11*. There, this court held that (1) the Non-Amex Class's alleged harm was not sufficiently direct to Amex; (2) there was an identifiable other class of more direct victims—namely, the class of merchants who accept Amex—which has "litigated the same issue, and remains free to do so pursuant to the arbitration process laid out in their agreement with Amex"; (3) that "Plaintiffs' damages **[*25]** calculation would necessarily rest on multiple layers of speculation"; and (4) that the availability of other enforcement mechanisms "reinforce[d] the conclusion that the remaining Plaintiffs are not efficient enforcers of the antitrust laws." *Id.*

a. Directness

HN9[] "Directness in the antitrust context means close in the chain of causation." *Gatt Comms., Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 78 (2d Cir. 2013)* "The overall inquiry is akin to proximate cause in tort law—plaintiffs may not be too remote so as to avoid duplicative recovery and limitlessly increase the universe of potential plaintiffs." *Harry v. Total Gas & Power N. Am., Inc., 889 F.3d 104, 116 (2d Cir. 2018)*. As a general matter, those entities most directly injured by anticompetitive conduct are customers or competitors of the defendant. *See In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 159 (2d Cir. 2016)*.

Nonetheless, a plaintiff who is not a customer or competitor may suffer a direct injury if it is "a participant in the very market directly distorted by the antitrust violation" and its injury is "inextricably intertwined with the injury the [defendants] sought to inflict." *Id. at 159, 160*; *see also SAS of PR, Inc. v. PR Telephone Co., 48 F.3d 39, 46 (1st Cir. 1995)*. "[T]o assess the plausibility of a putative plaintiff's claim to antitrust injury as being inextricably intertwined with the injury the defendants ultimately sought to inflict," this court must "ask whether the plaintiff was manipulated or utilized **[*26]** by defendant as a fulcrum, conduit[,] or market force to injure competitors or participants in the relevant product and geographical markets." *In re Aluminum Warehousing, 833 F.3d at 161*.

Plaintiffs are indisputably participants in the two-sided credit card market—the very market allegedly distorted by Amex's actions. The question is thus whether their supposed injury is inextricably intertwined with the injury Amex sought to inflict. It is not, for many of the same reasons that the alleged injury of the Non-Amex Class was not.[3] The crux of Plaintiffs' argument is that Amex's Anti-Steering Rules have led Visa, Mastercard, and Discover to raise merchant fees more than they would have absent the Anti-Steering Rules (and that, absent the Anti-Steering Rules, those competitors would all *lower* their merchant fees). (*See, e.g*. Compl. ¶¶ 125-129.) In turn, merchants have passed on increased costs to consumers. This is exactly the argument this court rejected in *Non-Amex Merchants*. There, the court explained that "Amex was not, according to the allegations in the complaint, using its market power to force its competitors to charge higher merchant fees across the board." *Non-Amex Merchants, 433 F. Supp. 3d 395, 2020 U.S. Dist. LEXIS 7095, 2020 WL 227425 at *8*. Instead, it "forc[ed] those merchants who did accept its cards **[*27]** to refrain from steering customers towards other cards and, in so doing, insulated its ability to charge those merchants ultracompetitive fees." *Id.* Even if "[p]laintiffs [were] right that this had an effect on the fees other credit card networks charged to the Non-Amex Class, . . . any such effect was incidental to Amex's alleged anticompetitive behavior." *Id; see also 433 F. Supp. 3d 395, 2020 U.S. Dist. LEXIS 7095, [WL] at * 9* ("Plaintiffs allegations involve Amex's competitors reacting—perhaps in predictable ways—to a contractual provision entered into between Amex and the Amex Class.").

Here, Plaintiffs rely on the same unpersuasive argument to try and bridge the causal gap. The complaint alleges that "no longer insulated from price competition on the merchant side of the [credit card] platform [absent the Anti-Steering Rules], the four [credit card] networks would compete on price to merchants, and therefore merchant fees and the two-sided transaction price would be lower." (Compl. ¶ 126.) That logic—Amex's Anti-Steering Rules have caused Visa, Mastercard, and Discover to make decisions that have led to increased cost for Plaintiffs—under—girds Plaintiffs' entire theory. Yet, Plaintiffs do not allege that Amex's Anti-Steering Rules **[*28]** are a "direct agreement with any other party to manipulate or limit entry into the credit card market," *Non-Amex Merchants, 433 F. Supp. 3d 395, 2020 U.S. Dist. LEXIS 7095, 2020 WL 227425 at *8*, and, like the Non-Amex Class, fail to demonstrate how the fees charged by Amex's competitors (that, absent the Anti-Steering Rules, would have been lower and therefore led to reduced costs to consumer) are not "incidental to Amex's alleged anti-competitive behavior," *id.*

In arguing that Plaintiffs' alleged injury is sufficiently close to Amex's anticompetitive behavior for Plaintiffs to be efficient enforcers, Plaintiffs rely solely on *Ohio* and its articulation of the "two-sided market." (Opp. at 8-9.) Plaintiffs argue that "in the context of the two-sided market for [credit card] transactions . . . Amex, Visa, Mastercard, and Discover provide transactions that are 'jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment.'" (*Id.* (quoting *Ohio, 138 S. Ct. at 2286*).) Therefore, Plaintiffs contend, Plaintiffs and merchants are "cohabitants" on the credit-card platforms, and "Plaintiffs' injury flows from having a direct relationship with the other three [credit card] networks." (Opp. at 9.)

Plaintiffs are of course correct that *Ohio* ***[*29]*** held that the credit card market is a "two-sided market" that "facilitate[s] a single, simultaneous transaction between participants," each one of which is "jointly consumed" by a cardholder and a merchant. *Ohio, 138 S. Ct. at 2286-87*. Yet, this observation does not change the fact that the theory of Plaintiffs' injury relies on the actions taken by "the three other [credit card] networks," actions this court has held to be "incidental" to Amex's alleged anticompetitive behavior. *See Non-Amex Merchants, 433 F. Supp. 3d*

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[3] Amex argues that Plaintiffs have not alleged a direct injury and instead present only a so-called umbrella theory of liability. (Mem. at 11-13.) The Second Circuit has not yet explicitly addressed the viability of antitrust claims that rely on an umbrella theory of liability, but it has expressed concerns about allowing such claims to proceed. *See Gelboim, 823 F.3d at 779* (noting that allowing claims under an umbrella theory of liability could "vastly extend the potential scope of antitrust liability" and could allow recovery for "damages disproportionate to wrongdoing."). Because the court holds that Plaintiffs are not efficient enforcers under the *AGC* factors, it need not rule on whether an umbrella theory of liability may ever create antitrust standing (or if umbrella standing concerns alone should determine that Plaintiffs are not efficient enforcers).

395, 2020 U.S. Dist. LEXIS 7095, 2020 WL 227425, at *8. Further, as Amex points out, the two-sided credit card market in which both Amex and Plaintiffs are participants "involve multiple suppliers and consumers," not all of whom have a direct relationship. (Reply at 4.) To endorse Plaintiffs' argument would be to find that all consumers have a direct relationship with all suppliers without an inquiry into the actual relationship between the parties in question. This would not "reflect a concern about whether the putative plaintiff is a proper party to . . . vindicate the public interest in antitrust enforcement," Gelboim, 823 F. 3d at 772, and the court declines to adopt such a rule here.

b. Identifiable Class of Other More Direct Victims

HN10[] The second efficient-enforcer factor recognizes "that not every victim **[*30]** of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced." Gelboim, 823 F.3d at 779. This is particularly relevant, where, as here, multiple sets of plaintiffs have sued the defendant over the same alleged antitrust violations. *See* IQ Dental, 924 F.3d at 66. In this case, there is an obvious class of "better positioned" victims who have been "more directly injured by the alleged antitrust [violation]" than Plaintiffs—the class of Amex merchants who are bound by Amex's Anti-Steering Rules. *Id.* Plaintiffs' assertion that Plaintiffs "bear the brunt of the alleged antitrust violation" (Opp. at 9), is unconvincing in light of the existence of that class of Amex-accepting merchants. *See* IQ Dental, 924 F. 3d at 66 ("Given that [the plaintiff] is further removed from the harm caused by Defendants than the parties directly affected by the boycott that have already sued the Defendants, the second efficient-enforcer factor weighs against [the plaintiff's] antitrust standing.").

Daniel v. American Bd. of Emergency Medicine does not compel a different result. 428 F.3d 408 (2d Cir. 2005). Plaintiffs note that, in *Daniel*, the Second Circuit affirmed denial of antitrust standing for a plaintiff "which was without 'natural economic **[*31]** self-interest' to reduce costs and favoring antitrust standing for ultimate payors which bore [the] brunt of alleged overcharges." (Opp. at 10 (quoting Daniel, 428 F.3d at 444).) In contrast, Plaintiffs here argue they are "significantly motivated [to pursue their claims] due to their natural economic self-interest in paying the lowest price possible." In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 689 ("DDAVP") (2d Cir. 2009). That fact alone, however, is not enough to sway this factor in Plaintiffs' favor because "denying [them] a remedy on the basis of [their] allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied." IQ Dental, 924 F.3d at 66. Here, as in *Daniel*, there are other parties better suited to "vindicate the public interest in antitrust enforcement" than Plaintiffs. Daniel, 428 F. 3d at 443.

c. Speculative Nature of the Injury

HN11[] The existence of only "highly speculative damages is a sign that a given plaintiff is an inefficient engine of enforcement." Gelboim, 823 F.3d at 779. "At the same time, some degree of uncertainty stems from the nature of ***antitrust law***." *Id.* "Impediments to reaching a reliable damages estimate often flow from the nature and complexity of the alleged antitrust violation." Id. at 780. Here, like in *Non*-Amex *Merchants*, Plaintiffs' claim "would involve assessing the **[*32]** pricing decision on Amex's nonparty competitors, all of whom are competing against one another as well as against Amex on both sides of the two-sided market." 433 F. Supp. 3d 395, 2020 U.S. Dist. LEXIS 7095, 2020 WL 227425 at *10. As this court explained:

> [T]he calculation involves several stages of speculation: how much steering would occur if merchants accepting Amex cards were permitted to engage in it? What effect would this have on Amex's merchant fees? What effect would any change in Amex's merchant fees have on the decisions of its competitors regarding their own merchant fees? And, perhaps most important in terms of the speculative nature of this clam, how would those decisions trickle over into the parallel situation of the Non-Amex Class members?

Id. Here, too, those questions remain unanswered—the most important of which, for these Plaintiffs, is how these decisions would trickle over into the retail costs charged to non-Amex consumers.

DDAVP does not tilt this factor toward Plaintiffs' favor. In that case, direct purchasers of a drug called DDAVP brought suit against the drug's brand name manufacturer alleging that the brand name manufacturer inflated DDAVP's price by suppressing generic competition in violation of the antitrust laws. *DDAVP, 585 F.3d at 682*. The **[*33]** Second Circuit held that, under the third efficient-enforcer factor, plaintiffs' harm was not overly speculative because there was clear evidence that "generic manufacturers would have decided to compete for DDAVP sales," because those "manufacturers [had] sought approval for generic DDAVP when [the defendants' patent] was still enforceable." *Id. at 689*. Thus, the panel held that while "it may be difficult to account precisely for the likely effects of generic competition . . . we have little doubt that those effects can be sufficiently estimated and measured." *Id.* Here, though, there is not a similarly tight nexus between the anticompetitive behavior and the harm, and simply asserting that there will be "competition on the merchant side of the market" absent Amex's Anti-Steering Rules does not address the numerous open questions regarding the pricing decisions of Amex's competitors. While "such exogenous factors are, to be sure, insufficient by themselves to defeat antitrust standing; nonetheless, their presence is relevant to the efficient enforcer analysis." *Non-Amex Merchants, 433 F. Supp. 3d 395, 2020 U.S. Dist. LEXIS 7095, 2020 WL 227425 at *10*.

d. Duplicative Recovery and Complex Apportionment

As a preliminary matter, Plaintiffs argue that this factor is "not relevant to Plaintiffs' **[*34]** federal claim for injunctive relief," and Amex agrees. (*See* Opp. at 7 n.11 (citing *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 111 n.6, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*; Mem at 16.) In *Cargill*, the Supreme Court explained that ***HN12***[] "because standing under *§ 16* [of the Clayton Act] raises no threat of multiple lawsuits or duplicative recoveries, some of the factors other than antitrust injury that are appropriate to a determination of standing under *§ 4* are not relevant under *§ 16*." *Cargill, 479 U.S. at 111 n. 6*.

Whether or not *Cargill* is applicable to this case, the court finds the other *AGC* efficient-enforcer factors all cut strongly against the Plaintiffs, and, accordingly, finds that Plaintiffs have not established federal antitrust standing. Therefore, Count I is dismissed with prejudice.

B. Count II—State Antitrust Claims

Under Count Two, Plaintiffs bring claims alleging antitrust violations under the laws of 28 jurisdictions. (Compl. ¶¶ 154-187.) Amex moves for dismissal of those claims on two grounds. First, Amex argues that Plaintiffs lack Article III standing to assert claims on behalf of consumers in 22 states for which Plaintiffs have not named any resident Plaintiffs. (*See* Mem. at 13-18.) Second, Amex contends that Plaintiffs have failed to plead antitrust standing under the laws of the remaining 10 states in which the named **[*35]** Plaintiffs reside. (*Id.*) For the following reasons, Amex's motion is granted in part and denied in part.

1. Non-Resident Plaintiff Standing

Plaintiffs seek to certify 32 separate state damages classes. (Compl. ¶ 138.) While the Complaint alleges named Plaintiffs for 10 of those jurisdictions, it does not identify individual resident Plaintiffs for the remaining 22.[4] Amex argues that "this is fatal" because "the law is clear that Plaintiffs lack Article III standing to assert claims on behalf of consumers in the 22 states for which Plaintiffs have no named any resident plaintiff." (Mem. at 14.)

Amex is wrong. In *Langan v. Johnson & Johnson Consumer Cos., Inc.*, the Second Circuit held that ***HN13***[] "as long as the named plaintiffs have standing to sue the named defendants, any concern about whether it is proper for a class to include out-of-state, nonparty class members with claims subject to different state laws is a question of predominance under *Rule 23(b)(3)* . . . not a question of adjudicatory competence under Article III." *897 F.3d 88, 93*

[4] These jurisdictions are: Alabama, Arizona, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Rhode Island, South Dakota, Utah, Vermont, West Virginia, and Wisconsin. (Mem. at 15.)

(2d Cir. 2018). In its reply, Amex responds that *Langan* does not apply because the parties there agreed that the named plaintiff had standing to sue, whereas, in this case, "no Plaintiff named in the **[*36]** Complaint has standing to bring a claim under the law of the state where he or she purports to sue as an individual." (Reply at 10.) However, as discussed below, the individual named plaintiffs residing in Kansas, North Carolina, Oregon, and Tennessee have standing to bring claims under the antitrust laws of the states in which they reside. Therefore, under the plain language of *Langan*, Plaintiffs have standing to bring claims under the antitrust laws of the 22 states in which no named Plaintiff resides.

2. Resident Named Plaintiff Standing.

The named Plaintiffs reside in 10 states: California, Florida, Kansas, Massachusetts, Nevada, New Mexico, New York, North Carolina, Oregon, and Tennessee. (Compl. ¶¶ 12-21.) In Count Two, Plaintiffs allege claims under the antitrust laws of California, Kansas, Nevada, New Mexico, New York, North Carolina, Oregon, and Tennessee. (*Id.* ¶¶ 154-187.) Amex argues that Plaintiffs lack antitrust standing to bring claims under the antitrust laws of these states because each has adopted the *AGC* factors for antitrust standing, and Plaintiffs fail that test. (Mem. at 15-18.) Amex also argues that Plaintiffs lack standing to sue under Tennessee law because Plaintiffs **[*37]** are neither direct nor indirect purchasers. (*Id.* at 17-18.) Plaintiffs argue that they have standing because New York, California, Kansas, Oregon, North Carolina, do not apply the *AGC* test. (Opp. at 14-15.) Plaintiffs also argue they have standing under Tennessee law. (*Id.*)

HN14[] A federal court adjudicating state law "look[s] to the state's decisional law, as well as to its constitution and statutes." *Santalucia v. Sebright Transp., Inc., 232 F.3d 293, 297 (2d Cir. 2000)*. When the state law is unsettled, the court "is obligated to carefully predict how the state's highest court would resolve the uncertainty or ambiguity." *Id.* The court must give the "fullest weight" to the pronouncements of the state's highest court while giving "proper regard" to the rulings of the state's lower courts. *Id.*

a. California

In *Non-Amex Merchants*, this court had occasion to examine whether antitrust standing under California state law is properly analyzed under the same framework used to determine federal antitrust standing. *Non-Amex Merchants, 433 F. Supp. 3d 395, 2020 U.S. Dist. LEXIS 7095, 2020 WL 227425, at *12*. While noting that "courts have disagreed on the issue," this court found the California state court decision *Vinci v. Waste Mgmt., Inc., 36 Cal. App. 4th 1811, 43 Cal. Rptr. 2d 337, 338-39 (Cal. Ct. App. 1995)* persuasive and held that it would "apply the federal factors to analyze antitrust standing under California law." *Non-Amex Merchants, 433 F. Supp. 3d 395, 2020 U.S. Dist. LEXIS 7095, 2020 WL 227425, at *12*. Plaintiffs have not advanced any new arguments to convince **[*38]** the court to reconsider its decision in *Non-Amex Merchants*. Therefore, the court applies the *AGC* factors to Plaintiffs' claim under California ***antitrust law***, and dismisses Plaintiffs' claim for the reasons stated above.

b. Kansas

Amex cites no state court cases applying the *AGC* factors to determine antitrust standing under Kansas law. Instead, Amex cites one federal district court opinion as support for its position. (*See* Mem. at 16 (citing *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, No. 09-cv-3690, *2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at *9 (N.D. Ill. June 29, 2015)* ("*Dairy Farmers*")).) Plaintiffs, for their part, also cite a single federal district court opinion to argue that the court should not apply the *AGC* factors to claims brought under Kansas' ***antitrust law***. (Opp. at 17 (citing *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig., 383 F. Supp. 3d 187, 259 (S.D.N.Y. 2019)* ("*Keurig*")).)

While the lack of Kansas authority makes it a close decision, the court finds that Plaintiffs and the *Keurig* court have the better argument. In *Keurig*, Judge Broderick conducted a review of the limited authority from Kansas courts—including an unpublished trial court opinion and federal district court cases—and concluded that "[t]hese cases do not clearly lead to the conclusion that the Kansas Supreme Court would apply the *AGC* factors in accordance with **[*39]** federal precedents." *Id.* Furthermore, *Keurig* explained that:

> The harmonization provision in the Kansas Restraint of Trade Act does not alter this conclusion. *Subsection (b)* states, "Except as otherwise provided in *subsections (d)* and *(e)*, the Kansas restraint of trade act shall be construed in harmony with ruling judicial interpretations of federal ***antitrust law*** by the United States supreme court." *Kan. Stat. Ann. § 50-163*. *Subsection (d)* states, "The Kansas restraint of trade act shall not be construed to prohibit . . . actions or proceedings by indirect purchasers pursuant to [*Kan. Stat. Ann. §] 50-161*, and amendments thereto . . . ." *Id.* Although it is plausible that the Kansas courts could interpret the harmonization provision to repeal *Illinois Brick* but still require application of the *AGC* factors in accordance with federal precedent, [Defendant] has provided no persuasive authority or argument supporting that reading.

Id. The court agrees, and Plaintiffs' claim under Kansas ***antitrust law*** survives.

c. Nevada and New Mexico

Amex cites persuasive state law authority for the proposition that Nevada and New Mexico apply the *AGC* factors under their respective state antitrust laws. (Mem. at 15-16 (citing *Nev. Recycling and Salvage, Ltd. V. Reno Disposal Co., 423 P.3d 605 (Nev. 2018)*; *Nass-Romero v. Visa U.S.A. Inc., 2012- NMCA 058, 279 P.3d 772 (N.M. Ct. App. 2012))*.) Both cases analyzed the relevant statutory language and case law and concluded **[*40]** that the *AGC* factors should apply to the antitrust standing determination. *Nev. Recycling, 423 P.3d at 607-08*; *Nass-Romero, 279 P.3d at 779-81*. Plaintiffs have not identified any contrary authority. As such, the court concludes that both Nevada and New Mexico would apply the *AGC* factors, and Plaintiffs therefore lack standing to bring claims under Nevada and New Mexico ***antitrust law***. Because Plaintiff Zachary Draper does not have a cause of action under either the Sherman Act or Nevada ***antitrust law***, he is dismissed from this case.

d. New York

HN15[] New York's Donnelly Act prohibits "[e]very contract, agreement, arrangement or combination whereby . . . competition . . . may be restrained." *N.Y. Gen. Bus. Law § 340(1)*. The parties dispute whether *AGC*'s efficient-enforcer factors apply to claims brought under the Donnelly Act. (*See, e.g.*, Mem. at 15-16; Opp. at 16-17.) The New York Court of Appeals has not squarely addressed this question, but it has noted that the Donnelly Act, "should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result." *X.L.O. Concrete Corp. v. Rivergate Corp., 83 N.Y.2d 513, 518, 634 N.E.2d 158, 611 N.Y.S.2d 786 (1994)*. Plaintiffs urge that the Donnelly Act's lack of prohibition from recovery of antitrust plaintiffs who have **[*41]** "not dealt directly with the defendant" is itself indicative of New York's different policy with respect to antitrust such that "it is not conceivable that the state's highest court would apply [the] *AGC* factors to bar Plaintiffs here." (Opp. at 16.) However, in *Gatt*, the Second Circuit explained "[w]e see no reason . . . to interpret the Donnelly Act differently than the Sherman Act with regard to antitrust standing." *Gatt, 711 F.3d at 81*.

Plaintiffs have not pointed to any post-*Gatt* authority from either the Second Circuit or the New York Court of Appeals that compels a different outcome here. Accordingly, the court holds that the *AGC* factors apply to Plaintiffs' claim under New York's Donnelly Act, and dismisses Plaintiffs' claim for lack of antitrust standing for the reasons discussed above.

e. North Carolina

Amex cites a single federal district court case from Illinois for the proposition that North Carolina would apply the *AGC* factors to determine standing under its state ***antitrust law***. (Mem. at 16 (citing *Dairy Farmers, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at *15)*.) Plaintiffs respond that the North Carolina Court of Appeals has held that indirect purchasers have a cause of action under the state's ***antitrust law***, *see* *Hyde v. Abbott Lab, Inc., 123 N.C. App. 572, 473 S.E.2d 680, 688 (N.C. Ct. App. 1996)*, and "that the *AGC* factors do not apply in determining **[*42]** which indirect purchasers have standing to sue under the North Carolina antitrust statutes," *Teague v. Bayer AG, 195 N.C. App. 18, 671 S.E.2d 550, 557 (N.C. Ct. App. 2009)*.

The court finds the Superior Court decision in *Dicesare v. Charlotte-Mecklenburg Hosp. Auth., No. 16-CVS-16404, 2017 NCBC LEXIS 33, 2017 WL 1359599 (N.C. Super. Apr. 11, 2017)*, to be a cogent analysis of the current state of the law on this issue in North Carolina. *Dicesare* involved a suit brought by consumers of various third-party health insurance companies against the market-leading hospital in the Charlotte-Mecklenburg area (the "Hospital"). *2017 NCBC LEXIS 33, [WL] at *1-5*. Plaintiffs alleged that the Hospital required the third-party insurers like Cigna and Blue Cross/Blue Shield ("BCBS") to enter into Anti-Steering provisions which restricted the insurers' ability to steer consumers to insurance plans that included the Hospital's lower-cost competitors. *Id.* The court explained plaintiffs' allegations as follows:

> Plaintiffs allege that they pay for and receive health insurance from Cigna and BCBS. The [Fist Amended Complaint] alleges that the Hospital imposes Anti-Steering Provisions in its contracts with the Four Insurers, which includes Cigna and BCBS. Plaintiffs contend that the Anti-Steering Provisions reduce competition between the Hospital and other providers of acute inpatient hospital services in the Charlotte Area and, as a result, **[*43]** Plaintiffs pay more for health insurance, incur higher out-of-pocket costs, have fewer insurance plans to choose from, and are denied access to truthful information that would enable Plaintiffs to comparison-shop based on cost and quality.

*2017 NCBC LEXIS 33, [WL] at *7*.

In finding that the plaintiffs had standing to assert a claim under the North Carolina ***antitrust law***, the *Dicesare* court made several salient observations. First, the court held that "until the Supreme Court of North Carolina rules otherwise, *Teague* is controlling."[5] *2017 NCBC LEXIS 33, [WL] at *9*. Second, *Dicesare* held that, under *Teague*, plaintiffs were "not required at the pleading stage to prove a causal chain between the Hospital's challenged conduct and the [p]laintiffs' alleged injury." *Dicesare, 2017 NCBC LEXIS 33, 2017 WL 1359599, at *8* (citing *Teague, 671 S.E.2d at 557-58*). Third, unlike the *AGC* analysis, *Dicesare* held that the inherent complexity of antitrust cases—and, specifically, the "complicated questions of causation and damages"—are not "sufficient reason[s] to dismiss for lack of standing." *Id.* Fourth, the court rejected the defendant Hospital's argument that plaintiff consumers lacked standing because the price premium consumers paid to third-party insurance companies was "the result of the independent action of the insurance companies," **[*44]** finding instead that it would be premature to dismiss for lack of standing on those grounds. *2017 NCBC LEXIS 33, [WL] at *9*.

The North Carolina Supreme Court declined to review the trial court's ruling in *Dicesare. See Dicesare v. Charlotte-Mecklenburg Hospital Authority, 370 N.C. 215, 804 S.E.2d 541 (2017)* (order denying writ of certiorari to review order of trial court). While this does not equate to a wholesale adoption of *Dicesare*'s analysis by the high court, it does add persuasive weight to *Teague*'s holding (emphasized by *Dicesare*) that the *AGC* factors "do not apply . . . under the North Carolina antitrust statutes." *Teague, 671 S.E.2d at 557*. Therefore, the court finds that the *AGC* factors do not apply in evaluating Plaintiffs' claim under North Carolina law. Because Plaintiffs' "allegations . . . are sufficient to demonstrate standing," under North Carolina law, *see* *Dicesare, 2017 NCBC LEXIS 33, 2017 WL 1359599, at *7*, the court finds that Plaintiffs' North Carolina antitrust claim survives.[6]

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[5] *Dairy Farmers*, upon which Amex relies, rejected *Teague* for what it called its "sometimes-dubious and often-difficult-to-follow analysis," and chose to rely on an earlier trial court decision in finding that North Carolina courts would apply the *AGC* factors. *Dairy Farmers, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at *15*. ***HN16***[] Yet, a federal court's view that a state appellate court decision is wrongly decided (or would lead to results with which the federal court would disagree) is not grounds for the federal court to ignore the state court's ruling.

[6] Amex cites *Dicesare* for the proposition that, because the North Carolina Supreme Court "has not spoken on the means . . . by which state courts are to distinguish those indirect purchasers who have sustained actual injuries from those who have

f. Oregon

The court is not aware of binding authority from Oregon state courts regarding the application of the *AGC* factors to determine antitrust standing under Oregon law. Amex cites to a federal district court decision predicting that the Oregon **[*45]** Supreme Court would apply the *AGC* factors (Mem. at 15 (citing *In re Dealer Mgmt. Sys. Antitrust Litig., 362 F. Supp. 3d 510, 545 (N.D. Ill. 2019)* (*"Dealer Mgmt."*)), while Plaintiffs cite to a federal district court decision that came to the opposite conclusion. (Opp. at 17 (citing *Keurig, 383 F. Supp. 3d at 261*).) The analysis in *Dealer Mgmt.* is quite limited. There, the court reasoned that "the presence of a statutory harmonization provision (either statutory or common law), absent any countervailing statutory law or case law from a state appellate court, is sufficient to permit a district court to apply federal antitrust standing law—including *AGC*—to claims brought under that state's antitrust laws." *Dealer Mgmt., 362 F. Supp. 3d at 545*. Because Oregon has a statutory harmonization provision, the *Dealer Mgmt.* court held that the *AGC* factors apply under Oregon law. In *Keurig*, by contrast, the court disagreed, explaining that "the Oregon antitrust statute states that federal precedents are persuasive, but not binding," and holding that "[a]bsent any authority from the Oregon state courts regarding the application of the *AGC* factors to determine antitrust standing under Oregon law, [the court] cannot conclude that the Oregon Supreme Court would apply *AGC." Keurig, 383 F. Supp. 3d at 261*.

The court finds *Keurig* to be the more persuasive opinion. ***HN17***[] A harmonization provision **[*46]** in a state's antitrust statute does not *require* a state's Supreme Court to find that state ***antitrust law*** must be analyzed under the federal standard. That is particularly true where, like here, the harmonization provision finds that federal law is "merely persuasive". *Cf. In re Packaged Seafood Products Antitrust Litig., 242 F. Supp. 3d 1033, 1108 (S.D. Cal. 2017)*. Accordingly, the court agrees with Judge Broderick that it "cannot conclude that the Oregon Supreme Court would apply *AGC," Keurig, 383 F. Supp. 3d at 261*, and finds that Plaintiffs have standing under Oregon ***antitrust law***.

g. Tennessee

HN18[] The Tennessee Trade Practices Act ("TTPA") prohibits anti-competitive conduct which tends to lessen "full and free competition in the importation or sale of articles imported into this state . . . or which tend to advance, reduce, or control the price or the cost to the producer or the consumer of any such product . . . ." *Tenn. Code Ann. § 47-25-101*. The TTPA provides a civil remedy to "any person who is injured or damaged by such arrangement." *Id. § 47-25-106*. The Tennessee Supreme Court has held that this includes claims brought by indirect purchasers. *See Freeman Indust., LLC v. Eastman Chem. Co., 172 S.W.3d 512, 519-20 (Tenn. 2005)*.

The court is convinced the Supreme Court of Tennessee would not apply the *AGC* factors. In holding that the TTPA included a right of action for indirect purchasers, the *Freeman* court noted that, **[*47]** unlike other state antitrust

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sustained injuries that are too remote or attenuated to warrant relief," state courts in North Carolina "may still consider the *AGC* factors." (Reply at 7 n.7 (quoting *Dicesare, 2017 NCBC LEXIS 33, 2017 WL 1359599, at *12)*.) This is not an accurate representation of *Dicesare. Dicesare* notes that the state's "Court of Appeals expressly held that the *AGC* factors do not apply in determining which indirect purchasers have standing to sue under the North Carolina antitrust statues." *Dicesare, 2017 NCBC LEXIS 33, 2017 WL 1359599, at *11*. The court goes on to note that "antitrust cases—especially those involving indirect purchasers—will often involve complicated causation and damages issues," and that the state's Supreme Court "has not spoken on this precise complex issue." *Id.* Recognizing the potential burdens and costs faced by the parties should the case continue to discovery and the importance of this issue to the state as a whole, *Dicesare* welcomed state Supreme Court review of its decision, noting that it would exercise its discretion to stay further proceedings should the state Supreme Court take up the issue. *Id.* Contrary to Amex's representation, however, nowhere in this part of its analysis does the court *mention* the *AGC* factors, let alone hold (or even suggest) that the state Supreme Court's silence on this issue meant that "state courts may still consider the *AGC* factors." (Reply at 7 n.7.) To the contrary, *Dicesare* discusses the *AGC* factors twice: first in the context of *Teague's* "controlling" holding that the *AGC* factors do not apply to determinations of standing under the North Carolina antitrust statutes, and second in the context of an earlier Superior Court case that applied a "modified" version of *AGC*, which *Teague* rejected. *See Dicesare, 2017 NCBC LEXIS 33, 2017 WL 1359599, at *11-12*.

statutes, ***HN19***[] the TTPA lacks a mandatory harmonization clause requiring consistency between interpretation of the TTPA and interpretations of federal antitrust laws. *Id. at 519*. The *Freeman* court also rejected some of the factors—such as the risk of multiple liability and recovery and the speculative risk of complex damages assessments—that motivated the Supreme Court in *AGC* to craft prudential standing limitations on who may sue under federal ***antitrust law***. *Id. at 520*. Finally, the parties have not provided the court with any decision in which the Tennessee state courts apply the *AGC* factors to claims brought under the TTPA.[7]

Amex argues that Plaintiffs nonetheless lack standing because they are neither direct nor indirect purchasers of any product the sale of which is "controlled" by Amex. (Mem. at 17 (quoting *Tenn. Code Ann. § 47-25-106*.) However, the *Freeman* court explained that ***HN21***[] the TTPA's use of "control" includes "the ability to exercise a restraining or directing influence over something." *Freeman Indus., 172 S.W.3d at 517-18*. Plaintiffs' allegations that Amex's Anti-Steering Rules restrained the credit card transaction market and caused Plaintiffs to pay more for consumer goods is sufficient, at this stage, to establish **[*48]** standing to sue under the TTPA.[8]

C. Count III—State Consumer Protection Claims

Under Count III, Plaintiffs allege violations of the state consumer protection laws of California, the District of Columbia, Florida, Hawaii, Illinois, Massachusetts, Montana, New Hampshire, New Mexico, Ohio, and Rhode Island. (Compl. ¶¶ 188-200.) Amex argues that Plaintiffs' claims under California, Florida, Massachusetts, and New Mexico law should be dismissed for lack of standing under the laws of each respective state. (Mem. at 18-23.)[9] The court evaluates Plaintiffs' standing to assert claims under the laws of each state in turn.

1. California

Plaintiffs assert claims under the California's Unfair Competition Law ("UCL), *Cal. Bus. & Prof. Code §§ 17200, et seq.*, based on the same underlying conduct as their federal and state antitrust claims. (Compl. ¶¶ 188-190.) ***HN22***[] However, under California law, "[w]here a plaintiff fails to state an antitrust claim, and where an unfair competition claim is based upon the same allegations, such state claims are properly dismissed." *Formula One Licensing, B.V. v. Purple Interactive Ltd., 2001 U.S. Dist. LEXIS 2968, 2001 WL 34792530, at *4 (N.D. Cal. Feb. 6, 2001)*; *see also* *In re Wellpoint, Inc., Out-of-Network UCR Rates Litig., 903 F. Supp. 2d 880, 927-28 (C.D. Cal. 2012)* (dismissing UCL claims base on lack of antitrust standing for plaintiffs' Sherman Act claims). Here, the court has dismissed Plaintiffs' underlying antitrust **[*49]** claims under both federal and California law. Therefore, because Plaintiffs have "made no attempts to distinguish their antitrust claims from their consumer-protection claims," *Dairy Farmers, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at *18*, the court dismisses Plaintiffs' claim under the

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[7] ***HN20***[] In lieu of the *AGC* factors, traditional constitutional standing principles apply. A party has standing to sue under Tennessee law when it meets the minimum constitutional requirements of standing under federal law. *See, e.g., In re Petition of Youngblood, 895 S.W.2d 322, 326 (Tenn. 1995)* (adopting federal constitutional standard); *Cox v. Shell Oil Co., 196 S.W.3d 747, 757-58 (Tenn. Ct. App. 2005)* (state law standing "parallels the constitutional restriction on federal court jurisdiction to 'cases and controversies'"). As discussed above, Plaintiffs meet that baseline constitutional standard.

[8] Amex argues that Plaintiffs' claim "is not an indirect purchaser claim," but "[r]ather, Plaintiffs allege that merchants passed some portion of alleged overcharges from credit card fees to consumers through increased prices on some unknown portion of goods sold and services rendered. This [c]ourt would need to track overcharges on countless items—paid by consumers with no relationship to Amex whatsoever, to merchants who may or may not accept Amex." (Mem. at 18.) Yet, the Tennessee Supreme Court has explicitly rejected the concerns Amex raises of complex damage assessment and fear of multiple liability as relevant to a standing analysis under TTPA (even though they are central to the *AGC* analysis).

[9] Amex describes the claims brought under the laws of these four states as Plaintiffs' "remaining state consumer protection law claims" (Mem. at 18), likely assuming that the claims brought under the consumer protection laws of the states in which no named Plaintiff is a resident must be dismissed. However, as discussed *supra, Langan* compels the opposite result. Therefore, Plaintiffs' claims under the consumer protection laws of District of Columbia, Hawaii, Illinois, Montana, New Hampshire, Ohio, and Rhode Island survive Amex's motion.

UCL. Because Plaintiff Anthony Oliver does not have a cause of action under the Sherman Act, California ***antitrust law***, or the UCL, he is dismissed from this case.

2. Florida

The same reasoning applies to Plaintiffs' claims under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). *See* *QSGI, Inc. v. IBM Glob. Fin., No. 11-80880-CIV, 2012 U.S. Dist. LEXIS 49601, 2012 WL 1150402, at *4 (S.D. Fla. Mar. 14, 2012)*("When, as here, plaintiff's FDUTPA claim is based on the same allegations as its antitrust claim, failure to establish a violation of ***antitrust law*** is sufficient to conclude that the plaintiff has also failed to state a FDUPTA claim."); *see also* *JES Props., Inc. v. USA Equestrian, Inc., No. 8:02-cv-1585-T-24MAP, 2005 U.S. Dist. LEXIS 43122, 2005 WL 1126665, at *19 (M.D. Fla. May 9, 2005)*. Because Plaintiffs' claim under the FDUTPA is identical to their antitrust claim, it must be dismissed. Plaintiff Michael Thomas Reid, who lacks a cause of action under either the Sherman Act or the FDUPTA, is dismissed from this case.

3. Massachusetts

The Massachusetts Consumer and Business Protection Act, Mass. ***HN23***[] Gen. **[*50]** Laws Ch. 93A ("CBPA") provides a cause of action for "any person . . . who has been injured by another person's use or employment of any . . . unfair method of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." CBPA, *§ 2*, *§ 9(1)*. Amex argues that Plaintiffs' claim must be dismissed because "Plaintiffs are consumers who have no business dealings with Amex and are neither direct nor indirect purchasers." (Mem. at 20.)

Both Plaintiffs and Amex direct the court towards *Ciardi v. F. Hoffmann-La Roche, Ltd., 436 Mass. 53, 762 N.E.2d 303 (2002)*, in which the Supreme Judicial Court of Massachusetts analyzed the CBPA in detail. In *Ciardi*, the court held that indirect purchasers can assert claims for anticompetitive conduct under the CBPA, even where they have no standing to bring such claims under Massachusetts state ***antitrust law***. *Id. at 55*. In so holding, the court emphasized that the CBPA is "a statute of broad impact which creates new substantive rights and provides new procedural devices for the enforcement of those rights." *Id. at 59*. In affirming the trial court's denial of the defendants' motion to dismiss, *Ciardi* explicitly rejected defendants' argument that plaintiff had "failed to allege a sufficiently close nexus between herself and the defendants **[*51]** to state a claim under [the CBPA]." *Id. at 65*; *see also id.* ("The defendants contend that plaintiff would be hard pressed to show how a portion of an overcharge was passed on at *each* stage of the distribution chain and by which defendants."). The court reasoned that "defendants' contentions essentially relate to whether the plaintiff can prove her claim under [the CBPA], not whether she is entitled, as an indirect purchaser, to assert such a claim." *Id.* Finally, the *Ciardi* defendants argued that public policy considerations should compel the court to bar indirect purchaser claims under the CBPA. In response, the court noted that "it is the province of the Massachusetts Legislature to make its own policy decisions about whether to permit claims by indirect purchasers for antitrust violations under Massachusetts law. We read the language of [the CBPA] as a clear statement of legislative policy to protect Massachusetts consumers through the authorization of such indirect purchaser actions." *Id. at 66-67*. The court finds that *Ciardi* supports the conclusion that Plaintiffs have standing to sue under the CBPA.[10]***HN24***[] *Ciardi* makes clear that the CBPA is to be construed broadly in light of its goals of protecting Massachusetts **[*52]** consumers, regardless of whether Plaintiffs have standing under either federal or state antitrust laws. Amex's contention that Plaintiffs are not indirect purchasers is unavailing. ***HN25***[] *Ciardi* explains that a CBPA plaintiff must "allege[] a connection" between plaintiff and defendant, even if it is an "indirect one." *Ciardi, 436 Mass. at 65*. Here, Plaintiffs have met this "relatively light burden," *id.*, by alleging such a

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[10] Amex cites to the federal district court opinion *Cash Energy Inc. v. Weiner*, but that case is distinguishable. (Mem. at 20 (citing *Cash Energy, Inc. v. Weiner, 768 F. Supp. 892, 894 (D. Mass. 1991))*.) *Cash* involved landowners bringing suit against defendants who had stored chemical solvents on an adjacent property that had allegedly contaminated plaintiffs' property. *Cash, 768 F. Supp. at 893*. The court dismissed plaintiffs' claim under the CBPA, holding that plaintiffs and defendants did not have "some transactional business relationship" as required by the CBPA. *Id. at 894*. Here, by contrast, Plaintiffs are not neighboring landowners with a dispute sounding in common law, but, accordingly to Plaintiffs, are participants in the same "two-sided market" as Defendants. At this stage, those allegations are sufficient—especially in light of the CBPA's "broad impact" and "clear statement of legislative policy to protect consumers," *Ciardi, 436 Mass. at 59, 65*, factors that were not implicated in *Cash*.

connection—namely, that Amex's Anti-Steering Rules restrain competition in such a way that Plaintiffs pay more for consumer goods than they would absent Amex's anticompetitive behavior.

4. New Mexico

HN26[] Finally, New Mexico's Unfair Practices Act ("NMUPA") provides that "[u]nfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful." *N.M. Stat. Ann. § 57-12-3*. The NMUPA defines "unconscionable trade practice" as:

> an act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment:
>
> > (1) takes **[*53]** advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or
> > (2) results in a gross disparity between the value received by a person and the price paid.

Id. at *§ 57-12-2(E)*. Plaintiffs allege that Amex's Anti-Steering Rules constitute an "unconscionable trade practice" because it "resulted in a gross disparity between the value received by members of the Class and the price paid by them for goods and services using an electronic form of payment." (Compl. ¶ 198(d).) Amex argues that Plaintiffs cannot sue for an NMUPA violation because "Plaintiffs are neither direct nor indirect purchasers of any product from Amex" (Mem. at 20), and "New Mexico law makes clear that only those who purchase a good or service from a defendant may sue under the NMUPA." (*Id.* (citing *Hicks v. Eller, 2012- NMCA 061, 280 P.3d 304 (N.M. Ct. App. 2012))*.)

The court agrees with Amex and finds that Plaintiffs have not stated a claim under the NMUPA. *Hicks* is instructive. That case involved a claim under the NMUPA brought by a seller of certain paintings to a defendant who subsequently sold the paintings to other buyers for a much higher price than originally paid to the plaintiff. *Hicks, 280 P.3d at 307*. The court held that the plaintiff did not state a claim under **[*54]** the NMUPA because "the [NM]UPA gives standing only to buyers of goods ands services," and the plaintiff who sold the paintings was not such a buyer. *Id. at 309*. While the court acknowledged that the NMUPA "does not require a transaction between a claimant and a defendant," it explained that the statute did require that "the claimant did purchase an item that was at some point sold by the defendants." *Id.* Plaintiffs fail to meet this standard and therefore lack standing under the NMUPA. Because Plaintiff Susan Burdette does not have a cause of action under the Sherman Act, New Mexico ***antitrust law***, or the NMUPA, she is dismissed from this case.

IV. COUNT IV—UNJUST ENRICHMENT

Under Count IV, Plaintiffs argue that New York law entitles them to damages for unjust enrichment. (*See* Opp. at 23-24.)[11] Plaintiffs allege that "[a]s a result of Defendants' conduct, Plaintiffs and other Class members in the State Damages Classes conferred a benefit upon Defendants, Defendants received and retained this benefit under such circumstances that it would be inequitable and unconscionable to permit them to retain it without paying the benefit's reasonable value to Plaintiffs and other Class members." (Compl. ¶ 202.) The court **[*55]** agrees with Amex that this claim should be dismissed.

HN28[] The New York Court of Appeals has held that while a plaintiff "need not be in privity with the defendant to state a claim for unjust enrichment," the connection between the defendant and the plaintiff must not be "too attenuated." *Sperry v. Crompton Corp., 8 N.Y.3d 204, 215-16, 863 N.E.2d 1012, 831 N.Y.S.2d 760 (2007)*; *see also*

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[11] The complaint alleges claims for damages under the "law of unjust enrichment of thirty-two jurisdictions." (Compl. ¶ 138.) However, Plaintiffs argue in their brief that the court should apply New York law to their unjust enrichment claim, and Amex did not contest application of New York law in its reply. (Opp. at 23-25; Reply at 10.) Because ***HN27***[] "implied consent is sufficient to establish choice of law," *Krumme v. WestPoint Stevens, Inc., 238 F.3d 133, 138 (2d Cir. 2000)*, the court applies New York law.

*Carmona v. Spanish Broad. Sys., Inc., No. 08-cv-4475 (LAK), 2009 U.S. Dist. LEXIS 26479, 2009 WL 890054, at *6 (S.D.N.Y. Mar. 30, 2009)* (plaintiffs must allege "direct dealings or an actual, substantive relationship" with defendants."). In *Sperry*, for example, the Court of Appeals held that "the connection between the purchaser of tires and producers of chemicals used in the rubber-making process is simply too attenuated to support" an unjust enrichment claim. *Sperry, 8 N.Y.3d at 216*; *see also* *Keurig, 383 F. Supp. 3d at 272* (dismissing unjust enrichment claim brought under New York law because alleged relationship between parties was "too attenuated."). The court finds that, as in *Sperry* and *Keruig*, the alleged relationship between the parties is "too attenuated" to support a claim of unjust enrichment under New York law. Accordingly, Count IV is dismissed with prejudice. Because Plaintiff Gianna Valdes does not have a cause of action under the Sherman Act, the Donnelly Act, or the law of unjust enrichment, she is dismissed **[*56]** from this case.

V. CONCLUSION

For the foregoing reasons, Defendants' (Dkt. 37) motion to dismiss is GRANTED in part and DENIED in part. Specifically:

- Count I is DISMISSED in its entirety with prejudice;
- Count II is DISMISSED in part. The claims that are dismissed are those asserted under the antitrust laws of: California, Nevada, New Mexico, and New York. The claims asserted under the antitrust laws of the remaining 24 jurisdictions remain;
- Count III is DISMISSED in part. The claims that are dismissed are those asserted under the consumer protection laws of California, Florida, and New Mexico. The claims asserted under the consumer protection laws of the remaining eight jurisdictions remain;
- Count IV is DISMISSED in its entirety with prejudice; and
- The following named Plaintiffs are dismissed from this case: Anthony Oliver, Susan Burdette, Gianna Valdes, Zachary Draper, and Michael Thomas Reid.

The Parties are DIRECTED to contact the chambers of Magistrate Judge Gold regarding next steps in this case.

SO ORDERED.

Dated: Brooklyn, New York

April 30, 2020

/s/ Nicholas G. Garaufis

NICHOLAS G. GARAUFIS

United States District Judge

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Bryant's Team Sports, Inc. v. Mizuno USA, Inc.

United States District Court for the Middle District of Florida, Fort Myers Division

May 1, 2020, Decided; May 1, 2020, Filed

Case No. 2:18-cv-786-FtM-SPC-MRM

Reporter
2020 U.S. Dist. LEXIS 240273 *; 2020 WL 7401281

Bryant's Team Sports, Inc., Plaintiff, v. Mizuno USA, Inc., Defendant.

Core Terms

summary judgment, material fact, genuine, breach-of-contract, cancelled

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For Bryant's Team Sports Inc., a Florida corporation, Plaintiff: Douglas A. Orr, LEAD ATTORNEY, Orr Law Firm P.L., Cape Coral, FL.

Judges: Paul A. Magnuson, United States District Court Judge.

Opinion by: Paul A. Magnuson

Opinion

MEMORANDUM AND ORDER

This matter is before the Court on Defendant Mizuno USA's Motion for Summary Judgment (Docket No. 58). For the following reasons, Defendant's Motion is granted.

BACKGROUND

Plaintiff Bryant's Team Sports was a sporting-goods retailer, which primarily sold baseball and softball equipment. Defendant Mizuno USA manufactures sporting-goods equipment. At Plaintiff's inception as a brick-and-mortar store in 2007, Plaintiff sold Defendant's and **[*2]** other manufacturers' goods.[1] (Bryant Dep. (Docket No. 58-3) at 18-19.) In 2012, when Plaintiff transitioned to become an online retailer, it sold the goods on third-party websites, namely Amazon. (Id. at 33-35.) On January 19, 2018, Defendant informed its online retailers, including Plaintiff, that as of April 2018, it would no longer allow other retailers to sell its products on third-party sites, such as Amazon. (Pl.'s Opp'n Mem. (Docket No. 70) at 10); Blocker Decl. (Docket No. 58-2) ¶¶ 17-18.) Defendant would allow Plaintiff to continue selling its goods through other means, such as in brick-and-mortar stores, on Plaintiff's own website, or at sports tournaments. On March 30, 2018, Plaintiff ceased operation. (Bryant Dep. at 38-39.)

Plaintiff alleges breach of contract and breach of implied-in-fact contract, tortious interference, as well as violations of the implied covenant of good faith and fair dealing, Florida's ***antitrust law***, and the *Florida Deceptive and Unfair Trade Practices Act*. Defendant seeks summary judgment on all claims.

DISCUSSION

Summary judgment is proper only if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* **[*3]** . The Court must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *Burton v. City of Belle Glade, 178 F.3d 1175, 1187 (11th Cir. 1999)* (citation omitted).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *O'Ferrell v. United States, 253 F.3d 1257, 1265 (11th Cir. 2001)*. When opposing a motion for summary judgment, the nonmoving party must demonstrate the existence of specific facts in the record that create a genuine issue for trial. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (citation omitted).

A. Breach of Contract

Plaintiff's breach-of-contract and breach-of-implied-contract claims arise out of the same facts. The breach-of-contract claim alleges that Defendant breached the parties' agreement by prohibiting Plaintiff from selling Defendant's goods on Amazon after March 30, 2018, while allowing Amazon to sell goods at a special discount. Plaintiff asserts that the alleged breach caused damages. The implied-contract claim is similar in all respects, except it purports **[*4]** that Defendant breached an implied-in-fact contract.

To prevail at summary judgment on Plaintiff's breach-of-contract claims, Defendant must show that there is no genuine issue of material fact as to: (1) the existence of a valid contract; (2) a material breach of that contract; or (3) damages. *Beck v. Lazard Freres & Co., LLC, 175 F.3d 913, 914 (11th Cir. 1999)*.

Defendant disputes that a valid contract existed, and Plaintiff concedes that no single document encompassed the parties' relationship, contending that a collection of documents and their course of dealing comprised the "contract" on which this claim is based. Yet Christopher Bryant, Plaintiff's founder and sole proprietor, acknowledged that the relationship between the parties was on based on purchase orders, and that there was no agreement that the relationship would continue in perpetuity. (Bryant Dep. at 120-21.) He further testified that Plaintiff was under no obligation to purchase any of Defendant's products and that Defendant in its "sole discretion" could cease doing

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[1] Christopher Bryant's deposition was the only evidence Defendant submitted in support of its Motion. Plaintiff submitted no evidence to oppose the Motion.

business with Plaintiff at any time. (Id. at 32, 140.) This forecloses any possibility of an ongoing contract between the parties.[2]

Viewing the facts in the light most favorable to Plaintiff, the Court is unpersuaded that a genuine dispute **[*5]** of material fact exists. See *Fed. R. Civ. P. 56(a)*. Plaintiff has not established the existence of an enforceable contract that required Defendant to allow Plaintiff to sell its goods on third-party websites. Defendant's Motion is granted as to the breach-of-contract claims.

B. Breach of Good Faith and Fair Dealing

In Florida, "an action for breach of the implied covenant of good faith cannot be maintained in the absence of a breach of an express contract provision." *Degutis v. Fin. Freedom, LLC, 978 F. Supp. 2d 1243, 1263 (M.D. Fla. 2013)* (quoting *Burger King Corp. v. Weaver, 169 F.3d 1310, 1316 (11th Cir. 1999))*. Because Plaintiff has not demonstrated that Defendant breached any express contract provision, the good-faith-and-fair-dealing claim is "untenable." *Id.* (quotation omitted). Without a valid breach-of-contract claim, Plaintiff's breach-of-good-faith-and-fair-dealing claim must be dismissed. Defendant's Motion is granted as to the alleged violation of *Fla. Stat. § 671.203*.

C. Deceptive Trade Practices

Plaintiff claims that Defendant's decision to prohibit Plaintiff from selling Defendant's goods on third-party websites and cancelling Amazon orders placed through Plaintiff, while allowing Amazon to sell Defendant's goods below minimum-advertised pricing ("MAP"), violated Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), *Fla. Stat. §§ 501.201-213*. To overcome summary **[*6]** judgment on this claim, Plaintiff must show a genuine dispute of material fact as to any element: "1) a deceptive act or unfair practice; 2) causation; and 3) actual damages." *KC Leisure, Inc. v. Haber, 972 So. 2d 1069, 1073 (Fla. Dist. Ct. App. 2008)*.

Plaintiff's failure to conduct discovery is fatal to the claim that Defendant committed a deceptive or unfair act, because Plaintiff has no evidence to support its bald claim that Defendant allowed Amazon to sell below MAP pricing, or even that doing so would constitute a violation of the Act. Likewise, Plaintiff provides no evidence regarding its allegations of a single customer's order placed through Plaintiff on Amazon that Defendant cancelled. Plaintiff's suspicions about Defendant's conduct simply do not suffice to show a genuine dispute of material fact. Defendant's Motion is granted as to the FDUTPA claim.

D. Antitrust

Plaintiff concedes that Defendant is entitled is entitled to summary judgment on the antitrust claim, thus Defendant's motion is granted as to that claim.

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[2] Although the claim fails, it notable that Plaintiff is less than forthcoming about its purported damages. Plaintiff argues that Defendant required it to place a $50,000 order of non-closeout items "[a]round June 2017 . . . to maintain its favorable pricing," and that it would have been impossible to sell those goods before Defendant prohibited Plaintiff from selling through third-party retailers in April 2018. (Pl.'s Opp'n Mem. at 3.) But Bryant testified that Defendant did not force Plaintiff to make the purchase and no contractual provision required it to do so. (Bryant Dep. at 201.) Further, Bryant did not know if Plaintiff's remaining inventory contained the goods obtained in the $50,000 purchase. (Id. at 183.) Plaintiff cannot now claim the $50,000 purchase as damages.

Additionally, Plaintiff cites a $153,463 purchase of closeout products in June 2017. (Pl.'s Opp'n Mem. at 9.) But Plaintiff is silent as to Defendant's contention that before litigation commenced, Defendant offered to buy back the closeout goods and give Plaintiff an additional $10,000. (Bryant Dep. at 186-87.)

E. Tortious Interference

Plaintiff claims that Defendant's employee, Tyson Blocker, cancelled an order that he placed through Plaintiff on Amazon, and that doing so tortiously interfered with Plaintiff and Defendant's business relationship **[*7]** and harmed Plaintiff. "Under Florida law, the elements of tortious interference with a business relationship are (1) the existence of a business relationship; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship." *Duty Free Americas, Inc. v. Estee Lauder Cos., 797 F.3d 1248, 1279 (11th Cir. 2015)* (quotation and citation omitted). The first element requires only a mere understanding between the parties, not an enforceable contract. Id. For the third element, "[e]ven if the contract is terminable at will, the interferer's actions are tortious and actionable [only] if the motive is purely malicious and not coupled with any legitimate competitive economic interest." *Heavener, Ogier Servs., Inc. v. R. W. Florida Region, Inc., 418 So.2d 1074, 1077 (Fla. Dist. Ct. App. 1982)*.

Defendant concedes that Blocker once cancelled a test order that he placed through Plaintiff on Amazon. Even so, Plaintiff's bare allegation of Defendant's malicious motive is insufficient to overcome summary judgment because Defendant has proffered a legitimate motive that serves its competitive economic interest: ensuring that Plaintiff could fulfill drop-ship orders. Though Plaintiff alleges that Defendant repeatedly cancelled **[*8]** online orders, Plaintiff has not come forward with any evidence to support that assertion. Moreover, Bryant's opinion of Defendant's business practices does not constitute admissible evidence. See *Rule 56(c)(4)*.

Similarly, Plaintiff repeatedly contends that Defendant did not enforce its MAP agreement with Amazon but offers no evidence to buttress that argument. Its opinions as to Defendant's motives does not raise any genuine issue of material fact to defeat summary judgment. Rather, it is Plaintiff's burden to come forward with evidence to show that it can prove this claim. Plaintiff has failed to cite any such evidence, and therefore, Defendant's Motion is granted as to the tortious-interference claim.

CONCLUSION

There are no genuine issues of fact as to any of Plaintiff's claims. Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion for Summary Judgment (Docket No. 58) is **GRANTED**.

The Clerk shall enter judgment accordingly, terminate all remaining deadlines as moot, and close the file.

Dated: May 1, 2020

/s/ Paul A. Magnuson

Paul A. Magnuson

United States District Court Judge

Acad. of Allergy & Asthma in Primary Care v. Superior Healthplan, Inc.

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

May 4, 2020, Decided; May 4, 2020, Filed

SA-17-CA-1122-FB (HJB)

Reporter
2020 U.S. Dist. LEXIS 253201 *

ACADEMY OF ALLERGY & ASTHMA IN PRIMARY CARE and UNITED BIOLOGICS, LLC D/B/A UNITED ALLERGY SERVICES, Plaintiffs, v. SUPERIOR HEALTHPLAN, INC. and CENTENE CORP., Defendants,

Core Terms

allergy, testing, immunotherapy, provider, patients, credentialing, antitrust, allergist, reimbursement, pleaded, skin, Recommendation, announced, lawsuit, tortious interference, emailed, motion to dismiss, policies, network, limitations period, allegations, Asthma, antitrust claim, contends, statute of limitations, civil conspiracy, relevant market, authorization, declaratory, limitations

Counsel: **[*1]** For Academy of Allergy & Asthma in Primary Care, David A. Ramos, MD, Betty Jean Ramos-Dorby, PA-C, David A. Ramos, M.D., P.A., Amarillo Pediatric Clinic, PLLC, Ahammed Hashim, M.D., Nacogdoches Pulmonary and Sleep Associates P.A., United Biologics, LLC, d/b/a United Allergy Services, Plaintiffs: Benjamin L. Bernell, Elizabeth Kozlow Marcum, Jeffrey D. Wexler, Ronald Casey Low, LEAD ATTORNEYS, Pillsbury Winthrop Shaw Pittman LLP, Austin, TX USA; Dillon J. Ferguson, LEAD ATTORNEY, Pillsbury Winthrop LLP, Austin, TX USA; Stephanie S. Gomez, LEAD ATTORNEY, PRO HAC VICE, Pillsbury Winthrop Shaw Pittman LLP, New York, NY USA.

For Superior HealthPlan, Inc., Defendant: Gemma Rose Galeoto, Theresa Wanat, Tricia R. DeLeon, LEAD ATTORNEYS, Holland & Knight LLP, Dallas, TX USA; Alan Wendler Hersh, Dale Wainwright, Emily Willis Collins, Gregory J. Casas, Greenberg Traurig, LLP, Austin, TX USA; L. Bradley Hancock, Holland & Knight LLP, Houston, TX USA.

For Centene Corp., Defendant: Steven M. Cady, LEAD ATTORNEY, Williams & Connolly LLP, Washington, DC USA.

Judges: Henry J. Bemporad, United States Magistrate Judge. Honorable Fred Biery, United States District Judge.

Opinion by: Henry J. Bemporad

Opinion

REPORT AND RECOMMENDATION [*2] OF UNITED STATES MAGISTRATE JUDGE

To the Honorable Fred Biery, United States District Judge:

This Report and Recommendation concerns Defendant Superior Healthplan, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint. (Docket Entry 116.) This case was referred to the undersigned for consideration of pretrial matters. (Docket Entry 13.) For the reasons set out below, I recommend that Defendant's motion (Docket

Entry 116) be **GRANTED IN PART and DENIED IN PART**. Plaintiffs' state claim for tortious interference with contract should be dismissed on limitations grounds; the remainder of Plaintiffs' claims should be allowed to go forward at this time.

I. Jurisdiction.

Plaintiffs bring suit under the Declaratory Judgment Act, *28 U.S.C. §§ 2201*, *2202*, claiming violations of the Sherman Act, *15 U.S.C. § 1*, and the Texas Free Enterprise and Antitrust Act, *Tex. Bus. & Comm. Code Ann. § 15.05* (West 2019), as well as tortious interference and civil conspiracy. (Docket Entry 119-3, at 3.) The Court has original subject matter jurisdiction over Plaintiffs' federal claims pursuant to *28 U.S.C. §§ 1331* and *2202*, and it exercises supplemental jurisdiction over Plaintiffs state claims pursuant to *28 U.S.C. § 1367*. I have authority to issue this Report and Recommendation pursuant to *28 U.S.C. § 636(b)*.

II. Background.

Plaintiffs **[*3]** in this case are the Academy of Allergy & Asthma in Primary Care ("AAAPC") and United Allergy Services ("UAS").[1] They sue Defendants Superior Healthplan. Inc. ("Superior") and Centene Corporation ("Centene"). AAAPC is a trade association of primary care doctors interested in providing patients with allergy testing and immunotherapy. (Docket Entry 106, at 4.) UAS is a corporation trying to break into the allergy testing and immunotherapy market by supplying doctors with the tools to perform these services. (*Id.* at 5.) Superior is a managed care organization ("MCO"); along with other, competing MCOs, it provides managed care services throughout Texas, including care under subsidized programs like Medicaid. STAR, and CHIP. Superior is a wholly-owned subsidiary of Centene. (*Id.* at 5-6.)

Based on a dispute regarding allergy testing and treatment for Medicaid and other subsidized patients in Texas, UAS has alleged federal and state antitrust violations against Defendants, as well as other violations of state law. This factual background first briefly describes the Texas MCO/Medicaid payment system, along with allergy testing and immunotherapy treatment regimens which together provide context for the parties' **[*4]** dispute. It then describes Plaintiff UAS's business, the anti-competitive conspiracy that UAS alleges, and outlines the litigation that has ensued, including the present lawsuit.

1. The MCO/Medicaid Payment System.

Texas MCOs like Superior are paid a fee by the state to stand in the shoes of Texas Medicaid and administer Medicaid benefits to MCO members. The Texas Health and Human Services Commission ("HHSC") contracts with the MCOs and pays them a fixed monthly amount per individual enrolled in their health plan. (Docket Entry 106, at 6.) MCOs in turn contract directly with healthcare providers, including primary care physicians ("PCPs"). to create provider networks their members can use, and the MCOs pay claims for services that would otherwise be paid by Texas Medicaid or the Centers for Medicare & Medicaid Services ("CMS"). (*Id*,. at 7.)

Because HHSC pays MCOs a fixed amount per enrollee regardless of the number of claims, an MCO stands to retain a greater share of the payments if it pays out fewer claims. This perverse incentive is theoretically kept in check by patient choice: if an MCO covers fewer services than one of its competitors, patients will switch to a competing provider that will **[*5]** reimburse their claims, and the MCO will lose the fixed monthly payment for those individuals, thus reducing overall payments from the state.

[1] In their briefs, both parties collectively referrer to Plaintiffs as "UAS." This Report and Recommendation follows the parties' approach.

2. Allergy Testing and Immunotherapy Treatment.

Millions of Americans suffer from seasonal and perennial allergies. Traditionally. allergy symptoms are treated by a wide swath of physicians, including primary care physicians, pediatricians, family physicians, otolaryngologists (also known as "ENTs" or "ear, nose, and throat" doctors), and, of course, allergists. (Docket Entry 106, at 8-9.) The most common method of treating allergy symptoms is through over-the-counter and prescription medications, such as antihistamines and nasal steroids. (*Id.* at 9.) While this method temporarily alleviates allergy symptoms, it does not treat the underlying disease. (*Id.*) Long-term allergy treatment can involve immunotherapy, which cures a person's allergies by slowly introducing allergens in incremental doses into a patient's system over time, eventually completely desensitizing the patient to the allergen. (*Id.*)

Before immunotherapy can be provided to a particular patient, it must first be identified as a viable treatment option through allergy testing. (Docket Entry **[*6]** 106, at 10.) There are two recognized methods of allergy testing: a skin prick test and a blood test. (*Id.* at 11.) A skin prick test may be recommended by a physician after a physical examination and review of the patient's medical history; the test is typically administered by a technician at the physician's direction. (*Id.*) The technician pricks the skin of the patient with allergic material and the skin's reaction is measured and recorded, allowing the physician to determine whether the patient is allergic to the tested allergen. (*Id.*) Alternatively, the physician may recommend a blood test, referring the patient to a testing laboratory for a blood draw. (*Id.*) Once the blood is drawn, the lab technician applies an instrument to the blood and provides the resulting data to the physician, who reviews the results and determines if the patient is allergic to the relevant allergen. (*Id.*)

Once the physician determines the patient is allergic to a relevant allergen, the physician may recommend immunotherapy. (Docket Entry 106, at 11.) Under the physician's supervision, a technician mixes a serum composed of antigens and a dilutant. (*Id.*) The mixture is then further diluted to greater or lesser degrees **[*7]** and distributed into different vials based on concentration. (*Id.*) The vials are then administered to the patient, beginning with the lowest concentration and progressing to the highest concentration. (*Id.*) The doses are most commonly administered through subcutaneous shots, known as "SCIT" or "allergy shots." (*Id.* at 12.) Typically. receiving these allergy shots from the physician requires a visit to the treating physician's office—up to three times a week for a period of three to five years. (*Id.*)

Because of the substantial commitment of time and effort such treatment requires, many patients have difficulty completing the entire course of treatment. (Docket Entry 106. at 12.) Additionally, it is often cost prohibitive for non-allergist physicians to provide allergy testing and immunotherapy; accordingly, patients typically must go to an allergist for these services. (*Id.*)

3. UAS's Business Model.

Although over 40 million Americans suffer from airborne allergies, there arc less than 4,000 board-certified allergists practicing nationwide, and less than 300 practicing in Texas. (Docket Entry 106, at 9.) According to UAS, this shortage of physicians capable of providing immunotherapy treatment has **[*8]** made access to the treatment virtually unobtainable for much of the population, especially for patients outside of major cities who would be subject to routine long-distance travel. (*Id.*) Additionally, not all allergists in Texas accept Medicaid patients. (*Id.*) As a result, of all the allergy sufferers who might benefit from immunotherapy, only 2 to 6 percent actually receive the treatment. (*Id.*)

UAS came up with a business plan to address the availability gap. It would contract with family doctors and PCPs and provide them with skin prick test kits, antigens, vials, needles, and all other materials necessary to perform allergy testing and immunotherapy, and it would provide a trained technician to perform the non-physician aspects of the testing and immunotherapy. (Docket Entry 106, at 10.) If the risk of side effects in a patient was low, the technician could teach the patient how to administer the immunotherapy at home through self-injection of the serum. (*Id.* at 12.) Through this plan, PCPs would be able to perform the full range of allergy treatments; this added ability would greatly expand access to these services Ibr the average citizen, while also avoiding the higher costs and longer **[*9]** wait time associated with using a board-certified allergist. (*Id.* at 10, 13.)

4. The Alleged Conspiracy.

Of course, an increase in access to and use of a treatment for a common disease would also increase the number of claims filed with MCOs. It was in response to the increase in claims, UAS alleges, that Superior embarked on a conspiracy with competing MCOs in Texas to deny claims for PCP allergy testing and immunotherapy, and thus run UAS out of the market.[2]

The alleged plot began to form in late 2012, when representatives from an allergist association and blood testing company contacted Centene, advising them of alleged dangers of what they dubbed "home immunotherapy." (Docket Entry 106, at 16.) Superior's Chief Medical Director, Dr. David Harmon, who is also an employee of Centene. then received a position statement from an allergy trade association stating the organization forbids the practice of home immunotherapy among its members, and advising Superior to refuse to do business with PCPs who contract with UAS, and to deny reimbursement of those physicians' claims. (*Id.*)

According to UAS, Superior CEO Tom Wise, realizing the opportunity to stem the flow of new claims it was having to pay **[*10]** out, directed Dr. Harmon to use technicalities to hold up payments to PCPs requesting reimbursement for allergy testing and immunotherapy performed in conjunction with UAS. (Docket Entry 106, at 17.) Meanwhile, Superior internally prepared to begin denying claims based on the alleged dangers cited by the allergist associations and blood testing companies. (*Id.*) Wise further directed Dr. Harmon to reach Out privately to physicians who had contracted with UAS and advise them that, if they continued to provide allergy services in conjunction with UAS, they would be blacklisted by Superior for other services they provide. (*Id.* at 17-18) Dr. Harmon began acting on these directives in early 2013. (*Id.* at 18.)

Superior faced a problem, however. If it began to unilaterally deny claims for these services, the existing market demand for allergy testing and immunotherapy by PCPs would drive patients and providers to other MCOs who were reimbursing the claims, thus reducing Superior's per-patient payment from LIFISC and its competitiveness as an MCO in the market. (Docket Entry 106, at 18.) To avoid this danger, Superior would need the other MCOs to deny the claims as well, so as to present a unified front. Accordingly, **[*11]** Superior began seeking other MCOs which were willing to enact policies of denying reimbursement claims for physicians using UAS's services. (*Id.*)

In April 2013, while attending an annual meeting in Austin of medical directors of all Texas MCOs, Dr. Harmon advanced the plan during a private conversation Dr. Fred Buckwold, a senior executive of Superior's competitor, Community Health Choice ("CHC"). (Docket Entry 106. at 18.) The two agreed that they could eliminate reimbursement payments for UAS's services without suffering adverse market consequences if all MCOs in Texas adopted identical credentialing policies that would restrict allergy services to specialists. (*Id.*)

The following day, Dr. Harmon emailed Dr. Buckwold to request a copy of the proposed credentialing policy CHC was developing to deny allergy services not performed by specialists. (Docket Entry 106, at 18.) Buckwold forwarded CHC's policy to Harmon the following week, requesting that Harmon advise him if he "see[s] ways to improve on this." (Id.) CHC's proposed policy stated that laPlergy skin testing, assessment of test results. and decision-making regarding therapy is considered to be a specialty area . . . ," and it **[*12]** required that, to provide these services, "a provider must be credentialed . . . by the Medical Care Management Committee." (*Id.*) Harmon forwarded the proposed policy to Susan Mills, Superior's Vice President of Credentialing, directing her to adopt a similar policy. (*Id.*) Mills took the policy and copied it *verbatim*, simply replacing CHC's name with Superior's. (*Id.*)

Dr. Harmon reported his progress to Superior's credentialing committee, which included CEO Wise. (Docket Entry 106, at 19.) He informed the committee he had found a better solution than the *ad hoc* method of holding up

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[2] As this case is at the motion-to-dismiss stage, all of UAS's well-pleaded facts must be accepted as true. *See* Part III, *infra*.

payments on technicalities; he advised the committee to adopt CHC's credentialing policy, which included requiring doctors to seek "sub-credentialing" to perform allergy services for which they were otherwise already licensed to perform. (*Id.*) He further suggested that the committee wholeheartedly embrace the safety concerns raised by the associations regarding "home immunotherapy." and to spread these concerns as widely as possible, regardless of their verity. (*Id.*) The committee agreed to table the proposal for further discussion. (*Id.*)

At the same time, other Texas MCOs had begun preparing to deny payments **[*13]** for UAS services. (Docket Entry 106, at 20.) Following the April 2013 MCO conference. Parkland Community Health Plan, Inc. ("Parkland")[3] began auditing and investigating providers by requesting medical records for allergy services provided by PCPs. (Id.) El Paso First Health Plan ("El Paso First") directed its special investigations unit to undertake audits and determine which PCPs in their network were offering allergy services of the type UAS provided. (*Id.*)

In June 2013, Superior began et Torts to recruit Dr. William Glomb, the medical director at FIFISC, to join Superior as its medical director and to guide its allergy-treatment-reimbursement policy, so as to avoid FIFISC interference with Superior's efforts to refuse reimbursement for allergy care by PCPs. (Docket Entry 106, at 20.) Glomb was apparently amenable to this plan, and while still at HHSC, he met with representatives from Thermo Fisher Scientific, Inc. ("Thermo Fisher"), the blood testing company who had initially approached Superior and Ccntene with position papers advising them not to do business with PCPs conducting allergy care services. (*Id.*) At that meeting, Glomb sought information on Thermo Fisher's talking **[*14]** points regarding how to characterize OAS's services as unsafe or fraudulent. (*Id.*) The Thermo Fisher representative obliged, and further suggested that Superior adopt a policy favoring blood testing under the pretext that skin prick allergy tests exposed patients with asthma to allergy-induced attacks. (*Id.*)

According to UAS, the alleged conspiracy then began to move forward in earnest. On June 5, 2013, Superior's credentialing committee reconvened and voted to approve Dr. Harmon's proposed allergy policy, and Superior immediately began implementing it. (Docket Entry 106. at 20.) On June 24, 2013, during a monthly conference call of the Texas Association of Health Plans. an association of Texas MCOs, representatives of Superior and Parkland discussed "an initiative that would authorize the Medicaid program to provide blood-based allergy testing for patients with persistent asthma to develop an appropriate treatment strategy that would minimize exposure to allergy-induced asthma attacks." (*Id.* at 21.) This tracked the suggestions made to Dr. Glomb by Thermo Fisher.

On July 1, 2013, Parkland's Medical Director and Vice President of Government Affairs, Dr. Barry Lachman, met with Thermo Fisher representatives **[*15]** to request advice on how to get other MCOs on board with the effort to restrict skin testing and immunotherapy by PCPs. (Docket Entry 106, at 21.) Lachman advised them at the meeting that he had recently attended the annual meeting of the Academy of Allergy, Asthma, and Immunology ("AAAAI") in order to gain insight into the methods allergists were using to discredit the practice of allergy testing and immunotherapy by non-allergists. (*Id.* at 20-21.) He suggested using AAAAI materials to lend legitimacy to the policy that only allergists could provide those services and that PCPs who allowed "home immunotherapy" did so in violation of the standard of care. (*Id.* at 21.)

On July 8, 2013, all Texas MCOs attended an annual meeting in Austin, Texas. (Docket Entry 106, at 22.) Included among the attendees were Dr. Buckwold of CHC, Dr. David Palafox of El Paso First, Dr. Lachman of Parkland, and Dr. Robert Griffin, the head of Superior's credentialing committee. (*Id.*) Dr. Glomb, who had by this time agreed to join Superior but was still working at HHSC, began the meeting by suggesting an open discussion among the MCOs on allergy care. (*Id.*) Superior's representative suggested all MCOs adopt policies restricting **[*16]** allergy skin testing and immunotherapy to specialists. (*Id.*) CHC, Parkland, El Paso First, and Superior representatives agreed that their respective MCOs would move forward with similar policies. (*Id.*)

Following the meeting, each of the four MCOs began taking steps to enact policies which would exclude PCPs and UAS from the allergy testing and immunotherapy market by disqualifying them from reimbursement for those

[3] Parkland was originally a party to this lawsuit, but the claims against it were resolved by joint motion last year (*See* Docket Entries 95. 96.)

services. On August 2, 2013, Superior issued a "news alert" to all providers in its network entitled "Allergy Testing Authorizations Change." in which it announced a proposed policy change to be effective on October 1, 2013. (Docket Entry 106, at 22.) The alert detailed the new policy it had been working on:

> Effective 10/01/13, all allergen immunotherapy services must be authorized through Superior, unless services are provided by an allergist, immunologist, or otolaryngologist. Requests should be submitted 5 business days prior to start of services. Up to (3) three months of treatment may be requested and authorized, when determined medically necessary and the medical prognosis is clinically supported . . . .
>
> Primary care providers may perform screening blood tests to help **[*17]** determine if a condition has an allergic origin. If such testing is positive, the member must be referred to an appropriate specialist for definitive testing and management . . . .
>
> In order to provide allergy testing and treatment to [Superior] members, a provider must be credentialed for this by the Credentials Committee (CC). Specialists considered trained in this area include Adult and Pediatric Allergy and Immunology; and Adult and Pediatric Otolaryngology (Ears, Nose, and Throat). If a provider outside these specialties desires such credentialing, the provider must submit:
>
> - Attestation form that states they have appropriate equipment and personnel to provide allergy and immunotherapy safely:
> - Evidence of comprehensive training in the field of allergy which is comparable to that received in a full training program of one of the specialties noted above.

(*Id.* at 22-23.)

Parkland then announced the same policy for its network. (Docket Entry 106, at 23.) On October 1, 2013, Parkland sent identical letters to PCPs and family physicians who were performing allergy testing and immunotherapy in contract with UAS, threating denial of reimbursement claims. (*Id.*) The letters stated:

> It has come to our attention **[*18]** that you are performing allergy and skin testing and immunotherapy in your primary care office. The American Academy of Allergy, Asthma and Immunology has developed standards for immunotherapy and skin testing. AAA[A]I states that physicians should have specialized training before providing these services. [Parkland] has mechanisms for PCP[]s to be jointly certified as specialists. Since you have never applied as a specialist qualified to do skin testing or immunotherapy, skin testing and primary immunotherapy are considered by [Parkland] as outside the scope of your primary care practice . . . . We are also aware that you are using [UAS] to provide some or all of these services. [UAS] is not a credentialed and contracted provider for [Parkland]. Your contract with [Parkland] indicates that those you contract with or refer services to must be participating providers with [Parkland]. Using this provider puts you in violation of your contract, which could subject you to termination of your contract with [Parkland].

(*Id.* at 23-24.) The letter went on to note that, effective October 4,2013—three days from the date of the letter—Parkland would no longer pay claims for immunotherapy or skin testing from **[*19]** any PCP. (*Id.* at 24.) It further required each provider in Parkland's network to submit a "corrective action plan" which confirmed that the provider would "no longer provide the services described in this letter or use non-credentialed subcontractors for [Parkland] patients," "comply with [Parkland] standards of care," and outline the steps the provider had taken or would take "to repair the contractual violations cited." (*Id.*) The letter was signed by Dr. Lachman. (*Id.*)

Later that same day, Superior ran into a problem blocking implementation of its policy: HHSC. (Docket Entry 106, at 24.) HHSC had begun an inquiry into Superior's proposed policy back in September 2013, due in part to concerns that it would negatively impact access to care. (*Id.*) FIHSC's review of Superior's geographic access maps revealed coverage issues based on the average distance a member would have to travel to receive allergy care. (*Id.* at 24-25.) Concerned by the inquiry, Dr. Harmon asked Dr. Glomb, who was still working at EIHSC at the time, to intervene on Superior's behalf. (*Id.* at 25.) Glomb emailed FIHSC's Director of Health Plan Management, Rudy Villarreal, and raised the same safety concerns that had been used by Superior to justify **[*20]** its policy. (*Id.*) Before emailing Villarreal, however, Glomb sent his draft to Harmon for approval. (*Id.*) The email proved ineffective, however, and Villarreal ordered HHSC to place an indefinite moratorium on Superior's policy. (*Id.*) Thus, on October 1, while Parkland was announcing its policy, Superior's policy was placed on indefinite hold. (*Id.*)

To announce the hold, Superior sent out another Provider Alert on October 1, 2013, announcing implementation of the policy had been "delayed." (Docket Entry 106. at 25.) However, the alert also "encourage [d]" Providers outside the specialties of allergist, immunologist, otolaryngologist, or pulmonologist to ensure that "[t]hey have appropriate equipment and personnel to provide allergy and immunotherapy safely; and, [e]vidence of comprehensive training in the field of allergy which is comparable to that received in a full training program of one of the specialties noted above." (*Id.* at 25-26.) The letter concluded by stating that Superior would distribute additional information on the future implementation of its policy as soon as final details and a timeline "are available and approved by" HHSC. (*Id.* at 26.)

Parkland was now the only MCO implementing the policy **[*21]** of denying reimbursement for PCPs utilizing allergy testing and immunotherapy. Parkland employees were instructed to forward all provider questions regarding the October 1 letter announcing Parkland's policy to Dr. Lachman or to Provider Relations Manager, Patricia Carney. (Docket Entry 106, at 26.) Lachman personally called the providers to discuss their work with UAS and the reasons for Parkland's concerns regarding allergy testing and immunotherapy. (*Id.*) In a communication to Parkland staff on November 6, 2013, Lachman announced that Parkland had received letters from the majority of their providers stating they had ceased performing allergy testing and immunotherapy for their patients, per the corrective action plan required by its October 1 letter. (*Id.*)

El Paso First also began moving forward with the policy in October 2013, when it began holding internal meetings on reimbursement for PCPs practicing allergy testing and immunotherapy as part of Dr. Palafox's previous commitment to the other MCOs. (Docket Entry 106, at 26.) At those internal meetings, Palafox supplied guidelines from an allergist trade organization, the American College of Allergy. Asthma, and Immunology ("ACAAI"), **[*22]** recommending, immunotherapy be prescribed only by an allergist-immunologist or other physician expertly trained in the therapy. (*Id.*) By this point, however, El Paso First had learned that Superior, its main competitor in the El Paso healthcare market, had placed a freeze on the policy. (*Id.*) Concerned that Superior would not perform its part of the agreement, El Paso First delayed implementation of its own program. (*Id.*) No further action was taken until November 6, 2013, when El Paso First's credentialing committee proposed they begin credentialing providers to provide immunotherapy in line with Parkland and Superior's policies. (*Id.* at 27.)

A few days later, on November 13, 2013 Dr. Lachman emailed Parkland's policy documents to Dr. Palafox, including the corrective action plan, the initial letter it had sent to its providers on October 1, and a follow up letter addressed to PCPs regarding the corrective action plan. (Docket Entry 106. at 27.) In the email. Lachman stated, "I-lope you find these useful. You will need to change the contract references and prior authorization language to match El Paso First. of course." (*Id.*) However, due to El Paso First's concern about Superior's delayed **[*23]** implementation, the proposal remained on hold. (*Id.*)

Although Superior's policy had been placed on hold indefinitely, it continued its efforts to reduce claims for allergy testing and immunotherapy services by PCPs. In December 2013. Dr. Harmon reached out to Dr. Gilbert Handal. a member of Superior's credentialing committee and paid consultant for Superior, and asked him to personally speak with some of the PCPs known to be working with UAS and persuade them to stop doing business with UAS. (Docket Entry 106. at 28.) Handal obliged, and a subsequent internal email from Harmon stated that he had, "asked Dr. Handal to visit some of the doctors that are using [UAS]. The first doctor he called decided he was going to stop. [Dr. Handal] is getting with the next group soon." (*Id.*)

In January 2014, Parkland began threatening providers with recoupment demands for alleged overpayment made for claims for allergy skin tests and immunotherapy by PCPs. (Docket Entry 106, at 29.) Parkland sent direct letters to individual physicians performing these services, referring to AAAAI's "standards of care" relating to allergy skin testing, immunotherapy, and the use of allergy technicians as justification. **[*24]** (*Id.*) One such physician was threatened with a recoupment demand of $172,557.97 for those services. (*Id.*) Parkland continued sending these recoupment letters for several months.

5. Litigation Begins.

By January 2014, UAS and AAAPC were aware of the concerted effort among MCOs to undermine PCP allergy services, and they filed a lawsuit. That lawsuit was not against Superior or the other MCOs, however; it was brought against the allergist associations AAAAI and ACAAI. alleging antitrust violations based on those organizations' efforts to convince MCOs not to do business with UAS or PCPs utilizing those services. *See Acad. of Allergy & Asthma in Primary. Care & United Biologics V. Allergy& Asthma Network/Mothers of Asthmatics. Inc..* No. 5:14-C V-35-OLG, Complaint (W.D. Tex. Jan. 13, 2014).

Superior's outside counsel, Greenberg Traurig, forwarded the complaint to Superior. (Docket Entry 106, at 30.) When Dr. Harmon received the complaint, he removed his attorneys from the email and added Dr. Palafox, Dr. Buckwold, and Dr. Lachman, writing "[a]ll of your plans are mentioned in this lawsuit, but only [Dr. Lachman] had the dubious distinction of being named specifically." (*Id.*) Palafox responded **[*25]** by stating. "Dr. [Lachman]. CONGRATULATIONS!!" (*Id.*) Lachman then responded, "This email track is discoverable. Therefore, I will not comment except to say that the information in the letter about [Parkland] is distorted and inaccurate." (*Id.*) Palafox then emailed Harmon directly, stating. "Thanks for the info as I did not know . . . I guess we are doing something right." (*Id.*)

The filing of the lawsuit was enough for El Paso First to drop the plan entirely. At a meeting of El Paso First's credentialing committee on February 12, 2014, the committee noted the "[p]roposed policy for Allergy & Immune Therapy has be[en] place[d] on hold due to [OAS's lawsuit]. [El Paso First] is not part of the lawsuit but could be a witness to the lawsuit so [El Paso First] cannot proceed in proposing any policies." (Docket Entry 106, at 30.)

Superior and Parkland, however, remained undaunted. In June 2014, Parkland sent a provider notification to physicians to clarify its position regarding authorization criteria for allergy skin testing and immunotherapy. (Docket Entry 106, at 31.) The notification stated that, unless the services were performed by allergists, pulmonologists, or otolaryngologists. Parkland **[*26]** would require prior authorization before the services were performed. (*M.*) Superior sent a similar provider alert that month entitled "Allergy and Immunology Therapy Credentialing Required for Medicaid Providers." (*Id.*) The alert stated that, effective August 1, 2014, providers who wanted to continue offering allergy and immunology services must be credentialed through Superior's credentialing committee before providing those services, unless the services were provided by an allergist. (*Id.*) The alert did make a small concession: Superior would allow noncredentialled PCPs to provide allergy blood tests. (*Id.*)

6. *The Effect on Access to Care.*

Following Superior's credentialing announcement, 1-11-ISC again requested information from Superior on its plan requirements and what effect the policy would have on its network's access to allergy testing and immunotherapy. (Docket Entry 106, at 32.) In response, Superior conceded to HFISC that its network would be insufficient to provide the statutorily required access to these services; this was because, in certain Texas counties, the relatively few providers in Superior's network who were authorized to provide allergy testing and immunotherapy **[*27]** services did not meet the statutorily required distance for travel to a provider. (Id.) Superior's directory listed only 153 locations in Texas where a new Medicaid enrollee could hypothetically receive allergy testing and immunotherapy, mainly in cities. (*M.*) This meant that each location would have to cover 19,119 Medicaid patients, with rural patients facing significant travel times to reach one of these locations. (*Id.*) In light of this issue, Superior had submitted an "access waiver" to the Texas Department of Insurance. (*Id.*) Superior advised HHSC it would continue its "ongoing efforts" to contract with available providers. (*Id.*)

In response to the credentialing policy. UAS and individual PCPs requested a meeting with HHSC and Superior to discuss their concerns. (Docket Entry 106, at 32.) HI-ISC and Superior agreed, and a meeting was held in May 2014. (*Id.*) At the meeting. UAS provided several testimonials from patients claiming they had utilized allergy services through their PCPs but were forced to stop when the insurance company stopped reimbursing the services, leaving no alternative but to seek sometimes distant allergists. (*Id.* at 33.) FIFISC stated its concerns regarding the lack **[*28]** of member access to allergy services through allergists, and in response Superior represented that their credentialing service would allow non-board-certified allergists to practice allergy care. (*Id.*) Despite these representations, after the announcement of the August 2014 policy, no provider seeking credentialing was approved who was not already a certified allergist. (*Id.* at 34.)

7. *Continued Litigation.*

On September 29, 2017, Chief Judge Garcia denied the defendant allergy associations' motion for summary judgment in OAS's pending case against the allergist associations, concluding, among other things, that UAS had factually supported antitrust standing, antitrust injury, and the relevant market. *See* No. 5:14-CV-35-OLG (Docket Entry 426, at *27-28, 30-32). That very same day, UAS and AAAPC filed this lawsuit. (*See* Docket Entry 1-1, at 1.)

A few months later, on December 28, 2017, UAS tiled a separate lawsuit in this district against Quest Diagnostics, Inc., the country's largest supplier of allergy blood tests, alleging nearly identical claims. See *Acad of Allergy & Asthma in Primary Care v. Quest Diagnostics Inc., No. CV 5:17-1295, 2019 U.S. Dist. LEXIS 29479, 2019 WL 919203, at *1 (W.D. Tex. Feb. 22, 2019)*. In that case, UAS's complaint was dismissed as time-barred. **[*29]** *Id. 2019 U.S. Dist. LEXIS 29479, [WL] at *4*. Judge Lamberth found that the last pleaded overt act in furtherance of the conspiracy was committed in August 2013, when a Quest representative met with Phadia, an allergy testing equipment manufacturer, to discuss Phadia's meeting with an insurance company to discuss its reimbursement policy for UAS; because the suit was filed in December 2017, it was outside the four-year limitations period for their federal and state antitrust claims. *Id.*

On March 26, 2018, a jury rendered a verdict against UAS in the allergist association case, and the Court entered a take-nothing judgment. *See* No. 5:14-CV-35-01A3 (Docket Entries 563. 564). Accordingly, the instant case is the only UAS anti-trust case that remains pending in the district.

III. Legal Standard Applicable to a Motion to Dismiss.

Under *Rule 8(a)(2) of the Federal Rules of Civil Procedure*, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Rule 12(b)(6)* authorizes the dismissal of a cause of action in a complaint when it fails "to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. When considering a motion to dismiss for failure to state a claim, the "court accepts 'all well-pleaded facts as true, viewing them in the light most favorable **[*30]** to the plaintiff.' *In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007)* (quoting *Martin K Eby Constr. Co. v. Dallas Area Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004))*. "Review is limited to the contents of the complaint and matters properly subject to judicial notice." *Mathews v. City of San Antonio, SA:14-CV-566-DAE, 2014 U.S. Dist. LEXIS 171307, 2014 WL 7019984. at *2 (W.D. Tex. Dec. 11, 2014)* (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd, 551 U.S. 308. 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007))*.

For a claim to survive a motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Cmp. v. Twombly, 550 U.S. 544. 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Although *Rule 8* does not require "detailed factual allegations," it does require more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* While "all well-pleaded facts are viewed in the light most favorable to the plaintiff," the plaintiff "must allege facts that support the elements of the cause of action in order to make out a valid claim." *City of Clinton v. Pilgrim's Pride Corp., 632 F.3d 148, 152-53 (5th Cir. 2010)*. That is, a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements °la cause of action will not do." *Twombly, 550 U.S. at 555*. "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.*

IV. Analysis.

Superior moved to dismiss UAS's **[*31]** claims in its Second Amended Complaint[4] pursuant to *Rule 12(b)(6)*. (Docket Entry 116, at 1.) Superior first contends that all of UAS's claims are time barred under the relevant statutes of limitations. (*Id.* at 11.) Alternatively. Superior contends that UAS has failed to plead sufficient facts to support its claims. (*Id.* at 17.) This Report and Recommendation addresses each of these arguments in turn.

A. *Statute of Limitations.*

The Court may grant a motion to dismiss on a statute of limitations defense when it is evident from the pleadings that the action is time-barred, and the pleadings fail to raise some basis for tolling. *Taylor v. Bailey Tool Mfg. Co., 744 F.3d 944, 946 (5th Cir. 2014)* (quoting *Jones v. Alcoa, Inc., 339 F.3d 359, 366 (5th Cir. 2003))*. In this case, UAS makes claims that are subject to four-year and two-year limitations periods. It is not evident from the pleadings that UAS's antitrust claims, or its other claims with four-year limitations periods, are barred: however, the claims subject to a two-year period are barred by limitations.

1. *Sherman Act and Texas Free Enterprise and Antitrust Act.*

Both the Sherman Act and the Texas Free Enterprise and Antitrust Act impose four-year limitations periods. *See 15 U.S.C. § 15b*; TEN. BUS. & COM. CODE ANN. § 15.25 (West 2019). In this circuit, a cause of action for an antitrust claim accrues each **[*32]** time a defendant commits an act that injures the plaintiff; provided a suit is filed within four years of the time of accrual, the action is not barred by limitations. *Bell v. Dow Chem., Co., 847 F.2d 1179, 1186 (5th Cir. 1988)* (citing *Imperial Point Colonnades Condo., Inc. v. Mangurian, 549 F.2d 1029, 1035 (5th Cir. 1977))*.[5] If some injurious acts occurred outside of the statute of limitations, and some occurred within, the plaintiff is limited to recovering damages "resulting only from those acts committed less than four years before commencement of his suit." *Imperial Point Colonnades Condo., Inc.. 549 F.2d at 1034*.

Here, UAS tiled its lawsuit on September 29, 2017; therefore, to survive the motion to dismiss, UAS must have pleaded facts supporting an injurious act occurring after September 29, 2013. Superior cites Texas case law for the general proposition that "a cause of action . . . accrues at the time when facts come into existence which authorize a claimant to seek a judicial remedy." (*See* Docket Entry 116, at 10 (quoting *Exxon Mobil Corp. v. Rincones, 520 S.W.3d 572.591 (Tex. 2017)*.) Applying this rule to UAS's' pleadings, Superior contends that VAS was aware of the alleged conspiracy as of August 2, 2013, when Superior announced that it would stop reimbursing allergy services provided by non-allergists effective October 1, 2013. (Docket Entry 116, at 10.)

While Superior is correct that accrual for an antitrust claim generally occurs **[*33]** at the time plaintiff becomes aware of an injurious conspiracy, it does not explain how its unilateral announcement of policy put UAS on notice of an illegal anti-competitive agreement with other MCOs, especially when the other alleged conspirators had not yet announced corresponding policies. Even if UAS was on notice, however, Superior cites no authority contradicting the rule that a claim accrues each time a defendant commits an act that injures the plaintiff. *See Bell, 847 F.2d at 1186*. As the Supreme Court has held, "each overt act that is part of the violation and injures the plaintiff . . . starts the statutory period running again, *regardless of the plaintiff's, knowledge* of the alleged illegality at much earlier times." *Kiehl-v. A.O. Smith Coop.. 521 U.S. 179, 189 (1997)* (emphasis added). Superior quotes *Klehr* for its holding that a "plaintiff cannot use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period." (*See* Docket Entry 129. at 4.) But that holding does not bar a lawsuit when additional injurious acts occurred within the limitations period: while a plaintiff cannot recover for acts accruing outside the limitations period. an act within **[*34]** the limitations period can still support a lawsuit. *Imperial Point Colonnades Condo., Inc., 549 F.2d at 1034*.

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[4] UAS has moved the Court for leave to tile its Third Amended Complaint. (*See* Docket Entry 119.) That motion, which is opposed by Superior and Centene, will he addressed by separate order.

[5] The Texas Antitrust Act is interpreted in harmony with federal interpretation of the Sherman Act. *See Caller-Times Pub. Co. v. Triad Commc'ns, Inc.. 826 S.W.2d 576. 580 (Tex. 1992)*.

Here, UAS has alleged numerous injurious acts occurring after September 29, 2013. It alleged that on October 4, 2013, as part of the IVICOs' agreement. Parkland eliminated coverage for allergy testing and immunotherapy performed by PCPs. (Docket Entry 106, at 23-24.) It also alleged Parkland sent recoupment demands in January 2014 to physicians contracting with UAS. (*Id.* at 29.) UAS also alleged Superior implemented its credentialing policy blocking reimbursement for "non-credential led" providers, meaning any provider who was not an allergist, in August 2014. (*Id.* at 31.) These allegations, taken as true, all establish injurious acts within the limitations period; while UAS cannot recover for injuries occurring prior to September 29, 2013, its knowledge of those prior acts is irrelevant to its ability to bring claims for independent, injurious acts occurring after that date. Because, based on this record, it is not evident from the pleadings that the entirety of UAS's anti-trust claims are time-barred, the Court should deny Superior's motion to dismiss them. *Taylor, 744 F.3d at 946*.

2. *UAS's Other*

UAS also presents state-law claims for tortious interference, civil conspiracy, **[*35]** declaratory judgment, and injunctive relief. (Docket Entry 106, at 44-45.) For tortious interference claims. Texas common law provides for a two-year statute of limitations.[6] *See First Nat'l Bank of Eagle Pass v. Levine, 721 S.W.2d 287, 289 (Tex. 1986)* (tortious interference). As civil conspiracy is a derivative tort, the Texas Supreme Court has held that the statute of limitations for civil conspiracy is the same as that of the underlying tort. *See Agar Corp., Inc. v. Electro Circuits Inter., LLC. 580 S.W.3d 136, 142 (Tex. 2019)*. The same is true of declaratory judgment and injunctive relief, which are also governed by the statute of limitations for the underlying claims. Nw. *Austin Mun. Util. Dist. No. 1 v. City of Austin, 274 S.W.3d 820, 836 (Tex. App.—Austin 2008, pet. denied.)* (because a "declaratory judgment action is a procedural device used to vindicate substantive rights, it is generally governed by the statute of limitations for the legal remedy underlying the claim: consequently, to determine what statute of limitations should apply to an action for a declaratory judgment, one must look to the legal remedy underlying the cause of action.")

Here, UAS has pleaded both the state and federal antitrust claims and the state tortious interference claims as the torts underlying its civil conspiracy claim and its requests for declaratory and injunctive relief. Because, for the reasons set out above, the antitrust claims are not barred **[*36]** by limitations, the only relevant limitations question is whether the tortious interference claims are.

Because tortious interference claims are subject to a two-year statute of limitations, the actions supporting UAS's claims must have occurred after September 29, 2015, to survive the motion to dismiss. *Taylor, 744 F.3d at 946*. Applying this limitations period to UAS's claim for tortious interference, it appears that that the claim accrued outside the limitations period.[7]

UAS contends the Court should toll the statute of limitations under the discovery rule. (Docket Entry 125, at 18-19.) That rule "defers accrual of certain causes of action until the plaintiff knew, or exercising reasonable diligence, should have known of the wrongful act causing injury." *Jackson v. W. Telemarketing Corp. Outbound, 245 F.3d 518, 523-24 (5th Cir. 2001)* (quoting *Salinas v. Gary Pools, Inc., 31 S.W.3d 333, 335 (Tex. App.—San Antonio 2000, no pet.))*. The rule applies only in two circumstances: (1) in cases of fraudulent concealment; and (2) "when the nature of the injury is inherently undiscoverable and the injury itself is objectively verifiable." *Id.*

The second circumstance is plainly inapplicable here. According to UAS's pleadings. Superior announced its policy on August 2, 2013, and began taking action to discourage physicians in contract with UAS from continuing business

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[6] In its motion, Superior alternatively contends that UAS's tortious interference claims are actually subject to only a one-year statute of limitations because they are based on defamatory conduct. (Docket Entry 116, at 13; Docket Entry 129. at 5 n.4.) This contention fails. Tortious interference claims are subject to a one-year limitations period only when defamatory conduct forms the sole basis for the complaint. *Nationwide Bi-Weekly Admin. Inc. v. Belo Corp., 512 F. 3d 137, 147 (5th Cir. 2007)*. Because UAS's tortious interference claims are based not only defamatory conduct but also on denial of reimbursement claims (*see* Docket Entry 106, at 44-45). the one-year statute of limitations is inapplicable.

[7] While UAS's response makes a conclusory reference to "more recent" acts against providers at Amarillo Pediatrics and Dr. Hashim, these alleged acts are not included in the second amended complaint. (*See* Docket Entry 125, at 20.)

with them shortly **[*37]** thereafter. (Docket Entry 106. at 23-24.) In December 2013, Dr. Handal, at Dr. Harmon's direction, personally contacted PCPs known to be working with UAS and persuaded them to stop doing business with UAS. (*Id.*, at 29.) In June 2014, Superior announced a credentialing policy, effective August 1, 2014. (Id. at 31.) But UAS has not shown how any of these acts were inherently undiscoverable. To the contrary, UAS filed a lawsuit in January 2014 in which it specifically pleaded that the allergist associations had wrongfully convinced MCOs not to do business with UAS. (*Id.* at 30.) Given that part of the alleged interference was already known to UAS, it cannot plausibly allege that Superior's publicly announced policies and actions were inherently undiscoverable even with due diligence on its part. *Cf.* *Jackson, 245 F.3d 518, 523-24*.

UAS instead rests its arguments on fraudulent concealment. Under Texas law, a plaintiff raising the limitations defense of fraudulent concealment must establish four elements: "(1) the existence of the underlying tort; (2) the defendant's knowledge of the tort; (3) the defendant's use of deception to conceal the tort; and (4) the plaintiff's reasonable reliance on the deception." *Welk v. Simpkins, 402 F. App'x 15, 18 (5th Cir. 2010)*. Claims of fraudulent concealment are **[*38]** subject to *Federal Rule of Civil Procedure 9*'s requirement that "the circumstances constituting fraud or mistake shall be stated with particularity." *Fed. R. Civ. P. 9(b)*; *see* *Norwood v. Raytheon Co., 501 F. Supp. 2d 836, 838 (W.D. Tex. 2006)* (discussing rule).

UAS's fraudulent concealment argument fails. UAS pleaded that Superior "fraudulently misrepresented to UAS since August 2014 that it would credential UAS-contracted physicians that complete a CME and applied to Superior's Credentialing Committee—a promise it made to both and UAS at a meeting held between the parties. It was not until well into 2016 UAS discovered every single physician who had tried to gain credentialing on this basis was denied and that Superior never meant to uphold that promise." (Docket Entry 106, at 50.) UAS has not stated, however, that Superior allegedly used deception to conceal the fact that no physician applying for credentialing over a two-year period ever received it, or in what way UAS reasonably relied on this alleged deception to its detriment. Because claims of fraudulent concealment must be made with specificity, UAS's failure to plead the third and fourth elements of a fraudulent concealment defense to limitations dooms its contention that the tortious interference claims should be tolled.[8] *Welk, 402 F. App'x at 18*.

For the reasons set **[*39]** out above, UAS's claims for tortious interference are time barred and the pleadings fail to raise a basis for tolling. Accordingly, as to that claim, Superior's motion to dismiss should be granted and UAS's tortious interference claims should be dismissed. *Taylor, 744 F.3d at 946*. However, because the antitrust claims underlying UAS's civil conspiracy claim and requests for declaratory and injunctive relief are timely, Superior's limitations arguments as to those claims should be denied in part.

B. *Sufficiency*.

Superior contends in its motion that UAS's antitrust claims[9] fail to state claims for relief under *Federal Rule of Civil Procedure 12(b)(6)*. Under *Section 1* of the Sherman Act. "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. "Although *§ 1* could be read to outlaw all contracts, it has long been interpreted to only proscribe unreasonable restraints." *Golden Bridge Tech., Inc. v. Motorola. Inc., 547 F.3d 266.*

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[8] In its proposed Third Amended Complaint, UAS avers that "the earliest time any of the aforementioned causes of action would accrue is in 2016, where a glimpse of the wrongdoing behind Superior's allergy policy was discovered via its responses to a subpoena in different litigation, including the 2016 corporate representative deposition of Dr. Glomb pursuant to that subpoena." (Docket Entry 119-3, at 55.) These additional "filets" are not before the Court in the present motion to dismiss; even if they were, they appear insufficiently specific to satisfy the particularity requirements of *Rule 9(b)*.

[9] As already noted, *see* n.5, *supra*, the Texas Act mirrors federal ***antitrust law***, and Texas courts "are statutorily instructed to interpret the [Texas Act] in harmony with federal judicial interpretations of equivalent federal laws." *Apani Sir., Inc. v. Coca-Cola Ewer., Inc., 300 F.3d 620, 628* (5th Cir. 2002.) Therefore, resolution of the question of whether UAS has stated a claim under the Sherman Act also determines the survival of his Texas Act claims.

271 (5th Cir. 2008). To establish a violation of § 1, a plaintiff must show that the defendants engaged in an unlawful agreement that restrained trade in the relevant market. *Id.*

Superior makes three arguments for dismissal under Rule I 2(b)(6): (1) UAS fails to allege facts plausibly **[*40]** demonstrating an unlawful agreement; (2) UAS fails to adequately allege the relevant product or geographic markets; and (3) UAS fails to demonstrate antitrust standing. (Docket Entry 116, at 17.) All three arguments should be rejected.

1. Unlawful agreement.

To adequately plead a § 1 claim under the Sherman Act, the plaintiff's complaint must contain enough factual matter, taken as true, to suggest that an agreement was made. *Twombly, 550 U.S. at 556*. The facts pleaded must demonstrate the conspirators had a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Golden Bridge Tech., Inc., 547 F.3d at 271*. "[T]he pivotal question is whether the concerted action was a result of an agreement." *Marital Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n, 751 F.3d 368. 375 (5th Cir. 2014)*.

Here, UAS has adequately pleaded the existence of an agreement. UAS's complaint describes the first instance of agreement in April 2013, when Dr. Harmon of Superior and Dr. Buckwold of CHC, representing competing MCOs, privately discussed eliminating reimbursement payments for UAS services, and concluded they could do so without suffering adverse market consequences if all MCOs in Texas adopted policies restricting allergy services to specialists. (Docket Entry 106, at 18.) Harmon emailed Buckwold the following day requesting a copy of **[*41]** CHC's proposed policy, which Superior then copied *verbatim*, replacing only the name of the organization. (*Id.*) At a later meeting of all Texas MCOs, Superior's representative suggested that all the MCOs adopt policies restricting allergy skin testing and immunotherapy to specialists. (*Id. at 21*.) CHC, Parkland, El Paso First, and Superior representatives agreed that their respective MCOs would move forward with similar policies. (*Id.*) Parkland followed up by announcing the same policy on October 1, 2013, sending letters to PCPs and family physicians who were performing allergy testing and immunotherapy in contract with UAS, and threating denial of reimbursement claims and demanding they submit evidence that they had ceased providing the services. (*Id.*)

On November 13, Dr. Lachman of Parkland emailed his MCO's policy documents to Dr. Palafox of El Paso First, including the corrective action plan, the initial letter it had sent to its providers on October 1, and a follow up letter addressed to PCPs regarding the corrective action plan; Dr. Lachman stated, "Hope you find these useful. You will need to change the contract references and prior authorization language to match El Paso First, of course." **[*42]** (*Id. at 27*.) And in January 2014, when it learned of UAS's lawsuit against certain allergy associations, Superior's Dr. Harmon immediately emailed his counterparts at CHC, Parkland, and El Paso First about the suit. (*Id. at 29-30*.)

If credited, as they must be, these allegations constitute direct evidence of an agreement between competing MCOs to adopt uniform policies to reduce the number of payable claims without suffering the competitive market consequences of denying reimbursement fur services. *See Tunica Web Advert. v. Tunica Casino Operators Ass'n, Inc., 496 F.3d 403. 410 (5th Cir. 2007)* (finding evidence of antitrust agreement from email referring to casinos' accord to refuse to do business, individually or as group, with entity leasing internet domain names). The frequent communication and sharing of materials alleged by UAS tends to exclude the possibility of independent action, and instead suggests a conscious commitment to a common scheme: such pleadings plausibly allege an agreement. *See Golden Bridge Tech, Inc., 547 F.3d at 271* (stating the pleading requirements for a plausible agreement). Superior argues in its motion that its actions are equally consistent with "unilateral parallelism," which is not actionable. *See Royal Drug Co. Inc. v. Grp. Life and Health Ins. Co., 737 F.2d 1433, 1437 (5th Cir. 1984)*. However. UAS's allegations plausibly support coordination between competitors, coordination which would **[*43]** counter a claim of independent, unilateral action. Even if these allegations were considered "doubtful," the Court must proceed "on the assumption that [they] are true." *Twombly, 550 U.S. at 555*.

Superior further contends that no inference of agreement can be drawn from UAS's allegations because it had no rational economic motive to conspire, a contention supported by the fact that El Paso First, who was allegedly its only competitor in the El Paso MCO market, backed out of the scheme. (*See* Docket Entry 116, at 19 (citing *Golden*

Bridge Tech, Inc., 547 F.3d at 271)). But the plausibility of a claim of an antitrust conspiracy is not dependent on its wisdom, or ultimate success; all that matters is whether an unlawful agreement has been plausibly alleged. *Cf.* Golden Bridge Tech, Inc., 547 F.3d at 271 ("The plaintiff must present evidence that the defendants engaged in concerted action, defined as having 'a conscious commitment to a common scheme designed to achieve an unlawful objective.') In any event, an economic incentive has been plausibly alleged: as UAS contends, if the MCOs combined in a united front, they could cease reimbursements for the increased number of allergy care claims due to UAS's services and thus all retain a greater share of the HHSC premiums. The fact that some conspirators **[*44]** subsequently backed out of the alleged scheme does not affect the analysis of whether a plausible agreement has been alleged. Accordingly, UAS has pleaded facts suggesting an agreement between the competing MCOs.

2. *The relevant geographic market*.

Antitrust plaintiffs must plead facts identifying "the relevant geographic market." Apani, 300 F.3d at 625-26. The facts must identify the area of "effective competition" for the product in question, which "must be charted by careful selection of the market area in which the seller operates and to which buyers can practicably turn for supplies." Id. at 626. "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiffs favor, the relevant market is legally insufficient, and a motion to dismiss may be granted." Id. at 628. Superior conceded at oral argument that UAS has adequately pleaded a product market; the parties differ only as to whether an adequate geographic market has been plead. (*See* Docket Entry 132, at 96.)

"[T]he definition **[*45]** of a relevant antitrust market is a highly fact-intensive inquiry; accordingly, a motion to dismiss a complaint for failure adequately to plead a relevant antitrust market should be granted only where the alleged market can be deemed "patently implausible solely on the basis of the four corners of the [complaint]." Cont'l Airlines, Inc. v. United Air Lines, Inc., 120 F. Supp. 2d 556, 568 (E.D. Va. 2000) (quoting Michael Anthony Jewelers, Inc. v. Peacock Jewelry, Inc., 795 F. Supp. 639, 646-47 (S.D.N.Y. 1992)). Measured by this standard, UAS's second amended complaint passes muster. UAS has pleaded that, for a PCP utilizing UAS's services to viably offer those services in its medical practice, the PCP must be reimbursed by a third-party payor, such as a commercial insurance company, an MCO, Medicare, or Medicaid. (Docket Entry 106, at 11.) It averred that 98% of allergy testing and immunotherapy services are paid for by one of these third-party payors. (*Id.*) The complaint also states that Medicaid patients are otherwise unable to afford these services, and thus 100% of reimbursements for these services from Medicaid patients come from MCOs or other government entities. (*Id.*) UAS stated that allergy services are offered in major cities and some smaller cities, and that the market boundary was that of cities in Texas. (*Id.* at 12.) The complaint elaborated that patients are willing **[*46]** to travel only a certain distance for these types of services based on Core-Based Statistical Areas ("CBSA"), which is limited to about 15 miles from their nearest provider. (*Id.* at 14.) It further elaborated that Superior's public directories listed 153 locations in Texas where a Medicaid enrollee could hypothetically receive allergy testing and immunotherapy from a credentialled allergist, which would equate to 19,119 Medicaid enrollees per location. (Id. at 32.)

UAS claims Texas MCOs control more than 90% of Texas's Medicaid patients. (Docket Entry 106, at 8.) It also claims that Superior provides Medicaid services in every county in Texas, and provides 60% of Texas's Medicaid services in El Paso County. UAS contends Parkland controls 60% of Texas's Medicaid services in Dallas County. (*Id.*) It further claims Superior. Parkland, and El Paso First jointly control more than 90% of Dallas and El Paso Counties, and that Parkland and Superior control more than 50% of the market in other areas. (*Id.* at 8, 40.)

While these pleadings are not supported with elaborate detail, they are sufficient at the motion to dismiss stage to place Defendants on notice of the relevant geographic market. *Cf. Allergy & Asthma Network, et* ***[*47]*** *al.*, No. 5:14-cv-35-OLG, at *31-32 (at summary judgment stage, finding sufficient detail regarding geographic based on claims that "consumers of ambulatory services, such as allergy testing and immunotherapy, are willing to travel locally to obtain service" but are "unlikely to shop outside the bounds of a CBSA"). UAS has detailed (1) the market area in which the seller operates and (2) the area to which buyers can practicably turn for supplies. Apani Sw., Inc., 300 F.3d at 626. It has further detailed the market power of the alleged conspirators, Superior, Parkland. and El Paso First. in combination, is greater than 50% in many areas and greater than 90% in some. *See Spectators' Commc'n*

Network Inc. v. Colonial country Club, 253 F.3d 215, 225 (5th Cir. 2001) ("[T]he reason for looking at market power is to determine whether the combination or conspiracy, not each individual conspirator, has the power to hurt competition in the relevant market."). Because "it is not inconceivable" that UAS "could prove a set of facts supporting the relevant market definition alleged in its complaint," the Court should deny Superior's motion to dismiss for failure to define the relevant market. *MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc., 62 F.3d 967, 977 (7th Cir. 1995)*.

3. *Antitrust standing and injury*.

Finally, Superior contends that even if UAS has pleaded **[*48]** a valid antitrust claim, it does not have standing and has failed to allege antitrust injury. (Docket Entries 116, at 23; 129, at 11.)

A private antitrust plaintiff does not acquire standing merely by showing that he was injured by the defendant's conduct. *Setfecz v. Jewel Food Stores, 67 F.3d 591, 597 (7th Cir. 1995)*. Rather, a plaintiff must show: "(1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; (2) antitrust injury; and (3) proper plaintiff status, which assures that other parties are not better situated to bring suit." *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. All., Inc., 123 F.3d 301, 305-06 (5th Cir. 1997)*.

Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Norris v. Hearst Tr., 500 F.3d 454, 465 (5th Cir. 2007)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. "The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id.* Exclusion of a competitor from the market is an injury that the antitrust laws were intended to prevent; thus, a competitor who has been excluded from the market "suffers a distinct injury considered "[i]rrespective of consumer injury," and "has clear standing to challenge the conduct of rival(s) that . . . tends to exclude competitors from the market." *Andrx Pharm., Inc. v. Biovail Corp. Int'l, 256 F.3d 799, 816 (D.C. Cir. 2001)*.

Here, UAS does not lack standing **[*49]** and has adequately pleaded injury. UAS claims antitrust injury in the form of lost profits it would have earned but for its exclusion from the market, which is the type of injury antitrust laws were intended to prevent and which flows directly from the combined efforts of Superior and Parkland to deny claims. *Cf. Norris, 500 F.3d at 465*. Although Superior argues that suppliers to direct market participants cannot seek recovery because their injuries are too indirect to be considered "antitrust injuries," (Docket Entry 129, at 11, citing *Serfecz, 67 F.3d at 597*), UAS has plead that Superior and its co-conspirators' allegedly unlawful conduct was specifically directed against UAS: accordingly, the injuries, far from being indirect, are a direct result of the conspirators allegedly anticompetitive conduct. *See Allergy & Asthma Network, et al.*, No. 5:14-cv-35-OLG, at *28 (reaching similar conclusion).

As for "proper plaintiff' status, courts determine whether a plaintiff is a "proper plaintiff' by considering "such facts as (1) whether the plaintiffs injuries or their causal link to the defendant are speculative, (2) whether other parties have been more directly harmed, and (3) whether allowing this plaintiff to sue would risk multiple lawsuits, **[*50]** duplicative recoveries, or complex damage apportionment." *Norris. 500 F.3d at 465* (quoting *McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1341 (5th Cir. 1988))*. Here, the injuries UAS alleges are not speculative. Moreover, they are unique to UAS, such that no other parties are "more directly harmed" and there is no risk of duplicative recoveries. *See Andrx Pharm., Inc., 256 F.3d at 816* (when plaintiffs "alleged injury is not derived from or measured by the injury to consumers" but is instead measured by lost profits it would have realized had it not been excluded from market, injuries are distinct from those recoverable by other potential plaintiffs).

For all these reasons, UAS has adequately pleaded an antitrust violation, and Superior's *Rule 12(b)(6)* claim fails.

V. Conclusion and Recommendation.

Based on the foregoing, I recommend that Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint (Docket Entry 116) be **GRANTED IN PART** and **DENIED IN PART**. Defendant's motion should be **DENIED** as to the Sherman Act and Texas Free Enterprise and Antitrust Act claims, as well as the civil conspiracy claim derivative of those claims and the derivative requests for injunctive and declaratory relief. It should be **GRANTED** as to tortious interference claims and to the civil conspiracy claim derivative of that claim, and as to **[*51]** the request for injunctive and declaratory relief based on tortious interference.

VI. Instructions for Service and Notice of Right to Object.

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing, a copy to those not registered by certified mail, return receipt requested. Written objections to this Report and Recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. *28 U.S.C. § 636(b)(1)*; *Fed. R. Civ. P. 72(h)*. The party shall file the objections with the clerk of the court, and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections arc being made and the basis for such objections: the district court need not consider frivolous, conclusive or general objections. A party's failure to tile written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination **[*52]** by the district court. *Thomas v. Arn, 474 U.S. 140,149-52, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; *Acuña v. Brown & Root, Inc., 200 F.3d 335,340 (5th Cir. 2000)*. Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this Report and Recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415. 1428-29 (5th Cir. 1996)* (en bane).

SIGNED on May 4, 2020.

/s/ Henry J. Bemproad

Henry J. Bemproad

United States Magistrate Judge

In re Restasis (Cyclosporine Opthalmic Emulsion) Antitrust Litig.

United States District Court for the Eastern District of New York

May 5, 2020, Decided; May 5, 2020, Filed

18-MD-2819 (NG) (LB)

Reporter

335 F.R.D. 1 *; 2020 U.S. Dist. LEXIS 82725 **; 106 Fed. R. Serv. 3d (Callaghan) 1164; 2020-1 Trade Cas. (CCH) P81,208

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

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

Core Terms

generic, consumers, brand, damages, class member, uninjured, predominance, class certification, but-for, class action, plaintiffs', antitrust, percent, prescriptions, methodology, drugs, individualized, classwide, purchases, predicted, aggregate, argues, penetration, forecasts, questions, calculations, overcharge, retention, insured, consumer protection

LexisNexis® Headnotes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Evidence > Burdens of Proof > Preponderance of Evidence

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN1[] **Prerequisites for Class Action, Commonality**

A plaintiff who seeks certification of a class action under *Fed. R. Civ. P. 23(b)(3)* bears the burden of satisfying the requirements of *Rule 23(a)*—numerosity, commonality, typicality, and adequacy of representation—as well as those of *Rule 23(b)(3)*: (1) that the questions of law or fact common to class members predominate over any questions affecting only individual members' and (2) that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *Fed. R. Civ. P. 23(b)(3)*. In addition to these enumerated requirements, the Second Circuit has recognized an implied requirement of ascertainability in *Rule 23*. A plaintiff must establish each *Rule 23* requirement by a preponderance of the evidence.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN2[] Class Actions, Certification of Classes

A court may certify a class action only if it concludes, after a rigorous analysis, that the proposed class meets the requirements of *Fed. R. Civ. P. 23(a)* and *(b)*. Such analysis may entail some overlap with the merits of the plaintiff's underlying claim. But courts may decide merits issues at class certification only to the extent they are relevant to the application of *Rule 23*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN3[] Prerequisites for Class Action, Numerosity

Fed. R. Civ. P. 23(a)(1) requires a class to be so numerous that joinder of all members is impracticable. In the Second Circuit, numerosity is presumed for classes of 40 or more.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN4[] Prerequisites for Class Action, Commonality

Fed. R. Civ. P. 23(a)(2) requires that there be questions of law or fact common to the class. A question is common to the class if it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. Consideration of the commonality requirement obligates a district court to determine whether class members have suffered the same injury. Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question.

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

HN5[] Deceptive & Unfair Trade Practices, State Regulation

In an antitrust case alleging overcharges, the typical measure of damage is the difference between the price that was actually charged and the price that a consumer would have been charged in the but-for world.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN6[] Prerequisites for Class Action, Typicality

Fed. R. Civ. P. 23(a)(3) requires a finding that the claims or defenses of the representative parties are typical of the claims or defenses of the class. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN7[] **Prerequisites for Class Action, Adequacy of Representation**

Fed. R. Civ. P. 23(a)(4) requires that the representative parties will fairly and adequately protect the interests of the class. To determine if this requirement is met, courts must inquire into whether a (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation. This process serves to uncover conflicts of interest between named parties and the class they seek to represent.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN8[] **Class Actions, Certification of Classes**

The predominance and superiority requirements of *Fed. R. Civ. P. 23(b)(3)* ensure that the class will be certified only when it would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN9[] **Class Actions, Certification of Classes**

A district court may certify a class under *Fed. R. Civ. P. 23(b)(3)* only if the questions of law or fact common to class members predominate over any questions affecting only individual members. Therefore, the predominance criterion is far more demanding than *Rule 23(a)*'s commonality requirement. A plaintiff satisfies the requirement by showing that: (1) resolution of any material legal or factual questions can be achieved through generalized proof, and (2) these common issues are more substantial than the issues subject only to individualized proof.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Evidence > Burdens of Proof > Allocation

HN10[] **Prerequisites for Class Action, Predominance**

Predominance is a comparative standard. A court must give careful scrutiny to the relation between common and individual questions in a case. An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN11[] **Class Actions, Certification of Classes**

The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. The analysis is more qualitative than quantitative. The essential question is whether the proposed class is sufficiently cohesive to warrant adjudication by representation.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN12[] **Remedies, Damages**

Determining whether common questions of law or fact predominate begins, of course, with the elements of the underlying cause of action. To establish a claim under the antitrust laws, a plaintiff must prove (1) a violation of ***antitrust law***; (2) injury and causation; and (3) damages.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN13[] **Prerequisites for Class Action, Predominance**

Predominance is a test readily met in certain cases alleging violations of the antitrust laws. Where plaintiffs were allegedly aggrieved by a single policy of the defendant and there is strong commonality of the violation and the harm, this is precisely the type of situation for which the class action device is suited.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN14[] **Class Actions, Certification of Classes**

The U.S. Supreme Court and the Second Circuit have recognized that the existence of uninjured plaintiffs does not bar class certification.

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN15[] **Standing, Elements**

To satisfy U.S. Const. art. III standing, a class member must have been affected in a personal and individual way, but the member need not be capable of sustaining a valid cause of action.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN16[] **Class Actions, Certification of Classes**

The U.S. Supreme Court and Second Circuit have never suggested that a certain percentage or number of uninjured plaintiffs would automatically bar class certification. And the Seventh Circuit explicitly eschewed such an approach. It has held that a class may be certified unless it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant. And it later made clear that there is no precise measure for a great many, the determination of which is a matter of degree, and will turn on the facts as they appear from case to case. Beyond percentages, the number of uninjured class members in relationship to the size of the class also may matter.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN17[] **Class Actions, Certification of Classes**

District courts in the Second Circuit and other Circuits have held that a class may be certified so long as a de minimis number of class members were uninjured or, conversely, virtually all class members were injured. Although the concept of de minimis is not well defined, one court recently suggested that 5% to 6% constitutes the outer limits of a de minimis number of uninjured class members.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN18[] **Standing, Requirements**

To decide if the class contains only a de minimis number of uninjured plaintiffs, the court must evaluate the methodology evidence to determine whether "no reasonable juror could have believed" it. Or, as other courts have framed it, the court must determine whether plaintiffs have advanced a workable methodology to demonstrate that antitrust injury can be proven on a class-wide basis.

Evidence > Types of Evidence > Documentary Evidence > Affidavits

HN19[] **Documentary Evidence, Affidavits**

Self-identifying affidavits are an accepted means to establish a class member's entitlement to recovery in class action litigation.

Evidence > Weight & Sufficiency

HN20[] **Evidence, Weight & Sufficiency**

The Second Circuit has accepted the use of representative evidence and statistical observations to prove classwide injury.

Civil Procedure > Pleading & Practice > Pleadings > Answers

HN21[] **Pleadings, Answers**

Defendants are not entitled to the benefit of the doubt when the very reason the court cannot know the answer to a question is because of their alleged wrongdoing.

Governments > Legislation > Statute of Limitations > Time Limitations

HN22[] **Statute of Limitations, Time Limitations**

Antitrust injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN23[] **Prerequisites for Class Action, Adequacy of Representation**

Speculative claims about class members' medical reaction to a non-existent drug cannot defeat class certification.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN24[] **Remedies, Damages**

The third and final element of an antitrust claim is damages.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN25[] **Class Actions, Certification of Classes**

Although a court must consider the fact that damages calculations will be individualized in the predominance analysis, class certification under *Fed. R. Civ. P. 23(b)(3)* does not require a court to conclude that damages are capable of measurement on a classwide basis. Further, where the legal and factual questions raised by the second element of an antitrust claim are common to the class, the predominance requirement of *Rule 23(b)(3)* is likely met.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN26[] **Class Actions, Certification of Classes**

The measure of overcharge damages in a RICO class action is straightforward.

Civil Procedure > Remedies > Damages > Compensatory Damages

HN27[] **Damages, Compensatory Damages**

The use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself. The Second Circuit has accepted the use of aggregate classwide damages so long as they roughly reflect the harm caused to plaintiffs.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Evidence > Burdens of Proof > Allocation

HN28[] **Remedies, Damages**

Courts recognize that, given the inherent difficulty of identifying a but-for world, antitrust damages need not be measured with certainty. Rather, they must be demonstrated as a matter of just and reasonable inference, although the result be only approximate. If plaintiffs cannot prove their damages with precision, the most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. For these reasons, the burden of proving antitrust damages is not as rigorous as in other types of cases.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN29[] **Class Actions, Certification of Classes**

In a motion for class certification, plaintiff bears the burden of providing an extensive analysis of state law variations to determine whether there are insuperable obstacles to class certification. Therefore, in such a case, the court must determine whether the variations in state case law "swamp" common legal issues and defeat the predominance requirement.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN30[] **Prerequisites for Class Action, Predominance**

As the Second Circuit has held, variations in state laws do not necessarily prevent a class from satisfying the predominance requirement, so long as district courts do more than take the plaintiff's word that no material differences exist. Rather district courts themselves must undertake a considered analysis of the differences in state laws.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN31[] **Class Actions, Certification of Classes**

Curts must exercise care in conducting a choice-of-law analysis in a putative *Fed. R. Civ. P. 23(b)(3)* class action in order to determine whether any conflicts in governing law will overwhelm the ability of the trier of fact meaningfully to advance the litigation through classwide proof.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN32[] Federal & State Interrelationships, Erie Doctrine

When deciding matters of state law, a federal court generally must apply the choice-of-law principles of the state in which it sits.

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

HN33[] Venue, Multidistrict Litigation

In a multidistrict litigation, the transferee court applies the choice of law rules of the state in which the action first was filed.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

Torts > Procedural Matters > Conflict of Law > Place of Injury

Torts > Procedural Matters > Conflict of Law > Significant Relationships

HN34[] Choice of Law, Significant Relationships

Unlike New York and California, Texas applies the "most significant relationship" test. This includes numerous factors to consider when determining which state has the most significant relationship to a case. The factors vary somewhat in importance from one field of law to another, and additional factors apply when considering tort claims. Under this analysis, the applicable law will usually be the local law of the state where the injury occurred.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

Torts > Procedural Matters > Conflict of Law > Place of Injury

Torts > Procedural Matters > Conflict of Law > Significant Relationships

HN35[] Choice of Law, Significant Relationships

The "most significant relationship" general factors include: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability, and uniformity of result, and (g) ease in the determination and application of the law to be applied. The additional factors applicable to tort cases include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Governmental Interests

Torts > Procedural Matters > Conflict of Law > Governmental Interests

Torts > Procedural Matters > Conflict of Law > Place of Injury

Torts > Procedural Matters > Conflict of Law > Significant Relationships

HN36[] **Choice of Law, Governmental Interests**

Under the government interest analysis, if conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN37[] **Class Actions, Certification of Classes**

The United States District Court for the District of Minnesota has expressly found that plaintiffs need not prove class-wide fact of injury or individual damages at the class certification stage, but only a viable method for doing so.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN38[] **Remedies, Damages**

In the context of proof of antitrust impact, in Michigan, the inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN39[] **Standing, Requirements**

In the context of proof of antitrust impact, the law in Florida does not support a heightened standard.

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

HN40[] **Deceptive & Unfair Trade Practices, State Regulation**

Vermont's Consumer Protection Act, *Vt. Stat. Ann. tit. 9, §§ 2453* requires, in addition to elements common to the other consumer protection claims, that the claimed deception must be material, that is, likely to affect the consumer's conduct or decision regarding the product.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN41[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23(b)(3) permits class certification only where a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The Rule provides a list of factors to be considered in this assessment: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and(D) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D).

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

Evidence > Burdens of Proof > Allocation

HN42[] Class Actions, Prerequisites for Class Action

In the Second Circuit, the ascertainability doctrine requires only that a class be defined using objective criteria that establish a membership with definite boundaries.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Class Attorneys > Appointments

HN43[] Prerequisites for Class Action, Adequacy of Representation

Fed. R. Civ. P. 23(g) requires the court to appoint class counsel at the time of certification. In doing so, the court must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN44[] Class Actions, Certification of Classes

When a court certifies a Fed. R. Civ. P. 23(b)(3) class, Rule 23(c)(2)(B) provides that the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

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For Rochester Drug Cooperative, Inc, Plaintiff: Archana Tamoshunas, LEAD ATTORNEY, Garwin Bronzaft Gerstein & Fisher, LLP, New York, NY USA; Barry Taus, LEAD ATTORNEY, Taus, Cebulash & Landau, LLP, New York, NY USA; Daniel John Walker, LEAD ATTORNEY, Berger & Montague, PC, Washington, DC USA; David F. Sorensen, Zachary D. Caplan, LEAD ATTORNEYS, Berger & Montague PC, Philadelphia, PA USA; Joseph T. Lukens, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Philadelphia, PA USA; Miles Greaves, LEAD ATTORNEY, Taus Cebulash & Landau LLP, New York, NY USA; Peter R. Kohn, LEAD ATTORNEY, Faruqi & Faruqi, LLP, New York, NY USA; Bradley J. Demuth, Faruqi & Faruqi LLP, New York, NY USA.

For Fraternal Order of Police, Miami Lodge 20, Insurance Trust Fund, On behalf of itself and all others similarly situated, Plaintiff: D. Sean Nation, Matthew C. Weiner, Steve D. Shadowen, **[**5]** LEAD ATTORNEYS, Hilliard & Shadowen LLP, Austin, TX USA; Frazar Wright Thomas, LEAD ATTORNEY, Hilliard & Shadowen, Austin, TX USA; Jayne A. Goldstein, LEAD ATTORNEY, Shepherd Finkelman Miller & Shah LLP, Fort Lauderdale, FL USA; Natalie Finkelman Bennett, LEAD ATTORNEY, Shepherd Finkelman Miller & Shah, LLP - Media, PA, Media, PA USA; Robert Christopher Bunt, LEAD ATTORNEY, Parker, Bunt & Ainsworth, P.C., Tyler, TX USA; Christina H.C. Sharp, Girard Gibbs LLP, San Francisco, CA USA.

For Ahold U.S.A. Inc., Plaintiff: Alfred Luke Smith, John Radice, LEAD ATTORNEYS, Radice Law Firm PC, Long Beach, NJ USA; David S. Nalven, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Cambridge, MA USA; Elizabeth L DeRieux, Sidney Calvin Capshaw, III, LEAD ATTORNEYS, Capshaw DeRieux LLP, Gladewater, TX USA; Hannah W. Brennan, Kristen A. Johnson, LEAD ATTORNEYS, Hagens Berman Sobol Shapiro LLP - Cambridge, Cambridge, MA USA; Thomas M. Sobol, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Cambridge, MA USA; Jessica R. MacAuley, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Cambridge, MA USA.

For Allied Services Division Welfare Fund, Plaintiff: Lanson Leon Bordelon, LEAD ATTORNEY, The Dugan Law Firm, APLC, **[**6]** New Orleans, LA USA.

For Plumbers & Pipefitters Local 178 Health & Welfare Trust Fund, on behalf of itself and all others similarly situated, Plaintiff: Gregory B. Linkh, Lee Albert, LEAD ATTORNEYS, Glancy Prongay & Murray LLP, New York, NY USA; Robert Christopher Bunt, LEAD ATTORNEY, Parker, Bunt & Ainsworth, P.C., Tyler, TX USA.

For Self Insured Schools of California, on behalf of itself and all others similarly situated, Plaintiff: Joseph R. Saveri, LEAD ATTORNEY, San Francisco, CA USA; Kyla Gibboney, Nicomedes Sy Herrera, Ryan J McEwan, V Chai Oliver Prentice, LEAD ATTORNEYS, Joseph Saveri Law Firm Inc, San Francisco, CA USA; Gaston Kroub, Zachary D. Silbersher, Kroub, Silbersher & Kolmykov PLLC, New York, NY USA; Christina H.C. Sharp, Girard Gibbs LLP, San Francisco, CA USA.

For Louisiana Health Service And Indemnity Company, on behalf of itself and all others similarly situated, doing business as, Blue Cross Blue Shield Of Louisiana, Hmo Louisiana, Inc, on behalf of itself and all others similarly situated, Plaintiffs: Bonnie Adele Kendrick, LEAD ATTORNEY, Dugan Law Firm, PLC, Ste 1000, New Orleans, LA USA; Charles A. O'Brien, III, LEAD ATTORNEY, Baton Rouge, LA USA; David S. Scalia, **[**7]** LEAD ATTORNEY, The Dugan Law Firm, New Orleans, LA USA; Douglas R Plymale, LEAD ATTORNEY, The Dugan Law Firm, New Orleans, LA USA.

For Kph Healthcare Services, Inc., A/K/A Kinney Drugs, Inc., Individually And on Behalf of All Others Similarly Situated, Plaintiff: Dianne M. Nast, Erin Burns, LEAD ATTORNEYS, NastLaw LLC, Philadelphia, PA USA; Debra G. Josephson, Michael L. Roberts, Stephanie Egner Smith, PRO HAC VICE, Roberts Law Firm, P.A., Little Rock, AR USA; Karen S. Halbert, PRO HAC VICE, Roberts Law Firm, Little Rock, AR USA.

For Direct Purchaser Class Plaintiffs, Plaintiff: Thomas M. Sobol, Hagens Berman Sobol Shapiro LLP, Cambridge, MA USA.

For End-Payor Plaintiffs, Plaintiff: Joseph R. Saveri, San Francisco, CA USA.

For Walgreen Co., The Kroger Co., Albertsons Companies, Inc., Heb Grocery Company L.P., Plaintiffs: Scott E. Perwin, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL USA; Anna Theresa Neill, Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Joshua Barton Gray, Kenny Nachwalter, P.A., Washington, DC USA; Lauren Carol Ravkind, PRO HAC VICE, Kenny Nachwalter P.A., Four Seasons Tower, Miami, FL USA.

For Allergan, Inc., Defendant: Jack Wesley Hill, LEAD **[**8]** ATTORNEY, Ward, Smith & Hill, PLLC, Longview, TX USA; Jason McKenney, LEAD ATTORNEY, Gibson, Dunn & Crutcher, LLP, Dallas, TX USA; M Sean Royall, LEAD ATTORNEY, Gibson Dunn & Crutcher LLP - Dallas, Dallas, TX USA; Matthew Cameron Parrott, LEAD ATTORNEY, Gibson. Dunn & Crutcher LLP, Irvine, CA USA; Richard Hale Cunningham, LEAD ATTORNEY, Gibson Dunn & Crutcher LLP, Denver, CO USA.

Judges: NINA GERSHON, United States District Judge.

Opinion by: NINA GERSHON

Opinion

[*7] OPINION AND ORDER ON END-PAYOR PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

GERSHON, United States District Judge:

I. INTRODUCTION

This case, brought as a class action, involves allegations that defendant Allergan, Inc., a pharmaceutical company, took several unlawful actions to delay the market entry of generic versions of its product Restasis (cyclosporine ophthalmic emulsion). The named plaintiffs are entities that provide prescription drug coverage for Restasis to their members.[1] These End-Payor Plaintiffs ("plaintiffs" or "EPPs") allege that, if a generic version of Restasis had entered the market, it would have cost significantly less than what they paid for brand Restasis **[**10]** and that they were damaged by paying overcharges. EPPs now seek certification under *Federal Rules of Civil Procedure 23(a)* and *23(b)(3)* of a class of all end-payors, including consumers. For the reasons set forth below, plaintiffs' motion for class certification is granted.

Plaintiffs also move under *Federal Rule of Evidence 702* to exclude the testimony of two of defendant's expert witnesses offered on this motion. Today, I separately issue a decision granting those motions (the "Daubert Decision").

II. BACKGROUND

A. Factual Background

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[1] The named plaintiffs are 1199SEIU National Benefit Fund; 1199SEIU Greater New York Benefit Fund; 1199SEIU National Benefit Fund for Home Care Workers; 1199SEIU Licensed Practical Nurses Welfare Fund; American Federation of State, County, and Municipal Employees District Council 37 Health and Security Plan; Fraternal Order of Police, Miami Lodge 20, Insurance Trust Fund; Ironworkers Local 383 Health Care Plan; Self-Insured Schools of California; Sergeants Benevolent Association Health & Welfare Fund; St. Paul Electrical Workers' Health Plan; and United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund.

I presume familiarity with EPPs' allegations, which are set forth in my decision **[*9]** denying defendant's motion to dismiss for lack of causation. *See* *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig., 333 F. Supp. 3d 135 (E.D.N.Y. 2018)*. I will summarize them briefly.

Restasis, an oil-in-water emulsion containing the active ingredient cyclosporine, is prescribed by doctors to treat dry-eye disease. It is an extremely successful drug, with annual sales of over $1.5 billion. Plaintiffs allege that, to maintain its monopoly on Restasis after its patents for the drug expired on May 17, 2014, Allergan worked to delay approval by the Food and Drug Administration ("FDA") of generic versions of Restasis by (1) filing sham citizen petitions with the FDA; (2) defrauding the U.S. Patent and Trademark Office into issuing second **[**11]** wave patents for Restasis; (3) using those patents to file baseless patent infringement lawsuits against generic drug makers; and (4) frustrating attempts to invalidate its patents by selling them to the Saint Regis Mohawk Tribe, which licensed them back, in order to rent the Tribe's sovereign immunity.

EPPs claim that defendant's efforts allowed it to maintain a monopoly on Restasis after its patents expired. They allege that Allergan had a strong incentive to foreclose generic entry because, once a generic enters the market, there is a quick and dramatic reduction in sales of the brand drug.

The proliferation of generic drugs was spurred by the passage of the *Drug Price Competition and Patent Term Restoration Act of 1984 (the "Hatch-Waxman Act"), 98 Stat. 1585*, which changed the terms under which generic products could enter the market and compete with brand drugs. Since the Hatch-Waxman Act's introduction, there has been a rapid increase in drugs' generic penetration rates—that is, the rates at which consumers purchase generic equivalents to brand name drugs when such an option is available. Between 2008 and 2013, the average generic penetration rate increased from 91 to 97 percent for all prescriptions, **[**12]** and it remained at 97 percent from 2013 to 2017.

It is not disputed that generic drugs are favored because they are generally much cheaper than their brand name counterparts. Between 2011 and 2013, within eight months of their market entry, generic drugs cost an average of 74 percent less than the price of the corresponding brand drug before generic entry; they cost 90 percent less within two and a half years of entry.

The American health care system incentivizes consumers' purchase of generic drugs. All states but one have laws that either require or permit a pharmacist who is filling a prescription for a brand drug to substitute an equivalent generic when available. Higher dispensing fees and performance targets encourage pharmacists to take advantage of these laws and substitute generic drugs when possible. Health insurance plans and pharmacy benefit managers (PBMs), which many plans hire to administer their prescription drug programs, also promote the use of generics, mostly through tiered formularies that assign lower copayments or coinsurance to generic drugs compared to their brand equivalents.

The FDA has not yet approved a generic version of Restasis.

B. Procedural Background

[13]** This multi-district litigation was transferred to me in January 2018.[2] On April 4, 2018, I appointed Eric B. Fastiff of Lieff Cabraser Heimann & Bernstein, LLP; Dena C. Sharp of Girard Sharp LLP; and Joseph R. Saveri of Joseph Saveri Law Firm, Inc. as End-Payor Interim Co-Lead Counsel, and I appointed Dan Drachler of Zwerling,

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[2] In addition to EPPs, the litigation includes other groups of plaintiffs. While the motion for class certification of the Direct Purchaser Plaintiffs ("DPPs") was pending, they announced that they and Allergan had agreed to a class settlement which awaits the court's approval. Another group of plaintiffs—referred to as the Retailer Plaintiffs—are DPPs who, in effect, opted out of the class action and also recently reached a settlement with Allergan. Finally, three entities proceeding as assignees of claims held by indirect purchasers—MSP Recovery Claims, Series LLC; MSPA Claims 1, LLC; and MAO-MSO Recovery II, LLC, Series PMPI—jointly filed a complaint in this court on May 3, 2019. These plaintiffs and defendant agreed to stay that action until I issue a ruling on EPPs' class certification motion.

Schachter & Zwerling, LLP as Interim Liaison Counsel. EPPs filed a Consolidated Class **[*10]** Action Complaint on that same day. Because *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, precludes EPPs from asserting federal damages claims under federal ***antitrust law***, they bring their claims exclusively under various state antitrust and consumer protection laws.[3]

On September 18, 2018, I denied Allergan's motion to dismiss plaintiffs' complaint for failure to allege causation. *In re Restasis, 333 F. Supp. 3d at 160*. And on November 13, 2018, I granted in part and denied in part defendant's motion to dismiss certain of plaintiffs' state law claims. *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig., 355 F. Supp. 3d 145, 162 (E.D.N.Y. 2018)*. EPPs filed a Corrected First Amended Consolidated Class Action Complaint on December 20, 2018, in which they incorporated my rulings on defendant's motion to dismiss and added new state law claims.

On April 10, 2019, with discovery nearly complete, EPPs moved to certify the following class:

> All persons or entities who indirectly purchased, paid and/or provided reimbursement for some or all of the purchase price for Restasis, other than for resale, in Arizona, Arkansas, California, Colorado, the District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine*, Massachusetts*, Michigan, Minnesota, Mississippi, Missouri*, Montana*, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont*, West Virginia, and Wisconsin from May 1, 2015,[4] through the present (in the case of Arkansas **[**14]** only, July 31, 2017), for consumption by themselves, their families, or their members, employees, insureds, participants, or beneficiaries.

The states marked with an asterisk are those in which EPPs assert claims only on behalf of people, not corporations.

The proposed class includes insured consumers, uninsured consumers ("cash payors"), and third-party payors ("TPPs"). TPPs are entities that pay or provide reimbursement for all or some of the cost of a drug for people whom they insure. Consumers covered by a health insurance plan offered by a TPP pay a portion of a prescribed drug's cost either through coinsurance or a copayment; the TPP pays the remainder.

EPPs have excluded the following from the proposed class:

> Allergan, its officers, directors, employees, subsidiaries, and affiliates; all federal and state government entities except for cities, towns, municipalities, or counties with self-funded prescription drug plans; all persons or entities who purchased Restasis for purposes of resale or directly from Allergan or its affiliates; fully insured health plans, *i.e.*, plans that purchased insurance covering 100 percent of their reimbursement obligations to members; any "flat copay" **[**15]** consumers who purchased Restasis only via a fixed dollar copayment that does not vary on the basis of the drug's status as brand or generic; PBMs; and all judges assigned to this case and any members of their immediate families.

Although not suggested by EPPs, I will also exclude all members of the chambers staff of all judges assigned to this case as well as those staff members' immediate families.

Plaintiffs' class certification motion generated extensive briefing, initially resulting in seven submissions. As discussed in the Daubert Decision, plaintiffs also filed two separate motions challenging the admissibility of **[*11]**

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[3] EPPs also brought claims for injunctive relief under the *Clayton Act* and for declaratory relief under the *Sherman Act*. They withdrew these federal claims in their class certification motion. This court retains jurisdiction over this action under the ***Class Action Fairness Act of 2005***, which grants federal district courts original jurisdiction over "any civil action in which [] the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant." *28 U.S.C. § 1332(d)(2)*.

[4] Plaintiffs originally sought certification of a class period that begins on May 17, 2014, the date the Restasis patents expired. But EPPs clarified at oral argument that the class period should begin on May 1, 2015, as a result of the conclusions of one of their merits experts that a reasonable date for generic entry would have been in May 2015.

evidence proffered by Dr. Laura Masselam Hatch and Dr. Kyriakos (Ken) Mandadakis—two experts Allergan relied on to oppose class certification.

On September 6, 2019, I granted defendant's request for an evidentiary hearing on class certification. At the hearing, which occurred during full day sessions on September 26 and September 27, 2019, I heard testimony from all six of the parties' experts—Todd Clark, Laura R. Craft, and Dr. Richard G. Frank for plaintiffs, and Dr. Hatch, Dr. James W. Hughes, and Dr. Mandadakis for defendant.

On October 23, 2019, I heard extensive oral **[**16]** argument on EPPs' three motions. At the proceeding, I also requested that the parties provide supplemental briefing addressing several issues relating to plaintiffs' state law claims, as described below.

As in many antitrust class actions, EPPs' ability to achieve class certification depends on whether they can satisfy *Rule 23(b)*'s predominance requirement by showing that individualized inquiries into the elements of injury-in-fact and damages will not overwhelm the common issues. Plaintiffs rely on the analysis of Dr. Frank, principally, and also on that of Ms. Craft to show that they can prove the element of injury-in-fact through common evidence and the element of damages through substantially common evidence. Dr. Frank's analysis predicts the conditions of the but- for world—a hypothetical world free of defendant's alleged anticompetitive actions. Defendant's critiques of Dr. Frank's analysis are at the heart of its opposition to class certification.

III. LEGAL STANDARD

HN1[] A plaintiff who seeks certification of a class action under *Rule 23(b)(3)* bears the burden of satisfying the requirements of *Rule 23(a)*—numerosity, commonality, typicality, and adequacy of representation—as well as those of *Rule 23(b)(3)*: (1) that "'the questions **[**17]** of law or fact common to class members predominate over any questions affecting only individual members'" and (2) that "'a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'" *In re Petrobras Sec., 862 F.3d 250, 260 (2d Cir. 2017)* (quoting *Fed. R. Civ. P. 23(b)(3)*). In addition to these enumerated requirements, the Second Circuit has recognized an "implied requirement of ascertainability" in *Rule 23*. *Brecher v. Republic of Argentina, 806 F.3d 22, 24 (2d Cir. 2015)*. A plaintiff must establish each *Rule 23* requirement by a preponderance of the evidence. *Johnson v. Nextel Communs., Inc., 780 F.3d 128, 137 (2d Cir. 2015)*.

HN2[] A court may certify a class action only if it concludes, after a "rigorous analysis," that the proposed class meets the requirements of *Rule 23(a)* and *(b)*. *Comcast Corp. v. Behrend, 569 U.S. 27, 33-34, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)* (internal quotation marks omitted). Such analysis may "entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*; *accord* *Brown v. Kelly, 609 F.3d 467, 476 (2d Cir. 2010)*. But courts may decide merits issues at class certification "only to the extent [] they are relevant to" the application of *Rule 23*. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 466, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)*.

IV. ANALYSIS

A. Requirements of *Rule 23(a)*

1. Numerosity

HN3[] *Rule 23(a)(1)* requires a class to be "so numerous that joinder of all members is impracticable." In the Second Circuit, numerosity is presumed for classes of 40 or more. *Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995)*. Plaintiffs estimate that the class includes between 30,000 and 40,000 TPPs and over one million consumers. The numerosity requirement **[**18]** is satisfied.

2. Commonality

HN4[] *Rule 23(a)(2)* requires that there be "questions of law or fact common to the class." A question is common to the class if it is "capable of classwide resolution—which means that determination of its truth or falsity **[*12]** will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart, 564 U.S. at 350*. Consideration of the commonality requirement obligates a district court to determine whether class members have "suffered the same injury." *Id. at 349-50* (internal quotation marks omitted). "Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Johnson, 780 F.3d at 137-38* (internal quotation marks omitted).

EPPs' proposed trial plan makes clear that there are a host of common issues of both law and fact.[5] Plaintiffs will attempt to show through common proof that Allergan willfully maintained monopoly power by engaging in anticompetitive conduct; that such conduct delayed market entry of generic Restasis; that absent Allergan's unlawful actions, multiple generic manufacturers would have entered the market; and that the relevant market is Restasis and generic versions of the drug. In addition, EPPs proffer that **[**19]** they will prove classwide injury by showing that consumers and TPPs pay significantly less for generic drugs than they do for brand drugs, with Restasis being no exception, and that many institutional mechanisms promote or require the substitution of less expensive generic drugs for brand versions once a generic drug enters the market.

Plaintiffs further intend to establish classwide damages by presenting evidence of generic Restasis' penetration rate and price in the but-for world as well as the number of Restasis prescriptions purchased during the class period. Using this common proof, the jury would then be asked to decide whether it found that the class paid more for Restasis than it would have paid if generic Restasis had been available and, if so, how much.[6]

Finally, EPPs' proposed claims administration process relies extensively on data collected from common sources in the pharmaceutical industry to identify plaintiffs, exclude uninjured ones, and allocate individualized damages. In a thorough, uncontested report, Ms. Craft, EPPs' expert who specializes in pharmaceutical data management and analysis, showed that, for every purchase of Restasis, data is available to discern **[**20]** who bought it, who paid for it, and how much every payor paid.[7] This is because each prescription drug purchase generates detailed and

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[5] EPPs and DPPs submitted, with their respective class certification motions, proposed trial plans, both of which contemplated joint trials. On September 25, 2019, I ordered EPPs, DPPs, and Retailer Plaintiffs to meet and confer about their plans and to provide additional detail as to how they intend to try their cases to avoid inconsistent verdicts. The plaintiffs then jointly submitted a plan proposing bifurcated trials at which all plaintiffs would present, to one jury, common evidence to show that Allergan violated the laws at issue and delayed the entry of generic Restasis. Next, depending on the jury's findings, there would be separate trials on impact and damages. The plaintiffs proposed bifurcation to satisfy *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 491-94, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*, which prohibits the admission at a direct purchaser trial of evidence that they may have passed on their overcharges to other parties, including end-payors. Retailer Plaintiffs have settled and, assuming I approve DPPs' proposed settlement, I expect EPPs to adjust their trial plan accordingly.

[6] ***HN5***[] In an antitrust case alleging overcharges, the typical measure of damage is the difference between the price that was actually charged and the price that a consumer would have been charged in the but-for world. *In re Rail Freight Fuel Surcharge Antitrust Litig., 292 F. Supp. 3d 14, 101 (D.C.C. 2017)*, *aff'd*, *934 F.3d 619, 443 U.S. App. D.C. 86 (D.C. Cir. 2019)*.

[7] Ms. Craft is the president of OnPoint Analytics, Inc., which provides data analytics for complex litigation. In many antitrust class actions, including those involving the pharmaceutical industry, she has developed databases of discrete transactions from multiple data sources, and she has used them to identify and remove class members who were uninjured or subject to specific exclusions.

Although defendant does not challenge her credentials, I note that a court recently denied a motion to exclude Ms. Craft's opinion. *See* *In re Loestrin 24 Fe Antitrust Litig., 410 F. Supp. 3d 352, 386 (D.R.I. 2019)* ("[Ms. Craft] is highly experienced in pharmaceutical data management and compilation for complex litigation. She has worked closely - and managed those working uniform data, including the product purchased, the patient's name and insurance plan, the TPP's identity, and the amounts **[*13]** paid by the consumer and the TPP. Indeed, data sets from the top seven PBMs and the 15 largest pharmacy operators alone would offer data for up to 97 to 99 percent of U.S. prescription drug sales. This data can be organized relatively easily because the industry uses a uniform coding system.

In sum, EPPs' proposed methodology to try this case is replete with common evidence, and the commonality requirement is easily met here. *See, e.g., In re Loestrin, 410 F. Supp. 3d at 397*; *In re Flonase Antitrust Litig., 284 F.R.D. 207, 217 (E.D. Pa. 2012)*.

3. Typicality

HN6[] *Rule 23(a)(3)* requires a finding that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux v. Celani, 987 F.2d 931, 936-37 (2d Cir. 1993)*; *see also Brown, 609 F.3d at 475*. EPPs satisfy their burden here. The claims of all class **[**21]** members, whether named or unnamed, arise from the same alleged conduct and rest on similar legal arguments.

In a footnote in its final submission, Allergan argues that plaintiffs have not satisfied *Rule 23(a)*'s typicality and adequacy requirements. It claims that the named plaintiffs, which are all TPPs, are not "fulfilling their fiduciary duties to absent consumer class members" because they have requested that I certify a TPP-only class, if I conclude that the class's inclusion of consumers defeats *Rule 23(b)*'s predominance requirement.

Like the court in *Loestrin, 410 F. Supp. 3d at 398*, I reject this contention. EPPs have strenuously argued that I certify their entire class. Their alternative proposal shows that they are pragmatic and responsive to Allergan's arguments, not conflicted.

4. Adequacy of Representation

HN7[] *Rule 23(a)(4)* requires that "the representative parties will fairly and adequately protect the interests of the class." To determine if this requirement is met, courts must inquire into whether a "1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, 502 F.3d 91, 99 (2d Cir. 2007)* (internal quotation marks omitted). "This process 'serves to **[**22]** uncover conflicts of interest between named parties and the class they seek to represent.'" *Id.* (quoting *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997))*.

Other than the argument I rejected in the context of typicality, defendant does not challenge the named plaintiffs' or plaintiffs' counsel's adequacy. I find that the named plaintiffs are adequate class representatives and that class counsel are qualified, experienced, and able to conduct this litigation. There are no antagonistic interests between the named plaintiffs and the putative class or their counsel. Moreover, through my extensive observations of counsel, I am assured that they are well qualified to litigate this class action.

B. Requirements of *Rule 23(b)(3)*

Having found that plaintiffs meet *Rule 23(a)*'s requirements, I now must consider whether they have met the demands of *Rule 23(b)(3)*. ***HN8***[] That rule's predominance and superiority requirements "ensure[] that the class will be certified only when it would 'achieve economies of time, effort, and expense, and promote . . . uniformity of

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closely - with pharmaceutical sales, marketing, and reimbursement data. The Court thus is convinced that she is knowledgeable about the types of data available, their presentation and formatting, and their use in analytical applications.").

decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" Cordes, 502 F.3d at 104 (quoting Amchem, 521 U.S. at 615).

It is at this point that Allergan's central opposition to class certification arises. **[**23]** Relying largely on the First Circuit's decision in In re Asacol Antitrust Litig., 907 F.3d 42 (1st Cir. 2018), Allergan contends that the proposed class contains large numbers of uninjured class members, that individualized inquiries are needed to cull the uninjured from the injured, and that these inquiries would overshadow the common questions of **[*14]** law or fact, compelling denial of class certification under Rule 23(b)(3).

1. Predominance

HN9[] A district court may certify a class under Rule 23(b)(3) only if "the questions of law or fact common to class members predominate over any questions affecting only individual members." Therefore, "the predominance criterion is far more demanding" than Rule 23(a)'s commonality requirement. Amchem, 521 U.S. at 623-24. A plaintiff satisfies the requirement by showing that: "(1) resolution of any material legal or factual questions can be achieved through generalized proof, and (2) these common issues are more substantial than the issues subject only to individualized proof." In re Petrobras, 862 F.3d at 270 (internal quotation marks and alterations omitted).

HN10[] "[P]redominance is a comparative standard[.]" Id. at 268. A court must "give careful scrutiny to the relation between common and individual questions in a case." Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. ___, 136 S.Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016). "An individual question is one where 'members **[**24]** of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof.'" *Id.* (quoting 2 W. Rubenstein, Newberg on Class Actions § 4:50, at 196-97 (5th ed. 2012)) (alteration omitted). ***HN11***[] "The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Id.* (quoting Newberg on Class Actions § 4:49, at 195-96). The analysis is "'more qualitative than quantitative.'" In re Petrobras, 862 F.3d at 271 (quoting Newberg on Class Actions, § 4:50, at 197) (alteration omitted). The essential question is whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." Amchem, 521 U.S. at 623.

a) Elements of an Antitrust Claim

HN12[] Determining whether common questions of law or fact predominate "begins, of course, with the elements of the underlying cause of action." Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011). To establish a claim under the antitrust laws, a plaintiff must prove (1) a violation of ***antitrust law***; (2) injury and causation; and (3) damages. Cordes, 502 F.3d at 105 (internal quotation **[**25]** marks and alternations omitted).[8]

HN13[] "Predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." Amchem, 521 U.S. at 625. For, "where plaintiffs were 'allegedly aggrieved by a single policy of the defendant[]', and there is 'strong commonality of the violation and the harm,' this is 'precisely the type of situation for which the class action device is suited.'" Brown, 609 F.3d at 484 (quoting In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 146 (2d Cir. 2001)).

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[8] Although EPPs raise only state law claims, the parties analyze the elements of a federal antitrust claim. This is because the state antitrust statutes generally adopt these same elements and require proof of injury-in-fact and damages—the elements at issue here. Below I separately address Allergan's arguments that differences in the state statutes cause individual issues to predominate.

Defendant also asserts that "[i]njury or impact" is an element of all of EPPs' consumer protection and unjust enrichment claims. EPPs have not argued otherwise, and thus I will assume for purposes of this motion that Allergan is correct.

Defendant does not dispute that EPPs will use common proof to attempt to prove the first element of an antitrust claim—a violation of ***antitrust law***—and this "concession does not eliminate a common issue from the predominance calculus." *See Cordes, 502 F.3d at 108* (internal quotation marks omitted). Indeed, as detailed above, every aspect of plaintiffs' allegations of anticompetitive conduct can be proven through common evidence, as these allegations focus exclusively on Allergan's actions and will not vary among class members. *See id. at 105*.

The second element of an antitrust violation presents two different questions. One is **[*15]** legal—whether the injury at issue "is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant['s] acts unlawful." *See Cordes, 502 F.3d at 106* (internal quotation marks omitted). **[**26]** It is uncontested that this question also will be answered through common proof—adding to the common proof in this case. *See id. at 108*. The second question—causation or "injury-in-fact," *id. at 106*—is the focus of defendant's arguments.

b) Whether, When Some Class Members Are Uninjured, Plaintiffs Can Show Injury-in-Fact Through Common Proof

EPPs have offered Dr. Frank's methodology to demonstrate that they can prove injury-in fact through common evidence. Dr. Frank is a professor of health economics at Harvard Medical School and a Research Associate at the National Bureau of Economic Research. From 2009 to 2016, he served in several senior capacities, including Assistant Secretary for Planning and Evaluation, at the U.S. Department of Health and Human Services. He has extensively studied, and published papers on, the economics of the pharmaceutical industry.

Dr. Frank used a commonly accepted two-step method to prove classwide injury-in-fact. *See Castro v. Sanofi Pasteur Inc., 134 F. Supp. 3d 820, 847-48 (D.N.J. 2015)* (collecting cases approving of the use of the same two-step model). This approach shows, first, that class members paid artificially inflated prices and, second, that "this price inflation occurred to substantially all class members." *Id. at 847*. Dr. Frank attempted to **[**27]** satisfy the second step by showing that generic Restasis would have achieved rapid and effective penetration of the market so that most purchases in the but-for world would have been for the generic.

Since a generic is not yet on the market, Dr. Frank lacked actual data regarding generic Restasis. He therefore used a yardstick approach to predict the price and penetration rate of generic Restasis in the but-for world. The approach examines the actual prices and quantities that occurred in a similar market that was not affected by defendant's behavior. Dr. Frank selected Pfizer's drug Xalatan, which is used to treat glaucoma, as his market yardstick. TPPs, insured consumers, and cash payors all paid significantly less for generic Xalatan than they had paid for Xalatan before generic entry. Additionally, the generic penetration rate for Xalatan averaged 94.3 percent over the damages period he measured.[9] Assuming that generic Restasis would have experienced the same penetration rate, Dr. Frank used common evidence to conclude that at least 94.3 percent of class members were injured by defendant's alleged conduct.

Based on his conclusion that 5.7 percent of prescriptions in the but-for world **[**28]** would have been for brand Restasis, Dr. Frank acknowledged that the class includes brand retainers—people who were uninjured because

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[9] Dr. Frank measured damages from February 2016 (when he assumed for purposes of his analysis a generic would have entered in the but-for world) to January 2019 (the last month for which he had data). His methodology can be adjusted to reflect the damages period found by the jury.

For TPPs and insured customers, Xalatan's generic penetration rate was 92.2 percent after six months, 96.3 percent after 12 months, and 97.8 percent after two years. For cash payors, the generic penetration rate was 89.2 percent after six months, 91.9 percent after 12 months, and 94.8 percent after two years. These penetration rates are consistent with the rates observed in the industry as a whole.

they would have purchased only brand Restasis even with generic alternatives.[10] Plaintiffs assert that the existence of those consumers does not defeat their ability to show classwide impact.

Allergan disagrees. It argues first that, in the Second Circuit, a class simply cannot be certified if it contains uninjured plaintiffs. Alternatively, it argues that the uninjured plaintiffs in the proposed class are too numerous and cannot be eliminated through common proof, which will cause individualized issues to predominate over the many common issues to be decided.

[*16] (1) Whether a Class May Contain Uninjured Consumers

Allergan's first proposition is simply incorrect. ***HN14***[] The Supreme Court and the Second Circuit have recognized that the existence of uninjured plaintiffs does not bar class certification. In *Tyson Foods, 136 S.Ct. at 1044*, the Supreme Court affirmed certification of a class under the *Fair Labor Standards Act ("FLSA")* that contained over 200 uninjured class members.[11] *See* *Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 276, 134 S. Ct. 2398, 189 L. Ed. 2d 339 (2014)* (noting that predominance would still be satisfied if a class contained uninjured class members that "defendant might **[**29]** attempt to pick off" through individualized inquiries).

In *Seijas v. Republic of Argentina, 606 F.3d 53, 56-58 (2d Cir. 2010)*, the Second Circuit affirmed certification of eight classes of holders of defaulted Argentine bonds, expressing no concern that summary judgment briefing revealed that "[c]omplicated questions existed [] as to which bondholders were class members and as to how much each class member could recover." Similarly, in *Sykes v. Mel S. Harris & Assocs. LLC, 780 F.3d 70, 91 (2d Cir. 2015)*, the Court concluded that the possibility of uninjured plaintiffs did not defeat predominance "given the myriad common issues" in the case. And, in *Cordes, 502 F.3d at 95-97*, the Court, after reversing the district court's denial of class certification, remanded with instructions to the district court to reconsider whether the plaintiffs had satisfied *Rule 23(b)*'s predominance requirement even though the Court indicated that "[m]ore than ninety percent of" (and thus not all) class members were injured and the defendants argued that individualized inquiries were needed to determine whether each class member sustained antitrust injury-in-fact. *See also* *In re Petrobras, 862 F.3d at 259, 261* (reversing class certification and remanding for consideration in the predominance analysis of the potential need for individualized inquiries to determine if each class member purchased its Petrobras **[**30]** Note in a "domestic transaction," as required by the *Exchange Act* and the *Securities Act*).

Consistent with this precedent, district courts in this Circuit have certified classes that likely or certainly contained uninjured class members. *See* *Dial Corp. v. News Corp., 314 F.R.D. 108, 120 (S.D.N.Y. 2015)*; *In re Air Cargo Shipping Servs. Antitrust Litig., 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at *44-45 (E.D.N.Y. Oct. 15, 2014)*, *adopted*, *2015 U.S. Dist. LEXIS 90402, 2015 WL 5093503 (E.D.N.Y. July 10, 2015)*; *In re Elec. Books Antitrust Litig., 2014 U.S. Dist. LEXIS 42537, 2014 WL 1282293, at *22 (S.D.N.Y. 2014)*; *In re Auction Houses Antitrust Litig., 193 F.R.D. 162, 166-67 (S.D.N.Y. 2000)*.

Circuit Courts in other circuits have also accepted that class certification does not require proof that all class members are injured. *Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1136 (9th Cir. 2016)*; *Mims v. Stewart Title Guar. Co., 590 F.3d 298, 307-08 (5th Cir. 2009)*; *Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 677 (7th Cir. 2009)*; *see* *In re Urethane Antitrust Litig., 768 F.3d 1245, 1254 (10th Cir. 2014)*, *aff'g*, *2013 U.S. Dist. LEXIS 69784, 2013 WL 2097346, at *2 (D. Kan. May 15, 2013)*; *In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litig., 678*

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[10] Allergan refers to these people as "brand loyalists." But, as Ms. Craft explained, powerful institutional factors, which are unrelated to a consumer's preference for a particular brand, drive brand retention rates. I will thus use the term "brand retention" instead of "brand loyalty."

[11] In its petition for certiorari, the employer, Tyson Foods, asked the Court to decide, among other things, "whether a class may be certified if it contains members who were not injured and have no legal right to any damages." *Id. at 1049* (internal quotation marks omitted). But, in its merits brief, Tyson Foods conceded that federal courts had the authority to certify such a class. *Id.*

F.3d 409, 420 (6th Cir. 2012), *vacated*, *569 U.S. 901, 133 S. Ct. 1722, 185 L. Ed. 2d 782 (2013)*, *reinstated*, 722 F.3d 838 (6th Cir. 2013), *cert. denied*, 71 U.S. 1196, 134 S.Ct. 1277, 188 L. Ed. 2d 298 (2014).

There is, in short, no support for defendant's contention that the mere existence of uninjured class members in this putative class compels denial of EPPs' motion.[12] I now will address each of the categories **[*17]** of class members that defendant alleges are uninjured. The first category, brand retainers, gives rise to the core disputes on this motion.

(2) Consumers Who Would Have Purchased Only the Brand in the But-For World

While defendant does not dispute that generic Restasis would have been cheaper than brand Restasis,[13] it claims there would have been more brand retainers than EPPs acknowledge, that Dr. Frank's methodology is unsound, and that individualized inquiries will therefore predominate. Relying on *Asacol*, Allergan **[**31]** further asserts that EPPs' proposal to use classwide proof to establish injury-in-fact violates its due process and *Seventh Amendment* rights to conduct individualized inquiries before the jury to identify each brand retainer, and that it also violates the *Rules Enabling Act*, which does not permit federal rules to "abridge, enlarge or modify any substantive right." *28 U.S.C. § 2072(b)*.

The parties vigorously dispute the percentage of prescriptions that brand Restasis would have retained in the but-for world, which they use to approximate the number of brand retainers. This dispute occupies the bulk of their briefing and was the focus of the witnesses' testimony at the evidentiary hearing.

While not abandoning its claim that the Second Circuit conditions class certification on a fully injured putative class, defendant asserts that it has not "staked its claims on the premise that *every single* class member must be uninjured for a class to be certified." Allergan's Sur-Reply in Further Opposition to End-Payor Plaintiffs' Motion for Class Certification at 3 n.7. It then notes that EPPs have not cited a case in the Second Circuit in which over four percent of class members were uninjured—referring to the certified class in *In re Air Cargo, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at *55* **[**32]** .

The Supreme Court and Second Circuit, however, have never suggested that a certain percentage or number of uninjured plaintiffs would automatically bar class certification. And the Seventh Circuit explicitly eschewed such an approach. ***HN16***[] It has held that a class may be certified unless "it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant." *Kohen, 571 F.3d at 677*. And it later made clear that "[t]here is no precise measure for 'a great many,'" the determination of which is "a matter of degree, and will turn on the facts as they appear from case to case." *Messer v. Northshore Univ. HealthSystem, 669 F.3d 802, 825 (7th Cir. 2012)*; *see also* *In re Rail Freight, 292 F. Supp. 3d at 137-38* ("Beyond percentages, the number of uninjured class members in relationship to the size of the class also may matter.").

In any event, a review of the specific percentages addressed in other cases indicates that the percentage of uninjured class members proffered by EPPs here is well within the range that courts routinely accept. ***HN17***[]

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[12] I also reject defendant's claim that *Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006)*, which held that a class must be defined to ensure that all class members have Article III standing, shows that the Second Circuit does not permit certification of a class containing uninjured members. ***HN15***[] To satisfy Article III standing, a class member must have been affected in a personal and individual way, but the member "'need not be capable of sustaining a valid cause of action.'" *Dubuisson v. Stonebridge Life Ins. Co., 887 F.3d 567, 574 (2d Cir. 2018)* (quoting *Denney, 443 F.3d at 264*). Here, because they purchased Restasis, all class members have standing—whether or not they paid an overcharge. *See* *Torres, 835 F.3d at 1137 n.6* (clarifying that *Denney*'s holding "signifies only that it must be possible that class members have suffered injury, not that they did suffer injury, or that they must prove such injury at the certification phase"). Notably, the *Asacol* Court found Article III standing satisfied there. *907 F.3d at 50-51*.

[13] The parties' experts disagree over the extent of the price differential, but that question will be resolved by the jury through the use of common evidence.

District courts in this and other Circuits have held that a class may be certified so long as a "*de minimis*" number of class members were uninjured or, conversely, "virtually all" class members were injured. *In re Rail Freight, 292 F. Supp. 3d at 134-35*; *In re Lidoderm Antitrust Litig., 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *11 (N.D. Cal. Feb. 21, 2017)*; *In re Air Cargo, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at *44-45*. Although the concept of *de minimis* is not well defined, **[**33]** one court recently "suggest[ed] that 5% to 6% constitutes the outer limits of a *de minimis* number of uninjured class members." *In re Rail Freight, 292 F. Supp. 3d at 137* (comparing *In re Lidoderm, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *19*, **[*18]** and *In re Nexium (Esomeprazole) Antitrust Litig., 297 F.R.D. 168, 179 (D. Mass. 2013)*, *aff'd*, *777 F.3d 9 (1st Cir. 2015)*, with *Vista Healthplan, Inc. v. Cephalon, Inc., 2015 U.S. Dist. LEXIS 74846, 2015 WL 3623005, at *20 (E.D. Pa. June 10, 2015))*; *see also* *Mayo v. USB Real Estate Sec., Inc., 2012 U.S. Dist. LEXIS 135454, 2012 WL 4361571, at *3 (W.D. Mo. Sept. 21, 2012)* (finding that a class where "at least 94%" of its members were injured was not overbroad, but declining class certification on other grounds). And recently the district court in *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litig., 2020 U.S. Dist. LEXIS 40975, 2020 WL 1180550, at *32-36 (D. Kan. Mar. 10, 2020)*, which involved, among other allegations, delayed generic entry, certified a class where the plaintiffs' expert concluded that approximately five percent of the consumers were uninjured. Conversely, the district court in *Rail Freight, 292 F. Supp. 3d at 141*, denied certification of a class in large part because at least 12.7 percent of its members were uninjured.

EPPs argue that Dr. Frank's methodology, which yielded a 5.7 percent brand retention rate, shows that only a *de minimis* number of plaintiffs were uninjured and that a finding of classwide injury-in-fact can be made. Indeed, they claim that the number of uninjured consumers is almost certainly lower than 5.7 percent. Because a consumer need incur only one overcharge to experience antitrust injury, an individual who purchased a single generic prescription in the but- for world—even if all of his or her other purchases **[**34]** were for the brand drug—was injured.[14] *See* *In re Nexium, 777 F.3d at 27*; *In re Rail Freight, 292 F. Supp. 3d at 136*; *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *15 (D. Ma. Oct. 16, 2017)*; *In re Air Cargo, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at *45*.

HN18[] To decide if the class contains only a *de minimis* number of uninjured plaintiffs, I must evaluate Dr. Frank's methodology to determine whether "no reasonable juror could have believed" it. *Tyson Foods, 136 S.Ct. at 1049*; *see* *Comcast, 569 U.S. at 35* (criticizing lower court for not deciding whether the plaintiffs' "methodology was a just and reasonable inference or speculative" (internal quotation marks and alterations omitted)). Or, as other courts have framed it, I must determine whether EPPs have "advance[d] a workable methodology to demonstrate that antitrust injury can be proven on a class-wide basis." *See, e.g.,* *Dial Corp., 314 F.R.D. at 115*. I therefore must assess whether Dr. Frank's decision to use Xalatan as an analog (the source of his determination of the brand retention rate) was "sufficiently reliable to merit the court's consideration of it as proof common to the class." *In re Air Cargo, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at *59*.

(a) Dr. Frank's Methodology to Predict But-For Brand Retention

As an initial matter, Allergan does not contest Dr. Frank's use of a yardstick approach to measure the but-for world—this is unsurprising as this approach is a generally accepted way to measure antitrust damages. *See, e.g.,* *SourceOne Dental, Inc. v. Patterson Cos., 2018 U.S. Dist. LEXIS 79291, 2018 WL 2172667, at *4 (E.D.N.Y. May*

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[14] Defendant contests Dr. Frank's assertion that the percentage of patients remaining on the brand after generic entry would be lower than the percentage of brand prescriptions. Dr. Frank deemed Restasis a chronic condition, citing one study that listed the median duration of treatment as 23 months. Allergan claims that Dr. Frank misconstrued the facts, that the study he cites described a small set of people with an incurable eye disease, and that less than a quarter of patients remain on Restasis after 12 months. At oral argument, defendant also asserted that most consumers using the brand drug at the time of generic entry would have remained on the brand rather than switch to the generic. I need not resolve this dispute, as I find that class certification is appropriate even if 5.7 percent of consumers were uninjured. But I do note that defendant's own experts, whose expertise treating dry-eye disease EPPs have not challenged, testified that the disease "needs to be treated chronically," *see* Class Cert. Hr'g Tr. at 82 (Dr. Hatch), and that Restasis is "a lifelong treatment regimen," *id.* at 292 (Dr. Mandadakis).

10, 2018). Rather, Allergan takes issue with Dr. Frank's **[**35]** choice of Xalatan as a yardstick, contending that his conclusion that Restasis, like Xalatan, would have had a 5.7 percent brand retention rate "appears to be unreasonably low." Expert Report of Professor James W. Hughes ("Hughes Rep.") ¶ 72.

[*19] I will first state the obvious: neither side will ever prove whether its predictions are correct. The but-for world is, by definition, hypothetical. *See* *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)* ("The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation.").

Dr. Frank selected Xalatan as his market yardstick because it is also an ophthalmic product, it faced generic entry within the last 10 years, and it is featured in Allergan's own forecasting of generic entry as a useful analog. He also noted that Xalatan's generic penetration rate is consistent with the average penetration rates in the pharmaceutical industry.

The parties' arguments generally presume that a drug's generic penetration rate increases with the number of initial generic entrants.[15] In 2011, three generic versions of Xalatan initially entered the market nearly simultaneously, and a fourth entered approximately 18 months **[**36]** later.[16] Dr. Frank explained that his choice of Xalatan was conservative for two reasons. First, between 2011 and 2014, drugs with over $1 billion in sales in the year before generic entry averaged 8.9 generic entrants, while those with sales between $250 million and $1 billion averaged 4.9 generic entrants. With retail sales of at least $1.5 billion in the year before Dr. Frank's predicted generic launch date of February 2016,[17] Restasis falls into the former category. Xalatan, which had about $502 million in annual sales before generic entry, falls into the latter. Moreover, Xalatan had three generic entrants—fewer than the average drug with similar revenue. Second, the overall generic penetration rate in this country increased significantly after 2011. While Xalatan's generics launched in March 2011, EPPs proffer that a generic Restasis would not have entered the but-for world until 2015.[18]

Defendant's first line of attack on Dr. Frank's proposal is to offer the conclusions of its expert Dr. Hughes.[19] Dr. Hughes recently retired as the Thomas Sowell Professor of Economics at Bates College. He has served as an expert in numerous pharmaceutical antitrust cases.[20] Relying exclusively on the projections **[**37]** of Company A and Company B,[21] **[*20]** two large companies that intended to enter the generic Restasis market, Dr. Hughes

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[15] Plaintiffs, through Ms. Craft's rebuttal report, offer a critique of this view. According to Ms. Craft, "the number of simultaneous generics may affect price discounts," but "its effect on the brand retention rate is not well established." Rebuttal Declaration of Laura R. Craft in Support of End-Payor Plaintiffs' Motion for Class Certification ("Craft Reb.") ¶ 74. According to her, "[t]he institutional mechanisms that drive generic adoption" can cause rapid generic penetration even with only one generic entrant. Craft Reb. ¶ 75.

[16] The exact contours of Xalatan's generic entry are not clear from the parties' submissions. According to Dr. Frank, there were initially five generic entrants, but the sales for two of them were small and quickly diminished to minimal level, so that the remaining three generic entrants accounted for 85 percent to nearly 100 percent of generic sales during the first two years. But, in a declaration submitted in the Restasis patent infringement litigation, David LeCause, Allergan's Vice President of U.S. Eye Care Sales, stated that four generics initially entered. Despite this confusion, at oral argument, counsel for both sides agreed that, for practical purposes, there were initially three generic entrants and a fourth entrant 18 months later.

[17] According to Dr. Frank, when adjusted to account for mail-order prescriptions, Restasis' sales were approximately $1.8 billion that year.

[18] Dr. Frank relied on these same factors to respond to defendant's criticism of his decision not to use as an analog Allergan's ophthalmic drug Alphagan P, which had only one generic entrant and higher brand retention than Xalatan. Dr. Frank explained that, in 2009, the year before Alphagan P lost exclusivity, its retail sales were only $188.8 million.

[19] I have excluded the challenged portions of defendant's other two witnesses, Dr. Hatch and Dr. Mandadakis. As I note in the Daubert Decision, however, even if I had found these experts' opinions admissible, they would not alter my decision on class certification.

[20] Although Dr. Hughes regularly serves as a defense witness in generic delay antitrust litigation, he has not published articles relevant to this topic.

concluded that at least 14 to 25 percent of Restasis prescriptions would have remained for the brand product in the but-for world.

In 2018, Company A forecasted that there would be three initial generic entrants, a fourth six months later, and a total of six after two years. It also predicted a brand retention rate that declined over time and leveled out at 14 percent after two years. Also in 2018, Company B predicted that brand Restasis would retain a steady 25 percent of the market throughout a five-year period. Company B's prediction of the number of generic entrants was unclear. A note on the forecast indicated that it would "only assume 1 - 2 enter," but, in a different section, the forecast appeared to predict three companies at launch and a fourth after six months.[22]

Dr. Hughes's prediction of brand retention does not demonstrate the unreliability of Dr. Frank's. Rather than doing any independent analysis, Dr. Hughes merely reasoned that, because the two companies whose forecasts he relied on were "deciding whether to invest the money to enter the market," he "would **[**38]** expect their work in the forecast[s] to be quite diligent." Class Cert. Hr'g Tr. at 241; *accord, e.g. id.* at 164. But there are reasons to question these forecasts' reliability. Indeed, Company A's representative testified that its forecasts are conservative to avoid overstating anticipated revenues. This may explain why the company predicted a generic entry rate almost identical to Xalatan's but a lower generic penetration rate.

As for Company B, although brand retention rates are known to decrease over time, that company forecasted that Restasis' brand retention rate would remain flat at 25 percent over five years. Dr. Hughes initially testified that the generic manufacturers' forecasts are "very serious" because "[t]hey try to take a lot of factors into account." *Id.* at 183. But, when asked about Company B's prediction of an unchanging rate, he speculated that the company "used very few assumptions and the more assumptions you use[,] the more assumptions that can be wrong." *Id.* at 267. Dr. Hughes's adherence to a forecast that does not reflect real world conditions, and a defense of it that defies his own economic principles, call into question his methodology.

Defendant also argues that Xalatan, a solution, is **[**39]** an inappropriate analog for Restasis, a complex emulsion. Plaintiffs do not dispute that emulsions are more complex than solutions and, as such, more difficult to reproduce by generic manufacturers. While Restasis' complex composition is not contested, the significance of the drug's composition on Restasis' but-for brand retention rate is.

Allergan asserts that Restasis' composition would have led to significant brand retention in the but-for world, making Xalatan an unrealistic analog. To support its position, it references a January 2019 statement from then-FDA Commissioner Scott Gottlieb that complex drugs, including eye drops, "are harder to 'genericize' under traditional approaches" and thus "often face less competition" and some industry analysts who predicted limited competition for Restasis because of its complexity.[23]

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[21] I have excluded the names of these companies as confidential. However, this opinion reveals some facts about Allergan or third parties that Allergan has requested that I seal. *See* Motion to Redact and Seal Certain Documents Related to End-Payor Plaintiffs' Motion for Class Certification, Dkt. No. 456. Where it does so, it is because I have determined that the public's right—under the common law and the *First Amendment*—to understand the basis of my conclusions on a crucial motion in this litigation substantially outweighs the factors that favor sealing. *See* *Brown v. Maxwell, 929 F.3d 41, 47-51 (2d Cir. 2019)*; *Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982)*; *Liberty Re (Bermuda) Ltd. v. Transamerica Occidental Life Ins. Co., 2005 U.S. Dist. LEXIS 9774, 2005 WL 1216292, at *6 (S.D.N.Y. May 23, 2005)*.

[22] At oral argument, EPPs' counsel asserted that Company B's representative confirmed that the company forecasted three initial entrants and a fourth six months later.

[23] Defendant cites *Statement from FDA Commissioner Scott Gottlieb, M.D., on 2019 Efforts to Advance the Development of Complex Generics to Improve Patient Access to Medicines*, Jan. 30, 2019, www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-2019-efforts-advance-development-complex-generics; Jefferies, *Akorn (AKRX) ANDA to Restasis Disclosed; Could Become AKRX's Largest Opportunity—If Approved* (transmitted in an email dated July 16, 2015); and RBC Capital Markets, *Allergan, Inc.: Restasis Guidelines Major Setback; But AGN Still Attractive at Current Valuation*, June 24, 2013.

[*21] But, as EPPs note, Allergan **[**40]** has offered no empirical evidence showing that a drug's complexity influences its brand retention rate, let alone a metric by which to determine how much more complex Restasis is than Xalatan or, even more importantly, how much its complexity affects its generic penetration rate. And it certainly has not shown that the empirical factors Dr. Frank cites that influence generic entry—including the size of the brand drug's market before generic entry—are rendered irrelevant (or even less significant) in the context of a complex drug.

Allergan further criticizes Dr. Frank's reliance on the company's own internal forecasts of the effects of generic entry on Restasis, many of which used Xalatan as an analog, to support his selection of the drug. Defendant asserts that those forecasts accounted for factors that would have led to aggressive generic penetration in the actual world but would not have existed in the but-for world. It argues that Dr. Frank did not consider those differences when he conducted his analysis.

EPPs respond by casting doubt on the accuracy of defendant's claims that its forecasts all predicted aggressive generic entry, as some of the forecasts selected analog drugs with **[**41]** only one initial generic entrant. In any event, even if all of Allergan's forecasts predicted aggressive generic entry, there is no indication that they led Dr. Frank astray. With three initial generic entrants in 2011, Xalatan is hardly the "very aggressive" choice Dr. Hughes said it was. *See* Class Cert. Hr'g Tr. at 188. Perhaps the most powerful evidence of this comes from Dr. Hughes himself: Company A's forecast—which Dr. Hughes deemed an accurate measure of the but-for world—predicted a nearly identical pattern of generic entry as Xalatan's.[24]

Defendant also asserts that the conclusions of Dr. Jeffrey Leitzinger, DPPs' expert, regarding brand retention show why Dr. Frank's analysis was misguided. By averaging 72 forecasts from five generic manufacturers, Dr. Leitzinger predicted a but-for brand retention rate of 11.5 percent after three years.[25] Dr. Frank responded that the use of averaging is accurate only when the data relied upon is similar and based on equal expertise. Since Dr. Leitzinger did not analyze the accuracy of the underlying forecasts (or even account for the generic manufacturers' own view of their accuracy), Dr. Frank criticized his method for giving "undue weight to **[**42]** the generic companies' projections, which are often imprecise and unrealistic." Rebuttal Declaration of Richard G. Frank in Support of Class Certification of Restasis End-Payors ¶ 16. Dr. Frank's defense of his methodology, including why he did not find Dr. Leitzinger's methodology more accurate than his own, was persuasive, and I am satisfied that Dr. Frank's decision to use a yardstick approach was sound and workable.

Relying heavily on the evidence from Dr. Hatch and Dr. Mandadakis that I excluded in the Daubert Decision, defendant further contends that Dr. Frank did not account for eye care providers' unique skepticism of generic drugs, which would have made them hesitant to switch patients to generic Restasis in the but-for world. Dr. Frank convincingly responds that any such skepticism would have been accounted for by his choice of Xalatan, which is also an ophthalmic product, as an analog.

Allergan's assertions about eye care providers' skepticism of generic drugs are thus relevant to class certification only if it can show that these providers are especially skeptical of complex generic ophthalmic drugs generally or of Restasis in particular.[26] **[*22]** Daubert Dec. at 14. Defendant's evidence on these points **[**43]** is far from

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[24] It is also possible that, in the but-for world, Allergan may have tried to retain more of the market by introducing its own generic version of Restasis—that is, an "authorized generic." According to Dr. Frank, 68 percent of drugs with high sales include an authorized generic at generic entry. One of Xalatan's generic entrants was an authorized one.

[25] It is noteworthy that, on average, these generic manufacturers predicted a brand retention rate that was significantly lower than that predicted by Dr. Hughes, who relied exclusively on single forecasts created by each of two companies.

[26] One piece of evidence cited by Dr. Hughes fails to make this critical distinction. Dr. Hughes wrote that "brand loyalty" is especially high for ophthalmic products in part because "the design of the bottle and eyedropper are very important for ophthalmic drugs, especially with regards to ease of use and precision of the quantity dispensed." Hughes Rep. ¶ 82. He cited an article in which an ophthalmologist, after asserting that the design of the bottle and eyedropper could make a generic drug less user-friendly, described the packaging of generic Xalatan products as an example. Dr. Yvonne Ou, *Glaucoma Eye Drops: Is There a Difference Between Brand Name and Generic*, Bright Focus Foundation, Mar. 24, 2017 ("Ou Article"),

conclusive. It relies heavily on a survey commissioned by Bank of America of just 75 ophthalmologists in which 78 percent stated that they viewed generics as potentially different from the brand (although the majority of that group still prescribe generics); 24 percent said they would not prescribe generic Restasis under the then- existing FDA bioequivalence guidance; and 27 percent said they would prescribe the generic only to new patients. Bank of America Merrill Lynch, *Allergan: Tidbits from ophthalmology survey*, at 5-6 (Aug. 7, 2013).

Most importantly, even if defendant had proffered stronger evidence of physician resistance, it has not bridged the gap between eye care providers' preferences and generic penetration rates. Indeed, the Bank of America survey itself acknowledged that "other factors (such as payor coverage)" often override physician preference, and, therefore, "most of the ophthalmic drugs that have gone generic in recent years have faced significant erosion." *Id.* at 1. Allergan notes that **[**44]** EPPs' expert Mr. Clark acknowledged that, if a large percentage of doctors wrote "dispense as written" on their prescriptions for a particular brand drug, it could increase the brand penetration rate. But Mr. Clark also described such a situation as extremely uncommon, citing prescriptions for thyroid medication as a rare exception. According to Ms. Craft, Allergan's former CEO David Pyott agreed, testifying at his deposition that "those days of writing dispense [as] written to [] override generics, they are history." Craft Reb. ¶ 56. In short, defendant has not shown that Dr. Frank's analysis is unreliable because of his failure to account for eye care providers' potential resistance to generic drugs.

Defendant further argues that the underperformance of a generic version of Restasis manufactured by Teva Pharmaceutical Industries Ltd. ("Teva") in Canada supports its claim that Restasis would have experienced significant brand retention in the United States. Teva's product entered the Canadian market in May 2018; after 11 months, it captured only a low percentage of sales—less than many other generic ophthalmic products in Canada had achieved. Allergan claims that Teva's experience **[**45]** shows that physician resistance to prescribing generic Restasis would have led to significant brand retention in the United States.

In response, EPPs retained Mr. Clark to compare the marketplaces for drugs in the United States and Canada and to determine whether the experience of Teva's generic was instructive as to how generic versions of Restasis would have performed in the United States. Mr. Clark, president of a life sciences industry advisory firm, concluded that Teva's **[*23]** generic sold poorly largely because it cost nearly the same as the brand and was not placed on Canada's provincial formularies. In a surrebuttal report, Dr. Hughes criticized Mr. Clark's findings, claiming that other generic drugs that shared the characteristics cited by Mr. Clark performed better in Canada. At the hearing, Mr. Clark took issue with Dr. Hughes's methodology.

The experience of Teva's generic in the Canadian pharmaceutical market does not render Dr. Frank's choice of Xalatan unreliable. The Canadian market is dramatically different from that of the United States. In 2018, Canadians spent about $30.7 billion on retail prescription drugs, while Americans spent between $360 and $520 billion. The smaller **[**46]** Canadian market reduces incentives for generic manufacturers to enter. In addition, insurance arrangements in Canada differ markedly from those in the United States, and the promotion of prescription drugs is

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www.brightfocus.org/glaucoma/article/glaucoma-eye-drops-there-difference-between-brand-name-and-generic. This article's reference to Xalatan, of course, undercuts Dr. Hughes' claim that concerns about a generic's inferior packaging could impede the drug's rapid and effective penetration of the market.

Defendant also cites a study of Medicare Part D recipients that found that, in 2013, eye care providers prescribed brand drugs to Medicare patients at the highest rate relative to all other physician specialties. Dr. Paula A. Newman-Casey, et al., *Brand Medications and Medicare Part D: How Eye Care Providers' Prescribing Patterns Influence Costs*, 125 Ophthalmology 332 (2018), www.ncbi.nlm.nih.gov./pmc/articles/PMC5732892. The authors did not determine the precise reasons for the difference, although they did acknowledge, among other possibilities, some doctors' concerns about the efficacy of generic drugs. They also noted, however, that brand medications' "[h]igh costs result in less frequent medication purchases and lead to lower medication adherence," citing a study of 8,427 patients with open-angle glaucoma who were 39 percent more likely to have reduced medication adherence if they were prescribed the brand name drug. *Id.* The authors deemed it "likely critically important to prescribe less expensive [generic] medications as first-line therapies to help decrease the risk of cost-related medication nonadherence." *Id.* The Ou Article similarly acknowledged that the "[d]ecreased cost of glaucoma drops has been shown to increase adherence, or compliance with taking a medication as prescribed."

more strictly regulated. Notably, Teva's representative said that the company did not account for the experience of its Canadian generic when it forecasted generic Restasis' performance in the United States.

In sum, Allergan requests that I find unreliable Dr. Frank's conclusion that Restasis would have penetrated the market in the but-for world at a rate consistent with the average market penetration rate of all drugs. I decline to do so. Dr. Frank offered persuasive reasons for choosing Xalatan as a yardstick and equally persuasive reasons why the choice was conservative. Additionally, having observed his testimony, I found Dr. Frank to be a thorough, thoughtful, and credible witness. Defendant may make its case to a jury, but it has not given me a basis to say that Dr. Frank's use of Xalatan as an analog is unsound. Thus, EPPs have met their burden to show that they can present classwide proof of injury-in-fact and that the number of brand retainers is *de minimis*.

Finally, defendant **[**47]** sometimes argues that I need to determine on this motion not only whether Dr. Frank's methodology is sound enough to go to the jury, but what Restasis' brand retention rate would have been in the but-for world. If that were in fact the standard, I would readily accept Dr. Frank's analysis as establishing that brand retainers would account for no more than 5.7 percent of consumer class members.

(b) Plaintiffs' Methodology to Remove Brand Retainers from the Judgment

I now address Allergan's argument, supported largely by *Asacol*, that it is entitled to individualized inquiries at the liability phase of trial to identify brand retainers in the but-for world and that EPPs' proposed methodology to exclude them from the class is insufficient.[27]

EPPs propose that, using Dr. Frank's damages methodology, which relies exclusively on common proof, the jury will remove purchases that would have remained for the brand in the but- for world from the total damages award. Therefore, the experts' dispute over the brand retention *rate*

> does not undermine the fact that both experts rely on common proof (as opposed to individual proof) to estimate the impact Brand Loyalists have on the aggregate damages **[**48]** number under both of their models. Estimating the number of Brand Loyalist purchases (using a common proof methodology) is a sufficiently reliable method to remove purchases from the aggregate damages award.

*See In re Lidoderm, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *19*.[28]

[*24] This model also ensures that Allergan will not be forced to pay a penny more than the damages the jury determines it caused, protecting its due process rights.

> [I]n cases in which aggregate liability can be calculated in such a manner, 'the identity of particular class members *does not implicate the defendant's due process interest at all'* because '[t]he addition or subtraction of individual class members affects neither the defendant's liability nor the total amount of damages it owes to the class.'

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[27] I note that defendant's argument appears contingent on a finding that the brand retention rate would be higher than that predicted by Dr. Frank—a finding I have not made. Notably, the district court in *Asacol* concluded that the rate there would have been 10 percent. *907 F.3d at 45*. I will nevertheless address defendant's argument, in part because it is not obvious that the *Asacol* Court's holding would have differed if that Court had been faced with a lower percentage of uninjured class members.

[28] EPPs' model distinguishes this case from two cited by defendant, *Jensen v. Cablevision Sys. Corp., 372 F. Supp. 3d 95, 129 (E.D.N.Y. 2019)*, and ***Vaccariello v. XM Satellite Radio, Inc., 295 F.R.D. 62, 74 (S.D.N.Y. 2013)***, in which the district courts denied class certification due, in part, to the need for individualized inquiries to determine whether each class member was injured. The plaintiffs in those cases, unlike EPPs, did not offer a method of classwide proof to separate uninjured class members from those who were injured.

See Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1132 (9th Cir. 2017) (quoting Mullins v. Direct Digital, LLC, 795 F.3d 654, 670 (7th Cir. 2015)) (emphasis added); *accord* In re EpiPen, 2020 U.S. Dist. LEXIS 40975, 2020 WL 1180550, at *37.

In Hickory Secs. Ltd. v. Republic of Argentina, 493 F. App'x 156 (2d Cir. 2012), another iteration of the Argentine bondholders' class actions at issue in *Seijas*, the Second Circuit indicated its approval for a damages model similar to EPPs'. The Hickory Court reversed the district court's entry of an aggregate damages award because it did not "sufficiently account[] for non-continuous bondholders," who were excluded from the classes. *Id. at 158-59*. On remand, the Court instructed the district court to see if it could calculate **[**49]** aggregate damages that account, in "a reasonably accurate, non-speculative" way, for the volume of bonds that did not belong in the classes at issue. *Id. at 160*. By removing the percentage of prescriptions that would have remained for brand Restasis in the but-for world from the total damages amount, EPPs' proposal does precisely that.

Plaintiffs' methodology offers additional protection to defendant. To collect damages, consumers will be required to submit sworn affidavits declaring, among other things, that they would have purchased a generic version of Restasis if it had been available.[29] There is nothing novel about this approach. ***HN19***[] Self-identifying affidavits are an accepted means to establish a class member's entitlement to recovery in class action litigation. *See, e.g.,* *Briseno, 844 F.3d at 1131-32*; *Mullins, 795 F.3d at 667-72*. For instance, in consumer protection cases, many courts in this Circuit have accepted self-identifying affidavits to establish proof of a product's purchase (a prerequisite, of course, to injury) where such evidence does not otherwise exist. *See, e.g.,* *Hasemann v. Gerber Prods. Co., 331 F.R.D. 239, 270-72 (E.D.N.Y. 2019)*; *Ebin v. Kangadis Food, Inc., 297 F.R.D. 561, 567 (S.D.N.Y. 2014)*.

Here, by contrast, the data available in the pharmaceutical industry, detailed by Ms. Craft, ensures that only those who actually purchased Restasis will receive damages. **[**50]** "The detail and specificity of this electronically recorded data is truly exceptional in the realm of consumer goods purchases." Declaration of Laura R. Craft in Support of End-Payor Plaintiffs' Motion for Class Certification ¶ 24. This unique fact provides protections to Allergan that are regularly absent from consumer class actions. The data will show exactly how many purchases a consumer made and exactly how much he or she paid for each one. Where courts have accepted the use of affidavits to establish something as essential as a class member's proof of purchase of a product at issue, I see no reason to reject their use to discern a consumer's hypothetical purchasing activity in the but-for world.

As Allergan stresses, a proposal similar to that of EPPs was rejected by the Court in *Asacol*, which was also an antitrust class action alleging that the defendant pharmaceutical manufacturers worked to prevent generic entry. *See* 907 F.3d at 44-45. Where the district court found that 10 percent of class members had not been injured, *id. at 45*, the First Circuit held that a claims process that relies on affidavits "provides defendants **[*25]** no meaningful opportunity to contest whether an individual would have, in fact, **[**51]** purchased a generic drug had one been available," in violation of the defendants' Seventh Amendment and due process rights, *id. at 53*. The *Asacol* Court also rejected the plaintiffs' proposal to instruct the jury to remove the percentage of uninjured consumers from the aggregate damages amount. *Id. at 55-56*. It reasoned that "[a]ccepting plaintiffs' proposed procedure for class litigation would [] put us on a slippery slope, at risk of an escalating disregard of the difference between representative civil litigation and statistical observations of tendencies and distributions." *Id.*; *accord* In re Thalomid & Revlimid Antitrust Litig., 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *12-13 (D.N.J. Oct. 30, 2018)

[29] Allergan insists that it will challenge each plaintiff in the claims process to assure that no uninjured plaintiff receives an award. There are two responses to this. Realistically, the likelihood that Allergan would choose to undertake the time and expense to challenge each plaintiff is remote. This is because any award against it, having already been reduced by the percentage of uninjured plaintiffs found by the jury, will not change. If it nonetheless chooses this path, it may effectively use the affidavit process to cull those plaintiffs it wishes to challenge.

(relying on *Asacol* and Third Circuit precedent to deny, with leave to renew, class certification after the plaintiffs' expert determined that up to 10 percent of consumer class members were brand retainers).[30]

But **HN20**[] the Second Circuit has accepted the use of representative evidence and statistical observations to prove classwide injury. In *Cordes*, the Second Circuit recognized that the plaintiffs in that antitrust class action may show that "injury-in-fact is susceptible to common proof" through the use of a "single formula," observing that, if the district court on remand were to agree that the **[**52]** plaintiffs' formula could show injury-in-fact, the predominance requirement would "likely" be met. *502 F.3d at 106-08*. In *Petrobras*, where the plaintiffs were required to prove that they had purchased Petrobras Notes in a "domestic transaction," the Second Circuit indicated that they might have satisfied the predominance requirements if they had "suggest[ed] a form of representative proof that would answer the question of domesticity for individual class members." *862 F.3d at 272* (citing *Tyson Foods, 136 S.Ct. at 1045-46*).[31]

Defendant's argument, buoyed by *Asacol*, that the *Seventh Amendment, Due Process Clause*, and *Rules Enabling Act* require that it be permitted to challenge each class member's ability to show injury at the liability stage of trial is also inconsistent with *Tyson Foods*. *Tyson Foods* affirmed certification of a class in which the jury awarded aggregate damages without determining which individual class members' FLSA rights had been violated by the employer Tyson Foods. *136 S.Ct. at 1049-50*. Tyson Foods asked the Court to determine whether, "where class plaintiffs cannot offer proof that all class members were injured, they must demonstrate instead that there is some mechanism to identify the uninjured class members prior to judgment and ensure that uninjured members (1) **[**53]** do not contribute to the size of any damage award and (2) cannot recover such damages." *Id. at 1049* (internal quotation marks omitted). Deeming "the question whether uninjured class members may recover [] one of great importance," the Court nonetheless found its resolution "premature" since the damages award at issue had not yet been distributed. *Id. at 1050*. In a concurrence, Chief Justice John Roberts agreed **[*26]** that the issue was not ripe for the Court's resolution, but stated that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not," and thus the jury's award could not stand "if there is no way to ensure that [it] goes only to injured class members." *Id. at 1053*.

As described above, uninjured class members here will "not contribute to the size of any damage award," and, by identifying and removing such class members during the claims administration process, plaintiffs' proposal satisfies Chief Justice Roberts's concerns. It also is in line with *Hickory*, in which the Second Circuit expressed no concern that uninjured class members had not been identified during the liability phase. *See 493 F. App'x at 160*. I therefore disagree with the First Circuit's conclusion in *Asacol* ***[**54]*** that defendant has a constitutional right to remove these individuals at the liability stage of trial. Notably, in a comprehensive opinion, the court in *EpiPen* predicted that *Asacol*'s analysis would not be followed by the Tenth Circuit, and it explicitly rejected the constitutional underpinnings of *Asacol*, upon which the defendants there, as here, relied. *2020 U.S. Dist. LEXIS 40975, 2020 WL 1180550, at *28-32, *36-37*.

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[30] Allergan also relies on the D.C. Circuit's recent decision in *Rail Freight, 934 F.3d at 620*, which affirmed the district court's denial, on remand, of class certification because the class contained too many uninjured members. Although the D.C. Circuit cited *Asacol* with approval, *see id. at 624, 627*, the plaintiffs' model in *Rail Freight* was different from that in *Asacol* as well as from EPPs'. The plaintiffs in *Rail Freight* "insist[ed] that each member of the proposed class *was* injured," even though their own expert's model found that over 2,000 class members were not. *Id. at 623-24*. Thus, unlike here, the plaintiffs had not proposed a method to remove uninjured plaintiffs through common evidence, leaving the D.C. Circuit to conclude that it must be done through "full-blown, individual trials." *Id. at 625*.

[31] Defendant unpersuasively argues that EPPs' proposed methodology to show classwide impact is prohibited by the Supreme Court's decision in *Wal-Mart*. But there is no basis to compare the proposed class here to the class in *Wal-Mart* of 1.5 million female employees alleging employment discrimination in 3,400 stores. *564 U.S. at 357*. The Court there found that *Rule 23(a)*'s lenient commonality requirement was not met as there was not even a single common question. *Id. at 359*. And it rejected the use of "sample cases" to extrapolate the percentage of women who were discriminated against by their local supervisors. *See id. at 348, 357-58*. Dr. Frank's use in this case of a market yardstick to show classwide impact in the but-for world bears no resemblance to the "trial by formula" condemned in *Wal-Mart. See id. at 367*.

(c) Defendant's Argument That Individual Inquiries Are "Likely Impossible"

While stressing its absolute right to question every individual class member to determine if he or she would have purchased generic Restasis in the but-for world, Allergan simultaneously argues that determining the hypothetical actions of a consumer is "next to impossible here because there is still no evidence of what patients actually did once a generic version of Restasis hit the market in the U.S." Allergan's Memorandum of Law in Opposition to End-Payor Plaintiffs' Motion for Class Certification ("Opp.") at 27.[32]

This argument only buttresses plaintiffs' case. If defendant were correct that individualized inquiries would be futile, Dr. Frank's reliance on aggregate data is not just a reasonable way to account for brand retention in the but-for **[**55]** world; it is the only way. ***HN21***[] A finding otherwise "would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery[.]" *See* *Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264, 66 S. Ct. 574, 90 L. Ed. 652 (1946)*; *see* *In re Namenda Direct Purchaser Antitrust Litig., 331 F. Supp. 3d 152, 209 (S.D.N.Y. 2018)* ("Defendants are not entitled to the benefit of [the] doubt when the very reason we cannot know the answer to [a] question is because of their alleged wrongdoing.").

Finally, Allergan's argument about the likely impossibility of individualized proof does not appear limited to class actions. If I were to accept this argument, it would lead to the untenable conclusion that in generic delay cases in which there is not yet a generic on the market—potentially because of the efficacy of a defendant's anticompetitive conduct—an individual plaintiff could not establish injury-in-fact. *Tyson Foods* accepted the plaintiffs' method of proving classwide liability in part because they could have relied on the same method to establish individual liability. *136 S.Ct. at 1046-48*. By analogy, I view with great skepticism an argument against class certification that would prevent individual lawsuits as well.[33]

[*27] In sum, Allergan may not defeat class certification **[**56]** by insisting that it has a right to individualized inquiries while also claiming that those inquiries would be fruitless.[34] EPPs have presented a reasonable methodology to eliminate brand retainers' purchases from the damages calculation and to remove them from the class before judgment. I therefore find that the existence of a small percentage of consumers who were unharmed by generic foreclosure does not doom this class action.

Indeed, defendant's assertion that a small percentage of brand retainers should prevent over one million people and 30,000 to 40,000 TPPs from suing collectively runs afoul of *Rule 23*, as interpreted by the Supreme Court and Second Circuit. Most of these class members have low value claims and no economic incentive to bring individual lawsuits. *Rule 23(b)(3)* was designed with such plaintiffs "dominantly in mind." *Amchem, 521 U.S. at 617*; *Sykes,*

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[32] It also claims that the lack of a generic Restasis prevents the parties from examining "[o]ne of the factors that will likely drive especially high brand loyalty rates here [-] each patient's idiosyncratic medical issues, such as the likelihood that a patient would experience side effects and/or efficacy problems with the generic and their likely response if they experienced such side effects." *Id.* But a class member who experienced side effects from a generic would still be injured because he or she paid at least one overcharge. *See, e.g.,* *In re Nexium, 777 F.3d at 27*.

[33] At oral argument, Allergan contended that the continued absence of a generic entrant weighs against class certification because it evidences the weakness of plaintiffs' case. But the overall strength of plaintiffs' case is not relevant to class certification. *See, e.g.,* *In re Initial Pub. Offerings Secs. Litig., 471 F.3d 24, 41 (2d Cir. 2006)* ("a district judge should not assess any aspect of the merits unrelated to a *Rule 23* requirement").

[34] Defendant further argues that, even if a generic enters the market during this litigation, consumers' purchasing decisions would likely still provide insufficient data to show what they would have done in the but-for world. It is true that whether a consumer purchased a generic version of Restasis in the actual world is not open-and-shut proof that he or she would have done the same in the but-for world. But this data nonetheless would provide insight into his or her actions in the but-for world. *See* *In re Flonase, 284 F.R.D. at 222*; *In re Cardizem CD Antitrust Litig., 200 F.R.D. 326, 343 (E.D. Mich. 2001)*.

780 F.3d at 81. A district court bound by Asacol recently deemed the First Circuit's decision "likely a death knell for pharmaceutical, antitrust class actions brought by indirect purchasers," leaving "most putative class members' claims . . . unremedied." In re Intuniv Antitrust Litig., 2019 U.S. Dist. LEXIS 141643, 2019 WL 3947262, at *7 n.8 (D. Mass. Aug. 21. 2019). Another such court was "troubled that over ninety percent of consumers in the proposed EPP class may have been injured by **[**57]** Defendants' alleged unlawful conduct, but now have no practical recourse under ***antitrust law***." In re Loestrin, 410 F. Supp. 3d at 404.

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In addition to brand retainers, which plaintiffs acknowledge exist within the class, Allergan argues there are other less significant categories of uninjured plaintiffs that also affect the predominance balance. As will be seen, these alleged categories either do not exist, are purely speculative, or at most create a small number of issues that can be dealt with using common proof or a relatively trivial number of individual inquiries.

(3) Consumers with Flat Copayment Plans

EPPs have excluded from the class consumers with flat copayment plans because they pay the same for both brand and generic drugs. Dr. Frank notes that the existence of this small group of consumers does not affect his classwide damages calculation because, when an insured consumer has a flat co-payment, the entire overcharge is borne by the TPP. These consumers thus affect only the distribution of damages between consumers and TPPs during the claims administration process.

Allergan argues that EPPs have not offered a way to use common proof to identify and exclude consumers with flat copayment plans, but sworn statements **[**58]** submitted to the court by PBMs OptumRx, Inc. and Prime Therapeutics LLC indicate otherwise. These PBMs confirmed that they are aware of the terms of the plans for the TPPs they service and that the PBMs can sort their data to exclude purchases by consumers with flat copayment plans.

Dr. Hughes does not contest that PBMs can identify and exclude flat copayors, but instead argues that there are *de facto* flat copayment plans that are not easily identifiable. He lists a coinsurance plan with a payment cap; an insurance plan that would have placed the generic drug on the same tier that the brand drug previously occupied; and individuals who qualify for "Full Extra Help" under Medicare's Low Income Subsidy Program.

Ms. Craft and Dr. Frank persuasively respond that Dr. Hughes's examples are based on either an unrealistic but-for price for generic Restasis, the unlikely and speculative actions of insurance plans in the but-for world, or an incorrect description of Medicare's program. In addition, these consumers **[*28]** constitute a *de minimis* group—around 0.4 percent of insured consumers.[35]

In short, the need to identify (solely to exclude from a damages award) consumers with official or *de facto* flat **[**59]** copayment plans does not defeat predominance. *But cf.* Vista Healthplan, 2015 U.S. Dist. LEXIS 74846, 2015 WL 3623005, at *19 (predominance requirement not satisfied in part because the plaintiffs' expert conceded that individualized inquiries were the only method to identify uninjured class members, including those with flat copayments).

EPPs explain that defendant's assertion that up to four percent of insured consumers fall into this category is incorrect because it includes consumers with coinsurance, whose payments are impacted by a drug's price.

[35] Ms. Craft and Dr. Frank both initially estimated that the percentage of individuals covered by employer-sponsored prescription drug plans that have flat copayments was 0.32. But, adjusting for numbers cited by Dr. Hughes in his report, Ms. Craft increased the percentage to 0.4 percent in her rebuttal report. This percentage may be a slight underestimate as it does not include individuals covered by Medicaid or by health insurance that is not sponsored by an employer.

(4) Consumers Who Used Coupon or Copayment Assistance Programs

Defendant offers coupon or copayment assistance programs that reduce the cost of brand Restasis for insured consumers to as low as $5 for a prescription. It asserts that, as a result, some consumers paid less for brand Restasis than they would have paid for a generic and that individualized inquiries are necessary to identify and exclude these individuals from the class.

I conclude that Allergan's issuance of coupons creates a *de minimis* number of unharmed class members, as most consumers who used coupons still paid overcharges. *See In re Thalomid and Revlimid, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *14*. According to Dr. Frank, consumers who used coupons made out-of-pocket payments of an average of $48 per prescription, **[**60]** and the vast majority of those consumers would have paid an average of $11 per prescription for generic Restasis in the but-for world. Furthermore, Dr. Frank asserts, and defendant does not contest, that the coupons limiting consumers' payments to $5 applied to just three percent of prescriptions, making it unlikely that a consumer who used such a coupon on one purchase would not have paid an overcharge on another purchase.

Furthermore, EPPs have indicated that common data probably can be used to determine which consumers used coupons and to what extent. According to Ms. Craft, the data generated by pharmaceutical transactions could be used to link transactions with and without coupons to the same consumer. Additionally, Allergan's own data may allow the parties to identify coupon users through common proof. Ms. Craft explained that the coupon programs were designed to collect consumers' data to aid defendant's marketing efforts. During discovery, Allergan apparently provided only aggregate coupon data to EPPs, claiming that its individualized data had been lost. Having examined the contracts between Allergan and its coupon processors, Ms. Craft opined that it is "highly implausible **[**61]** given the commercial value of the data and the large expense incurred in its collection" that the data is truly gone. Craft Reb. 1 52.

In sum, defendant has not persuaded me that its use of coupon programs creates predominance concerns.

(5) Consumers Who Would Have Purchased a Different or No Brand Drug in the But-For World

Allergan asserts that it devoted substantial resources to marketing Restasis and that Restasis usage rates were particularly susceptible to these efforts. Defendant claims that, once a generic enters, brand manufacturers generally discontinue these efforts, and, as a result, some customers who purchased Restasis in the real world may have purchased Xiidra (another dry-eye medication) or no drug at all in the but-for world. These uninjured consumers, defendant argues, cannot be identified and excluded from the class through the use of common proof.

Dr. Frank criticized the assumption upon which this argument is based: Dr. Hughes's claim that there would be a "likely reduction in total [Restasis] prescriptions in the but-for world." Hughes Rep. 1 94. According to Dr. **[*29]** Frank, Dr. Hughes relied on a misrepresentation of the findings of one study to argue that purchases of **[**62]** the molecule form (*i.e.*, brand and generic forms combined) of a drug decrease after generic entry. Dr. Frank indicated that, often, any decline in demand for the molecule form of a drug caused by a decline in promotion after generic entry is offset by an increase in demand resulting from generics' lower price. While Dr. Frank acknowledged at his deposition that the sales of the molecule form of drugs sometimes do decline after market entry, he said that he considered that possibility while conducting his analysis and found it unlikely here, since Allergan's own models predicted a steady increase in total molecule sales after generic entry.

Defendant's argument about this category of so-called uninjured class members is based on speculation and thus insufficient to defeat class certification. *See* *Amgen, 568 U.S. at 469-70*; *In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 121-22 (2d Cir. 2013)*.

(6) Potentially Uninjured Third-Party Payors

Defendant argues that individualized inquiries are also required to identify and exclude certain categories of uninjured TPPs.[36] EPPs argue, and I agree, that, even though a percentage of insured consumers would have remained on the brand, there is no sound basis to conclude that any TPP would not have been injured as it would have paid at least one **[**63]** overcharge for Restasis. *In re EpiPen, 2020 U.S. Dist. LEXIS 40975, 2020 WL 1180550, at *32-34*; *In re Loestrin, 410 F. Supp. 3d at 404-05*; *In re Solodyn., 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *18*.

Defendant's argument that some TPPs were uninjured because they received rebates from Allergan is also meritless. In *Nexium*, the First Circuit observed that "[t]here is some disagreement as to whether [] rebates are passed-through as a discounted price when the PBMs bill the TPPs or whether TPPs are charged the list price and then refunded a portion based on the rebate amount." *777 F.3d at 28 n.23*. If they fall into the latter category, as EPPs contend, then "the rebates are only a damages setoff and do not affect the fact of injury." *Id.*; *accord In re Thalomid and Revlimid, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *14*. ***HN22***[] This is because "antitrust injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset." *In re Nexium, 777 F.3d at 27*.[37]

If, however, rebates fall into the former category (that is, if they serve to discount the initial price a TPP pays for a prescription), they still do not raise predominance concerns. Dr. Frank has challenged Dr. Hughes's assertion that the rebates offered to certain TPPs must have reduced the price of Restasis so dramatically that the TPPs would have paid more for a generic. Dr. Frank explains that Dr. Hughes relied on an unrealistically high price for generic Restasis in the but-for world. At **[**64]** minimum, "[Dr. Frank's] analysis suffices for purposes of the class certification motion . . . ." *In re Lidoderm, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *21*; *see In re Solodyn, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *18*. Notably, even if Dr. Hughes' price calculations were accurate, a TPP would still have been injured if it paid just one overcharge on a purchase of Restasis. *See In re Solodyn, 2017 U.S. Dist. LEXIS\ 170676, 2017 WL 4621777, at *18*.

In addition, Allergan asserts that some TPPs who possessed stop-loss insurance may not have been injured and can only be identified through individualized inquiries. But reimbursements from stop-loss insurance are post-injury offsets that are "irrelevant to the question of impact." *In re Thalomid and Revlimid, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *14*.

[*30] Defendant also argues that a TPP would not suffer injury if, in the but-for world, a patient experienced side effects from generic Restasis, leading to additional medical visits and participation in a costly appeals process to demand coverage for the brand drug. Allergan's argument again is not grounded in the law, as a TPP's payment of a single overcharge renders it injured. *See, e.g., In re Lidoderm, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *21*. ***HN23***[] And speculative claims about class members' medical reaction to a non-existent drug cannot defeat class certification. *See, e.g., Amgen, 568 U.S. at 469-70*.

Defendant further claims that individualized inquiries are necessary to determine which TPP, among the many potential payors, **[**65]** paid any overcharge. It claims that PBMs (which are excluded from the class) often share in a prescription's cost through their role obtaining rebates from drug manufacturers and sharing these rebates with their TPP customers. Allergan also claims that PBMs offer discount guarantees and price protection to their TPP customers and, in doing so, share with these TPPs the risk of negotiating reimbursement terms and drug price increases.

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[36] Dr. Frank's assertion that TPPs bore about 90 percent of the class' overcharges is uncontested.

[37] Defendant's reliance on *Minpeco, S.A. v. Conticommodity Servs., Inc., 676 F. Supp. 486, 488-90 (S.D.N.Y. 1987)*, to argue otherwise is not persuasive, as that case holds only that damages offsets should be accounted for in the ultimate assessment of damages, not that the existence of these offsets renders a party uninjured in the first place. The same can be said about *Abrahamson v. Fleschner, 568 F.2d 862, 878-79 (2d Cir. 1977)*, another case cited by Allergan, which addressed the measure of damages under the *Investment Advisors Act of 1940*. Consistent with these cases, Dr. Frank subtracted rebates from his calculation of TPPs' damages.

In response, EPPs have submitted declarations from the PBMs Express Scripts, Inc., OptumRx, Inc., and Prime Therapeutics LLC. The PBMs explain that they are hired to provide various services to assist in the administration of their clients' health plans. Nothing in those declarations suggests that a PBM directly or indirectly pays for its customers' prescription drug purchases. Ms. Craft also credibly and persuasively testified that PBMs serve only as agents for TPPs and do not pay for prescription drugs themselves. Allergan has provided no evidence to refute these representations.

I find that PBMs are not end-payors and, accordingly, their exclusion from the class does not create predominance concerns. *See, e.g., In re Loestrin, 410 F. Supp. 3d at 405*; *In re Thalomid and Revlimid, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *23*; *In re Lidoderm, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *6-7, *25*; *but cf. Vista Healthplan, 2015 U.S. Dist. LEXIS 74846, 2015 WL 3623005, at *9-13* (finding class unascertainable, **[**66]** in part, because PBMs may share the cost of a prescription); *In re Skelaxin (Metaxalone) Antitrust Litig., 299 F.R.D. 555, 569-77 (E.D. Tenn. 2014)* (denying class certification on ascertainability (and several alternative) grounds where plaintiffs' expert suggested that, while PBMs were excluded from the class, they might pay for the cost of some prescriptions); *In re Wellbutrin XL Antitrust Litig., 308 F.R.D. 134, 148-51 (E.D. Pa. 2015)* (decertifying an end-payor class in part because the plaintiffs did not show that they could "ascertain which PBMs, if any, are members of the class").[38]

To summarize, the existence of a relatively small number of uninjured class members does not preclude a finding of predominance under *Rule 23(b)(3)*.

c) Plaintiffs' Aggregate Damages Proposal

HN24[] The third and final element of an antitrust claim is damages. *Cordes, 502 F.3d at 105*. EPPs propose that the jury issue an award of aggregate damages that accounts for classwide harm. Their "model is relatively straightforward as aggregate class-wide damages equal the difference between the costs paid by class members for [brand Restasis] in the actual world versus the costs class members would have paid for [generic Restasis] in the 'but-for' world." *In re Flonase, 284 F.R.D. at 232* (approving similar damages methodology). These damages would then be distributed to injured class **[*31]** members during the claims administration process.

Defendant argues **[**67]** that the need for individualized damages determinations weighs against a finding of predominance. ***HN25***[] Although a court must consider the fact that damages calculations will be individualized in the predominance analysis, class certification under *Rule 23(b)(3)* does not require a court to conclude "that damages are capable of measurement on a classwide basis." *Roach v. T.L. Cannon Corp., 778 F.3d 401, 402, 405 (2d Cir. 2015)*. Further, where, as here, the legal and factual questions raised by the second element of an antitrust claim are common to the class, "the predominance requirement of *Rule 23(b)(3)* is likely met." *Cordes, 502 F.3d at 108*.

Here, while the claims administration process will include individualized damages calculations, many of the questions relevant to the damages distribution will be answered through common proof. The entire process depends on the extensive and particularized data created in the pharmaceutical industry that reveals the number of prescriptions purchased by each consumer and how much each end-payor paid for each prescription. These common components will significantly narrow the scope of individualized damages calculations, which will likely

[38] Dr. Hughes also criticized EPPs' failure to exclude from the class insurers who function in an Administrative Services Only (ASO) capacity. As their name indicates, ASOs solely administer health plans on behalf of a health insurer; they do not pay for the drugs themselves. While Dr. Hughes does not assert otherwise, he claims the contractual relationships between TPPs and ASOs would cause various administrative difficulties, requiring individualized inquiries to determine exactly who is entitled to recoup an overcharge. But Dr. Hughes admitted during his hearing testimony that he had offered no specific case in which a conflict between a TPP and ASO may arise. I trust that, pursuant to the terms of their agreements, ASOs and TPPs will submit proper claims. To the extent they do not, these issues can be addressed during the claims administration process, with the aid of the robust data attached to each pharmaceutical transaction.

involve simple arithmetic. *See* In re U.S. Foodservice Inc., 729 F.3d at 123 (**HN26**[] the measure of overcharge damages in a RICO class action "is straightforward"). Thus, individualized **[**68]** damages calculations "will not qualitatively outweigh the plaintiffs' reliance on common proof." *See* In re Air Cargo, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at *63.

Defendant also argues that Dr. Frank's damages calculations do not satisfy the Second Circuit's standard for aggregate damages. "'**HN27**[] The use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself.'" Hickory Secs., 493 F. App'x at 159 (quoting In re Pharm. Indus. Average Wholesale Price Litig., 582 F.3d 156, 197 (1st Cir. 2009)). The Second Circuit has accepted the use of aggregate classwide damages so long as they "roughly reflect" the harm caused to plaintiffs. Id. at 158 (internal quotation marks omitted).

Upon careful scrutiny of Dr. Frank's methodology to calculate classwide damages, I find that it arrives at amounts that, at minimum, "roughly reflect" the harm caused by defendant. Hickory Secs., 493 F. App'x at 158. The result of this methodology would "accurately reflect the number of plaintiffs actually injured by defendant[]" and bear a direct "relationship to the amount of economic harm actually caused by defendant[]." *Cf.* McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 231 (2d Cir. 2008).

To determine overcharges for each of the three categories of class members (TPPs, insured consumers, and cash payors), Dr. Frank determined the monthly average price each category paid for a prescription of Restasis in the actual world **[**69]** and subtracted his predicted but-for price. He then reduced those numbers for TPPs and uninsured consumers according to Xalatan's data. In the case of insured consumers, he used weighted averages from the Kaiser Family Foundation's annual survey regarding generic copay and coinsurance amounts. Dr. Hughes challenges Dr. Frank's use of Xalatan's prices as a yardstick as well as his use of averages to calculate damages. I find Dr. Frank's use of the data he relied upon and his use of averages in this context a reasonable way to measure overcharges. *See* In re Air Cargo, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at *61-62 (collecting cases in which "courts have permitted the use of averages to calculate overcharges").

Critically, Dr. Frank used Xalatan's monthly generic penetration rate to omit from his damages calculations the prescriptions that would have remained for the brand even after generic entry in the but-for world. He factored these figures in by determining the quantity of prescriptions that were subject to overcharges each month, based on the actual number of Restasis prescriptions, and reducing it by Xalatan's corresponding generic penetration rate. Dr. Frank then multiplied the per-month overcharge by the quantity of generic Restasis that **[**70]** would have been purchased each month and added the monthly **[*32]** totals together.[39]

Dr. Frank adjusted his overcharge totals based on the assumption that Allergan would not have provided rebates to TPPs and coupons to insured consumers in the but-for world. And he eliminated from his damages calculations uninjured entities not in the class—including insured consumers with flat copays, federal and state governmental entities, and fully insured health plans.

These actions ensure that Dr. Frank's aggregate damages formulation does not create substantial danger that defendant would be overpaying. *Cf.* McLaughlin, 522 F.3d at 231 (rejecting aggregate damages calculation that was "likely to result in an astronomical damages figure"); In re Rail Freight, 292 F. Supp. 3d at 143-44 (finding plaintiffs' classwide damages model unreliable because it, in part, assessed damages to uninjured class members).

Dr. Frank's methodology is especially appropriate here, where it is impossible to measure the true harm caused by Allergan's alleged conduct. **HN28**[] Courts recognize that, "[g]iven the inherent difficulty of identifying a 'but-for world,'" antitrust damages need not "be measured with certainty." Behrend v. Comcast Corp., 655 F.3d 182, 203 (3d Cir. 2011), *rev'd on other grounds*, 569 U.S. 27, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013). Rather, they must be demonstrated as "a matter of just and **[**71]** reasonable inference, although the result be only approximate."

[39] Dr. Frank calculated damages for two different scenarios in the but-for world—one in which generic products replaced prescriptions for Restasis MultiDose (a product Allergan launched in March 2017) and one in which they did not.

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 51 S. Ct. 248, 75 L. Ed. 544 (1931). If plaintiffs cannot prove their damages with precision, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." Bigelow, 327 U.S. at 265; *accord* Story Parchment Co., 282 U.S. at 563; In re Elec. Books, 2014 U.S. Dist. LEXIS 42537, 2014 WL 1282293, at *16. For these reasons, the "burden of proving antitrust damages is not as rigorous as in other types of cases." New York v. Julius Nasso Concrete Corp., 202 F.3d 82, 88 (2d Cir. 2000).

Allergan contends that Dr. Frank's damages calculations do not satisfy the demands of Hickory because, "[a]s in Asacol, the damages here are incremental rather than fixed." Opp. at 35. That Court concluded that "the aggregate damage amount is the sum of damages suffered by a number of individuals, such that proving that the defendant is not liable to a particular individual . . . reduces the amount of the possible total damage." In re Asacol, 907 F.3d at 55. That is not the case here. By removing a percentage of prescriptions from the total damages calculation, EPPs' model is not dependent on any individual class member's actions in the but-for world. If, in the claims administration process, defendant successfully challenges a class member's representation in his or her affidavit that he or she would have purchased generic **[**72]** Restasis, defendant would have identified someone who falls within the percentage of uninjured plaintiffs whose prescriptions were removed from the damages award. While that class member would not recover, the aggregate damages amount would not be affected.

I conclude that EPPs' method to determine and allocate classwide damages is reasonable and will not cause individual issues to predominate.

d) Predominance Concerns Raised by Multiple State Laws

EPPs' claims, under the laws of 31 states and the District of Columbia, arise under 31 antitrust laws, five consumer protection laws, and the unjust enrichment statute of California.[40] The statutes in play, while similar, are not identical. ***HN29***[] "In a motion for class certification, plaintiff bears the burden of providing an extensive analysis of state law variations to determine whether there are insuperable obstacles to class certification." Lyon v. Caterpillar, Inc., 194 F.R.D. 206, 219 (E.D. Pa. 2000) (internal quotations **[*33]** marks omitted). Therefore, I must determine whether the variations in state case law "swamp" common legal issues and defeat the predominance requirement. In re Pharm. Indus. Aver. Whol. Price List, 252 F.R.D. 83, 98 (D. Mass. 2008); *see also* In re Polyurethane Foam Antitrust Litig., 2015 U.S. Dist. LEXIS 94785, 2015 WL 4459636, at *4 (N.D. Ohio July 21, 2015) ("In the end, the question is not whether the 15 state consumer protection and unfair competition laws are different—they **[**73]** are—but whether those differences overwhelm common issues."). ***HN30***[] As the Second Circuit has held, "[v]ariations in state laws do not necessarily prevent a class from satisfying the predominance requirement," so long as "district courts . . . do more than take the plaintiff's word that no material differences exist. . . . Rather district courts themselves must undertake a considered analysis of the differences in state laws." Langan v. Johnson & Johnson Consumer Cos., 897 F.3d 88, 97 (2d Cir. 2018) (citations omitted).

Here, I found insufficient the charts initially offered by EPPs to meet their burden. Therefore, at my direction at oral argument, they submitted additional support for their trial plan. They have now grouped the states' laws according to the various statutes' requirements and drafted proposed questions for the jury that address the differences between these laws.

Plaintiffs contend that a multistate class action is appropriate because the elements of most statutes are substantially similar, any differences fall into predictable patterns that can be separated into tranches, and the court, in charging the jury and providing the jury with an appropriate verdict sheet, will resolve any remaining variations. As to the antitrust statutes, EPPs argue **[**74]** that each state's antitrust statute mirrors the federal antitrust laws, contains a federal harmonization provision, and/or has been interpreted in harmony with federal laws. Except in one regard discussed below and certain issues reserved for summary judgment, *see infra* footnote 41, Allergan does

[40] Defendant categorizes these slightly differently, classifying Missouri's antitrust statute as a consumer protection law, but that does not affect the analysis here.

not dispute that this is the case. As a result, plaintiffs argue, a single set of questions on the verdict sheet can be used to resolve questions of Allergan's liability.

With regard to the consumer protection statutes, plaintiffs maintain that they can prove violations of the statutes at issue here—those of Arkansas, California, Colorado, Montana, and Vermont—based on Allergan's allegedly unfair, unconscionable, and/or deceptive conduct through the presentation of common proof. Even so, several of the consumer protection statutes require additional proof. Specifically, California requires proof that Allergan violated another law, *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937, 943 (Cal. 2003)*; Colorado requires a showing that defendant knowingly made a false representation, *Colo. Rev. Stat. § 6-1-105(1)(e)*; and Vermont requires proof that Allergan's misconduct was likely to affect a consumer's conduct, *Carter v. Gugliuzzi, 168 Vt. 48, 716 A.2d 17, 23 (Vt. 1998)*. Additionally, as discussed below, multiple states' antitrust and consumer protection **[**75]** statutes have different standards for the imposition of enhanced damages. EPPs argue that the statutes' differences are resolvable through proposed additional jury questions.

Defendant, on the other hand, argues that these differences will predominate over common issues and render adjudication of the class unmanageable. In addition to the issues related to additional proofs identified above, Allergan argues that the antitrust statutes of Florida, Michigan, and Minnesota require a greater showing of individual impact than the other states' antitrust statutes and that the antitrust and consumer protection statutes of Colorado, Illinois, and Montana prohibit class actions entirely. Allergan does not argue that any single issue is determinative, but rather that the cumulative effect of the state law variations defeats predominance.[41]

(1) Choice-of-Law Analysis

Neither side addressed choice-of-law concerns in the initial briefing. I raised the **[*34]** issue at oral argument because***HN31***[] "[c]ourts must exercise care in conducting a choice-of-law analysis in a putative *Rule 23(b)(3)* class action . . . in order to determine whether any conflicts in governing law will overwhelm the ability of the trier of fact meaningfully **[**76]** to advance the litigation through classwide proof." *Johnson, 780 F.3d at 141*.

At oral argument, EPPs initially stated that their class definition included both purchases of Restasis made by residents of the class states and purchases of Restasis made in the class states by non-residents. In an attempt to avoid possible conflicts of law, EPPs have since limited the class to consumers who purchased Restasis in the class states, regardless of the consumer's state of residence. Defendant responds that plaintiffs have not adequately analyzed the issues and that choice-of-law considerations compound the problems of this multi-state class action.

HN32[] When deciding matters of state law, a federal court generally must apply the choice-of-law principles of the state in which it sits. *See* *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)*. Adding a layer of complexity, this action is a consolidation of cases filed in this court and cases transferred from California and Texas. ***HN33***[] In a multidistrict litigation, "the transferee court applies the choice of law rules of the state in which the action first was filed." *In re Rezulin Prods. Liab. Litig., 390 F. Supp. 2d 319, 329 (S.D.N.Y. 2005)* (citations omitted). Thus, I must apply the choice-of-law rules of California, New York, and Texas to the cases arising therefrom.

Defendant acknowledges that California **[**77]** and New York courts employ variations on the same choice-of-law analysis—the "government interest test"—and it does not genuinely dispute that, under that analysis, the state of purchase provides the appropriate substantive law for consumer class members' claims. *See, e.g.,* *Mazza v. Am. Honda Motor Co., 666 F.3d 581, 594 (9th Cir. 2012)* (applying California's choice-of-law rule in determining that "each class member's consumer protection claim should be governed by the consumer protection laws of the

[41] In its initial briefing, defendant cited more perceived differences between the states' antitrust and consumer protection laws than it raises now. At oral argument and in subsequent briefing, defendant has acknowledged that many of the issues it had raised to defeat class certification are more appropriate for summary judgment. Therefore, I do not address them now.

jurisdiction in which the transaction took place"); *In re Grand Theft Auto Video Game Consumer Litig., 251 F.R.D. 139, 147, 150 (S.D.N.Y. 2008)* (applying law of state of purchase under New York and California choice-of-law rules). I agree with this uncontroversial analysis.

I therefore focus on three issues on which the parties disagree: (1) whether the law of a state other than the state of purchase would apply to consumers' purchases under Texas's choice of-law analysis, (2) whether the law of the state in which a TPP has its principal place of business should apply to its claims, and (3) whether the law of the state to which a consumer's mail-order prescription was delivered should apply to the claims of both consumers and TPPs.

Unlike New York and California, Texas applies the "most significant relationship" test of the Restatement (Second) **[**78]** Conflict of Laws (1971) ("the Restatement"). *Johnson, 780 F.3d at 145* (citing *Spence v. Glock, Ges.m.b.H., 227 F.3d 308, 311-12 (5th Cir. 2000))*. ***HN34***[] The Restatement lists numerous factors to consider when determining which state has the most significant relationship to a case.[42] *Restatement § 6(2)*. The factors vary somewhat in importance from one field of law to another, and additional factors apply when considering tort claims such as those at issue here.[43] *See In re Wellbutrin XL Antitrust* ***[*35]*** *Litig., 282 F.R.D. 126, 135 (E.D. Pa. 2011)* ("'antitrust violations are essentially tortious acts. . . .'") (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 547, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (Marshall, J., dissenting)); *In re Flonase Antitrust Litig., 815 F. Supp. 2d 867, 882 (E.D. Pa. 2011)* (same). Under this analysis, "[t]he applicable law will usually be the local law of the state where the injury occurred." *Restatement §§ 156(2)* (addressing the tortious character of the conduct); *158(2)* (addressing the interest entitled to legal protection).

Defendant argues that, under the most significant relationship test, the state where the anticompetitive activities occurred, or the states where plaintiffs and defendant are residents, may have the most significant contacts to the case. I disagree. As the court in *Wellbutrin* reasoned in a thorough analysis of the relevant state policies and contacts,

> The place of purchase is where the relationship between the parties is centered; it is where the transaction with the alleged overcharge actually **[**79]** occurs. A place-of purchase rule protects justified expectations because an in-state transaction will be governed by the antitrust laws and/or consumer protection laws of that state and not by the chance location of the TPP's principal place of business, the location of the TPP's PBM, or an individual purchaser's residence. This approach will also provide consistent results because all purchases within a state will be treated uniformly.

282 F.R.D. at 135. While some of the Restatement's factors favor other states, consideration of the factors as a whole and in the context of this case indicates that a consumer's place of purchase—that is, where he or she was injured by overpaying—has the most significant contacts or relationships with the particular issue. *See id.*; *In re Flonase, 815 F. Supp. 2d at 882*; *In re Relafen Antitrust Litig., 221 F.R.D. 260, 277 (D. Ma. 2004)*.

Johnson v. Nextel Communs., 780 F.3d 128, is relied upon by defendant because it found class members' home states to have the most significant contacts. But *Johnson*'s analysis fully supports plaintiffs' position, not Allergan's.

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[42] ***HN35***[] These general factors include: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, **[*36]** predictability, and uniformity of result, and (g) ease in the determination and application of the law to be applied." *Restatement § 6(2)*.

[43] The additional factors applicable to tort cases include: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." *Restatement § 145*. The Restatement further provides that "[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue." *Id.*

The Second Circuit in *Johnson* found the place of injury of critical importance for tort claims, but, under the wholly different facts in that case, the place of economic injury was the class members' home states. *Id. at 142-44*. Here, the place of injury is the place **[**80]** of purchase. Accordingly, I conclude that, under the choice-of-law analysis of New York, California, and Texas, the law of the place of purchase applies to each consumer class member's claims.

As to TPP class members, Allergan argues that, under a government interest analysis, the law of the state of a TPP's principal place of business should apply. On the contrary, the law of the TPPs' insured consumer's place of purchase governs the TPPs' claims under the most significant relationship test and the government interest test. ***HN36***[] Under the government interest analysis, "[i]f conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders." *Cooney v. Osgood Mach., Inc., 81 N.Y.2d 66, 72, 612 N.E.2d 277, 595 N.Y.S.2d 919 (N.Y. 1993)*. Here, the consumer's antitrust injury or consumer protection injury takes place in the state where the drug is purchased, and, without a consumer's purchase in that state, the TPP would not be injured. As a result, under either the government interest test or the most significant interest test, the state that would be most impaired if its laws were not applied, the state with the greatest contacts, and **[**81]** the state with the most significant interest in preventing antitrust and consumer protection violations is the state in which a TPP's insured consumer purchased Restasis.[44] Moreover, this result will provide "certainty, predictability, and uniformity of result," *Restatement § 6(2)(f)*, and promote "ease in the determination and application of the law to be applied." *Restatement § 6(2)(g)*.

Finally, the parties disagree as to which state's law governs mail-order prescriptions. Defendant asserts that the law of the state of the consumer's residence should govern, while EPPs argue that, under both the government interest test and the most significant interest test, the law of the state where the drug was delivered (presumably, this generally would be the state of residence) should apply to both consumers and TPPs. I conclude that it is reasonable to treat the place of receipt of mailed drugs as the place of purchase and, therefore, the place of injury. In other words, it is reasonable to treat drugs received by mail-order the same as drugs received at a retail location.

In sum, choice-of-law considerations do not raise issues that defeat predominance.

(2) Proof of Antitrust Impact

Allergan argues that the antitrust laws of **[**82]** Florida, Michigan, and Minnesota require "a somewhat stronger and more precise showing of individual impact" than the laws of the other states at issue, quoting *In re Relafen, 221 F.R.D. at 282*, and *In re Digital Music Antitrust Litig., 321 F.R.D. 64, 99 (S.D.N.Y. 2017)*, which adopts this phrase from *Relafen* without discussion. As a result, defendant argues that the existence of uninjured plaintiffs precludes class certification under Florida, Michigan, and Minnesota antitrust laws.

A careful review of the law in these three states, and of the analysis made by the court in *Relafen*, leads me to a different conclusion—namely, that the requirements for showing individual impact, and also damages, are essentially the same in all of the states under which plaintiffs sue. I discern no heightened standard, explicit or implicit, in the cases upon which *Relafen* relies, and therefore there are no individualized issues regarding these three states.

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[44] *Cf. In re Flonase, 815 F. Supp. 2d at 882-83* (applying state law of consumers' place of purchase using Pennsylvania's choice of law principles which "require[] an inquiry both into the number and nature of contacts at issue, as set forth in the Restatement (Second) of Conflict of Laws, as well as the policies and governmental interests underlying the issue"); *In re Wellbutrin XL, 282 F.R.D. at 135* (same); *but see In re K-Dur Antitrust Litig., 2008 U.S. Dist. LEXIS 113310, 2008 WL 2660783, at *5 (D.N.J. Mar. 19, 2008)* (applying state law of TPPs' principal place of business using government interest analysis); *In re Rezulin, 392 F. Supp. 2d at 611 n.85* (same).

In *Gordon v. Microsoft Corp., 2001 U.S. Dist. LEXIS 26360, 2001 WL 366432, at *4 (D. Minn. March 30, 2001)*, cited by *Relafen, 221 F.R.D. at 281*, the United States District Court for the District of Minnesota noted the "consistency" with which Minnesota courts had denied certification of indirect purchaser classes, but, after a close and comprehensive analysis of those cases, certified a class of indirect purchasers of Microsoft products. *Gordon* concluded that denial in the prior **[**83]** cases had been on "narrow grounds rather than pursuant to any general rule." *Id.* In addressing the earlier denials, the *Gordon* court highlighted the individual complexities of determining injury in *Keating v. Philip Morris, Inc., 417 N.W.2d 132 (Minn. App. 1987)*, where cigarette purchasers unsuccessfully sought class certification. *2001 U.S. Dist. LEXIS 26360, 2001 WL 366432, at *5*. In ***HN37***[] *Keating*, the complicated chain of distribution, and the likely unavailability of purchase records—two issues entirely absent here— made individualized issues predominant and made the proposed class unmanageable.[45] *417 N.W.2D at 137*. The court in *Gordon* also expressly found that plaintiffs need not "*prove* class-wide fact of injury or individual damages at the class certification stage," but only a viable method for doing so. *2001 U.S. Dist. LEXIS 26360, 2001 WL 366432, at *7* (emphasis in original).

Turning to Michigan, although its statute requires proof of "actual damages," *Mich. Comp. Laws Ann. § 445.778(2)*, that language, as interpreted by Michigan courts, does not require a showing of damages inconsistent with that proposed by EPPs here. *Ren v. Philip Morris Inc., 2002 Mich. Cir. LEXIS 1, 2002 WL 1839983 (Mich. Cir. Ct. June 11, 2002)*, which was not cited by *Relafen*, but is relied upon by Allergan, is particularly instructive. The *Ren* court found that "common issues of law or fact would likely predominate relative to the issue of the existence of injury in fact" despite the plaintiffs' expert's **[**84]** inability to "show that each and every member of the class was necessarily subjected to paying an illegal overcharge and hence was impacted." *2002 Mich. Cir. LEXIS 1, [WL] at *11*. This, the court held, was because the***HN38***[] "inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class." *Id.* **[*37]** (quoting *In re Cardizem CD Antitrust Litig., 200 FRD 297, 321 (E.D. Mich. 2001))*. While the court in *Ren* rejected a class that sought to aggregate damages and then "simply award[ ] each member of the class the average of the class wide damages," it observed that an end-payor class "might not founder on the issue of computation of individual damages . . . where the number of purchasers of the product are readily identifiable and reliable records for individual purchases exist." *2002 Mich. Cir. LEXIS 1, [WL] at *15-16*. That, of course, is the situation here.

Finally, ***HN39***[] the law in Florida also does not support a heightened standard. For example, in *Execu-Tech Business v. Appleton Papers, 743 So. 2d 19 (Fla. App. 4 Dist. 1999)*, cited by *Relafen*, the appellate court upheld the trial court's denial of certification of an end-payor class where the trial court had rejected the plaintiffs' expert evidence and had concluded that there was no reasonable methodology for generalized proof of classwide impact and damages. Thus, while the court acknowledged its skepticism **[**85]** of end-payor classes, its holding was based upon the lack of sufficient evidence needed to avoid individual inquiries.

As *Relafen* also noted, a different Florida court had certified an end-payor class where, in contrast to *Execu-Tech*, the plaintiffs' expert economists had "identified methodologies for demonstrating the individual impact of" the defendants' behavior. *In re Relafen, 221 F.R.D. at 281* (citing *In re Fla. Microsoft Antitrust Litig.*, 2002 WL 31423620, at *11 (Fla. Cir. Ct. Aug. 26, 2002)). The *Florida Microsoft* court held that Microsoft's claim that some class members were not harmed and may even have benefitted from its conduct presented, at most, matters of fact for the jury, and did not impact class certification. Perhaps most significantly, in a case decided since *Relafen*, a Florida appellate court has expressly accepted that uninjured class members do not automatically preclude class certification in end-payor class actions. *Miami-Dade Expressway v. Tropical, 250 So.3d 751 (Fla. App. 3 Dist. 2018)*.

Rollins, Inc. v. Butland, 951 So. 2d 860, 866 (Fla. Dist. Ct. App. 2006), upon which Allergan relies, is not to the contrary. The court there refused to allow the plaintiffs to demonstrate classwide impact merely through a "pattern and practice" of deception. *Id. at 873*. It found that such a method would insufficiently show that class members

[45] The facts in *Ludke v. Philip Morris Cos., 2001 Minn. Dist. LEXIS 2, 2001 WL 1673791 (Minn. Dist. Ct. Nov. 21, 2001)*, relied upon by *Relafen*, were similar to those in *Keating*.

were impacted by the same misconduct and therefore, in violation of due process, the defendants would be denied **[**86]** their ability to defend against the claims. No such issue exists here.

In sum, the laws in these three states, like the laws of the other states at issue, permit the use of EPPs' methodologies to determine classwide impact and damages and to cull before judgment any uninjured class members.[46]

(3) Vermont

HN40[] EPPs bring a claim of deception against Allergan under *Vermont's Consumer Protection Act, Vt. Stat. Ann. Tit. 9 §§ 2453 et seq.*, which requires, in addition to elements common to the other consumer protection claims, that the claimed deception "must be material, that is, likely to affect the consumer's conduct or decision regarding the product." *Carter, 716 A.2d at 23*. To address this, plaintiffs' proposed verdict form includes a question asking if "Allergan's deceptive misconduct was likely to affect the consumer's conduct or decision regarding Restasis." Allergan argues that the inclusion of Vermont's deception claim greatly increases the difficulty of managing a certified class.

To the extent defendant argues, as it did in a withdrawn motion to dismiss, that Vermont's statute requires consumer-facing conduct and that EPPs are unable to meet that burden, this argument must be saved for summary judgment. If, however, **[**87]** Allergan is asserting that the inclusion of the additional **[*38]** jury question makes the case unmanageable, I am unpersuaded. Adding this question, and an appropriate jury charge, would not be onerous, and obtaining a common answer would not defeat the predominance of the common issues. Indeed, I accept plaintiffs' representation that they would use the same proof to answer this question as they would all others. I therefore find that the inclusion of EPPs' claims under Vermont law does not defeat predominance.

(4) Scienter - Arkansas & Colorado

Defendant argues that the consumer protection statutes of Arkansas and Colorado require a showing of scienter, rendering the class unmanageable because "there would have to be a separate phase of trial or a unique set of jury instructions in order for the jury to determine what scienter was required." Opp. at 38-39. Though Allergan acknowledged at oral argument that the court would determine the level of scienter that is required and instruct the jury to apply it to the facts, it still argues that including states with a scienter requirement would cause individual issues in those states to predominate.

The parties agree that EPPs' claim, pursuant to the catch-all **[**88]** provision of the *Arkansas Deceptive Trade Practices Act, Ark. Code Ann. § 4-88-107(a)(10)*, does not contain a scienter requirement. Allergan argues, however, that plaintiffs' patent-related allegations fall more appropriately under a different subsection of the same statute, which prohibits "[k]nowingly making a false representation as to the characteristics, ingredients, uses, benefits, alterations, source, sponsorship, approval, or certification of goods or services or as to whether goods are original or new or of a particular standard, quality, grade, style, or model." *Ark. Code Ann. § 4-88-107(a)(1)*. Defendant argues that EPPs' Arkansas claim therefore requires a different standard for scienter than the other class claims, contributing to the overall complexity of jury instructions.

As an initial matter, because EPPs bring their claim under only the catch-all provision, defendant's argument is, in essence, a motion to dismiss that claim and is inappropriately raised in opposition to class certification. *See Amgen,*

[46] It is also worth noting that many courts have certified end-payor classes containing claims under the laws of Minnesota, Michigan, and/or Florida without any discussion of a higher standard of individual impact. *See, e.g., Hosp. Auth. of Metro. Gov't of Nashville and Davidson County, Tenn. v. Momenta Pharmaceuticals, Inc., 333 F.R.D. 390, 2019 WL 4573433 (M.D. Tenn. Sept. 20, 2019)*; *In re Lidoderm, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367*; *In re Terazosin Hydrochloride, 220 F.R.D. 672 (S.D. Fla. 2004)*. Indeed, in *In re Nexium, 297 F.R.D. at 175*, the very judge who wrote the decision in *Relafen*, did precisely that.

568 U.S. at 466. And, even if defendant ultimately manages to transform EPPs' current Arkansas claim into one under *subsection (a)(1)*, the inclusion of a single jury question as to whether defendant possessed the requisite scienter would not defeat predominance. **[**89]** *See In re Pharm. Indus. Aver. Whol. Price List, 252 F.R.D. at 100* ("In the context of plaintiffs' theory in this case, the varying standards governing a defendant's scienter do not pose insuperable management issues because the Court can ask the jury specific questions. . . .").

The same analysis applies to the Colorado statute under which plaintiffs sue, which requires a showing that defendant "knowingly" made a false representation. *Colo. Rev. Stat. § 6-1-105(1)(e)*.

In sum, the need for a jury to determine scienter under one or two statutes does not defeat predominance or render the class unmanageable.

(5) Enhanced Damages

Defendant raises concerns regarding the availability of enhanced damages, whether treble or punitive, under some states' antitrust and consumer protection statutes. At oral argument, it conceded that this issue "is not important by itself" and that it has pressed the issue only because it "adds to the manageability." Oral Arg. Tr. at 165.

EPPs propose three questions to account for states that require an additional finding for an award of enhanced damages. The inclusion of these questions, even when added to the other questions regarding liability and damages, does not cause individual issues to predominate or render the class unmanageable.

(6) [90] State Law Bans on Class Actions**

Allergan also argues that Colorado, Illinois, and Montana ban class actions, precluding certification of a class that includes those states' claims. *See 740 Ill. Comp. Stat. § 10/7(2)*; *Mont. Code Ann. § 30-14-133(1)*; *Colo. Rev. Stat. § 6-1-113(2)*. Having carefully reviewed the parties' supplemental papers, I find that this issue is a legal question common to all class members within each state. Whether the statutes of Colorado, Illinois, **[*39]** and Montana bar recovery through a class action is more appropriately resolved on summary judgment; my decision on these questions is unnecessary for the purposes of class certification. *See Amgen, 568 U.S. at 466*. For efficiency's sake, I will rely on the parties' current briefing on these questions when I consider defendant's forthcoming summary judgment motion.

In conclusion, EPPs have met their burden of demonstrating, through an extensive analysis of state law variations, that class certification does not present insuperable obstacles. None of the issues raised by Allergan is alone so material as to prevent certification. Even when taken together, the differences cited by Allergan address factual and legal questions common to the entire class, or discrete subsections thereof; are remediable by additional questions to the jury; **[**91]** and/or are more appropriately raised on summary judgment.

2. Superiority

HN41[] *Rule 23(b)(3)* permits class certification only where "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The Rule provides a list of factors to be considered in this assessment:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3)(A)-(D).

EPPs have shown that litigating this case as a class is superior to other methods of adjudication. None of the factors listed in *Rule 23(b)(3)* counsels against certification. First, since the class contains thousands of TPPs, some with relatively small claims, and at least one million consumers, "proceeding individually would be prohibitive," not advantageous, for the majority of class members. *See Seijas, 606 F.3d at 58*. Thus, "substituting a single class action for numerous trials in a matter involving substantial common legal issues and factual **[**92]** issues susceptible to generalized proof will achieve significant economies of 'time, effort and expense, and promote uniformity of decision.'" *In re U.S. Foodservice Inc., 729 F.3d at 130-31* (quoting *Fed. R. Civ. P. 23* advisory committee's notes).

Second, the only cases brought by or against class members regarding this controversy are pending before me. Third, I do not see any reason why this litigation cannot remain concentrated in this court. Plaintiffs have effectively litigated these actions before me, and defendant has not argued that they cannot continue to do so. Finally, no one has a greater interest than I do in ensuring that this class action is manageable before certifying it. Based on my familiarity with the case, I am confident that this litigation can be managed as a class action.

Defendant makes two arguments against a finding of superiority. It first relies on its assertions, raised in the context of predominance, regarding the need for individualized inquiries. As set forth above, the individualized determinations required by this class action are relatively minimal. They do not make this class action unmanageable or inappropriate.

Nor am I persuaded by defendant's second argument, that the mere possibility of a *parens patriae* action **[**93]** in an antitrust case renders a class action an inferior mechanism to resolve EPPs' claim. *See Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 266, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)*. This is especially true where the Federal Trade Commission ("FTC") and New York Attorney General chose not to bring such an action against Allergan regarding Restasis. *See Bryan v. Amrep Corp., 429 F. Supp. 313, 318-19 (S.D.N.Y. 1977)* ("The possibility that the FTC may at some future time secure refunds for the class is not an adequate reason to deny a class determination in this case, which seeks present and independent relief.").

[*40] C. Ascertainability

HN42[] In the Second Circuit, the ascertainability doctrine "requires only that a class be defined using objective criteria that establish a membership with definite boundaries." *In re Petrobras, 862 F.3d at 264*. As defendant does not contest, that "modest threshold" is easily met here. *See id. at 269*. The class is objectively defined as consisting of any person or entity who purchased Restasis not for resale in specific states during a discrete period. *See In re Solodyn, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *13-14*.

V. APPOINTING CLASS COUNSEL AND CLASS REPRESENTATIVES

HN43[] *Rule 23(g)* requires me to appoint class counsel at the time of certification. In doing so, I must consider

> (i) the work counsel has done in identifying or investigating potential claims in the action;
>
> (ii) counsel's experience in handling class actions, other **[**94]** complex litigation, and the types of claims asserted in the action;
> (iii) counsel's knowledge of the applicable law; and
> (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

EPPs' current interim counsel seek appointment as class counsel. As discussed above in the context of *Rule 23(a)(4)*'s adequacy requirement, it is undisputed that these lawyers satisfy the requirements of *Rule 23(g)(1)(A)*. I carefully reviewed the qualifications, experience, and resources of these attorneys when I appointed them to their interim roles, and the attorneys' work since then, including on this motion, serves as further assurance that they are extremely qualified and able to represent the certified class. I have no hesitation that these lawyers will "fairly and adequately represent the interests of the class." *Fed. R. Civ. P. 23(g)(4)*. Therefore, Girard Sharp LLP, Lieff Cabraser Heimann & Bernstein, LLP, and Joseph Saveri Law Firm, Inc. are appointed as co-lead counsel for class plaintiffs, and Zwerling, Schachter & Zwerling, LLP is appointed as liaison counsel for the class.

Additionally, 1199SEIU National Benefit Fund; 1199SEIU Greater New York Benefit Fund; 1199SEIU National Benefit Fund for Home Care Workers; 1199SEIU Licensed Practical **[**95]** Nurses Welfare Fund; American Federation of State, County, and Municipal Employees District Council 37 Health and Security Plan; Fraternal Order of Police, Miami Lodge 20, Insurance Trust Fund; Ironworkers Local 383 Health Care Plan; Self-Insured Schools of California; Sergeants Benevolent Association Health & Welfare Fund; St. Paul Electrical Workers' Health Plan; and United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund are appointed as class representatives.

VI. CONCLUSION

Plaintiffs' motion for class certification is granted. The class is defined as:

> All persons or entities who indirectly purchased, paid and/or provided reimbursement for some or all of the purchase price for Restasis, other than for resale, who made their purchases in Arizona, Arkansas, California, Colorado, the District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine*, Massachusetts*, Michigan, Minnesota, Mississippi, Missouri*, Montana*, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont*, West Virginia, and Wisconsin from May 1, 2015, through the present (in the case of Arkansas **[**96]** only, July 31, 2017), for consumption by themselves, their families, or their members, employees, insureds, participants, or beneficiaries.

In the states marked with an asterisk, class members are only consumers, not TPPs. Excluded from the class are:

> Allergan, its officers, directors, employees, subsidiaries, and affiliates; all federal and state government entities except for cities, towns, municipalities, or counties with self-funded prescription drug plans; all persons or entities who purchased Restasis for purposes of resale or directly from Allergan of **[*41]** its affiliates; fully insured health plans, *i.e.*, plans that purchased insurance covering 100 percent of their reimbursement obligations to members; any "flat copay" consumers who purchased Restasis only via a fixed dollar copayment that does not vary on the basis of the drug's status as brand or generic; PBMs; and all judges assigned to this case and their chambers staff and any members of the judges' or chambers staff's immediate families.

HN44[] When a court certifies a *Rule 23(b)(3)* class, *Rule 23(c)(2)(B)* provides that "the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can **[**97]** be identified through reasonable effort." Plaintiffs are directed to submit to the court a proposed plan for notice to class members, which should include a proposed form of notice.

Dated: May 5, 2020

Brooklyn, New York

SO ORDERED.

/s/ Nina Gershon

NINA GERSHON

United States District Judge

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In re Google Assistant Privacy Litig.

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

May 6, 2020, Decided; May 6, 2020, Filed

Case No. 19-cv-04286-BLF

Reporter

457 F. Supp. 3d 797 *; 2020 U.S. Dist. LEXIS 80971 **; 2020 WL 2219022

IN RE GOOGLE ASSISTANT PRIVACY LITIGATION

Subsequent History: Motion denied by *In re Google Assistant Privacy Litig., 2020 U.S. Dist. LEXIS 145957, 2020 WL 4698810 (N.D. Cal., Aug. 13, 2020)*

Motion denied by, Without prejudice *In re Google Assistance Privacy Litig., 2020 U.S. Dist. LEXIS 235824, 2020 WL 7342713 (N.D. Cal., Dec. 14, 2020)*

Motion granted by, in part, Motion denied by, in part, Request granted, Dismissed by, in part, Dismissed by, Without prejudice, in part *In re Google Assistant Privacy Litig., 546 F. Supp. 3d 945, 2021 U.S. Dist. LEXIS 123837 (N.D. Cal., July 1, 2021)*

Motion granted by *In re Google Assistant Privacy Litig., 2022 U.S. Dist. LEXIS 132590 (N.D. Cal., July 26, 2022)*

Motion granted by *In re Google Assistant Priv. Litig., 2022 U.S. Dist. LEXIS 154191 (N.D. Cal., Aug. 26, 2022)*

Later proceeding at *In re Google Assistant Priv. Litig., 2022 U.S. Dist. LEXIS 233186 (N.D. Cal., Sept. 28, 2022)*

Motion granted by *In re Google Assistant Privacy Litig., 2022 U.S. Dist. LEXIS 233187 (N.D. Cal., Sept. 28, 2022)*

Motion denied by *In re Google Assistant Priv. Litig., 2022 U.S. Dist. LEXIS 233185 (N.D. Cal., Sept. 28, 2022)*

Motion denied by *Kumandan v. Google LLC, 2022 U.S. Dist. LEXIS 233165, 2022 WL 17970213 (N.D. Cal., Sept. 28, 2022)*

Motion dismissed by, Without prejudice *Kumandan v. Google LLC, 2023 U.S. Dist. LEXIS 86374 (N.D. Cal., Jan. 6, 2023)*

Core Terms

Plaintiffs', Defendants', recording, interception, motion to dismiss, Consolidated, Privacy, conversations, allegations, users, Wiretap, electronic communication, wire, disclosure, warranty, communications, intrusion, judicial notice, AMEND, accepts, courts, electronic, unfair, third party, circumstances, damages, pleaded, oral communication, contents, cable

Counsel: **[**1]** For Asif Kumandan, Melissa Spurr, Plaintiffs: Eric Somers, LEAD ATTORNEY, Lexington Law Group, San Francisco, CA; Vincent Briganti, LEAD ATTORNEY, Lowey Dannenberg, P.C., White Plains, NY; Andrea Farah, PRO HAC VICE, Lowey Dannenberg, P.C., White Plains, NY; Christian Levis, Lowey Dannenberg, P.C., White Plains, NY; Erin Green Comite, Scott & Scott, LLP, Colchester, CT; Henry J Kusjanovic, PRO HAC VICE, Lowey Dannenberg, P.C., White Plains, NY; John T. Jasnoch, ScottScott Attorneys at Law LLP, San Diego, CA; Joseph P. Guglielmo, ScottScott, Attorneys at Law, LLP, New York, NY; Stephanie Ann Hackett, Scott Scott, Attorneys at Law, LLP, San Diego, CA; Mark N. Todzo, Lexington Law Group, LLP, San Francisco, CA.

For B. S. a minor, individually and on behalf of all others similarly situated, Plaintiff: Mark N. Todzo, Lexington Law Group, LLP, San Francisco, CA; Vincent Briganti, LEAD ATTORNEY, Lowey Dannenberg, P.C., White Plains, NY; Erin Green Comite, Scott & Scott, LLP, Colchester, CT; Stephanie Ann Hackett, Scott Scott, Attorneys at Law, LLP, San Diego, CA.

For Lourdes Galvan, Eleeanna Galvan, Plaintiffs: Mark N. Todzo, Lexington Law Group, LLP, San Francisco, CA; Stephanie Ann Hackett, **[**2]** LEAD ATTORNEY, Scott Scott, Attorneys at Law, LLP, San Diego, CA; Vincent Briganti, LEAD ATTORNEY, PRO HAC VICE, Lowey Dannenberg, P.C., White Plains, NY; Christian Levis, PRO HAC VICE, Lowey Dannenberg, P.C., White Plains, NY; John T. Jasnoch, ScottScott Attorneys at Law LLP, San Diego, CA.

For Google LLC, Alphabet Inc., Defendants: Bobbie Jean Wilson, LEAD ATTORNEY, Perkins Coie LLP, San Francisco, CA; Sunita Bali, Perkins Coie LLP, San Francisco, CA.

Judges: BETH LABSON FREEMAN, United States District Judge.

Opinion by: BETH LABSON FREEMAN

Opinion

[*809] ORDER RE DEFENDANTS' MOTION TO DISMISS

[Re: ECF 56]

The instant litigation comprises two separately-filed cases that the Court has consolidated. *See* ECF 42 (consolidating *Kumandan et al v. Google LLC et al*, Case No. 19-cv-04286-BLF and *Galvan et al v. Google LLC et al*, Case No. 19-cv-04360-BLF). Both cases charge Defendants Google LLC and Alphabet, Inc. with unlawfully intercepting, recording, disclosing, and using the private conversations of thousands of users of the Google Assistant software. Presently before the Court is Defendants' motion to dismiss the entire consolidated suit. ECF 56. Having considered the parties' arguments and the applicable law, the Court GRANTS **[**3]** IN PART and DENIES IN PART the motion to dismiss; further, any dismissals are WITH LEAVE TO AMEND.

I. BACKGROUND

This is a putative consumer class action concerning the Google Assistant, a virtual assistant software developed by Defendants Google LLC and Alphabet, Inc. for use on various "Google Assistant Enabled Devices" ("GAEDs") manufactured by Defendants and by third parties. Specifically, the operative Consolidated Amended Class Action Complaint ("Consolidated FAC"), which was filed on October 25, 2019, ECF 48, contains the following allegations:

[*810] The Google Assistant is a voice-activated software, which means that users can ask questions of and give instructions to the Google Assistant using their voices. ECF 48 ("Consol. FAC") ¶¶ 2, 22. This software comes preloaded onto certain devices, such as the Google Home, the Google Pixel smartphones, and third party-manufactured smartphones that use the Google Android operating system; it can also be installed on a range of devices. *Id.* ¶ 2. Because the Google Assistant is voice-activated, it is constantly listening for "hotwords"—i.e., "Okay Google" or "Hey Google." *Id.* ¶ 22. It does this by recording and analyzing short snippets of audio, **[**4]** which are stored locally in the Google Assistant Enabled Device's random-access memory ("RAM"); these snippets are continuously overwritten, however, if no hotwords are detected. *Id.* ¶ 23. When the hotwords are detected, the Google Assistant switches into "active listening" mode, meaning that it begins recording and analyzing audio in order to carry out the user's command. *Id.* ¶ 24. The Google Assistant can also be manually activated by pressing a button on the device. *Id.*

Plaintiffs allege that Defendants also keep and use the audio recordings for two purposes other than carrying out the user's command: (1) to target personalized advertising to users, and (2) to improve the voice recognition capabilities of the Google Assistant. *Id.* ¶ 25. The focus of this suit is the latter. Citing a 2019 news article by VRT NWS, Plaintiffs allege that the Google Assistant produces a script of each audio recording that it stores; Defendants then task human subcontractors with comparing the script to the audio recording to check the accuracy of the Google Assistant's interpretation. *Id.* ¶ 35. In a blog post responding to this and similar reports, Google apparently confirmed that it uses human reviewers **[**5]** to analyze audio recordings, but stated that only "0.2 percent" of all audio recordings are subject to such analysis. *Id.* ¶ 39.

Sometimes, the Google Assistant may be triggered into active listening mode when the Google Assistant misperceives other words as the hotwords. This is known as a "false accept." *Id.* ¶ 39. Plaintiffs believe that in such situations, Defendants do not destroy the audio recordings, but rather continue to use them for personalized advertising and to analyze the accuracy of the Google Assistant—just as Defendants would do with authorized recordings. *Id.* ¶¶ 38, 41. As evidence, Plaintiffs point to the investigation carried out by VRT NWS, in which VRT NWS reviewed "more than a thousand" audio recordings and "identified 153 conversations" that were recorded due to false accepts. *Id.* ¶ 36.

This suit is based on Defendants' use of audio recordings in "false accept" situations. In Plaintiffs' view, such use is an invasion of privacy, especially because many of the recorded conversations take place in individuals' homes. *Id.* ¶¶ 27-30. Plaintiffs also believe that this practice contravenes the privacy assurances that Defendants make to users in their Privacy Policy. *Id.* ***[**6]*** ¶ 31. Finally, Plaintiffs are particularly troubled by the fact that some of the recordings include the conversations of children because they do not believe that these children can consent to being recorded. *Id.* ¶ 42.

Based on the foregoing, Plaintiffs have sued Google LLC and its parent company Alphabet Inc. under various state and federal laws. There are 12 claims in the Consolidated FAC: (1) violation of the federal *Wiretap Act, 18 U.S.C. §§ 2510 et seq.*; (2) violation of the federal *Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701 et seq.*; (3) violation of the *California Invasion of Privacy Act ("CIPA"), Cal. Penal Code § 631(a)*; (4) violation of the CIPA, *Cal. Penal Code § 632*; (5) intrusion upon seclusion **[*811]** under California common law; (6) invasion of privacy, in violation of *Article I, Section 1 of the California Constitution*; (7) breach of contract under California common law; (8) breach of express warranty under *Cal. Comm. Code § 2313*; (9) breach of the implied warranty of merchantability under *Cal. Comm. Code § 2314*; (10) violation of the *Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 et seq.*; (11) violation of the California Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code §§ 17200 et seq.*; (12) request for declaratory judgment under the *Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq.* Consol. FAC ¶¶ 76-252.

These claims are brought by five Named Plaintiffs:

- Plaintiff Asif Kumandan is a resident of Kings County, New York. Consol. FAC **[**7]** ¶ 13. He alleges that he owned a Google Pixel smartphone during the Class Period (defined below) and that he "interacted with the Google Assistant on his Google Pixel repeatedly." *Id.* ¶ 52.

- Plaintiff Melissa Spurr is a resident of Union County, New York. *Id.* ¶ 14. She alleges that she owned a Google Home device during the Class Period and that "she interacted with this Google Home device repeatedly." *Id.* ¶ 51.

- Plaintiff B.S. is a minor member of Plaintiff Spurr's household; as such, she has allegedly interacted with Plaintiff Spurr's Google Home device during the Class Period. *Id.* ¶¶ 15, 51. She brings suit by and through her legal guardian, Plaintiff Spurr. *Id.* ¶ 15.

- E.G., is a member of Plaintiff Galvan's household; she was a minor during a portion of the Class Period but now brings suit on her own. *Id.* ¶¶ 17, 53. Plaintiff E.G. alleges that she owned a Samsung Galaxy Tab device on which she activated the Google Assistant. *Id.* ¶ 53. She further alleges that she interacted with the Samsung Galaxy Tab device repeatedly during the Class Period. *Id.*

- Lourdes Galvan is a resident of Los Angeles County, California. *Id.* ¶ 16. She alleges that she interacted with Plaintiff E.G.'s Samsung **[**8]** Galaxy Tab device during the Class Period. *Id.* ¶ 53.

To be precise, all five Named Plaintiffs assert Counts 1-7 and 11-12 on behalf of themselves and the following nationwide "Class":

> All individual purchasers of a Google Assistant Enabled Device, who reside in the United States and its territories and members of their households, whose conversations were obtained by Google without their consent or authorization and/or were shared with third parties without their consent from at least as early as May 18, 2016 to the present, or during the applicable statute of limitations period (the "Class Period").

Consol. FAC ¶ 60. As for Counts 8, 9, and 10, Plaintiffs Kumadan and Spurr assert these claims on behalf of themselves and the "Google Manufactured Device Subclass," which is defined as:

> A Subclass of individual purchasers of a Google Manufactured Device, who reside in the United States and its territories, and members of their households, whose conversations were obtained by Google without their consent or authorization and/or were shared with third parties without their consent during the Class Period.

Id.

Defendants now move to dismiss the Consolidated FAC in full pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. ECF 56 ("Mot.") **[**9]** at 1. The motion has been fully briefed and was heard on April 9, 2020. **[*812]** ECF 58 ("Opp."); ECF 61 ("Reply"); ECF 75 (hearing).

II. LEGAL STANDARD

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint that fails to meet this standard may be dismissed pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. In other words, "[a] motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim upon which relief can be granted 'tests the legal sufficiency of a claim.'" *Conservation Force v. Salazar, 646 F.3d 1240, 1241-42 (9th Cir. 2011)* (quoting *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001))*. To survive a *Rule 12(b)(6)* motion, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted).

A court's review on a 12(b)(6) motion to dismiss "is limited to the complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice." **[**10]** *Cedar Point Nursery v. Shiroma, 923 F.3d 524, 530 (9th Cir. 2019)* (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007))*. Moreover, in evaluating the complaint, the court must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*. At the same time, a court need not accept as true "allegations that contradict matters properly subject to judicial notice" or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (internal quotation marks and citations omitted).

III. REQUEST FOR JUDICIAL NOTICE AND INCORPORATION BY REFERENCE

Defendants have submitted six exhibits that they ask the Court to review in ruling on their motion to dismiss. *See* ECF 56-1 ¶¶ 2-7; *id.* at Ex. A-F. Defendants believe these exhibits are either incorporated by reference by the Consolidated FAC or subject to judicial notice.

There are two doctrines that permit district courts to consider material outside the pleadings without converting a motion to dismiss into a motion for summary judgment: judicial notice under *Federal Rule of Evidence 201* and incorporation by reference. *Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 998 (9th Cir. 2018)*, *cert. denied sub nom. Hagan v. Khoja, 139 S. Ct. 2615, 204 L. Ed. 2d 264 (2019)*. The judicial notice doctrine permits a court to take judicial notice of matters that are "not subject to reasonable dispute." *Fed. R. Evid. 201(b)*. A fact **[**11]** is "not subject to reasonable dispute" if it is "generally known," or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)(1)-(2)*. However, "[j]ust because the document itself is susceptible to judicial notice does not mean that every assertion of fact within **[*813]** that document is judicially noticeable for its truth." *Khoja, 899 F.3d at 999*. For instance, though public records are generally subject to judicial notice, a court may not take judicial notice of disputed facts within public records. *Id.*

"[I]ncorporation-by-reference is a judicially created doctrine that treats certain documents as though they are part of the complaint itself." *Khoja, 899 F.3d at 1002*. This doctrine permits a court to consider a document "if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)*. A court generally "may assume an incorporated document's contents are true for purposes of a motion to dismiss under *Rule 12(b)(6)*." *Khoja, 899 F.3d at 1003* (internal quotations omitted). Because all inferences must still be drawn in the nonmoving party's favor, however, "it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded **[**12]** complaint." *Id.*

Having reviewed the basic principles of judicial notice and incorporation by reference, the Court turns to each of the six documents Defendants have submitted. Plaintiffs have not opposed the Court's consideration of any of the documents at issue.

Exhibit A is a copy of the 2019 news report by VRT NWS cited by Plaintiffs in Consolidated FAC. ECF 56-1, Ex. A; *see* Consol. FAC ¶¶ 34-38. Defendants ask the Court to treat the article as incorporated by reference; Defendants also argue that the article is subject to judicial notice, as it "appears on [a] publicly accessible website." Mot. at 2-3. It is well-established that "[c]ourts may take judicial notice of publications introduced to indicate what was in the public realm at the time, not whether the contents of those articles were in fact true." *Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 960 (9th Cir. 2010)* (internal quotations omitted); *see also Packsys, S.A. de C.V. v. Exportadora de Sal, S.A. de C.V., 899 F.3d 1081, 1087 n.2 (9th Cir. 2018)* ("We take notice of the fact of publication, but do not assume the truth of the article's contents."). The Court therefore takes judicial notice of the fact that VRT NWS published each of the allegations contained in the article, but not of the truth of those allegations. As Defendants do not ask the Court to treat the contents of the article **[**13]** as true—indeed, they dispute its truth—the Court need not reach the issue of incorporation by reference. The request for judicial notice is GRANTED, with the caveats just described.

Defendants similarly ask the Court to consider Exhibit B—the Google blog post referenced in the Consolidated FAC, *see* Consol. FAC ¶ 39—as incorporated by reference or as a judicially-noticeable website. Mot. at 2-3; ECF 56-1, Ex. B. Again, Defendants do not ask the Court to treat the contents of the blog post as true. Thus, as with the VRT NWS article, the Court takes judicial notice of the blog post for the fact that Google made the statements it contains, but not for the truth of those statements. The request for judicial notice is GRANTED as stated; the Court need not decide whether the blog post was incorporated by reference.

Exhibits C and D are copies of Defendants' Terms of Service ("TOS") and Privacy Policy, respectively. ECF 56-1, Ex. C (Google Terms of Service), Ex. D (Privacy Policy). These documents "form the basis" for Plaintiffs' claims for breach of contract (Count 7) and breach of express warranty (Count 8), as they contain the contract terms and warranty terms that were allegedly breached. **[**14]** *See* Consol. FAC ¶¶ 189-199, 210. Defendants' request to incorporate by reference the Terms of Service **[*814]** and Privacy Policy is therefore GRANTED. *See Ritchie, 342 F.3d at 908*; *accord Bass v. Facebook, Inc., 394 F. Supp. 3d 1024, 1037 n.1 (N.D. Cal. 2019)* (granting Facebook's request to incorporate by reference the Terms of Service because the consolidated complaint relied upon them to allege the breach of contract claims and statutory claims).

Lastly, Exhibit E purports to be a copy of the "Google Home Warranty — United States" and Exhibit F purports to be a copy of the "Hardware limited warranty for Android Hardware devices, including the Pixel smartphone." ECF 56-1 ¶¶ 6-7; *see id.* Ex. E-F. These documents are not incorporated by reference by the Consolidated FAC; rather, Defendants ask the Court take judicial notice of them because "they appear on publicly accessible websites and their authenticity cannot be reasonably questioned." Mot. at 3 (citing *Datel Holdings Ltd. v. Microsoft Corp., 712 F. Supp. 2d 974, 983-84 (N.D. Cal. 2010))*. The Court agrees that the existence of these documents is a judicially noticeable fact, and therefore GRANTS Defendants' unopposed request. *See, e.g., Opperman v. Path, Inc., 84 F. Supp. 3d 962, 976 (N.D. Cal. 2015)* (collecting cases in which courts have taken judicial notice of publicly available policies and agreements). The Court notes, however, that its judicial notice does not establish **[**15]** that these documents are "valid or binding contracts." *Datel Holdings, 712 F. Supp. 2d at 984*.

IV. DISCUSSION

Defendants move to dismiss all the claims in the Consolidated FAC; Plaintiffs, of course, oppose the motion. Because the legal requirements for each claim differ substantially, the Court considers the sufficiency of Plaintiffs' allegations as to each set of claims *seriatim*.

A. Count 1: Federal Wiretap Act

The Federal Wiretap Act ("Wiretap Act"), *18 U.S.C. §§ 2510-2520*, "is designed to prohibit 'all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officials engaged in investigation of specified types of major crimes.'" *Greenfield v. Kootenai County, 752 F.2d 1387, 1388 (9th Cir. 1985)* (quoting S. Rep. No. 1097, 90th Cong., 2d Sess.). In Count 1 of the Consolidated FAC, Plaintiffs allege that the Defendants violated *18 U.S.C. 2511(1)(a)*, which makes it unlawful for a person to "intentionally intercept[], endeavor[] to intercept, or procure[] any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." *Id. § 2511(1)(a)*; *see* Consol. FAC ¶¶ 88-91. The Wiretap Act also imposes liability on any person who "intentionally discloses" to "any other person the contents of any wire, oral, or electronic communication," or "intentionally uses" the "contents of any **[**16]** wire, oral or electronic communication" while "knowing or having reason to know that the information was obtained through the [unlawful] interception," *id. § 2511(1)(c)-(d)*; Plaintiffs allege that Defendants also violate this provision. *See* Consol. FAC ¶¶ 92-95

Defendants contend that Plaintiffs have failed to adequately plead either of their theories because (1) Plaintiffs have not shown that any interception was "intentional" rather than inadvertent, (2) Plaintiffs have not identified any specific "oral communications" that were allegedly intercepted, (3) Defendants' conduct falls within the "ordinary course of business exception," and (4) Plaintiffs have not shown that Defendants used or disclosed information they knew to be unlawfully obtained. Mot. at 4-8. The Court addresses each argument below.

[*815] i. "Intentional" Interception

As the text of the statute makes clear, the Wiretap Act prohibits only interception that is "intentional, as opposed to inadvertent." *Sunbelt Rentals, Inc. v. Victor, 43 F. Supp. 3d 1026, 1030 (N.D. Cal. 2014)* (citing *Sanders v. Robert Bosch Corp., 38 F.3d 736, 742-43 (4th Cir. 1994))*. Defendants emphasize that Plaintiffs' claim is based only on "false accepts," which Defendants maintain are definitionally inadvertent rather than intentional. Mot. at 4-5. That is, false accepts are a defect rather than an intended **[**17]** feature of the Google Assistant. *Id.* Plaintiffs respond that Defendants' knowledge of the defect combined with its failure to remedy it or to destroy the recordings suffice to make its conduct "intentional" under the statute. ECF 58 ("Opp.").

The intent requirement under § 2511 requires the interception to have been "purposeful[] and deliberate[]" and not "a result of accident or mistake." United States v. Christensen, 828 F.3d 763, 774 (9th Cir. 2015); *accord* In re Pharmatrak, Inc., 329 F.3d 9, 23 (1st Cir. 2003) ("An act is not intentional if it is the product of inadvertence or mistake."). Although inadvertent interceptions are plainly not actionable, several courts have rejected a defendant's claim that the interception was inadvertent where the defendant was aware it was occurring. The case most similar to this one is Backhaut v. Apple, Inc., 74 F. Supp. 3d 1033 (N.D. Cal. 2014), in which the court allowed a Wiretap Act claim to proceed despite Apple's contention that it had "mistakenly" intercepted the messages at issue. Id. at 1044. The court held that Plaintiffs' allegations that Apple knowingly allowed the defect to recur and "even charged consumers $19 to 'fix' the problem" were sufficient to "foreclose[] the possibility that Apple's actions were the product of inadvertence or mistake." *Id.* This reasoning is consistent with that of courts outside this Circuit. *See* ***[**18]*** Abraham v. Cty. of Greenville, S.C., 237 F.3d 386, 392 (4th Cir. 2001) (upholding a jury's finding of intent under § 2511 based on evidence that the County knew it "might be inadvertently eavesdropping" on judges' conversations using a recording system intended only for "administrative personnel and the guards in the jail" yet never informed the judges); Anderson v. City of Columbus, Georgia, 374 F. Supp. 2d 1240, 1247 (M.D. Ga. 2005) (denying summary judgment on the issue of intent under § 2511 because "evidence exists that Turner was aware of the glitch in the recording system when the headsets were used. Therefore, a reasonable jury could conclude that Turner knew that the system would record Plaintiff, and she intentionally failed to tell Plaintiff how to prevent the recording").

The Court agrees with Plaintiffs and these various courts that interceptions may be considered intentional where a defendant is aware of the defect causing interception and takes no remedial action. And indeed, the Consolidated FAC alleges that Defendants are aware of false accepts and the recordings they cause to be made, yet have not fixed the problem. *See* Consol. FAC ¶¶ 38-39. At the same time, the Court finds persuasive Defendants' argument that some *de minimis* error rate in the Google Assistant may be tolerated without exposing them to liability; after all, **[**19]** even the human ear misinterprets words and sounds at times. For that reason, the degree of error will likely be material to the ultimate factual determination of whether Defendants' conduct was intentional. At the motion to dismiss stage, however—construing the allegations in Plaintiffs' favor—the Court will not assume that the rate of false accepts is *de minimus*.

Besides, Plaintiffs' objection is not only to Defendants' failure to prevent recordings **[*816]** caused false accepts—which may be a tall order—but also to Defendants' failure to destroy the audio recordings produced by false accepts. Plaintiffs allege that Defendants persist in using the recordings for personalized advertising or to improve the functionality of the Google Assistant, even after they become aware of their provenance. FAC ¶¶ 38-39. That Defendants allegedly do not destroy the audio recordings further supports an inference that the interception is "intentional."

The Court therefore rejects Defendants' argument that Plaintiffs have not adequately pleaded "intentional" interception. To be clear, the Court does not hold that inaction in the face of a known design defect necessarily makes an interception "intentional" under **[**20]** the Wiretap Act—only that the facts alleged here are sufficient to survive a motion to dismiss.

ii. "Oral Communications"

Defendants' second argument for dismissal concerns the requirement that a plaintiff show interception of a "wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a). Defendants argue that Plaintiffs' claim, despite being premised on the alleged interception of "oral communications," has failed "to identify a single oral communication that they contend was intercepted." Mot. at 5-6. Moreover, the Wiretap Act defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation," 18 U.S.C. § 2510(2); i.e., an oral communication in which the speaker had a "reasonable expectation of privacy," United States v. McIntyre, 582 F.2d 1221, 1223 (9th Cir. 1978). Defendants therefore assert that Plaintiffs must not only identify intercepted oral communications, they must also show that those communications were subject to a reasonable expectation of privacy. Mot. at 5-6.

In response, Plaintiffs point first to the 153 recordings due to false accepts that VRT NWS discovered in the course of reporting its 2019 news piece. Consol. FAC § 36. To show that these **[**21]** conversations were subject to a reasonable expectation of privacy, VRT NWS's description of these conversations as including "bedroom conversations, conversations between parents and their children," and "professional phone calls containing lots of private information." *Id.* But Plaintiffs do not allege that any of these 153 recordings covered Plaintiffs' communications rather than the communications of unnamed third parties. Hence, these allegations do not suffice to show that Plaintiffs' own oral communications were intercepted, which they must do. *See Lewis v. Casey, 518 U.S. 343, 357, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)* ("[N]amed plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.") (internal quotations omitted).

As for the allegations regarding the Named Plaintiffs themselves, the Court finds these to be too vague. *See* Consol. FAC ¶¶ 51-53. At the outset, the Court rejects Defendants' suggestion that Plaintiffs must identify specific communications that Plaintiffs reasonably believed to be private and that were wrongly recorded. The Court is not convinced that Plaintiffs are **[**22]** required to produce such details at the pleading stage, prior to discovery. At the motion hearing, Defendants represented that through their accounts, users can view all their past conversations with the Google Assistant, including false accepts. If that is the case, Plaintiffs are advised to avail themselves of that information. But the Court believes it would be enough for Plaintiffs to show that they **[*817]** frequently have oral communications near their respective Google Assistant Enabled Devices under circumstances giving rise to a reasonable expectation of privacy. That, coupled with the allegations that false accepts routinely occur, would support an inference that Plaintiffs had private conversations intercepted.

In their Opposition, Plaintiffs maintain that they have done this. Opp. at 6. Not so. The Consolidated FAC contains insufficient detail regarding the particular circumstances under which Plaintiffs used their Google Assistant Enabled Devices. The Consolidated FAC merely alleges that Plaintiffs' conversations were "confidential" without alleging any facts regarding the participants in the conversations, the locations of the conversations, or examples of content from the conversations. **[**23]** *Cf. In re Yahoo Mail Litig., 7 F. Supp. 3d 1016, 1041 (N.D. Cal. 2014)* (finding plaintiffs' allegations that their emails were "private" to be "fatally conclusory"). Nor does the bare allegation that each Named Plaintiff "interacted with" their device "repeatedly" establish that those devices necessarily picked up private conversations, or that any expectation of privacy was reasonable. *Cf. Sunbelt Rentals, Inc. v. Victor, 43 F. Supp. 3d 1026, 1035 (N.D. Cal. 2014)* ("[T]here is no legally protected privacy interest and reasonable expectation of privacy in electronic messages, in general. Rather, a privacy interest can exist, if at all, only with respect to the content of those communications.") (internal quotations omitted).

This problem is especially glaring for Plaintiffs Kumandan, Galvan, and E.G., who allegedly interacted with smartphones. After all, smartphones are by their nature mobile and are frequently used in public places. The allegations as to Plaintiffs Spurr and B.S. also fall short. Though they allegedly interacted with a Google Home device—which presumably is less mobile—Plaintiffs make no allegations as to where the Google Home device was located and how Plaintiffs used it. Consol. FAC ¶ 51. Under these circumstances, the Court cannot infer that the Plaintiffs themselves had "oral communications" intercepted, **[**24]** as necessary under the Wiretap Act.

Accordingly, the Court must GRANT Defendants' motion to dismiss. That dismissal is with LEAVE TO AMEND, as leave ordinarily must be granted in this Circuit and Defendants have articulated no reason it should not be. *See Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003)* (citing *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962))*.

iii. Ordinary Course of Business Exception

Although the Court must dismiss the Wiretap Act claim for failure to adequately plead "oral communications," the Court proceeds to address Defendants' other proposed grounds for dismissal. The next of these is Defendants' contention that the "ordinary course of business exception" inoculates its alleged interceptions here. The Wiretap Act defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). In other words, there is no illegal interception without the use of a "device." *Accord* In re Yahoo Mail Litig., 7 F. Supp. 3d at 1026. The Wiretap Act then goes on to carve out from its definition of "device" "any telephone or telegraph instrument, equipment or facility, or any component thereof . . . being used by a provider of wire or electronic communication service *in the ordinary course of business*." *Id.* **[**25]** § 2510(5)(a)(ii); the "ordinary course of business" exception refers to this carve-out.

[*818] Defendants claim that their alleged conduct falls within the ordinary course of business exception because "the Assistant cannot operate unless it records and transmits audio to Google." Mot. at 7. They further assert that any false accepts are "incidental to" the necessary transmissions. *Id.* (citing *In re Google Inc. Gmail Litig., No. 13-MD-02430-LHK, 2013 U.S. Dist. LEXIS 172784, 2013 WL 5423918 (N.D. Cal. Sept. 26, 2013))*.

In response, Plaintiffs contend that Defendants are not a provider of "electronic communication service" ("ECS") as required for the exception to apply. Opp. at 7 (quoting 18 U.S.C. § 2510(5)(a)(ii)). The Wiretap Act defines "electronic communication service" as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). Of relevance here, "oral communications" are distinct from both "wire communications" and "electronic communications" under the Wiretap Act. *See* 18 U.S.C. §§ 2510(1), (2), (12); *Siripongs v. Calderon, 35 F.3d 1308, 1320 (9th Cir. 1994)* (treating the intercepted communication as an "oral communication" because police "acquired only what they recorded Siripongs saying into the mouthpiece, not what was transmitted over the wire"). Plaintiffs maintain that Defendants "cannot be considered" an ECS provider "in the instance **[**26]** when it is recording Plaintiffs' private oral communication" because oral communications are not "wire or electronic communications." Opp. at 7.

Plaintiffs misunderstand Defendants' argument, however. The "wire or electronic communication service" that the Google Assistant purports to provide is the transmission of valid commands from the user to Defendants' servers, which carry out the commands. These commands arguably constitute "electronic communications," which "means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce." 18 U.S.C. § 2510(12). In simple terms—and as described in the Consolidated FAC, *see id.* ¶ 24—the Google Assistant translates a user's verbal command (e.g., "Hey Google, what is the weather forecast?") into electronic signals and then transmits those signals to the recipient, the relevant Google server. The Google Assistant could thus be seen as providing an electronic communication service.[1]

Nevertheless, the Court need not conclusively decide the merits of this issue, which has not been treated in any depth **[**27]** by the parties. Even assuming the Google Assistant is an electronic communication service provider, the ordinary course of business exception does not preclude Plaintiffs' Wiretap Act claims.

As Defendants themselves acknowledge, "the ordinary course of business exception . . . offers protection from liability only where an electronic communication service provider's interception *facilitates* the transmission of the communication at issue or *is incidental to* the transmission of such communication." *In re Google Inc. Gmail Litig., 2013 U.S. Dist. LEXIS 172784, 2013 WL 5423918, at *8*. False accepts certainly do not "facilitate" the functioning of the Google Assistant; they are, in both parties' **[*819]** views, produced by the malfunctioning of the Google Assistant. The question becomes, then, whether false accepts are so unavoidable that they could fairly be considered "incidental to" the Google Assistant's ordinary functioning. But as noted earlier, the degree to which that false accepts are unavoidable is a factual issue, unsuited for resolution at the pleading stage. *See* *Khoja, 899 F.3d at 1003*. Moreover, the Court is not aware of any cases applying the exception to interceptions that are allegedly the product of a defect. Hence, even if Defendants are providers of electronic communication services, **[**28]** there is a

[1] Defendants point out that Plaintiffs allege in the Consolidated FAC that the Google Assistant is an "electronic communication service" within the meaning of the SCA, 18 U.S.C. § 2702(a). Consol. FAC ¶ 112. Although true, this allegation is not dispositive. First of all, Plaintiffs are entitled to plead claims in the alternative: Plaintiffs may have pleaded that SCA claim in the event the Wiretap Act claim was found to be precluded by the ordinary course of business exception. Besides, the Court is not required to accept the purely legal conclusion offered by the allegation.

question of fact as to whether false accepts are "incidental to" the transmission of legitimate commands by the Google Assistant. Plaintiffs' Wiretap Act claim is not subject to dismissal on the basis of the ordinary course of business exception.

iv. Use or Disclosure

Plaintiffs' Wiretap Act claim also asserts the theory that Defendants "used" and "disclosed" unlawfully intercepted information, which is itself unlawful under *18 U.S.C. §§ 2511(1)(c)-(d)*. *See generally* *Noel v. Hall, 568 F.3d 743, 749 (9th Cir. 2009)*. Of relevance to this claim, Plaintiffs allege that Defendants used the unlawfully created audio recordings to personalize advertising and to improve the voice recognition capabilities of the Google Assistant. *See* Consol. FAC ¶¶ 41, 95. Plaintiffs further allege that, in order to accomplish the latter, Defendants disclosed the audio recordings to third party subcontractors. *Id.* ¶¶ 35-39.

Defendants move to dismiss this theory on two grounds. First, they correctly point out that liability for disclosure or use is contingent on the original interception being unlawful. *Noel, 568 F.3d at 751*; *see* Mot. at 8. Because the Court has just determined that Plaintiffs have not adequately pleaded the unlawfulness of the interceptions, their use or disclosure claim likewise **[**29]** fails.

Defendants' second argument implicates the requirement under *§§ 2511(1)(c)-(d)* that a defendant "*know[] or hav[e] reason to know* that the information was obtained through" an interception that violates the Wiretap Act. *18 U.S.C. §§ 2511(1)(c)-(d)*. Defendants maintain that Plaintiffs "have not and cannot allege that Google knew that the information allegedly disclosed or used came from an intercepted communication (rather than a communication intended for the Assistant) or that such interception was prohibited by the Wiretap Act." Mot. at 8. The argument appears to be that Defendants reasonably believed each audio recording to be the result of a legitimate command at the time when it sent the recording to a third party for analysis or used it to customize advertising.

To be sure, Defendants may mount a defense based on this argument. But Plaintiffs have specifically pleaded that "even after Google discovers that it has wrongly recorded a conversation, it nonetheless keeps and analyzes the recording." Consol. FAC ¶ 38. In other words, Plaintiffs allege that Defendants knew each recording was the product of an unauthorized interception at the time of their alleged use and disclosure. The Court must construe this allegation **[**30]** to be true at the motion to dismiss stage, despite Defendants' assertion to the contrary. Accordingly, the Court will dismiss the "use" or "disclosure" theory, but not on the ground that Defendants lacked knowledge of the antecedent interception.

B. Count 2: Stored Communications Act

Count 2 alleges violations of the Stored Communications Act ("SCA"). As the Ninth Circuit has explained, the SCA **[*820]** is modeled off the common law of trespass. *Theofel v. Farey-Jones, 359 F.3d 1066, 1072-73 (9th Cir. 2004)*. "Just as trespass protects those who rent space from a commercial storage facility to hold sensitive documents, the Act protects users whose electronic communications are in electronic storage with an ISP or other electronic communications facility." *Id.* (internal quotations and citations omitted). Thus, the SCA forbids making unlawful access to a stored communication, imposing liability on any person or entity who:

> (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
> (2) intentionally exceeds an authorization to access that facility;
>
> and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall **[**31]** be punished as provided in *subsection (b)* of this section.

18 U.S.C. § 2701(a).

Subsection (c) goes on to state that subsection (a) does not apply "to conduct authorized" "(1) by the person or entity providing a wire or electronic communications service; [or] (2) by a user of that service with respect to a communication of or intended for that user." 18 U.S.C. § 2701(c)(1); *accord* Crowley v. CyberSource Corp., 166 F. Supp. 2d 1263, 1271 (N.D. Cal. 2001). However, an ECS provider still "shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service"; if it does so, it is liable for unlawful disclosure of customer communications under § 2702(a). 18 U.S.C. § 2702(a)(1). The Consolidated FAC asserts claims for unlawful access pursuant to § 2701(a) and unlawful disclosure pursuant to § 2702(a). Consol. FAC ¶¶ 117-124. In their motion to dismiss, Defendants argue that "Plaintiffs cannot state a claim under either provision." The Court disagrees: Although Plaintiffs have not pleaded a claim for unlawful access, Count 2 may proceed based on a theory of unlawful disclosure.

i. Unlawful Access under *18 U.S.C. § 2701(a)*

To make out a claim under either subsection of 18 U.S.C. § 2701(a), Plaintiffs must show that Defendants "(1) gained unauthorized access to a 'facility' where it (2) accessed an electronic communication in 'electronic storage.'" Davis v. Facebook, Inc. (In re Facebook Inc. Internet Tracking Litig.), 956 F.3d 589, 2020 WL 1807978, at *13 (9th Cir. 2020). The SCA defines "electronic **[**32]** storage" as

> (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and
> (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication;

18 U.S.C. §§ 2711(1), 2510(17). The SCA does not, however, provide a statutory definition of "facility," which is a separate element of an SCA claim. *See* In re Facebook, 956 F.3d 589, 2020 WL 1807978, at *13, *14 n.10. Nor has the Ninth Circuit provided much guidance on interpreting the term.

In their motion to dismiss, Defendants argue that a facility must be "physical means or equipment," such as a server. Mot. at 9 (quoting Council on Am.-Islamic Relations Action Network, Inc. v. Gaubatz, 793 F. Supp. 2d 311, 335 (D.D.C. 2011)). Defendants believe that Plaintiffs have failed to identify a qualifying "facility" providing "electronic storage" that has allegedly been accessed. *See* Mot at 9; Reply at 5. The Consolidated FAC indicates that the Google Assistant "is the facility through which Google provides an electronic service." Consol. FAC ¶ 115. In their Opposition brief, Plaintiffs reiterate **[*821]** that the Google Assistant is a "facility" within the meaning of the SCA, *see* Opp. at 9; Plaintiffs also offer another possible "facility": Defendants' "remote servers," *see id.* (citing Consol. FAC ¶¶ 43, 93). Defendants maintain that **[**33]** neither qualifies. *See* Mot at 9; Reply at 5.

Turning first to whether the Google Assistant is a "facility," the Court notes that Plaintiffs have not been consistent or precise as to what they mean by the "Google Assistant." For clarity, the Court uses "Google Assistant" to refer to the virtual assistant software and not the Google Assistant Enabled Device onto which it may be pre-installed or downloaded. *See* Consol. FAC ¶¶ 21, 112. Without adopting Defendants' definition of "facility" as "physical" equipment, the Court is skeptical that software could properly be considered a facility. Regardless whether a facility is necessarily "physical," it indisputably must provide "electronic storage." It is not alleged that the Google Assistant itself—which, as a "computer program," is comprised of lines of code—provides electronic storage of any kind. *See* Consol. FAC ¶ 21. Rather, the Consolidated FAC states that a Google Assistant Enabled Device's RAM stores the snippets of audio that are continuously being analyzed by the Google Assistant. *See id.* ¶ 23.

It is perhaps unsurprising, then, that Plaintiffs do not attempt to argue that the Google Assistant software is a "facility" in their Opposition brief; **[**34]** they assert instead that their devices' RAM constitutes the facility from which their communications were accessed "while they were temporarily stored" there. Opp. at 9. Defendants object that a user's personal device cannot be a "facility" under the SCA. It is true that courts in this Circuit and others have interpreted "facility" to exclude users' personal devices. *See, e.g.,* In re Google Inc. Cookie Placement Consumer Privacy Litig., 806 F.3d 125, 147-48 (3d Cir. 2015); In re Facebook Internet Tracking Litig., 263 F. Supp. 3d 836, 845 (N.D. Cal. 2017), *aff'd*, 956 F.3d 589 (9th Cir. 2020); In re iPhone Application Litig., 844 F. Supp. 2d 1040, 1057-58 (N.D. Cal. 2012); Freedom Banc Mortg. Servs., Inc. v. O'Harra, No. 2:11-cv-01073, 2012 U.S. Dist.

LEXIS 125734, 2012 WL 3862209, at *9 (S.D. Ohio Sept. 5, 2012). Even the Ninth Circuit has alluded to the SCA as "cover[ing] access to electronic information stored in *third party* computers." *In re Zynga Privacy Litig., 750 F.3d 1098, 1104 (9th Cir. 2014)*; *see also Theofel, 359 F.3d at 1072-73* ("Just as trespass protects those who rent space from a commercial storage facility to hold sensitive documents, the Act protects users whose electronic communications are in electronic storage *with an ISP or other electronic communications facility*.") (internal quotations and citation omitted).

These courts have focused on the requirement that the facility be one "through which an electronic communication service is provided." *18 U.S.C. § 2701(a)(1)*. As the Fifth Circuit put it, "[t]he relevant 'facilities' that the SCA is designed to protect are not computers that *enable* the use of an electronic communication **[**35]** service, but instead are facilities that are *operated by* electronic communication service providers and used to store and maintain electronic storage." *Garcia v. City of Laredo, Tex., 702 F.3d 788, 792 (5th Cir. 2012)* (emphasis in original) (holding that plaintiff's cell phone was not a "facility"). An individual's personal device "does not *provide* an electronic communication service just because the device *enables* use of electronic communication services," *id.* (emphasis in original); rather, that device is, in every practical sense, the "user." Moreover, as another court in this district pointed out, a contrary reading would "render other parts of the statute illogical," such as the provision at *18 U.S.C. § 2701(c)(1)* **[*822]** permitting an ECS provider to authorize access to the facility. *In re iPhone Application Litig., 844 F. Supp. 2d at 1058* ("It would certainly seem odd that the provider of a communication service could grant access to one's home computer to third parties, but that would be the result of plaintiff's argument."); *see also In re Google, 806 F.3d at 147* ("And this is consistent with the Act's purpose: home computers are already protected by the *Fourth Amendment*, so statutory protections are not needed.").

Thus, the weight of authority supports Defendants' position. Plaintiffs, meanwhile, have failed even to respond, let alone show that the Google **[**36]** Assistant Enabled Devices at issue are factually distinct from the above situations. Under these circumstances, the Court does not believe Plaintiffs' current allegations permit an inference that their personal Google Assistant Enabled Devices constitute "facilities."

Plaintiffs also argue that "Google's remote servers" constitute the requisite facilities. Opp. at 9. But of course, Defendants have authorization to access their own servers. *See 18 U.S.C. § 2701(c)(1)*; *accord In re Yahoo Mail Litig., 7 F. Supp. 3d at 1026-27* ("The SCA grants immunity to *18 U.S.C. § 2701(a)* claims to electronic communication service providers . . . for accessing content on their own servers."); *In re Google, Inc. Privacy Policy Litig., No. C-12-01382-PSG, 2013 U.S. Dist. LEXIS 171124, 2013 WL 6248499, at *12 (N.D. Cal. Dec. 3, 2013)* ("Whatever the propriety of Google's actions, it plainly authorized actions that it took itself."). Hence, though the servers are indisputably "facilities," there cannot have been "unauthorized access" by Defendants. Any claim that Defendants improperly "process[ed]" or "disseminat[ed]" Plaintiffs' communications, Mot. at 10, is properly brought under *18 U.S.C. § 2702(a)*, as assessed below.

Because Plaintiffs have not pleaded unauthorized access to a "facility" within the meaning of the SCA, their SCA claim under *§ 2701(a)* is DISMISSED. **[**37]** Although the Court is skeptical that Plaintiffs will be able to articulate yet another theory of unlawful access to an electronic storage "facility", the Court will nonetheless grant LEAVE TO AMEND.

ii. Unlawful Disclosure under *18 U.S.C. § 2702(a)*

Next, turning to Plaintiffs' claim for unlawful disclosure *18 U.S.C. § 2702(a)*, Plaintiffs allege that Defendants did not have authorization to disclose any audio recordings or transcripts resulting from false accepts, but nonetheless did so "for analysis or other purposes, including improving the functionality of Google Assistant for Google's own financial benefit and targeting personalized advertising to users." Consol. FAC ¶ 122.

First, to the extent Plaintiffs assert a claim based on Defendants' use of audio or transcripts to "target[] personalized advertising to users," the Court agrees with Defendants that this claim fails. There are no allegations in the Consolidated FAC suggesting that Defendants disclose any information to "third parties" to accomplish this purpose. Defendants' own use of Plaintiffs' data for advertising purposes does not constitute an unlawful "disclosure." The Court therefore DISMISSES WITH LEAVE TO AMEND any claim based on targeted advertising.

On the **[**38]** other hand, the Consolidated FAC does contain allegations of disclosure to third parties for the purpose of improving the Google Assistant's voice recognition functionality; these third parties are the "subcontractors" Defendants allegedly use to perform the relevant analysis. *See* Consol. FAC ¶¶ 35, 39. Defendants move to dismiss this claim on the ground **[*823]** that any disclosure was consented to by Plaintiffs. Mot. at 10. As relevant here, *§ 2702(b)(3)* permits an ECS provider to divulge the contents of a communication "with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computer service." Defendants say that Plaintiffs (the originator of the purported communications) explicitly consented to any disclosure to "subcontractors" that Defendants may have used by agreeing to Defendants' Privacy Policy. Mot. at 10-11. Plaintiffs acknowledge that they are bound by the Privacy Policy, which forms the basis for their breach of contract and breach of express warranty claims. *See* Consol. FAC ¶¶ 2, 192, 210. The question then becomes whether the Privacy Policy adequately indicated to users that Defendants would engage in **[**39]** the disclosures at issue, such that users could fairly be said to have "agreed" to these disclosures. *In re Facebook, Inc., Consumer Privacy User Profile Litig., 402 F. Supp. 3d 767, 789 (N.D. Cal. 2019)*. The Court considers this question "objectively, from the perspective of a reasonable . . . user." *Id.*

The Privacy Policy, of which the Court has taken judicial notice, *see infra* Part III, contains a section entitled "When Google shares your information." ECF 56-1 at 30. That section states, "We do not share your personal information with companies, organizations, or individuals outside of Google except in the following cases." ECF 56-1 at 30. It then goes on to state that one of these instances is "for external processing":

> We provide personal information to our affiliates and other trusted businesses or persons to process it for us, based on our instructions and in compliance with our Privacy Policy and other appropriate confidentiality and security measures. For example, we use service providers to help us with customer support.

Id. at 31.

Plaintiffs contend that this provision is too general to conclusively establish consent, and the Court agrees. *See* Opp. at 11. The Privacy Policy says nothing about the types of information that Defendants might send to "affiliates and other trusted business or persons" **[**40]** for "processing." Critically, moreover, the Privacy Policy does not indicate that such "processing" might involve human reviewers listening to the audio. Under these circumstances, the Court cannot say that a reasonable user reading the Privacy Policy must have understood it to cover the disclosures alleged in the Consolidated FAC. As the party seeking the benefit of an exception, Defendants have the burden to establish the existence of consent. *See* *In re Yahoo Mail Litig., 7 F. Supp. 3d at 1028*. It also bears repeating that, at the motion to dismiss stage, the Court must give Plaintiffs the benefit of all reasonable inferences. Where, as here, "the contract language at issue is reasonably susceptible to more than one interpretation, with one of those interpretations suggesting consent and another belying it, the Court cannot decide the consent issue in [Defendants'] favor." *In re Facebook, Inc., Consumer Privacy User Profile Litig., 402 F. Supp. 3d at 789*.

Other courts in this district have come to the same conclusion when evaluating similarly vague language. In particular, the instant terms bear a close resemblance to those in *Campbell v. Facebook Inc., 77 F. Supp. 3d 836 (N.D. Cal. 2014)*. There, Facebook's counsel argued that their disclosure "that Facebook 'may use the information we received about you' for 'data analysis.'" *Id. at 847*. The court held, however, that "this disclosure **[**41]** is not specific enough to establish that users expressly **[*824]** consented to the scanning of the content of their messages . . . for alleged use in targeted advertising." *Id.*; *see also* *id. at 848* ("[A]ny consent with respect to the processing and sending of messages itself does not necessarily constitute consent to the specific practice alleged in this case—that is, the scanning of message content for use in targeted advertising."). The court in *In re Facebook, Inc., Consumer Privacy User Profile Litigation* made a similar point: "Although Facebook points to a section in its Data Use Policy entitled 'Service Providers' which says 'we give your information to the people and companies that help us provide, understand, and improve the services we offer,' that statement does not come close to disclosing the massive information-sharing program with business partners that the plaintiffs allege in the complaint." *402 F. Supp. 3d at 792*. So too here.

In an effort to supplement the Privacy Policy's notice regarding information sharing, Defendants highlight another provision in the Privacy Policy:

> We also use your information to ensure our services are working as intended, such as tracking outages or troubleshooting issues that you **[**42]** report to us. And we use your information to make improvements to our services—for example, understanding which search terms are most frequently misspelled helps us improve spell-check features used across our services.

ECF 56-1 at 24. However, this provision comes in a different section of the Privacy Policy, entitled "Why Google collects data." A reasonable user cannot be expected to connect the two sections and anticipate that Defendants may use "external processing" for any purpose for which Defendants collect data. Put another way, although users may have consented to Google's *collection* of their data to "to improve the functionality of the Assistant," Mot. at 11 (quoting Consol. FAC ¶ 122), that consent does not reasonably extend to *disclosure* of data. The Court DENIES Defendants' motion to dismiss the *§ 2702(a)* claim on the ground that Plaintiffs' consented to any disclosures.

Defendants assert an additional reason for dismissal in a footnote: They maintain that their subcontractors are "employees or agents" and not "third parties" under *§ 2702(a)*. *See* Mot. at 10-11 n.3. The Court rejects this argument, which is hardly even developed. That the putative third parties here are referred to as "subcontractors" **[**43]** does not, by itself, defeat Plaintiffs' claim. After all, whether an entity is a "third party" within the meaning of the statute is a factual question, interrogating the relationship between the entity and the provider. Moreover, the relevant facts are likely unavailable to Plaintiffs prior to discovery. Construing the allegations in Plaintiffs' favor, the Court finds that the "subcontractors" may be third parties, which suffices at the motion to dismiss stage. Defendants' motion to dismiss for failure to plead that subcontractors are "third parties" is DENIED.

In sum, the Court finds that Plaintiffs have adequately pleaded a claim for unlawful disclosure under *18 U.S.C. § 2702(a)* based on Defendants' disclosure of audio and transcripts to subcontractors for analysis "to improve the functionality" of the Google Assistant.

C. Counts 3 and 4: California Invasion of Privacy Act

Counts 3 and 4 of the Consolidated FAC assert violations of the California Invasion of Privacy Act ("CIPA"), *Cal. Penal Code §§ 630, et seq.* Consol. FAC ¶¶ 127-146. The CIPA is the California state law analogue to the federal Wiretap Act, enacted in 1967 in response to "advances in science and technology [that] have led to the development **[*825]** of new devices and techniques **[**44]** for the purpose of eavesdropping upon private communications." *Cal. Penal Code § 630*; *see* *Campbell v. Facebook Inc., 77 F. Supp. 3d 836, 848 (N.D. Cal. 2014)*. Two provisions of the CIPA are implicated in the instant case: Count 3 asserts a violation of *California Penal Code § 631*, which addresses "wiretapping," and Count 4 asserts a violation of *California Penal Code § 632*, which addresses "eavesdropping."

Defendants move to dismiss both counts on several grounds, as set forth below.

i. *Section 631*

To briefly describe the statutory framework, *California Penal Code § 631* addresses "wiretapping." As relevant here, *§ 631(a)* imposes liability upon

> Any person who, by means of any machine, instrument, or contrivance, or in any other manner, intentionally taps, or makes any unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system, or who willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any

> wire, line, or cable, or is being sent from, or received at any place within this state; **[**45]** or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained . . . .

Cal. Penal Code § 631(a). The California Supreme Court has clarified that this lengthy provision contains three operative clauses protecting against "three distinct and mutually independent patterns of conduct": (i) "intentional wiretapping," (ii) "willfully attempting to learn the contents or meaning of a communication in transit over a wire," and (iii) "attempting to use or communicate information obtained as a result of engaging in either of the two previous activities." *Tavernetti v. Superior Court, 22 Cal. 3d 187, 192, 148 Cal. Rptr. 883, 583 P.2d 737 (1978)*; *accord* *In re Google Inc., No. 13-MD-02430-LHK, 2013 U.S. Dist. LEXIS 172784, 2013 WL 5423918, at *15 (N.D. Cal. Sept. 26, 2013)*. Count 3 purports to allege violations of all three clauses in that "(i) Google made an unauthorized connection with Class Members' GAEDs; (ii) through the unauthorized interception, Google learned the contents of Plaintiffs' and Class Members' confidential communications; and (iii) Google transmitted the contents of the confidential communications to Google's servers as well as to third-party vendors." Opp. at 13 (citations omitted); *see* Consol. FAC ¶¶ 135-36.

In their motion to dismiss, Defendants argue that Plaintiffs cannot state a claim based on any of the three types **[**46]** of conduct prohibited by *§ 631(a)* because the provision prohibits only connections with a "wire, line, or cable" and hence "does not apply to in-person verbal communications" Mot. at 13. The Court considers this argument as to each clause.

Beginning the first clause of *§ 631(a)*, Defendants are correct that it protects only communications that are made over a "wire, line, or cable." This is evident from the plain text of the statute: The first clause expressly requires that the unauthorized "connection" be made with "any telegraph or telephone wire, line, cable, or instrument." *Cal. Penal Code § 631(a)*; *accord* *Matera v. Google Inc., No. 15-CV-04062-LHK, 2016 U.S. Dist. LEXIS 107918, 2016 WL 8200619, at *18 (N.D. Cal. Aug. 12, 2016)* (explaining that "the first clause" of *§ 631(a)* is "limited to communications passing over 'telegraph or telephone' wires, lines, or cables"). Plaintiffs do not dispute this; they **[*826]** also do not explain how their allegations satisfy the requirement of a "telegraph or telephone wire, line, cable, or instrument." Nor does the Consolidated FAC suggest that the Google Assistant operates using telegraph or telephone wires. In light of the foregoing, the Court finds that Plaintiffs fail to state a claim for violation of *§ 631(a)* based on intentional wiretapping.

The Court turns next to the second clause, **[**47]** which applies to any person who "willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within this state." *Cal. Penal Code § 631(a)*. Defendants argue that this clause also requires a "wire, line, or cable." Plaintiffs object, citing *In re Google Inc. Gmail Litigation, 2013 U.S. Dist. LEXIS 172784, 2013 WL 5423918*. But that case simply stands for the proposition that "the limitation of 'telegraphic or telephone' on 'wire, line, cable, or instrument' in the first clause of the statute" is not "imported to the second clause of the statute"; it did not find that the second clause lacked the requirement of a "wire, line, or cable." *2013 U.S. Dist. LEXIS 172784, [WL] at *20*; *accord* *Matera, 2016 U.S. Dist. LEXIS 107918, 2016 WL 8200619, at *18* (explaining that "the second clause prohibits the unauthorized interception of communications passing over 'any wire, line, or cable'").

However, Plaintiffs also point out that the second clause applies if a communication is "in transit or passing over any wire, line, or cable, *or is being sent from, or received at any place within this state*." Because the clause is written in the disjunctive, **[**48]** the Court agrees that it could be read to cover messages "being sent from, or received at any place within this State," without regard to whether the sending and receiving makes use of a "wire, line, or cable." *See* Opp. at 13.

At the same time, California courts have often distinguished the essential concepts of eavesdropping under *§ 632* and wiretapping under *§ 631* on the ground that eavesdropping "does not require an unauthorized *connection* to a transmission line, whereas wiretapping does." *People v. Guzman, 11 Cal. App. 5th 184, 192 n.7, 217 Cal. Rptr. 3d*

509 (Ct. App. 2017), *aff'd*, (2019) (emphasis in original). And, as already noted, the California Supreme Court summarized the second clause as proscribing "wilfully attempting to learn the contents or meaning of a communication in transit *over a wire*." Tavernetti, 22 Cal. 3d at 192. Yet, the question of whether a defendant may be liable under § 631(a) for reading or attempting to read communications not sent over a wire, line or cable does not appear to have been squarely considered by other courts.

This Court may also leave that question to another day. That is because Plaintiffs have not plausibly alleged that their communications were being "sent from, or received at any place within this State." Although it may be possible for a communication to be "sent" or "received" **[**49]** without use of a wire, line or cable, it cannot fairly be said that a face-to-face conversation between two people in the same location involves "sending" or "receiving" communications within the meaning of the *§ 632*. Per the Consolidated FAC, the "communications" of which the Defendants are alleged to have "learned the contents" are oral conversations that took place in the presence of Plaintiffs' GAEDs. But as already discussed, Plaintiffs have not alleged any information about these conversations—they have not even plausibly alleged that they themselves were party to intercepted conversations. **[*827]** Of particular relevance here, there are no facts from which the Court could infer that any communications were being "sent from" and "received at" different locations; on the contrary, the Consolidated FAC suggests that the conversations were had in person. The Court therefore GRANTS Defendants' motion to dismiss any claim based on the second clause of § 631(a).

Last, the third clause covers any "attempt[] to use or communicate information obtained as a result of engaging in either of the two previous activities." Tavernetti, 22 Cal. 3d at 192. In other words, Plaintiffs must establish that the information at issue—here, the recordings **[**50]** and transcripts that Defendants' allegedly analyzed—was obtained through a violation of the first or second clauses. Because Plaintiffs have not done so, they also have failed to plead a violation of the third clause of § 631(a).

For these reasons, Count 3 is DISMISSED. Although Plaintiffs' theories as currently alleged do not appear to be compatible with § 631, the Court will nevertheless grant LEAVE TO AMEND to clarify those theories.

ii. *Section 632*

Defendants next challenge Plaintiffs' claim under *California Penal Code § 632*, which addresses "eavesdropping on or recording confidential communications." Specifically, *§ 632(a)* imposes liability upon

> A person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communications is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio . . . .

"California courts interpret 'eavesdrop,' as used in *section 632*, to refer to a third party secretly listening to a conversation between two other parties." Thomasson v. GC Servs. Ltd. P'ship., 321 Fed. Appx. 557 (9th Cir. 2008) (citing Ribas v. Clark, 38 Cal.3d 355, 363, 212 Cal. Rptr. 143, 696 P.2d 637 (1985))); *see also* Flanagan v. Flanagan, 27 Cal. 4th 766, 775, 117 Cal. Rptr. 2d 574, 41 P.3d 575 (2002) (*§ 632* prohibits "unconsented-to eavesdropping or recording of conversations"). **[**51]** Count 4 alleges that Defendants violate this provision by "creat[ing] recordings . . . of Plaintiffs' and Class Members' confidential communications not preceded by the utterance of a hot word or where the Google Assistant Enabled Device was not manually activated." Consol. FAC ¶ 152.

A claim under *§ 632* bears many similarities to a claim under the federal Wiretap Act. *See, e.g.,* NovelPoster v. Javitch Canfield Grp., 140 F. Supp. 3d 938, 954 (N.D. Cal. 2014) ("Because NovelPoster is unable to allege a violation of the Wiretap Act, it is also unable to allege a violation of CIPA."). In particular, it covers only (1) "confidential communications" and (2) "intentional" conduct. Defendants therefore move to dismiss the *§ 632* claim for two of the reasons already discussed as to Count 1: that Plaintiffs have not adequately pleaded that their conversations were "confidential" or that Defendants' alleged interceptions were "intentional" rather than inadvertent.

Taking the latter first, the Court considered the parties' arguments regarding whether Defendants' conduct could be considered "intentional" as to Plaintiffs' Wiretap Act claim. As explained, the Court finds that Defendants' failure to rectify the defect causing "false accepts" or destroy the recordings produced under such **[**52]** circumstances could plausibly be considered "intentional" rather than "a result of accident **[*828]** or mistake." *See supra* Part IV.A.i. The result is the same under the CIPA, as the CIPA does not define "intentional" more restrictively than the Wiretap Act. *See* Mot. at 13; *Rojas v. HSBC Card Servs. Inc., 20 Cal. App. 5th 427, 435, 228 Cal. Rptr. 3d 640 (2018)* ("[T]he recording of a confidential conversation is intentional if the person using the recording equipment does so with the purpose or desire of recording a confidential conversation, or *with the knowledge to a substantial certainty that his use of the equipment will result in the recordation of a confidential conversation*.") (quoting *People v. Superior Court of Los Angeles Cty., 70 Cal. 2d 123, 134, 74 Cal. Rptr. 294, 449 P.2d 230 (1969))* (emphasis in original). Defendants' motion to dismiss for failure to plead "intentional" eavesdropping is therefore DENIED.

In the same vein, though, the Court agrees that Plaintiffs have not adequately pleaded "confidential communications." The California Supreme Court has held that a conversation is "confidential" under *§ 632* "if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded." *Kearney v. Salomon Smith Barney, Inc., 39 Cal. 4th 95, 117 n. 7, 45 Cal. Rptr. 3d 730, 137 P.3d 914 (2006)*; *see also* *Faulkner v. ADT Sec. Services, Inc., 706 F.3d 1017, 1019 (9th Cir. 2013)*. Neither party disputes that this standard is the same as the "reasonable expectation of privacy" required under the Wiretap **[**53]** Act, *18 U.S.C. § 2510(2)*. *See* Mot. at 14; Opp. at 15. The Court already concluded that the Consolidated FAC does not adequately demonstrate Plaintiffs' reasonable expectation of privacy in the conversations that the Google Assistant alleged intercepted and recorded. *See supra* Part IV.A.ii. That same defect afflicts Plaintiffs' *§ 632* claim, wherefore the Court must GRANT Defendants' motion to dismiss Count 4. As with the Wiretap Act claim, the Court gives LEAVE TO AMEND.

Having dismissed Count 4 for failure to allege "confidential communications," the Court need not address Defendants' additional argument that Plaintiffs "have not alleged facts showing that the parties did not consent to the alleged recording." Mot. at 14. The Court nonetheless advises Plaintiffs to further develop their contention that Defendants lacked consent to listen or record, as required to state a claim under *§ 632(a)*. Plaintiffs' allegation that the recordings "were made without Plaintiffs' consent" is conclusory. Consol. FAC ¶ 152. Meanwhile, Plaintiffs made little effort to respond to Defendants' argument in their Opposition briefing, opting to reference their arguments regarding consent under the SCA, *18 U.S.C. § 2702(a)*. But the SCA claim concerned unlawful disclosure **[**54]** to third parties—not the initial recording of Plaintiffs' conversations. Moreover, whereas consent is a defense under the SCA, "[i]t appears that, under California law, the plaintiff bringing a CIPA claim has the burden to prove that the defendant lacked consent to record." *Reyes v. Educ. Credit Mgmt. Corp., 773 Fed. App'x 989, 990 n.1 (9th Cir. 2019)*. Plaintiffs therefore cannot simply rest on their arguments regarding consent as to the SCA claim.

D. Counts 5 and 6: Common Law Intrusion upon Seclusion and Invasion of Privacy

Plaintiffs' next two claims are also California state law claims: Count 5 is the common law tort of intrusion upon seclusion and Count 6 is invasion of privacy in violation of the *California Constitution, Art. I, Sec. 1*. Consol. FAC ¶¶ 162, 187. Defendants move to dismiss both claims. Because the common law and constitutional sources of privacy protection under California **[*829]** law are closely related, the Court treats them together. *See* *Hernandez v. Hillsides, Inc., 47 Cal. 4th 272, 286, 97 Cal. Rptr. 3d 274, 211 P.3d 1063 (2009)*.

To state a claim for intrusion upon seclusion, a plaintiff must allege "(1) intrusion into a private place, conversation or matter (2) in a manner highly offensive to a reasonable person." *Shulman v. Group W Prods., Inc., 18 Cal. 4th 200, 231, 74 Cal. Rptr. 2d 843, 955 P.2d 469 (1998))*. As to the first element, the plaintiff must have had an "objectively reasonable expectation of seclusion or solitude in the place, conversation or data source." **[**55]** *Id. at*

232. "The second common law element essentially involves a policy determination as to whether the alleged intrusion is "highly offensive" under the particular circumstances." Hernandez, 47 Cal. 4th at 287. "Relevant factors include the degree and setting of the intrusion, and the intruder's motives and objectives." *Id.*

To allege a violation of California's constitutional right to privacy, a plaintiff must allege "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) conduct by the defendant that amounts to a serious invasion of the protected privacy interest." Low v. LinkedIn Corp., 900 F. Supp. 2d 1010, 1024 (N.D. Cal. 2012) (citing Hill v. Nat'l Collegiate Athletic Ass'n, 7 Cal. 4th 1, 35-37, 26 Cal. Rptr. 2d 834, 865 P.2d 633 (1994)). Regarding the first element, the California Supreme Court has explained that "[l]egally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." Hill, 7 Cal. 4th at 35. The third element, meanwhile, requires the invasion to be "sufficiently serious in [its] nature, scope, and actual or potential impact to constitute an egregious **[**56]** breach of the social norms underlying the privacy right." Id. at 37.

In this case, Plaintiffs allege that Defendants' practice of "intercepting, recording, transmitting, and disclosing" Plaintiffs' communications in false accept situations "constitute[s] an intentional intrusion" upon Plaintiffs' seclusion "in that Google effectively placed itself in the middle of a conversation to which it was not invited." Consol. FAC ¶ 164. Plaintiffs further allege that this same practice invades Plaintiffs' informational privacy interest "in the confidential and sensitive information" contained in their communications as well as Plaintiffs' autonomy privacy interest "in conducting their personal activities." *Id.* ¶ 179.

As evident from the foregoing, the constitutional and common law causes of action overlap substantially. Accordingly, the California Supreme Court has recognized that "the largely parallel elements of these two causes of action" require a court to consider "(1) the nature of any intrusion upon reasonable expectations of privacy, and (2) the offensiveness or seriousness of the intrusion, including any justification and other relevant interests." Hernandez, 47 Cal. 4th at 288. In their motion to dismiss, Defendants argue **[**57]** that (1) Plaintiffs have failed to allege a "reasonable expectation of privacy" in the communications at issue and (2) the alleged intrusion is not sufficiently "offensive" or "serious" to support a claim for invasion of privacy or intrusion upon seclusion. Mot. at 15.

First, Defendants contend that Plaintiffs have not shown that they had a "reasonable expectation of privacy" in the **[*830]** conversations upon which Defendants allegedly intruded. Mot. at 15. They are correct. As the Court already explained with respect to Plaintiffs' Wiretap Act claim, Plaintiffs have not alleged sufficient information about the conversations that were allegedly intercepted and recorded to establish that they were had under circumstances that would give rise to a reasonable expectation of privacy. *See supra* Part IV.A.ii. That deficiency is fatal to Plaintiffs' claims for invasion of privacy and intrusion upon seclusion.

In addition, Defendant argue that Plaintiffs have not alleged sufficient facts to establish a "highly offensive" or "serious" invasion of privacy. Mot. at 15-16. It is true, as Defendants emphasize, that "[t]he California Constitution and the common law set a high bar" for an intrusion to be actionable. **[**58]** Low, 900 F. Supp. 2d at 1025 (collecting cases). Many courts have found that the collection—and even disclosure to certain third parties—of personal information about the users of a technology may not constitute a sufficiently "egregious breach of social norms" to make out a common law or constitutional privacy claim. *See, e.g.,* In re Google, Inc. Privacy Policy Litig., 58 F. Supp. 3d 968, 988 (N.D. Cal. 2014) (no intrusion claim based on Google's collection and disclosure of users' data, including their browsing histories); Low, 900 F. Supp. 2d at 1025 (finding that LinkedIn did not commit a "highly offensive" invasion of users' privacy by disclosing users' browsing histories to third parties); In re iPhone Application Litig., 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012) (finding no invasion of privacy based on Defendants' disclosure of each user's addresses, geolocation, the unique device identifier assigned to the user's device, gender, age, time zone, and information about app usage). These courts have characterized the collection and disclosure of such data as "routine commercial behavior." Low, 900 F. Supp. 2d at 1025 (quoting Folgelstrom v. Lamps Plus, Inc., 195 Cal. App. 4th 986, 992, 125 Cal. Rptr. 3d 260 (2011)).

Nonetheless, the Court is not persuaded that the conduct Plaintiffs have described is not "highly offensive" or "serious" as a matter of law. Although it is a close call, the Court believes that a reasonable person could find Defendants' alleged conduct to be "highly offensive." **[**59]**

To begin with, the Court observes that courts have repeatedly found the surreptitious recording of a plaintiff's conversations or activity to constitute an actionable intrusion. *See, e.g., Shulman v. Group W Productions, Inc., 18 Cal. 4th 200, 237, 74 Cal. Rptr. 2d 843, 955 P.2d 469, 494 (1998), as modified on denial of reh'g* (July 29, 1998); *Safari Club Int'l v. Rudolph, No. SACV131989JVSANX, 2014 WL 12577408, at *8 (C.D. Cal. May 14, 2014)*. Plaintiffs' allegations that Defendants recorded their private conversations without authorization could be considered more analogous to these surreptitious recording cases than cases involving, for instance, browsing history. That human reviewers are alleged to listen to the recordings makes the analogy to surreptitious recording especially apt.

In any event, determining whether an intrusion is "highly offensive" requires a fact-intensive inquiry that "examine[s] all of the surrounding circumstances." *Hernandez, 47 Cal. 4th at 295*. Such an inquiry cannot be conducted at the motion to dismiss stage where, as here, there are open factual questions regarding "the likelihood of serious harm to the victim, the degree and setting of the intrusion, the intruder's motives and objectives, and whether countervailing interests or social norms render the intrusion inoffensive." *In re Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 2020 WL 1807978, at *11* ("The ultimate question of whether Facebook's tracking and **[**60]** collection **[*831]** practices could highly offend a reasonable individual is an issue that cannot be resolved at the pleading stage."). In particular, false accepts are, by definition, situations in which the user is not attempting to use the relevant technology. A reasonable person could thus find that Defendants have no justifiable "motive" or "objective" for making the alleged interceptions, or that the "degree" of the intrusion is especially great. *See id.* ("Plaintiffs' allegations of surreptitious data collection when individuals were not using Facebook are sufficient to survive a dismissal motion on the issue.").

Many other factual circumstances remain to be ascertained. Take for instance the frequency with which false accepts occur and the amount of information that is subsequently recorded. As the California Supreme Court has recognized in the context of surreptitious surveillance, the scope or frequency of recording affects the offensiveness and seriousness of the privacy intrusion; "electronic surveillance that is persistent and pervasive may constitute a tortious intrusion on privacy even when conducted in a public or semi-public place." *Hernandez, 47 Cal. 4th at 297*. Other relevant factors include the content **[**61]** of the recordings and the degree to which the recordings are anonymized.

In sum, Plaintiffs have failed adequately to plead claims for intrusion upon seclusion or invasion of privacy because they have not established a reasonable expectation of privacy in the conversations or the recordings thereof. If they are able to do so, however, the Court believes that any dispute regarding the offensiveness of Defendants' alleged conduct is ill-suited for resolution on a motion to dismiss. Defendants' motion to dismiss Counts 5 and 6 is GRANTED WITH LEAVE TO AMEND.

E. Count 7: Common Law Breach of Contract

Count 7 is a claim for breach of contract based on Defendants' Terms of Service ("TOS") and the Privacy Policy contained therein. Consol. FAC ¶¶ 188-201. In order to plead a claim for breach of contract, Plaintiffs must allege: (1) the existence of a contract with Defendants, (2) their performance under that contract, (3) Defendants breached that contract, and (4) they suffered damages. *In re Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 2020 WL 1807978, at *14* (citing *Oasis West Realty, LLC v. Goldman, 51 Cal. 4th 811, 821, 124 Cal. Rptr. 3d 256, 250 P.3d 1115 (2011))*. Defendants move to dismiss on the grounds that (1) Plaintiffs have failed to identify the specific provisions that have allegedly been breached; (2) there has been no breach, in any event; and (3) Plaintiffs **[**62]** have not alleged an adequate damages theory. *See* Mot. at 16-18.

i. Specific Contractual Provisions

The Court begins with Defendants' contention that Plaintiffs have not identified the specific contractual provisions creating the obligation Defendants are said to have breached, which the Court confirms Plaintiffs must do. *See* Miron v. Herbalife Int'l, Inc., 11 Fed. Appx. 927, 929 (9th Cir. 2001); Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1117 (N.D. Cal. 2011).

Defendants do not dispute that the TOS and the Privacy Policy are binding agreements to which they are parties. *See* Mot. at 16. Hence, there is no dispute that any provisions contained therein would be actionable in Plaintiffs' breach of contract claim. The Consolidated FAC alleges that Defendants breached the provision of the Privacy Policy promising, "We do not share your personal information with companies, organizations, or individuals outside of Google except in the **[*832]** following cases": "with your consent," "with domain administrators," "for external processing," and "for legal reasons." ECF 56-1 at 31-32; *see* Consol. FAC ¶¶ 192-93. Under the subheading entitled "with your consent," the Privacy Policy elaborates:

> We'll share personal information outside of Google when we have your consent. For example, if you use Google Home to make a reservation through a booking **[**63]** service, we'll get your permission before sharing your name or phone number with the restaurant. We'll ask for your explicit consent to share any sensitive personal information.

See ECF 56-1 at 30. The Consolidated FAC specifically highlights the statement, "We'll ask for your explicit consent to share any sensitive personal information." *See* Consol. FAC ¶ 193. The Court finds these provisions to be alleged with particularity, as required to state a claim for breach of contract.

However, these are the only contractual provisions that may form the basis for Plaintiffs' breach of contract claim. As the Court will explain, the other provisions referenced in the Consolidated FAC are not actionable.

First, in their Opposition brief, Plaintiffs assert a violation of another provision of the Privacy Policy: one stating that Defendants "may" collect "voice and audio information when you use audio features." Opp. at 18 (quoting ECF 56-1 at 22). The Consolidated FAC makes no reference to this provision, which means the Court cannot consider it to be alleged for purposes of the instant motion. *Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003)* ("In determining the propriety of a *Rule 12(b)(6)* dismissal, a court may not look beyond the complaint to a plaintiff's moving **[**64]** papers, such as a memorandum in opposition to a defendant's motion to dismiss.").

Additionally, Plaintiffs attempt to base their contract claim upon various provisions from different websites, including the "Google Nest Help Center" and the "Google Safety Center." *See* Consol. FAC ¶¶ 193-94. Plaintiffs assert that these websites are "incorporated into Google's TOS or Privacy Policy" by virtue of the following provision in the TOS:

> Our Services are very diverse, so sometimes additional terms or product requirements (including age requirements) may apply. Additional terms will be available with the relevant Services, and those additional terms become part of your agreement with us if you use those Services.

Consol. FAC ¶ 191; *see* ECF 56-1 at 13. But this vague statement is hardly sufficient to establish that the particular websites cited by Plaintiffs are part of the TOS or otherwise are binding upon the parties. Although it certainly possible that statements on the cited websites constitute binding agreements between the parties, Plaintiffs have not plausibly alleged this to be so.

All told, the only specific contractual terms allegedly breached are Defendants' promises in the Privacy Policy **[**65]** (1) not to share users' "personal information" "outside of Google" except in the four stated circumstances (2) to "ask for [users'] explicit consent to share any sensitive personal information."

ii. Breach

The Court now turns to whether Plaintiffs have plausibly alleged that Defendants breached these terms of the Privacy Policy. In Plaintiffs' view, these provisions amount to a promise that Defendants will not share users' "personal information" with "companies organizations, or individuals outside of Google *except . . . [with the express* *consent of the user]*." Opp. at 19 (alterations in original). Plaintiffs **[*833]** then assert that Defendants violate this promise by "shar[ing] the audio recording obtained from Plaintiffs and the Class with third-party vendors without Plaintiffs' consent in order to improve the functionality of the Google Assistant and not for external processing of users' request or queries." *Id.*

At the outset, the Court observes that in paraphrasing the relevant terms, Plaintiffs have altered them. Remember, the Privacy Policy listed four circumstances under which it would share users' personal information: "with your consent," "with domain administrators," "for external processing," **[**66]** and "for legal reasons." To establish a breach, then, Plaintiffs must not only plead that Defendants lacked consent, but also that their conduct does not fall within the other three circumstances. The Consolidated FAC has not done this. It all but ignores the existence of these three circumstances, focusing only on the alleged lack of consent. *See* Consol. FAC ¶¶ 197-99.

The Consolidated FAC falls short for another reason: It does not adequately plead that Plaintiffs' "personal information" has been shared. The vague and conclusory allegation that Plaintiffs "private conversations" were recorded and disclosed does not suffice. Consol. FAC ¶ 199. As already discussed multiple times, Plaintiffs have not plausibly alleged that Plaintiffs' own conversations were intercepted. *See supra* Part IV.A.ii. Relevant here, the Consolidated FAC contains no allegations describing the content of those conversations or the circumstances under which they were had. *See id.* In the absence of such allegations, the Court has no basis upon which to infer that Plaintiffs' "sensitive personal information" is implicated.

For these reasons, the Court finds that Plaintiffs have not stated a claim for breach of contract **[**67]** and DISMISSES Count 7. The Court will grant LEAVE TO AMEND.

iii. Damages

Although the Court need not do so, it now briefly considers the parties' arguments regarding Plaintiffs' damages theories. Plaintiffs proffer three damages theories: (1) benefit of the bargain, (2) "harm to [Plaintiffs'] "privacy interests," and (3) "disgorgement of profits made by Google as a result of its breach of contract." Consol. FAC ¶ 201; *see* Opp. at 19. Defendants believe all of these theories to be flawed. *See* Mot. at 18-19.

The first theory is benefit of the bargain damages: "Plaintiffs seek damages resulting from their overpayment for the GAEDs, which they allege are worth less due to Google's breaches of contract." Opp. at 19; *see* Consol. FAC ¶ 201. Also known as expectation damages, a benefit of the bargain measure of damages is intended "to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been in had the promisor performed the contract." *Coughlin v. Blair, 41 Cal. 2d 587, 262 P.2d 305, 314 (Cal. 1953)*; *see also* *Twin City Fire Ins. Co. v. Philadelphia Life Ins. Co., 795 F.2d 1417, 1425 (9th Cir. 1986)*.

Courts have approved damages based on benefit of the bargain in several technology cases involving privacy. For instance, in *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, Plaintiff Mortensen alleged **[**68]** that he paid "$19.95 each year since December 2007 for Yahoo's premium email service" but did not acquire the full value of Yahoo's service because it was not secure. *313 F. Supp. 3d 1113, 1130 (N.D. Cal. 2018)*. There, Plaintiff Mortensen plausibly lost the benefit of the bargain in that he received a less valuable email service than the one he paid for. *See id.* Similarly, in *In re Anthem, Inc. Data Breach Litig.*, plaintiffs paid premiums to defendants for health insurance plans. *No. 15-MD-02617-LHK, 2016 U.S. Dist. LEXIS 70594, 2016 WL 3029783, at *7-*8 (N.D.* **[*834]** *Cal. May 27, 2016)*. When the defendants experienced various breaches of its database containing individuals' health record information, the plaintiffs alleged, *inter alia*, that the defendants had breached their privacy policies. *2016 U.S. Dist. LEXIS 70594, [WL] at *9*. The Court allowed the plaintiff to pursue a theory of benefit of the bargain losses on the theory that some portion of their premiums went toward paying for robust security measures, which they allegedly did not receive. *2016 U.S. Dist. LEXIS 70594, [WL] at *13*.

In this case, however, Plaintiffs have not alleged that they paid anything to Defendants for the Google Assistant. Not only does the Consolidated FAC say nothing about any fee or premium paid, it appears that the Google Assistant is available free of charge for use on Google Assistant Enabled Devices. *See* **[**69]** Consol. FAC ¶ 21.

As a result, it cannot be said that Plaintiffs received less than what they paid for—they appeared to have paid nothing. *See* *In re LinkedIn User Privacy Litig., 932 F. Supp. 2d 1089, 1093 (N.D. Cal. 2013)* (rejecting plaintiffs' benefit of the bargain theory because "the FAC fails to allege that Plaintiffs actually provided consideration for the security services which they claim were not provided"). The Court therefore does not believe that benefit of the bargain is a viable damages theory.

On the other hand, Plaintiffs' second theory of damages—harm to their privacy interests—is more promising. Generally, a plaintiff may seek damages for "the detriment caused by the breach." *Stephens v. City of Vista, 994 F.2d 650, 657 (9th Cir. 1993)* (citing *Cal. Civ. Code § 3300*). In this case, the detriment Plaintiffs say they suffered was an invasion of their privacy. Plaintiffs are entitled to seek compensatory damages or perhaps nominal damages for such harm. *See* *In re Facebook, Inc., Consumer Privacy User Profile Litig., 402 F. Supp. 3d at 802*; *Cal. Civ. Code § 3360*. The problem is that Plaintiffs have not sufficiently alleged an invasion of their privacy in the Consolidated FAC. As the Court has explained, the Consolidated FAC does not plausibly allege that Plaintiffs' own private conversations were intercepted. *See* Part IV.A.ii. If Plaintiffs are able to cure that deficiency, the Court believes they would be able to seek damages **[**70]** based on harm to their privacy interests.

Plaintiffs' third theory of damages suffers from a similar problem, but may also be viable. That theory is that Plaintiffs are entitled to "disgorgement of profits made by Google as a result of its breach of contract." Consol. FAC ¶ 201. The Ninth Circuit has said that "under California law, a defendant's unjust enrichment can satisfy the 'damages' element of a breach of contract claim, such that disgorgement is a proper remedy." *Foster Poultry Farms, Inc. v. SunTrust Bank, 377 Fed. App'x 665, 669 (9th Cir. 2010)* (citing *Ajaxo Inc. v. E*Trade Group, Inc., 135 Cal. App. 4th 21, 56-57, 37 Cal. Rptr. 3d 221 (2005))*. The Ninth Circuit has further held that "California law recognizes a right to disgorgement of profits resulting from unjust enrichment, even where an individual has not suffered a corresponding loss." *In re Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 2020 WL 1807978, at *5-*6*.

To plead a theory of disgorgement, Plaintiffs must show "that they retain a stake in the profits garnered." *956 F.3d 589, Id. at *6*. Plaintiffs attempt to plead that they are entitled to the "substantial profits" that Defendants' have earned using their "personal information" because Defendants' use was unauthorized. Consol. FAC ¶¶ 199-200. But Plaintiffs have not adequately alleged that their unspecified "personal information" has financial value or that Defendants have profited from the information. Although courts **[**71]** have found **[*835]** that individuals' browsing history may plausibly carry financial value, *In re Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 2020 WL 1807978, at *6*., Plaintiffs have not pleaded any description of the "personal information" that Defendants' allegedly used. Without such facts, Plaintiffs' assertion that Defendants garnered "substantial profits" from the information is purely conclusory. *See, e.g.,* *Varga v. Wells Fargo Bank, N.A., 796 Fed. App'x 430, 431 (9th Cir. 2020)* ("Varga's conclusory assertion that she was 'deprived of the contractual and consumer protections and benefits' of the notice provision is insufficient to plausibly allege" damages.). Should Plaintiffs cure this deficiency, however, the Court believes they could plausibly demonstrate that any profits were unjustly earned by virtue of Defendants' use being allegedly unauthorized. *In re Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 2020 WL 1807978, at *6*.

F. Counts 8, 9, 10: Breach of Warranty

Counts 8, 9, and 10 are claims for breach of express and implied warranty; Counts 8 and 9 are brought under California state law and Count 10 is brought under the federal Magnuson-Moss Warranty Act. Unlike the other counts, these are asserted only by Plaintiffs Kumandan and Spurr, based upon their purchases of GAEDs manufactured by Defendants. Specifically, Plaintiff Kumandan allegedly purchased a Google Pixel smartphone and Plaintiff Spurr **[**72]** allegedly purchased a Google Home. The three claims assert essentially the same factual basis for relief: Defendants made affirmations of fact or promises to consumers that they would not intercept, record, or use the consumers' communications unless hotwords were uttered or the device was manually activated; Defendants subsequently breached these promises.

Defendants move to dismiss Counts 8, 9, and 10 on various grounds. As set forth below, the motion GRANTED WITH LEAVE TO AMEND as to all three claims.

i. Breach of Express Warranty

Count 8 alleges a breach of express warranty. Consol. FAC ¶¶ 202-210. "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." *Cal. Comm. Code § 2313*. To plead an action for breach of express warranty under California law, a plaintiff must allege: (1) the exact terms of the warranty; (2) reasonable reliance thereon; and (3) a breach of warranty which proximately caused plaintiff's injury. *Williams v. Beechnut Nutrition Corp., 185 Cal. App. 3d 135, 142, 229 Cal. Rptr. 605 (1986)*. To satisfy the first element, a plaintiff must identify a "specific and unequivocal written statement," *Maneely v. Gen. Motors Corp., 108 F.3d 1176, 1181 (9th Cir. 1997)*, "relating to **[**73]** the title, character, quality, identity, or condition of the sold goods," *In re Sony PS3 "other OS" Litig. v. Sony Computer Entm't Am., Inc., 551 Fed. Appx. 916, 919 (9th Cir. 2014)*. The statement need not be in a formal warranty document; for instance, "statements made in a manufacturer's advertising that are 'disseminated to the consuming public in order to induce sales' can create express warranties." *Birdsong v. Apple Inc., No. C 06-02280 JW, 2007 U.S. Dist. LEXIS 111342, 2007 WL 9723505, at *5 (N.D. Cal. Dec. 14, 2007)* (quoting *Keith v. Buchanan, 173 Cal. App. 3d 13, 22, 220 Cal. Rptr. 392 (1985))*.

Defendants move to dismiss this claim for two reasons. First, Defendants argue that Plaintiffs have not alleged the exact terms of the warranty, as they are required to do at this stage, *see, e.g., Blennis v. Hewlett-Packard Co., No. C 07-00333 JF, 2008 U.S. Dist. LEXIS 106464, 2008 WL 818526, at *2 (N.D. Cal. Mar. 25, 2008)*. Mot. at 19. In response, Plaintiffs simply refer to the Court **[*836]** to its arguments regarding breach of contract (Count 7). Opp. at 20; *see* Part IV.E.i. In so doing, Plaintiffs seem to imply that the same provisions of the Privacy Policy and Terms of Service that form the basis for their contract claim are also the relevant warranty terms for their warranty claim. But as Defendants emphasize, the "sold goods" here are the GAEDs that Plaintiffs purchased—not the Google Assistant software. Plaintiffs have not shown the cited provisions of the Privacy Policy relate to the Google Home or Google Pixel—let alone **[**74]** that they amount to an "explicit guarantee" about the quality or character of either product. *Hadley v. Kellogg Sales Co., 273 F. Supp. 3d 1052, 1092 (N.D. Cal. 2017)*. Indeed, the cited provisions—which are general assurances about Defendants' use and disclosure of user information—do not allude to any particular product or products.

Most of the statements that Plaintiffs cite from the "Google Nest Help Center" and the "Google Safety Center" webpages fare no better. *See* Consol. FAC ¶¶ 193-195. There is one statement, however, that could plausibly be construed as an express warranty term for the Google Home. In the Frequently Asked Questions section of the Google Nest Help Center cite, Defendants provided the following response to the question, "Is Google Home recording all of my conversations?":

> No. Google Home listens in short (a few seconds) snippets for the hotword. Those snippets are deleted if the hotword is not detected, and none of that information leaves your device until the hotword is heard. When Google Home detects that you've said "Ok Google" or "Hey Google," or that you've physically long pressed the top of your Google Home device, the LEDs on top of the device light up to tell you that recording is happening, Google Home records what you say, **[**75]** and sends that recording (including the few-second hotword recording) to Google in order to fulfill your request. You can delete these recordings through My Activity anytime.

Id. ¶ 195. This passage pertains to the Google Home device and describes the way that it functions. The Court finds that this statement about the Google Home is sufficiently specific and unequivocal, and could plausibly be considered a promise that the Google Home will delete any recordings "if the hotword is not detected." However, Plaintiffs have not adequately alleged that the promise was breached. *See* Mot. at 17-18. As described in the Consolidated FAC, false accepts are situations in which a hotword *is* detected, albeit mistakenly. Plaintiffs must plausibly plead that retaining recordings when a hotword is *mistakenly* detected violates a promise to delete recording if a hotword is *not* detected. They have not yet done so.

Accordingly, because Plaintiffs have not identified any particular warranty term that has plausibly been breached, Count 8 is DISMISSED WITH LEAVE TO AMEND.

The Court also briefly addresses Defendants' second ground for dismissal: They argue in a footnote that the Google Home and Google Pixel **[**76]** "are subject to express limited warranties which state that they are the only express warranty that Google provides for these devices, and provide an exclusive remedy in the event a defect arises during the warranty period." Mot. at 19 n.4. In other words, Defendants disclaim any express warranties beyond the ones they have submitted in their request for judicial notice. ECF 56-1 ¶¶ 6-7; *see id.* Ex. E-F. In Part III, the Court took judicial notice of the existence of the two documents—the "Google Home Warranty — United States" and the "Hardware limited warranty for Android Hardware devices, including the Pixel smartphone"— **[*837]** because they are available on public websites. However, the Court made clear that its judicial notice does not establish that these documents are "valid or binding contracts." *Datel Holdings, 712 F. Supp. 2d at 984*. That is because the binding effect of the documents is not a matter that "cannot reasonably be questioned," *Fed. R. Evid. 201*.

Consequently, the Court cannot yet determine whether the two documents asserted by Defendants operate to preclude any warranty claim based other statements Defendants have made. *See Ladore v. Sony Computer Entm't Am., LLC, 75 F. Supp. 3d 1065, 1074 (N.D. Cal. 2014)* ("[T]he Court will not consider whether Sony may have effectively disclaimed any express warranties **[**77]** in its Terms of Service or Software License."). Therefore, Count 8 is not subject to dismissal on that basis.

To summarize, then, Defendants' motion to dismiss Count 8 is GRANTED WITH LEAVE TO AMEND for failure to plead a prima facie case of breach of express warranty, but not based on the disclaimer proffered by Defendants.

ii. Breach of Implied Warranty

Next, Defendants move to dismiss Count 9, Plaintiffs' claim for breach of the implied warranty of merchantability. Consol. FAC ¶¶ 211-222; *see* Mot. at 20-21. Plaintiffs have asserted Count 9 under *California Commercial Code § 2314*, which is modeled on the Uniform Commercial Code. *See* Consol. FAC ¶ 217; Opp. at 20-21. Defendants move to dismiss this claim for three reasons, but the Court need only reach the first: that Plaintiffs' claims are barred by an explicit disclaimer of the implied warranty of merchantability in its Terms of Service.

Defendants cite the following provision from their Terms of Service, of which the Court has taken judicial notice, *see supra* Part III:

> Other than as expressly set out in these terms or additional terms, neither Google nor its suppliers or distributors make any specific promises about the services. For example, we don't make any commitments about **[**78]** the content within the services, the specific functions of the services, or their reliability, availability, or ability to meet your needs. We provide the services "as is."
>
> *Some jurisdictions provide for certain warranties, like the implied warranty of merchantability, fitness for a particular purpose and non-infringement. To the extent permitted by law, we exclude all warranties*.

ECF 56-1 at 16. Plaintiffs do not dispute that they are bound by the TOS or that the disclaimer contained therein covers the implied warranty of merchantability asserted in Count 9. *Cal. Com. Code § 2316(2)* (providing that a disclaimer of the implied warranty of merchantability "must mention merchantability and in case of a writing must be conspicuous").

Plaintiffs nonetheless challenges the validity of the disclaimer by arguing that it is "unconscionable in that it 'creates an overly harsh or one-sided result that shocks the conscience.'" Opp. at 22. But Plaintiffs have alleged no facts to support this argument, which is made in a scant few sentences in their Opposition brief. They simply assert that the

TOS is "a non-negotiable contract of adhesion." *Id.* That is not enough, for not all contracts of adhesion are unconscionable. Under California **[**79]** law, a contract provision is unconscionable, and therefore unenforceable, only if it is both procedurally and substantively unconscionable. *See Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 113-14, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000)*. Procedural unconscionability "focus[es] on 'oppression' or 'surprise' due to unequal bargaining power,"; **[*838]** substantive unconscionability focuses on "'overly harsh' or 'one-sided' results." *Id.* Plaintiffs have made no non-conclusory allegations to establish either element.

Meanwhile, this Court and other courts in this district have dismissed implied warranty claims based on similar disclaimers. *See In re Nexus 6P Prod. Liab. Litig., 293 F. Supp. 3d 888, 944 (N.D. Cal. 2018)* (collecting cases). Under these circumstances, the Court is not persuaded by Plaintiffs' cursory argument that the instant disclaimer is unconscionable.

The Court will therefore enforce the disclaimer and GRANT Defendants' Motion to Dismiss the implied warranty claim. The Court will grant LEAVE TO AMEND to allege further facts in support of Plaintiffs' unconscionability argument.

iii. Magnuson-Moss Warranty Act

Count 10 alleges a violation of the federal Magnuson-Moss Warranty Act based on breach of the implied warranty of merchantability. Consol. FAC ¶¶ 223-233. Although the Magnuson-Moss Warranty Act creates a separate federal cause **[**80]** of action for breach of an implied warranty, it directs courts to state law to determine the meaning and scope of the implied warranty. *See 15 U.S.C. § 2301(7)*; *see Birdsong v. Apple, Inc., 590 F.3d 955, 958 n.2 (9th Cir. 2009)*. In this case, Plaintiffs have predicated their Magnuson-Moss Warranty Act claim on a breach of California state warranty law. *See* Opp. at 22. The Court has found Plaintiffs' claim for breach of implied warranty under California law (Count 9) to be inadequately pleaded; consequently, Plaintiffs' claim under the Magnuson-Moss Warranty Act must also be dismissed. *See Birdsong, 590 F.3d at 958 n.2* (dismissing plaintiffs' claims under the Magnuson-Moss Act "because we conclude that the plaintiffs have failed to state a claim for breach of an express or implied warranty" under California law). Defendants' motion to dismiss is GRANTED WITH LEAVE TO AMEND.

G. Count 11: California UCL

Count 11 is brought under California's Unfair Competition Law ("UCL"), which prohibits any "unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code § 17200*. The California Supreme Court has clarified that the UCL, because it is "written in the disjunctive," prohibits three separate types of unfair competition: (1) unlawful acts or practices, (2) unfair acts of practices, **[**81]** and (3) fraudulent acts or practices. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*; *accord Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1168 (9th Cir. 2012)*. To plead a UCL claim, a plaintiff's allegations must show that a defendant's conduct violates one of these three "prongs." *Id.* In addition, because a UCL claim may only be brought by "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition," *Cal. Bus. & Prof. Code § 17204*, a plaintiff must "demonstrate some form of economic injury." *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 323, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)*. This requirement is sometimes referred to as "UCL standing." *Id. at 320-21*.

In their motion to dismiss, Defendants contend that Plaintiffs have failed to allege economic injury, which would preclude any UCL claim. Defendants also challenge the sufficiency of Plaintiffs' allegations as to each of the three prongs ("unlawful," "unfair," and "fraudulent").

i. Economic injury

The Court begins by addressing Defendants' contention that Plaintiffs **[*839]** have not alleged economic injury, as necessary to bring a UCL claim. Under California law, a UCL plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that **[**82]** is the gravamen of the claim." *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 322, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)*. "There are innumerable ways in which economic injury" may be shown; for instance:

> A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary.

Id. at 323.

In the instant case, Plaintiffs advance two theories of economic injury. First, Plaintiffs allege overpayment for their Google Assistant Enabled Devices, i.e. "that they would not have purchased their GAEDs, or would have paid less for them, if they had known that Google was intercepting, recording, disclosing, and otherwise misusing their conversations without their authorization." Opp. at 22 (citing Consol. FAC ¶¶ 7, 54, 241). Certainly, overpayment is an economic injury under the UCL. *See, e.g., Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 966 (9th Cir. 2018)*, *cert. denied*, *139 S. Ct. 640, 202 L. Ed. 2d 492 (2018)*. The question becomes whether Plaintiffs have pleaded sufficient facts to establish overpayment here.

On that issue, Defendants maintain that the Consolidated FAC contains insufficient details regarding **[**83]** Plaintiffs' purchase of their Google Assistant Enabled Devices. Mot. at 22; Reply at 13. According to Defendants, the Consolidated FAC merely alleges that Plaintiffs "owned" and "interacted" with GAEDs and not that they purchased their devices. *Id.* (citing Consol. FAC ¶¶ 51-53). That is true of Named Plaintiff B.S., who allegedly interacted with a GAED that he did not own. *See* Consol. FAC ¶ 51. It is also true of Named Plaintiffs Galvan and E.G., who allegedly interacted with a device that was not manufactured by Defendants, the Samsung Galaxy Tab. *See id.* ¶ 53. Because these Named Plaintiffs have failed to allege that they actually paid any money for a Google Assistant Enabled Device, they cannot have been injured by overpayment.

By contrast, the Consolidated FAC does allege that Plaintiffs Kumandan and Spurr "purchased their Google Manufactured Device either directly from Google or from actual or apparent agents of Google." Consol. FAC ¶ 215. This allegation suffices to support an inference that Plaintiffs Kumandan and Spurr paid for their respective GAEDs. Defendants raise no other objection to the overpayment theory of damages. The Court therefore finds that Plaintiffs Kumandan **[**84]** and Spurr have plausibly alleged they would not have purchased their GAEDs, or would have paid less for them, if they had been aware of Defendants' practices with regard to false accepts.

Plaintiffs' second theory of economic injury is that Defendants "wrongfully monetized and profited from Plaintiffs' personal content and information, which is of value, entitling Plaintiffs to restitution." Opp. at 23. According to Plaintiffs, "[e]ntitlement to restitution is sufficient to demonstrate a loss of money or property under the UCL." Opp. at 23.

[*840] The Court does not doubt that claims for restitution are often based on actual loss of money or property, as in the cases Plaintiffs cite. *See* *In re Anthem, Inc. Data Breach Litig., No. 15-MD-02617-LHK, 2016 U.S. Dist. LEXIS 70594, 2016 WL 3029783, at *32 (N.D. Cal. May 27, 2016)* ("All California Plaintiffs paid premiums, which were in turn used to pay for services by Defendants."); *In re Google Android Consumer Privacy Litig., No. 11-MD-02264 JSW, 2014 U.S. Dist. LEXIS 31430, 2014 WL 988889, at *5 (N.D. Cal. Mar. 10, 2014)* ("Plaintiffs have alleged sufficient facts to show standing based on the diminished battery life."). But Plaintiffs are not absolved of their burden to plead economic injury by their conclusory assertion that they are entitled to restitution. Plaintiffs' allegation that Defendants "wrongfully monetized and profited **[**85]** from Plaintiffs' personal content and information" does not give rise to an inference that Plaintiffs "lost money or property," *Cal. Bus. & Prof. Code § 17204*. As another court in this district has explained, claiming that a defendant "may have gained money through its sharing or use of the plaintiffs' information" is "different from saying the plaintiffs lost money." *In re Facebook, Inc., Consumer Privacy User Profile Litig., 402 F. Supp. 3d at 804*.

Moreover, Plaintiffs have not shown that they are, in fact, entitled to restitution under the UCL. The California Supreme Court has "defined an order for 'restitution' as one 'compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken.'" Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1144, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003). Of relevance here, restitution is distinguished from disgorgement. "'Disgorgement' is a broader remedy than restitution" in that disgorgement "has been used to refer to surrender of all profits earned as a result of an unfair business practice *regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice*." Id. at 1145 (emphasis in original). By contrast, restitution under the UCL must "restore the status quo" by "returning to the plaintiff" funds taken from him or "benefits in **[**86]** which the plaintiff has an ownership interest." Id. at 1148-49. Put another way, restitutionary disgorgement "focuses on the plaintiff's loss, and nonrestitutionary disgorgement "focuses on the defendant's unjust enrichment." Meister v. Mensinger, 230 Cal. App. 4th 381, 398, 178 Cal. Rptr. 3d 604 (2014). Although the defendant's benefit and the plaintiff's loss are often the same, nonrestitutionary disgorgement may also be had "where a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss." *Id.* (internal quotations and alterations omitted).

Plaintiffs say they are entitled to restitution because Defendants "wrongfully monetized and profited from Plaintiffs' personal content and information." Opp. at 23. But "plaintiff's assertion that defendants received ill-gotten gain does not make a viable UCL claim unless the gain was money in which plaintiff had a vested interest." Madrid v. Perot Systems Corp., 130 Cal. App. 4th 440, 455, 30 Cal. Rptr. 3d 210 (2005). Here, as discussed in connection with Plaintiffs' breach of contract claim, *see supra* Part IV.E.iii, Plaintiffs have not shown that they have a vested interest in any money earned from unspecified "personal content and information."

To be clear, the Court is not requiring Plaintiffs to show they are entitled to restitution under the UCL in order to establish their standing **[**87]** under the UCL. *See* Kwikset Corp., 51 Cal. 4th at 337 (holding that standing is not dependent on eligibility for restitution). But where, as here, Plaintiffs **[*841]** themselves base their standing on eligibility for restitution, Plaintiffs' failure to plead their entitlement to restitution under the UCL is fatal.

In sum, the Court GRANTS Defendants' motion to dismiss Plaintiff Galvan's, Plaintiff B.S.'s, and Plaintiff E.G.'s UCL claims for failure to adequately plead economic injury; the Court will GRANT LEAVE TO AMEND, however, because they may able to remedy that defect. Plaintiffs Kumandan and Spurr have adequately pleaded economic injury. Because their UCL claims shall go forward, the Court proceeds to consider of the adequacy of Plaintiffs' pleadings under each prong of the UCL.

i. Unlawful Prong

The "unlawful" prong of the UCL "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." Cel-Tech, 20 Cal. 4th at 180. In other words, to be "unlawful" under the UCL, Defendants' conduct must violate another "borrowed" law. HSBC Bank Nevada, 691 F.3d at 1168. "Virtually any state, federal or local law can serve as the predicate for an action under section 17200." *Id.* (quoting People ex rel. Bill Lockyer v. Fremont Life Ins. Co., 104 Cal. App. 4th 508, 515, 128 Cal. Rptr. 2d 463 (2002)) (alterations omitted). Here, Plaintiffs predicate **[**88]** their "unlawful" claim on Defendants' alleged violations of (1) the Wiretap Act, (2) the SCA, (3), the CIPA, (4) the Magnuson-Moss Warranty Act, (5) Cal. Bus. & Prof. Code § 22576,[2] for having breached the Privacy Policy, (6) the California Constitution's right of privacy, and (7) the common law prohibition of intrusion upon seclusion. Opp. at 24; *see* Consol. FAC ¶ 235.

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[2] This provision states:

> An operator of a commercial Web site or online service that collects personally identifiable information through the Web site or online service from individual consumers who use or visit the commercial Web site or online service and who reside in California shall be in violation of this section if the operator fails to comply with the provisions of Section 22575 or with the provisions of its posted privacy policy in either of the following ways:
>
> (a) Knowingly and willfully.

Because Plaintiffs assert each of these alleged violations as independent counts, the Court has already considered the adequacy of Plaintiffs' allegations as to those counts. The Court's findings in that regard are equally determinative of the validity of Plaintiffs' UCL claim. Accordingly, the Court must DISMISS WITH LEAVE TO AMEND any claims based on (1) the Wiretap **[**89]** Act, as alleged in Count 1; (2) *Section 2701(a)* of the Wiretap Act, as alleged in Count 2; (3) the CIPA, as alleged in Counts 3 and 4; (4) the Magnuson-Moss Warranty Act, as alleged in Count 10; (5) *Cal. Bus. & Prof. Code § 22576*, as alleged in Count 7; (6) the California Constitution's right of privacy, and (7) the common law prohibition of intrusion upon seclusion. On the other hand, Plaintiffs have stated a UCL claim based on a violation of *Section 2702(a) of the SCA*, which the Court found to be sufficiently pleaded in Count 2. *See supra* Part IV.ii.

Although not addressed in Plaintiffs' Opposition brief, the Consolidated FAC also alleges an "unlawful" claim based on *California Family Code § 6701*, *see* Consol. FAC ¶¶ 236-38, which provides:

> Except as otherwise provided by statute, a contract of a minor may be disaffirmed by the minor before majority or within a reasonable time afterwards or, in case of **[*842]** the minor's death within that period, by the minor's heirs or personal representative.

The Consolidated FAC alleges that Defendants have run afoul of this provision by failing to obtain "minor Plaintiff B.S.'s or E.G.'s consent to intercept, record, disclose, or use their confidential communications." Consol. FAC ¶ 238.

In their motion to dismiss, Defendants argue that Plaintiffs have **[**90]** not shown how the facts of this case implicate a minor's right of disaffirmance. Mot. at 24. The Court agrees that it is not clear how Plaintiffs' allegations pertain to the statute, and Plaintiffs have provided no explanation in their Opposition briefing. Based on Plaintiffs' lack of response, the Court considers the claim based on *California Family Code § 6701* abandoned and the argument conceded. *Montgomery v. Specialized Loan Servicing, LLC, 772 Fed. App'x 476, 477 (9th Cir. 2019)* ("The district court properly dismissed plaintiffs' remaining claims because plaintiffs failed to respond to the arguments raised in defendants' motion to dismiss these claims.") (citing *Walsh v. Nev. Dep't of Human Res., 471 F.3d 1033, 1037 (9th Cir. 2006))*.

For these reasons, Plaintiffs may proceed with their UCL claim premised on *Section 2702(a) of the SCA*; Defendants' motion to dismiss is otherwise GRANTED.

ii. Fraudulent Prong

The UCL also provides a cause of action again "fraudulent" business acts or practices. "A business practice is fraudulent under the UCL if members of the public are likely to be deceived." *HSBC Bank Nevada, 691 F.3d at 1169* (citing *Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal. App. 4th 638, 645, 72 Cal. Rptr. 3d 903 (2008))*. In their Opposition brief, Plaintiffs argue that they "adequately allege affirmative misrepresentations" and "omissions," which are presumably meant to form the basis of a claim that Plaintiffs have engaged in "fraudulent" business practices. Opp. at 23. But the Consolidated FAC does not purport to assert a claim **[**91]** under the fraudulent prong of the UCL. *See* Consol. FAC ¶¶ 234-242. Furthermore, the Consolidated FAC makes no mention of "affirmative misrepresentations" or "omissions"; certainly, it has not identified any misrepresentations or omissions with particularity.

The lack of specific allegations regarding the allegedly fraudulent business practices is especially problematic here because claims under the fraudulent prong of the UCL are subject to "the heightened pleading requirements of *Rule 9(b)*." *Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 964 (9th Cir. 2018)*. To satisfy *Rule 9(b)*, "a pleading must

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> (b) Negligently and materially.

Cal. Bus. & Prof. Code § 22576. Plaintiffs allege that Defendants violate this provision by virtue of its breach of contract, as alleged in Count 7. Opp. at 24; *see* Consol. FAC ¶ 235.

identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement." *Cafasso v. Gen. Dynamics C4 Sys., 637 F.3d 1047, 1055 (9th Cir. 2011)*. Plaintiffs have not done any of the above. Defendants' motion to dismiss is therefore GRANTED WITH LEAVE TO AMEND.

iii. Unfair Prong

Last, Plaintiffs allege that Defendants have "engaged in business acts or practices deemed 'unfair' under the UCL." Consol. FAC ¶ 239.

"The UCL does not define the term 'unfair.' In fact, the proper definition of 'unfair' conduct against consumers is currently in flux among California courts." *Hodsdon v. Mars, Inc., 891 F.3d 857, 866 (9th Cir. 2018)* (internal quotations omitted). For some years, the California **[**92]** Courts of Appeal formulated different tests, such as whether the practice "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious **[*843]** to consumers," *Cel-Tech, 20 Cal. 4th at 184* (quoting *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 887, 85 Cal. Rptr. 2d 301 (1999))* ("*South Bay* test"), or whether "the gravity of the harm to the alleged victim" outweighs "the utility of the defendant's conduct," *id.* (quoting *State Farm Fire & Casualty Co. v. Superior Court, 45 Cal. App. 4th 1093, 1104, 53 Cal. Rptr. 2d 229 (1996))* ("*State Farm Fire* test"). Then, in *Cel-Tech*, the California Supreme Court appeared to confine "unfair" to "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *20 Cal. 4th at 187*. "It further required that 'any finding of unfairness to competitors under *section 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.'" *HSBC Bank Nevada, 691 F.3d at 1170* (quoting *Cel-Tech, 20 Cal. 4th at 185*). The *Cel-Tech* Court explained that the prior definitions were "too amorphous" and "provide[d] too little guidance to courts and businesses." *HSBC Bank Nevada, 691 F.3d at 1169* (quoting *Cel-Tech, 20 Cal. 4th at 185*).

However, the *Cel-Tech* court expressly limited **[**93]** its decision, stating, "Nothing we say relates to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law such as 'fraudulent' or 'unlawful' business practices or 'unfair, deceptive, untrue or misleading advertising.'" *Cel-Tech, 20 Cal. 4th at 187 n.12*. Consequently, California courts remain divided on whether the *Cel-Tech* definition applies to "consumer actions" or whether the *State Farm Fire* and *South Bay* tests remain valid. *See HSBC Bank Nevada, 691 F.3d at 1170*. The Ninth Circuit has noted this continued controversy but awaits the California Supreme Court's resolution of it. *See id.*; *Hodsdon, 891 F.3d at 866*.

In this case, the parties follow the Ninth Circuit's lead and argue under both *Cel-Tech* and the prior balancing tests from *State Farm Fire* and *South Bay. See* Consol. FAC ¶ 239.

First, as to Plaintiffs' claim that Defendants' conduct is unfair under the *Cel-Tech* test, the Court agrees with Defendants that Plaintiffs have not alleged any harm to competition or violation of the "letter, policy, or spirit of the antitrust laws," *HSBC Bank Nevada, 691 F.3d at 1170*. *See* Mot. at 24. Indeed, the Court cannot discern a single allegation in the Consolidated FAC pertaining to competitive harm. Plaintiffs' brief in Opposition makes **[**94]** no attempt to explain or defend their omissions, wherefore the Court considers the claim abandoned. *See Montgomery, 772 Fed. App'x at 477*.

Second, as to the pre-*Cel-Tech* definitions of "unfair," some courts have treated the *State Farm Fire* and *South Bay* tests as distinct tests; others, including the Ninth Circuit, have referred to them together as the "balancing test," *see HSBC Bank Nevada, 691 F.3d at 1169*; *Accord Herskowitz v. Apple Inc., 940 F. Supp. 2d 1131, 1146 (N.D. Cal. 2013)*. In any event, the parties agree that both tests require the Court to "weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." Mot. at 25; Opp. at 25 (quoting *HSBC Bank Nevada, 691 F.3d at 1169*). Plaintiffs say that Defendants' actions have harmed Plaintiffs by "illegally wiretapping and wrongfully transmitting to third parties Plaintiffs' confidential communications." Opp. at 25. Defendants object that, considering the substantial benefit the Google Assistant **[*844]** provides to consumers, Plaintiffs "cannot reasonably allege" that the utility of their Google Assistant Enabled Devices is outweighed by the "occasional error" of false accepts. Mot. at 25.

Just how "occasional" the error is, however, is a question of fact that remains unanswered at this stage. Moreover, the harm that is asserted here is the invasion of privacy, which is difficult to quantify. **[**95]** The Court cannot say, as a matter of law, that the utility of the Google Assistant necessarily outweighs the harm from false accepts. *Accord* *In re Carrier IQ, Inc., 78 F. Supp. 3d 1051, 1117 (N.D. Cal. 2015)* ("The cost-benefit analysis this test calls for is not properly suited for resolution at the pleading stage."); *In re iPhone Application Litigation, 844 F. Supp. 2d 1040 (N.D. Cal. 2012)* ("While the benefits of Apple's conduct may ultimately outweigh the harm to consumers, this is a factual determination that cannot be made at this stage of proceedings.").

The Court nevertheless finds that Plaintiffs' "unfair" claim is deficient because, as discussed in Part IV.A.ii., the Named Plaintiffs failed to adequately plead that their own conversations were intercepted and that those conversations were subject to a reasonable expectation of privacy. That failure means that Plaintiffs have not adequately pleaded "harm to the alleged victim" for purposes of their UCL claim. The Court therefore must DISMISS Plaintiffs' claims under the "unfair" prong of the UCL but will GRANT LEAVE TO AMEND.

H. Count 12: Declaratory Judgment

Defendants do not move to dismiss Count 12, Plaintiffs' request for declaratory judgment under the Declaratory Judgment Act, *28 U.S.C. §§ 2201 et seq.* Count 12 may proceed.

V. ORDER

For the foregoing reasons, the Court rules **[**96]** on Defendants' motion to dismiss the 12 Counts in the Consolidated FAC as follows:

- Count 1: GRANTED WITH LEAVE TO AMEND.

- Count 2: GRANTED WITH LEAVE TO AMEND as to the claim under *18 U.S.C. § 2701(a)*; DENIED as to the claim under *18 U.S.C. § 2702(a)*.
- Count 3: GRANTED WITH LEAVE TO AMEND.
- Count 4: GRANTED WITH LEAVE TO AMEND.
- Count 5: GRANTED WITH LEAVE TO AMEND.
- Count 6: GRANTED WITH LEAVE TO AMEND.
- Count 7: GRANTED WITH LEAVE TO AMEND.
- Count 8: GRANTED WITH LEAVE TO AMEND.
- Count 9: GRANTED WITH LEAVE TO AMEND.
- Count 10: GRANTED WITH LEAVE TO AMEND.
- Count 11: GRANTED WITH LEAVE TO AMEND as to the fraudulent and unfair prongs; DENIED as to the unlawful prong.

Any amended complaint is **due by June 5, 2020**. Plaintiffs are directed to file a redlined complaint as an attachment to any amended complaint. Leave to amend is restricted to the defects discussed in this Order and in Defendants' motion; Plaintiff may not add new parties or claims without obtaining prior express leave of the Court. However, to the extent Plaintiffs fail to cure the defects identified by this Order, **[*845]** their claims will be subject to dismissal with prejudice.

IT IS SO ORDERED.

Dated: May 6, 2020

/s/ Beth Labson Freeman

BETH LABSON FREEMAN

United States **[**97]** District Judge

Nuance Communs., Inc. v. Omilia Natural Language Sols., Ltd.

United States District Court for the District of Massachusetts

May 6, 2020, Decided; May 6, 2020, Filed

Civil Action No. 19-11438-PBS

Reporter

2020 U.S. Dist. LEXIS 79718 *; 2020-1 Trade Cas. (CCH) P81,207; 2020 U.S.P.Q.2D (BNA) 10489; 2020 WL 2198362

NUANCE COMMUNICATIONS, INC., Plaintiff, v. OMILIA NATURAL LANGUAGE SOLUTIONS, LTD., Defendant.

Prior History: *Nuance Communs., Inc. v. Omilia Nat. Language Sols., Ltd., 2019 U.S. Dist. LEXIS 215652 (D. Mass., Dec. 16, 2019)*

Core Terms

patent, alleges, competitors, antitrust, immunity, counterclaims, customers, lawsuit, acquisitions, discovery, motion to dismiss, patent infringement, unfair competition, tortious interference, geographic, argues, anticompetitive, software, sham, Clayton Act, Sherman Act, monopolization, Enterprise, business relationship, antitrust claim, baseless, infringe, monopoly, communications, technology

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Judges: Patti B. Saris, United States District Judge.

Opinion by: Patti B. Saris

Opinion

MEMORANDUM AND ORDER

Saris, D.J.

Plaintiff Nuance Communications, Inc. brings this action against Defendant Omilia Natural Language Solutions, Ltd., alleging infringement of eight patents concerning automated speech recognition and interactive voice response systems used in large scale call centers.

Omilia counter-punched with numerous counterclaims alleging, among other things, a violation of *Section 2* of the Sherman Act (Count 17); a violation of *Section 7* of the Clayton Act (Count 18); common law unfair competition (Count 19); tortious interference with contractual relations (Count 20); and tortious interference with advantageous business **[*3]** relations (Count 21)[1] .

Now, Nuance moves to dismiss Omilia's antitrust and state law counterclaims (Counts 17-21), or in the alternative to stay those counterclaims pending resolution of the underlying patent infringement suit. After hearing, the Court **ALLOWS** the motion to dismiss Omilia's claim of common law unfair competition (Count 19) and **DENIES** the motion with regard to Omilia's remaining antitrust and state law counterclaims.

FACTUAL BACKGROUND

The following facts are drawn from Omilia's countercomplaint (Docket No. 44) and must be taken as true at this stage. See *Newman v. Lehman Bros. Holdings Inc., 901 F.3d 19, 25 (1st Cir. 2018)*.

I. Nuance

Nuance develops and provides Automated Speech Recognition ("ASR") technology, which allows a machine to recognize and respond to human voice commands. Nuance's ASR software is used by enterprise-level call centers around the world.

Nuance was created in 2005 from a merger of ScanSoft and another entity named Nuance ("Pre-2005 Nuance"). ScanSoft had already acquired at least three other voice recognition firms between 2001 and 2005. From 2005 to 2018, the newly formed Nuance acquired at least 16 additional companies "that developed and/or commercialized voice recognition-related technology." Docket No. 44 ¶ 106. **[*4]** Nuance also acquired over 5,000 voice-recognition related patents during the 2005-2018 timeframe. Omilia alleges that, due to these corporate and intellectual property acquisitions, Nuance has maintained an international market share of over 70% since 2001.[2] Nuance is now the owner of one of the largest speech-recognition patent portfolios in the world.

Omilia alleges that Nuance has a strategy of "acquir[ing] actual and potential competitors through a calculated scheme of threatening to assert and/or actually asserting baseless patent infringement litigation using its massive portfolio of acquired patents to drive its competitors out of the market and/or coerce them into being acquired by Nuance." Id. ¶ 112. Since 2011, ScanSoft/Nuance has initiated at least seventeen patent lawsuits against its competitors. At least three of these lawsuits were initiated shortly after the defendant corporation refused a buyout offer by Nuance.

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[1] Omilia's answer labeled this claim as Count 20. Docket No. 44 at 68.

[2] Omilia argues that the Court may reasonably infer that, given Nuance's 70% international market share, Nuance's market share within the United States is at least 70%. See Dkt. No. 80 at 44 (motion hearing transcript).

Omilia alleges that this strategy enables Nuance to "maintain supra-competitive prices for its software . . . without innovating that software, which it would have been forced to do" if it was subject to competition. Id. ¶ 114. For example, Nuance introduced **[*5]** a new major release related to its speech recognition software once a year between 1994 and 2005, but since 2005 has issued only three new releases. The Department of Justice ("DOJ") Antitrust Division investigated a Nuance transaction related to the medical transcription sector in 2008 and "raised concerns" about Nuance's proposed acquisition of a voice recognition firm in 2009. Id. ¶ 115.

II. Omilia's Relationship with Nuance

Omilia is a Cyprus-based company that sells a proprietary ASR software system for use in large enterprise call centers. Omilia resold Nuance's ASR technology from 2007 to 2013, along with Omilia's own proprietary natural language understanding ("NLU") engine and dialogue manager ("DM").

In April 2010, Omilia's Managing Director Dimitris Vassos contacted Nuance's CEO to discuss the possibility of an expanded partnership. Vassos met with Peter MacKinnon, the General Manager of Nuance Europe, in January 2011. During that meeting and in related emails, Vassos provided Nuance with documents describing Omilia's proprietary NLU and DM system, known as DiaManT.

In 2012, Nuance introduced an amendment to its reseller agreement with Omilia. The amendment required Omilia to **[*6]** bundle Nuance's professional support services with Omilia's products and required Omilia to sell the full stack of Nuance's products, so that Omilia could not integrate Omilia's NLU with Nuance's ASR. Omilia alleges that Nuance implemented the same amendments with other resellers, in order to use its dominant position in the ASR market to gain monopoly profits in the market for professional services.

In October 2013, Nuance asked Omilia to disclose its full list of customers and projects as part of a "global partner review." Id. ¶ 125. Nuance represented that it would maintain the list in confidence. However, soon after Omilia provided the list, Nuance contacted an Omilia customer and an Omilia partner organization, allegedly to interfere with Omilia's relationships with those organizations. On October 31, 2013, Nuance served Omilia with a 90-day notice to terminate the Nuance-Omilia reseller agreement. After termination of the reseller agreement, Omilia implemented a proprietary ASR technology.

III. Procedural Background

In January 2018, Nuance sent Omilia a letter demanding it to submit to an audit of all transactions and royalty payments it received from any customer since the inception **[*7]** of its Reseller Agreement with Nuance. Omilia refused this demand. In September 2018, Nuance sent Omilia a letter asserting that Omilia's systems infringe three patents owned by Nuance. Two of those patents are at issue in Nuance's infringement lawsuit here.

Omilia alleges that before Nuance sent the September 2018 letter, Nuance represented to Omilia's customers and potential customers in the U.S. and Canada that it had already brought a patent infringement lawsuit against Omilia. Omilia claims it lost commercial opportunities and "hundreds of millions of dollars of potential revenue" due to those representations. Id. ¶¶ 133-34.

In March 2019, Omilia responded to Nuance's letter, stating that Omilia did not infringe Nuance's patents. In June 2019, Nuance filed suit in this Court, alleging that Omilia infringed eight of its patents. Omilia subsequently filed a motion to dismiss for lack of personal jurisdiction, which this Court denied in December 2019.

Omilia filed an Answer and Counterclaims in November 2019. Omilia alleged that Nuance engaged in a "monopolistic scheme" in the ASR Enterprise Software Market in the United States by acquiring more than fifty companies and "thousands" **[*8]** of patents. Id. ¶¶ 91, 143-44, 146. Omilia also claimed that Nuance told at least two actual or potential Omilia customers, Connex and TD Bank, about Omilia's alleged patent infringement. Nuance filed the present motion to dismiss in January 2020, and Omilia opposed in February 2020.

The underlying patent dispute is scheduled to proceed in phases. Claims related to two of the eight patents will be considered during Phase 1, for which a trial is currently scheduled for October 2021.

STANDARD OF REVIEW

A *Rule 12(b)(6)* motion is used to dismiss complaints that do not "state a claim upon which relief can be granted." See *Fed. R. Civ. P. 12(b)(6)*. To survive a *Rule 12(b)(6)* motion to dismiss, the factual allegations in a complaint must "possess enough heft" to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-57, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In evaluating the motion, the Court must accept the factual allegations in the plaintiff's complaint as true, construe reasonable inferences in his favor, and "determine whether the factual allegations in the plaintiff's complaint set forth 'a plausible claim upon which relief may be granted.'" *Foley v. Wells Fargo Bank, N.A., 772 F.3d 63, 71 (1st Cir. 2014)* (quoting *Woods v. Wells Fargo Bank, N.A., 733 F.3d 349, 353 (1st Cir. 2013))*.

In addition to the complaint, the court may also consider "documents incorporated by reference into the complaint, matters **[*9]** of public record, and facts susceptible to judicial notice." *Haley v. City of Boston, 657 F. 3d 39, 46 (1st Cir. 2011)* (cleaned up).

DISCUSSION

I. Antitrust Claims

Nuance argues that Omilia's antitrust claims should be dismissed because (1) Omilia fails to allege unlawful monopolization under *Section 2* of the Sherman Act; (2) Omilia fails to plead a plausible market definition for its *Sherman Act* and *Clayton Act* claims; and (3) all but one of the transactions challenged by Omilia under the *Clayton Act* are time-barred by the four-year statute of limitations period, and the single remaining transaction is insufficient to state a claim.

A. *Section 2* of the Sherman Act (Count 17)

Nuance argues that Omilia fails to allege unlawful monopolization under *Section 2* of the Sherman Act. That section imposes liability upon "every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States." *15 U.S.C. § 2*. To establish a *Section 2* monopolization claim, a plaintiff must show "(1) that the defendant possesses monopoly power in the relevant market, and (2) that the defendant has acquired or maintained that power by improper means." *In re Lantus Direct Purchased Antitrust Litigation, 950 F.3d 1, 7 (1st Cir. Feb. 13, 2020)* (quoting *Town of Concord v. Bos. Edison Co., 915 F.2d 17, 21 (1st Cir. 1990))*.

Here, neither party contests that Nuance plausibly possesses monopoly power in the ASR Enterprise Market. The **[*10]** parties disagree about the proper geographic scope of that market, as described below in section I.B. The parties also disagree as to whether Omilia has plausibly alleged that Nuance has acquired or maintained its monopoly power by improper means.

Omilia alleges that Nuance has a strategy of "acquir[ing] actual and potential competitors through a calculated scheme of threatening to assert and/or actually asserting baseless patent infringement litigation using its massive portfolio of acquired patents to drive its competitors out of the market and/or coerce them into being acquired by Nuance." Docket No. 44 ¶ 112; see id. ¶ 118 (quoting New York Times report that Nuance's CEO had told a potential competitor, "I have patents that can prevent you from practicing in this market."); id. ¶¶ 117, 119 (providing additional example of lawsuit filed after a competitor refused a buy-out offer). Omilia supports this theory with examples of Nuance acquiring competitors and patents in the ASR market, pursuing patent enforcement lawsuits, and "interfer[ing] with rivals' relationships with customers." Docket No. 72-1 at 3; see also Docket No. 44 ¶¶ 91-92, 125-27, 129, 132-33. Nuance responds that each **[*11]** of the individual complained-of acts are lawful. See, e.g., *Automatic Radio Mfg. Co. v. Hazeltine Res. Inc., 339 U.S. 827, 834, 70 S. Ct. 894, 94 L. Ed. 1312, 1950 Dec. Comm'r Pat. 608 (1950)* ("[M]ere accumulation of patents, no matter how many, is not in and of itself illegal.").

In the antitrust context, however, "acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme." *Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*; see also *id. at 699* ("[P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."); *LePage's Inc v. 3M, 324 F.3d 141, 162 (3d Cir. 2003)* (explaining that "courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation"); *City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1376 (9th Cir. 1992)* ("[I]t would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect.")

Courts examining a monopolist's otherwise lawful acts must ask whether the actions "impaired competition in an unnecessarily restrictive way," such as by "exclude[ing] rivals on some basis other than efficiency." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*; see also *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230 (1st Cir. 1983)* (asking whether the defendant's conduct was "reasonable in light of its business needs" or whether it "unreasonably restrict[ed] competition"). A motion to dismiss a *Section 2* claim must **[*12]** be denied if there is a plausible allegation that the defendant acted to artificially restrict competition and inflate prices in the market. See *In re Lantus, 950 F.3d at 7* (reversing dismissal of antitrust claims).

Here, Omilia has plausibly alleged that Nuance violated *Section 2* of the Sherman Act by wielding its pool of patents against competitors to threaten costly, baseless litigation unless the competitors agree to a buy out or merger, and by notifying the competitors' potential customers of the possibility of litigation, all with an anti-competitive motive. Cf. *Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416, 423-24 (10th Cir. 1952)* (upholding jury's finding of violations of *Sections 1* and *2* of the Sherman Act where defendant had monopoly on patents in market and sent plaintiff's potential customers notices of patent infringement lawsuits). Omilia has plausibly alleged that a monopolization scheme by Nuance has resulted in supracompetitive prices for customers and less frequent innovation for consumers, and impeded Omilia's ability to compete in the ASR Enterprise market.

1. Noerr-Pennington Doctrine and "Sham" Litigation Exception

a. Legal Framework

The Noerr-Pennington doctrine "provides a party immunity from antitrust liability for . . . enforcing one's intellectual property rights in court." **[*13]** *United Food & Commercial Workers Unions & Employers Midwest Health Benefits Fund v. Novartis Pharms. Corp., 902 F.3d 1, 4-5 (1st Cir. 2018)*; see also *Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*. The immunity is grounded in the *First Amendment* right to petition the government. *Novartis, 902 F.3d at 4-5*.

"Noerr-Pennington immunity has two exceptions. An antitrust defendant may not enjoy the immunity in enforcing its patent if it obtained that patent through a fraud on the Patent Office, or if its suit to enforce the patent is a 'sham' for impermissible anti-competitive conduct." *Id. at 5* (citations omitted).

The "sham" litigation exception to Noerr-Pennington immunity applies if the lawsuit is (1) "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and (2) "conceals 'an attempt to interfere directly with the business relationships of a competitor' through the 'use [of] the governmental process — as opposed to the outcome of that process — as an anticompetitive weapon.'" *Id. at 13* (citation omitted). An objectively reasonable patent suit is not a "sham" within the meaning of the exception to Noerr-Pennington immunity, even if the litigant has a subjective intent to monopolize. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 57, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* ("PREI").

b. Parties' Arguments

Nuance argues that Omilia's *Section 2* counterclaim must be dismissed because Nuance enjoys Noerr-Pennington immunity. Omilia responds that the "sham" litigation exception **[*14]** to Noerr-Pennington immunity applies because Nuance's patent infringement lawsuit is objectively baseless and intended to harm competition. Omilia also points to Nuance's past lawsuits against other competitors as evidence of a "pattern of anticompetitive conduct." Docket No. 74 at 8.

It is premature for the court to determine whether Noerr-Pennington immunity applies here. Without a claim construction hearing and discovery, this court has no basis to assess the merits of the underlying patent suit. Moreover, even if the litigation is not baseless, Omilia has also alleged non-litigation conduct by Nuance, such as threats to litigate if a competitor does not agree to a buy-out, threats to competitors' customers, and statements to the market via the press regarding Nuance's buy-out strategy. The motion to dismiss the Sherman Act *Section 2* claim under the Noerr-Pennington doctrine is accordingly denied.

B. Market Definition (Counts 17 and 18)

Nuance also alleges that Omilia fails to plead a plausible market definition for its antitrust claims. Antitrust plaintiffs must allege both a plausible product market and plausible geographic market. *Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 197 & n.11 (1st Cir. 1996)*. A geographic market is "the geographic area in which the **[*15]** defendant faces competition and to which consumers can practically turn for alternative sources of the product." *Id. at 196*; see also *United States v. Phila. Nat'l Bank, 374 U.S. 321, 359, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*.

Neither party contests Omilia's product market definition of the "ASR Enterprise software market." The conflict centers on the geographic market definition: Omilia alleges that the geographic market for its Sherman and Clayton Act claims is the United States. Nuance contends that this allegation, on its own, is insufficient to survive a motion to dismiss, because the market for ASR Enterprise Software is global, or at least includes all English-speaking countries.

Market definition is a question of fact that generally cannot be decided on a motion to dismiss. See *Morales-Villalobos v. Garcia-Llorens, 316 F.3d 51, 55 (1st Cir. 2003)* (reversing a motion to dismiss because parties' dispute as to whether the relevant geographic market was an individual town, all of Puerto Rico, or the entire United States could not "be resolved on the face of the complaint"); see also *Coastal Fuels, 79 F.3d at 196* ("[M]arket definition is a question of fact.").

Here, Omilia has plausibly alleged that the United States is the relevant geographic market for its antitrust claims. Omilia alleges that Nuance uses its U.S. patents to exclude competitors within the United States. Omilia **[*16]** also alleges "massive barriers to entry" to the market due to challenges in "acquiring the [speech] data required to train an ASR system." Docket No. 44 ¶ 145; see also id. ¶ 94 (explaining that "time-intensive analysis of real-life human speech for a given language . . . is critical for an ASR engine to function well as to that language"). Given the location-specific nature of the technology, Omilia has plausibly alleged that the United States is "the geographic area in which [Nuance] faces competition, and to which consumers can practically turn for alternative sources of the product." See *Coastal Fuels, 79 F.3d at 196*. These allegations are sufficient to survive a motion to dismiss.

C. Clayton Act (Count 18)

Nuance argues that Omilia's claim under *Section 7* of the Clayton Act is time-barred and insufficient to state a claim. Omilia alleges that in the four years prior to this suit, Nuance acquired patents related to "speech recognition that's used in enterprises in the United States." Docket No. 80 at 40 (hearing transcript); Docket No. 51 at 21 & n.4. Moreover, Omilia argues that its challenges to Nuance's earlier acquisitions are not time-barred under the Clayton

Act, because those acquisitions ripened into a prohibited **[*17]** effect and caused Omilia injury within the four-year limitations period.

Section 7 of the Clayton Act prohibits asset acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly." *15 U.S.C. § 18*. The statute requires *Section 7* claims to be brought "within four years after the cause of action accrued." *15 U.S.C. § 15(b)*.

The Supreme Court has articulated two formulations of *Section 7*'s "accrual" standard. In a case brought by the United States, the Court held that a *Section 7* claim accrues "any time when the acquisition threatens to ripen into a prohibited effect." *United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 587, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957)* (permitting *Section 7* prosecution to proceed thirty years after the challenged stock acquisition, even where no anticompetitive threat existed at the time of the acquisition). In a case brought by a private plaintiff, the Court held that a *Section 7* claim accrues "when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*.

Although these capacious holdings have been criticized, see, e.g., Paul J. Stancil, Atomism and the Private Merger Challenge, *78 Temp. L. Rev. 949, 1011 (2005)*, they are still applied. See id. (describing the precedents as "still-valid (and still-cited)"); see also *United States v. ITT Cont'l Baking Co., 420 U.S. 223, 240, 95 S. Ct. 926, 43 L. Ed. 2d 148 (1976)* (holding that *Section 7*'s restriction on "acquisitions" includes "both the purchase of rights in another company **[*18]** and the retention of those rights"); *U.S. Gypsum Co. v. Indiana Gas Co., Inc., 350 F.3d 623, 628 (7th Cir. 2003)* (explaining that "old activity . . . is not immunized, if the potential for [an antitrust injury] is created or realized more recently as market conditions change"); *Telectronics Proprietary, Ltd. v. Medtronic, Inc., 687 F. Supp. 832, 844 (S.D.N.Y. 1988)* (denying summary judgment because of factual dispute existed as to whether plaintiff suffered *Section 7* injury when defendant acquired certain patents or when defendant asserted those patents against the plaintiff). Cf. *Midwestern Machinery, Co., Inc. v. Nw. Airlines, Inc., 392 F.3d 265, 276 (8th Cir. 2004)* (holding, at summary judgment stage, that *Section 7* claim was barred because plaintiffs had not filed suit within four years of suffering "a quantifiable injury"); *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1051 (8th Cir. 2000)* (explaining that the Clayton Act's statute of limitations can be tolled "where a plaintiff's damages are only speculative during the limitations period"); Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application § 320b (4th Ed. 2013-2018) (explaining that antitrust cause of action accrues at time plaintiff is injured, even if defendant committed the illegal act more than four years before the injury); id. § 320d ("In some cases the injury caused by a merger might not occur until many years after the transaction was completed.").

Here, Omilia alleges that its *Section 7* claim accrued within **[*19]** the statute of limitations because Nuance's past acquisitions "ripened into a prohibited effect" and caused Omilia an injury within that timeframe. Docket No. 74 at 8. Specifically, Omilia alleges it "discovered the effects of Nuance's anticompetitive acquisitions" only when it attempted to enter the U.S. market in 2015 and 2016. Id. Omilia has plausibly alleged a *Section 7* violation within the four-year statute of limitations.

II. State Law Claims

A. Unfair Competition (Count 19)

Omilia alleges that Nuance is liable for the Massachusetts common law tort of unfair competition. However, "[i]t is settled in Massachusetts that 'the gravamen of an unfair competition claim is the likelihood of consumer confusion as to the source of the goods or services.'" *Open Software Found., Inc. v. U.S. Fid. & Guar. Co., 307 F.3d 11, 17 (1st Cir. 2002)* (quoting *Datacomm Interface, Inc v. Computerworld, Inc., 396 Mass. 760, 489 N.E.2d 185, 191 (Mass. 1986))*.

Here, Omilia has failed to allege any customer confusion regarding the source of an ASR product. Instead, Omilia argues that Nuance engaged in unfair competition under Massachusetts common law by providing Omilia's customers with incorrect information regarding the instant patent infringement suit. Omilia has not cited any case law to support this interpretation of the unfair competition tort. Omilia's unfair competition claim is therefore **[*20]** dismissed for failure to state a claim upon which relief can be granted. See *Pegasystems, Inc. v. Appian Corp., No. 19-11461, 424 F. Supp. 3d 214, 2019 WL 6560120, at *6 (D. Mass. Dec. 5, 2019)* (dismissing unfair competition claim for failure to allege customer confusion about the source of litigant's products).

B. Tortious Interference (Counts 20 and 21)

Omilia also brings counterclaims against Nuance for tortious interference with contractual relations (Count 20) and advantageous business relations (Count 21). Omilia alleges that Nuance intentionally and with improper means informed Omilia's current and prospective customers of the instant patent lawsuit in order to interfere with Omilia's contractual and business relations. Nuance responds that these claims must fail because Nuance's conduct was incidental to lawful patent enforcement protected by Noerr-Pennington immunity.

Under Massachusetts law, a plaintiff claiming tortious interference must show "(1) a business relationship or contemplated contract of economic benefit; (2) the defendant's knowledge of such relationship; (3) the defendant's interference with the relationship through improper motive or means; and, (4) the plaintiff's loss of advantage as a direct result of the defendant's conduct." *Singh v. Blue Cross/Blue Shield of Mass., Inc., 308 F.3d 25, 47 (1st Cir. 2002)* (citation omitted). Here, Omilia alleges that **[*21]** Nuance knowingly communicated with Omilia's current client Connex and prospective client TD Bank regarding the instant patent lawsuit. Omilia alleges that as a direct result of these actions, Omilia "suffered substantial economic damages." Docket No. 44 ¶¶ 163, 168. Omilia has plausibly alleged claims of tortious interference with contractual and advantageous business relations.

Some courts have held that communications related to ongoing patent suits are protected by Noerr-Pennington immunity in some circumstances. Compare *Golan v. Pingel Enter., Inc., 310 F.3d 1360, 1364-65 (Fed. Cir. 2002)* (holding that notices sent to distributors of alleged infringer were protected by Noerr-Pennington immunity, because they were not sent in bad faith despite the patent having been expired at the time the letters were sent) and *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting Ltd., No. 02-12102, 2006 U.S. Dist. LEXIS 43690, 2006 WL 1766434, at *35 (D. Mass. June 28, 2006)* (dismissing tortious interference claim because defendant's communication with plaintiff's business partner regarding court's preliminary injunction decision was an act "incidental to protected litigation"), with *Nuance Commc'ns, Inc. v. MModal LLC, No. 17-01484, 2018 U.S. Dist. LEXIS 216709, 2018 WL 6804488, at *3 (D. Del. Dec. 27, 2018)* (explaining that "blog posts and press releases providing status updated regarding the litigation" did not enjoy Noerr-Pennington immunity). Here, Omilia argues that Noerr-Pennington immunity does not protect Nuance from tort liability **[*22]** because some communications were made before the patent lawsuit was filed. Omilia has plausibly alleged claims for tortious interference.

III. Request to Bifurcate and Stay Discovery

Nuance argues that if dismissal is not warranted, discovery on Omilia's antitrust and state law counterclaims should be stayed pending resolution of the patent infringement claims. *Federal Rule of Civil Procedure 42(b)* permits bifurcation of claims "[f]or convenience, to avoid prejudice, or to expedite and economize" issues for trial. "[F]ederal courts possess the inherent power to stay proceedings for prudential reasons." *Microfinancial, Inc. v. Premier Holidays Intern., Inc., 385 F.3d 72, 77 (1st Cir. 2004)*.

The Federal Circuit has noted that the "standard practice" is to separate "for trial patent issues and those raised in an antitrust counterclaim." *In re Innotron Diagnostics, 800 F.2d 1077, 1084 (Fed. Cir. 1986)* (emphasis added). This Court has affirmed that view multiple times. See, e.g., *Hewlett-Packard Co. v. Genrad, Inc., 882 F. Supp. 1141, 1157-58 (D. Mass. 1995)* ("[C]ourts often separate patent issues from antitrust counterclaim issues."); *Skinder-Strauss Assocs. v. Mass. Continuing Legal Educ., Inc., 870 F. Supp. 8, 11 (D. Mass. 1994)* ("[P]roceedings on the counterclaims should be stayed until after the resolution of the [intellectual property] action. This procedure will avoid a waste of judicial and party resources on the question of [the defendant's] intent in filing the lawsuit."). Courts sometimes allow discovery on patent claims and antitrust **[*23]** counterclaims to proceed in tandem, while preserving the possibility of bifurcation at trial. See, e.g., *Wi-LAN Inc. v. LG Elecs., Inc., 382 F. Supp. 3d 1012, 1026 (S.D. Cal. 2019)*.

Nuance points out that if it succeeds in its original patent suit, its success could demonstrate that the original suit is not a sham, but rather merits Noerr-Pennington immunity. See *Skinder-Strauss, 870 F. Supp. at 11* (staying defendant's antitrust counterclaims because resolution of the underlying intellectual property dispute would create "a record for determining whether the challenged litigation is objectively meritless"); see also *PREI, 508 U.S. 49, 60 n.5 (1993)* ("A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham."); *U.S. Philips Corp. v. Sears Roebuck & Co., 55 F.3d 592, 597 (Fed. Cir. 1995)* ("The charge that Philips' patent infringement suit in Florida was sham can not be deemed to have substance, for Philips prevailed in Florida on that issue.").

Nuance also argues it would be prejudiced by the cost of discovery regarding twenty years of its acquisition of patents and competitors. Indeed, the Supreme Court has cautioned that "proceeding to antitrust discovery can be expensive." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

Omilia responds that it would be prejudiced by a delay in the resolution of its antitrust claims, as continuation of Nuance's anticompetitive activities will hinder Omilia's ability **[*24]** to enter the U.S. market.

In order to balance judicial economy and potential prejudice to the parties, the Court stays discovery regarding Omilia's Sherman Act counterclaim at least until after phase 1 of the patent litigation. However, the Court allows limited discovery regarding Nuance's pre-litigation conduct and communications with respect to Omilia and certain competitors named in the complaint, specifically ART, Voice Signal, Vlingo, and MModal. See Docket No. 44 ¶ 117-119. The Court also allows discovery on Omilia's claims of tortious interference. Finally, the Court allows discovery related to the anticompetitive effect of Nuance's mergers and acquisitions on the current market under the Clayton Act claim. The parties shall propose a discovery schedule within 30 days.

CONCLUSION

The Court **ALLOWS** the motion to dismiss with regard to Omilia's claim of common law unfair competition (Count 19) and **DENIES** the motion to dismiss with regard to Omilia's remaining antitrust and state law counterclaims. The parties shall submit a joint proposed discovery schedule within 30 days.

SO ORDERED.

/s/ PATTI B. SARIS

Patti B. Saris

United States District Judge

United Food & Commer. Workers Health & Welfare Fund v. Ranbaxy Inc. (In re Ranbaxy Generic Drug Antitrust Litig.)

United States District Court for the District of Massachusetts

May 8, 2020, Decided; May 8, 2020, Filed

MDL No. 19-md-02878-NMG; No. 19-cv-10356 (D. Mass); No. 19-cv-10274 (D. Mass)

Reporter

2020 U.S. Dist. LEXIS 81462 *; 2020-1 Trade Cas. (CCH) P81,225

In re: Ranbaxy Generic Drug Application Antitrust Litigation, This Document Relates To: United Food and Commercial Workers Health and Welfare Fund of Northeastern Pennsylvania v. Ranbaxy Inc., et al., No. 19-cv-10356 (D. Mass) Louisiana Health Services and Indemnity Company d/b/a Blue Cross and Blue Shield of Louisiana, et al. v. Ranbaxy Inc., et al., No. 19-cv-10274 (D. Mass)

Prior History: *In re Ranbaxy Generic Drug Application Antitrust Litig., 355 F. Supp. 3d 1382, 2019 U.S. Dist. LEXIS 24048, 2019 WL 625968 (J.P.M.L., Feb. 11, 2019)*

Core Terms

consumer protection, motion to dismiss, notice, compliance, notice and demand, Consolidated, Counts, requirement of notice, alleged violation

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Judges: Nathaniel M. Gorton, United States District Judge.

Opinion by: Nathaniel M. Gorton

Opinion

MEMORANDUM & ORDER

GORTON, J.

This multi-district litigation involves five actions which were centralized in this Court and divided into two putative classes against Ranbaxy Inc. and Sun Pharmaceutical Industries Limited (collectively, "Ranbaxy" or "defendants") for allegedly causing the delayed market entry of three generic drugs (Diovan, Valcyte and Nexium).

Direct purchaser plaintiffs ("DPPs"), such as wholesalers, purchased brand name and generic drugs directly from drug manufacturers. End-payor plaintiffs ("EPPs"), such as consumers and third-party payors, purchased brand name and generic drugs at the end of the distribution chain from retailers and other financial intermediaries. The DPPs and EPPs separately bring claims for violations of the *Racketeer Influenced and Corrupt Organizations Act* ("RICO"), federal and state ***antitrust law*** and state consumer protection law.

Pending **[*5]** before the Court is the motion of Ranbaxy to dismiss Counts Six, Seven and Eight of the Consolidated Amended Complaint of the EPPs insofar as those counts allege violation of the state consumer protection statutes of California, West Virginia and Maine.

I. Background

Both the Court and the parties are well acquainted with the facts, which are described in detail in Magistrate Judge Page Kelley's Report and Recommendation on Ranbaxy's motion to dismiss the complaint of plaintiffs Meijer, Inc. and Meijer Distribution, Inc. in the original action in this Court prior to centralization. See *Meijer, Inc. v. Ranbaxy, Inc., No.1:15-cv-11828-NMG, 2016 U.S. Dist. LEXIS 120998 (D. Mass. Sept. 7, 2016)*. For purposes of completeness, however, the Court provides the following abbreviated summary of the background relevant to the pending motion.

On November 27, 2019, this Court dismissed without prejudice the EPPs' consumer protection claims under the laws of California, West Virginia and Maine for failure to plead compliance with the notice and demand requirements of the respective state statutes. With the Court's permission, the EPPs amended their consolidated complaint but Ranbaxy once again moves to dismiss each amended claim. **[*6]**

II. Motions to Dismiss

A. Legal Standard

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In considering the merits of a motion to dismiss, the Court may only look to the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the complaint and matters of which judicial notice can be taken. *Nollet v. Justices of Trial Court of Mass., 83 F. Supp. 2d 204, 208 (D. Mass. 2000)*, aff'd, *228 F.3d 1127 (1st Cir. 2000)*.

Furthermore, the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Langadinos v. Am. Airlines, Inc., 199 F. 3d 68, 69 (1st Cir. 2000)*. If the facts in the complaint are sufficient to state a cause of action, a motion to dismiss the complaint must be denied. See *Nollet, 83 F. Supp. 2d at 208*.

Although a court must accept as true all the factual allegations in a complaint, that doctrine is not applicable to legal conclusions. *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Threadbare recitals of legal elements which are supported by mere conclusory statements do not suffice to state a cause of action. Id. Accordingly, a complaint does not state a claim of relief where the well-pled facts fail to warrant an inference of any more than the mere possibility of misconduct. *Id. at 1950*.

B. Application

Ranbaxy moves to dismiss **[*7]** Counts Six, Seven and Eight of the EPPs' Consolidated Amended Complaint insofar as those counts allege violation of the state consumer protection statutes of California, West Virginia and Maine. Ranbaxy submits that the EPPs fail to allege compliance with the procedural notice and demand requirements of those acts. The EPPs respond that the procedural requirements are satisfied because Ranbaxy had actual notice of the EPPs' claims and written demands would have been futile.

1. California

The California consumer protection statute requires that 30 days prior to commencement of an action for damages for a consumer protection violation, a consumer "[n]otify the person alleged to have employed or committed" unlawful practices and "[d]emand that the person correct, repair, replace, or otherwise rectify" the unlawful goods or services. *Cal. Civ. Code § 1782(a)*. Such notice must be in writing and sent by certified mail. Id. The sole statutory exception applies to actions for injunctive relief. Id. *§ 1782(d)*. Such actions may be commenced without compliance with *Subdivision (a)* and may be amended 30 days thereafter to include a claim for damages. Id.

The procedural requirements of *Section 1782(a)* are not jurisdictional. *Cattie v. Wal-Mart Stores, Inc., 504 F. Supp. 2d 939, 949 (S.D. Cal. 2007)*. Compliance is, however, "necessary **[*8]** to state a claim." Id. (citing *Outboard Marine Corp. v. Superior Court, 52 Cal. App. 3d 30, 40-41, 124 Cal. Rptr. 852 (1975))*. The legislative intent in enacting *Section 1782(a)* reflects goals beyond mere notice and include the imposition of time constraints upon a manufacturer's opportunity to take corrective action as well as the facilitation of settlement prior to litigation. See *Outboard Marine Corp., 52 Cal. App. 3d. at 40-41*. California courts have consistently held that such goals can be accomplished only by literal application of the notice and demand requirements. *Davis v. Chase Bank U.S.A., N.A., 650 F. Supp. 2d 1073, 1088-89 (C.D. Cal. 2009)*. Anything short of compliance is insufficient, even upon a showing that the defendant had actual notice as a result of similar litigation between the parties and the likelihood of settlement is virtually nonexistent. Id.

The EPPs were provided an opportunity to amend their consolidated complaint to allege compliance with the procedural requirements of *Section 1782(a)*. The Consolidated Amended Complaint fails to accomplish that goal. Accordingly, the California consumer protection claims of the EPPs will be dismissed, this time with prejudice.

2. West Virginia

The West Virginia consumer protection statute, like that of California, contains mandatory compliance language. It provides that no claim may be brought until the plaintiff

> has informed the seller or lessor in writing and by certified **[*9]** mail . . . of the alleged violation and provided . . . twenty days from receipt of the notice of violation but ten days in the case a cause of action has already been filed to make a cure offer . . .

W. Va. Code. § 46A-6-106(c). There is admittedly a dearth of caselaw interpreting that provision. The little that does exist, however, favors the California approach requiring strict application of the notice requirement absent statutorily prescribed excuses. See *McCoy v. South Energy Homes, Inc., No. 1:09-cv-1271, 2012 U.S. Dist. LEXIS 56594, 2012 WL 1409533, *12 (S.D.W. Va. Apr. 23, 2012)* ("Plaintiffs' argument that they are excused from providing notice to the seller because it would be impossible to do so fares no better. The statute does not create such an exception . . . .").

The EPPs' respond that the Court should simply apply a "liberal construction" to the West Virginia statute because it is "remedial" in nature and intended to protect consumers from unfair and deceptive business practices. The remedial nature of the statute does not, however, excuse one who seeks to bring a consumer protection claim from complying with the procedural requirements of providing written notice. Consequently, the EPPs' West Virginia consumer protection claims will be dismissed, also with prejudice.

[*10] 3. Maine

The consumer protection statute of Maine similarly employs mandatory language requiring pre-suit notice and demand. *Maine's Unfair Trade Practices Act* ("the MUTPA") provides that

> [a]t least 30 days prior to the filing of an action for damages, a written demand for relief, identifying the claimant and reasonably describing the unfair and deceptive act or practice relied upon and the injuries suffered, must be mailed or delivered to any prospective respondent at the respondent's last known address.

5 Me. Rev. Stat. § 213(1-A). The only statutory exception applies to counterclaims and cross claims. Id.

The case law interpreting the MUTPA is, as the parties describe, even more "sparse" than that interpreting its West Virginia counterpart. Unlike the West Virginia precedent, however, the limited case law interpreting the MUTPA is virtually uniform in allowing claims to proceed despite lack of pre-suit notice and demand. The Maine Supreme Judicial Court has plainly held that failure to comply with the MUTPA's pre-suit notice and demand requirement does not require dismissal. *Oceanside at Pine Point Condominium Owners Ass'n v. Peachtree Doors, Inc., 659 A.2d 267, 268 (Me. 1995)* ("Oceanside").

In Oceanside, the Court considered a dispute between a condo association and a window manufacturer in which summary judgment **[*11]** was entered in favor of defendants on plaintiffs' MUTPA claim for failure to comply with *Section 213(1-A)*. Id. Plaintiff insisted that the notice requirement was effectively met because the contractor that installed the allegedly defective windows sent to defendants a letter regarding the defect before plaintiff filed its lawsuit. *Id. at 272*. The Court held that the contractor's letter did not satisfy *Section 213(1-A)* because it was not written by the plaintiff, did not identify the allegedly unfair and deceptive conduct and did not make a demand for monetary relief. *Id. at 273*. The appellate Court nevertheless concluded that

> [i]n the absence of explicit terms regarding noncompliance . . . the notice requirements of *section 213(1—A)* are not jurisdictional and do not operate in this case to preclude the plaintiffs from maintaining their UTPA claim against [defendant].

Id.

Ranbaxy dismisses Oceanside as merely holding that *Section 213(1-A)* is not jurisdictional. That interpretation is, however, undermined by the clear language of the Maine Supreme Judicial Court reaffirming *Oceanside in Kilroy v. Northeast Sunspaces, Inc., 2007 ME 119, 930 A.2d 1060, 1064 (Me. 2007)*. In Kilroy, the Court considered "the question of the appropriate remedy when . . . the notice requirement of *section 213(1-A)* is not met." Id. After reiterating that dismissal of the MUTPA claim was not required, **[*12]** the Court explained that the failure of a plaintiff to comply with *Section 213(1-A)* may have consequences other than dismissal, such as being factored into consideration in determining whether to award attorney's fees. Id. See also *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 350 F. Supp. 2d 160, 186 (D. Me. 2004)* ("[F]ailure to comply with the express terms of [the MUTPA's] notice requirement does not bar [plaintiff's] Maine consumer protection claim.").

Oceanside and *Kilroy* compel the conclusion that the failure to comply with *Section 213(1-A)* does not require dismissal of the EPPs' MUTPA claims. Accordingly, Ranbaxy's motion to dismiss the Maine consumer protection claims of the EPPs will be denied.

ORDER

For the forgoing reasons, the motion of defendants Ranbaxy, Inc. and Sun Pharmaceutical Industries, Ltd. to dismiss Counts Six, Seven and Eight of the Consolidated Amended Complaint of the End-Payor Plaintiffs (Docket No. 181) is, with respect to the alleged violation of the state consumer protection laws of Maine, **DENIED**, but is otherwise **ALLOWED**. Those counts, with respect to the alleged violation of the state consumer protection laws of California and West Virginia, are **DISMISSED with prejudice**.

So ordered.

/s/ Nathaniel M. Gorton

Nathaniel M. Gorton

United States District Judge

Dated May 8, 2020 **[*13]**

End of Document

Aya Healthcare Servs. v. AMN Healthcare, Inc.

United States District Court for the Southern District of California

May 12, 2020, Decided; May 20, 2020, Filed

Case No.: 17cv205-MMA (MDD)

Reporter

613 F. Supp. 3d 1308 *; 2020 U.S. Dist. LEXIS 139286 **; 112 Fed. R. Evid. Serv. (Callaghan) 801; 2020 WL 2553181

AYA HEALTHCARE SERVICES, INC., and AYA HEALTHCARE, INC., Plaintiffs, v. AMN HEALTHCARE, INC., et al., Defendants.

Prior History: *Aya Healthcare Servs. v. AMN Healthcare, 2017 U.S. Dist. LEXIS 201993 (S.D. Cal., Dec. 6, 2017)*

Core Terms

damages, travel, healthcare, retaliatory, nurses, staffing, non-solicitation, agencies, provisions, markets, termination, antitrust, summary judgment, argues, contract provision, exclusionary, prices, market power, monopolization, market share, Sherman Act, customers, employees, proffered, competitors, rivals, output, placements, platforms, Skiing

Counsel: **[**1]** For Aya Healthcare Services, Inc., Aya Healthcare, Inc., Plaintiffs: William A Markham, LEAD ATTORNEY, Law Offices of William Markham, P.C., San Diego, San Diego, CA USA; Kenneth M. Fitzgerald, Fitzgerald Knaier LLP, San Diego, CA USA.

For Amn Healthcare, Inc., Defendant: Amanda Catherine Fitzsimmons, LEAD ATTORNEY, DLA Piper LLP (USA), San Diego, CA USA; David Henry Bamberger, LEAD ATTORNEY, PRO HAC VICE, DLA Piper LLP (US), Washington, DC USA; Noah A Katsell, LEAD ATTORNEY, DLA Piper LLP (US), San Diego, CA USA.

For Amn Healthcare Service, Inc., Amn Services, Llc., Medefis, Inc., Defendants: Noah A Katsell, LEAD ATTORNEY, DLA Piper LLP (US), San Diego, CA USA; Amanda Catherine Fitzsimmons, DLA Piper LLP (USA), San Diego, CA USA.

For Shiftwise, Inc., Defendant: Noah A Katsell, LEAD ATTORNEY, DLA Piper LLP (US), San Diego, CA USA; Amanda Catherine Fitzsimmons, DLA Piper LLP (USA), San Diego, CA USA.

For National Staffing Solutions, Miscellaneous Party: Michael W Healy, LEAD ATTORNEY, Greene & Roberts, San Diego, CA USA.

Judges: HON. MICHAEL M. ANELLO, United States District Judge.

Opinion by: MICHAEL M. ANELLO

Opinion

[*1316] **REDACTED**[1]

[1] The Court has implemented the parties' proposed redactions in substantial part.

ORDER GRANTING DEFENDANTS' DAUBERT MOTION; AND

[Doc. No. 99]

GRANTING IN PART AND DENYING IN PART [2] DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

[Doc. No. 98]

Defendants AMN Healthcare, Inc., AMN Healthcare Services, Inc., AMN Healthcare Services LLC, Medefis, Inc. ("Medefis"), and Shiftwise Inc. ("Shiftwise"), (collectively, "Defendants" or "AMN") move to exclude certain opinions proffered by Plaintiffs Aya Healthcare Services, Inc. and Aya Healthcare, Inc.'s (collectively, "Plaintiffs" or "Aya") expert Patricia G. Donohoe. *See* Doc. No. 99 (hereinafter "*Daubert* motion"). Defendants also move for summary judgment on each of the claims asserted by Plaintiffs. *See* Doc. No. 98. For the reasons set forth below, the Court **GRANTS** AMN's *Daubert* motion and **GRANTS IN PART** and **DENIES IN PART** AMN's motion for summary judgment. The Court also **ORDERS** the parties to show cause as to whether summary judgment should be granted in AMN's favor with respect to Aya's *Sherman Act Sections 1* and *2* claims for exclusionary damages in light of the Court's findings with respect to market power and harm to competition.

BACKGROUND[2]

Aya brings this action against AMN asserting claims pursuant to *Sections 1* and *2* of the Sherman Antitrust Act of 1890 ("Sherman Act"), *15 U.S.C. §§ 1-7*, as amended by the *Clayton Act of 1914* ("Clayton Act"), *15 U.S.C. §§ 12-27*, *California's Cartwright Act*, **[**3]** *Cal. Bus. & Prof. Code § 16750(a)* and Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200, et seq.*, as well as a common law claim of tortious interference with prospective economic relations. *See* Doc. No. 37 ("TAC").

The case involves non-solicitation provisions in AMN's agreements with other healthcare staffing agencies, including Aya, as well as AMN's termination of the parties' collaborating relationship. The parties are companies that operate agencies for different types of temporary healthcare employees, the most relevant type here being travel nurses. Travel nurses are nurses and nurse technicians who perform temporary, medium-term assignments in understaffed hospitals and other healthcare facilities ("hospitals") that cannot have the assignments performed by their own nurses. *See* Doc. No. 150-2 ("Braynin Decl.") at 1.[3] The only other kind of temporary nurses are per diem nurses, who are generally unavailable to perform medium-term assignments. Hospitals will use the services of travel nurses only when they lack any alternative. *Id.*

Healthcare staffing agencies employ travel nurse recruiters to find, screen, and **[*1317]** recruit travel nurses, and maintain relationships with the travel nurses and work with other company personnel, particularly account **[**4]** managers, to place the travel nurses on temporary assignments. *Id.* at 8. The agencies place the travel nurses at hospitals several ways: by directly placing the travel nurses at the agencies' hospital accounts and by indirectly placing the travel nurses at hospitals through either an agency that manages the hospitals' travel nurse needs ("managed service provider" or "MSP") or electronic platforms that facilitate the placements. *See id.* at 2. In 2017, agencies placed approximately 31 percent of travel nurse services directly and approximately 15 and 54 percent indirectly via platforms and MSPs, respectively. *See* Doc. 150-22 ("Markham Decl.), Ex. 81 at 12-16.

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[2] These material facts are taken from the parties' separate statements and responses thereto, as well as the supporting declarations and exhibits. Disputed material facts are discussed in further detail where relevant to the Court's analysis. Facts that are immaterial for purposes of resolving the current motions are not included in this recitation.

[3] Unless the Court indicates otherwise, the Court's citations to electronically filed documents refer to the pagination assigned by the document's author, rather than the pagination assigned by the CM/ECF system.

AMN has been a leader in the healthcare staffing industry for over thirty years. *See id.* at 3. In 2009, in addition to providing travel nurses to hospitals on direct placements, AMN started to become the MSP of an increasing number of hospitals. Later in 2013 and 2015, AMN acquired two electronic platforms, Shiftwise and Medefis, respectively, and began to place temporary travel nurses through the platforms. *See id.* at 3.

Aya is a younger healthcare staffing company that was founded in 2009 by Alan Braynin. *See id.* at 1. Braynin merged Aya with another healthcare staffing **[**5]** company that he founded in 2001, Access Nurses, Inc., by having Aya purchase its assets and operations. *Id.* Since its founding, Aya has been placing nurses directly in hospitals, and it has also been Aya's "mainstay" to take advantage of subcontracting opportunities, placing nurses in hospitals indirectly through MSP programs, such as those of AMN. *See id.* at 3-4.

As AMN grew its MSP programs, it was not always able to fulfill the demand of its hospital customers for travel nurse assignments. In these circumstances, AMN referred these "spillover assignments" to its network of subcontractors, or "associate vendors" ("AVs"), which were other healthcare staffing agencies, such as Aya. *See id.* at 4. These spillover assignments offered Aya and other healthcare staffing agencies a valuable source of income, which was also attractive to travel nurses because AMN's customer network was known generally to offer better opportunities in terms of pay and healthcare experience. *See id.* Aya later introduced its own MSP program, *see* Doc. 150-1 at 12, as have other healthcare staffing agencies. *See* Markham Decl., Ex. 81 at 20-21.

To obtain the spillover assignments from AMN, Aya first had to satisfy AMN that Aya was **[**6]** competent to provide travel nurses to AMN's customer network. In 2010, Aya provided information about its company to AMN at its request and met its criteria to become a subcontractor and receive spillover assignments. *See id.* Thereafter, AMN explained to Aya that to complete the process, Aya had to agree to AMN's [TEXT REDACTED BY THE COURT] that AMN allowed Aya to serve for spillover assignments. *Id.* at 4-5; Braynin Decl., Exs. 1, 2. The AV agreements include certain non-solicitation provisions. *See* Braynin Decl., Exs. 1, 2. Aya signed its first AV agreement in 2010, becoming AMN's AV for subcontracting opportunities to provide travel nurses to AMN's customers upon its request. *See* Braynin Decl. at 5. AMN and Aya experienced a mutually beneficial relationship going forward as Aya became AMN's largest AV and AMN continued to provide Aya with opportunities to grow its young company. *See id.* at 5-6.

In 2013, when AMN acquired Shiftwise, AMN utilized the electronic platform like its MSP programs and fulfilled the demand of its customers for travel nurses through placements on Shiftwise. *See id.* at **[*1318]** 5. AMN made spillover assignments available to its AVs via Shiftwise, and later via Medefis when AMN acquired that platform **[**7]** in 2015. Aya has made temporary placements of its travel nurses through both platforms since AMN acquired them and continues to do so. *See id.* at 17.

Around May 2015, Aya began actively soliciting AMN's travel nurse recruiters. *See* Braynin Decl. at 9-12. Aya had not previously solicited AMN's travel nurse recruiters. *See id.* at 10-11. Since then, the parties' business relationship has soured. Around late September 2015, AMN temporarily terminated Aya's access to AMN's platform. *See* Braynin Decl. at 14. This took place while Aya still had travel nurses on assignments through the platform at some of AMN's hospital accounts. Aya experienced difficulty with monitoring the travel nurses that remained on assignments until it successfully negotiated with AMN to restore limited access for Aya to the platform. *See id.* AMN no longer provided Aya with spillover assignments through its MSP programs, and the parties later memorialized the termination of their prior AV agreements in December 2015. *See id.* at 15; Doc. No. 98-2 ("Fitzsimmons Decl."), Ex. 1.

During its AV relationship with AMN, Aya grew its business. According to Staffing Industry Analysts ("SIA"), the leading research and trade organization for the U.S. staffing **[**8]** industry, Aya ranked [TEXT REDACTED BY THE COURT] between 2013 and 2017. *See* Doc. No. 150-1 at 1 (referring to Fitzsimmons Decl., Ex. 4 at 40:7-41:6, 42:16-19 and Fitzsimmons Decl., Ex. 2). SIA also reported that between 2014 and 2017, Aya's travel nurse revenues [TEXT REDACTED BY THE COURT]; its travel nurse market share [TEXT REDACTED BY THE

COURT];[4] and it rose from [TEXT REDACTED BY THE COURT]. *See id.* at 2 (referring to Fitzsimmons Decl., Ex. 5).

[TEXT REDACTED BY THE COURT][5] [TEXT REDACTED BY THE COURT]. *See id.* at 4 (referring to Fitzsimmons Decl., Ex. 9). Aya grew at a compound annual growth rate of 85% between 2012 and 2017 and by an average of 90% between 2013 and 2018. *See id.* at 5 (referring to Fitzsimmons Decl., Ex. 4 at 83:17-22, 116:12-117:4, 117:22-118:13). Aya has also reported truthfully to its customers that in 2016 to 2017, "it added more travel nurses than its top two competitors combined (one of them being AMN);" "it has a consistent 'fill rate' for all of its MSP programs of 99% and can fill those travel nurse positions within one to five days;" and "it has tens of thousands of travel nurse candidates for recruitment each year." *Id.* at 7-9 (referring to Fitzsimmons Decl., Ex. 4 at 83:17-22, **[**9]** 88:23-89:15, 90:1-13, 115:2-10).

Aya commenced this action on February 2, 2017. *See* Doc. No. 1. Aya claims that it suffered "exclusionary damages" as a result of AMN's non-solicitation covenant in the parties' AV agreements and "retaliatory damages" as a result of AMN's decision to terminate its AV relationship with Aya. *See* Opp. at 19, 22-24. Aya claims that these business practices unreasonably restrain trade and interfere with Aya's prospective business opportunities in violation of federal, state, and common law. *See* Doc. No. 1. The non-solicitation provision applicable to Aya in the parties' AV agreement is set forth below:

> [TEXT REDACTED BY THE COURT]

[*1319] Braynin Decl. Ex. 1; *see also* Braynin Decl. Ex. 2.

DEFENDANTS' *DAUBERT* MOTION

AMN moves pursuant to *Rules 403* and *702 of the Federal Rules of Evidence* to exclude certain opinions proffered by Aya's putative industry expert, Patricia G. Donohoe. AMN objects to Donohoe's opinions regarding (1) "how certain restraints would be interpreted by industry participations," and (2) "how these restraints would impact the relevant industry participants." Doc. No. 99 at 1 (quoting 99-1 at 50). AMN argues that Donohoe's proposed testimony should be excluded to the extent (1) she proffers legal interpretations **[**10]** of certain contractual provisions between AMN and its employees, customers, and other healthcare staffing agencies; (2) she opines as to the purported competitive impact of such contractual provisions; (3) she opines as to how industry participants might react to or feel about such contractual provisions; and (4) opines as to AMN's reputation for enforcing such contractual provisions. *See* Doc. No. 99 at 2-6. Aya opposes AMN's *Daubert* motion, primarily arguing that the opinions at issue should not be excluded because Donohoe "does not tell the jury what legal conclusions to reach on the ultimate issues before it . . . ." Doc. No. 110 at 5.

1. Legal Standard

Rule 702 of the Federal Rules of Evidence provides that expert opinion evidence is admissible if: "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." *Fed. R. Evid. 702*. Expert opinion testimony is reliable if such knowledge has a "basis in the knowledge

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[4] Aya disputes that AMN's market share [TEXT REDACTED BY THE COURT] as shown by an SIA report because [TEXT REDACTED BY THE COURT]. *See id.* This dispute, however, is not material since the market share is measured nationally, while Aya's proposed geographic markets for its federal antitrust claims are regional. *See* Doc. No. 37 ¶¶ 331, 360.

[5] Aya's fiscal year begins on October 1st of the preceding year and ends on September 30th of the fiscal year in question. For example, for Aya's fiscal year 2017, it began on October 1, 2016, and ended on September 30, 2017. *See* Fitzsimmons Decl., Ex. 7 at 45:7-13.

and experience **[**11]** of [the relevant] discipline." *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. "Knowledge" requires more than a subjective belief or an unsupported speculation; it requires an appropriate level of validation. *See id. at 593*. As the Ninth Circuit has explained:

> Under *Daubert* and its progeny, including *Daubert* II, a district court's inquiry into admissibility is a flexible one. *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc., 738 F.3d 960, 969 (9th Cir. 2013)*. In evaluating proffered expert testimony, the trial court is "a gatekeeper, not a fact finder." *Primiano v. Cook, 598 F.3d 558, 565 (9th Cir. 2010)* (citation and quotation marks omitted).
>
> "[T]he trial court must assure that the expert testimony 'both rests on a reliable foundation and is relevant to the task at hand.'" *Id. at 564* (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 597, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993))*. "Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." *Id. at 565* (citation and internal quotation marks omitted). "Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Id. at 564* (citation omitted). The judge is "supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable." **[**12]** *Alaska Rent-A-Car, 738 F.3d at 969*. Simply put, "[t]he district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance **[*1320]** such that it would be helpful to a jury." *Id. at 969-70*.

City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1043-44 (9th Cir. 2014). "Challenges that go to the weight of the evidence are within the province of a fact finder, not a trial court judge. A district court should not make credibility determinations that are reserved for the jury." *Id. at 1044*.

2. Discussion

a. Qualifications

As an initial matter, the parties do not dispute that Donohoe has extensive experience in the healthcare staffing industry. *See* Doc. No. 134 at 1. Nor has AMN moved to exclude Donohoe's proffered testimony on the ground that she is not qualified.

Rule 702 recognizes that witnesses gain expertise in a variety of ways, including training and experience. Experience-based experts may testify on matters within their expertise. *See, e.g., Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc., 618 F.3d 1025, 1043 (9th Cir. 2010)* (admitting proffered expert's industry testimony where his expertise "is one based on experience"); *Hangarter v. Provident Life and Accident Ins. Co., 373 F.3d 998, 1016 (9th Cir. 2004)* ("Given [expert's] significant knowledge of and experience within the insurance industry, the district court did not abuse its discretion in concluding that he was qualified to testify as an expert witness.")

Donohoe has gained extensive experience **[**13]** and specialized knowledge in the healthcare staffing industry since 1980. *See* Doc. Nos. 99-3 at 7;[6] 110 at 2. She details this extensive experience in the beginning of her report. *See* Doc. No. 99-3 at 7-9. Accordingly, the Court finds that Donohoe is qualified under *Rule 702* to opine on matters within her experience in the healthcare staffing industry.

b. Opinions as to the Industry Participants' Interpretations of or Reactions to Contract Provisions

[6] There are two sets of page numbering with respect to Defendants' Exhibit A (Doc. No. 99-3) in support of its *Daubert* motion. The Court's citations refer to the page numbering of the filed exhibit, located directly beneath the page number of the actual report.

The parties dispute whether Donohoe has inappropriately opined as to industry participants' interpretations of and reactions to certain of AMN's contract provisions. AMN contends that Donohoe's opinions regarding the legal interpretations of contract provisions are "inappropriate and would be confusing to a jury . . .." Doc. No. 99-1 at 3. AMN further argues that Donohoe may neither opine as to the legal interpretations of the contractual provisions nor to industry participants' interpretations of or reactions to the same. *See id.* at 3-5. Aya responds that Donohoe "does not offer any ultimate conclusion of law at issue in this antitrust case" and permissibly "provides [an] analysis on the basis of her extraordinary experience and knowledge in the travel-nurse **[**14]** industry." Doc. 110 at 4.

Unless a contract is deemed ambiguous or there is a term of the contract that requires an expert's explanation, it is improper for an expert to interpret or construe a contract in his opinion. *McHugh v. United Serv. Auto. Ass'n, 164 F.3d 451, 454 (9th Cir. 1999)* (holding that "although experts may disagree in their conclusions; their testimony cannot be used to provide legal meaning or interpret the policies as written."). Such matters of law are "inappropriate subjects for expert testimony." *Aguilar v. Int'l Longshoremen's Union Local No. 10, 966 F.2d 443, 447 (9th Cir.1992)*. Moreover, "the opinions of [expert] witnesses on the intent, **[*1321]** motives, or states of mind of corporations, regulatory agencies and others have no basis in any relevant body of knowledge or expertise." *Stone Brewing Co., LLC v. MillerCoors LLC, No. 18-CV-331, 2020 U.S. Dist. LEXIS 32010, 2020 WL 907060, at *4 (S.D. Cal. Feb. 25, 2020)* (quoting *In re Rezulin Prods. Liab. Litig., 309 F. Supp. 2d 531, 546 (S.D.N.Y. 2004))*.

AMN primarily relies on *Wells Fargo Bank N.A. v. LaSalle Bank Nat. Ass'n* in support of its position that Donohoe's interpretations of their contractual provisions should be excluded. In that case, the defendant's industry expert opined as to the defendant's liability pursuant to an exculpatory provision of the contract at issue and the lack of any basis for the plaintiff's claim under the contract. *See Wells Fargo Bank N.A. v. LaSalle Bank Nat. Ass'n, No. 08-CV-1448, 2011 U.S. Dist. LEXIS 119395, 2011 WL 743748, at *3 (D. Nev. Feb. 23, 2011)*. The court held that such opinions based on the expert's contract interpretation were inappropriate and excluded. Here, AMN is **[**15]** correct that Donohoe interprets the contract, as she expressly states in her report that her assignment was in part to "opine on how certain restraints imposed by AMN would be interpreted by participants in the travel nurse staffing industry . . .." Doc. No. 99-3 at 10; *see also id.* at 56.

Aya does not contend that Donohoe opines as to any purportedly ambiguous provisions of AMN's contracts. Nor does Aya proffer any reason as to why Donohoe was opined as to the interpretation of such contract provisions, other than to "explain[] her understanding of what those restraints purport to do, how those are bound by them are affected by them in practice, and what has been their likely effect on agencies, staffing professionals, and travel nurses." Doc. No. 110 at 4. Aya primarily relies on dicta from the Tenth Circuit's *Specht v. Jensen* decision, arguing that such opinions are proper. *See id.* In *Specht*, the court excluded an attorney expert witness's testimony regarding his views of the applicable law and opinion as to whether defendants' conduct violated the law. *See Specht v. Jensen, 853 F.2d 805, 806 (10th Cir. 1988)*. In dicta, the court stated that an expert's testimony is proper "if the expert does not attempt to define the legal parameters within **[**16]** which the jury must exercise its fact-finding function," but is improper "when the purpose of testimony is to direct the jury's understanding of the legal standards upon which their verdict must be based . . .." *Id. at 809-10*.

Aya's reliance on *Specht* is unpersuasive, as the court there did not speak to an expert's attempt to interpret any contract provision. Moreover, "[t]he question of interpretation of [a] contract is for the jury and the question of legal effect is for the judge. In neither case do we permit expert testimony." *Loeb v. Hammond, 407 F.2d 779, 781 (7th Cir. 1969)* (citing 3 Corbin on Contracts, § 554, 226-27 (1960)); *see also Marx & Co. v. Diners' Club Inc., 550 F.2d 505, 509 (2d Cir. 1977)* (excluding expert opinion "as to the meaning of the contract terms at issue"). Accordingly, Donohoe's interpretations of the contracts must be excluded because "it is improper for an expert to interpret or construe the [unambiguous] contract in h[er] opinion." *Wells Fargo, 2011 U.S. Dist. LEXIS 119395, 2011 WL 743748, at *3* (citing *McHugh, 164 F.3d at 454*). Further, Donohoe's proffered testimony is speculative as to how the "restraints would be interpreted by industry participants." Doc. No. 99-3 at 56. This constitutes impermissible testimony regarding the states of mind of third parties that has "no basis in any relevant body of knowledge or expertise." *Stone Brewing Co., 2020 U.S. Dist. LEXIS 32010, 2020 WL 907060, at *4*. Lastly, the Court excludes Donohoe's testimony under *Rule 403* as substantially **[**17]** more prejudicial than probative, since the testimony would **[*1322]** intrude on the jury's role of interpreting the contract provisions at issue.

c. Opinions as to the Competitive Impact of Contractual Restraints

AMN next contends that Donohoe's testimony as to the competitive impact of certain of AMN's contract provisions should be excluded. *See* Doc. No. 99-1 at 3-4. AMN argues that such testimony is speculative, unreliable, confusing, and highly prejudicial, and in any event the testimony should come from percipient witnesses. *See id.* Aya maintains that such testimony is admissible. *See* Doc. No. 110 at 4-5.

"Expert testimony is inadmissible if it addresses lay matters which a jury is capable of understanding and deciding without the expert's help." *In re Novatel Wireless Secs. Litig., No. 08-CV-1689, 2011 U.S. Dist. LEXIS 133105, 2011 WL 5827198, at *4 (S.D. Cal. Nov. 17, 2011)* (internal quotations omitted, citing *Highland Capital Mgmt., L.P. v. Schneider, 379 F. Supp. 2d 461, 468 (S.D.N.Y. 2005))*. As such, expert testimony cannot be presented to the jury solely for the purpose of constructing a factual narrative based upon record evidence. *See Johns v. Bayer Corp., No. 09-CV-1935, 2013 U.S. Dist. LEXIS 51823, 2013 WL 1498965, at *28 (S.D. Cal. Apr. 10, 2013)* (excluding proffered expert testimony that "offer[ed] nothing more than a factual narrative of [] documents") (citing *In re Rezulin, 309 F. Supp. 2d at 551* (rejecting portions of plaintiffs' expert's testimony that was "a narrative reciting selected regulatory events" because "[s]uch material, to the **[**18]** extent it is admissible, is properly presented through percipient witnesses and documentary evidence")).

The Court finds that under the circumstances, such testimony is unhelpful to the jury. Donohoe sets out her interpretations of certain contractual provisions and then concludes that such provisions "make it more difficult" for other healthcare staffing agencies to compete and "discourage" AMN's employees from leaving to other healthcare staffing agencies. *See, e.g.*, Doc. No. 99-3 at 55 ("AMN's non-solicitation restraint makes it more difficult for an associate vendor to hire employees . . .."), 62 ("AMN's confidentiality restraint would discourage an AMN employee from leaving for a competitor . . .."). In other words, after Donohoe impermissibly interprets the contractual provisions at issue in this case, she forms conclusions as to their effects on competition and states of mind of industry participants. Such testimony intrudes on the province of the jury, who is capable of evaluating the same evidence and drawing conclusions without Donohoe's proffered testimony. Donohoe's experience in the healthcare staffing industry does not render her specially situated, or any better situated **[**19]** than lay persons on a jury, to observe and draw conclusions from evidence regarding any effects of the different types of contractual provisions at issue on healthcare staffing agencies and AMN's employees. *See In re Novatel Wireless Secs. Litig., 2011 U.S. Dist. LEXIS 133105, 2011 WL 5827198, at *4* (excluding proffered expert testimony forming conclusions based on a reading of record evidence because "no specialized or technical knowhow is required to read and draw conclusions" from the documents and testimony cited by the expert); *Andrews v. Metro N. Commuter R.R. Co., 882 F.2d 705, 708 (2d Cir. 1989)* (expert testimony is inadmissible when it addresses "lay matters which a jury is capable of understanding and deciding without the expert's help"). And as discussed above, an expert may not testify regarding the states of mind of third parties. *See Stone Brewing Co., 2020 U.S. Dist. LEXIS 32010, 2020 WL 907060, at *4*. Therefore, her opinions that certain industry participants are "discouraged" by AMN's contracts are likewise inadmissible.

The Court further agrees with AMN that Donohoe is simply providing a narrative **[*1323]** of Aya's theory of the case, which "is properly presented through percipient witnesses and documentary evidence." *Rezulin, 309 F. Supp. 2d at 551*; *see also LinkCo, Inc. v. Fujitsu Ltd., 2002 U.S. Dist. LEXIS 12975, 2002 WL 1585551, at *1-*2 (S.D.N.Y. July 16, 2002)* (where expert's report was based on a review of, *inter alia*, "documents, computer documents, computer files, deposition transcripts and exhibits," the "testimony by fact witnesses **[**20]** familiar with those documents would be far more appropriate ... and renders [the expert witness'] secondhand knowledge unnecessary for the edification of the jury") (citation and internal quotation marks omitted) (alterations in original); *Taylor v. Evans, No. 94-CV-8424, 1997 U.S. Dist. LEXIS 3907, 1997 WL 154010, at *2 (S.D.N.Y. Apr.1, 1997)* (rejecting portions of expert report on the ground that the testimony consisted of "a narrative of the case which a lay juror is equally capable of constructing").

Thus, for the foregoing reasons, Donohoe's proffered testimony as to the competitive impact of the contractual provisions is excluded.

d. Opinions as to Defendants' Reputation

AMN lastly argues that Donohoe's opinions as to AMN's reputation for enforcing their contracts with its employees and other healthcare staffing agencies should be excluded. *See* Doc. No. 99-1 at 5-6. Specifically, AMN argues that such testimony "is vague, confusing, irrelevant and prejudicial." *Id.* at 6. As AMN recognizes, Aya's failure to oppose the *Daubert* motion on this issue constitutes a waiver or abandonment in regard to this uncontested issue. *See* *Luat v. Mabus, No. 11-CV-0496, 2011 U.S. Dist. LEXIS 142484, 2011 WL 6152285, at *4 (S.D. Cal. Dec. 12, 2011)* (citing *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp., 802 F. Supp. 2d 1125, 1132 (C.D. Cal. Aug. 9, 2011)* ("[I]n most circumstances, failure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to **[**21]** the uncontested issue")).

The Court also agrees with AMN on the merits. Donohoe's testimony is irrelevant to any issue that the jury will decide in this case, and even if it had any relevance, such relevance is substantially outweighed by the likelihood of unfair prejudice to AMN. *See, e.g.,* *Napolitano v. Synthes, Inc., No. 09-CV-828, 2014 U.S. Dist. LEXIS 204087, 2014 WL 12867042, at *5 (D. Conn. Apr. 9, 2014)* (excluding expert's opinion of the reputation of the defendant and its products as irrelevant to any issue in the case and unfairly prejudicial to the defendant). Moreover, Donohoe's testimony as to AMN's reputation lacks any basis in her experience or in any methodology and is therefore unreliable and unhelpful to the jury. *See, e.g.,* *Tajonera v. Black Elk Energy Offshore Operations, L.L.C., No. 13-CV-0366, 2016 U.S. Dist. LEXIS 193772, 2016 WL 8274173, at *8 (E.D. La. May 26, 2016)* (excluding expert opinion as to defendant's "culture" and reputation because the expert lacked experience, expertise, and methodology to substantiate such opinions).

e. Conclusion

In sum, the Court finds that while Donohoe is qualified to testify as a healthcare staffing industry expert, her testimony as to industry participants' interpretations of and reactions to certain contract provisions, the competitive effect of such contract provisions, and AMN's reputation is impermissible. Accordingly, the Court finds the proffered opinions inadmissible and **GRANTS** AMN's **[**22]** *Daubert* motion.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

AMN moves for summary judgment on all of Aya's claims. *See* Doc. No. 98. AMN argues that Aya cannot establish the essential element of antitrust injury and therefore Aya's Sherman Act and Cartwright Act claims fail. AMN contends that **[*1324]** Aya's additional claims lack any evidentiary basis upon which to establish a genuine factual issue for trial.

1. Legal Standard

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. The party seeking summary judgment bears the initial burden of establishing the basis of its motion and of identifying the portions of the declarations, pleadings, and discovery that demonstrate absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The moving party has "the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party." *Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)*. A fact **[**23]** is material if it could affect the outcome of the suit under applicable law. *See* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *See id.*

2. Aya's Antitrust Claims

AMN argues that Aya's claims under *Sections 1* and *2* of the Sherman Act and the California Cartwright Act fail because the undisputed record evidence shows Aya has suffered no antitrust injury, nor could it as a matter of law.[7] *See* Doc. 98-1 ("MSJ Mem.") at 4-33.

a. Relevant Law

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. To prove a *Section 1* claim, a plaintiff must show (1) that there was a contract, combination, or conspiracy, *i.e.*, an agreement or concerted action toward a common goal, (2) that the agreement unreasonably restrains trade, under either a *per se* rule of illegality or a rule of reason analysis, and (3) that the restraint harmed competition, not just competitors. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 632 (9th Cir. 1987)*; *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 812 (9th Cir. 1988)*.

Section 2 of the Sherman Act declares it unlawful to "monopolize" or "attempt to monopolize." *15 U.S.C. § 2*. To prove monopolization under *Section 2*, a plaintiff must prove (1) that the defendant **[**24]** has monopoly power in the relevant market, and (2) that the defendant willfully acquired or maintained that power. *See Transamerica Computer Co., Inc. v. International Business Machines Corp., 698 F.2d 1377, 1382 (9th Cir.)*, *cert. denied*, *464 U.S. 955, 104 S. Ct. 370, 78 L. Ed. 2d 329 (1983)*. To prove attempted monopolization under *Section 2*, a plaintiff must show (1) that the defendant specifically intended to control prices or to destroy competition, (2) that the defendant engaged in anticompetitive conduct directed to accomplishing **[*1325]** that end, and (3) that the defendant has a dangerous probability of success. *See id.*

Section 4 of the Clayton Act authorizes a private right of action for private parties "injured in [their] business or property by reason of anything forbidden in the antitrust laws . . .." *15 U.S.C. § 15*. And as with all federal claims, a plaintiff must establish Article III standing, which requires proof of (1) injury-in-fact, (2) causation, and (3) redressability. *Gerlinger v. Amazon.com Inc., 526 F.3d 1253, 1255 (9th Cir. 2008)*. "For Article III purposes, an antitrust plaintiff establishes injury-in-fact when he has suffered an injury which bears a causal connection to the alleged antitrust violation." *Id.* (internal quotation marks and citation omitted). Private antitrust plaintiffs must make that showing of causal antitrust injury by demonstrating they suffered (1) "injury of the type the antitrust laws were intended **[**25]** to prevent" that also (2) "flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; *In re Online DVD-Rental Antitrust Litig., 779 F.3d 914, 921-22 (9th Cir. 2015)*.

b. Analysis

AMN moves for summary judgment on the singular issue of antitrust injury. *See* Doc. No. 98 at 1 ("[T]he undisputed material facts in the record and applicable law compel the conclusion that Aya has not suffered antitrust injury, whether in the form of 'exclusionary' or 'retaliatory' damages or otherwise, and therefore Aya cannot prevail on its claim for violation of the federal and state antitrust laws."); Reply at 1 (quoting the same). As noted above, Aya claims it "has suffered two kinds of antitrust injury because of AMN's antitrust violations: exclusionary harm and retaliatory harm." TAC ¶ 262. With respect to Aya's claim of exclusionary damages, AMN does not argue that Aya cannot demonstrate the other requisite *Section 1* elements: (1) that there was a contract, combination, or conspiracy, *i.e.*, an agreement or concerted action toward a common goal, (2) that the agreement unreasonably restrains trade, under either a *per se* rule of illegality or a rule of reason analysis, and (3) that the restraint harmed competition, not just competitors. Regarding Aya's claim of **[**26]** retaliatory damages, AMN similarly does not address these elements expressly, though it does contest the existence of a "'cartel' agreement among industry staffing companies" under the first element. MSJ Mem. at 16. Moreover, AMN does not expressly move for summary judgment on the other *Section 2* elements for monopolization or attempted monopolization, though AMN

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[7] The Court prioritizes its analysis of Aya's Sherman Act claims because the Court's subject matter jurisdiction hinges on the presence of a federal question pursuant to *28 U.S.C. § 1331*. In any event, the Court's analysis under the Cartwright Act would be the same as the Court's analysis under the *Sherman Act*. *See County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)* (citing *Cal. Bus. & Prof. Code § 16700 et seq.*).

does contest Aya's assertion that AMN was "acting as a monopolist or under circumstances where there was a danger of AMN becoming a monopolist." *Id.* at 17.

The Court provides this detail as a threshold matter to make clear that it will only address the express basis for AMN's motion for summary judgment: the issue of antitrust injury. To the extent AMN appears to challenge other elements of Aya's claims, the Court will address those arguments as they arise.

i. Exclusionary Damages

AMN first argues that Aya's claim for "exclusionary damages" is belied by the undisputed factual record, and in any event fails as a matter of law because (1) the parties' AV agreements containing the restraints at issue were easily terminable, and (2) Aya cannot disaggregate its damages attributable to the alleged anticompetitive conduct from losses flowing from lawful **[**27]** conduct. *See* MSJ Mem. at 4-13. The Court addresses each argument in turn.

[*1326] 1. Aya's Growth

First, AMN argues that the undisputed record evidence shows that Aya grew considerably from 2013 to mid-2015 when Aya was subject to the non-solicitation provisions at issue, and therefore, there is no genuine dispute of material fact that Aya has suffered no injury in fact or antitrust injury. *See* MSJ Mem. at 4-9. Aya responds that AMN is incorrect, because even a profitable plaintiff may suffer causal antitrust injury where a defendant's anticompetitive conduct causes the plaintiff lost profits. *See* Opp. at 20.

The Court agrees with Aya. Aya's undisputed growth during the time period in question is no doubt in tension with its theory that it suffered harm. However, AMN provides no authority that such evidence is dispositive on the issue of whether Aya suffered causal antitrust injury. Indeed, the argument is not responsive to Aya's theory that it would have earned greater profits but for the alleged anticompetitive conduct. *See, e.g.*, Opp. at 21. Controlling and persuasive case law show that even a profitable antitrust plaintiff may recover lost profits attributable to a defendant's anticompetitive conduct. *See* *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1222 (9th Cir. 1997)* ("Juries **[**28]** may award damages to profitable businesses for lost sales as the result of anticompetitive behavior."); *see also* *Pierce v. Ramsey Winch Co., 753 F.2d 416, 436-37 (5th Cir. 1985)* (plaintiff can establish antitrust injury by showing that it would have earned an even higher profit but for anticompetitive conduct). Accordingly, AMN is not entitled to summary judgment on this ground.

2. Easily Terminable Contracts

AMN next argues that because its AV agreements with Aya were easily terminable, Aya's purported claim for exclusionary damages fails as a matter of law. *See* MSJ Mem. at 9-10. Aya responds that "a party that enters into a contract offered by a counterparty with superior bargaining power can later challenge the contract on antitrust grounds." Opp. at 25 (citing *Systemcare, Inc. v. Wang Labs. Corp., 117 F.3d 1137, 1138 (10th Cir. 1997)* and *US Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43, 48-49 (2d Cir. 2019))*. Aya adds that in any event, the non-solicitation restraints on AVs expressly [TEXT REDACTED BY THE COURT] Opp. at 26.

Though AMN provides no authority for its position, the argument has some appeal. The pertinent inquiry in a *Section 1* case such as this is whether the challenged agreement *unreasonably* restrains trade. *See* *United States v. Standard Oil Co., 221 U.S. 1, 60, 31 S. Ct. 502, 55 L. Ed. 619 (1911)* (establishing the "rule of reason" standard that only those restraints upon interstate commerce which are unreasonable are proscribed by *§ 1* of the Sherman Act); *see also* *Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 315 (2d Cir. 2008)* (The Supreme Court "has **[**29]** not taken a literal approach to [*Section 1*]," but instead "has long recognized that Congress intended to outlaw only *unreasonable* restraints.") (citing *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* (emphasis in *Dagher*)). In essence, AMN argues that no such unreasonable restraint exists here since Aya and other agencies can simply exercise their rights to terminate their agreements and free themselves of the non-solicitation provisions. An analogous argument has been made, sometimes successfully, in the exclusive dealing context. *See, e.g.,* *Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163 (9th Cir. 1997)* (granting summary judgment for defendant manufacturer where its agreements with customers were of short duration and easily terminable, thereby "negat[ing] substantially their potential to foreclose competition" **[*1327]** from competing manufacturers); *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 194 (3d Cir. 2005)* (reversing judgment for defendant, finding that despite the legal ease with which customers can terminate contracts with defendant, the commercial realities showed that such terminations were not realistic).

Nevertheless, the Court finds that AMN's argument is insufficient for purposes of summary judgment. First, AMN provides no authority for its position, nor can the Court find any that holds a contract with a termination clause precludes a finding of an unreasonable **[**30]** restraint under *Section 1*. Rather, if there is an agreement that harms competition, and the counterparty suffers injury as a result, it may challenge the agreement as an unreasonable restraint under *Section 1*. *See* *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 766, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (noting that the Court has previously found "each plaintiff could 'clearly' charge a combination between itself and the defendants") (citing *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968))*. Though the cases cited by Aya do not directly confront the issue, the cases are informative. In *Systemcare*, the court recognized that "a plaintiff 'can clearly charge a combination between [the defendant] and himself, as of the day he unwillingly complied with the restrictive . . . agreement[ ].'" *117 F.3d at 1143* (citing *Copperweld* and *Perma Life Mufflers*). Aya asserts that it is doing just that. *See* Braynin Decl. at 7-8. Similarly, *US Airways* involved a plaintiff airline customer challenging under *Section 1* of the Sherman Act provisions in its contract with the defendant operator of a global distribution system. *See* *938 F.3d at 48-51*. Like the plaintiff in *US Airways*, Aya here is challenging discrete provisions in its AV agreements that, according to Aya, harm competition by restricting the labor market for travel nurses and recruiters. *See* Braynin Decl. at 7-8.

Second, Aya correctly notes **[**31]** that the AV agreements have a [TEXT REDACTED BY THE COURT]. *See* Opp. at 26 (citing Markham Decl. Ex. 31, § VII.F.). AMN responds "that the language does not support that strained interpretation." Reply at 5. The parties' disagreement on the matter is a factual dispute regarding the interpretation of the AV agreements, which is within the province of the jury. Moreover, Aya's theory of exclusion, supported by some evidence, is that AMN will enforce its alleged scheme to restrict the employment mobility of its personnel by various threats and retaliatory actions, including cutting off MSP or platform access for noncompliant AVs, initiating baseless litigation against defecting employees and the agencies that the employees join, and publicizing its enforcement efforts to current employees. *See* Opp. at 12-18. Whether such actions harm competition generally is a separate question that AMN has not expressly addressed in its motion for summary judgment on Aya's claim for exclusionary damages; rather, AMN only addresses whether Aya can suffer exclusionary harm when the theory of exclusion is premised on an easily terminable contract.

The Court declines AMN's invitation to adopt a legal presumption that Aya suffered **[**32]** no such injury here because it could have simply terminated the AV agreements. "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***." *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 466-67, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. Accordingly, summary judgment is not appropriate on this basis.

[*1328] 3. Disaggregation

With respect to Aya's purported claim of exclusionary damages, AMN lastly argues that they are unavailable as a matter of law because Aya cannot disaggregate damages attributable to unlawful conduct from injury resulting from lawful conduct. *See* MSJ Mem. at 10-13. Aya replies that it has disaggregated its damages, and in any event AMN's argument is legally flawed. *See* Opp. at 20-21.

AMN relies on *City of Vernon v. S. California Edison Co., 955 F.2d 1361, 1371-72 (9th Cir. 1992)*, and *ACT, Inc. v. Sylvan Learning Sys., Inc., 296 F.3d 657, 670 (8th Cir. 2002)*, in support of its position. MSJ Mem. at 11. In *City of Vernon*, the Ninth Circuit affirmed summary judgment for a defendant because the plaintiff's damages study was "seriously flaw[ed]" in the sense that the plaintiff's expert failed to segregate damages flowing from each allegedly anticompetitive act complained of by the plaintiff. *See* *955 F.2d at 1373*. Because the Ninth Circuit, earlier in the opinion, "had already found that many of those acts were proper," the jury had no basis to award damages as the expert failed **[**33]** to construct a model segregating damages resulting from those lawful acts from damages attributable to unlawful acts. *Id.*

Here, by AMN's own admission, Aya's economist expert, Dr. Rothman, "attributes **all** of Aya's 'exclusionary' damages **solely** to one particular type of 'restraint:' the so-called 'no-poaching' (non-solicitation) provisions in AMN's Associate Vendor (AV) agreements." Reply at 3 (emphasis in original, citations omitted); *see also* MSJ Mem. at 9 (same); Opp. at 20 ("AMN's No-Poaching Restraints prohibited Aya from soliciting *any* of AMN's travel-nurse recruiters . . .. That was the cause of Aya's harm during this period.") (emphasis in original). Therefore, *City of Vernon* is distinguishable as requiring disaggregation in a damages study where a plaintiff challenges various allegedly anticompetitive acts as causing its injury. Whereas here, it is undisputed that Aya is only challenging an allegedly anticompetitive non-solicitation provision in AMN's AV agreements with healthcare staffing agencies.

ACT is similarly distinguishable. There, the Eighth Circuit affirmed the district court decision granting a motion in limine to exclude evidence of purported damages, finding that "damages **[**34]** [plaintiff] claims from its failure to close a deal with [a third party] did not flow from conduct by [defendant] that violated *§ 2*." *296 F.3d at 670*. In other words, there was no finding that the defendant had harmed competition. Here, by contrast, AMN moves for summary judgment solely on the issue of "antitrust injury" in the form of "exclusionary damages" and "retaliatory damages," leaving it for the jury to determine whether its non-solicitation provisions have harmed competition generally.

4. Conclusion

For the aforementioned reasons, the Court **DENIES** AMN's motion for summary judgment on Aya's claim for exclusionary damages.

ii. Retaliatory Damages

AMN next argues that Aya's claim for retaliatory damages is not recoverable with respect to its *Section 1* claim because there is no "cartel." MSJ Mem. at 13-17. Regarding Aya's *Section 2* claim, AMN argues that retaliatory damages are unavailable for "at least three independent reasons: (1) AMN reserved the legal right to terminate the AV agreements, pursuant to their express terms; (2) there is no evidentiary showing that the alleged 'retaliatory' damages were the result of conduct by AMN acting as a monopolist or under circumstances where there was a danger of AMN becoming **[**35]** a monopolist; and (3) **[*1329]** the *Colgate* doctrine preludes those damages." *Id.* at 17. The Court considers each argument in turn.

1. Cartel

AMN argues that Aya cannot recover retaliatory damages because there is no genuine dispute of material fact that there even is a cartel that retaliated against Aya. *See* MSJ Mem. at 13-17.

A cartel is defined as "[a] combination of producers or sellers that join together to control a product's production or price." Black's Law Dictionary (11th ed. 2019). "Competing firms form a cartel when they replace independent decisions with an agreement on price, output, or related matters." Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 405a, at 26 (2d ed. 2002). "Horizontal price fixing, output limitations, and market division are classic characteristics of a cartel." *Freedom Holdings, Inc. v. Spitzer, 447 F. Supp. 2d 230, 251 (S.D.N.Y. 2004)*, *aff'd*, *408 F.3d 112 (2d Cir. 2005)*. The key feature of a cartel is the concerted action between competitors toward a *per se* illegal goal, such as the aforementioned trade restraints, "that would always or almost always tend to restrict competition and decrease output." *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*.

Aya argues that it is allowed to recover retaliatory damages under *Hammes v. AAMCO Transmissions, Inc.* "on policy grounds." Opp. at 22. *Hammes* involved two individuals (the **[**36]** "Cookseys") who were franchised by a transmissions company to operate a transmission repair center in Indianapolis. *33 F.3d 774, 777 (7th Cir. 1994)*. To obtain the franchise, the Cookseys had to join an unincorporated association, which included the company's other dealers. *Id.* The association purchased an advertisement in the yellow pages that lists each number of the association's members, and calls to each number were forward in accordance with a preexisting agreement to one of the association's dealers. *Id.* The other members wanted to stifle competition from the Cookseys, so they refused to include the Cooksey's dealership in the call-forwarding network, such that no calls were forwarded to the Cookseys. *Id.* When the Cookseys tried to advertise outside the association, the dealers sued and enjoined the Cookseys in state court for violating the association's agreement, then eventually the Cookseys "went belly-up." *Id.*

As an out-of-circuit case, *Hammes* is of course not binding on this Court. In any event, Aya is not entitled to retaliatory damages under *Hammes* for several reasons. First, it is undisputed that an overarching horizontal agreement amongst AMN and the other healthcare staffing agencies does not exist. Aya merely **[**37]** contends that it and other healthcare staffing agencies each entered into AV agreements with AMN that contain the non-solicitation provision at issue. Contrary to Aya's suggestion that the distinction is "meaningless," it is not because, as the Court has explained, cartels are formed when competitors agree to pursue ends "that would always or almost always tend to restrict competition and decrease output." *Business Electronics, 485 U.S. at 723*. Aya admits that it is challenging the non-solicitation provisions in "bilateral staffing agreements," not some overarching agreement between AMN and agencies to refrain from soliciting or hiring each other's employees or to retaliate against Aya for not agreeing to do the same. *See* Doc. No. 150-1 at 21-23. Those non-solicitation provisions are not "naked" horizontal agreements to fix prices or achieve some other manifestly anticompetitive end, but rather they are admittedly part of a collaboration agreement to fulfill the demand of hospitals for travel nurses. *See, e.g.*, Braynin **[*1330]** Decl., Exs. 1 and 2 (Aya's AV agreements with AMN). Simply put, there is no evidence here of a cartel of healthcare staffing agencies combining "to accomplish an unlawful purpose or to accomplish some purpose, **[**38]** not unlawful in itself, by unlawful means." *Frackowiak v. Farmers Ins. Co., 411 F. Supp. 1309, 1316 (D. Kan. 1976)* ("[A] 'conspiracy' in violation of the Sherman Act is not established by mere proof of joint undertaking or concerted action.") (citations omitted).

Second, Aya fails to sufficiently dispute that "[t]here is no evidence that any companies other than AMN were involved in or even knew in advance about the termination of Aya's collaborations with AMN." Doc. No. 150-1 at 22; *see also id.* at 23 (not disputing that "AMN unilaterally determined not to continue extending to Aya the benefits of the AV relationship"). Aya offers evidence that AMN has taken measures to enforce its non-solicitation provisions, including by initiating "baseless" litigation. *See id.* at 22. But efforts by AMN to enforce the non-solicitation provisions against other agencies in the past have nothing to do with those agencies jointly agreeing to retaliate against Aya in any way. *Hammes* involved competitors agreeing to stifle competition from another competitor and is therefore distinguishable on this basis as well.

Third, neither the Supreme Court nor the Ninth Circuit has held so-called "no-poaching" agreements to be *per se* illegal under the antitrust laws.[8] Moreover, this case involves no **[**39]** such thing. A non-solicitation agreement is not synonymous with a no-poaching agreement. A no-poaching agreement refers to an agreement between competing employers "not to solicit, recruit, hire without prior approval, or otherwise compete for employees." *See* Competitive Impact Statement at 1, *United States v. Knorr-Bremse AG, et al.*, No. 1:18-cv-00747 (D.D.C. April 3, 2018), Doc. No. 3. In contrast, a non-solicitation agreement generally refers to an agreement between two parties not to solicit each other's employees or customers.

The Court is mindful that the United States Department of Justice ("DOJ") has stated its intention "to bring criminal, felony charges against culpable companies and individuals who enter into naked No-Poach Agreements." *Id.* at 10-11 (citation omitted). However, DOJ's policy is not binding authority and the non-solicitation provisions that Aya challenges here are clearly not naked no-poach agreements, but rather are ancillary provisions in agreements between collaborating healthcare staffing agencies to meet customer demand. *See, e.g.*, Braynin Decl., Exs. 1 and 2 (Aya's AV agreements with AMN). Aya's own expert, Dr. Rothman, **[**40]** admits that such ancillary provisions

[8] Aya erroneously cites *United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1038-39 (N.D. Cal. 2013)*, and *In re High-Tech Empl. Antitrust Litig., 856 F. Supp. 2d 1103, 1122-23 (N.D. Cal. 2012)*, for the proposition that "a naked agreement among employers not to solicit one another's employees is a *per se* violation of *Section 1*." Opp. at 27. Both cases, confronted with motions to dismiss, deferred ruling on whether the *per se* rule applies until summary judgment. *See* *eBay, 968 F. Supp. 2d at 1039*; *In re High-Tech Empl. Antitrust Litig., 856 F. Supp. 2d at 1122*.

can protect firms against risks that would otherwise be present and impede healthcare staffing agencies from collaborating to provide hospital customers with the travel nurse services that they demand. *See* Markham Decl., Ex. 81 at 87-88. Indeed, Aya's AV agreement with AMN clearly shows that AMN is subject to a similar non-solicitation provision [TEXT REDACTED BY THE COURT]. Braynin Decl., Ex. 1 at AMN0000102619. It is also noteworthy that Aya does not argue the non-solicitation **[*1331]** provisions prevent it and other agencies from "conducting general advertising to which AMN employees may respond" or hiring AMN employees. *Id.* at AMN0000102620. Under these circumstances, the Court cannot conclude that the non-solicitation covenants that Aya complains of are agreements between competitors to pursue ends "that would always or almost always tend to restrict competition and decrease output." *Business Electronics, 485 U.S. at 723*. *See also infra* at 28-29.

In sum, Aya is not entitled to retaliatory damages under *Hammes*. Accordingly, summary judgment in favor of AMN is appropriate as to Aya's claim for retaliatory damages under *Section 1* of the Sherman Act.

2. Easily Terminable Contracts

AMN next argues that retaliatory **[**41]** damages are not recoverable by Aya under *Section 2* of the Sherman Act because AMN contractually reserved the right to terminate the AV agreements with Aya. *See* MSJ Mem. at 17-18. AMN further argues that without a contractual right to receive spillover assignments, Aya is left with a "dubious claim" for relief as a result of AMN's unilateral refusal to deal, *see id.* at 18-21, which does not meet an exception to the *Colgate* doctrine. *See id.* at 24-27. Aya contends that even if *Hammes* does not apply, "*Aspen Skiing* affords an independent ground for [retaliatory damages]." Opp. at 23.

The Sherman Act "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal . . .." *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*. This is referred to as the *Colgate* doctrine and it recognizes that "[t]he freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage." *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 137, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*.

The Court finds that the *Colgate* doctrine bars Aya's request for retaliatory damages. For the reasons already discussed with respect to Aya's claim for exclusionary damages, the Court is not persuaded that retaliatory damages are unavailable **[**42]** as a matter of law because Aya's AV agreements have termination clauses. Rather, retaliatory damages are unavailable because the alleged damages do not flow from anticompetitive conduct in violation of the Sherman Act. AMN correctly notes that the *Colgate* doctrine protects the freedom of contract, even for firms with substantial market power. *See* MSJ Mem. at 24-25 (citing *Colgate, 250 U.S. at 307*). AMN argues that its refusal to deal with Aya by continuing their AV relationship is not anticompetitive, *i.e.*, such conduct has not harmed competition in a relevant market. The Court agrees.

Aspen Skiing does not change the outcome that AMN lawfully refused to deal further with Aya. That case involved two ski companies that successfully offered skiers joint passes to both companies' ski mountains until the defendant ski company decided to end the relationship. *472 U.S. 585, 587-95, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. When the plaintiff ski company tried to recreate the multi-mountain pass by giving its customers vouchers equal to a price of a full day's lift ticket, the defendant refused to honor the vouchers. *Id. at 593-94*. The Court held that termination of the relationship was anticompetitive, as the evidence supported an inference that the defendant "was not motivated by efficiency **[**43]** concerns and that it was willing to sacrifice short-run benefits **[*1332]** and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id. at 611*.

This case does not involve a unilateral refusal to deal motivated by solely by the goal of stifling competition. At most, Aya claims that AMN refused to continue the AV relationship with Aya because Aya would no longer abide by the parties' non-solicitation provision in their AV agreements. *See, e.g.*, Opp. at 23 ("AMN, which holds monopoly positions, cut off Aya to retaliate against it and deter others from emulating its example."). But even Aya's expert, Dr. Rothman, recognizes that such contractual restraints are important to guiding a collaboration between otherwise competing healthcare staffing agencies. *See* Markham Decl., Ex. 81 at 87-88. Without being able to provide for such contractual restraints, the companies would likely be less willing or unwilling to deal with other agencies to supply travel nurses to hospitals which, as Aya also recognizes, already experience a "chronic shortage of nurses." Opp. at 31. The reason is because, as the undisputed facts clearly demonstrate, competitiveness in the healthcare staffing industry depends in large **[**44]** part on an agency's ability to establish networks that include recruiters, travel nurses, AVs, and of course, hospital customers. *See* Markham Decl., Ex. 81 at 59-61. AMN, a player in the industry for over thirty years, guards its investments and establishes AV relationships with only those agencies that agree, *inter alia*, not to abuse the relationship by proactively raiding AMN's employees, AVs, and customers. Aya is therefore not entitled to retaliatory damages under *Aspen Skiing*, as there is no dispute that AMN had a legitimate reason to refuse to deal further with Aya. *See* *Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1075 (10th Cir. 2013)* ("Put simply, the monopolist's conduct must be irrational but for its anticompetitive effect."). Accordingly, summary judgment in favor of AMN is appropriate as to Aya's claim for retaliatory damages under *Section 2* of the Sherman Act

Moreover, as discussed below, Aya is not entitled to retaliatory damages under *Aspen Skiing* because there is insufficient evidence from which a jury could find that AMN is a monopolist or even a near-monopolist in the relevant markets that Aya identifies for its *Section 2* claims.

3. Monopolization and Attempted Monopolization

AMN next asserts that Aya is not entitled to retaliatory damages because Aya **[**45]** did not suffer those damages due to AMN acting as a monopolist or near-monopolist. *See* MSJ Mem. at 21-24. Aya responds that it has proffered evidence that shows it suffered damages as a result of AMN's exercise of monopoly or near-monopoly power in the market for travel nurses. *See* Opp. at 33-35.

In deciding whether a plaintiff was injured by a defendant's anticompetitive conduct, the focus is whether the injury results from harm to competition—not the elimination or reduction of competition with rivals, but harm to consumer welfare. *See* *Rebel Oil, 51 F.3d at 1433* ("[R]eduction of competition does not invoke the Sherman Act until it harms consumer welfare.") (citation omitted). Consumer welfare is maximized when economic resources are allocated to their best use and consumers are assured competitive prices and quality of goods or services. *Id.* (citations omitted). "Accordingly, an act is deemed *anticompetitive* under the Sherman Act only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality." *Id.* (emphasis in original, citation omitted).

[*1333] For a firm unilaterally to raise prices above competitive levels, it must have sufficient market power to restrict its **[**46]** output, thereby restricting market-wide output and increasing market-wide prices. *See id.* (citing Phillip Areeda & Donald F. Turner, ***Antitrust Law*** ¶ 501, at 322 (1978)). "Market power" refers to a firm's "ability to raise prices above those that would be charged in a competitive market." *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 109 n.38, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. "Monopoly power" generally refers to a firm's large degree of market power that allows it "to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. Market power can be demonstrated by "direct evidence of the injurious exercise of market power," such as restricting output and charging supracompetitive prices, or by circumstantial evidence: a well-defined relevant market, defendant's dominant share of that market, and the existence of significant barriers to entry and expansion. *See* *Rebel Oil, 51 F.3d at 1434* (citations omitted).

The Court finds Aya has failed to show as a matter of law that it suffered retaliatory damages as a result of AMN exercising its monopoly or market power. First, as AMN correctly notes, Dr. Rothman computed Aya's retaliatory damages on a nationwide basis, even though he did not opine that AMN has a nationwide monopoly or even a high nationwide market share. *See* MSJ Mem. at 22 (citing Fitzsimmons Decl., Ex. 13 at **[**47]** 107:20-108:7). Aya does not specifically address this point other than to insist that it has offered sufficient evidence of AMN's monopoly power in several regional, not national, markets. *See* Opp. at 24, 34-35 (citing Markham Decl., Ex. 81 at 94-100, Table 3, in support of its argument that sufficient evidence supports that it "suffered compensable antitrust injury in the form of exclusionary and retaliatory losses because of AMN's attempted and actual monopolization").

Aya effectively concedes that Dr. Rothman has not attributed all of the retaliatory damages to AMN exercising its monopoly power in regional markets by refusing to deal with Aya. There is no nexus between, on one hand, AMN's alleged monopoly or near-monopoly market shares in certain regional markets, and on the other, Aya's lost profits resulting from AMN's termination of the AV relationship that covered their collaboration to provide travel nurses to hospitals around the nation. And *Aspen Skiing* is distinguishable, as that case involved a ski company suffering damages as a result of a larger ski company monopolizing the market for downhill skiing services in Aspen, Colorado by ending a long-standing collaboration for no legitimate **[**48]** business reason other than to stifle competition. Here, Aya is not seeking lost profits attributable to AMN ending its AV relationship with Aya in certain regional markets for the purpose of monopolizing travel nurse services in those markets.

Furthermore, the Court will not infer monopoly power or sufficient market power solely from Dr. Rothman's market share calculations for AMN. AMN again correctly points out that for Aya's *Section 2* claim, Dr. Rothman calculates market shares for regions that are "far below anything that might be actionable." MSJ Mem. at 22-24. For the markets in which AMN is alleged to have monopoly power, *see* Doc. No. 37 at 75, AMN did not have a market share of even 50% according to Dr. Rothman. *See* Fitzsimmons Decl., Ex. 14, Exhibit V-2. Case law holds that a market share of less than 50 percent is presumptively insufficient for purposes of determining whether a firm has monopoly power. *See* *Rebel Oil, 51 F.3d at 1438* (collecting cases).

[*1334] Similarly, the Court will not infer the requisite *durable* monopoly power here where there are low barriers to entry and expansion, for "[a] mere showing of substantial or even dominant market share alone cannot establish market power sufficient to carry out a predatory **[**49]** scheme." *Id. at 1439* ("The plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the predator's high price."). While Aya argues that market barriers are high, *see* Opp. at 34, Dr. Rothman identified only two barriers to entry and expansion: access to key inputs and brand recognition. *See* Markham Decl. Ex. 81 at 53-54. A nursing shortage may prove to be a peculiar market barrier, but the same cannot be said with respect to brand recognition, which is typically important in many industries.

In any event, evidence of Aya's tremendous success and dramatically increasing number of placements demonstrates that barriers to expansion are low. *See* Doc. No. 150-1 at 1-10. For example, it is undisputed that Aya has grown dramatically since 2013, as shown by its rapid growth in profits and travel nurse placements. *See* Doc. No. 150-1 at 1-9. On the other hand, Aya has come forward with no evidence of would-be rivals passing on opportunities to enter the market or existing rivals lacking the capacity to expand output to challenge AMN. Under these circumstances, there is insufficient evidence from which a reasonable **[**50]** juror could find that "new rivals are barred from entering the market and [] existing competitors lack the capacity to expand their output to challenge [AMN]." *Rebel Oil, 51 F.3d at 1438*.

Nor will the Court infer that AMN has sufficient market power for purposes of Aya's attempted monopolization claim or that AMN has harmed competition in any relevant market. In addition to the same list of states identified as relevant markets for purposes of Aya's monopolization claim, Aya identifies eight other states and five metropolitan service areas. *See* Doc. No. 37 at 71. AMN argues that its market share in the additional markets are too low, and that Dr. Rothman fails to consider some of these additional markets in analyzing any potential impact on competition. *See* MSJ Mem. at 23. Aya does not respond to this point other than to insist that the proffered evidence supports its monopolization claim. *See* Opp. at 34-35. Nor does Aya address any actual harm to competition, which would be direct evidence of AMN's market power. *See* *Rebel Oil, 51 F.3d at 1433*.

Even though AMN has over 30% market shares in some of the alleged markets, as a matter of law the Court cannot infer that AMN has market power due to such shares, for market shares alone do not demonstrate **[**51]** that a firm has durable market power. *See* *id. at 1439*. Rather, Aya must show that market barriers impede entry from new firms and obstruct the expansion of output from existing rivals, and that it has failed to do.

Moreover, Aya's failure to identify any harm to competition in several of the relevant markets that it has identified for both its monopolization and attempted monopolization claim is another independent reason why its *Section 2* claims for retaliatory damages fail as a matter of law. Evidence of harm to the competitive process would serve to make the requisite showing of AMN's market power, as well as the separate essential showing that AMN's conduct does not merely harm competitors, but competition generally. *See* id. at 1433. A review of Dr. Rothman's report supports this finding, as he identifies as purported harm to competition a few instances in which Aya won business away from AMN by offering customers lower rates after **[*1335]** Aya reneged on its non-solicitation agreement with AMN. *See* Markham Decl., Ex. 81 at 77-82.

Isolated incidents of Aya's successful bidding do not demonstrate that AMN's prices were supracompetitive *market-wide*. Dr. Rothman repeatedly opines in his report that AMN imposes restraints **[**52]** that "make it more difficult for its rivals" to compete. *See, e.g.*, Markham Decl., Ex. 81 at 82-84. But Aya's "raising rivals' costs" theory of harm is insufficient, for the "reduction of competition does not invoke the Sherman Act until it harms consumer welfare." Rebel Oil, 51 F.3d at 1433; *see also* Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 494 (3d Cir. 1992) (it is "no concern of the antitrust laws" that a practice may consign even an entire "class of competitors . . . to competitive oblivion," unless "consumers [a]re also hurt because of diminished competition.").

In an effort to demonstrate harm to competition, Aya relies on Dr. Rothman's study that purportedly shows prices, or "bill rates," are higher in relevant markets in which AMN has a 30% or higher market share. *See* Opp. at 30 (citing Markham Decl., Ex. 82). Such markets include four of the six markets that Aya identified for both its monopolization and attempted monopolization claims, as well as four of the additional 12 markets that Aya identified for the attempted monopolization claim. *See* Doc. No 37 ¶¶ 331, 360. Aya therefore effectively concedes that it has failed to identify any harm to competition in 10 of the 18 geographic markets it has identified for its Sherman Act claims.

As for the eight markets in which **[**53]** AMN has a 30% market share or higher, the Court fails to see how any reasonable juror could find such evidence is indicative of harm to competition as a result of either the non-solicitation provisions in the AV agreements, or AMN's refusal to deal with Aya. Dr. Rothman calculates AMN's market share by referring to "all placements made directly by AMN, all placements made through AMN's MSPs, and all placements made through AMN's platforms if the placements are not made through another provider MSP." Markham Decl., Ex. 81 at 52. But neither Dr. Rothman nor Aya explains how this data is relevant later in analyzing the significance of bill rates increasing in markets where AMN has a 30% or higher market share. Aya's theory of harm to competitors and competition is that AMN's non-solicitation provisions in AV agreements raise rivals' costs so that AMN is able to charge supracompetitive prices in certain regional markets. *See* Opp. at 30 ("AMN's trade restraints have . . . blocked rivals' access to key inputs . . . and sales outlets . . . result[ing] in less competitive pressure in the markets for travel-nurse services and higher prices for these service, and the effect is most pronounced in those **[**54]** markets where AMN has the strongest presence."); *see also* Markham Decl., Ex. 82 at 7 (". . . AMN's trade restraints harm competition by making it more difficult for AMN's rivals to compete.").

There are a few problems fatal to Aya's theory of harm to competition. First, this theory of harm has no nexus with Aya's claim for retaliatory damages; the alleged harm to competition, *i.e.*, supracompetitive pricing, purportedly results from the effect of AMN's non-solicitation provisions, not the retaliation of AMN terminating Aya's AV relationship. *See* Opp. at 30-31. Second, Aya provides no support whatsoever that such non-solicitation provisions (or any contract provision for that matter) raise rivals' costs. Third, even crediting the unsupported assertion, AMN's direct placements have no bearing on Aya's theory of harm to competition by supracompetitive prices since those placements do not involve AMN collaborating with and imposing **[*1336]** non-solicitation covenants on AVs; the same is true for the placements that AMN makes through its own MSP programs and platforms. Yet, Dr. Rothman does not account for this in his study, leading the Court to view his opinion on this issue unreliable under the Daubert standard **[**55]** and of marginal relevance without understanding the underlying data more clearly.

Fourth, the mere fact that market bill rates are higher in certain markets where AMN's market share is 30% or higher does not speak to whether AMN, the alleged monopolist or near-monopolist, is charging supracompetitive prices, as opposed to rivals charging higher prices. But that question is precisely what Section 2 concerns—the threat of monopolists or near-monopolists engaging in conduct unfairly allowing it to reap supracompetitive profits by charging high prices or restricting output, while successfully fending off competitors from expanding output to challenge the dominant firm and eat away at the monopoly profits. It is axiomatic that "[a]ntitrust claims must make economic sense." Adaptive Power Sols., LLC v. Hughes Missile Sys. Co., 141 F.3d 947, 952 (9th Cir. 1998) (affirming summary judgment for defendants where plaintiff's "argument makes no economic sense") (citing *Eastman Kodak, 504 U.S. at 468*). Aya's theory of harm to competition makes no "economic sense" upon closer examination and is unsupported by the evidence.[9]

Lastly, even where Aya has proffered some evidence that AMN has a market share of 30% or higher, AMN's refusal to deal with Aya is not actionable as anticompetitive conduct. AMN is correct that "even **[**56]** a monopolist . . . is free to refuse to deal or cooperate with rivals for legitimate business reasons" because a refusal to deal is not actionable unless the refusal "would make no economic sense but for its tendency to eliminate or lessen competition." MSJ Mem. at 24 (emphasis omitted, citing *Novell, 731 F.3d at 1075*). As discussed *supra*, AMN's refusal to deal with Aya for not abiding by the agreed-upon non-solicitation provision qualifies as a legitimate business decision. Non-solicitation provisions like the types at issue serve to protect AMN from its collaborating AVs taking advantage of the relationship by pilfering AMN's employees, AVs, and customers.

4. Conclusion

In sum, no reasonable jury could find that Aya is entitled to retaliatory damages for its claims under *Sections 1* and *2* of the Sherman Act. First, Aya is not entitled to relief under *Hammes* because there is no evidence of a cartel of healthcare staffing agencies that all agreed to refrain from soliciting or hiring each other's employees or to retaliate against Aya for reneging on such an agreement. Furthermore, Aya has failed to proffer evidence that AMN has sufficient market power in the various markets identified for Aya's *Section 2* claims, or that AMN's conduct **[**57]** has harmed competition. Even where there may arguably be indicia of higher prices in markets where AMN has a 30% or higher market share relative to prices in markets where AMN's share is lower, Aya is still not entitled to retaliatory damages for its *Section 2* claims because that evidence does not speak to whether AMN is charging **[*1337]** supracompetitive prices in those markets, and in any event, AMN has not committed an actionable unilateral refusal to deal under *Aspen Skiing*.

Accordingly, the Court **GRANTS** AMN's motion for summary judgment on Aya's claim for retaliatory damages.

3. Order to Show Cause re: Exclusionary Damages and State Law Claims

The Court finds that Aya has not put forth evidence of AMN's market power or harm to competition sufficient to meet its burden on summary judgment. As such, Aya's claim for retaliatory damages under *Sections 1* and *2* of the Sherman Act fail as a matter of law. Given the Court's conclusion that this case does not involve a cartel or a *per se* illegal agreement, the Court's findings of insufficient market power and harm to competition similarly appear fatal to Aya's claim for exclusionary damages, which the Court understands is redress that Aya seeks for both its Sherman Act **[**58]** *Sections 1* and *2* claims. *See* Opp. at 33, 35. With no federal claim to provide this Court with subject matter jurisdiction under *28 U.S.C. § 1331*, the Court would decline to exercise supplemental jurisdiction over Aya's remaining state law claims. Thus, the Court **ORDERS** the parties to submit supplemental briefing or otherwise show cause on or before June 1, 2020 as to whether summary judgment should be granted in AMN's favor with respect to Aya's Sherman Act *Sections 1* and *2* claims for exclusionary damages. The supplemental briefing must be no more than ten pages in length and may cite to documents already filed with the Court, but must not include new exhibits not already filed with the Court.

CONCLUSION

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[9] Also insufficient is Aya's argument that AMN's trade restraints, when aggregated, have a "marketwide reach" that hinder rivals from soliciting AMN's employees, AVs, and hospital customers. Opp. at 32. Still, Aya must demonstrate harm to competition, as the Court will not give Aya a pass on the requirement. Doing so would inappropriately condemn facially innocuous non-solicitation provisions as *per se* illegal under the Sherman Act or inherently anticompetitive.

Based on the foregoing, the Court **GRANTS** AMN's *Daubert* motion and **GRANTS IN PART** and **DENIES IN PART** AMN's motion for summary judgment. The Court also **ORDERS** the parties to submit supplemental briefing or otherwise show cause on or before June 1, 2020 as to whether summary judgment should be granted in AMN's favor with respect to Aya's Sherman Act *Sections 1* and *2* claims for exclusionary damages in light of the Court's findings with respect to market power and harm to competition.

IT IS SO ORDERED.

Dated: May 12, 2020

/s/ Michael M. Anello

HON. MICHAEL **[**59]** M. ANELLO

United States District Judge

Alston v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.)

United States Court of Appeals for the Ninth Circuit

March 9, 2020, Argued and Submitted, San Francisco, California; May 18, 2020, Filed

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Reporter

958 F.3d 1239 *; 2020 U.S. App. LEXIS 15789 **; 2020-1 Trade Cas. (CCH) P81,227; 2020 WL 2519475

IN RE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION,SHAWNE ALSTON; MARTIN JENKINS; JOHNATHAN MOORE; KEVIN PERRY; WILLIAM TYNDALL; ALEX LAURICELLA; SHARRIF FLOYD; KYLE THERET; DUANE BENNETT; CHRIS STONE; JOHN BOHANNON; ASHLEY HOLLIDAY; CHRIS DAVENPORT; NICHOLAS KINDLER; KENDALL GREGORY-MCGHEE; INDIA CHANEY; MICHEL'LE THOMAS; DON BANKS, "DJ"; KENDALL TIMMONS; DAX DELLENBACH; NIGEL HAYES; ANFORNEE STEWART; KENYATA JOHNSON; BARRY BRUNETTI; DALENTA JAMERAL STEPHENS, "D.J."; JUSTINE HARTMAN; AFURE JEMERIGBE; ALEC JAMES, Plaintiffs-Appellees, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, THE NCAA; PACIFIC 12 CONFERENCE; CONFERENCE USA; THE BIG TEN CONFERENCE, INC.; MID-AMERICAN CONFERENCE; SOUTHEASTERN CONFERENCE; ATLANTIC COAST CONFERENCE; MOUNTAIN WEST CONFERENCE; THE BIG TWELVE CONFERENCE, INC.; SUN BELT CONFERENCE; WESTERN ATHLETIC CONFERENCE; AMERICAN ATHLETIC CONFERENCE, Defendants-Appellants,AMERICAN BROADCASTING COMPANIES, INC.; CBS BROADCASTING, INC.; ESPN ENTERPRISES, INC.; ESPN, INC.; FOX BROADCASTING COMPANY, LLC.; FOX SPORTS HOLDINGS, LLC.; TURNER BROADCASTING SYSTEM, INC., Intervenors.IN RE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION,JOHN BOHANNON; JUSTINE HARTMAN, as representatives of the classes, Plaintiffs-Appellants, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, THE NCAA; PACIFIC 12 CONFERENCE; CONFERENCE USA; THE BIG TEN CONFERENCE, INC.; MID-AMERICAN CONFERENCE; SOUTHEASTERN CONFERENCE; ATLANTIC COAST CONFERENCE; MOUNTAIN WEST CONFERENCE; THE BIG TWELVE CONFERENCE, INC.; SUN BELT CONFERENCE; WESTERN ATHLETIC CONFERENCE; AMERICAN ATHLETIC CONFERENCE, Defendants-Appellees,AMERICAN BROADCASTING COMPANIES, INC.; CBS BROADCASTING, INC.; ESPN ENTERPRISES, INC.; ESPN, INC.; FOX BROADCASTING COMPANY, LLC.; FOX SPORTS HOLDINGS, LLC.; TURNER BROADCASTING SYSTEM, INC., Intervenors.

Subsequent History: Stay denied by *Alston v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.), 2020 U.S. App. LEXIS 24562 (9th Cir. Cal., Aug. 4, 2020)*

US Supreme Court certiorari granted by *NCAA v. Alston, 141 S. Ct. 1231, 208 L. Ed. 2d 504, 2020 U.S. LEXIS 6102, 2020 WL 7366281 (U.S., Dec. 16, 2020)*

US Supreme Court certiorari granted by *Am. Ath. Conf. v. Alston, 141 S. Ct. 972, 208 L. Ed. 2d 504, 2020 U.S. LEXIS 6103, 2020 WL 7366279 (U.S., Dec. 16, 2020)*

Affirmed by *NCAA v. Alston, 2021 U.S. LEXIS 3123 (U.S., June 21, 2021)*

Prior History: [1]** Appeal from the United States District Court for the Northern District of California. Claudia Wilken, District Judge, Presiding. D.C. No. 4:14-md-02541-CW.

In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 2019 U.S. Dist. LEXIS 44512, 2019 WL 1593939 (N.D. Cal., Mar. 8, 2019)

Core Terms

student-athletes, district court, athletic, procompetitive, benefits, amateurism, limits, education-related, sports, injunction, effects, awards, anticompetitive, consumer demand, consumer, expenses, schools, graduation, professional sports, conferences, above-COA, antitrust, unrelated, football, courts, attendance, salaries, anti trust law, cap, cash payment

LexisNexis® Headnotes

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

Governments > Courts > Judicial Precedent

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

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

The application of stare decisis and res judicata are questions of law that the appellate court reviews de novo.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

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

HN2[] **Standards of Review, Clearly Erroneous Review**

The appellate court reviews factual findings for clear error and legal conclusions de novo. Under clear error review, the appellate court must accept the district court's findings of fact unless it is left with the definite and firm conviction that a mistake has been committed. The appellate court must not reverse as long as the findings are plausible in light of the record viewed in its entirety. In other words, a decision is not clearly erroneous unless it strikes the appellate court as wrong with the force of a five-week-old, unrefrigerated dead fish.

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

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

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

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

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

The appellate court reviews a district court's decision to grant a permanent injunction for an abuse of discretion; the factual findings underpinning the award for clear error; and the rulings of law relied upon by the district court in awarding injunctive relief de novo.

Governments > Courts > Judicial Precedent

HN4[] Courts, Judicial Precedent

Stare decisis binds today's court to yesterday's decisions. In determining whether the court is bound by an earlier decision, it considers not only the rule announced, but also the facts giving rise to the dispute, other rules considered and rejected and the views expressed in response to any dissent or concurrence. Insofar as there may be factual differences between the current case and a prior case, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis. Decisions furnish the rule for the determination of a subsequent case involving identical or similar material facts.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN5[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Antitrust decisions are particularly fact-bound. The Rule of Reason contemplates case-by-case adjudication. Each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and opinions in those cases must be read in the light of their facts.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN6[] Preclusion of Judgments, Res Judicata

Res judicata, also known as claim preclusion, bars a party in successive litigation from pursuing claims that were raised or could have been raised in a prior action. It applies when there is: (i) an identity of claims between the prior and subsequent actions; (ii) a final judgment on the merits; and (iii) identity or privity between the parties. The defendant bears the burden of proving all three elements.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN7[] Preclusion of Judgments, Res Judicata

Claim preclusion does not apply to claims that were not in existence and could not have been sued upon when the allegedly preclusive action was initiated.

Antitrust & Trade Law > Sherman Act > Claims

HN8[] Sherman Act, Claims

The Sherman Act prohibits, inter alia, agreements in restraint of interstate trade or commerce. *15 U.S.C.S. § 1*. The United States Supreme Court has interpreted *§ 1* as outlawing only unreasonable restraints' of trade. When considering agreements among entities involved in league sports, the court must determine whether the restriction is unreasonable under the Rule of Reason.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN9[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under the Rule of Reason's three-step framework: (1) the plaintiffs bear the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market; (2) if they carry that burden, the defendant must come forward with evidence of the restraint's procompetitive effects; and (3) the plaintiffs must then show that any legitimate objectives can be achieved in a substantially less restrictive manner. Courts are not free to micromanage organizational rules or to strike down largely beneficial market restraints, Accordingly, a court must invalidate a restraint and replace it with an less restrictive alternative only if the restraint is patently and inexplicably stricter than is necessary to accomplish all of its procompetitive objectives.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN10[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Improving customer choice is procompetitive. A restraint that broadens choices can be procompetitive.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN11[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The proper inquiry under the Rule of Reason is: What procompetitive benefits are served by the defendants' challenged rules?

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN12[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

At the Rule of Reason's third step, it is the plaintiff's burden to make a strong evidentiary showing that their proposed less restrictive alternatives to the challenged scheme are viable. To be viable, an alternative must be virtually as effective in serving the procompetitive purposes of the defendant's current rules, and without significantly increased cost. Where a restraint is patently and inexplicably stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and order it replaced with an less restrictive alternative.

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

HN13[] **Injunctions, Permanent Injunctions**

Courts construe injunctions in context and so as to avoid absurd results.

Civil Procedure > Appeals > Standards of Review

HN14[] Appeals, Standards of Review

Under the deferential standard of review required, the appellate court must examine the record in its entirety.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN15[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Courts are ill-suited to identify terms of dealing between competitors, including a product's proper price.

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

HN16[] Injunctions, Permanent Injunctions

Fed. R. Civ. P. 65(d) reflects the basic principle that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits. The appellate court will not set aside injunctions under *Rule 65(d)* unless they are so vague that they have no reasonably specific meaning.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN17[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A finding of anticompetitive harm at step one of the Rule of Reason does not end the inquiry. A defendant may escape antitrust liability despite inflicting harm if a court determines that the restraint has a procompetitive effect, and a proposed less restrictive alternative eliminating that restraint is not viable.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN18[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Where a restraint is patently and inexplicably stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and order it replaced with a viable less restrictive alternative.

Summary:

SUMMARY[*]

Antitrust

[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel affirmed the district court's order in an antitrust action, enjoining the National Collegiate Athletic Association from enforcing rules that restrict the education-related benefits that its member institutions may offer students who play Football Bowl Subdivision football and Division I basketball.

In *O'Bannon v. NCAA (O'Bannon II), 802 F.3d 1049 (9th Cir. 2015)*, the court affirmed in large part the district court's ruling that the NCAA illegally restrained trade, in violation of *section 1 of the Sherman Act*, by preventing FBS football and D1 men's basketball players from receiving compensation for the use of their names, images, and likenesses, and the district court's injunction insofar as it required the NCAA to implement the less restrictive alternative of permitting athletic scholarships for the full cost of attendance.

Subsequent antitrust actions by student-athletes were consolidated in the district court. After a bench trial, the district court entered judgment for the student-athletes in part, concluding that NCAA limits on education-related benefits were unreasonable **[**2]** restraints of trade, and accordingly enjoining those limits, but declining to hold that NCAA limits on compensation unrelated to education likewise violated *section 1*.

The panel affirmed the district court's conclusion that *O'Bannon II* did not foreclose this litigation as a matter of stare decisis or res judicata.

The panel held that the district court properly applied the Rule of Reason in determining that the enjoined rules were unlawful restraints of trade under *section 1 of the Sherman Act*. The panel concluded that the student-athletes carried their burden at the first step of the Rule of Reason analysis by showing that the restraints produced significant anticompetitive effects within the relevant market for student-athletes' labor on the gridiron and the court.

At the second step of the Rule of Reason analysis, the NCAA was required to come forward with evidence of the restraints' procompetitive effects. The district court properly concluded that only some of the challenged NCAA rules served the procompetitive purpose of preserving amateurism and thus improving consumer choice by maintaining a distinction between college and professional sports. Those rules were limits on above-cost-of-attendance **[**3]** payments unrelated to education, the cost-of-attendance cap on athletic scholarships, and certain restrictions on cash academic or graduation awards and incentives. The panel affirmed the district court's conclusion that the remaining rules, restricting non-cash education-related benefits, did nothing to foster or preserve consumer demand. The panel held that the record amply supported the findings of the district court, which reasonably relied on demand analysis, survey evidence, and NCAA testimony.

The panel affirmed the district court's conclusion that, at the third step of the Rule of Reason analysis, the student-athletes showed that any legitimate objectives could be achieved in a substantially less restrictive manner. The district court identified a less restrictive alternative of prohibiting the NCAA from capping certain education-related benefits and limiting academic or graduation awards or incentives below the maximum amount that an individual athlete may receive in athletic participation awards, while permitting individual conferences to set limits on education-related benefits. The panel held that the district court did not clearly err in determining that this alternative **[**4]** would be virtually as effective in serving the procompetitive purposes of the NCAA's current rules, and could be implemented without significantly increased cost.

Finally, the panel held that the district court's injunction was not impermissibly vague and did not usurp the NCAA's role as the superintendent of college sports. The panel also declined to broaden the injunction to include all NCAA compensation limits, including those on payments untethered to education. The panel concluded that the district court struck the right balance in crafting a remedy that both prevented anticompetitive harm to student-athletes while serving the procompetitive purpose of preserving the popularity of college sports.

Concurring, Judge M. Smith wrote that because he was bound by *O'Bannon II*, he joined the panel opinion in full. He wrote separately to express concern that the current state of ***antitrust law*** reflects an unwitting expansion of the Rule of Reason inquiry in a way that deprived the student-athletes of the fundamental protections that the antitrust laws were meant to provide them.

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Judges: Before: Sidney R. Thomas, Chief Judge, and Ronald M. Gould and Milan D. Smith, Jr., Circuit Judges. M. SMITH, Circuit Judge, concurring.

Opinion by: THOMAS

Opinion

[*1243] THOMAS, Chief Judge:

We consider an appeal and cross-appeal from an order enjoining the National Collegiate Athletic Association (the "NCAA") from enforcing rules that restrict the education-related benefits that its member institutions may offer students who play Football Bowl Subdivision ("FBS") football and Division I ("D1") basketball (collectively, "Student-Athletes"). *See* *In re* **[*1244]** *NCAA Athletic Grant-In-Aid Cap Antitrust Litig. (Alston), 375 F. Supp. 3d 1058 (N.D. Cal. 2019)*. We have jurisdiction under *28 U.S.C. § 1291*, and we affirm.

We conclude that the district court properly applied the Rule of Reason in determining that the enjoined rules are unlawful restraints of trade under *section 1* of the **[**8]** Sherman Act, *15 U.S.C. § 1*. We further conclude that the record supports the factual findings underlying the injunction and that the district court's antitrust analysis is faithful to our decision in *O'Bannon v. NCAA (O'Bannon II), 802 F.3d 1049 (9th Cir. 2015)*.

I

A. The NCAA and its Compensation Rules

Founded in 1905, the NCAA regulates intercollegiate sports. *Id. at 1053*. Its mission statement is to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." NCAA regulations govern, among other things, the payments that student-athletes may receive in exchange for and incidental to their athletic participation as well as in connection with their academic pursuits.

The NCAA divides its member schools into three competitive divisions. D1 schools—some 350 of the NCAA's approximately 1,100 member schools—sponsor the largest athletic programs and offer the most financial aid. D1 football has two subdivisions, one of which is the FBS.

In August 2014, the NCAA amended its D1 bylaws (the "Bylaws") to grant the so-called "Power Five" conferences—the FBS conferences that generate the most **[**9]** revenue—autonomy to adopt collectively legislation in certain areas, including limits on athletic scholarships known as "grants-in-aid." [1] In January 2015, the Power Five voted to increase the grant-in-aid limit to the cost of attendance ("COA") at each school. Since August 2015, the Bylaws have provided that a "full grant-in-aid" encompasses "tuition and fees, room and board, books and other expenses related to attendance at the institution up to the [COA]," as calculated by each institution's financial aid office under federal law. *See 20 U.S.C. §§ 1087kk*, *ll*. The Bylaws also contain an "Amateurism Rule," which strips student-athletes of eligibility for intercollegiate competition if they "[u]se[] [their] athletics skill (directly or indirectly) for pay in any form in [their] sport." "[P]ay" is defined as the "receipt of funds, awards or benefits not permitted by governing legislation."

However, governing legislation permits a wide range of above-COA payments—both related and unrelated to education. Without losing their eligibility, student-athletes may receive, for instance: (i) awards valued at several hundred dollars for athletic performance ("athletic participation awards"), [2] which may take the form **[**10]** **[*1245]** of Visa gift cards; (ii) disbursements—sometimes thousands of dollars—from the NCAA's Student Assistance Fund ("SAF") and Academic Enhancement Fund ("AEF") for a variety of purposes, such as academic achievement or graduation awards, school supplies, tutoring, study-abroad expenses, post-eligibility financial aid, health and safety expenses, clothing, travel, "personal or family expenses," loss-of-value insurance policies, car repair, personal legal services, parking tickets, and magazine subscriptions; [3] (iii) cash stipends of several thousands of dollars calculated to cover costs of attendance beyond the fixed costs of tuition, room and board, and books, but used wholly at the student-athlete's discretion; [4] (iv) mandatory medical care (available for at least two years after the athlete

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[1] The Power Five conferences are the Atlantic Coast Conference (the "ACC"), Big Ten Conference, Big 12 Conference, Pacific 12 Conference (the "Pac-12"), and Southeastern Conference (the "SEC"). Student-Athletes named the Power Five as defendants, along with Conference USA, the Mid-American Conference (the "MAC"), Mountain West Conference, Sun Belt Conference, Western Athletic Conference, and American Athletic Conference (the "AAC").

[2] Athletic participation awards include the "Senior Scholar-Athlete Award," which is a postgraduate scholarship of $10,000 or less that institutions may award two student-athletes per year, and awards for achievement in special events, such as all-star or post-season bowl games.

[3] The record indicates that the NCAA does little to regulate or monitor the use of these funds. While it controls the total pool of money that an institution may distribute each year, it has not capped the amount that an individual athlete may receive. The SAF is broadly available to "assist student-athletes in meeting financial needs that arise in conjunction with participation in intercollegiate athletics, enrollment in an academic curriculum or to recognize academic achievement as determined by conference offices." And the NCAA "encourage[s]" schools to allocate AEF funds to provide "direct benefits to student-athletes that enhance [their] welfare."

graduates) for an athletics-related injury; (v) unlimited meals and snacks; (vi) reimbursements for expenses incurred by student-athletes' significant others and children to attend certain athletic competitions; and (vii) a $30 per diem for "unitemized incidental expenses during travel and practice" for championship events.

The NCAA has carved out many of these exceptions in the past five years. For **[**11]** example, before 2015, athletic participation awards did not take the form of cash-like Visa gift cards. And once the NCAA permitted grants-in-aid for the full COA, effective August 2015, many more student-athletes began to receive above-COA payments, such as cash stipends, Pell Grants, and AEF as well as SAF distributions.

This expansion of above-COA compensation has coincided with rising revenue from D1 basketball and FBS football for the NCAA and its members. In the 2015-16 academic year, these programs generated $4.3 billion in revenue (a $300 million increase from the previous year) for the Power Five. And in 2016, the NCAA negotiated an eight-year extension (until 2032) of its multimedia contract for the broadcasting rights to March Madness, the annual D1 men's basketball tournament. Under that agreement, the NCAA will receive $1.1 billion per year (an annual increase of over $325 million).

B. The *O'Bannon* Litigation

The NCAA is no stranger to antitrust litigation arising from its compensation rules. In 2009, Ed O'Bannon, a former UCLA basketball player, sued the NCAA after learning that a college basketball video game featured an avatar that resembled him and sported his jersey **[**12]** number. *O'Bannon II, 802 F.3d at 1055*. "The gravamen of [his] complaint" was that the NCAA illegally restrained trade, in violation of *section 1*, by preventing FBS football and D1 men's basketball players from receiving compensation for the use of their names, images, and likenesses ("NILs").[5] *Id.*

[*1246] After a bench trial, the district court agreed under the Rule of Reason and entered relief for the plaintiffs. *See O'Bannon v. NCAA (O'Bannon I), 7 F. Supp. 3d 955, 962-63 (N.D. Cal. 2014)*, *aff'd in part, rev'd in part*, *O'Bannon II, 802 F.3d at 1079*. The district court acknowledged the NCAA's evidence that college athletics'"amateur tradition" helps maintain their popularity as a product distinct from professional sports. *Id. at 999*. It nevertheless concluded that this procompetitive benefit did not justify the NCAA's "sweeping prohibition" on NIL compensation. *Id.* Based on evidence that "school loyalty and geography" primarily drive consumer demand and a lack of proof that small payments to student-athletes would diminish college sports' popularity, the district court determined that the NCAA could justify, at most, restrictions on large payments. *Id. at 1000-01*.

After identifying two less restrictive alternatives ("LRAs") to the challenged rules, *id. at 1004-07*, the district court implemented those LRAs through an injunction that required the NCAA to permit **[**13]** its schools to (i) "use the licensing revenue generated from the use of their student-athletes' [NILs] to fund stipends covering the [COA]"; and (ii) to make deferred, post-eligibility cash payments in NIL revenue, not to exceed $5,000, to student-athletes. *Id. at 1007-08*; *see also id. at 1008* (finding no evidence that "such a modest payment" would "undermine[]" NCAA's "legitimate procompetitive goals"). The NCAA appealed.

A majority of a Ninth Circuit panel concluded that the district court's decision, the first of its kind, was "largely correct." *O'Bannon II, 802 F.3d at 1053*; *id. at 1079* (Thomas, C.J., concurring in part and dissenting in part). The panel unanimously affirmed the injunction insofar as it required the NCAA to permit athletic scholarships for the full

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[4] Under the Bylaws, student-athletes who have already received Pell Grants (calculated to cover the COA) may also receive these stipends.

[5] The *O'Bannon* class included "[a]ll current and former student-athletes" who had played D1 men's basketball or FBS football "and whose [NILs] may be, or have been, included or could have been included (by virtue of their appearance in a team roster) in game footage or in video[]games licensed or sold by Defendants, their co-conspirators, or their licensees." *Id. at 1055-56*.

COA, but a panel majority reversed and vacated the injunction's requirement that the NCAA allow deferred NIL payments. *Id. at 1053*.

In pertinent part, the panel rejected the NCAA's threshold argument that its amateurism rules, including those governing compensation, are "valid as a matter of law" under *NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. *O'Bannon II, 802 F.3d at 1061*. The panel acknowledged the Supreme Court's observation, in "dicta," that the NCAA has historically preserved its product by, *inter alia*, prohibiting payments to student-athletes. *Id. at 1063* (citing *Bd. of Regents, 468 U.S. at 102*). **[**14]** But it declined to read that statement as perpetual blanket approval for the NCAA's compensation rules, which were not at issue in *Board of Regents*. *Id.* Though conceding that the NCAA's "amateurism rules are likely to be procompetitive," [6] *id. at 1053*, the panel refused to exempt them from antitrust scrutiny, *see id. at 1064* (explaining that a procompetitive rule "can still be invalid under the Rule of Reason").

The panel then affirmed much of the district court's analysis. *See id. at 1069-76*. As is relevant here, it found, based on the record, "a concrete procompetitive effect in the NCAA's commitment to amateurism: namely that the amateur nature of collegiate sports increases their appeal to consumers." *Id. at 1073*. As to LRAs, it **[*1247]** agreed that the ban on funding COA scholarships with NIL revenue was "*patently and inexplicably* stricter" than necessary to differentiate college from professional sports. *Id. at 1075* ("[B]y the NCAA's own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses."). It clarified that courts must invalidate such restraints but may not "micromanage organizational rules" or "strike down largely beneficial market restraints[.]" ***[**15]*** *Id.*

A panel majority, however, found error in the district court's adoption of deferred NIL compensation "untethered to [student-athletes'] education expenses" as a viable LRA. *Id. at 1076*. It explained that "not paying student-athletes is *precisely what makes them amateurs*" and disagreed that "being a poorly-paid professional" is "'virtually as effective' for that market as being a[n] amateur." *Id.* To avert a "transition[]" to "minor league status" and to heed the "Supreme Court's admonition that [courts] must afford the NCAA 'ample latitude' to superintend college athletics," the majority vacated this portion of the injunction. *Id. at 1079* (quoting *Bd. of Regents, 468 U.S. at 120*). In closing, it "emphasize[d] the limited scope of [its] decision," explaining that "in th[at] case," the Rule of Reason did "not require" anything "more" of the NCAA than to permit student-athletes to receive scholarships for the COA. *Id.* [7]

C. The *Alston* Litigation

In March 2014, while the NCAA was litigating *O'Bannon I*, FBS football and D1 men's and women's basketball players filed several antitrust actions against the NCAA and eleven D1 conferences that were transferred to and, with one exception, consolidated before the same district court presiding over **[**16]** *O'Bannon I*. Rather than confining their challenge to rules prohibiting NIL compensation, Student-Athletes sought to dismantle the NCAA's entire compensation framework.

In December 2015, the district court certified three injunctive relief classes comprised of (i) FBS football players, (ii) D1 men's basketball players, and (iii) D1 women's basketball players. Each subclass consists of student-athletes who have received or will receive a full grant-in-aid during the pendency of this litigation.

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[6] In *O'Bannon II*, "amateurism rules" refers to, *inter alia*, the NCAA's "financial aid rules" and other rules "that limit student-athletes' compensation and their interactions with professional sports leagues." *Id. at 1055*.

[7] I dissented from this vacatur, mostly on the basis of the standard of review, because I concluded that the record supported the entirety of the judgment. *Id. at 1080*. Though agreeing that "court[s] should not eliminate the distinction between professional and college sports," I also disagreed that the vacated remedy would have done so. *Id. at 1082 n.4*. As a practical matter, the remedy that survived appeal required nothing of the NCAA, which had already adopted a more generous adjustment to the grant-in-aid limit by permitting schools to offer *any* D1 recruit an athletic scholarship up to the COA, irrespective of whether his or her NIL was or could be used or licensed.

Nearly a year after our decision in *O'Bannon II*, the NCAA sought judgment on the pleadings, invoking res judicata. It argued that *O'Bannon II* "requires nothing more of the NCAA than that it permit its member schools to provide student-athletes with their full education-related [COA]." Because the NCAA had already amended its rules to satisfy that requirement, it reasoned that any post-*O'Bannon* antitrust challenges to its compensation rules must fail. The district court denied the motion. It explained that Student-Athletes, unlike the *O'Bannon* plaintiffs, had challenged, among other things, limits on non-cash, education-related benefits. It acknowledged the possibility that *O'Bannon* forecloses a **[**17]** *type* of relief—lifting restrictions on cash payments untethered to educational **[*1248]** expenses—but declined to read it more broadly than that.

Cross-motions for summary judgment followed. The district court again rejected the NCAA's preclusion arguments. As to the merits, it adopted, at the parties' request, the market definition from *O'Bannon I*: the market for a college education or, alternatively, student-athletes' labor. It then granted Student-Athletes summary judgment at the Rule of Reason's first step, as the NCAA did not meaningfully dispute that the challenged rules have anticompetitive effects in the relevant markets. At the Rule of Reason's second step, it determined that the NCAA had raised triable issues as to whether its rules have the procompetitive effect(s) of maintaining the popularity of its elite college basketball and football products or integrating student-athletes into the wider campus community. Last, the district court found that Student-Athletes had proffered sufficient evidence to support their two proposed LRAs: (i) allowing individual conferences, but not the NCAA, to regulate student-athlete compensation; or (ii) enjoining NCAA rules that restrict both non-cash **[**18]** education-related benefits and benefits that are incidental to athletic participation.

D. The District Court's Decision

After a ten-day bench trial, the district court entered judgment for Student-Athletes, in part. The court concluded that NCAA limits on education-related benefits are unreasonable restraints of trade, and accordingly enjoined those limits; however, the court declined to hold that NCAA limits on compensation unrelated to education likewise violate section 1. Alston, 375 F. Supp. 3d at 1109.

1. *Determination that* O'Bannon *Is Not Preclusive*

At the outset of its conclusions of law, the district court again declined to dismiss the case on res judicata grounds. Id. at 1092-96. It identified "material factual differences" between *O'Bannon* and the *Alston* litigation, id. at 1095, including in the identity of class members and the rules and rights at issue, *see* id. at 1093-94 (explaining that "[t]he crux of the *O'Bannon* case was the right to student-athletes' NIL[s]," whereas "[t]he conduct at issue here is not connected to NIL rights" but to limits on above-COA compensation and benefits); id. at 1094 (noting that challenged rules either did not exist or have "materially changed" since *O'Bannon*). The district court then proceeded to its Rule of Reason analysis.

2. *The **[**19]** Relevant Market*

To begin, the district court accepted Student-Athletes' trial theory narrowing the relevant market to one in which Student-Athletes sell their "labor in the form of athletic services" to schools in exchange for athletic scholarships and other payments permitted by the NCAA. Id. at 1067, 1097.

3. *Anticompetitive Effects*

Next, the court reiterated its summary judgment finding of "significant anticompetitive effects in the relevant market." Id. at 1067, 1097. It relied on Student-Athletes' economic analyses reflecting that schools, as buyers of athletic services, exercise monopsony power to artificially cap compensation at a level that is not commensurate with student-athletes' value. Id. at 1068. Based on these analyses, it also found that, but for the challenged restraints, schools would offer recruits compensation that more closely correlates with their talent. Id. at 1068-69, 1098.

The district court also highlighted additional trial evidence demonstrating the challenged rules' anticompetitive effects. **[*1249]** This included testimony that, in 2013, the Power Five began to urge the NCAA to loosen its compensation restrictions based on a concern that existing rules incongruously allowed schools to spend on virtually anything, including palatial **[**20]** athletic facilities and seven-figure coaches' salaries, *except* direct financial support for student-athletes. *Id. at 1068-69*. In the district court's view, the Power Five's concerns constituted further proof that, absent the NCAA's rules, student-athletes would receive higher compensation. *Id. at 1069*. Although the NCAA granted the Power Five autonomy to create new forms of compensation and to expand previously available compensation and benefits in 2015, the district court observed that these conferences remain constrained by "overarching NCAA limits" that cap compensation at an artificially low level. *Id.*

4. *Procompetitive Effect*

The district court then turned to the NCAA's asserted procompetitive justifications. In pertinent part, the NCAA argued that the challenged rules implement "amateurism," which drives consumer interest in college sports because "consumers 'value amateurism.'" [8] *Id. at 1070* (internal citation omitted). The district court accepted this justification with respect to the NCAA's limits on cash compensation untethered to education, but not as to its limits on non-cash education-related benefits. *Id. at 1082-83, 1101-02*.

As a preliminary matter, the district court found no proof that the challenged rules *directly* foster consumer **[**21]** demand. *Id. at 1070*. It acknowledged the NCAA's theory that its rules safeguard "amateurism" for consumers' benefit, but the meaning of that term eluded the court. [9] *See id. at 1070-71* (noting former SEC commissioner's testimony that he "do[es not] even know what [amateurism] means" (internal citation omitted)). Though the NCAA defined amateurism during the litigation as "'not paying' the participants," *id. at 1071* (internal citation omitted), the district court observed that this purported pay-for-play prohibition is riddled with exceptions. *See id. at 1071-74*.

After cataloguing the long list of above-COA payments that the NCAA permits, the court then reached two conclusions: (i) the challenged rules "do not follow any coherent definition of amateurism . . . or even 'pay,'" and (ii) these payments (many of which post-date *O'Bannon*) have not diminished demand for college sports, which "remain[] exceedingly popular and revenue-producing." *Id. at 1074*.

On the question of consumer demand, the district court found Student-Athletes' evidence regarding the effect (or lack thereof) of above-COA compensation on demand more compelling than the NCAA's. For instance, in the battle of **[*1250]** economic experts, the district court found the NCAA's only demand expert, **[**22]** Dr. Kenneth Elzinga, unreliable because he failed to study "standard measures of consumer demand, such as revenues, ticket sales, or ratings," but instead relied on interviews with NCAA affiliates introduced to him by defense counsel. *Id. at 1075*. The district court further found his analysis irrelevant as he refused to study consumer response to historical changes in compensation levels based on the false premise that the NCAA's amateurism rules have not materially changed over time. *Id.*

By contrast, the district court credited Student-Athletes' expert Dr. Daniel Rascher's demand analysis, which was based on two natural experiments and, in some respects, corroborated by defense witnesses. *Id. at 1076-78, 1100*. The first experiment—comparing consumer demand before and after the August 2015 increase to the grant-in-aid limit, which resulted in "thousands of class members receiving significant" above-COA payments, including SAF and AEF distributions—demonstrated "no negative impact on consumer demand." *Id. at 1076*. In fact, Dr. Rascher

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[8] This justification is the only one raised on appeal. The district court rejected the NCAA's other proffered justification (abandoned on appeal): The challenged rules purportedly enhance student-athletes' college education by integrating them into the wider campus community. *Id. at 1083-86, 1102-03*. The district court declined to find that the challenged rules improve academic performance or prevent a social "wedge" between athletes and non-athletes. *Id. at 1083-85, 1102-03*. To the contrary, it found that the challenged rules foster resentment by permitting expenditures on "frills, like extravagant athletes-only facilities." *Id. at 1085-86, 1103*.

[9] The NCAA's "Principle of Amateurism" provides that student-athletes'"participation should be motivated primarily by education and by the physical, mental and social benefits to be derived," that their "participation in intercollegiate athletics is an avocation," and that they "should be protected from exploitation by professional and commercial enterprises." *Id. at 1070* (internal citation omitted).

found that revenues from D1 basketball and FBS football, "one of the best economic measures of consumer demand," have increased since 2015. *Id. at 1076-77*; *see also* *id. at 1078* (noting corroborating testimony by an NCAA **[**23]** *Rule 30(b)(6)* witness and a Big 12 *Rule 30(b)(6)* witness). The second experiment—comparing demand before and after the University of Nebraska (of the Big Ten) began providing athletes up to $7,500 in post-eligibility education-related aid—likewise did not demonstrably reduce interest in Nebraska sports or FBS football and D1 basketball more broadly. *Id. at 1077-78*.

The district court also found Student-Athletes' survey expert, Dr. Hal Poret, considerably more persuasive than the NCAA's, Dr. Bruce Isaacson. *Id. at 1078-80, 1100-01*. Dr. Isaacson asked respondents why they watch college sports and listed "amateurs and/or not paid" as one possible reason, but failed to indicate that "amateurs" means "not paid" or to otherwise define "amateurs," thus "render[ing] the responses hopelessly ambiguous." *Id. at 1078*. Moreover, he measured only consumer *preference* and conceded that he did not attempt to study *behavior*. *Id. at 1079*. By contrast, Dr. Poret tested behavior and found that consumers would continue to view or attend college athletics (at the same rate) even if eight types of compensation that the NCAA currently prohibits or limits were individually implemented. *Id. at 1079-80*. The district court credited this conclusion. *Id. at 1079-80 & n.24*.

Testimony by NCAA lay witnesses that "student" status **[**24]** drives demand also failed to persuade the district court of a connection between the challenged compensation regime and demand. *Id. at 1082, 1101*. It reasoned that "student-athletes would continue to be students in the absence of the challenged rules," *id. at 1082*, relying on *O'Bannon II*'s observation that higher education "would still be available to student-athletes if they were paid some compensation in addition to their athletic scholarships," *id. at 1101* (quoting *O'Bannon II, 802 F.3d at 1073*). It also underscored the absence of evidence that the NCAA had promulgated its rules based on demand analyses. *Id. at 1080, 1100-01*.

Despite finding the NCAA's procompetitive theory largely unpersuasive, the district court "credit[ed] the importance to consumer demand of maintaining a distinction between college sports and professional sports." *Id. at 1082*. The court then found that some NCAA rules—the COA limit on the grant-in-aid, limits on compensation unrelated to education, and limits on cash awards for graduating or other academic **[*1251]** achievements—serve that purpose by precluding "unlimited payments unrelated to education, akin to salaries seen in professional sports leagues." *Id. at 1082-83*; *see also* *id. at 1101-02*. But the court concluded that limits on "non-cash education-related benefits," such as post-eligibility **[**25]** graduate scholarships or tutoring, do not have that effect; it reasoned that such benefits "could not be confused with a professional athlete's salary" and would only "emphasize that the recipients are students." *Id. at 1083*.

5. *Less Restrictive Alternative*

At the Rule of Reason's third step, the district court considered whether three potential alternatives to the challenged restraints were less restrictive but virtually as effective in preventing "demand-reducing unlimited compensation indistinguishable from that observed in professional sports." *Id. at 1086*. The district court rejected two proposed LRAs, both of which would have permitted individual conferences to limit above-COA compensation, but would have otherwise invalidated either (i) *all* NCAA compensation limits or (ii) NCAA limits on education-related compensation *and* existing caps on benefits incidental to athletics participation, such as healthcare, pre-season expenses, and athletic participation awards. *Id. at 1086-87*. The district court found that both these alternatives would enable professional-style cash payments, thus threatening the distinction between college and professional sports. *Id. at 1087*. The court acknowledged the possibility that conferences could "discover" **[**26]** demand-preserving compensation levels. *Id.* But it rejected these LRAs to avoid demand-reducing "miscalculations" during "the inevitable trial-and-error phase." *Id.*

The district court then identified a viable LRA:

> (1) allow the NCAA to continue to limit grants-in-aid at not less than the [COA]; (2) allow the [NCAA] to continue to limit compensation and benefits unrelated to education; (3) enjoin NCAA limits on most compensation and benefits that are related to education, but allow it to limit education-related academic or graduation awards and

> incentives, as long as the limits are not lower than its limits on athletic performance awards now or in the future. [10]

Id. The court enumerated specific education-related benefits that the NCAA would be unable to prohibit or limit under the LRA: "computers, science equipment, musical instruments and other items not currently included in the [COA] but nonetheless related to the pursuit of various academic studies"; post-eligibility scholarships for undergraduate, graduate, and vocational programs at any school; tutoring; study-abroad expenses; and paid post-eligibility internships. *Id. at 1088*.

The district court explained that this LRA would permit some NCAA **[**27]** regulation of cash graduation or academic awards because these payments could otherwise morph into professional-like salaries. *Id.* It instructed that the cap on such awards should not fall below the existing limit on aggregate athletic participation awards (currently, $5,600), as receipt of the latter "has been shown not to decrease consumer demand and not to be inconsistent with the NCAA's understanding of amateurism." *Id.* Under this LRA, individual conferences may continue to limit all payment types because "no individual conference dominates **[*1252]** nearly the entire market, like the NCAA does." *Id.* The district court further reasoned that this LRA would not "greatly impact[]" the NCAA's "latitude to superintend college sports," as it "would affect only a small fraction of [its] rulemaking jurisdiction." *Id.*

The district court concluded that this LRA would be virtually as effective as the challenged rules at preserving student-athletes' status as students (and thus demand), analogizing it to the LRA affirmed in *O'Bannon II*: Both require the NCAA to permit members "to cover legitimate education-related costs." *Id. at 1105* (citing *O'Bannon II, 802 F.3d at 1075*). Finally, it determined that, far from resulting in significantly increased **[**28]** costs, the LRA's elimination of a category of rules would decrease the NCAA's enforcement costs. *Id. at 1090-91, 1105*.

6. *Remedy*

The district court implemented this LRA via a permanent injunction. *See In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 2019 WL 1593939 (N.D. Cal. Mar. 8, 2019)*. The injunction provides that the parties may move to modify its list of education-related benefits and that the NCAA may move to incorporate a definition of compensation and benefits that are "related to education" if it chooses to adopt one. *Id.* at *1. It also allows the NCAA to regulate *how* its members provide education-related benefits. *Id.*; *see also Alston, 375 F. Supp. 3d at 1107* ("[T]he NCAA could require schools to pay for these items directly or to reimburse student-athletes for [equipment] expenses if adequate proof of purchase is shown."). The court reiterated that NCAA members remain free to independently restrict pay. *Alston, 375 F. Supp. 3d at 1109*. And it stayed the injunction pending resolution of a timely appeal. *Id. at 1110*.

E. Post-Appeal Developments

After the NCAA timely appealed, California enacted the Fair Pay to Play Act (the "FPP Act"). *See* Cal. S.B. 206 (Sept. 30, 2019), *Cal. Educ. Code § 67456*. The FPP Act requires the NCAA and its member institutions to permit student-athletes enrolled in California colleges and universities to earn compensation from the use of their NILs. *Id. § 67456(a)*, *(g)*. It **[**29]** takes effect on January 1, 2023. *Id. § 67456(h)*.

In response to the FPP Act, the NCAA created a working group that has recommended permitting NIL benefits so long as they are tethered to education and otherwise preserve the distinction between college and professional sports recognized in *O'Bannon II*. *See* Fed. and State Leg. Working Grp. Report 4 (Oct. 23, 2019), *available at* https://tinyurl.com/working-grp-report. In recent testimony before the Senate Commerce Subcommittee on Manufacturing, Trade and Consumer Protection, NCAA President Dr. Mark Emmert denied that the NCAA would be "taking any action that is contrary to the position advocated by the NCAA or accepted by the Ninth Circuit with

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[10] The district court found that the current aggregate limit on such awards is $5,600. *Id. at 1072, 1099*.

respect to the type of NIL payments that were at issue in the *O'Bannon* case[.]" *See* Test. of Dr. Mark Emmert 6 (Feb. 11, 2020), *available at* https://tinyurl.com/Emmert-Test-y.

II

HN1[] The application of stare decisis and res judicata are questions of law that we review de novo. *See In re Watts, 298 F.3d 1077, 1079 (9th Cir. 2002)*; *Media Rights Techs., Inc. v. Microsoft Corp., 922 F.3d 1014, 1020 (9th Cir. 2019)*.

HN2[] We review factual findings for clear error and legal conclusions de novo. *See O'Bannon II, 802 F.3d at 1061*. Under clear error review, we must "accept the **[*1253]** district court's findings of fact unless we are left with the definite and firm conviction that a mistake **[**30]** has been committed." *Id.* (quoting *FTC v. BurnLounge, Inc., 753 F.3d 878, 883 (9th Cir. 2014))*; *see also United States v. Alexander, 106 F.3d 874, 877 (9th Cir. 1997)* ("We must not reverse as long as the findings are plausible in light of the record viewed in its entirety[.]"). In other words, a decision is not clearly erroneous unless it "strike[s] us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Prete v. Bradbury, 438 F.3d 949, 968 n.23 (9th Cir. 2006)* (internal citation omitted).

HN3[] Last, "[w]e review a district court's decision to grant a permanent injunction for an abuse of discretion"; the "factual findings underpinning the award" for clear error; and the "rulings of law relied upon by the district court in awarding injunctive relief" de novo. *Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 867 (9th Cir. 2014)* (internal citations and quotation marks omitted).

III

The district court correctly concluded *O'Bannon II* did not foreclose this litigation as a matter of stare decisis and res judicata.

A

HN4[] Stare decisis binds "today's Court" to "yesterday's decisions." *Danielson v. Inslee, 945 F.3d 1096, 1097 (9th Cir. 2019)* (quoting *Kimble v. Marvel Entm't, LLC, 576 U.S. 446, 135 S. Ct. 2401, 2409, 192 L. Ed. 2d 463 (2015))*. "In determining whether [we are] bound by an earlier decision," we consider "not only the rule announced, but also the facts giving rise to the dispute, other rules considered and rejected and the views expressed in response to any dissent or concurrence." *Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001)*. "Insofar as there may be factual differences between the current case" and *O'Bannon* ***[**31]*** *II*, we "must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis." *Id. at 1172*; *see also In re Osborne, 76 F.3d 306, 309 (9th Cir. 1996)* (explaining that decisions "furnish[] the rule for the determination of a subsequent case involving identical or similar material facts" (internal citation omitted)).

HN5[] Antitrust decisions are particularly fact-bound. The Supreme Court has long emphasized that the Rule of Reason "contemplate[s]" "case-by-case adjudication." *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*; *see also Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563, 579, 45 S. Ct. 578, 69 L. Ed. 1093 (1925)* ("[E]ach case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and . . . opinions in those cases must be read in the light of their facts"); Phillip Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application*, ¶ 1205c3 (4th ed. 2018) ("Continuing contracts in restraint of trade," are "typically subject to continuing reexamination," and "even a judicial holding that a particular agreement is lawful does not immunize it from later suit or preclude its reexamination as circumstances change.").

O'Bannon II was a decision of "limited scope," which the panel majority summarized as follows:

> [W]e reaffirm **[**32]** that NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason. . . . [T]he NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring **[*1254]** the NCAA to play by the Sherman Act's rules. *In this case*, the NCAA's rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market. *The Rule of Reason requires* that the NCAA permit its schools to provide up to the [COA] to their student athletes. It does not require more.

802 F.3d at 1079 (emphasis added).

In arguing that the last two sentences of this passage foreclose the current litigation, the NCAA ignores the inherently fact-dependent nature of a Rule of Reason analysis, which evaluates dynamic market conditions and consumer preferences; the panel majority's manifest effort to limit its decision to the record before it; and the majority's mandate that courts must continue to subject NCAA rules, including those governing compensation, to antitrust scrutiny. *See id. at 1064* ("The amateurism rules' validity must be proved, not presumed.").

Far from straying outside *O'Bannon II*'s bounds, the district court here sought to toe the **[**33]** line that the panel majority drew. The court uncapped education-related benefits, but left in place NCAA limits on compensation unrelated to education, consistent with the majority's observation that "student-athletes remain amateurs as long as any money paid to them goes to cover *legitimate educational expenses*." *Id. at 1075* (emphasis added); *see also id. at 1076* (vacating injunction only insofar as it forced NCAA to permit "cash payments untethered to . . . education expenses").

The district court meaningfully and properly distinguished *O'Bannon II* from the current litigation as a narrow challenge to restrictions on NIL compensation. *See id. at 1052* (introducing challenged rules as those that "prohibit student-athletes from being paid for the use of their [NILs]"); *id. at 1055* (stating that the "gravamen of O'Bannon's complaint was that the NCAA's amateurism rules, insofar as they prevented student-athletes from being compensated for the use of their NILs, were an illegal restraint of trade"); *id. at 1073 n.17* ("The correct inquiry under the Rule of Reason is: What procompetitive benefits are served by the NCAA's existing rule banning NIL payments?"). Additionally, the proposed LRAs in *O'Bannon* were expressly limited to "licensing revenue **[**34]** generated from the use" of student-athletes' NILs. *See O'Bannon I, 7 F. Supp. 3d at 1007*. By contrast, this action more broadly targets the "interconnected set of NCAA rules that limit the compensation [student-athletes] may receive in exchange for their athletic services." *Alston, 375 F. Supp. 3d at 1062*. And Student-Athletes sought LRAs that would uncap above-COA compensation, regardless whether their NILs have, will, or could generate any revenue that would fund such compensation. *See id. at 1086*.

The NCAA's argument that it should not incur antitrust liability for *relaxing* its compensation limits since *O'Bannon* is not persuasive. The district court rightly concluded that this argument misses the mark: "It is the fact that the prices of student-athlete compensation are fixed, as opposed to the amount at which these prices are fixed, that renders the agreements at issue anticompetitive." *Id. at 1095* (citing *O'Bannon II, 802 F.3d at 1071* ("It is no excuse that the prices fixed are themselves reasonable.") (quoting *Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980)))*.

Additionally, the NCAA's concession that it has relaxed its compensation limits since *O'Bannon* only underscores that the instant litigation is materially factually different from *O'Bannon*. Indeed, as Student-Athletes **[*1255]** argue, the changes to compensation limits since *O'Bannon* "alter the **[**35]** factual assumption that drove the result in *O'Bannon*: they show that non-education-related cash payments in excess of the [COA] are no longer a 'quantum leap' from current NCAA practice[.]" *See O'Bannon II, 802 F.3d at 1078* ("The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap.")).

In *O'Bannon II*, the majority addressed only two types of above-COA allowances: Pell Grants and prize money for tennis recruits. *See id. at 1058-59*. It distinguished Pell Grants, which are "intended for education-related expenses," from "pure cash compensation" for athletic performance. *Id. at 1078 n.24*. And it declared that "award money from outside athletic events implicates amateurism differently than allowing schools to pay student-[athletes] directly." *Id. at 1077 n.21*. Neither of these above-COA allowances is analogous to the post-*O'Bannon II* forms of compensation—provided by schools and unrelated to education—that the district court cited to support its conclusion that the NCAA, contrary to its theory of amateurism, *does* provide at least some "pay for play." *See Alston, 375 F. Supp. 3d at 1071-74*. For example, the court found that, after the *O'Bannon* record closed, student-athletes **[**36]** have received, *inter alia*, athletic participation awards in the form of Visa gift cards,[11] SAF disbursements in the thousands of dollars to pay for loss-of-value insurance,[12] and personal expenses unrelated to education. *Id. at 1095*. Based on these innovations, the court fairly concluded that the compensation landscape has meaningfully changed since *O'Bannon. See id. at 1094*.

In sum, because *O'Bannon II* "was decided on a narrow set of facts that are distinguishable from the present case," we "decline to adopt" the NCAA's "broad interpretation" of that decision. *United States v. Silver, 245 F.3d 1075, 1079 (9th Cir. 2001)*.

B

HN6[] Res judicata, also known as "claim preclusion," "bars a party in successive litigation from pursuing claims that 'were raised or could have been raised in [a] prior action.'" *Media Rights Techs., 922 F.3d at 1020* (internal citation omitted). It applies when there is: (i) an identity of claims between the prior and subsequent actions; (ii) a final judgment on the merits; *and* (iii) identity or privity between the parties. *Id. at 1020-21*. The NCAA bears the burden of proving all three elements. *Id. at 1021*. The NCAA fails to carry its burden with respect to the first element.

HN7[] "Claim preclusion does not apply to claims that were not in existence and could not have been sued upon . . . when the allegedly **[**37]** preclusive action was initiated." *Id.* (internal citation omitted). That bright-line rule is dispositive here. Because Student-Athletes' antitrust claim "arose from events that occurred after" the *O'Bannon* record closed in August 2014—that is, the above-described proliferation **[*1256]** of permissible above-COA payments alongside a growth in revenues from FBS football and D1 basketball—it is "not barred." *Howard v. City of Coos Bay, 871 F.3d 1032, 1040 (9th Cir. 2017)*; *see also Harkins Amusement Enters., Inc. v. Harry Nace Co., 890 F.2d 181, 183 (9th Cir. 1989)* ("Failure to gain relief for one period of time does not mean that the plaintiffs will necessarily fail for a different period of time"); *California v. Chevron Corp., 872 F.2d 1410, 1415 (9th Cir. 1989)* (providing that "conduct of the parties since the first judgment[] must be considered" in connection with successive antitrust suits).[13]

IV

The district court properly granted judgment on the Student-Athletes' *Sherman Act § 1* claim. ***HN8***[] The *Sherman Act* prohibits, *inter alia*, agreements "in restraint of" interstate trade or commerce. *15 U.S.C. § 1*. The Supreme

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[11] Visa gift cards function like cash, even if the NCAA declines to admit as much.

[12] The NCAA characterizes this insurance as a "legitimate expense to protect against the risk of loss that could be incurred during athletic competition," but the legitimacy of these payments is irrelevant here. What matters, for stare decisis purposes, is that the *O'Bannon II* panel had no occasion to consider whether such payments accord with the NCAA's conception of amateurism.

[13] In support of its res judicata argument, the NCAA cites the *O'Bannon II* majority's discussion of the "danger" of "future plaintiffs" pursuing "essentially the same claim again and again." If anything, the cited discussion cuts against the NCAA. The majority predicted that future challenges to the district court's $5,000 cap on deferred NIL payments would ultimately result in student-athletes, "captur[ing] the full value of their NIL" and the NCAA's transformation into a minor league. *O'Bannon II, 802 F.3d at 1079*. Far from enshrining the majority's decision as the last word on the legality of NCAA compensation rules, this hypothetical rests on the premise that res judicata would *not* have blocked such challenges.

Court has interpreted *section 1* "as 'outlaw[ing] only unreasonable restraints' of trade." *See In re Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1149 (9th Cir. 2019)* (alteration in original) (quoting *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997))*. "[W]hen considering agreements among entities involved in league sports, such as here, [we] must determine whether the restriction is unreasonable under the [R]ule of [R]eason." **[**38]** *Id. at 1150 n.5*; *see also O'Bannon II, 802 F.3d at 1069* ("[T]he appropriate rule is the Rule of Reason.").

HN9[] As applied here, under the Rule of Reason's "three-step framework:" (1) Student-Athletes "bear[] the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market"; (2) if they carry that burden, the NCAA "must come forward with evidence of the restraint's procompetitive effects"; and (3) Student-Athletes "must then show that any legitimate objectives can be achieved in a substantially less restrictive manner." *O'Bannon II, 802 F.3d at 1070* (quoting *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001))*. Throughout this analysis, we remain mindful that, although "the NCAA is not above the antitrust laws," *id. at 1079*, courts are not "free to micromanage organizational rules or to strike down largely beneficial market restraints," *id. at 1075*. Accordingly, a court must invalidate a restraint and replace it with an LRA only if the restraint is "*patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives." *Id. at 1075*.

A

The district court properly concluded that the Student-Athletes carried their burden at the first step of the Rule of Reason. The district court found that the NCAA's rules have "significant anticompetitive effects in the relevant **[**39]** market" for Student-Athletes' labor on the gridiron and the court. *See Alston, 375 F. Supp. 3d at 1070* ("[B]ecause elite student-athletes lack any viable alternatives to [D1], they **[*1257]** are forced to accept, to the extent they want to attend college and play sports at an elite level after high school, whatever compensation is offered to them by [D1] schools, regardless of whether any such compensation is an accurate reflection of the competitive value of their athletic services."). These findings "have substantial support in the record," *O'Bannon II, 802 F.3d at 1070*; *see Alston, 375 F. Supp. 3d at 1067-70*, and the NCAA does not dispute them, *see O'Bannon II, 802 F.3d at 1072*.

B

The NCAA does, however, quarrel with the district court's analysis at the Rule of Reason's second step, where the NCAA bears a "heavy burden" of "competitively justify[ing]" its undisputed "deviation from the operations of a free market." *Bd. of Regents, 468 U.S. at 113*; *see also O'Bannon II, 802 F.3d at 1064* (explaining that the NCAA is not entitled to a presumption that its restraints are procompetitive). On appeal, the NCAA advances a single procompetitive justification: The challenged rules preserve "amateurism," which, in turn, "widen[s] consumer choice" by maintaining a distinction between college and professional sports.

HN10[] "Improving customer choice is procompetitive." *Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1157 (9th Cir. 2003)*; *see also O'Bannon II, 802 F.3d at 1072* ("[A] restraint **[**40]** that broadens choices can be procompetitive."). Thus, the district court properly "credit[ed] the importance to consumer demand of maintaining a distinction between college and professional sports." *Alston, 375 F. Supp. 3d at 1082*.[14]

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[14] Writing in support of Student-Athletes, amici assert that courts may not consider a restraint's procompetitive benefits in a market outside the market deemed relevant for the purpose of evaluating a restraint's anticompetitive effects. That proposition is not settled. *See Paladin, 328 F.3d at 1157 n.11* (acknowledging the "theory that procompetitive effects in a separate market cannot justify anticompetitive effects in the market . . . under analysis" (citing *United States v. Topco Assocs., Inc. 405 U.S. 596, 610, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972))*. The *O'Bannon II* panel had no occasion to address it, as the parties there limited their dispute to whether the challenged rules, as a factual matter, preserved consumer demand. *See 802 F.3d at 1072-74*. So, too, here: The parties have agreed that the relevant market is the market for Student-Athletes' labor, while the market to be

The district court concluded, however, that only *some* of the challenged rules serve that procompetitive purpose: limits on above-COA payments unrelated to education, the COA cap on athletic scholarships, and certain restrictions on cash academic or graduation awards and incentives. *Id. at 1101-02* (recognizing that removal of these restrictions could result in unlimited cash payments akin to professional salaries). It explained that the remaining rules—those restricting "non-cash education-related benefits"—do nothing to foster or preserve demand because "[t]he value of such benefits, like a scholarship for post-eligibility graduate school tuition, is inherently limited to its actual value, and could not be confused with a professional athlete's salary." *Id. at 1083*.

The record amply supports these findings. The district court reasonably relied on demand analyses, survey evidence, and NCAA testimony indicating that caps on non-cash, education-related benefits have no demand-preserving effect and, **[**41]** therefore, **[*1258]** lack a procompetitive justification. *See id. at 1076-80*.

First, Dr. Rascher's and Dr. Noll's demand analyses demonstrate that the NCAA has loosened its restrictions on above-COA, education-related benefits since *O'Bannon* without adversely affecting consumer demand. These benefits include SAF and AEF distributions to cover fift-hand sixth-year aid, postgraduate scholarships, tutoring, international student fees, educational supplies, academic achievement or graduation awards, graduate school exam fees, and fees for internship programs. *Id. at 1072 n.15*.

Second, Student-Athletes' survey evidence reflects that individually implementing seven types of education-related benefits—limited or forbidden under the challenged rules—would not diminish the survey respondents' viewership or attendance.[15]

Third, NCAA witnesses confirmed that the NCAA set limits on education-related benefits without consulting any demand studies. *See id. at 1080* ("Indeed, [Kevin] Lennon, who has worked for the NCAA for more than thirty years, testified that he does not recall any instance in which any study on consumer demand was considered by the NCAA membership when making rules about compensation"); *see also id. at 1074* ("Defendants have not provided any cogent **[**42]** explanation for why the NCAA generally prohibits financial aid for graduate school at another institution, or for why the Senior Scholar Awards are limited in quantity and amount.").

Notwithstanding this evidence, the NCAA accuses the district court of straying from a purported "judicial consensus" that the NCAA expands consumer choice by enforcing an amateurism principle under which student-athletes "must not be paid" a penny over the COA. This sweeping procompetitive justification—the "Not One Penny" standard, in Dr. Noll's parlance—lacks support in both precedent and the record.

Although both *Board of Regents* and *O'Bannon II* define amateurism to exclude payment for athletic performance, neither purports to immortalize that definition as a matter of law. In fact, *O'Bannon II* recognizes that *Board of Regents*' discussion of amateurism is "dicta." *802 F.3d at 1063*. And to the extent the *O'Bannon II* majority accepted the NCAA's conception of amateurism, it did so based on the record, which demonstrated a "concrete procompetitive effect," *id. at 1073*, of limiting above-COA "NIL cash payments untethered to [students'] education expenses," *id. at 1076*.

The record in this case, by contrast, reflects no such concrete procompetitive **[**43]** effect of limiting non-cash, education-related benefits. Instead, the record supports a much narrower conception of amateurism that still gives rise to procompetitive effects: Not paying student-athletes "unlimited payments unrelated to education, akin to salaries seen in professional sports leagues" is what makes them "amateurs." *Alston, 375 F. Supp. 3d at 1083*. The district court credited NCAA testimony that college sports resonates with fans because they are not professionalized, and that "if the college game looks to be professional sports, [fewer] people will watch it." *Id. at*

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assessed for pro-competitive effects is the market for college sports. Thus, the issue is not presented in this case. Because the issue raised by amici is "not properly before us," we express no view on its merits, and leave it for another day. *Pres. Coal., Inc. v. Pierce, 667 F.2d 851, 862 (9th Cir. 1982)*.

[15] These benefits were: an academic incentive payment with a maximum value of $10,000, a graduation incentive payment with a maximum value of $10,000, a post-eligibility undergraduate scholarship, a work-study payment, off-season expenses, a graduate school scholarship for the COA, and a post-eligibility study-abroad scholarship.

1082 (internal citations omitted). But the court reasonably declined to adopt the Not One Penny standard based on considerable **[*1259]** evidence that college sports have retained their distinctive popularity despite an increase in permissible forms of above-COA compensation and benefits.

In defense of its expansive conception of amateurism, the NCAA relies on its survey of 1,100 college sports fans, reflecting that 31.7 percent watch college sports because, *inter alia*, they "like the fact that college players are amateurs and/or are not paid." The NCAA claims that the district court rejected this survey on "baseless grounds." But it disregards the court's **[**44]** primary and most compelling reason for dismissing this evidence: The survey results reflect, at most, a consumer *preference* for "amateurism," but do not capture the effects (if any) that the tested compensation scenarios would have on consumer *behavior. See* *id. at 1079* ("Dr. Isaacson acknowledged that measuring consumer preferences is 'not the same thing' as measuring future consumer behavior, and that he did not do any work to measure any relationship between the two." (internal citation omitted)). The NCAA does not deny this flaw in its survey evidence.

The district court offered another sound reason to reject the NCAA's survey evidence: The survey's use of the phrase "amateurs and/or not paid" made its responses "hopelessly ambiguous." *Id. at 1078*. In so finding, the district court did not, as the NCAA complains, "inject ambiguity into a commonplace term." Amateurism does not have a fixed definition, as NCAA officials themselves have conceded. *See, e.g., id. at 1070-71* ("Mike Slive, who served as commissioner of the SEC, one of the Power Five, . . . testified that amateurism is 'just a concept that I don't even know what it means. I really don't.'" (internal citation omitted)); *see also* *O'Bannon II, 802 F.3d at 1083* (Thomas, C.J., dissenting) **[**45]** (referring to amateurism as a "nebulous concept prone to ever-changing definition"). Survey respondents who selected "amateurs and/or not paid" may have very well equated amateurism with student status, irrespective of whether those students receive compensation for athletics. *See* *Alston, 375 F. Supp. 3d at 1082* (acknowledging defense witness testimony that "consumers' perception that student-athletes are, in fact, students" drives consumer demand for D1 basketball and FBS football). Given this lack of clarity, the district court reasonably concluded that the NCAA's survey results were of limited evidentiary value.

Finally, the district court properly considered whether the challenged rules themselves, rather than hypothetical alternatives, have procompetitive benefits. ***HN11***[] As both parties recognize, the proper "inquiry under the Rule of Reason is: What procompetitive benefits are served by the NCAA's [challenged] rule[s]?" *See* *O'Bannon II, 802 F.3d at 1073 n.17*. As we have recounted, the district court gave reasoned consideration to the procompetitive effects achieved by each type of challenged rule, ultimately concluding that the NCAA "sufficiently show[ed] a procompetitive effect of *some aspects of* the *challenged compensation scheme*," but not all. **[**46]** *Alston, 375 F. Supp. 3d at 1103* (emphasis added). By contrast, in *O'Bannon*, the district court erred at step two because it considered the procompetitive benefits of *hypothetical* limits on large amounts of compensation. *See* *O'Bannon II, 802 F.3d at 1073 n.17* ("During the second step, the district court could only consider the benefits of the NCAA's existing rule prohibiting NIL payments—it could not consider the potential benefits of an alternative rule (such as capping large payments)."). Here, the NCAA has conceded that its rules, in part, "prevent the receipt of unlimited pay" unrelated to education. Dr. Isaacson also acknowledged that the challenged rules prohibit unlimited pay. Thus, the court did not err **[*1260]** in assessing whether such rules have procompetitive effects.

In short, the district court fairly found that NCAA compensation limits preserve demand to the extent they prevent unlimited cash payments akin to professional salaries, but not insofar as they restrict certain education-related benefits.[16]

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[16] The NCAA asserts that the district court proceeded from the "simply fictional" premise that the dividing line between student-athletes and professionals is that the latter may receive "unlimited pay." In context, the district court was using the term "unlimited pay" as shorthand for payments that run the risk of eroding consumer perception of student-athletes as students—that is, *cash* payments *unrelated to education* and *akin to professional salaries*. The NCAA's own expert used that shorthand in surveying consumer attitudes toward an "unlimited payments scenario," where "a college could pay a student-athlete any amount it wanted to, without any limit, for playing college sports."

C

HN12[] At the Rule of Reason's third step, it is Student-Athletes' burden to "make a strong evidentiary showing" that their proposed LRAs to the challenged scheme "are viable." *Id. at 1074*. "[T]o be viable," an **[**47]** alternative "must be 'virtually as effective' in serving the procompetitive purposes of the NCAA's current rules, and 'without significantly increased cost.'" *Id.* (quoting *Cty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1159 (9th Cir. 2001))*. Where "a restraint is *patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and order it replaced with [an LRA]." *Id. at 1075*.

The LRA identified by the district court would prohibit the NCAA from (i) capping certain education-related benefits[17] and (ii) limiting academic or graduation awards or incentives below the maximum amount that an individual athlete may receive in athletic participation awards, while (iii) permitting individual conferences to set limits on education-related benefits. *See* *Alston, 375 F. Supp. 3d at 1087*. The district court did not clearly err in determining that this LRA would be "'virtually as effective' in serving the procompetitive purposes of the NCAA's current rules," and may be implemented without "significantly increased cost." *See* *O'Bannon II, 802 F.3d at 1074* (internal citation omitted).

1

The district court reasonably concluded that uncapping certain education-related benefits would preserve consumer demand for college athletics just as well as the challenged **[**48]** rules do. Such benefits are easily distinguishable from professional salaries, as they are "connect[ed] to education"; "their value is inherently limited to their actual costs"; and "they can be provided in kind, not in cash." *Alston, 375 F. Supp. 3d at 1102*. And, as already detailed, the record furnishes ample support for the district court's finding that the provision of education-related benefits has not and will not repel college sports fans.

The district court drew an apt analogy between the LRA upheld in *O'Bannon II* **[*1261]** and the LRA it identified here: Both athletic scholarships for the COA and education-related benefits "cover legitimate education-related costs." *Id. at 1105*. Indeed, in affirming the district court's order insofar as it raised the grant-in-aid cap to the COA, the *O'Bannon II* panel noted Dr. Emmert's testimony that this alternative would not harm demand "because all the money given to students would be going to cover their 'legitimate costs' to attend school." *O'Bannon II, 802 F.3d at 1075*. In reference to this litigation, Dr. Emmert similarly announced the NCAA's approval of the court's order to the extent that it would foster competition among conferences and schools "over who can provide the best educational experience"—"an inherently **[**49]** good thing." Associated Press, *Emmert: Ruling reinforced fundamentals of NCAA*, ESPN, Apr. 4, 2019, *available at* https://tinyurl.com/emmert-NCAA/ .

Dr. Emmert's comment is consistent with the record. As in *O'Bannon II*, the NCAA presented no evidence that demand will suffer if schools are free to reimburse education-related expenses of inherently limited value. Indeed, its evidence was to the contrary. For instance, in testifying about a University of Nebraska program that permits student-athletes to receive up to $7,500 in post-eligibility aid (for study-abroad expenses, scholarships, and internships), the University's former chancellor conceded that such benefits "relate to the educational enterprise" and, thus, do not erode demand. When asked about the propriety of above-COA compensation, the current MAC commissioner similarly testified that the "key" is "linking" payments to the "pursuit of the educational opportunities of the individual involved." The LRA fashioned by the district court achieves that link.

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[17] Those benefits are the following: "computers, science equipment, musical instruments and other tangible items not included in the cost of attendance calculation but nonetheless related to the pursuit of academic studies; post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; tutoring; expenses related to studying abroad that are not included in the cost of attendance calculation; and paid post-eligibility internships." *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 2019 WL 1593939, at *1*.

In light of this evidence, the district court reasonably concluded that market competition in connection with education-related benefits will only reinforce consumers' perception **[**50]** of student-athletes as students, thereby preserving demand. *See Alston, 375 F. Supp. 3d at 1089* (observing that NCAA's "own witnesses" testified that "consumer demand for [D1] basketball and FBS football is driven largely by consumers' perception that student-athletes are, in fact, students").

Moreover, no evidence in the record substantiates the NCAA's concerns that certain benefits permissible under the LRA, if uncapped, will become vehicles for payments that are virtually indistinguishable from a professional's salary. These concerns are premised on an unreasonably expansive reading of the injunction, including its requirement that the NCAA permit reimbursement for "tangible items not included in the [COA] calculation but nonetheless related to the pursuit of academic studies." *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 2019 WL 1593939, at *1*. ***HN13***[] We construe injunctions in "context" and "so as to avoid . . . absurd result[s]." *Gathright v. City of Portland, 439 F.3d 573, 581 (9th Cir. 2006)*. The context here makes plain that it "cannot have been the district court's intent," *id.*, for uncapped benefits to be vehicles for unlimited cash payments. Instead, it expressly envisioned "non-cash education-related benefits" for "*legitimate* education-related costs," not luxury cars or expensive musical instruments for students who are *not* studying music. **[**51]** *Alston, 375 F. Supp. 3d at 1105* (emphasis added). Thus, properly construed, the injunction does not permit the type of unlimited cash payments asserted by the NCAA. Further, as the district court properly concluded, it is doubtful that a consumer could mistake a *post-eligibility* internship for a professional athlete's salary, where the former is necessarily divorced from participation in college athletics.

[*1262] The NCAA's challenges to the evidence underlying this LRA are likewise unavailing. To be sure, neither the survey nor Dr. Rascher's observations regarding the Nebraska program purport to reflect the effect that *nationwide* education-related benefits, implemented in the *aggregate*, would have on consumer demand. But the district court did not rely exclusively on this evidence. ***HN14***[] Under the deferential standard of review required here, we must examine the record "in its entirety." *Alexander, 106 F.3d at 877*. The NCAA fails to explain why the cumulative evidence, which included demand analyses regarding the growth of NCAA revenue alongside the expansion of SAF and AEF payments for education-related expenses, was insufficient.

And though the record does not reflect whether an athlete has ever received $5,600 in aggregate athletic participation awards, **[**52]** the district court reasonably concluded that permitting student-athletes to receive up to that amount in academic or graduation awards and incentives will not erode consumer demand. *See Alston, 375 F. Supp. 3d at 1072* (citing Dr. Elzinga's testimony that a player on a successful team could obtain $5,600 in cumulative awards under existing rules). The district court had before it (and fairly credited) evidence that demand would withstand even *higher* caps on such awards and incentives. *See id. at 1080* (discussing Student-Athletes' survey, which indicated that consumers would continue to view and attend college sports events even if student-athletes received academic or graduation incentive payments of up to $10,000); *see also id. at 1074, 1102, n.42* (observing that NCAA's *30(b)(6)* witness was unable to explain the NCAA's reason for limiting Senior Scholar-Athlete Awards to two students per year and a value of $10,000). The NCAA's objection to the $5,600 cap rings especially hollow considering that it does not cap individual academic or graduation awards drawn from the AEF or SAF. *See id. at 1072 n.15*.[18]

Finally, the NCAA contends that the district court engaged in improper judicial price setting by tying the cap on academic and graduation awards and incentives **[**53]** to the cap on aggregate athletic participation awards. ***HN15***[] The Supreme Court has remarked that courts are "ill suited" to identify terms of dealing between competitors, including a product's "proper price." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. But the district court did not *fix* the value of these

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[18] The $5,600 cap on academic achievement awards and the $5,000 cap on deferred NIL compensation that the panel majority struck down in *O'Bannon II* may be "remarkably close" as a numerical matter, but they are different where it counts: Unlike deferred NIL compensation, academic achievement awards are plainly education-related and, thus, reinforce the demand-preserving perception of student-athletes as students.

academic awards: The task of setting their value to protect demand, by adjusting the aggregate value of athletic participation awards, remains in the NCAA's court. *See Alston, 375 F. Supp. 3d at 1107*.

2

The district court did not clearly err in finding that this LRA will not result in significantly increased costs. The district court reasoned that enjoining NCAA caps on most education-related benefits will actually save the NCAA resources that it would have otherwise spent on enforcing those caps. *Id. at 1090*. Commonsense supports that determination, as does the record.

Moreover, though the injunction permits the NCAA to regulate, to an extent, academic **[*1263]** and graduation awards and incentives, and conferences to regulate all education-related benefits, there is no reason to believe that such regulation, if pursued, will result in significantly increased costs. The NCAA does not dispute that it and its conferences have existing rulemaking and enforcement infrastructure to achieve **[**54]** such regulation. *See id. at 1090 n.32* (noting NCAA's recent creation of enforcement body to adjudicate violations of "complex" NCAA rules, including the "prioritiz[ation of] academics and the well-being of college athletes" (internal citation omitted); *see also id.* (noting that conferences are legislative bodies under the Bylaws).

The court's findings at step three are supported by the record, and certainly not clearly erroneous.

V

The final question remaining is whether the district court's injunction goes too far or not far enough in enjoining the NCAA's unlawful conduct. In the NCAA's view, the injunction is impermissibly vague, in violation of *Federal Rule of Civil Procedure 65(d)* ("*Rule 65(d)*"), and usurps the association's role as the "superintend[ent]" of college sports, *O'Bannon II, 802 F.3d at 1074*. On cross-appeal, Student-Athletes urge that the district court should have enjoined *all* NCAA compensation limits, including those on payments untethered to education. In our view, the district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports. Thus, we neither vacate nor broaden the injunction, but affirm.

A

HN16[] *Rule 65(d)* reflects the "basic **[**55]** principle" that "those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits." *Fortyune v. Am. Multi-Cinema, Inc., 364 F.3d 1075, 1086-87 (9th Cir. 2004)* (internal citation omitted). "[W]e will not set aside injunctions under *Rule 65(d)* 'unless they are so vague that they have no reasonably specific meaning.'" *Id. at 1087* (internal citation omitted). The challenged injunction clears this hurdle.

The district court enjoined the NCAA from limiting *enumerated* "compensation and benefits related to education," *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 2019 WL 1593939, at *1* (listing computers, science equipment, musical instruments, etc.). The NCAA does not claim confusion as to the meaning of any of these items. Instead, it stakes its *Rule 65(d)* objection on the injunction's reference to "other tangible items not included in the [COA] but nonetheless related to the pursuit of academic studies." *Id.* When read in context, following a list of specific types of education-related equipment, this language is reasonably specific. And unlike in *Columbia Pictures Industries, Inc. v. Fung*, a copyright infringement case on which the NCAA relies, the injunction here does not make cryptic reference to "general[]" or "wide[spread]" understanding and knowledge of technical terms. *710 F.3d 1020, 1048 (9th Cir. 2013)*.

Nor did the district **[**56]** court impermissibly wrest control of college sports from the NCAA by empowering itself to determine the types of benefits that qualify as "related to" education, instead of "leaving th[at] task" to "the institutions experienced in and responsible for providing education." The NCAA does not (nor can it reasonably) dispute that the benefits enumerated in the injunction are plainly related to academics. What is more, the injunction **[*1264]** invites the NCAA to promulgate a definition of "related to education," based on its institutional expertise, subject to the court's approval. *See In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 2019 WL 1593939, at *1*. This allowance does not constitute judicial usurpation by a long shot.

In sum, we uphold the injunction against the NCAA's challenges.

B

If the district court had concluded, as Student-Athletes contend, that NCAA limits on compensation unrelated to education unreasonably restrain trade, then it should have enjoined those limits. *See* 15 U.S.C. §§ 4, 25 (conferring jurisdiction on federal courts to "prevent and restrain violations" of ***antitrust law***); *see also Ford Motor Co. v. United States, 405 U.S. 562, 577-78, 92 S. Ct. 1142, 31 L. Ed. 2d 492 (1972)* ("Antitrust relief should unfetter a market from *anticompetitive conduct*." (emphasis added)). The problem for Student-Athletes is that the court did not conclude as much; instead, **[**57]** it determined that NCAA limits on *education*-related compensation are the only challenged rules that flunk the Rule of Reason.

HN17[] Although the district court found that *all* the challenged rules have an anticompetitive effect, *Alston, 375 F. Supp. 3d at 1067-70*, a finding of anticompetitive harm at step one does not end the inquiry. A defendant may escape antitrust liability despite inflicting harm if a court determines that the restraint has a procompetitive effect, and a proposed LRA eliminating that restraint is not viable. *See, e.g., O'Bannon II, 802 F.3d at 1070, 1076-79* (finding that rules prohibiting NIL compensation had significant anticompetitive effects, but vacating portion of injunction requiring deferred compensation for NILs after concluding that this alternative was not a viable LRA).

As previously stated, the district court concluded, at step two, that the NCAA satisfied its burden of showing that "[r]ules that prevent unlimited payments"—"unrelated to education" and "akin to salaries seen in professional sports leagues"—serve the procompetitive end of distinguishing college from professional sports. *Alston, 375 F. Supp. 3d at 1083*. And at step three, it rejected Student-Athletes proposed LRAs, which would have eliminated such limits, reasoning:

> [A]t least some conferences would **[**58]** allow their schools to offer student-athletes unlimited cash payments that are unrelated to education. Such payments could be akin to those observed in professional sports leagues. Payments of that nature could diminish the popularity of college sports as a product distinct from professional sports.

Id. at 1087. Contrary to Student-Athletes' understanding, this analysis reflects the judgment that limits on cash compensation unrelated to education do *not*, on this record, constitute anticompetitive conduct and, thus, may not be enjoined.

This judgment was adequately reasoned and rests on neither factual nor legal error. The district court acknowledged the theoretical possibility that "conference officials, as rational economic actors, would not act contrary to their members' aggregate economic interests" by paying demand-reducing levels of compensation. *Id.* But it reasonably perceived a risk of "miscalculations" by conferences during an "inevitable trial-and-error phase." *Id.* The district court did not clearly err in declining to assume that conferences, in reality, would act rationally.

[*1265] The record indicates that the Power Five schools have exercised their autonomy in recent years to expand benefits **[**59]** unrelated to education and that conferences and schools have provided largely discretionary SAF and AEF payments for a wide range of expenses unrelated to education—both without harming consumer demand. But the district court reasonably concluded that this evidence may not reliably indicate that *individual* conferences would regulate payments in a demand-preserving manner absent any restrictions: The autonomy structure permits the Power Five to *collectively* adopt compensation-related legislation, in line with *O'Bannon II*'s guidance that some degree of "mutual agreement" is necessary to make the college sports product available. *See 802 F.3d at 1069* (quoting *Bd. of Regents, 468 U.S. at 102*). And the NCAA currently limits the use of SAF funds to payments that are distinguishable from a professional's salary in that they "meet[] financial needs that arise in conjunction with participation in intercollegiate athletics, enrollment in academic curriculum or to recognize academic achievement."

Student-Athletes' claims of legal error are likewise unpersuasive. They cite no support for their position that a court "should not simply import the [LRA] as its injunction." ***HN18***[] Indeed, *O'Bannon II* holds otherwise: "Where, as here, a restraint is *patently* ***[**60]*** *and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and *order it replaced with a [viable LRA]*." *Id. at 1075* (emphasis added).

Finally, Student-Athletes argue that the NCAA may no longer rely on *O'Bannon II*'s conclusion that NCAA limits on cash payments untethered to education are critical to preserving the distinction between college and professional sports now that it has "endorse[d]" the very "same NIL benefits" at issue there. This argument is premature. As it stands, the NCAA has *not* endorsed cash compensation untethered to education; instead, it has undertaken to comply with the FPP Act in a manner that is consistent with *O'Bannon II*—that is, by loosening its restrictions to permit NIL benefits that are "tethered to education." Fed. and State Leg. Working Grp. Report 4 (Oct. 23, 2019), *available at* https://tinyurl.com/working-grp-report; *see also* Test. of Dr. Mark Emmert 6 (Feb. 11, 2020), *available at* https://tinyurl.com/Emmert-Test-y. Accordingly, we disagree that the NCAA's response to the FPP Act militates in favor of enjoining all NCAA compensation limits.[19]

VI

To repeat my observation **[**61]** in *O'Bannon II*: "The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of ***antitrust law*** and under the appropriate standard of review." *O'Bannon II, 802 F.3d at 1083* (Thomas, C.J., concurring in part and dissenting in part).

For the foregoing reasons, we hold that the district court properly concluded that NCAA limits on education-related benefits do not "play by the Sherman Act's rules." **[*1266]** *Id. at 1079*. Accordingly, we affirm its liability determination and injunction in all respects.

AFFIRMED.

Concur by: M. SMITH

Concur

M. SMITH, Circuit Judge, concurring:

Because I am bound by our decision in *O'Bannon v. NCAA (O'Bannon II), 802 F.3d 1049 (9th Cir. 2015)*, I join the panel opinion in full. I write separately to express concern that the current state of our ***antitrust law*** reflects an unwitting expansion of the Rule of Reason inquiry in a way that deprives the young athletes in this case (Student-Athletes) of the fundamental protections that our antitrust laws were meant to provide them.

Student-Athletes are talented, hardworking individuals who have dedicated their young lives to excelling in specific sports. As amici describe, Student-Athletes **[**62]** work an average of 35-40 hours per week on athletic duties during their months-long athletic seasons, and most work similar hours during the off-season to stay competitive. At

[19] Student-Athletes further contend that the FPP Act and similar proposed legislation in other states indicate a "consensus" that student-athletes' receipt of payments unrelated to education will not dampen consumer interest in college sports. However, the Act's legislative history suggests that concerns about fundamental fairness, rather than considerations regarding demand, drove its enactment. *See, e.g.*, S.B. 206 Assembly Floor Analysis 2 (Sept. 4, 2019), *available at* https://tinyurl.com/SB-206-AFA .

the same time, most of them do their best to succeed academically, managing to devote on average another 40 hours per week to classes and study. Nevertheless, their coaches and others in the Division 1 ecosystem make sure that Student-Athletes put athletics first, which makes it difficult for them to compete for academic success with students more focused on academics. They are often forced to miss class, to neglect their studies, and to forego courses whose schedules conflict with the sports in which they participate. In addition to lessening their chances at academic success because of the time they must devote to their sports obligations, Student-Athletes are often prevented from obtaining internships or part-time paying jobs, and, as a result, often lack both income and marketable work experience. Meanwhile, the grueling hours and physical demands of college sports carry significant health risks, such as sleep deprivation, stress, broken bones, and even potential brain damage. Despite their best efforts, **[**63]** however, fewer than 5% of Student-Athletes will ever play at a professional level, and most of those lucky few will stay in the pros only a few short years. In short, the college years are likely the only years when young Student-Athletes have any realistic chance of earning a significant amount of money or achieving fame as a result of their athletic skills.

For all their dedication, labor, talent, and personal sacrifice, Student-Athletes go largely uncompensated. They may receive tuition for an academic experience that they cannot take full advantage of, minimal living expenses, and some lavish perks that do nothing for their present or future financial security. However, that is not because their athletic services have little value. On the contrary, the NCAA and Division 1 universities make *billions* of dollars from ticket sales, television contracts, merchandise, and other fruits that directly flow from the labors of Student-Athletes. A number of Division 1 head football coaches take home multimillion-dollar salaries that exceed those of many NFL coaches. Moreover, contrary to the NCAA's representations about the importance of "amateurism," the evidence in this case shows that college **[**64]** sports viewership has only increased since we reduced some limitations on student-athlete compensation in *O'Bannon II. See* Panel Op. at 11-13.

My reaction to our application of federal ***antitrust law*** to the case of the Student-Athletes is similar Justice Alito's reaction to the majority's view in *Collins v. Virginia, 584 U.S. __, 138 S. Ct. 1663, 201 L. Ed. 2d 9 (2018)*. Said he: "An ordinary person of common sense would react to the Court's decision the way Mr. Bumble famously **[*1267]** responded when told about a legal rule that did not comport with the reality of everyday life. If that is the law, he exclaimed, 'the law is a ass—a idiot.'" *Id. at 1681* (Alito, J., dissenting) (quoting C. Dickens, *Oliver Twist* 277 (1867)).

The treatment of Student-Athletes is not the result of free market competition. To the contrary, it is the result of a cartel of buyers acting in concert to artificially depress the price that sellers could otherwise receive for their services. Our antitrust laws were originally meant to prohibit exactly this sort of distortion.

The Sherman Act and related antitrust laws were designed to preserve our economic freedom. *United States v. Topco Assocs., Inc., 405 U.S. 596, 610, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*. Under those laws,

> the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, **[**65]** devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector for the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.

Id. The Sherman Act thus "protect[s] the economic freedom of participants in the relevant market." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1057 (9th Cir. 1999)* (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 538, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*. Those protections extend to sellers of goods and services—such as Student-Athletes—to the same extent they do buyers, consumers, or competitors. *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)*. "The Act is comprehensive in its terms and coverage, protecting *all* who are made victims of the forbidden practices by whomever they may be perpetrated." *Id.* (emphasis added).

Section 1 of the Sherman Act, at issue here, prohibits agreements that unreasonably restrain trade. *15 U.S.C. § 1*; *Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 58, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*. In evaluating alleged violations of *Section 1* that fall outside the bounds of several now-established *per se* rules, courts apply the Rule of Reason to determine the effect of a given restraint on competition. "[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." **[**66]** *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. Importantly, it is *not* the purpose of the Rule of Reason analysis "to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress." *Id. at 692*.

The Rule of Reason entails a three-step analysis, of which the starting point is to identify the market in which the restraint occurs. *See Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1104-05 (9th Cir. 1999)*. At Step One, the "plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within" that market. *O'Bannon II, 802 F.3d at 1070* (quoting *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001))*. If the plaintiff meets that burden, at Step Two, "the defendant must come forward with evidence of the restraint's procompetitive effects." *Id.* (quoting *Tanaka, 252 F.3d at 1063*). Finally, at Step Three, "the plaintiff must . . . **[*1268]** show that any legitimate objectives can be achieved in a substantially less restrictive manner." *Id.* (quoting *Tanaka, 252 F.3d at 1063*).

Despite confining the Step One analysis of anticompetitive effects to the defined market, courts have not consistently limited the scope of the Step Two analysis in the same way. Some, including our court, have permitted defendants to offer procompetitive effects in a collateral market as **[**67]** justification for anticompetitive effects in the defined market. In *NCAA v. Board of Regents of Univ. of Oklahoma (Board of Regents), 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*, for example, the Supreme Court considered whether preserving demand for tickets to live college football games could justify anticompetitive restraints in the market for live college football television. *Id. at 95-96, 115-17*. The district court defined the relevant market at Step One as "live college football television." *Id. at 95*. The NCAA had restrained competition in this market by fixing the price of telecasts, negotiating exclusive contracts with two television networks, and artificially limiting the number of televised games. *Id. at 96*. Among other alleged procompetitive justifications, all of which the Court ultimately rejected, the NCAA argued that its television plan promoted consumer demand for live attendance at college football games. *Id. at 115*. The Court rejected this argument for three reasons: (1) individual schools could protect live attendance at the specific game being televised by negotiating a regional blackout, without acting in concert with other schools; (2) no evidence supported the NCAA's theory that limiting televised games actually promoted live attendance, especially since games would still be broadcast at all hours of the day; and **[**68]** (3) the NCAA's live attendance theory was "not based on a desire to maintain the integrity of college football as a distinct and attractive product, but rather on a fear that . . . ticket sales for most college games are unable to compete in a free market"—"a justification that is inconsistent with the basic policy of the Sherman Act." *Id. at 115-17*. The Supreme Court did not, however, say that the live attendance justification failed because courts categorically cannot consider procompetitive benefits outside the defined market.

Our relevant precedents follow a similar analysis. In *O'Bannon II*, we held that preserving consumer demand for college sports was a legitimate procompetitive justification for anticompetitive restraints on compensation for student-athletes' names, images, and likenesses in the market among colleges for student-athletes' services. *802 F.3d at 1069-73*. The district court had defined the relevant market at Step One as the "college education market," "wherein colleges compete for the services of athletic recruits by offering them scholarships and various amenities, such as coaching and facilities." *Id. at 1070*. The NCAA had restrained competition in this market by preventing member schools from paying student **[**69]** athletes for the use of their names, images, and likenesses. *Id.* Contrary to two of the NCAA's proffered justifications, we accepted the district court's factual determinations that the restraint did "not promote competitive balance," and did "not increase output in the college education market." *Id. at 1072*. We also rejected the NCAA's argument that, by preserving the character of college sports, the restraint "'widen[ed]' the choices 'available to athletes.'" *Id.* (quoting *Board of Regents, 468 U.S. at 102*). "As the district court found, it is primarily 'the opportunity to earn a higher education' that attracts athletes to **[*1269]** college sports rather than professional sports, and that opportunity would still be available to student-athletes if they were paid some compensation in addition to their athletic scholarships." *Id. at 1073*. Yet, without tying the Step 2 analysis to the "college education market," we held that the NCAA had demonstrated that the restraint served the procompetitive purpose of preserving "the amateur nature of collegiate sports [that] increases their appeal to consumers." *Id.* Accordingly, we proceeded to Rule of Reason Step Three, wherein we upheld the district court's less restrictive alternative of allowing grant-in-aid **[**70]** up to the full cost of attendance, but we vacated the district court's less restrictive alternative of allowing "small" amounts of deferred cash compensation as incompatible with amateurism. *Id. at 1074-79*.

Other courts, however, have rejected procompetitive justifications outside of the defined market. For example, in *Smith v. Pro Football, Inc., 593 F.2d 1173, 193 U.S. App. D.C. 19 (D.C. Cir. 1978)*, a former NFL player challenged rules governing the draft of graduating college players under which "no team was permitted to negotiate prior to the draft with any [eligible] player . . . and no team could negotiate with (or sign) any player selected by another team in the draft." *Id. at 1176*. The D.C. Circuit affirmed the finding that the draft had anticompetitive effects. The draft eliminated competition by "inescapably forc[ing] each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic market, of any real bargaining power." *Id. at 1185*.

At Step Two of the Rule of Reason analysis, the NFL asserted that the draft rules were procompetitive because they promoted "competitive balance" among the league's teams, in turn "producing better entertainment for the public, higher salaries for the players, and increased financial security for the clubs." *Id. at 1186*. The **[**71]** court rejected those justifications because they did not have procompetitive effects in the *market for players' services*. "The draft is 'procompetitive,' if at all, in a very different sense from that in which it is anticompetitive." *Id.* "[W]hile [the draft] may heighten athletic competition and thus improve the entertainment product offered to the public, [it] does not increase competition in the economic sense of encouraging others to enter the market and to offer the product at lower cost." *Id.* The court concluded that the draft's anticompetitive and procompetitive effects were "not comparable," and thus it was "impossible to 'net them out' in the usual rule-of-reason balancing." *Id.*

Despite its ruling in *Board of Regents*, the Supreme Court has not squarely addressed the proper scope of the Step Two analysis. And, although we conducted a similar analysis in *O'Bannon II*, neither have we. In my view, the underlying purpose of the Sherman Act—promoting competition—counsels in favor of conducting a more limited Rule of Reason analysis, as the court in *Smith* did. Realistically, the Rule of Reason analysis is judicially administrable only if it is confined to the single market identified **[**72]** from the outset. If the purpose of the Rule of Reason is to determine whether a restraint is net procompetitive or net anticompetitive, accepting procompetitive effects in a collateral market disrupts that balancing. It weakens antitrust protections by permitting defendants to rely on a broader array of justifications that promote competition, if at all, in collateral markets where the restraint under analysis does not occur.

Jurists faced with weighing the anticompetitive effects in one market with the procompetitive effects in another cannot simply "net them out" mathematically. **[*1270]** *Smith, 593 F.2d at 1186*. Rather, courts employing a cross-market analysis must—implicitly or explicitly—make value judgments by determining whether competition in the collateral market is more important than competition in the defined market. As the Supreme Court has warned, this is not what the antitrust laws invite courts to do. "If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions **[**73]** and courts are ill-equipped and ill-situated for such decisionmaking." *Topco, 405 U.S. at 611*.

Consider this case. The district court accepted the relevant market as that for Student-Athletes' "labor in the form of athletic services in men's and women's Division I basketball and FBS football," in which Student-Athletes "sell their athletic services to the schools that participate in Division I basketball and FBS football in exchange for grants-in-aid and other benefits and compensation permitted by NCAA rules." *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig. (Alston), 375 F. Supp. 3d 1058, 1067 (N.D. Cal. 2019)*. At Step One, the district court found that Student-Athletes had established significant anticompetitive effects in the market for their athletic services. The court concluded that the NCAA rules "have the effect of artificially compressing and capping student-athlete compensation and reducing competition for student-athlete recruits by limiting the compensation offered in exchange for their athletic services." *Id. at 1068*.

At Step Two, the court did not limit its consideration to the procompetitive effects of the compensation limits in the market for Student-Athletes' athletic services. Rather, it found that certain of the compensation limits are procompetitive because they drive consumer demand for college **[**74]** sports by distinguishing collegiate from professional athletics. *Id. at 1083*. In other words, the court found that limiting Student-Athletes' pay in the market for their services was justified because that restraint drove demand for the distinct product of college sports in the consumer market for sports entertainment. The court did not require that the NCAA prove that this impact on consumer demand had a corollary procompetitive impact on the market for Student-Athletes' services, that it "increase[d] output" or "'widen[ed]' the choices 'available to athletes.'" *O'Bannon II, 802 F.3d at 1072* (quoting *Board of Regents, 468 U.S. at 102*). The court did not require that the NCAA prove its compensation rules, within the defined market, "increase competition in the economic sense of encouraging others to enter the market to offer the product at lower cost." *Smith, 593 F.2d at 1186*. It was enough for the NCAA to meet its Step Two burden that it could show (however feebly) a procompetitive effect in a collateral market.

Although the district court correctly applied our precedents, the result of this analysis seems to erode the very protections a Sherman Act plaintiff has the right to enforce. Here, Student-Athletes are quite clearly deprived of the fair value of their services. *Alston, 375 F. Supp. 3d at 1068*. As **[**75]** the district court found, while the NCAA and its conferences generate billions in revenue from college sports, they "have monopsony power to restrain student-athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance." *Id. at 1063, 1070*. Under the Rule of Reason analysis we affirm today, so long as the NCAA cites consumer demand for college sports, we allow it to artificially suppress competition for collegiate athletes' services by limiting their compensation. **[*1271]** Instead of requiring the NCAA to explain how those limits promote schools' competition for athletes, we leave Student-Athletes with little recourse under the antitrust laws. Student-Athletes are thus denied the freedom to compete and, in turn, "of compensation they would receive in the absence of the restraints." *Id. at 1068*.

Our Rule of Reason framework has shifted toward this cross-market analysis without direct consideration or a robust justification. It may be that scholars or litigants can develop a purely economic, mathematically-defensible method for cross-market analysis that does not depend on policy judgments that our antitrust laws never meant to delegate to the courts. But we **[**76]** do not currently have such a method, and it may equally be the case that no such method is possible or desirable.

Lacking a robust justification, I fear that our cross-market Rule of Reason analysis frustrates the very purpose of the antitrust laws, in this case to the great detriment of Student-Athletes. I hope our court will reconsider this issue in a case that squarely raises it.

3Shape Trios A/S v. Align Tech., Inc.

United States District Court for the District of Delaware

May 20, 2020, Decided; May 20, 2020, Filed

C.A. No. 18-1332-LPS

Reporter

2020 U.S. Dist. LEXIS 88709 *; 2020 WL 2559777

3SHAPE TRIOS A/S, Plaintiff, v. ALIGN TECHNOLOGY, INC., Defendant.

Subsequent History: Adopted by *3shape Trios A/S v. Align Tech., 2020 U.S. Dist. LEXIS 221845 (D. Del., Nov. 25, 2020)*

Prior History: *3Shape Trios A/S v. Align Tech., Inc., 2019 U.S. Dist. LEXIS 137982, 2019 WL 3824209 (D. Del., Aug. 15, 2019)*

Core Terms

Align, scanner, dental, discount, amended complaint, alleges, relevant market, iTero, anticompetitive conduct, scans, prices, monopoly power, antitrust, bundled, competitors, cases, monopolization, anticompetitive, ordering, markets, digital, sales, manufacture, products, argues, braces, sells, geographic, patient's, teeth

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Judges: Jennifer L. Hall, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Jennifer L. Hall

Opinion

REPORT AND RECOMMENDATION

This is an antitrust case. Plaintiff 3Shape TRIOS A/S ("3Shape" or "Plaintiff") filed suit against Defendant Align Technology, Inc. ("Defendant" or "Align") on August 28, 2018, alleging monopolization and attempted monopolization in violation of *Section 2 of the Sherman Act*, *15 U.S.C. § 2*. (D.I. 1.) The Court dismissed 3Shape's original complaint without prejudice on September 26, 2019. (D.I. 59, 62.) *No. 18-1332-LPS, 2019 U.S. Dist. LEXIS 165242, 2019 WL 4686614 (D. Del. Sept. 26, 2019)* (adopting Report and Recommendation, *2019 U.S. Dist. LEXIS 137982, 2019 WL 3824209 (D. Del. Aug. 15, 2019))*. 3Shape filed an amended complaint on October 28, 2019. (D.I. 63.) Pending before the Court **[*2]** is Align's motion to dismiss 3Shape's amended complaint for failure to state a claim under *Federal Rule of Civil Procedure 12(b)(6)*. (D.I. 66.) Because 3Shape has plausibly alleged both anticompetitive conduct and relevant markets, I recommend that Align's motion be DENIED.

I. BACKGROUND[1]

Defendant Align is a Delaware corporation that sells Invisalign, a system of clear plastic aligners for straightening teeth. (D.I. 63 ¶¶ 1, 25-26.) Aligners are ordered through dental professionals, who prescribe them to patients with teeth misalignment. (*Id.* ¶¶ 8, 28.) Aligners are custom-made, which requires an accurate representation of the patient's upper and lower jaws, teeth, and bite. (*Id.*) A fast and accurate way to obtain an accurate image of the patient's full mouth is to scan it with a digital intraoral scanner. (*Id.*) With a scanner, a dental professional can scan a patient's full mouth, process and evaluate the scan through task-specific software, and submit the scan to aligner manufacturers. (*Id.* ¶ 151.) According to the amended complaint, digital scanners "are essential to dental professionals offering Clear Aligners to their patients and are essential to effective sales of Clear Aligners by dental professionals." (*Id.* ¶ 40.) **[*3]** Typically, a dental practice can only afford to own one scanner because it is a significant capital investment—not only are the scanners themselves expensive, but the accompanying software subscription can be several thousand dollars annually. (*Id.* ¶ 41.)

In addition to selling aligners, Align sells the iTero Element digital intraoral scanner, which it introduced in 2015. (*Id.* ¶¶ 3, 39.) The iTero Element was designed to send digital scans directly to Align for orders of Invisalign. (*Id.*) It cannot send scans to Align's competitors. (*Id.* ¶¶ 44-45.)

Plaintiff 3Shape is a Danish corporation that designs and manufactures dental equipment and software, including digital intraoral scanners. (*Id.* ¶¶ 24, 73.) 3Shape sells the TRIOS digital intraoral scanner, which "can be used for scanning, designing and ordering of clear aligners and a number of other orthodontic treatments or dental products." (*Id.* ¶ 73.)

In December 2015, Align and 3Shape entered into an interoperability agreement "under which the parties worked together to build an interface so that dental professionals could send TRIOS scans into Align's Invisalign work flow." (*Id.* ¶ 80.) Pursuant to the agreement, "3Shape was certified **[*4]** by Align to send digital scans from 3Shape's TRIOS to Align for Invisalign orders." (*Id.* ¶ 16.) The interoperability agreement permitted 3Shape to continue to provide scans to other aligner manufacturers. (*Id.* ¶ 85.) In December 2017, Align announced that it was unilaterally terminating the agreement with 3Shape with respect to Invisalign orders placed from the United States. (*Id.* ¶ 93.) Since the termination, which became effective in January 2018, Invisalign can no longer be ordered with scans sent directly from a TRIOS in the United States. (*Id.* ¶¶ 93-94.) In the rest of the world, where Align has a lower share in the aligner market, Align continues to accept scans sent from TRIOS scanners. (*Id.* ¶ 94.)

The amended complaint defines two markets relevant to 3Shape's antitrust claims. First, it alleges the existence of a relevant market in the United States for the manufacture and sale of "custom-manufactured removable dental aligners made of clear plastic that correct teeth misalignment." (*Id.* ¶¶ 1, 141-148.) According to the amended complaint, consumers do not view braces as reasonably interchangeable with aligners and the price of braces does not affect the price of aligners. (*Id.* ¶¶ 143, 147.) **[*5]** Aligners are removable, making them appropriate for sports, and they are more comfortable and require less time for treatment than braces. (*Id.* ¶¶ 143-144.) Unlike braces, which can only be prescribed by orthodontists, aligners can be prescribed by dentists. (*Id.* ¶ 145.) In addition, treatment with aligners requires fewer in-person office visits than with braces. (*Id.* ¶ 144.)

The amended complaint also alleges the existence of a relevant market in the United States for the manufacture and sale of "digital intraoral scanners used by dental professionals to generate full mouth scans for orthodontic treatment, including to order Clear Aligners." (*Id.* ¶ 150.) The amended complaint alleges that only two scanners on the market are "viable" for ordering aligners: Align's iTero and 3Shape's TRIOS. (*Id.* ¶¶ 8, 152.) It alleges that

[1] I assume the facts alleged in the amended complaint to be true for purposes of resolving this motion. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

scanners designed to scan individual teeth for crowns and local dental restorative work are not adequate substitutes because they are slower and less accurate. (*Id.* ¶¶ 158-165.) It further alleges that silicone molds are not adequate substitutes for generating dental representations because they are less accurate, more cumbersome, inconvenient, and unpleasant **[*6]** for the patient. (*Id.* ¶¶ 166-170.)

Align has significant shares in both the aligner and scanner markets. Align manufactures over 90 percent of the clear aligners sold in the United States and it has monopoly power in that market. (*Id.* ¶¶ 2, 26-27, 142, 182.) In 2017, Align's iTero scanner had approximately a 60 percent share in the scanner market (as defined above). (*Id.* ¶¶ 1, 155.) Following Align's termination of its agreement with 3Shape in 2017, the iTero's share of the scanner market has increased significantly. (*Id.* ¶¶ 155-156.)

Align has entered into several types of contracts with dental professionals and dental service organizations ("DSOs") that, 3Shape contends, operate to maintain and enhance Align's monopoly power in the aligner market and give rise to a dangerous probability that Align will acquire monopoly power in the scanner market. (*Id.* ¶¶ 11-12.) The first type includes Align's multi-year contracts with DSOs, including Heartland Dental and Aspen Dental. On July 25, 2018, Align announced a deal with Heartland Dental, the nation's largest DSO, to place iTero scanners in 90% of supported member dental offices by the end of 2018. (*Id.* ¶ 51.) That deal resulted in Heartland **[*7]** Dental's purchase of over 900 scanners. (*Id.*) That same day, Align announced a deal with Aspen Dental, the nation's largest branded DSO, to place iTero scanners in all of its locations. (*Id.* ¶ 53.) 3Shape submitted a bid for the Aspen Dental contract but was not selected because TRIOS scanners were not interoperable with Align's Invisalign system. (*Id.* ¶ 54.)

The second type of contract involves Align's Fusion Program. Launched in 2017, the program provides a significant discount on the iTero scanner to dental professionals who commit to ordering a certain number of Invisalign cases each year for three years. (*Id.* ¶¶ 56-57.) A dental professional who fails to meet the minimum cases is subject to penalties that "could total $10,000 over three years, or 30 percent or more of the cost of the iTero scanner." (*Id.* ¶¶ 58, 60.) According to the amended complaint, Align set the required number of cases in excess of the average dental professional's anticipated total number of aligner cases, "which forced the dental professionals to either stop sending cases to Align's competitors, or trigger penalties." (*Id.* ¶¶ 58-59.) Align offered the Fusion program to "major DSOs," and it resulted in a dramatic **[*8]** increase in sales of iTero scanners to DSOs and an increase in sales of Invisalign. (*Id.* ¶ 50.)

3Shape alleges that it could not compete with Align's Fusion Program offering. (*Id.* ¶ 64.) Although 3Shape's TRIOS and Align's iTero were sold at similar list prices, the Fusion program effectively made the iTero $10,000 cheaper. (*Id.*) While 3Shape could drop its pricing to compete with the lower price, it would cause 3Shape to forego nearly a third of its revenue. (*Id.*) According to 3Shape, the Fusion Program has foreclosed portions of both the aligner and scanner markets from competitors. (*Id.* ¶¶ 62-64.)

As a result of Align's arrangements with DSOs, DSO members are effectively locked into using iTero scanners and ordering Invisalign. (*Id.* ¶ 47.) 3Shape alleges that Align's sales of iTero scanners to DSOs have "increased dramatically" as a result of the DSO arrangements, and that they "have enabled Align to rapidly increase its market share" in the scanner market. (*Id.* ¶¶ 50, 55.) 3Shape further alleges that the DSO contracts have enabled Align to "maintain its monopoly" in the aligner market. (*Id.* ¶ 55.)

The third type of arrangement involves Align's Advantage Program. Under that program, **[*9]** dental professionals received discounts on Invisalign based on the total number of cases they submit. (*Id.* ¶¶ 65-66.) Dental professionals that submit the most cases receive the largest discounts. (*Id.*) Until recently, once a dental professional reached the highest discount level they would retain the same discount level moving forward. (*Id.* ¶ 67.) Align changed the program in 2018 so that dental professionals were offered discounts based solely on their sales for in the previous six months. (*Id.* ¶ 68.) Consequently, to achieve the highest discounts, dental professionals must consistently order from Align. (*Id.* ¶ 69.) These discounts, which can affect a dental professional's margins by 30 percent or more, are necessary for a dental professional to effectively compete with dental professionals who receive the discounts. (*Id.*) According to the amended complaint, "[t]he only way for dental professionals to achieve the highest discount levels is to purchase and use an iTero scanner." (*Id.* ¶ 70.)

3Shape alleges that "Align's conduct has harmed competition in both [the scanner and aligner] markets by, among other things, excluding rivals, increasing barriers to entry, and imposing costs on **[*10]** rivals." (*Id.* ¶ 140.) According to the amended complaint, "[t]his conduct has resulted in less consumer choice and higher consumer cost." (*Id.*) The amended complaint contains two counts: monopolization of the clear aligner market under *Section 2 of the Sherman Act*, *15 U.S.C. § 2* (Count 1); and attempted monopolization of the scanner market under *Section 2 of the Sherman Act* (Count 2). (*Id.* ¶¶ 174, 181.)

Align filed the pending motion to dismiss the amended complaint on November 12, 2019 (D.I. 66), and the parties completed the briefing on December 20, 2019. (D.I. 72.) Both parties requested oral argument (D.I. 73, 74), and I heard oral argument on February 13, 2020. ("Tr. __".)

II. LEGAL STANDARDS

A defendant may move to dismiss a complaint under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is plausible on its face when the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A possibility of relief is not enough. *Id.* "Where a complaint pleads facts **[*11]** that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly, 550 U.S. at 557*). In determining the sufficiency of the complaint under the plausibility standard, all "well-pleaded facts" are assumed to be true, but legal conclusions are not. *Id. at 679*.

"[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly, 550 U.S. at 558* (internal marks omitted). "Antitrust claims in particular must be reviewed carefully at the pleading stage because false condemnation of competitive conduct threatens to 'chill the very conduct the antitrust laws are designed to protect.'" *In re Keurig Green Mt. Singleserve Coffee Antitrust Litig., 383 F. Supp. 3d 187, 218 (S.D.N.Y. 2019)* (quoting *Verizon Commc'ns., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004))*. However, the same *Twombly* plausibility standard applies. *W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 98 (3d Cir. 2010)* ("[I]t is inappropriate to apply Twombly's plausibility standard with extra bite in antitrust and other complex cases.").

III. DISCUSSION

Section 2 of the Sherman Act, *15 U.S.C. § 2*, makes it unlawful to "monopolize" or "attempt to monopolize."[2] It does not prohibit monopolies. Indeed, the possession of monopoly power is not only legal, "it is an important **[*12]** element of the free-market system." *Trinko, 540 U.S. at 407* ("The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth.").

A *Section 2* plaintiff must therefore do more than just prove a monopoly. To succeed on a monopolization claim, the plaintiff must demonstrate both (1) the defendant's possession of monopoly power in a relevant market and (2) anticompetitive conduct. *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007)*. To establish

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[2] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." *15 U.S.C. § 2*.

attempted monopolization, the plaintiff must show (1) anticompetitive conduct, (2) a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power in a relevant market. *Phila. Taxi Ass'n, Inc. v. Uber Techs., Inc., 886 F.3d 332, 339 (3d Cir. 2018)*. Both types of claims require "anticompetitive conduct." *See id. at 338* ("Anticompetitive conduct is the hallmark of an antitrust claim.").

A private plaintiff (as opposed to a government plaintiff) must also demonstrate that it has antitrust standing, that is, that the plaintiff suffered injuries caused by the defendant's anticompetitive conduct. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 281 (3d Cir. 2012)*.

Align argues that the amended complaint fails to plausibly allege anticompetitive conduct, monopoly power, and antitrust standing. I disagree.

A. Anticompetitive Conduct [*13]

Anticompetitive conduct is "generally defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits." *Broadcom, 501 F.3d at 308*. On the other hand, "[c]onduct that merely harms competitors, . . . while not harming the competitive process itself, is not anticompetitive." *Id.*; *W. Penn, 627 F.3d at 108* ("The line between anticompetitive conduct and vigorous competition is sometimes blurry, but distinguishing between the two is critical, because the *Sherman Act* 'directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.'"). Accordingly, in order to be deemed exclusionary, a monopolist's conduct must have an anticompetitive effect on the market. *United States v. Microsoft Corp., 253 F.3d 34, 58, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*.

"'Anticompetitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties." *LePage's Inc. v. 3M, 324 F.3d 141, 152 (3d Cir. 2003)* (quoting *Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C., 148 F.3d 1080, 1087, 331 U.S. App. D.C. 226 (D.C. Cir.1998))*. Over the last century, however, courts have recognized various types of conduct that have the potential to harm competition. Examples of agreements that may constitute anticompetitive conduct under *Section 2* include exclusive dealing arrangements, *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005)*, and tying **[*14]** agreements, *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 483, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. Courts also recognize that deceptive or bad faith conduct can be anticompetitive. *See Broadcom, 501 F.3d at 314* (patentee's deception of a standards setting organization can be anticompetitive); *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993) ("PRE")* (sham litigation can be anticompetitive).

Certain types of pricing behavior can also constitute anticompetitive conduct. For example, setting prices below one's costs can constitute anticompetitive predatory pricing (if other requirements are met). *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-23, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*. The Third Circuit (but not the Supreme Court) has also held that offering bundled discounts can constitute anticompetitive conduct. *LePage's, 324 F.3d at 154-58*.

As explained in more detail below, there are legal rules that govern the application of each of these theories of anticompetitive conduct. Still, challenged conduct "may be susceptible to more than one court-defined category." *Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 453 (7th Cir. 2020)*. "At bottom, the purpose of identifying these categories of conduct is to help determine 'the presence or absence of harmful effects, which are both the reason for any antitrust concern and often the simplest element to disprove.'" *Id.* (quoting Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***: *An Analysis of Antitrust Principles and Their Application* ¶ 1701d, at 33 (4th ed. 2015)).

Here, 3Shape **[*15]** alleges that Align has engaged in two types of monopolistic conduct recognized by the antitrust laws: (1) exclusive dealing; and (2) bundled discount arrangements.[3] The parties do not dispute that exclusive dealing arrangements and bundled discounts are cognizable theories of anticompetitive conduct. They dispute, however, whether 3Shape alleged enough facts to move forward on either theory. I conclude that it has.

1. Exclusive Dealing

3Shape contends that Align's agreements with DSOs and dental professionals constitute unlawful exclusive dealing arrangements. In an exclusive dealing arrangement, "a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time." *ZF Meritor, 696 F.3d at 270*. While an exclusive dealing claim requires a showing of an agreement between the buyer and seller, an express exclusivity provision is not necessary. *Id. at 282*. "*De facto* exclusive dealing claims are cognizable under the antitrust laws" where the effect of the agreement "in the real world" demonstrates that competitors are excluded from a substantial share of the relevant market. *ZF Meritor, 696 F.3d at 270-272, 282-83*.

Exclusive dealing arrangements are not *per se* illegal. Rather, due to their potentially procompetitive **[*16]** benefits, the legality of an exclusive arrangement is judged under the rule of reason. *Id. at 271*. Whether an arrangement is legal "depends on whether it will foreclose competition in such a substantial share of the relevant market so as to adversely affect competition." *ZF Meritor, 696 F.3d at 271*. There is no set formula for conducting the analysis, "but modern ***antitrust law*** generally requires a showing of significant market power by the defendant, . . . substantial foreclosure, . . . contracts of sufficient duration to prevent meaningful competition by rivals, . . . and an analysis of likely or actual anticompetitive effects considered in light of any procompetitive effects." *ZF Meritor, 696 F.3d at 271-72*.

I agree with 3Shape that its amended complaint plausibly alleges unlawful exclusive dealing in both markets. 3Shape alleges that Align has significant shares in both markets: 90 percent in the aligner market and 60 percent in the scanner market. (D.I. 63 ¶¶ 2, 26-27, 142, 155 182.) It further alleges that, as a result of the DSO arrangements, Align's sales of its iTero scanners to DSOs "increased dramatically" and that they "have enabled Align to rapidly increase its market share" in the scanner market. (*Id.* ¶¶ 50, 55.) And 3Shape alleges that **[*17]** the DSO arrangements have enabled Align to "maintain its monopoly" in the aligner market. (*Id.* ¶ 55.) 3Shape alleges that the DSO agreements with Heartland Dental and Aspen Dental are multi-year, *de facto* exclusive dealing contracts that essentially require members of the two largest DSOs in the United States to purchase their scanners from Align. (*Id.* ¶¶ 47-55.) It alleges that the result of the agreements is to lock DSO members into using iTero scanners and ordering Invisalign. (*Id.*) It further alleges that, in connection with its Fusion program, Align offered discounts on its iTero scanners to other DSOs in exchange for multi-year Invisalign order commitments that could only be met if participating dental professionals sent scans exclusively to Align for Invisalign, and not its competitors. (*Id.* ¶¶ 56-64.) 3Shape alleges that its own sales and market share have "fallen precipitously" as a result of Align's conduct. (Id. ¶ 136.) And it alleges that Align's conduct has likely and actual anticompetitive effects, including higher costs for consumers. (*Id.* ¶¶ 140, 177, 183.)

Align argues that the amended complaint fails to adequately allege "substantial foreclosure" of the relevant markets. **[*18]** (D.I. 67 at 9.) In particular, Align points out that the amended complaint lacks detail about the percentage of the market foreclosed to competitors. (*Id.*; Tr. 7:15-10:2) But the cases cited by Align do not stand for the proposition that such detail is required at the pleading stage. *See, e.g., Eisai Inc. v. Sanofi Aventis US, LLC, 821 F.3d 394 (3d Cir. 2016)* (summary judgment); *ZF Meritor, 696 F.3d 254* (trial); *Dentsply Int'l, 399 F.3d 181* (trial); *Barr Labs. v. Abbott Labs., 978 F.2d 98 (3d Cir. 1992)* (summary judgment); *Roxul USA, Inc. v. Armstrong World, Indus., Inc., No. 17-1258, 2019 U.S. Dist. LEXIS 37925, 2019 WL 1109868 (D. Del. Mar. 8, 2019)* (summary

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[3] In this round of briefing, 3Shape does not contend that Align's other actions—its design of the iTero Element Scanner, its termination of the interoperability agreement with 3Shape in 2017, and its patent litigation—are independently anticompetitive. (D.I. 71 at 13-16; *see also* Tr. 22:4-7.) Rather, 3Shape argues that Align's other conduct has contributed to the overall exclusionary effect and evidences its intent to monopolize. (*Id.*)

judgment); *Insight Equity A.P. X, LP v. Transitions Optical, Inc., No. 10-635, 2016 U.S. Dist. LEXIS 85751, 2016 WL 3610155 (D. Del. July 1, 2016)* (summary judgment).[4] Viewing the amended complaint in its entirety and in the light most favorable to 3Shape, there is enough detail to make it plausible that the effect of the alleged exclusive dealing arrangements was to substantially foreclose competitors from the relevant markets. Whether the foreclosure was *in fact* "substantial" is a conclusion that does not need to be reached, and would be inappropriate to reach, at this stage of the litigation. That determination will ultimately require factual assessments and expert analyses that are inappropriate at the pleading stage.

I conclude that the amended complaint plausibly alleges unlawful exclusive dealing.

2. Bundled Discounts

3Shape also argues that Align's Fusion program—which provided significant discounts on Align's iTero scanner to dental professionals who **[*19]** committed to ordering a high number of Invisalign cases each year for three years—constitutes an unlawful bundled discount arrangement. I agree with 3Shape that the amended complaint plausibly alleges an anticompetitive bundled discount.

Price discounts are generally not anticompetitive. *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 451, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *Philadelphia Taxi Ass'n, 886 F.3d at 340* ("It is well established that lower prices, as long as they are not predatory, benefit consumers—'regardless of how those prices are set.'" (quoting *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))*. But there are exceptions to the general rule. One exception is predatory pricing, which is when a monopolist prices its goods below cost in order to drive other competitors out of the market. Once its competitors have been eliminated, the monopolist raises its prices to supracompetitive levels. *Brooke Grp., 509 U.S. at 226*; *Cargill, Inc. v. Monfort of Colo., 479 U.S. 104, 121 n.17, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. To plead predatory pricing, an antitrust plaintiff must plausibly allege both (1) "that the prices complained of are below an appropriate measure of [the defendant's] costs"; and (2) that the defendant had "a dangerous probability[] of recouping its investment in below-cost prices." *Brooke Grp., 509 U.S. at 222-24*; *ZF Meritor, 696 F.3d at 272*.

The Third Circuit (but not the Supreme Court) has also recognized a bundled discount exception to the general rule protecting price discounts. **[*20]** A bundled discount is when a firm sells a bundle of goods for a lower price than the seller charges for the goods purchased individually. In *LePage's*, the Third Circuit held that bundled discounts can constitute anticompetitive conduct even when the predatory pricing test is not met (for example, because the goods are sold above cost). *324 F.3d at 154-157*. Under the *LePage's* standard, the antitrust plaintiff must show that the effect of the discounts is to "foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer."[5] *Id. at 155*.

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[4] The only case cited by Align that dismissed an exclusive dealing claim at the pleading stage for failure to allege substantial foreclosure is *International Construction Products LLC v. Caterpillar Inc., C.A. No. 15-108, 2016 U.S. Dist. LEXIS 6826, 2016 WL 264909, at *4 (D. Del. Jan. 21, 2016)*. In that case, the court noted that "the factual allegations [in the complaint] pertaining to exclusive dealing [were] sparse" and that it "allege[d] no facts about the nature of the exclusive dealing arrangements and their potentially anticompetitive effects." *2016 U.S. Dist. LEXIS 6826, [WL] at *5-6*. That case does not stand for the proposition that a specific percentage of foreclosure must be alleged.

Here, 3Shape has alleged numerous facts about the nature of Align's arrangements with DSOs and has alleged facts regarding their exclusionary effects.

[5] The *LePage's* standard for bundled discounts has not been adopted by any other Circuit Court of Appeals, and it has not been expanded in the Third Circuit. *See* ***Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 894-903, 908-09 (9th Cir. 2008)*** (discussing the controversy over *LePage's*). The Third Circuit has instructed courts to interpret *LePage's* narrowly in light of more recent Supreme Court precedent. *See* *ZF Meritor, 696 F.3d at 274 n.11* (acknowledging the Supreme Court's recent emphasis on adherence to the predatory pricing test to assess the legality of price discounts).

In its motion to dismiss, Align argues that the amended complaint fails to plausibly allege that 3Shape was unable to make "a comparable offer" to Align's Fusion Program discount within the meaning of *LePage's*. According to Align, 3Shape must allege that it could not match the price of the iTero scanner if the aggregate Fusion program discount were allocated to the scanner. (D.I. 67 at 11; Tr. 18:14-19:20.) Align points out that the amended complaint does not contain that allegation and, on the contrary, acknowledges that "3Shape could . . . drop **[*21]** its TRIOS price to compete with [the Fusion program] price." (D.I. 63 ¶ 64.)

3Shape responds that it has adequately alleged its inability to make "a comparable offer" within the meaning of *LePage's* because it "does not manufacture an equally diverse group of products." *LePage's, 324 F.3d at 155*. 3Shape only sells scanners, not aligners. And it alleges that matching Align's Fusion program price on scanners would require 3Shape to forego a third of its revenue, whereas Align can make up for the discount from the sale of the additional Invisalign cases. (D.I. 63 ¶¶ 64, 137; Tr. 26:13-27:1)

The problem I am confronted with is that neither side adequately articulates what "a comparable offer" means, or how it is plausibly alleged in the Third Circuit at the pleading stage. It seems to me that 3Shape's articulation would allow an antitrust plaintiff who only sells one product to state a claim whenever a dominant seller provides a discount for ordering products in multiple lines. (D.I. 71 at 8; Tr. 29:3-13.) I am highly skeptical of that articulation since it does not require any consideration of the size of the discount. On the other hand, contrary to Align's argument, the Third Circuit in *LePage's* did not require **[*22]** a showing that the aggregate discount resulted in a below-cost price when allocated to a single product, nor did it require a showing that the plaintiff could not match the aggregate discount. *See generally* *LePage's, 324 F.3d at 175-76* (Greenberg dissenting) ("LePage's did not even attempt to show that it could not compete by calculating the discount that it would have had to provide in order to match the discounts offered by 3M through its bundled rebates . . . ."); *see also* Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application*, ¶ 749d3 n.92 (4th ed. 2020).

The line must be somewhere in the middle. Under the circumstances here, where the amended complaint alleges not only that a defendant with market power offered a discount for purchasing products in multiple lines, but it also alleges facts supporting the allegation that the plaintiff "could not compete effectively" if it matched the aggregate discount applied to a single line (D.I. 63 ¶ 64), I think it states a plausible bundled discounting claim. I am not stating where I think the line for plausibly asserting a bundled discount claim exists, I am merely stating my conclusion that it has been crossed **[*23]** here.

The amended complaint also plausibly alleges facts suggesting that "portions of the [scanner] market" have been "foreclosed" to potential competitors. *LePage's, 324 F.3d at 155*. For example, the amended complaint alleges that 3Shape's scanner sales have "fallen precipitously as dental professionals have ceased purchasing the TRIOS scanner as they have been forced to turn instead to the iTero scanner," and that iTero sales have increased by 84 percent. (D.I. 63 ¶¶ 55, 136.)

Align again points out that the amended complaint fails to include details about the number of customers lost or the percentage of market foreclosure. However, the cases cited by Align do not support the proposition that such details are required at the pleading stage. *See, e.g.,* *Dentsply Int'l, 399 F.3d at 189 (3d Cir. 2005)* (trial); *Microsoft, 253 F.3d at 58* (same).

Here, viewing the amended complaint in its entirety and in the light most favorable to 3Shape, I agree with 3Shape that it plausibly alleges an exclusionary bundled discount arrangement.[6]

[6] Because I conclude that the amended complaint plausibly alleges anticompetitive conduct in connection with Align's DSO arrangements and its Fusion Program (which will result in the case moving forward), I do not address Align's argument that its Advantage Program does not constitute anticompetitive conduct. Align is free to re-raise at the summary judgment stage its arguments that the Advantage Program is not actionable anticompetitive conduct, either alone or in connection with its other conduct.

B. Monopoly Power in a Relevant Market

To succeed on a claim under *Section 2 of the Sherman Act*, the plaintiff must also demonstrate the defendant's possession of monopoly power in a relevant market (for a monopolization claim) or a dangerous probability of achieving **[*24]** monopoly power in a relevant market (for an attempted monopolization claim). *Dentsply, 399 F.3d at 186-87*; *Phila. Taxi Ass'n, 886 F.3d at 339*. Align argues that 3Shape failed to plausibly allege relevant scanner and aligner markets in which Align has monopoly power or a dangerous probability of achieving it. I disagree.

The Supreme Court has defined monopoly power as "the power to control prices or exclude competition." *United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)* (quoting *United States v. E. I. du Pont De Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*. The existence of monopoly power in a relevant market may be proven "through direct evidence of supracompetitive prices and restricted output." *Broadcom, 501 F.3d at 307*. Alternatively, monopoly power may be inferred from indirect evidence, where the plaintiff shows that a defendant "has a dominant share in a relevant market, and that significant 'entry barriers' protect that market." *Broadcom, 501 F.3d at 307* (citing *Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 380-81 (3d Cir. 2005))*.

Section 2 plaintiffs who take the indirect route bear the burden of defining a "relevant market." *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)*. "Competing products are in the same market if they are readily substitutable for one another; a market's outer boundaries are determined by the reasonable interchangeability of use between a product and its substitute, or by their cross-elasticity of demand." *Broadcom, 501 F.3d at 308*.

The plaintiff must adequately allege a proposed relevant market in its complaint. *Id.*; *see also* *Queen City Pizza, 124 F.3d at 436*. A complaint **[*25]** may be dismissed for failure to plead a relevant market where the plaintiff "fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand." *Queen City Pizza, 124 F.3d at 436*. A complaint is also legally insufficient and subject to dismissal where the "proposed relevant market . . . clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor." *Id.* However, in general, the determination of a relevant market is a "complex and fact-intensive inquiry." *Philadelphia Taxi Ass'n, 886 F.3d at 341-42*. Accordingly, courts should deny motions to dismiss unless "the alleged market makes 'no economic sense under any set of facts.'" *PepsiCo, Inc. v. Coca—Cola Co., No. 98-3282, 1998 U.S. Dist. LEXIS 13440, 1998 WL 547088, at *6 (S.D.N.Y. Aug. 27, 1998)*. "Absent an inherently implausible market allegation, the question must be resolved on the facts and economic realities of the case." *Id.*

Align challenges 3Shape's proposed scanner and aligner market definitions on the basis of their product scopes as well as their geographic scopes. Align first argues that 3Shape's scanner and aligner market definitions both improperly define the geographic market as the United States. According to Align, the amended complaint "reveals nothing **[*26]** about why demand conditions are bounded at the United States and not more narrowly or broadly." (D.I. 72 at 6.) I disagree.

The amended complaint alleges that Align sells its products in all fifty states. (D.I. 63 ¶¶ 159, 173.) That is a plausible reason why the geographic markets should not be defined any smaller. The amended complaint also alleges facts making it plausible that the geographic markets should not be defined any larger, namely, differences in the United States markets arising from the fact that Align only terminated interoperability with the TRIOS scanner in the United States and not elsewhere. (*Id.* ¶¶ 93-94.) And there is no reason to think that 3Shape is attempting to gerrymander a geographic market, as was the situation in the case cited by Align. *See* *Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 726 (3d Cir. 1991)* (rejecting "an oddly configured" geographic market "stretching 6.36 miles east, 7 miles west, 11.45 miles north and 10 miles south"). Taking the allegations in the amended complaint as true, I cannot conclude that 3Shape's geographic market definitions are inherently implausible.

Align also challenges both the scanner and aligner product market definitions. As for scanners, Align argues that 3Shape's market definition **[*27]** is too narrow. I conclude that the definition of the scanner market in 3Shape's amended complaint is not inherently implausible.

The amended complaint defines the scanner market as "the market for digital intraoral scanners used by dental professionals to generate full mouth scans to order [clear] aligners." (*Id.* ¶ 1.) It alleges that silicone molds are not adequate substitutes for scanners, for example, because they are inconvenient and unpleasant to for the patient. (*Id.* ¶¶ 166-170.) The amended complaint also alleges that scanners designed to scan individual teeth for crowns and local dental restorative work are not adequate substitutes, for example, because they are slower and less accurate. (*Id.* ¶¶ 158-165.) Those allegations describing the differences between the market as alleged and potential substitutes are sufficient to survive a motion to dismiss, particularly since defining the relevant market is a "fact-intensive inquiry." *Philadelphia Taxi Ass'n, 886 F.3d at 341-42*.

3Shape also argues that Align fails to sufficiently allege a relevant market for aligners. 3Shape contends that the amended complaint "does not allege facts that would enable the Court to conclude that traditional braces do not substitute for clear aligners." **[*28]** (D.I. 72 at 6.) I disagree.

It is not inherently implausible that there is a relevant market for aligners. The amended complaint defines the aligner market as "the market for custom-manufactured removable dental aligners made of clear plastic that correct teeth misalignment." (D.I. 63 ¶ 1.) It alleges that "[c]ustomers do not see Clear Aligners as reasonably interchangeable with traditional metal braces" and that "cross-elasticity of demand is not present between Clear Aligners and metal braces." (*Id.* ¶¶ 143, 147.) And it sets forth reasons why that is so, for example, because aligners cause less discomfort and require less time for treatment. (*Id.* ¶¶ 143-148.) Those allegations are sufficient to survive a motion to dismiss.[7]

IV. CONCLUSION

For the reasons set forth above, I recommend that Align's motion be DENIED. Align is, of course, free to re-raise all of its defenses at the summary judgment stage.

This Report and Recommendation is filed pursuant to *28 U.S.C. § 636(b)(1)(B)*,*(C)*, *Federal Rule of Civil Procedure 72(b)(1)*, and *District of Delaware Local Rule 72.1*. Any objections to the Report and Recommendation shall be filed within fourteen days and limited to ten pages. Any response shall be filed within fourteen days thereafter and limited

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[7] Align also argues, in a footnote, that 3Shape lacks antitrust standing to assert its claim that Align monopolized the aligner market. (D.I. 67 at 19 n.12.) To establish antitrust standing, a plaintiff must show that it has suffered an "antitrust injury"—that is, an "'injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful.'" *Ethypharm S.A. France v. Abbott Labs., 707 F.3d 223, 233 (3d Cir. 2013)* (alteration in original) (quoting *Brunswick Corp., 429 U.S. at 489*). Typically, only consumers and competitors in the restrained market have antitrust standing. *See W. Penn, 627 F.3d at 102*. A plaintiff may also have antitrust standing when its "injuries are the means by which the defendant[] seek[s] to achieve [its] anticompetitive ends." *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc., 806 F.3d 162, 172* (quoting *W. Penn, 627 F.3d at 102*).

Antitrust standing is a prudential limitation rather than a jurisdictional requirement. *Ethypharm, 707 F.3d at 232*. As such, antitrust standing "is more properly viewed as an element of an antitrust claim" that can be resolved at a later stage of the case. *In re Wellbutrin XL Antitrust Litig., 868 F.3d 132, 164 (3d Cir. 2017)*.

Align does not challenge 3Shape's standing with respect to the scanner market, but it points out that 3Shape is neither a competitor nor a consumer in the aligner market. Having reviewed the complaint in its entirety, I find that 3Shape has plausibly alleged that the injuries it suffered to its scanner business as a result of Align's conduct were the means by which Align sought to maintain its monopoly in the aligner market. I conclude, therefore, that 3Shape has adequately pleaded antitrust standing at this stage. Align is free to re-raise its antitrust standing arguments at the summary judgment stage.

to ten pages. The failure **[*29]** of a party to object to legal conclusions may result in the loss of the right to *de novo* review in the district court.

The parties are directed to the Court's "Standing Order for Objections Filed Under *Fed. R. Civ. P. 72*," dated October 9, 2013, a copy of which can be found on the Court's website.

Dated: May 20, 2020

/s/ Jennifer L. Hall

Jennifer L. Hall

UNITED STATES MAGISTRATE JUDGE

New Horizon Home Care v. Northeastern Nev. Reg'l Hosp.

United States District Court for the District of Nevada

May 20, 2020, Decided; May 20, 2020, Filed

Case No. 3:19-CV-00521-RCJ-WGC

Reporter
2020 U.S. Dist. LEXIS 88433 *; 2020 WL 2559378

NEW HORIZON HOME CARE, LLC and GUIDING LIGHT HOSPICE, INC., Plaintiffs, vs. NORTHEASTERN NEVADA REGIONAL HOSPITAL, et al., Defendants.

Subsequent History: Dismissed by, Motion denied by, As moot *New Horizon Home Care v. Guiding Light Hospice, 2021 U.S. Dist. LEXIS 34025 (D. Nev., Feb. 24, 2021)*

Core Terms

interstate commerce, allegations, patients, antitrust claim, amended complaint, antitrust, steering, leave to amend, discovery, motion to dismiss, hospice care, benefits, futile, unjust enrichment, diversity, facially, hospice

Counsel: **[*1]** For New Horizon Home Care, LLC, Guiding Light Hospice, Inc., Plaintiffs: Joseph Carlos Alamilla, LEAD ATTORNEY, PRO HAC VICE, Joseph C. Alamilla, PLLC, Centerville, UT.

For Northeastern Nevada Regional Hospital, Defendant: Ryan T. Holt, Phillip F. Cramer, LEAD ATTORNEY, Sherrard Roe Voigt & Harbison, PLC, Ste 1100, Nashville, TN.

For Horizon Hospice, Inc., Billie Jean Crawford, Defendants: Zachary Aaron Gerber, Gerber Law Offices, LLP, Elko, NV.

For Genesis Home Health Services, Inc., Querubin Iguban, Jr., Defendants: Gary E Di Grazia, Goicoechea, Di Grazia, Coyle & Stanton, Ltd., Elko, NV.

Judges: ROBERT C. JONES, United States District Judge.

Opinion by: ROBERT C. JONES

Opinion

ORDER

Defendants move to dismiss, alleging failure to state a claim and other defenses. Additionally, Defendant Northeastern Nevada Regional Hospital ("NNRH") moves to strike portions of the complaint. Finally, Plaintiffs move for leave to file an amended complaint. First, the Court finds that leave to amend would be futile, and therefore denies Plaintiffs' motion. Proceeding to the motions to dismiss, the Court finds the complaint facially insufficient and consequently dismisses it with leave to amend. Because the Court dismisses the complaint, **[*2]** it denies the motion to strike as moot.

FACTUAL BACKGROUND

The allegations in the complaint are as follows: Plaintiffs provide home health care and hospice service in and around Elko, Nevada. Defendants include a hospital, other home health care and hospice service providers, and individuals. Defendant NNRH is the dominant hospital in Elko and has used this market dominance to "steer" patients to the hospice Defendants, which are direct competitors of Plaintiffs. This steering is accomplished through referrals of discharged patients and providing only the contact information for hospice Defendants in publications. Defendant NNRH refuses to refer patients to Plaintiffs or to put Plaintiffs' contact information in the community publications despite repeated request and complaints. Such steering conduct renders Plaintiffs unable to compete in the hospice market for Elko.[1] Presently, Plaintiffs bring this suit against Defendants, claiming antitrust injuries and unjust enrichment.

LEGAL STANDARD

Fed. R. Civ. P. 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." This pleading standard "does not require 'detailed factual allegations,' **[*3]** but demands more than . . . 'labels and conclusions' or 'formulaic recitations of the elements of a cause of action." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 570*). Plausibility is satisfied where the pleaded factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*. Plausibility does not require a demonstration of probability, but "asks for more than a sheer possibility." *Id.*

Further, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* Consequently, while the Court "accept[s] all material allegations in the complaint as true and construe[d] . . . in the light most favorable to" the nonmoving party, *NL Indus. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986)*, it is not required to "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit," *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*. Nor is it required to accept "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Id.*

ANALYSIS

Prior to engaging in the analysis **[*4]** of the merits, the Court notes that an issue of subject-matter jurisdiction must be addressed, despite there being no objection by Defendants. *See* *Louisville & Nashville R.R. Co. v. Motley, 211 U.S. 149, 152 (1908)* (noting that it is the duty of a federal court to ensure that its jurisdiction granted by statute is not exceeded). Plaintiffs argue that this Court has subject-matter jurisdiction under both *28 U.S.C. § 1331* and *§ 1332* (among other statutes not at issue here). The issue here is with the claim of jurisdiction under *28 U.S.C. § 1332*.

First, Plaintiffs claim jurisdiction under *§ 1332(d)*, which is restricted to class actions. Plaintiffs' complaint does not identify this suit as a class action, nor does it identify a proposed class of plaintiffs. However, even if the "(d)" is in error, the requirements for diversity jurisdiction under *§ 1332*, generally, are not met. Plaintiffs allege that "diversity exists, and the amount in controversy exceeds $10 million," (ECF No. 1 at ¶ 25), but review of the named parties

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[1] Plaintiffs' complaint includes a significant number of paragraphs discussing incidents of patient care, alleged violations of Medicare and Nevada licensing statutes, and multiple other allegations that are not relevant to either antitrust or unjust enrichment claims. Due to this lack of relevance, the Court declines to include those allegations in its recitation of the facts.

show only corporations with their principal place of business in Nevada or individuals domiciled in Nevada. (*Id.* at ¶¶ 13-23.)[2] Therefore, any jurisdiction of this Court may only arise from the presence of a federal question.

I. Motion for Leave to File an Amended Complaint (ECF No. 108)

Plaintiffs **[*5]** move for leave to file an amended complaint under *Fed. R. Civ. P. 15(a)(2)*. (ECF No. 108.) As granting Plaintiffs' motion would void the original complaint, and all of Defendants' motions associated with it, the Court must address Plaintiffs' motion prior to ruling on the other motions. Plaintiffs note the original complaint was prepared by the parties *in propria persona*, and the purpose of the amended complaint is to "clarify their claims and allegations." (*Id.*) Plaintiffs further note that "[t]here has been no undue delay, no bad faith, and no dilatory motive on the part of [Plaintiffs.]" (*Id.*) Defendants oppose the motion, claiming that amendment would be futile. (ECF Nos. 110 and 111.) The Court agrees, and therefore denies the motion.

"A motion for leave to amend may be denied if it appears to be futile or legally insufficient." *Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988)* (citing *Gabrielson v. Montgomery Ward & Co., 785 F.2d 762, 766 (9th Cir. 1986))*. In considering futility, the Court applies an analysis identical to that used for Rule 12(b)(6) motions. *Miller, 845 F.2d at 214*.

As discussed in greater detail below, Plaintiffs' antitrust claims are deficient in multiple aspects. Of those deficiencies, the only one Plaintiffs attempt to correct is the lack of interstate commerce or substantial effect on interstate commerce. However, the mere addition **[*6]** of the fact that Defendant NNRH treats patients from Oregon and Utah, (*see, e.g.*, ECF No. 108 Ex. 1 at ¶ 33), does not in any way address the question of whether the *hospice care* is itself participating in or substantially affecting interstate commerce. Thus, even under the amended complaint, Plaintiffs' federal antitrust claims fail as a matter of law.

Plaintiffs' amended complaint correctly identifies the Nevada statutes regarding antitrust actions and also brings two additional state-law claims that were not in the original complaint: business disparagement and intentional interference with prospective economic advantage and/or contractual relationship. However, as discussed above, Plaintiffs have not alleged the presence of any diverse parties, therefore this Court has no diversity jurisdiction under *28 U.S.C. § 1332*. As the Court finds the federal antitrust claims facially insufficient, there are no remaining federal claims that would allow for supplemental jurisdiction under *28 U.S.C. § 1367*. Accordingly, there are no claims in the amended complaint over which this Court has jurisdiction and amendment would therefore be futile. Consequently, the Court denies the motion for leave to file amended complaint and **[*7]** proceeds to the motions to dismiss filed in connection with the original complaint.

II. Motions to Dismiss (ECF Nos. 28, 46, 60, 85, and 103)

Plaintiffs' claims can be organized into three categories: federal antitrust claims under the Sherman Act, state antitrust claims, and a state claim for unjust enrichment. The Court addresses each of these categories in turn and, finding the complaint facially insufficient, dismisses the complaint with leave to amend.[3]

a. Federal Antitrust Claims Generally

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[2] Even if the Court were to consider the parties alleged in the proposed amended complaint, the analysis would not change. (ECF No. 108 Ex. 1 at ¶¶ 1-15.)

[3] Because the Court dismisses Plaintiffs' complaint in its entirety for failure to state a claim, Defendant NNRH's motion to strike (ECF No. 45) and Defendant Highland Manor's Rule 12(b)(4-5) arguments are moot. Thus, the Court denies them without prejudice.

To bring a claim under the Sherman Act, a plaintiff must demonstrate that the allegedly unlawful conduct either occurred in interstate commerce, *Yellow Cab Co. of Nev. v. Cab Emp'rs, Auto. and Warehousemen, Local No. 881, 457 F.2d 1032, 1034 (9th Cir. 1972)*, or had a substantial effect on interstate commerce, *id. at 1035 n.2*. In the instant case, Plaintiffs allege the Sherman Act applies because "Defendants employed various [interstate] devices to commit illegal acts described herein," and that "Defendants' complained-of activities occurred within the stream of, and have substantially affected, state and interstate commerce." (ECF No. 1 at ¶ 27.)[4]

However, Plaintiffs do not provide any factual allegations to support those legal conclusions. In fact, Plaintiffs have explicitly described the relevant market as "a market **[*8]** for hospice care which benefits patients that comprise the geographic region of Nevada and specifically the region surrounding Elko, Nevada (or smaller geographic markets therein)." (*Id.* at ¶ 234.) Plaintiffs' description of the results of that conduct further undercuts their argument that the allegedly unlawful conduct substantially affects interstate commerce. (*See, e.g.*, ECF No. 1 at ¶ 8 ("This scheme lets Defendants pocket or re-capture a substantial percentage of the home health care and hospice care business in Elko, Nevada.").) Thus, there is not, and cannot be, a dispute over whether Defendants' conduct substantially affected interstate commerce because Plaintiffs have provided only "formulaic recitations of a cause of action," *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 570*), insufficient to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly, 550 U.S. at 555* (omission in original) (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*.

Nevertheless, Plaintiffs argue that the Court should allow discovery and litigate "the issue of jurisdiction . . . once discovery and the facts ha[ve] been solidified by depositions and other discovery." (ECF No. 80 at 26; *see also* ECF No. 100 at 2 ("In fact, every case the Defendants cite had **[*9]** extensive discovery conducted before the courts entertained the question of whether the Plaintiffs have met their burden of proof on the jurisdictional question of interstate commerce.").) Yet, the high cost of discovery, especially in antitrust cases, was the genesis for the *Twombly* ruling. *550 U.S. at 558* ("[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.") (internal citation omitted). Consequently, "it is only by taking care to require allegations that reach the level suggesting [valid antitrust claims] that we can hope to avoid the potentially enormous expense of discovery." *Id. at 559*.

To support the argument that their complaint is sufficient to withstand a motion to dismiss, Plaintiffs point to *Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991)*, which stated that "'liability may be established by proof of either an unlawful purpose or an anticompetitive effect' . . . . Thus, respondent need not allege, or prove, an actual effect on interstate commerce to support federal jurisdiction." *Id. at 330-331* (quoting *McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 243, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980))*. Plaintiffs misplace reliance on *Pinhas*, however, as it was "undisputed" that the defendant in *Pinhas* "unquestionably engaged **[*10]** in interstate commerce." *500 U.S. at 329*. Further, the market in *Pinhas* was the "provision of [specific in-hospital] services . . . [which] are regularly performed for out-of-state patients and generate revenues from out-of-state sources" and are important to "the entire operation of the hospital." *Id. at 329-330*. In the instant case, as discussed above, the relevant market is in-home hospice care, and the complaint lacks allegations that Defendants (or Plaintiffs, for that matter) provide such services in interstate commerce. Therefore, *Pinhas* is inapposite.

Furthermore, the failure to demonstrate interstate commerce, or substantial effect on the same, is not the only legal defect in Plaintiffs' complaint. As has been repeatedly noted, "[t]he antitrust laws . . . were enacted for 'the protection of *competition* not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (emphasis added) (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320,*

[4] These vague assertions evince another deficiency that pervades the complaint in that it does not allege facts sufficient to show how this claim applies to *every* Defendant. Plaintiffs attempt to assert all of the causes of action against all Defendants, but, for example, there is no allegation mentioning Defendant Iguban anywhere in the complaint except in the caption and in Paragraph 20, which only states that he resides and does business in Elko, Nevada.

82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)). Explicitly excluded from that category are "claim[s] to profits that would have been earned" in the absence of the alleged anti-competitive conduct. Brunswick Corp., 429 U.S. at 490.

Yet, these are precisely the allegations made by Plaintiffs. (*See, e.g.*, ECF No. 1 at ¶ 34 ("Steering—*and the competition from lower-priced healthcare providers that steering animates*— threatens Plaintiff's [sic] **[*11]** revenues.") (emphasis added).) In fact, the conduct described by Plaintiffs seem to *benefit* consumers, not harm them. (*See, e.g.*, *id.* at ¶ 33 ("The ability of NNRH to steer gave [Defendants] a decided market advantage as those organizations did not have to advertise or otherwise seek new patients, *which in turn reduced their costs* and provided a market edge to them that was not provided to the Plaintiffs.") (emphasis added); *id.* at ¶ 35 ("NNRH steered patients to Defendants . . . and away from Plaintiff's [sic] *to the detriment and loss of the Plaintiffs*.") (emphasis added); ECF No. 113 at 4:20-22 ("Plaintiffs have been harmed by this [conduct] because they have lost patients based upon this activity, and the Plaintiffs have decreased revenue as a result of the activity in question").) Thus, Plaintiffs only allege Defendants' actions harmed *them*—not *competition*—contravening well-settled ***antitrust law***.

In sum, Plaintiffs have not alleged facts sufficient to show that any Defendant's actions were in or substantially affected interstate commerce, or that they harmed competition. Therefore, Plaintiffs' federal antitrust claims are facially invalid, and the Court dismisses them accordingly. **[*12]**

b. Federal Antitrust Claims in Regard to Defendant NNRH

In addition to the general objections brought by various Defendants, Defendant NNRH makes several objections that apply solely to the claims against it. Defendant argues that, aside from the other deficiencies in Plaintiffs' antitrust claims, Plaintiffs fail to allege a conspiracy, as required under Section 1, and that Defendant is a market participant, as required under Section 2. Both arguments are correct.

It is well-settled law that "[t]he conduct of a single [entity] is governed by § 2 alone and is unlawful only when it threatens actual monopolization." Copperweld Corp. v Independence Tube Corp., 467 U.S. 752, 767, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). That is, Section 1 requires "a 'contract, combination . . . or conspiracy' between *separate* entities. It does not reach conduct that is 'wholly unilateral.'" Id. at 768 (emphasis in original) (first quoting 15 U.S.C. § 1, then quoting Albrecht v. Herald Co., 390 U.S. 145, 149, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968)). The sole allegations in the complaint that there is any sort of agreement or conspiracy are the grammatically incorrect phrase "Between NNRH steering patients to Defendants . . . because of the increased patient volume that accompanies steering, as well as alleged kickbacks from Defendants," (ECF No. 1 at ¶ 36), and the phrase "Defendants continue to improperly steer patients away from Plaintiffs **[*13]** and into their own pockets," (*id.* at ¶ 73). The inclusion of the words "alleged kickbacks" and vague allegations are not sufficient to find a properly alleged conspiracy in light of the multiple allegations that appear to demonstrate that Defendant NNRH's conduct is unilateral in nature. (*See, e.g.*, ECF No. 1 at ¶¶ 1-5, 35.)

As to Plaintiffs' Section 2 claims, "[t]he requirement that the alleged injury be related to anti-competitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors." Bhan v. NME Hospitals, Inc., 772 F.2d 1467, 1470 (9th Cir. 1985). Plaintiffs identify the relevant market as "the market for hospice care which benefits patients." (ECF No. 1 at ¶ 234.) As a hospital, Defendant NNRH is not involved in the market for hospice care other than the fact that patients discharged from the hospital sometimes engage hospice care providers. That is simply not enough to label Defendant NNRH as a "market participant."

c. State Antitrust Claims

Four of Plaintiffs' nine counts claim antitrust abuses in violation of "Nevada common law." However, antitrust actions are governed by Nevada statute, not common law. *See* NRS 598A.010, et seq. Specifically, private antitrust actions are governed by NRS 598A.210. Therefore, Plaintiffs' **[*14]** state antitrust claims are facially invalid, and the Court dismisses them accordingly. Furthermore, as discussed above, correctly identifying the statutes which provide a cause of action does not remedy the jurisdictional issue created by the lack of diversity or the lack of standing provided by the federal antitrust statutes.

d. Unjust Enrichment

Under Nevada law, "[u]njust enrichment exists when the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is 'acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof.'" *Certified Fire Prot. V. Precision Constr., 128 Nev. 371, 283 P.3d 250, 257 (Nev. 2012)* (quoting *Unionamerica Mtg. v. McDonald, 97 Nev. 210, 626 P.2d 1272, 1273 (Nev. 1981))*. Here, Plaintiffs allege that "Defendants have knowingly received and retained wrongful benefits in multiple forms," (ECF No. 1 at ¶ 294), but do not provide any factual description of benefits "conferred by" Plaintiffs. Instead, the "benefits" Plaintiffs appear to allege are unlawfully withheld are the "financial benefits" that Plaintiffs would have derived from referrals if not for the unlawful conduct. (*Id.* at ¶ 298.) Such financial benefits are not those envisioned by the doctrine of unjust enrichment. **[*15]** Accordingly, the Court dismisses Plaintiffs' claim of unjust enrichment.

e. Leave to Amend

Upon granting a motion to dismiss, a court must then determine whether to allow leave to amend the complaint. Leave to amend should be granted unless "amendment would be futile." *DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992)* (citing *Reddy v. Litton Indus., 912 F.2d 291, 296 (9th Cir. 1990))*. That is, dismissal without leave to amend is appropriate only where "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1401 (9th Cir. 1986)* (citing *Bonanno v. Thomas, 309 F.2d 320, 322 (9th Cir. 1962))*. Here, the Court cannot find that amendment would be futile, therefore dismisses Plaintiffs' complaint with leave to amend.[5]

CONCLUSION

IT IS HEREBY ORDERED that Defendants' Motions to Dismiss (ECF Nos. 28, 46, 60, 85, and 103) are GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Complaint (ECF No. 1) is DISMISSED WITH LEAVE TO AMEND.

IT IS FURTHER ORDERED that Plaintiffs have thirty days from the date of this Order to file an amended complaint. If Plaintiffs decline to file an amended complaint, the Clerk shall enter judgment and close the case.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File an Amended Complaint (ECF No. 108) **[*16]** is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion to Strike (ECF No. 45) is DENIED AS MOOT.

IT IS SO ORDERED.

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[5] In the event Plaintiffs choose to file an amended complaint, the Court refers counsel to LR IA 10-1, LR 7-2, and LR 7-3 for use in their litigation before this Court. Furthermore, the Court notes that the practice of simply copying and pasting paragraphs from a complaint into a responsive filing does not actually constitute argument or rebuttal of the relevant motion. *See, e.g.*, *Aubrecht v. Penn. State Police, 389 Fed. App'x 189, 192-93 (3d Cir. 2010)*. Indeed, such a "copy-and-paste approach to briefing . . . 'is inexcusable for a counseled complaint.'" *Dama v. Prudential Ins. Co. of Am., No. 18-CV-03104, 2018 U.S. Dist. LEXIS 215738, 2018 WL 6706314, at *2 n.3 (E.D.N.Y. Dec. 20, 2018)* (quoting *Lowe v. Planning & Zoning Comm'n of Town of Mansfield, No. 3:16-CV-381, 2018 U.S. Dist. LEXIS 4842, 2018 WL 379010, at *4 n.3 (D. Conn. Jan. 10, 2018)*).

Dated May 20, 2020.

/s/ Robert C. Jones

ROBERT C. JONES

United States District Judge

Black v. Occidental Petroleum Corp.

United States District Court for the District of Wyoming

May 28, 2020, Decided; May 28, 2020, Filed

Case No. 19-CV-243-F

Reporter

2020 U.S. Dist. LEXIS 259342 *; 2020 WL 10573279

DENNIS A. BLACK, et al., Plaintiffs, vs. OCCIDENTAL PETROLEUM CORPORATION, et al., Defendants.

Subsequent History: Motion denied by *Deselms v. Occidental Petroleum Corp., 2021 U.S. Dist. LEXIS 134375 (D. Wyo., June 16, 2021)*

Decision reached on appeal by *Black v. Occidental Petro. Corp., 2023 U.S. App. LEXIS 14103 (10th Cir. Wyo., June 7, 2023)*

Core Terms

leases, permits, drilling, Defendants', immunity, antitrust, state-action, monopoly, mineral, geographic, relevant market, acquisition, anticompetitive conduct, supervision, rights, private party, anticompetitive, terms, oil and gas, intracompany, monopolize, sections, oil, state policy, exploration, royalty, pooling, motion to dismiss, royalty rate, Sherman Act

Counsel: **[*1]** For Dennis A Black, Rita Kolkman also known as | Rita D Kolkman | formerly known as | Rita Rief, Trustee Anita C Deselms trustee | Anita C Deselms Living Trust, Gross-Wilkinson Ranch LLC, Theresa M Williams trustee | John & Theresa Williams Trust dated July 18 2019, Russell I Williams, Jr trustee | Russell I Williams Jr Revocable Trust U/A dated 7/27/83, Jolene M Simkins, Norma Jean Smith, Richard Bagby, Tracy Bagby, Trustee Phyllis A Cooney trustee | Phyllis A Cooney Trust U/A dated September 22, 1995, Justin W Miller, Brandi J Miller, Mina Bayne, Karen Bryant individually, Trustee Karen Bryant trustee | Karen Bryant Living Trust dated September 22, 2017, Norma Jean Smith Trustee trustee | Smith Family Revocable Trust Dated May 1 2018, Benjamin D Adkison also known as | Benjamin Adkison, Kelli J Adkison also known as | Kelli Adkison, Val D Eklund also known as | Val Eklund, Sharron R Eklund also known as | Sharon Eklund, Melvin C Fornstrom also known as | Melvin Fornstrom, Lois T Fornstrom also known as | Lois Fornstrom, Karen Leslie Bryant individually | also known as | Karen Bryant, John Gilbert Williamstrustee | John & Theresa Williams Trust dated July 18 2019 | also known as | **[*2]** John G Williams, Plaintiffs: Bradley L Booke, LEAD ATTORNEY, LAW OFFICE OF BRADLEY L BOOKE, Jackson, WY USA; Cody L Balzer, LEAD ATTORNEY, BALZER LAW FIRM, Loveland, CO USA; J N Murdock, LEAD ATTORNEY, MURDOCK LAW FIRM, Casper, WY USA; Justin Ashkhan Daraie, LEAD ATTORNEY, LONG REIMER WINEGAR BEPPLER LLP, Jackson, WY USA; Kristopher C Koski, LEAD ATTORNEY, LONG REIMER WINEGAR LLP, Cheyenne, WY USA; Laurence O Masson, LEAD ATTORNEY, PRO HAC VICE, LAW OFFICE OF LAURENCE O MASSON, Berkeley, CA USA; Robert P Schuster, LEAD ATTORNEY, ROBERT P SCHUSTER PC, Jackson, WY USA; Samuel Issacharoff, LEAD ATTORNEY, PRO HAC VICE, New York, NY USA; Thomas N Long, LEAD ATTORNEY, LONG REIMER WINEGAR BEPPLER LLP, Cheyenne, WY USA.

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For Karen Black, Phillip Brock Carl Williams trustee | Williams Family Trust UA dated 7/21/14, Suzanne Lee Eklund trustee | Suzanne Lee Eklund Revocable Trust UA April 25 2011, John K Marquardt trustee | John K Marquardt Revocable Trust UA dated 5/1/08, Gust of Wind LLC a Nebraska limited liability company, Kyle Dean Murdoch, J & L Lerwick Limited Partnership, Julie Jayne Goyen, John C Eklund, Jr trustee | John C Eklund Revocable Trust UA April 25 2011, Plaintiffs: Cody L Balzer, LEAD ATTORNEY, BALZER LAW FIRM, Loveland, CO USA; J N Murdock, LEAD ATTORNEY, MURDOCK LAW FIRM, Casper, WY USA; Laurence O Masson, LEAD ATTORNEY, PRO HAC VICE, LAW OFFICE OF LAURENCE O MASSON, Berkeley, CA USA; Robert P Schuster, LEAD ATTORNEY, ROBERT P SCHUSTER PC, Jackson, WY USA; Samuel Issacharoff, LEAD ATTORNEY, PRO HAC VICE, New York, NY USA; Thomas N Long, LEAD ATTORNEY, LONG REIMER WINEGAR BEPPLER LLP, Cheyenne, WY USA.

For J Michael Powers trustee | J.Michael Powers Revocable Trust UA Dated August 10 1982, Plaintiff: Cody L Balzer, LEAD **[*4]** ATTORNEY, BALZER LAW FIRM, Loveland, CO USA.

For Occidental Petroleum Corporation, Anadarko Petroleum Corporation, Anadarko E&P Onshore LLC, Anadarko Land Corp, Defendants: Benjamin Gruenstein, LEAD ATTORNEY, PRO HAC VICE, CRAVATH SWAINE & MOORE LLP, New York, NY USA; Matthew J Micheli, Walter Frederick Eggers, III, LEAD ATTORNEYS, HOLLAND & HART, Cheyenne, WY USA.

For Anadarko Oil & Gas 5 LLC, Defendant: Matthew J Micheli, Walter Frederick Eggers, III, LEAD ATTORNEYS, HOLLAND & HART, Cheyenne, WY USA.

Judges: NANCY D. FREUDENTHAL, UNITED STATES DISTRICT JUDGE.

Opinion by: NANCY D. FREUDENTHAL

Opinion

ORDER DENYING MOTION TO DISMISS

This matter is before the Court on Defendants' Motion to Dismiss, filed December 30, 2019 (CM/ECF Document 10), Plaintiffs' Response, filed February 4, 2020 (Doc. 25), and Defendants' Reply, filed February 14, 2020 (Doc. 30). Having reviewed the pleadings, applicable law, and being otherwise fully informed in the premises, the Court FINDS and ORDERS as follows.

BACKGROUND

This case arises from a dispute over Defendants' alleged antitrust violations in relation to their acquisition and leasing of minerals in the Codell and Niobrara formations, located in east Laramie County, Wyoming. For the **[*5]** purpose of this motion, the Court assumes as true the factual allegations made in the Complaint. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

According to the Complaint, Plaintiffs are owners of several thousand acres of land and mineral rights in various areas of east Laramie County. Defendant Anadarko Land Corp ("Land Corp"), a subsidiary of Anadarko, also owns several thousand acres of land in the area, including fee mineral interests that it acquired from Union Pacific Land Resources Corporation ("Union Pacific"). Union Pacific originally acquired the land now owned by Land Corp through federal land grants during the development of the railroad. To foster railroad development, the federal government granted Union Pacific the alternating odd-numbered square-mile sections along the railroad corridor, creating a "checkerboard" pattern of land ownership. Land Corp owns interests in the odd-numbered sections formerly belonging to Union Pacific, while Plaintiffs own interests in the neighboring even-numbered and certain odd-numbered sections.

At some point not specified in the Complaint, Anadarko's subsidiary, Anadarko E&P Onshore ("E&P Onshore"), leased Land Corp's mineral rights in the Codell and Niobrara mineral formations and **[*6]** obtained from the Wyoming Oil and Gas Conservation Commission ("WOGCC") approximately 2,200 permits to drill oil and gas wells. E&P Onshore's permits authorize it to drill the maximum number of allowable wells under WOGCC regulations in the odd-numbered sections of the checkerboard owned by Land Corp. All of E&P Onshore's permits are for two-mile horizontal wells, which involve drilling vertically to a certain depth, then drilling horizontally for a distance of two miles. According to Plaintiffs, each permit grants E&P Onshore "the exclusive right to conduct (or not conduct) horizontal oil and gas drilling for two square miles." This right encompasses the minerals in the odd-numbered sections where Land Corp holds an interest. It also extends to embrace the even-numbered sections owned by Plaintiffs, as those sections are included in the drilling unit for each two-mile horizontal well.

Plaintiffs' Complaint, filed November 25, 2019, factually asserts that E&P Onshore's acquisition of drilling permits, along with the leases executed between Land Corp and E&P Onshore (together "Anadarko" or "Defendants"), give rise to an unlawful monopoly in Anadarko for the exploration and production **[*7]** and oil and gas leasing in the Niobrara and Codell Formations. Plaintiffs assert that Anadarko has not drilled a well in the area since 2013 and that it has no plans to do so. Plaintiffs also allege that, to the extent Anadarko's permits are exclusive under Wyoming law, Anadarko's possession of permits to drill in all permissible areas prevents other operators from drilling a well to extract Plaintiffs' minerals. Finally, Plaintiffs allege that Land Corp leased its minerals to Onshore at an above-market, noncompetitive royalty rate of 30%. Plaintiffs assert that the excessive royalty to Land Corp would render drilling unprofitable to Anadarko unless Anadarko leased Plaintiffs' minerals at a royalty rate below market value. Even if another operator acquired permits in the area, drilling would be unprofitable due to the high royalties to which Anadarko would be entitled, according to Plaintiffs.[1]

Ultimately, Plaintiffs' alleged injury derives from Anadarko's acquisition and maintenance of exclusive permits to drill in the area, as well as Anadarko's execution of "supracompetitive" lease terms, as this conduct by Anadarko has prevented competing operators from seeking **[*8]** permits from WOGCC or leases from Plaintiffs. Plaintiffs further assert that, were Anadarko itself ever to lease Plaintiffs' minerals, Anadarko would necessarily offer Plaintiffs less than fair-market royalties, given the excessive royalties reserved for Land Corp under the terms of the intracompany leases.

Legally, Plaintiffs' Complaint first alleges that Defendants have created an unlawful monopoly in violation of *§ 2* of the *Sherman Act* by executing collusive leases that misappropriate, convert, and arrogate the value of Plaintiffs' mineral rights (Count One: *Sherman Act § 2*, Monopolization). Second, the Complaint alleges that even if Defendants have not succeeded in creating the alleged monopoly, they attempted to do so in violation of *§ 2* of the *Sherman Act*. (Count Two: *Sherman Act § 2*, Attempted Monopolization). Third, the Complaint alleges that Defendants violated *Wyoming Statute § 40-4-101* by making, entering into, forming, and becoming a party to a "plan, contract, agreement, and combination to prevent competition and to control or influence production and prices thereof through the acquisition of drilling permits and the execution of collusive leases." (Count Three:

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[1] Plaintiffs do not explicitly state whether, or through what contractual, legal or procedural mechanism, competing operators would be obligated to assume royalty payments of 30% to Land Corp if another operator was permitted to develop the unit and pooled Anadarko's interest. However, at the stage of a motion to dismiss, the Court is obligated to indulge all reasonable inferences in Plaintiffs' favor. *See, e.g., Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984)*. Here, Plaintiffs allege that due to the leases executed between Onshore and Land Corp, competing operators could not operate profitably even if those competitiors leased Plaintiffs' rights and applied for permits on the expiration of Defendants' permits. ((*See, e.g.*, Doc. 25 at 3) ("[T]he non-competitive royalty rate essentially guaranteed that competitors would be unable to economically lease the plaintiffs, pool the defendants, and profitably drill wells.")). This allegation is sufficient for the Court to draw the reasonable inference that a competing operator, if permitted, would be obligated by contract or law to fulfill the 30% royalty owed to Land Corp. In drawing this inference, the Court does not mean to indicate this is the only plausible reading of Plaintiffs' Complaint.

Violation of *Wyoming Statute § 40-4-101*). Finally, the Complaint alleges that Defendants violated Article 1, § 30 and *Article 10, § 8 of the Wyoming Constitution* through unlawful **[*9]** competition or interference with the public good and general welfare through monopolistic enterprises. (Count Four: Violation of Wyoming Constitution).

Defendants have moved to dismiss Plaintiffs' Complaint on numerous grounds: (1) Plaintiffs' Sherman Act claims (Counts One and Two) are barred by the state-action doctrine; (2) Plaintiffs' Sherman Act and state-law claims (all Counts) are further barred by the *Noerr-Pennington* doctrine; (3) Plaintiffs' state-law claims (Counts Three and Four) should be dismissed because Wyoming antitrust laws do not prohibit monopolies obtained through drilling permits issued under Wyoming law; (4) Plaintiffs fail to state a claim for monopolization under *Federal Rule of Civil Procedure 12(b)(6)* by failing to plead a relevant geographic market, failing to allege anticompetitive conduct, and failing to adequately plead antitrust injury; and (5) Plaintiffs lack standing to bring their claims.

Standard on Motion to Dismiss

The standard of review on a motion to dismiss is well-established. An antitrust claim is not subject to a heightened pleading standard. *Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001)*; *Lawter & Assocs., PLLC v. Sw. Bell Advert. L.P.*, No. CIV-07-0393-HE, 2009 WL 10673103, at *2 (W.D. Okla. Jan. 16, 2009) (citing *New Home Appliance Center, Inc. v. Thompson, 250 F.2d 881, 883 (10th Cir. 1957)*). To survive a motion to dismiss, a plaintiff's "complaint must contain sufficient factual matter . . . to 'state a claim to relief **[*10]** that is plausible on its face.'" *Iqbal, 556 U.S. at 678* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). For the claims of a complaint to be considered "plausible," a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*. Thus, although the plaintiff does not need to provide detailed factual allegations, the complaint must contain more than mere "labels," "conclusions," and "formulaic recitations of the elements of a cause of action." *Twombly, 550 U.S. at 555*. In its evaluation of the complaint, the Court must accept all factual allegations as true. *Id. at 572*.

When ruling on a motion to dismiss for failure to state a claim, it is not the Court's function "to weigh [the] potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz, 948 F.2d 1562, 1565-66 (10th Cir. 1991)*. The Court must also view the factual allegations in the light most favorable to the non-moving party. *Sutton v. Utah State Sch. For Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir. 1999)*.

Discussion

I. *Sherman Act* § 2

Section 2 of the *Sherman Act* provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be **[*11]** deemed guilty of a felony." *15 U.S.C. § 2*. To state a monopolization claim under *§ 2*, a plaintiff must "define a relevant market within which the defendants allegedly engaged in anticompetitive behavior. 'The offense of monopoly under *§ 2* of the *Sherman Act* has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power.'" *Campfield v. State Farm Mutual Auto. Ins. Co., 532 F.3d 1111, 1117-18 (10th Cir. 2008)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*).

To state an attempted monopolization claim, Plaintiffs must plead: "(1) relevant market (including geographic market and relevant product market); (2) dangerous probability of success in monopolizing the relevant market; (3) specific intent to monopolize; and (4) conduct in furtherance of such an attempt." *Colo. Interstate Gas. Co. v. Natural Gas Pipeline, 885 F.2d 683, 693 (10th Cir. 1989)*. "Initially, therefore, the plaintiff must plead facts sufficient to establish the existence of a relevant market and the defendant's power in that market." *TV Commc'ns Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1025-26 (10th Cir. 1992)* (citing *Perington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369, 1373 (10th Cir. 1979)*).

As threshold issues, Defendants assert two theories under which Plaintiffs' claims are barred. First, Defendants state Plaintiffs' Sherman Act claims must be dismissed because Defendants' alleged monopoly is the result of a state action. Therefore, Defendants contend they are entitled to immunity from suit under the state-action or "*Parker* ***[*12]*** " doctrine. Defendants also assert Plaintiffs' claims are barred under the *Noerr-Pennington* doctrine, which would shield from liability Defendants' acquisition of permits from the WOGCC if it is considered petitioning activity under the *First Amendment*. The Court will first consider whether Plaintiffs' claims are barred under the *Parker* and *Noerr-Pennington* doctrines before proceeding to consider whether Plaintiffs have stated a claim on which relief can be granted under *Federal Rule of Civil Procedure 12(b)(6)*.

A. State-Action/*Parker* Immunity

1. Summary of Defendants' Argument for State-Action Immunity

The Court finds a brief summary of Defendants' arguments is warranted before proceeding to analyze each in turn. The instant motion presents three theories in support of the application of state-action immunity. First, Defendants state that the gravamen of the Complaint is directed toward conduct actually committed by the State of Wyoming through the WOGCC. For instance, Plaintiffs state "[t]he purpose and effect of Anadarko's obtaining the drilling permits have been to confer on Anadarko a monopoly in the relevant market, in that no other oil and gas exploration firm will be able to gain entry and operate profitably in the relevant market." **[*13]** (Doc. 1, at 19). Taking the facts as pled, Anadarko necessarily "obtained" its permits through a process regulated by the WOGCC. Therefore, Defendants argue, the WOGCC bears equal responsibility for the conferral of such a monopoly because it granted the permits for which Anadarko applied.

Anadarko's second theory in favor of state-action immunity is that even if the WOGCC is not considered "the state" for purposes of immunity, the WOGCC is a sub-state actor entitled to immunity under the relevant test. For sub-state actors, the relevant test for application of state-action immunity is whether the entity's conduct "was authorized by a clearly articulated and affirmatively expressed state policy to displace competition with regulation, and therefore was not subject to the *Sherman Act*." *See* *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38-40, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*.

Defendants' assertion that they are entitled to state-action immunity rests primarily on the two theories described above (*i.e.*, that the WOGCC was the monopolizing actor). However, Defendants submit in the alternative that state-action immunity extends protection over Anadarko's conduct as a private entity, including Anadarko's execution of intracompany leases allegedly designed to exclude competitors from **[*14]** profitably operating in the market. According to Defendants, they enjoy immunity for *all* conduct, even as private non-state actors, because the alleged conduct is a "foreseeable result" of Wyoming law. *See* *Lease Lights, Inc. v. Pub. Serv. Co. of Okla., 849 F.2d 1330, 1333 (10th Cir. 1988)*.

2. *Parker v. Brown* and Other Applicable Law

The Supreme Court originally set forth the state-action doctrine in *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. In *Parker*, the Supreme Court held that the *Sherman Act* does not restrict states from imposing market restraints "as an act of government." *Id. at 352*. "States may regulate economic activity as they wish, pursuing even patently anticompetitive policies without having to look over their shoulders to see if Congress approves." *Kay Elec. Co-op. v. City of Newkirk, Okla., 647 F.3d 1039, 1042 (10th Cir. 2011)*. Except for situations in which the state itself is acting as a market participant, "any action that qualifies as state action is *ipso facto* . . .

exempt from the operation of the antitrust laws . . . ." *City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 379, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*.

a. Whether Defendants Enjoy Immunity for their Acquisition of the Permits?

Defendants' primary argument is that Plaintiffs' claims must be dismissed because the alleged harms arise directly from the WOGCC's issuance of permits to Anadarko, which pursuant to their own terms, give Anadarko exclusive drilling rights in the area covered by the permits. (Doc. 1 at 5). Thus, Anadarko's **[*15]** acquisition of its alleged monopoly would be characterized as a state-action immunized from liability under the *Sherman Act*. At least one circuit has issued precedent that agrees with this result. Defendants cite *Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc., 810 F.2d 869 (9th Cir. 1987)*, in which the Ninth Circuit concluded that a *Sherman Act § 2* claim lacked merit where a state department of transportation had conferred on a defendant taxi company an exclusive franchise to provide outbound taxi service from the airport. That Court stated:

> Because the monopoly granted to [the State Independent Drivers Association, Inc. ("SIDA")] was shielded by the *Parker* doctrine, SIDA cannot be held liable for possessing that monopoly. To hold otherwise, would allow the *Parker* doctrine to be circumvented by artful pleading: 'A plaintiff could frustrate any [*Parker* protected state plan] merely by filing suit against the regulated private parties, rather than the state officials who implement the plan.'

Id. at 878 (quoting *S. Motor Carriers Rate Conference, 471 U.S. 48, 56-57, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985)*). Similarly here, to the extent Plaintiffs' monopoly claims rely upon Defendants' acquisition of the permits, the Court concludes Defendants are immunized under *Parker* because the alleged harms arise just as much from WOGCC's approval of the permit complex as Anadarko's application for those permits.

b. Whether Defendants [*16] Enjoy Immunity for the Execution of "Supracompetitive" Intracompany Leases?

While the Court finds that Defendants enjoy state-action immunity from *Sherman Act* liability for their acquisition of the permits, Plaintiffs' alleged harms appear to arise at least in part from Anadarko's execution of intracompany leases divorced from its conduct in acquiring the permits. Therefore, Plaintiffs necessarily assert that Defendants have engaged in *§ 2* violations in their capacities as private parties.

Courts have extended the state-action doctrine to immunize conduct by private parties. "Although the doctrine was aimed at protecting state legislatures and state supreme courts acting in their legislative capacities, it can provide protection to other individuals or entities acting pursuant to state authorization." *Zimomra v. Alamo Rent-A-Car, Inc., 111 F.3d 1495, 1498 (10th Cir. 1997)*. But when the challenged conduct is attributable to another person or entity acting under state authorization, "closer analysis is required" to determine whether antitrust immunity is warranted. *Porter Testing Lab. v. Bd. of Regents, 993 F.2d 768, 770 (10th Cir. 2017)*.

In *California Retail Liquor Dealers Association v. Midcal Aluminum, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*, the Supreme Court established a two-part test (the "*Midcal* test") to determine whether alleged anticompetitive conduct by a private party under state regulation is immunized under the state-action doctrine. **[*17]** The two requirements under that test are: (1) "the challenged restraint must be one clearly articulated and affirmatively expressed as state policy," and (2) "the policy must be actively supervised by the State itself." *Id. at 105* (internal quotation marks omitted).

i. Whether the challenged restraint is clearly articulated and affirmatively expressed as state policy?

"Whether a state policy is clearly and affirmatively expressed such that immunity extends to private parties is a matter of degree." *Id.* In *Kay Electric Cooperative v. City of Newkirk, Oklahoma*, the Tenth Circuit instructed that, at minimum, a defendant seeking the protection of state-action immunity "bear[s] the burden of showing that its challenged conduct was *at least* a foreseeable (if not explicit) result of state legislation." *647 F.3d 1039, 1043 (10th Cir. 2011)*. The Tenth Circuit has previously framed this foreseeability test by emphasizing that "there must be a clearly articulated and affirmatively expressed state policy to *displace competition*," as opposed to merely a "neutral" expression of state policy. *Allright Colo., Inc. v. Denver, 937 F.2d 1502, 1507 (10th Cir. 1991)* (emphasis added) (internal quotation marks omitted).

In order to meet the first prong of the *Midcal* test, a private party does not have to "point to a specific, **[*18]** detailed legislative authorization" for its challenged conduct; the State need only have made clear its intent to replace competition with a regulatory program in a particular field. *Trigen Okla. City Energy Corp. v. Okla. Gas & Elec. Co., 244 F.3d 1220, 1226 (10th Cir. 2001)* (citing *S. Motor Carriers, 471 U.S. at 64*). The state policy does not have to compel the private party to engage in anticompetitive conduct. "If the state policy expressly permits, but does not compel, anticompetitive conduct, the private party may still qualify for state action immunity." *Id.*

The purpose of the Wyoming Oil and Gas Conservation Act (the "Act") is to "provide a comprehensive regulatory program which prevents the *waste* of Wyoming's oil and gas resources and *protects the correlative rights* of property owners." *Union Pac. Res. Co. v. Texaco, Inc., 882 P.2d 212, 223 (Wyo. 1994)* (emphasis added) (citing *Wyo. Stat. §§ 30-5-102*, 104). As relevant here, the Act authorizes the WOGCC to set forth a process for the permitting of oil and gas wells (*see Wyo. Stat. Ann. § 30-5-115*) and to regulate the drilling, producing, and spacing of oil and gas wells (*see § 30-5-104*). Further, *§ 30-5-109* authorizes the WOGCC to enter voluntary or forced "pooling" orders for the development of a drilling unit that embraces two or more separately owned tracts. Pooling can be voluntary, but when owners do not consent to pool their interests, *Wyoming Statute § 30-5-109* allows the WOGCC to compulsorily pool the **[*19]** non-participating interests. In such a "forced-pooling" situation, non-consenting owners do not receive payment for their interests in production until the operator has recovered 100% of the owner's share of equipment and operating costs, 300% of the costs of drilling and of well-completion, and 200% of the cost incurred on new in-well equipment.[2]

There is nothing in the Act indicating, nor do Defendants argue, that the Act is intended to displace unfettered competition in the market of oil and gas leasing. *City of Columbia v. Omni Outdoor Advert. Inc., 499 U.S. 365, 373, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*. Still, at least one foreseeable result of the Act's forced-pooling provision is that mineral owners such as Plaintiffs would be forced into accepting less than "fair-market" royalty rates by application of the Act itself, in the event an operator offered less than desirable royalty rates. Further, the Wyoming legislature's recent amendment to *§ 30-5-109* requiring "mandatory royalties" in a forced-pooling situation suggests that the legislature intended to regulate the royalty percentages to which even non-consenting owners are entitled in a forced-pooling scenario. Similar to the zoning ordinance that was at issue in *Omni*, one possible reading of the Act's purpose in authorizing the **[*20]** WOGCC to comprehensively regulate the permitting, spacing, and unitization of oil and gas development is the "prevent[ion of] normal acts of competition, particularly on the part of new entrants." *Omni Outdoor Advert., Inc., 499 U.S. at 373*.

At the same time, it is clear that neither the WOGCC nor the Act have explicit provisions authorizing owners and/or operators to enter into leases that have the effect of excluding competition. But the facts that (1) the permits themselves grant Anadarko the exclusive drilling rights for the entire area, and (2) the Act does regulate the

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[2] The State of Wyoming Legislature recently enacted an amendment to *§ 30-5-109*, which becomes effective on July 1, 2020. *See* Drilling Units-Risk Penalties and Mandatory Royalties Act, H.B. 14, Budget Sess. 2020 (Wyo. 2020). Under the amendment, in addition to other modifications to the statute, pooling orders shall "expire twelve (12) months after issuance if the person authorized to drill and operate a well fails to commence operations within twelve (12) months of issuance of the pooling order." *Id.* Further, the amendment includes a provision for the payment of royalty to an unleased, non-consenting owner in a drilling unit during the operator's cost-recovery period. The new royalty payment provision mandates the royalty payment be in the amount of sixteen percent (16%) or "[t]he acreage weighted average royalty interest of the leased tracts within the drilling unit." *Id.*

situation in which Anadarko does not offer to lease Plaintiffs' rights on terms agreeable to them, render Defendants' argument on this prong at least persuasive. Nonetheless, for the reasons stated below, Defendants' leases may give rise to liability because the State of Wyoming does not exercise active supervision over the terms of oil and gas leases.

ii. Whether the policy is actively supervised by the State itself?

The second prong of the *Midcal* test, the "active supervision" requirement, "is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further **[*21]** state regulatory policies." *Patrick v. Burget, 486 U.S. 94, 100-01, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988)* (internal citation omitted). The active supervision requirement "mandates that the State exercise ultimate control over the challenged anticompetitive conduct." *Id. at 101*. It requires

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

Id. In the context of private parties alleged to be involved in a price-fixing scheme, as Plaintiffs have alleged here, "actual state involvement, not deference to private pricefixing arrangements under the general auspices of state law, is the precondition for immunity from federal law. Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint." *F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 633, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)*.

Defendants argue that the conduct of permitted operators is actively supervised by the WOGCC pursuant to its statutory powers, "both in relation to the permit application process and after any permits are issued." (Doc. **[*22]** 11, at 17-18). In response, Plaintiffs state that even though the WOGCC has this authority and, on expiration of Anadarko's two-year drilling period, other operators could have filed their own permit applications ("APDs"), those operators were dissuaded from doing so given that Anadarko's complex of leases at non-competitive royalty rates would render exploration, development, and production of the even sections unprofitable, since those sections would necessarily need to be pooled with Defendants' sections to prevent waste and to protect all owners' correlative rights.

There is no provision in the Act granting WOGCC specific authority to actively supervise the terms of oil and gas leases. However, the Act gives the WOGCC authority to "make rules, regulations, and orders, and shall take other appropriate action, to effectuate the purposes and intent" of the Act. *Wyo. Stat. Ann. § 30-5-104*. The Wyoming Supreme Court has interpreted the WOGCC's authority to include "continuing authority to modify its previous orders" for the *prevention of waste and protection of correlative rights.* *Union Pac. Res. Co., 882 P.2d at 225* (emphasis added). Moreover, the WOGCC requires permit holders to file a new application to drill "after the expiration of a period **[*23]** of two (2) years from the date of issuance" if drilling is not commenced by that time. WOGCC Rules, Ch. 3, § 8(h).

At the very least, the WOGCC appears to have ultimate control over whether Anadarko's permits are re-issued, and Anadarko would be entitled to immunity on that basis. However, Plaintiffs urge the Court to find that the active-supervision requirement is not met for Anadarko's leasing practices which, according to Plaintiffs, is a "manipulation of their royalty rate in the checkerboard" that guarantees other operators will not seek to file competing APDs on the two-year expiration of Anadarko's leases. (Doc. 25 at 3). According to Plaintiffs, "the non-competitive royalty rate essentially guaranteed that competitors would be unable to economically lease the plaintiffs, pool the defendants, and profitably lease wells." (*Id.*).

Viewing the Complaint in the light most favorable to Plaintiffs, Plaintiffs plausibly allege that Anadarko's leasing practices have precluded competitors from applying for permits to drill in the even sections owned by Plaintiffs, even when Anadarko's permits have expired under the two-year period. Neither the WOGCC, nor any other state regulatory body, **[*24]** are charged with "actively supervising" leasing practices among mineral owners and their lessees (much less for the specific purpose of policing anticompetitive processes). It is clear that leases are private contracts, *see* *State v. Moncrief, 720 P.2d 470, 473 (Wyo. 1986)*, over which the WOGCC does not exercise ongoing supervision once it issues any related permits for drilling under any such leases. Indeed, the purpose of the state-action doctrine is to protect the sovereignty of "actual state involvement," not to protect "private pricefixing arrangements under the general auspices of state law." *See* *Ticor Title Ins. Co., 504 U.S. at 633*. Finding that Plaintiffs have plausibly alleged the latter type of "state-action," Defendants' invocation of immunity fails on this prong in relation to their execution of intracompany leases.

B. Immunity from Suit under the *Noerr-Pennington* Doctrine

Defendants further submit the *Noerr—Pennington* doctrine also immunizes them from Plaintiffs' antitrust claims brought under both the *Sherman Act* and Wyoming state law. According to Defendants, Plaintiffs' claims are untenable because the *Noerr-Pennington* doctrine prevents Plaintiffs from attacking Anadarko for its acquisition of the permits. Defendants' theory appears to be that Plaintiffs bring this **[*25]** action in a veiled attempt to influence the WOGCC's permitting process and its decision to issue the specific permits at issue.

As stated above, the Court agrees with Defendants that Anadarko's acquisition of permits through the WOGCC is not a proper basis of liability. Nonetheless, a brief review of the *Noerr-Pennington* doctrine is warranted to determine whether it bears applicability here. "The *Noerr—Pennington* doctrine is based upon the protections of the *First Amendment* and exempts from antitrust liability any legitimate use of the political process by private individuals, even if their intent is to eliminate competition." *Zimomra, 111 F.3d at 1503* (citing *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; *E. R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*). "Immunity under the *Noerr—Pennington* doctrine is designed to protect the right to petition and engage in political activity." *Oberndorf v. City & County of Denver, 900 F.2d 1434, 1440 (10th Cir. 1990)*, *abrogated on other grounds,* *Omni Outdoor Advert., Inc., 499 U.S. at 382*. "[T]he right to petition extends to all departments of the Government . . . [including] to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government." *California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*.

Defendants assert the *Noerr-Pennington* doctrine shields them from Plaintiffs' Sherman Act claims because, according to Defendants, the crux of Plaintiffs' claims is that Anadarko **[*26]** gained its alleged monopoly by applying for and obtaining drilling permits from the WOGCC. As stated above, the Court has determined that Defendants' argument fails to embrace a critical component of Plaintiffs' argument, namely, that Defendants are liable as private parties for anticompetitive leasing practices conducted without state supervision. This line of Plaintiffs' Complaint cannot be construed as an "effort to influence Executive Branch or administrative rulings" because Plaintiffs do not challenge the permits themselves. (*See* Doc. 30 at 8 (citing AREEDA & HOVENKAMP, ***ANTITRUST LAW***: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 202a (2019)). Rather, a plausible reading of the Complaint is that Plaintiffs challenge Defendants' intracompany leases as entirely divorced from WOGCC's conferral of the permit complex on Anadarko. Therefore, the Court is not persuaded that *Noerr-Pennington* shields Defendants from Plaintiffs' Sherman Act or Wyoming state law claims.

C. Whether Plaintiffs have Plausibly Alleged the Elements of a Sherman Act *§ 2* Claim

Finding that Plaintiffs' claims arising from the intracompany leases are not barred by either the *Parker* or the *Noerr-Pennington* doctrines, **[*27]** the Court turns next to Defendants' argument for dismissal of Plaintiffs' Sherman Act claims under *Federal Rule of Civil Procedure Rule 12(b)(6)*. Defendants assert that the claim must be dismissed for failure to adequately plead a relevant geographic market; failure to adequately plead that Anadarko engaged in anti-competitive conduct; and failure to adequately plead that Plaintiffs suffered an antitrust injury.

1. Relevant Geographic Market

Plaintiffs' Complaint sets forth two proposed relevant geographic markets, the first based on "exploration and production of oil and gas," and the second based on "the leasing and sale of oil and gas rights" of mineral acre lands in the Niobrara and Codell formations in portions of Laramie County, Wyoming, generally east of Cheyenne. Defendants state this description is deficient for lack of specificity and because it does not fall within the definition of a relevant market for antitrust purposes. Defendants further contend this is not an adequate geographic market for purposes of an antitrust claim, as "buyers" of oil and gas production rights can easily seek "competitive substitutes for exploration and production" in areas adjacent to east Laramie County.

a. Applicable Law

To state an antitrust **[*28]** claim, Plaintiffs must identify a relevant market in terms of both product and geographic area. *Campfield, 532 F.3d at 1118*. The product market consists of products "found to be sufficiently substitutable," and the geographic market encompasses "the terrain in which competition takes place." *Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1071 (10th Cir. 2013)*. If the market described in the Complaint fails to include "reasonably good substitutes," the plaintiff has not carried his burden to allege a relevant market. *Campfield, 532 F.3d at 1118*. To be legally sufficient, the alleged geographic market must be "the narrowest market which is wide enough so that products from adjacent areas cannot compete on substantial parity with those included in the market." *Lantec, Inc. v. Novell, Inc., 306 F.3d 1003, 1026-27 (10th Cir. 2002)* (internal quotation omitted). Defendants' motion appears to address only whether Plaintiffs have failed to plead a relevant geographic market; thus, the Court will not address whether Plaintiffs have adequately pled a relevant product market except to the extent it is relevant to their alleged geographic market.

Market definition is a fact-intensive inquiry. Historically, courts have hesitated to grant motions to dismiss for failure to plead a relevant market. *See* *Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design, 244 F.3d 521, 531 (6th Cir. 2001)* ("Market definition is a highly fact-based analysis that generally requires discovery.") **[*29]** (citing *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*); *Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 560 (8th Cir. 1998)* (noting that "courts are hesitant to dismiss antitrust actions before the parties have had an opportunity for discovery"); *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)* (explaining that "in most cases, proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers") (citing *Eastman Kodak, 504 U.S. at 482*); *see also* *Bansavich v. McLane Co., Inc., No. 3:07cv702 (WWE), 2008 U.S. Dist. LEXIS 89071, 2008 WL 4821320, *3 (D. Conn. Oct. 31, 2008)* (unreported) ("An antitrust plaintiff fails to state a claim only where a proposed market definition is patently implausible on the basis of the four corners of the complaint."). Nonetheless, there is no absolute rule against the dismissal of antitrust claims for failure to allege a relevant market. *Queen City, 124 F.3d at 436*.

Defendants' first argument is that Plaintiffs' alleged geographic market is underinclusive because it fails to explain why "areas adjacent to 'Laramie County east of Cheyenne' are not competitive substitutes for exploration and production within it." (Doc. 11 at 25). Defendants further state "Plaintiffs must, but do not, describe the specific bounds of their alleged market." (*Id.*).

First, the Court notes that the relevant geographic market to an antitrust claim is "not ordinarily susceptible to a metes and bounds" definition encouraged by Defendants. *Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111, 1118 (10th Cir. 2008)* (citing *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 331-32, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*). This is especially **[*30]** true at the pleadings stage, when Plaintiffs' burden is solely to allege a plausible geographic market. Second, and more importantly, this track of Defendants' argument mischaracterizes

Plaintiffs' alleged product market.[3] As the Court has discussed above, Plaintiffs' described market consists of exploration and production of oil and gas, *and* leases for the exploration and production of oil and gas. While it is true that oil and gas operators could conduct exploration and production in areas outside of this particular segment of east Laramie County, Plaintiffs also argue their claims in the context of a geographic market for oil and gas leases in which Plaintiffs and Defendants are competing suppliers. If true, Plaintiffs contend these facts give rise to a monopsony.

Monopsonistic practices by buyers are among the practices prohibited by the *Sherman Act*. *Telecor Commc'ns, Inc., 305 F.3d at 1134* (citing *Mandeville Island Farms v. Am.Crystal Sugar Co., 334 U.S. 219, 235-36, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)*). "A monopsony is different from the usual form **[*31]** of monopolistic control in which suppliers utilize market power to restrict output and thereby raise prices." *Campfield, 532 F.3d at 1118*. The prevailing distinction between a monopoly and a monopsony is the concentration of anticompetitive market power in sellers, versus buyers. "In a monopsony, the buyers have market power to decrease market demand for a product and thereby lower prices." *Id.* (citing HERBERT HOVENKAMP, ANTITRUST 3 (3d ed. 1999)).

At this stage, Plaintiffs have alleged specific facts to support their definition of a relevant geographic market "in a in a way that is plausible and bears a rational relation to the methodology courts prescribe to define a market for antitrust purposes." *See* *Todd v. Exxon Corp., 275 F.3d 191, 203 (2d Cir. 2001)* (holding that market underinclusivity is a "fact-specific question" that "cannot be resolved on the pleadings."). Plaintiffs have alleged they are suppliers of mineral leasing, exploration, and production opportunities in portions of the Codell and Niobrara formations. Defendants are the sole lessees or "buyers" of mineral interests in the area where Plaintiffs own rights. Taking the facts as pled, Defendants have exercised their market power with the result that Anadarko is the only feasible lessee of Plaintiffs' **[*32]** oil and gas interests.[4] Competing operators—even if permitted—could not operate profitably in the area. Plaintiffs have also alleged that Defendants' market power would permit Defendants to manipulate the royalty terms of new leases. While certain parameters of Plaintiffs' alleged market remain unclear, instances of dismissal at the pleading stage for failure to define a relevant geographic market are rare and the Court

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[3] Although Defendants do not appear to challenge Plaintiffs' proposed product market, Defendants draw the Court's attention to *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1314 (10th Cir. 2017)*. In *Buccaneer Energy*, the Tenth Circuit considered whether a plaintiff's mere designation of "production rights" as the relevant product was a deficient description of the product market. In finding that the Plaintiff had failed to meet its burden on summary judgment, the Court stated:

> By arguing only that the district court's definition is wrong, but never offering a definition it considers to be right, Buccaneer left that question open and, as a result, impermissibly shirked its "obligat[ion] to make an affirmative showing of [its] proposed relevant market."

Id. at 1314 (quoting *Telecor Commc'ns, Inc. v. Southwestern Bell Tel. Co., 305 F.3d 1124, 1134 (10th Cir. 2002)*, *305 F.3d 1124, 1131 (10th Cir. 2002)*). The Court acknowledges the value of *Buccaneer* in its holding that "production rights" is a legally deficient description of a relevant product. However, the question presently before the Court relates to the relevant *geographic* market, not the relevant product market. Further, at this stage of these proceedings, Plaintiffs' burden is only to allege a plausible relevant geographic market, not to make an affirmative showing.

[4] On this point, *Campfield* does not warrant a contrary conclusion. In *Campfield*, the Tenth Circuit held that a plaintiff's alleged market of "the State Farm insured repairable windshield repair market, in the geographic area of the United States of America" was deficient. *Campfield, 532 F.3d at 1119* (citing *Jayco Sys., Inc. v. Savin Bus. Mach. Corp., 777 F.2d 306, 319 n. 43 (5th Cir. 1985)* ("[O]ne purchaser in a market of competing purchasers cannot constitute a relevant geographic market, absent exceptional market conditions")). This case is readily distinguishable from the facts of *Campfield*. The *Campfield* plaintiff owned an automobile glass repair shop and brought antitrust allegations against an auto-insurance agency that refused to endorse the plaintiff's patented windshield repair technique, which refusal limited the plaintiff's access to the defendant's market of insured customers. Unlike the *Campfield* plaintiff, Plaintiffs in this case have not limited their alleged market to Anadarko as its sole lessee, but rather allege that they are not able to market their mineral interests to *any* operator given the anticompetitive effects of Anadarko's lease complexes.

cannot find that Plaintiffs' Complaint is subject to any glaring deficiencies for which courts have found such dismissal appropriate.[5]

b. Anticompetitive Conduct

Defendants next argue Plaintiffs' Complaint is subject to dismissal for failure to allege anticompetitive conduct by Defendants. Defendants state, "Plaintiffs cannot plausibly explain how Anadarko's obtaining permits is anticompetitive, even setting aside the immunities that attach to this conduct" and "Plaintiffs allege no facts indicating that Anadarko engaged in any anticompetitive or predatory conduct to prevent other operators from seeking the permits at issue." (Doc. 11 at 26). Further, Defendants assert that Anadarko's decisions not to drill in the relevant area or seek **[*33]** leases from Plaintiffs are not anticompetitive, as "businesses are free to choose the parties with whom they will deal as well as the prices, terms, and conditions of that dealing." (Doc. 11 at 27 (quoting *Pac. Bell Tel. Co. v. Linkline Comm'ns, Inc., 555 U.S. 438, 448 (2009)*). Plaintiffs respond that they have effectively alleged anticompetitive conduct in the form of Anadarko's intracompany leases. (Doc. 25 at 20).

Anticompetitive conduct is an essential element of a claim under the *Sherman Act*. "Even if a firm has monopoly *power* in a relevant market, a plaintiff must also show 'the *willful acquisition or maintenance of that power* as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Christy Sports, LLC v. Deer Valley Resort Co., 555 F.3d 1188, 1194 (10th Cir. 2009)* (quoting *Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)* (emphasis added)). But while the *Sherman Act* clearly prohibits certain anticompetitive conduct, the Supreme Court and Tenth Circuit have both emphasized that even a "putative monopolist, has 'no antitrust duty to deal with its rivals at all.'" *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1221 (10th Cir. 2009)* (quoting *Pac. Bell Tel. Co., 555 U.S. at 444*).

The thrust of Defendants' argument on this element relies upon their apparent assumption that Anadarko's acquisition of drilling permits is the sole basis of anticompetitive conduct that Plaintiffs allege. Were this Plaintiffs' only argument for a finding of anticompetitive **[*34]** conduct, Defendants would enjoy immunity, as the Court has already elaborated at length.

As the Court has further indicated, the crux of Plaintiffs' remaining argument is that Anadarko's intracompany leases have fortified the market against new entrants and necessarily reduced the value Plaintiffs would expect to receive from the development of their mineral interests. While the law certainly does not inhibit Defendants' freedom to "choose the parties with whom they will deal as well as the prices, terms, and conditions of that dealing," Plaintiffs have alleged anticompetitive conduct by Anadarko beyond a "refusal-to-deal." *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 410, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*). Rather, Plaintiffs' allegations indicate that Anadarko executed its intracompany leases for the express purpose of "making it difficult for other competitors to coexist." (Doc. 25 at 20 (citing SULLIVAN & HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 274 (7th Ed., 2019))). At this stage in the proceedings, and accepting as true Plaintiffs' factual allegations, the Court finds Plaintiffs have met their burden on this element.

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[5] *See Allen v. Dairy Farmers of Am., Inc., 748 F. Supp. 2d 323, 338-39 (D. Vt. 2010)* (collecting cases) ("dismissals at the pre-discovery, pleading stage . . . are generally limited to instances in which the complaint either: (1) fails to allege a geographic market or the boundaries of a relevant geographic market, *see, e.g., Sun Microsystems, Inc. v. Versata Enters., Inc., 630 F. Supp. 2d 395, 403 (D. Del. 2009)*; (2) defines a geographic market in an unreasonably and implausibly narrow manner, *see, e.g., Smugglers Notch Homeowners' Ass'n, Inc. v. Smugglers' Notch Mgmt. Co., Ltd., 2009 U.S. Dist. LEXIS 46026, 2009 WL 1545829, *3 (D. Vt. May 29, 2009)* (granting motion to dismiss where, among other things, plaintiffs' proposed geographic market was a single village); or (3) alleges a "contradictory" and "vague delineation of the relevant geographic market." *Mathias v. Daily News, L.P., 152 F. Supp. 2d 465, 483 (S.D.N.Y. 2001)*") (internal quotations omitted)). *See also Bansavich, 2008 U.S. Dist. LEXIS 89071, 2008 WL 4821320, *3* ("An antitrust plaintiff fails to state a claim only where a proposed market definition is patently implausible on the basis of the four corners of the complaint.").

c. Antitrust Injury

Defendants further argue that Plaintiffs have not alleged antitrust injury, as Plaintiffs' **[*35]** alleged losses "stem from the purported exclusion of non-permitted operators from the alleged relevant market" and therefore the alleged injuries "can be due only to the permits themselves, as Plaintiffs identify no other conduct by which rival operators could plausibly have been excluded." (Doc. 11 at 29).

To establish an antitrust injury, a plaintiff "must allege a business or property injury, an antitrust injury, as defined by the *Sherman Act*." *Tal v. Hogan, 453 F.3d 1244, 1257-58 (10th Cir. 2006)*. "[O]nly buyers and sellers in the defendants' market are within the target of the antitrust laws." *Id.* (quoting *Comet Mech. Contractors, Inc. v. E.A. Cowen Constr., Inc., 609 F.2d 404, 406 (10th Cir. 1980)*). Secondary or remote injuries, "such as those suffered by companies that desire to obtain a subcontract from a company injured by an antitrust violation" are not cognizable antitrust injuries. *Id.* The mere fact that a plaintiff "could potentially benefit as a result of a derivative future business relationship" with a competitor seller or buyer in the same market or "through incidental and speculative increases in property value" does not establish an antitrust injury. *Id.*

Unlike the *Tal* plaintiff, Plaintiffs in this case have alleged an injury to their own pecuniary and property interests. Plaintiffs assert they are suppliers in their alleged **[*36]** market. Plaintiffs have further alleged their injuries are not merely speculative, but that Plaintiffs have already been injured. The Court finds that Plaintiffs have plausibly pled facts, which taken as true, are sufficient to demonstrate a redressable antitrust injury.

II. Whether Plaintiffs Lack Article III Standing to Assert their Claims for Injunctive Relief

In bringing this suit, Plaintiffs seek money damages as well as an order enjoining Anadarko's leases. Defendants assert that Plaintiffs do not possess standing to seek the requested injunctive relief. "Standing under Article III is, of course, a threshold issue in every case before a federal court." *Coll v. First Am. Title Ins. Co., 642 F.3d 876, 892 (10th Cir. 2011)* (citing *Hutchinson v. Pfeil, 211 F.3d 515, 523 (10th Cir. 2000)* (internal quotation, alteration, emphasis omitted)). To establish constitutional standing under Article III, Plaintiffs "must demonstrate three elements: injury in fact, traceability, and redressability." *S. Utah Wilderness All. v. Off. of Surface Mining Reclamation & Enforcement, 620 F.3d 1227, 1233 (10th Cir. 2010)*. Plaintiffs "must have standing to seek each form of relief in each claim." *Bronson v. Swensen, 500 F.3d 1099, 1106 (10th Cir. 2007)*. "At bottom, the gist of the question of standing is whether [Plaintiffs] have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." **[*37]** *Mass. v. E.P.A., 549 U.S. 497, 517, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007)* (citation and internal quotation marks omitted).

Here, Defendants' only argument on standing is that Plaintiffs' claims lack redressability. "[T]he requirement of redressability ensures that the injury can likely be ameliorated by a favorable decision." *S. Utah Wilderness Alliance, 620 F.3d at 1233*. "The plaintiff must show that a favorable judgment will relieve a discrete injury, although it need not relieve his or her every injury." *Nova Health Sys. v. Gandy, 416 F.3d 1149, 1158 (10th Cir. 2005)*.

According to Defendants:

> [I]t is clear that enjoining Anadarko's intercompany leases would not likely affect Plaintiffs' property values [because (1)] Anadarko has an incentive to get the best rate it can to keep its drilling costs down, irrespective of the rates in its intercompany leases [and (2)] the alleged leverage from the threat of forced-pooling exists by virtue of the statute; even if the leases were enjoined, Plaintiffs would . . . be compelled to acquiesce to unreasonable royalty terms to avoid remuneration under forced pooling.

(Doc. 11, at 31). In essence, Defendants argue that even if the Court enjoined the leases in question, Plaintiffs would be forced to accept excessively low remuneration under operation of Wyoming's forced pooling statute.

Plaintiffs respond that the injuries they **[*38]** allege are in fact redressable because "[e]njoining the enforcement and transfer of the collusive leases will remove this impediment to oil and gas development by plaintiffs and by defendants' drilling competitors in the relevant market." (Doc. 25, at 24). Plaintiffs state that Defendants "have the power to refrain from enforcing or conveying the supra-competitive royalty rights," and thus that an injunction on the leases would redress the harms to Plaintiffs.

At this stage of the proceedings, the Court finds that Plaintiffs have sufficiently alleged redressability in satisfaction of Article III's standing requirements. Plaintiffs have alleged that, were Anadarko's allegedly "supra-competitive" leases to be enjoined, Plaintiffs would have opportunity to lease their mineral rights at fair-market value because other operators would not be precluded from entry into the market. If Plaintiffs succeed on their claim that Anadarko's royalty rates are anti-competitive in violation of the *Sherman Act*, Plaintiffs would likely benefit from an injunction on the leases. The possibility that Plaintiffs would still be forced "to acquiesce to unreasonable royalty terms to avoid remuneration under forced pooling" **[*39]** does not negate that a "favorable judgment" would relieve Plaintiffs of their alleged "discrete injury" under the leases. Therefore, the Court will allow Plaintiffs' claim for injunctive relief to proceed. *See Nova Health Sys., 416 F.3d at 1158*.

III. State-Law Claims

Finding that Plaintiffs' *Sherman Act § 2* claims survive the Motion to Dismiss, the Court must finally determine whether Plaintiffs' state-law claims may also proceed. Plaintiffs have asserted that the alleged conduct by Defendants creates a basis for liability not only under the *Sherman Act*, but also under provisions of Wyoming's Constitution and state law (Wyo. Const. art. I, § 30, art. X, § 8; *Wyo. Stat. Ann. § 40-4-101(a)(1)*). Defendants claim these laws erect no prohibitions against monopolies obtained by operators through their acquisition of permits to drill and that Plaintiffs' state-law claims must therefore be dismissed.

The Wyoming Constitution deems "perpetuities and monopolies . . . contrary to the genius of a free state." *Wyo. Const. art. I, § 30*. The Wyoming Constitution further commands against the "consolidation or combination of corporations of any kind whatever to prevent competition, to control or influence productions or prices thereof, or in any other manner to interfere with the public good and general welfare." *Id.* at art. X, § 8. To this end, *Wyoming Statute § 30-4-101(a)(1)* forbids firms and **[*40]** corporations from "[m]ak[ing], enter[ing] into, form [ing]or becom[ing] a party to any plan, contract, agreement, consolidation, merger or combination of any kind whatsoever to prevent competition or to control or influence production or prices thereof."

Defendants argue that there is "no precedent to construe this clause as prohibiting permits that were issued by the State and remain subject to its active control and supervision." (Doc. 11). This argument must fail for the same reasons described above, that Plaintiffs have pled liability arises on Defendants' intracompany leases. As previously discussed, the WOGCC does not actively supervise the leasing process and the leases at issue are wholly separate from the permitting process. Therefore, Defendants' argument for dismissal of Plaintiffs' state-law claims must fail for substantially the same reasons as their arguments for dismissal of Plaintiffs' *Sherman Act § 2* claims.

CONCLUSION

For all the reasons stated herein, the Court concludes that Defendants have not stated a basis for dismissal of Plaintiffs' Complaint. At this stage in the proceedings, Plaintiffs have stated a plausible claim for relief.

Accordingly, the Court HEREBY ORDERS that the Motion **[*41]** to Dismiss (Doc. 10) is DENIED.

Dated this 28 day of May, 2020.

/s/ Nancy D. Freudenthal

NANCY D. FREUDENTHAL

UNITED STATES DISTRICT JUDGE

ICTSI Or., Inc. v. Int'l Longshore & Warehouse Union

United States District Court for the District of Oregon

May 28, 2020, Decided; May 28, 2020, Filed

Case No. 3:12-cv-1058-SI

Reporter

2020 U.S. Dist. LEXIS 93371 *; 2020 WL 2768683

ICTSI OREGON, INC., Plaintiff, v. INTERNATIONAL LONGSHORE AND WAREHOUSE UNION; and INTERNATIONAL LONGSHORE AND WAREHOUSE UNION Local 8, Defendants.

Subsequent History: Appeal dismissed by *ICTSI Or., Inc. v. Int'l Longshore & Warehouse Union, 2022 U.S. App. LEXIS 1279 (9th Cir. Or., Jan. 18, 2022)*

Prior History: *ICTSI Or., Inc. v. Int'l Longshore & Warehouse Union Local 8, 442 F. Supp. 3d 1329, 2020 U.S. Dist. LEXIS 38457, 2020 WL 1062881 (D. Or., Mar. 5, 2020)*

Core Terms

damages, Post-Trial, new trial, interlocutory appeal, apportionment, motions, district court, certification, principles, cases, remittitur, question of law, reconsideration, controlling question, tort principles, challenges, antitrust, argues, burden of proof, causation, materially affect, matter of law, second trial, interlocutory review, pretrial ruling, anti trust law, termination, factors, prevail, reconsideration motion

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > ... > Grounds for Relief from Final Judgment, Order or Proceeding > Excusable Mistakes & Neglect > Inadvertence

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Fraud, Misconduct & Misrepresentation

Civil Procedure > ... > Grounds for Relief from Final Judgment, Order or Proceeding > Excusable Mistakes & Neglect > Mistake

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Newly Discovered Evidence

HN1[] **Relief From Judgments, Altering & Amending Judgments**

Fed. R. Civ. P. 60(b) governs reconsideration of a final judgment, order, or proceeding of a district court. That rule allows a district court to relieve a party from a final judgment, order, or proceeding for the following reasons: (1)

mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied or (6) any other reason that justifies relief. *Fed. R. Civ. P. 60(b)*. A motion under *Rule 60(b)* must be made within a reasonable time but no more than a year after the entry of the judgment or order or the date of the proceeding. *Fed. R. Civ. P. 60(c)*. The party making a motion under *Rule 60(b)* bears the burden of proof. Reconsideration is an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources. Reconsideration is appropriate only in very limited circumstances. Motions for reconsideration are not the proper vehicles for rehashing old arguments and are not intended to give an unhappy litigant one additional chance to sway the judge. A motion for reconsideration also may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Extraordinary Circumstances

HN2[] **Grounds for Relief from Final Judgment, Order or Proceeding, Extraordinary Circumstances**

A movant seeking relief under *Fed. R. Civ. P. 60(b)(6)* must show extraordinary circumstances. This rule is used sparingly as an equitable remedy to prevent manifest injustice.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN3[] **Relief From Judgments, Altering & Amending Judgments**

It is inappropriate to raise an argument for the first time in a motion for reconsideration, absent good cause.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

HN4[] **Relief From Judgments, Altering & Amending Judgments**

In the absence of new evidence or a change in the law, a party may not use a motion for reconsideration to raise arguments or present new evidence for the first time when it could reasonably have been raised earlier in the litigation.

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN5[] **Appellate Jurisdiction, Certified Questions**

A district court may certify an order for interlocutory appeal when the district court finds that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. *28 U.S.C.S. § 1292(b)*. A court may find a question of law controlling if its resolution could materially affect the outcome of litigation in the district court. A court may find substantial ground for difference of opinion when reasonable jurists might disagree about the resolution to the question of law at issue.

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

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

HN6[] **Appellate Jurisdiction, Certified Questions**

The first statutory requirement for certification for interlocutory appeal is that the requested issue or issues for appeal be a controlling question of law.

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

HN7[] **Standards of Review, Questions of Fact & Law**

Under *28 U.S.C.S. § 1292(b)*, a question of law is generally one that is pure or abstract and does not require a review of the record.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

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

HN8[] **Appellate Jurisdiction, Interlocutory Orders**

When the court of appeals is not asked to overturn any findings of fact, but instead to determine the legal significance of a set of facts by deciding whether a complaint met the pleading standard set forth in Bell Atlantic Corp. v. Twombly, such a determination might be appropriate for interlocutory appeal.

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

HN9[] **Standards of Review, Questions of Fact & Law**

Application of a legal standard is a controlling question of law, although routine applications of well-settled legal standards to facts are not.

Civil Procedure > ... > Discovery > Privileged Communications > Attorney-Client Privilege

Evidence > Privileges > Attorney-Client Privilege > Waiver

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

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

HN10[] **Privileged Communications, Attorney-Client Privilege**

Whether a holder has waived the right to claim the attorney-client privilege is a mixed question of law and fact which the court reviews de novo.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

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

HN11[] **Appellate Jurisdiction, Interlocutory Orders**

In the liability phase of a multidistrict, multiparty litigation case, or what the court described as the issue of liability in such unusual cases, interlocutory appeal of mixed questions of law relating to the Court's interpretation of Mead v. Retail Clerks International Association is a pure question of law.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN12[] **Appellate Jurisdiction, Interlocutory Orders**

An appellate court's interlocutory jurisdiction under *28 U.S.C.S. § 1292(b)* permits it to address any issue fairly included within the certified order because it is the order that is appealable, and not the controlling question identified by the district court. The scope of interlocutory review includes all issues material to the order in question. A court of appeals may not, however, reach beyond the certified order to address other orders made in the case.

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

HN13[] **Standards of Review, Questions of Fact & Law**

Decisions holding that the application of a legal standard is a controlling question of law within the meaning of *28 U.S.C.S. § 1292(b)* are numerous.

Constitutional Law > ... > Freedom of Speech > Commercial Speech > Boycotts & Picketing

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN14[] **Commercial Speech, Boycotts & Picketing**

The rules of causation imported into the statutory scheme through the by reason of language of section 303, *29 U.S.C.S. § 187*, afford a means of dealing with at least the extremes of the problem. The requirement that the unlawful objective must have materially contributed to the loss or have been a substantial factor in bringing it about, will prevent windfall recoveries by employers negligibly affected by a violation, and protect the union's right to strike for primary objectives where such objectives, standing alone, would have caused the strike, but the unlawful objective, standing alone, would not. On the other hand, a relatively relaxed standard of proof, allowing recovery on evidence supporting a just and reasonable inference, more likely true than not, that the employer was damaged because of picketing or other union pressure will assure recovery in most cases in which the unlawful motivation was a significant factor producing the union pressure.

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN15[] **Collective Bargaining & Labor Relations, Strikes & Work Stoppages**

Mead v. Retail Clerks International Association does not require that the illegal object be the sole cause of the strike, only that it be a substantial cause or that it materially contribute to the injury, notwithstanding other factors contributed also.

Torts > Procedural Matters > Conflict of Law > Place of Injury

HN16[] **Conflict of Law, Place of Injury**

The controlling rules derive from tort law principles where more than one factor can be a substantial cause, and no single factor need be the sole causative element.

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

HN17[] **Private Actions, Remedies**

Cases under ***antitrust law***, however, may require more specific apportionment of damages by the plaintiff.

Evidence > Burdens of Proof > Allocation

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN18[] **Burdens of Proof, Allocation**

Under tort law principles, however, the burden of apportionment is placed on the party arguing for divisibility. Under the Restatement (Third) of Torts, § 26, a jury determines divisibility and apportionment unless the issue is without dispute or a court determines that no reasonable jury could find the damages to be divisible. The party arguing for divisibility and apportionment has the burden of proof on both divisibility and the magnitude of each divisible part. Whether damages are divisible is a question of fact. A party alleging that damages are divisible has the burden to prove that they are divisible. The magnitude of each divisible part is also a question of fact.

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

Evidence > Burdens of Proof > Allocation

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN19[] **Private Actions, Remedies**

There is conflict between antitrust principles and tort principles relating to divisibility and apportionment, particularly on the burden of proof. Mead v. Retail Clerks International Association cites and incorporates both ***antitrust law*** and tort law.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN20[] **Appellate Jurisdiction, Final Judgment Rule**

Resolution of a question materially advances the termination of litigation if it facilitates disposition of the action by getting a final decision on a controlling legal issue sooner, rather than later in order to save the courts and the litigants unnecessary trouble and expense.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Civil Procedure > ... > Stays of Judgments > Appellate Stays > Nonmoney Judgments

HN21[] **Judges, Discretionary Powers**

A district court may stay a case pending interlocutory appeal. *28 U.S.C.S. § 1292(b)*. Filing an interlocutory appeal does not automatically stay proceedings in the district court, but a district court may grant a stay to promote economy of time and effort for itself, for counsel, and for litigants. A stay is not a matter of right, however, even if irreparable injury might otherwise result. Instead, it is an exercise of judicial discretion. In deciding whether to order a stay pending interlocutory appeals, courts traditionally balance four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. The first two factors are the most critical.

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > Appellate Stays

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

HN22[] **Stays of Judgments, Appellate Stays**

There are many ways to articulate the minimum quantum of likely success necessary to justify a stay—be it a reasonable probability; fair prospect; a substantial case on the merits; or that serious legal questions are raised.

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For International Longshore and Warehouse Union and International Longshore and Warehouse Union Local 8, Defendants: Susan J. Harriman, Dan Jackson, and Brook Dooley, KEKER, VAN NEST & PETERS LLP, San Francisco, CA; Robert A. Shlachter, Timothy S. DeJong, and Lydia Anderson-Dana, STOLL BERNE PC, Portland, OR.

Judges: Michael H. Simon, United States District Judge.

Opinion by: Michael H. Simon

Opinion

OPINION AND ORDER

Michael H. Simon, District Judge.

After a ten-day trial, the jury returned a verdict in the amount of $93,635,000 in favor of Plaintiff ICTSI Oregon, Inc. ("ICTSI") and against Defendants International Longshore and Warehouse Union ("ILWU National") and International Longshore and Warehouse Union Local 8 ("Local 8") (collectively, "ILWU"). The jury found that ILWU had engaged in illegal secondary boycott activities, in violation of *§ 303 of the Labor-Management Relations Act*, *29 U.S.C. § 187*. The Court received the jury's verdict and discharged the jury but deferred entering judgment. **[*2]**

ILWU filed post-trial motions under *Rules 50(b)* and *59(a) of the Federal Rules of Civil Procedure*. The Court denied ILWU's renewed motion for judgment as a matter of law under *Rule 50(b)*. The Court also denied ILWU's motion for new trial under *Rule 59(a)* based on the jury's findings related to liability and causation. Further, the Court conditionally denied ILWU's motion for new trial on damages if ICTSI would agree to accept reduced damages in the amount of $19,061,248 but also conditionally ordered a new trial limited to damages if ICTSI were to reject remittitur. ICTSI rejected remittitur. A second trial, limited to damages, has not yet occurred.

Before the Court is ILWU's motion for: (1) reconsideration of the Court's order for new trial limited to damages; (2) certification for interlocutory appeal under *28 U.S.C. § 1292(b)* of the Court's Opinion and Order resolving ILWU's post-trial motions; and (3) stay pending appeal. The Court has reviewed the written submissions of the parties and all *amici curiae* and heard oral argument on May 27, 2020. For the reasons that follow, the Court denies ILWU's motion for reconsideration, grants ILWU's motion for certification in part, and grants ILWU's motion for stay.

DISCUSSION

A. Motion for Reconsideration

HN1[] *Rule 60(b) of the Federal Rules of Civil Procedure* governs reconsideration of "a **[*3]** final judgment, order, or proceeding" of a district court. That rule allows a district court to relieve a party from a final judgment, order, or proceeding for the following reasons: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . ; (3) fraud . . . by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied . . . or (6) any other reason that justifies relief." *Fed. R. Civ. P. 60(b)*. A motion under *Rule 60(b)* must be made within a reasonable time but "no more than a year after the entry of the judgment or order or the date of the proceeding." *Fed. R. Civ. P. 60(c)*. The party making a motion under *Rule 60(b)* bears the burden of proof. *See Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 383, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992)*. Reconsideration is "an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Carroll v. Nakatani, 342 F.3d 934, 945 (9th Cir. 2003)* (citation and quotation marks omitted); *see also Shalit v. Coppe, 182 F.3d 1124, 1132 (9th Cir. 1999)* (noting that "reconsideration is appropriate only in very limited circumstances"). "[M]otions for reconsideration are not the proper vehicles for rehashing old arguments and are not intended to give an unhappy litigant one additional chance to sway the judge." *Phillips v. C.R. Bard, Inc., 290 F.R.D. 615, 670 (D. Nev. 2013)* (alteration in original) (quoting *Cheffins v. Stewart, 2011 U.S. Dist. LEXIS 34036, 2011 WL 1233378, at *1 (D. Nev. Mar. 29, 2011)*). A motion for reconsideration also "may not be used to raise **[*4]** arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Carroll, 342 F.3d at 945*.

ILWU moves for reconsideration of the Court's order granting a new trial limited to damages. ILWU does not discuss the standards for reconsideration but presumably moves under *subsection (b)(6) of Rule 60*, the "catch-all" provision. ***HN2***[] "A movant seeking relief under *Rule 60(b)(6)* must show 'extraordinary circumstances' . . . ." *Jones v. Ryan, 733 F.3d 825, 833 (9th Cir. 2013)* (quoting *Gonzalez v. Crosby, 545 U.S. 524, 528, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005)*). This rule is "'used sparingly as an equitable remedy to prevent manifest injustice.'" *Lal v.*

California, 610 F.3d 518, 524 (9th Cir. 2010) (quoting United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir. 1993)).

ILWU argues that damages and liability are so intertwined in this case, and generally in cases under 29 U.S.C. § 187, that a court may not hold a trial limited to damages. ILWU argues that reconsideration is necessary to prevent the manifest injustice of separating liability from damages. In support of this argument, ILWU cites Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 51 S. Ct. 513, 75 L. Ed. 1188 (1931), and Hasbrouck v. Texaco, Inc., 663 F.2d 930 (9th Cir. 1981).

In ILWU's 119 pages of briefing on its post-trial motions, however, ILWU never cited either Gasoline Products or Hasbrouck. Further, in its post-trial motions, ILWU moved alternatively for judgment as a matter of law, for new trial (on all issues, including liability), and for *new trial on damages*. ILWU also moved, in the further alternative, for remittitur. **[*5]** ILWU did *not* argue that if the Court were to deny ILWU's motions for judgment as a matter of law and for new trial based on liability but grant ILWU's motion for new trial on damages (or grant ILWU's request for remittitur and ICTSI were to reject remittitur), the Court would need to grant a new trial on *both* liability and damages. Indeed, ILWU argued just the opposite in its post-trial motions. ILWU specifically requested that the Court propose reduced damages of $3,983,669 and "if ICTSI rejects that remittitur, the Court should grant a new trial limited to damages for the time period from May 21, 2012 to August 13, 2013." ECF 653 at 14 and 70.

ILWU now argues that the Court may not grant a new trial limited to damages. ILWU also argues that if the Court were to deny a new trial conditioned upon remittitur and ICTSI were to reject remittitur, the Court would be required to order a new trial on both liability and damages. Yet these positions are inconsistent with ILWU's earlier arguments. In resolving ILWU's post-trial motions, if the Court would have agreed with the argument now being made by ILWU and so fashioned a remittitur order, this would have been important information for ICTSI **[*6]** to consider before deciding whether to accept remittitur. This argument, however, was not made by ILWU until its pending motion for "reconsideration."

Gasoline Products and Hasbrouck, the cases cited by ILWU for its current argument, date from 1931 and 1981, respectively. They are not new law. ILWU's only argument for why it did not cite these decades-old cases in its post-trial motions and did not present the argument it now raises is that it did not need to because the Court had not yet ordered a new trial limited to damages. This argument is rejected.

ILWU should have raised this argument in its post-trial motions. ILWU requested the relief of remittitur and requested, in the alternative, a new trial limited to damages. Yet ILWU did not argue that if the Court were to grant this requested relief, the Court would be required to order a new trial on all issues, including liability. ILWU also specifically requested in its reply brief a new trial limited to damages, without expressing any issue based on Gasoline Products or Hasbrouck. Moreover, during oral argument on the post-trial motions, the Court expressed its concern with the testimony of ICTSI's damages expert, but ILWU did not **[*7]** raise any argument at that time about the need for a full retrial if the Court were to reject the jury's damage award as lacking in evidentiary support. Instead, ILWU again argued for a new trial limited to damages for the period from May 21, 2012 through August 13, 2013. When the Court asked ICTSI's counsel whether a new trial limited to damages could extend to the period including through 2017, depending on how the Court viewed the evidence, counsel for ILWU agreed, stating: "Right." ILWU gave no hint of its current position, either in briefs or at oral argument.

HN3[] It is inappropriate to raise an argument for the first time in a motion for reconsideration, absent good cause. *See* Shalit, 182 F.3d at 1132 (concluding that there was no abuse of discretion by district court in denying motion for reconsideration when movant offered no reason for failure to provide evidence when litigating underlying motion); Rosenfeld v. U.S. Dep't of Justice, 57 F.3d 803, 811 (9th Cir. 1995) ("The district court did not abuse its discretion in declining to consider an argument raised for the first time on reconsideration without a good excuse."). **HN4**[] "In the absence of new evidence or a change in the law, a party may not use a motion for reconsideration to raise arguments or present new evidence for **[*8]** the first time when it could reasonably have been raised earlier in the litigation." Cachil Dehe Band of Wintun Indians of Colusa Indian Cty. v. California, 649 F. Supp. 2d 1063, 1069 (E.D. Cal. 2009) (citing Carroll v. Nakatani, 342 F.3d 934, 945 (9th Cir. 2003)). ILWU has not shown good cause for not raising this argument earlier. Accordingly, ILWU's motion for reconsideration is denied. *Accord In re Galena Biopharma, Inc. Derivative Litig., 2014 U.S. Dist. LEXIS 154652, 2014 WL 5494890, at *2 (D. Or. Oct. 30, 2014)* (denying motion for reconsideration when movant raised new arguments that could have been presented during the substantive briefing of the original motion).[1]

B. Request for Certification for Interlocutory Appeal

HN5[] A district court may certify an order for interlocutory appeal when the district court finds "that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *28 U.S.C. § 1292(b)*. A court may find a question of law "controlling" if its resolution "could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982)*. A court may find substantial ground for difference of opinion when "reasonable jurists might disagree" about the resolution to the question of law at issue. *Reese v. BP Expl. (Alaska) Inc., 643 F.3d 681, 688 (9th Cir. 2011)*.

1. Whether a Controlling Question of Law Must be Purely a Legal Issue

HN6[] The first statutory requirement for certification for interlocutory **[*9]** appeal is that the requested issue or issues for appeal be a controlling question of law. The parties dispute whether the questions for review need to be "pure" legal issues or may be mixed questions of law and fact that would require the Ninth Circuit to review the record on appeal.[2] The Ninth Circuit has not specifically addressed this question outside the context of multidistrict litigation involving unusual issues of liability.[3]

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[1] The Court granted ILWU's motion for new trial "relating to damages." The Court, however, has not yet described the parameters of that trial. Both parties cite *Great Coastal Exp., Inc. v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 511 F.2d 839, 844-48 (4th Cir. 1975)*. Although the second trial in that case was limited to damages, the trial court there also allowed evidence and argument related to causation. Precisely how a second trial limited to damages will be structured here is an issue that the Court reserves for another day.

[2] This district court previously found persuasive the Seventh Circuit's discussion in *Ahrenholz v. Bd. of Trs., 219 F.3d 674, 677 (7th Cir. 2000)*, holding that ***HN7***[] under *§ 1292(b)*, a question of law is generally one that is "pure" or "abstract" and does not require a review of the record. *See, e.g., Columbia Sportswear N. Am., Inc. v. Seirus Innovative Accessories, Inc., 2020 U.S. Dist. LEXIS 12050, 2020 WL 403722, at *3 (D. Or. Jan. 24, 2020)*; *accord Schedler v. FieldTurf USA, Inc., 2018 U.S. Dist. LEXIS 7433, 2018 WL 451555 (D. Or. Jan. 17, 2018)* (explaining that the issue was not a controlling question of law in part because it was not a "pure" legal issue), *adopting Schedler v. FieldTurf USA, Inc., 2017 U.S. Dist. LEXIS 215616, 2017 WL 8948593 (D. Or. Oct. 16, 2017)* (citing *Ahrenholz* and concluding the issue was not a "pure question of law" and thus not controlling). The Seventh Circuit later held, however, that ***HN8***[] when the court of appeals is not asked to overturn any findings of fact, but instead "to determine the legal significance of a set of facts" by deciding whether a complaint met the pleading standard set forth in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, such a determination might be appropriate for interlocutory appeal. *In re Text Messaging Antitrust Litig., 630 F.3d 622, 625-26 (7th Cir. 2010)*. The court certified the case for interlocutory appeal despite the fact that such a review is often labeled as a "mixed question of law and fact," noting that such labels were "not helpful," and concluding that an appeal under *§ 1292(b)* "should not be precluded altogether by a narrow interpretation of 'question of law.'" *Id.* The court distinguished *Ahrenholz* because resolving the *Twombly* issue did not require "hunting through a record or immersing ourselves in a complicated contract." *Id. at 626*. The court further noted that ***HN9***[] "application of a legal standard is a controlling question of law," although "routine applications of well-settled legal standards to facts" are not. *Id.*

[3] In *Steering Committee v. United States, 6 F.3d 572 (9th Cir. 1993)*, the Ninth Circuit *sua sponte* addressed whether it could consider an interlocutory appeal of a mixed issue of law and fact "served the congressional purposes underlying *§ 1292(b)*." *Id.* (quoting *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975, 479 F. Supp. 1118, 1126 (E.D.N.Y. 1978)*). The Ninth Circuit, however, has certified some cases under *§ 1292(b)* that are not multidistrict litigation actions yet involve mixed questions of law and fact. *See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764 (9th Cir.*

At oral argument, the parties clarified their positions on this issue. ILWU argues that so long as the resolution of the proposed question of law meets the requirement established in *In re Cement Antitrust Litig.* that resolution of the question could materially affect the outcome of the litigation in the district court, the question may be appropriate for certification for interlocutory appeal even if it requires a review of the record, particularly if it involves an important question of law. ICTSI argues that only "pure" questions of law are appropriate **[*10]** for certification. ICTSI further argues that the Ninth Circuit and district courts in the Ninth Circuit accept certification for mixed questions of law and fact only when there also is a "pure" question of law that has been certified.

Under either parties' interpretation of this factor, certification may be appropriate for the questions proposed for certification by ILWU, provided that resolution could materially advance the outcome of the litigation. This is because even under ICTSI's interpretation, there only needs to be one "pure" question of law, and the Court finds, as discussed below, that the question and fact, after noting that several other jurisdictions do not permit interlocutory review of such issues under *§ 1292(b)*. *Id. at 575*. In *Steering Committee*, the Ninth Circuit concluded that ***HN11***[] in "the liability phase of a multidistrict, multiparty litigation case," or what the court described as "'the issue of liability in such unusual cases,'" interlocutory appeal of mixed questions of law relating to the Court's interpretation of *Mead* is a pure question of law. Thus, the critical question for the "controlling question of law" factor in this case is whether the resolution of ILWU's proposed questions **[*11]** "could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig., 673 F.2d at 1026*. The specific questions requested to be certified by ILWU are considered under this standard.

2. *Mead's* Application of Tort Principles to Dividing and Apportioning Damages

a. Waiver

ILWU requests interlocutory review of the Court's Opinion and Order resolving ILWU's post-trial motions ("Post-Trial Opinion"). *ICTSI Oregon, Inc. v. Int'l Longshore & Warehouse Union, 2020 U.S. Dist. LEXIS 38457, 2020 WL 1062881 (D. Or. Mar. 5, 2020)* (ECF 662). ILWU argues that the Court's citations in the Post-Trial Opinion to the Ninth Circuit's decision in *Mead v. Retail Clerks Int'l Ass'n Local Union No. 839, 523 F.2d 1371 (9th Cir. 1975)*, warrant interlocutory review because the Court interpreted *Mead* as applying tort principles, rather than antitrust principles. ILWU specifically challenges the Court's conclusions relating to divisibility (or separability) of damages and the burden of proof for apportionment of damages.

Although before trial ILWU argued that the Court—and not the jury—must determine divisibility (or separability) of damages as a matter of law, the Court allowed the jury to determine that issue. The Court also applied tort principles for apportionment, even though ILWU argued that the Court must find as a matter of law that ICTSI failed properly to apportion damages and thus failed to prove any damages. ILWU also **[*12]** argued that the Court must follow antitrust principles in this case and place the burden of proof on ICTSI to apportion damages, if the question of apportionment were sent to the jury. ILWU did not directly challenge any of these decisions in the post-trial motions and did not directly challenge the related jury instructions. Thus, the Court's interpretation of *Mead* relating to these decisions was not directly at issue in the post-trial motions and *Mead* was not cited for these propositions in the Post-Trial Opinion. To be precise, ILWU's current challenges in its request for interlocutory appeal are not directly to the Court's use of *Mead* in the Post-Trial Opinion but rather to the Court's pretrial rulings interpreting

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2000), *aff'd*, *535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002)*, *and overruled on other grounds by Gonzalez v. Arizona, 677 F.3d 383 (9th Cir. 2012)* (certifying under *§ 1292(b)* the question of a regulatory taking and specifically noting that whether government regulation of private property amounts to a regulatory taking "depends largely upon the particular circumstances [of each] case—that is, on essentially *ad hoc*, factual inquiries" and engaging in the requisite factual inquiry (alterations in original) (quoting *Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)*)); *Tennenbaum v. Deloitte & Touche, 77 F.3d 337, 339-40 (9th Cir. 1996)* (certifying under *§ 1292(b)* the question of waiver of attorney-client privilege and stating that ***HN10***[] "[w]hether a holder has waived the right to claim the attorney-client privilege is a mixed question of law and fact which we review *de novo*.").

Mead. Ultimately, however, the Court's interpretation of Mead in the Court's pretrial rulings and jury instructions played a significant role in the outcome of this case, including the results reached in the Court's Post-Trial Opinion.

The two citations to Mead in the Post-Trial Opinion are not related to the Court's interpretation of Mead currently challenged by ILWU related to applying tort principles to divisibility and apportionment of damages. The Court cited Mead ***[*13]*** in the Post-Trial Opinion as an "accord" supporting authority after a string citation relating to "mixed motive" liability—supporting that when a union has a mixed motive (both lawful and unlawful) for conduct, if the unlawful objective is found to be a substantial motivating factor for the challenged activity, then all of the activity is considered unlawful. *ICTSI, 2020 U.S. Dist. LEXIS 38457, 2020 WL 1062881, at *12*. The court later cited Mead and one of the cases in the string cite for the proposition that if a union engaged in both unlawful activity and lawful activity and an unlawful motive (giving rise to the unlawfulness) was a substantial motivating factor for all the conduct, then all damages caused by that conduct are recoverable. *2020 U.S. Dist. LEXIS 38457, [WL] at *14*.[4] ICTSI argues that because ILWU did not specifically challenge in its post-trial motions the Court's pretrial rulings or jury instruction relating to the Court's interpretation of Mead applying tort principles to separability and apportionment, ILWU waived its ability to request interlocutory review of the Court's interpretation of Mead on this issue. The Court rejects ICTSI's argument.

Both the Supreme Court and the Ninth Circuit have held that **HN12**[] "an appellate court's interlocutory jurisdiction **[*14]** under *28 U.S.C. § 1292(b)* permits it to 'address any issue fairly included within the certified order because it is the *order* that is appealable, and not the controlling question identified by the district court.'" *Nevada v. Bank of Am. Corp., 672 F.3d 661, 673 (9th Cir. 2012)* (quoting *Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 205, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996)* (emphasis in original)); *see also* *Yamaha Motor Corp., 516 U.S. at 205* (noting that the "scope of interlocutory review [includes] all issues material to the order in question" (alteration in original) (quoting Note, "*Interlocutory Appeals in the Federal Courts Under § 1292(b)*," 88 Harv. L. Rev. 607, 628-29 (1975)). A court of appeals may not, however, "reach beyond the certified order to address other orders made in the case." *Id.* Although the Court's Post-Trial Opinion only cited Mead for two discrete issues, the Court's understanding of the burden of proof and the sufficiency of the evidence relating to causation and damages was guided by the Court's interpretation of Mead applying tort principles to divisibility and apportionment, and that interpretation was material to most of the Court's conclusions. In fact, most of the Court's conclusions in the Post-Trial Opinion may be fairly construed as including the Court's interpretation of Mead reflected in the Court's pretrial rulings and jury instructions. Thus, ILWU has not waived its right to have this issue **[*15]** considered.

b. Controlling question of law

Whether the Court correctly interpreted Mead regarding applying tort principles instead of antitrust principles to the issues of divisibility of damages and the proper allocation of the burden of proof for apportionment in a case under *29 U.S.C. § 187* is a controlling question of law that could materially affect the outcome of this litigation. If ILWU's interpretation is correct, then the jury's liability determination may not survive review and a new trial limited to damages could be a waste of the parties' and the Court's resources.

Further, the proper interpretation of *Mead* on this issue is a "pure" question of law. Thus, regardless of whether a mixed question of law and fact is appropriate for certification under *§ 1292(b)*, this specific question is appropriate for certification. It does not involve the "routine application of a well-settled legal standard" because the standard is not well-settled. *See* *In re Text Messaging Antitrust Litig., 630 F.3d 622, 626 (7th Cir. 2010)*. And although applying whatever legal standard is ultimately found to be the correct legal standard to the facts of this case would involve

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[4] To the extent ILWU requests certification of the Court's citations to Mead in the Post-Trial Opinion for the two discrete issues for which it was cited, the Court declines certification. The Court cited Mead as one authority among others supporting "routine applications of well-settled legal standards to facts," which is not considered a controlling question of law for purposes of interlocutory review. *See* *In re Text Messaging Antitrust Litig., 630 F.3d at 626*.

consideration of the facts, ***HN13***[] "[d]ecisions holding that the application of a legal standard is a controlling question of law **[*16]** within the meaning of *section 1292(b)* are numerous." *Id.* (citing cases).

c. Substantial ground for disagreement

ILWU argued before trial that *Mead* incorporates antitrust principles of apportionment and places the burden on ICTSI to prove that no other factors other than illegal labor activities caused damage to ICTSI. This argument is based on *Mead's* statements that labor law derives from ***antitrust law***. *See Mead, 523 F.2d at 1376-78* (citing and quoting antitrust cases for legal principles to apply and noting the "exact parallel" of problems for plaintiffs in labor cases and antitrust cases trying to prove lost profit damages).

Before trial, however, ICTSI argued, and the Court held, that *Mead* incorporates tort principles relating to apportionment for that specific causation issue. As stated by the Ninth Circuit in *Mead*:

> ***HN14***[] The rules of causation imported into the statutory scheme through the "by reason of" language of *section 303* afford a means of dealing with at least the extremes of the problem. The requirement that the unlawful objective must have "materially contributed" to the loss or have been a "substantial factor" in bringing it about, will prevent windfall recoveries by employers negligibly affected by a violation, and protect the **[*17]** union's right to strike for primary objectives where such objectives, standing alone, would have caused the strike, but the unlawful objective, standing alone, would not. *Restatement (Second) of Torts § 432*; W. Prosser, *Law of Torts* § 41, at 238-40 (4th ed. 1971); 2 F. Harper & F. James, *Torts* § 20.3, at 1121-23 (1956). On the other hand, a relatively relaxed standard of proof, allowing recovery on evidence supporting "a just and reasonable inference," more likely true than not, that the employer was damaged because of picketing or other union pressure will assure recovery in most cases in which the unlawful motivation was a significant factor producing the union pressure.

Mead, 523 F.2d at 1379; *see also id. at 1376* (quoting the Restatement (Second) of Torts in support of the "substantial factor" standard, and stating that the "by reason of" text "is read as incorporating common law principles of causation," the same as in antitrust cases).

In crafting the jury instructions here, the Court considered the most recent Restatement, the Restatement (Third) of Torts, instead of the Restatement (Second) of Torts, which was the Restatement in effect when *Mead* was decided.[5] The Court determined that the damages here might be capable of divisibility, or separation, depending **[*18]** on the evidence presented at trial, and thus the Court asked the jury to decide the issue, as instructed by both the Restatement (Second) of Torts and the Restatement (Third) of Torts. The Court also asked the jury to decide whether ILWU engaged in any lawful labor activity (the jury's answer was "no") and whether any lawful activity or nonlabor factors caused any damage to ICTSI (again, the jury's answer was "no"). Because both these answers were "no," the jury did not need to answer the question about divisibility.

In considering divisibility and apportionment, and whether to apply antitrust or tort law principles, the Court also relied on the Ninth Circuit's decision in *Frito-Lay, Inc. v. Local Union No. 137, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 623 F.2d 1354 (9th Cir. 1980)*. In *Frito-Lay*, the Ninth Circuit stated:

> Appellants claim that the underlying object of the strike was lawful to obtain increased economic benefits for its members even though the attempt to force multi-employer bargaining was unlawful. They argue that to recover damages Frito-Lay must either (1) distinguish between the effects of the legal and illegal objectives, or (2) if those effects are not separable, establish that the strike would not have occurred absent the illegal objectives.
>
> *Mead* ***HN15***[] does not require that the **[*19]** illegal object be the sole cause of the strike, only that it be a "substantial" cause or that it "materially contribute" to the injury, "notwithstanding other factors contributed also." *523 F.2d at 1376-77*. The Union's argument misapprehends the principles applicable to proof of

[5] ICTSI argued that under the Restatement (Second) of Torts, the burden also was on ILWU.

> causation in cases such as this. **HN16**[] *The controlling rules derive from tort law principles where more than one factor can be a substantial cause*, and no single factor need be the sole causative element. Here the district court properly found the illegal objective to be at least a substantial if not the sole cause of the strike; from this the court could reasonably infer a causal relationship between the illegal objectives and the damages attributable to the strike.

Id. at 1362-63 (emphasis added).

Many cases under labor law decline to apportion damages in the manner argued by ILWU. *See, e.g., R.L Coolsaet Constr. Co. v. Local 150, Int'l Un. Of Operating Eng'rs, 177 F.3d 648, 660 (7th Cir. 1999)*; *Abreen Corp. v. Laborers' Int'l Un., N.A., AFL, AFL-CIO, 709 F.2d 748, 758-60 (1st Cir. 1983)*; *Pepsi-Cola Co. v. Rhode Island Carpenters Dist. Council, 962 F. Supp. 266, 282-83 (D.R.I. 1997)*. Jury instructions under labor law generally focus on what the Court instructed here—that a union may only be held liable for unlawful conduct and defining what that means. **HN17**[] Cases under ***antitrust law***, however, may require more specific apportionment of damages **[*20]** by the plaintiff. *See, e.g., Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 415-16 (7th Cir. 1992)*; *U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1376-79 (2d Cir. 1988)*; *Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1351-53 (3d Cir. 1975)*.

ILWU requested a modified version of the American Bar Association's Antitrust Model Jury Instruction No. 4: Causation and Disaggregation. This proposed instruction would require placing the burden on ICTSI to prove that no other factor, such as nonlabor factors or any lawful labor activity engaged in by ILWU, caused ICTSI's damages, and to require ICTSI to provide evidence from which damages may be apportioned between illegal labor activity and any other factor. ILWU argued that if ICTSI did not provide evidence from which a jury could apportion damages, then a verdict must be entered for ILWU. ILWU argued that ICTSI had this burden of apportionment, even if ILWU's unlawful purpose was a substantial factor in motivating ILWU's conduct.

HN18[] Under tort law principles, however, the burden of apportionment is placed on the party arguing for divisibility. Under the *Restatement (Third) of Torts, § 26*, a jury determines divisibility and apportionment unless the issue is without dispute or a court determines that no reasonable jury could find the damages to be divisible. The party arguing for divisibility and apportionment has the burden of proof on both divisibility **[*21]** and the magnitude of each divisible part. *See, e.g.*, *Restatement (Third) of Torts: Apportionment Liab. § 26 cmt. h (2000)* ("Whether damages are divisible is a question of fact. A party alleging that damages are divisible has the burden to prove that they are divisible. . . . The magnitude of each divisible part is also a question of fact. The burden to prove the magnitude of each part is on the party who seeks division.").

Thus,**HN19**[] there is conflict between antitrust principles and tort principles relating to divisibility and apportionment, particularly on the burden of proof. *Mead* cites and incorporates both ***antitrust law*** and tort law. In issuing its pretrial rulings, the Court found the following persuasive: (1) *Mead's* discussion and citation to tort principles on causation; (2) *Frito-Lay's* interpretation of *Mead*; and (3) the application of labor law, including *Mead*, by courts in this circuit and other jurisdictions. These pretrial rulings permeate throughout the Court's Post-Trial Opinion.

Mead, however, also specifically referenced and incorporated ***antitrust law***. The application of ***antitrust law*** may support ILWU's argument. The Court struggled with this issue and asked for supplemental briefing from the parties, who cited differing authorities. **[*22]** Reasonable jurists could disagree on whether the Court should have applied tort law principles or ***antitrust law*** principles in this context, and whether applying ***antitrust law*** principles would have made a difference in the outcome of the Court's pretrial rulings, jury instructions, or the Post-Trial Opinion in this case. Thus, this factor supports certification.

d. Materially advance the ultimate termination of the litigation

HN20[] "Courts within the Ninth Circuit have held that resolution of a question materially advances the termination of litigation if it 'facilitate[s] disposition of the action by getting a final decision on a controlling legal issue sooner, rather than later [in order to] save the courts and the litigants unnecessary trouble and expense.'" *Finder v. Leprino Foods Co., 2016 U.S. Dist. LEXIS 100417, 2016 WL 4095833, at *4 (E.D. Cal. Aug. 1, 2016)* (alterations in original) (quoting *United States v. Adam Bros. Farming, Inc., 369 F. Supp. 2d 1180, 1182 (C.D. Cal. 2004)*). If the Ninth Circuit reviews on interlocutory appeal the district court's application of tort principles to divisibility and apportionment of damages for claims under *29 U.S.C. § 187*, that would materially advance the litigation under the unique circumstances of this case because it may prevent an otherwise unnecessary second trial (or even a third, of the second trial is not done consistently with the Ninth Circuit's **[*23]** view of the law). Further, if ILWU's arguments prevail, then a second trial limited to damages may be unnecessary. ILWU may prevail as a matter of law or may prevail in obtaining a new trial on both liability and damages. If a new trial limited to damages is held before this issue is resolved on appeal and if ILWU were to prevail on appeal, a second trial would result in a significant waste of the parties' and the district court's resources.

3. The Court's Finding that ICSTI Remained a Secondary Employer

ILWU argued in its motions under *Rule 50(b)* that ICSTI entangled itself in the "vortex" of ILWU's dispute with the Port of Portland (the "Port") to such a degree that ICTSI lost its status as a "secondary employer." The Court rejected this argument, holding that ICTSI did not so entangle itself the Port or with ILWU's dispute with the Port as to lose ICTSI's status as a secondary employer. The Court also found that to the extent there were labor activities between ILWU and ICTSI that were lawful primary activities, there was sufficient evidence in the record to support a finding by the jury that ILWU's unlawful objective was a substantial motivating factor for ILWU's conduct and thus, as the jury **[*24]** found, all of the challenged conduct was unlawful. ILWU requests certification of this decision.

a. Controlling question of law

As discussed above, for this factor the Court focuses on whether resolution of the proposed question could materially affect the outcome of this litigation before the district court. It could. If ILWU prevails in its argument, ILWU might be entitled to judgment as a matter of law. Thus, this factor is satisfied.

b. Substantial ground for disagreement

ILWU argues that Congress and the Supreme Court have mandated that secondary liability be narrowly construed and that the jury's interpretation of the evidence and the Court's construction is too expansive. Although the Court finds this to be a closer call than the issue of whether tort or antitrust principles apply to divisibility and apportionment in labor law, the Court nevertheless concludes that if certification is accepted, there would be a benefit to having these challenged issues considered together and that reasonable jurists could disagree on this issue. Thus, this factor is met.

c. Materially advance the termination of the litigation

For the same reasons discussed above, this factor is satisfied. Under the **[*25]** unique circumstances of this case, if ILWU prevails in its argument, ILWU might be entitled to judgment as a matter of law.

4. The Court's Determination on ILWU's Waiver

ILWU also challenged in its motions under *Rule 50(b)* certain evidence from ICTSI's experts. In response to ILWU's motions under *Rule 50(b)*, ICTSI objected that ILWU had waived its right to challenge that evidence by failing to include its objections in its pretrial *Daubert* motions and other pretrial filings. In its Post-Trial Opinion, the Court held that although ILWU included these challenges in its *Rule 50(a)* motions, it had not raised many of these later objections to ICTSI's expert testimony in any pretrial objection or timely raised those objections during trial, specifically during the relevant expert's testimony or at the earliest reasonable time after the basis for the objection became apparent. Thus, the Court held, ILWU waived its right to challenge those aspects of expert testimony for purposes of its motion under *Rule 50(b)*. ILWU requests certification of the Court's ruling that ILWU's challenges to expert testimony that ILWU raised in its motion under *Rule 50(a)* but did not preserve before or during trial were waived for purposes of *Rule 50(b)*.

ILWU's question regarding **[*26]** waiver might not be a "controlling question of law." Reversing the Court's findings of waiver relating to ILWU's challenges to certain testimony by ICTSI's expert witnesses would not materially affect the outcome of the litigation before this Court. Regarding ILWU's challenges to ICTSI's causation expert Dr. Bryce Ward, the Court made an alternative finding on the merits. Thus, any possible harm to ILWU by any potential erroneous ruling by the Court in finding waiver was mitigated by the Court's alternative merits determination.

Regarding the Court's finding of waiver of some of ILWU's challenges to ICTSI's damages expert Mr. Jay Sickler, even if the Court erroneously found waiver and even if the Court would have accepted ILWU's challenges and excluded Mr. Sickler's testimony, that would not materially affect the outcome of this case. The Court denied ILWU's *Rule 59(a)* motion based on challenges to Mr. Sickler's testimony conditioned on ICTSI's acceptance of remittitur. Because ICTSI rejected remittitur, the Court, in effect, granted ILWU's *Rule 59(a)* motion based on challenges to Mr. Sickler's testimony. The Court ordered a new trial limited to damages.

ILWU's current request for interlocutory appeal would **[*27]** only materially affect the outcome of this litigation if it could result the Court granting ILWU's *Rule 50(b)* motion. Even if ILWU's challenges to Mr. Sickler's testimony that were considered waived had been accepted by the Court, and if Mr. Sickler's testimony was thus excluded at trial, there was still sufficient evidence of damage presented by ICTSI as of the close of its case-in-chief for the case to go to the jury. The other evidence of damage included at least: (1) evidence of the fee paid by ICTSI to terminate the lease; (2) testimony from Elvis Ganda, President and Chief Executive Officer of ICTSI, regarding estimated shipping volume through 2012 that, in his opinion, would have occurred but for the labor dispute; (3) Mr. Ganda's testimony regarding the rates ICTSI charged for shipping volume; and (4) testimony from James Mullen, ICTSI's former Director of Labor and Terminal Services, regarding the lost volume from shipping companies that had to bypass Terminal 6 in the summer of 2012. Thus, even without Mr. Sickler's testimony, there was evidence of at least some damage to ICTSI sufficient to withstand a *Rule 50(a)* motion at the close of Plaintiff's case-in-chief, and also warranting the denial **[*28]** of a renewed motion under *Rule 50(b)*.

Although the Court declines to certify this specific issue for interlocutory appeal, the Court notes that it is an issue fairly included within the Post-Trial Opinion and thus is nevertheless eligible for interlocutory appeal along with the controlling questions certified by this Court. *See Bank of Am., 672 F.3d at 673*; *see also Yamaha Motor Corp., 516 U.S. at 205*. The Court expresses no opinion on whether the Ninth Circuit should include this non-controlling but related issue if the Ninth Circuit decides to accept interlocutory review of the other issues certified in this Opinion and Order.

C. Motion for Stay Pending Appeal

Finally, ILWU moves to stay pending appeal a second trial limited to damages. ILWU argues that moving forward with a second trial limited to damages could be a waste of the parties' and the district court's resources. If ILWU were to prevail on interlocutory appeal on some or all the issues that it has raised, then a second trial may be unnecessary or may significantly change in scope.

HN21[] A district court may stay a case pending interlocutory appeal. *See 28 U.S.C. § 1292(b)*; *see also Lakeland Vill. Homeowners Ass'n v. Great Am. Ins. Grp., 727 F. Supp. 2d 887, 897 (E.D. Cal. 2010)*. Filing an interlocutory appeal does not automatically stay proceedings in the district court, but a district court may grant a stay to "promote **[*29]** economy of time and effort for itself, for counsel, and for litigants." *Filtrol Corp. v. Kelleher, 467 F.2d 242, 244 (9th Cir. 1972)*. "A stay is not a matter of right, [however,] even if irreparable injury might otherwise result." *Nken v. Holder, 556 U.S. 418, 433, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)*. Instead, it is "an exercise of judicial discretion." *Id.* In deciding whether to order a stay pending interlocutory appeals, courts traditionally balance four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Id. at 434*; *Scallon v. Scott Henry's Winery Corp., 2015 U.S. Dist. LEXIS 134617, 2015 WL 5772107, at *1 (D. Or. 2015)*. The first two factors are the most critical. *Nken, 556 U.S. at 433-34*.

The Ninth Circuit has discussed at length the first factor and what a moving party must show with regard to success on the merits, reviewing *Nken* and other Supreme Court and circuit court cases. *Leiva-Perez v. Holder, 640 F.3d 962, 966-68 (9th Cir. 2011)*. ***HN22***[] The Ninth Circuit has explained that "[t]here are many ways to articulate the minimum quantum of likely success necessary to justify a stay—be it a 'reasonable probability'[;] 'fair prospect'; 'a substantial case on the merits'; or that 'serious legal questions are raised.'" *Id. at 967-68* (citations omitted). **[*30]** The Ninth Circuit concluded that however the standard is articulated, it does not "demand a showing that success is more likely than not." *Id. at 968*. Although ILWU has not shown that success is more likely than not, it raises serious legal questions, and denying a stay risks causing irreparable injury to ILWU. Further, staying this action will not likely cause substantial injury to ICTSI, especially in light of the fact that ICTSI ceased all operations at the Port in 2017. A stay also will serve the public interest by avoiding potentially wasteful use of the parties' and the district court's resources. Balancing all factors and considering the unique circumstances of this case, the Court exercises its discretion and grants a stay pending appeal.

CONCLUSION

The Court GRANTS ILWU's motion for certification for interlocutory appeal under *28 U.S.C. § 1292(b)*. ECF 664. The Court CERTIFIES for interlocutory appeal its Opinion and Order dated March 5, 2020. ECF 662. The Court also STAYS all proceedings before this Court pending final action by the Ninth Circuit on ILWU's interlocutory appeal. The parties are directed to file a joint status report within two weeks after any final action by the Ninth Circuit on ILWU's petition **[*31]** for interlocutory review.

IT IS SO ORDERED.

DATED this 28th day of May, 2020.

/s/ *Michael H. Simon*

Michael H. Simon

United States District Judge

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Tyntec Inc. v. Syniverse Techs., LLC

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

May 29, 2020, Decided; May 29, 2020, Filed

CASE NO. 8:17-cv-591-T-23SPF

Reporter
2020 U.S. Dist. LEXIS 94138 *; 2020 WL 2786873

TYNTEC INC., et al., Plaintiffs, v. SYNIVERSE TECHNOLOGIES, LLC, Defendant.

Prior History: *Tyntec Inc. v. Syniverse Techs., LLC, 2019 U.S. Dist. LEXIS 231273 (M.D. Fla., Aug. 19, 2019)*

Core Terms

tyntec, antitrust

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Judges: STEVEN D. MERRYDAY, UNITED STATES DISTRICT JUDGE.

Opinion by: STEVEN D. MERRYDAY

Opinion

ORDER

A review of the papers, record, precedent, and scholarly literature reveals that the magistrate judge's report and recommendation (Doc. 240) warrants adoption. However, the circumstance justifies a few comments on some points the plaintiff raises in objection and on the report in general.

First, the argument that tyntec inherited a "preexisting voluntary **[*2]** and . . . profitable"[1] course of dealing by virtue of Iris's contract assignment is weak, at best.[2] (Doc. 250 at 20-1) Because a course of dealing, considered in the

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[1] *Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074 (10th Cir. 2013)*.

antitrust context, sheds "light upon the motivation of [the] refusal to deal," *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, the course of dealing between Iris and Syniverse imputes no probative course of dealing to tyntec and Syniverse, who were strangers before the assignment. Although Iris and Syniverse's prior course of dealing might retain some evidentiary value on some issue and, in that sense, might acquire some "relevance," the Iris and Syniverse course of dealing establishes neither a voluntary and profitable course of dealing between Syniverse and tyntec nor a perennial course of dealing in the inter-carrier vendor (ICV) market. Both logic and the protean economics of the ICV market caution strongly to the contrary.

Second, a year into this action, tyntec offered Syniverse more than forty-thousand dollars if Syniverse would agree to a free peering relationship. tyntec argues that Syniverse manifested "exclusionary practices" by rejecting this offer and forbearing short-term profits. (Doc. 116 at 10-11) The notion that Syniverse's rejection of tyntec's **[*3]** eleventh-hour offer exemplifies Syniverse's "anti-competitive" motivation will not cohere. The antitrust laws obligate a court to "look back in time to the marketplace as it once was and . . . not as it now is." *Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1071 (10th Cir. 2013)*. Further, "the bringing of a lawsuit . . . may provide a sound business reason for . . . terminating [business] relations." *House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867, 871 (2d Cir. 1962)*). And Syniverse provides several other reasons for the decision to discontinue a peering relationship. Thus, because tyntec initiated the peering offers a year after suing Syniverse and because Syniverse states a reasonable basis for refusing to deal, Syniverse's refusal to accept tyntec's eleventh-hour peering offers displays no "willingness to sacrifice short-term profits" within the contemplation of *Section 2*. Therefore, Syniverse's rejection of tyntec's proposals constitutes no ongoing refusal to deal and serves no useful evidentiary function.

* * *

Section 2 of the Sherman Act provides, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a felony." Although monopolistic behavior typically comprises **[*4]** collusive or conspiratorial conduct, ***antitrust law*** recognizes in a limited circumstance the potential for monopolistic behavior to manifest in unilateral conduct. An anticompetitive refusal to deal is one of these limited circumstances. But "refusal to deal" jurisprudence comes shrouded in "weak" and precarious doctrinal justification. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 346 (1993) ("[T]he doctrinal justifications for the differences in [refusal to deal] outcome[s] appear weak."). Accordingly, a posture of restraint should guide the analysis of antitrust liability for a refusal to deal. This is not to suggest that "refusal to deal" jurisprudence lacks any proper place in antitrust jurisprudence or serves no benefit in averting monopolistic conduct; rather, this is to suggest that "refusal to deal" jurisprudence needs no further muddling — an inevitable result if unwarranted liability is imposed in a case such as tyntec's.

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985), a seminal precedent for "refusal to deal" doctrine (and a case on which tyntec heavily relies), falls "at or near the outer boundary of § 2 liability," as characterized in *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, which circumscribes *Aspen* within its idiosyncratic facts and **[*5]** which consequently constricts "refusal to deal" liability.

Eleventh Circuit precedent further constricts the boundary of "refusal to deal" liability and narrows the conduct that falls within the boundary. *See, e.g., Morris Communications Corp. v. PGA Tour, Inc., 364 F.3d 1288 (11th Cir. 2004)*; *Covad Communications Co. v. BellSouth Corp., 374 F.3d 1044 (11th Cir. 2004)*. At whatever undescribed boundary "refusal to deal" liability might lie following *Aspen, Trinko, Morris, Covad, Novell*, and similar precedent, Syniverse's business conduct — pervaded by deliberative, understandable, reasonable, and lucid efficiency justifications — falls somewhere outside the boundary of Section 2 liability.

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[2] *But see Steward Health Care Sys., LLC v. Blue Cross & Blue Shield of Rhode Island, 997 F. Supp. 2d 142, 154 (D.R.I. 2014)* (declining to grant a motion to dismiss because "the Court is not aware of case law that would preclude consideration of [the assignor's] direct prior course of dealing with [the defendant]").

tyntec's action stands consequentially distinct from *Aspen*, some of which distinctions warrant remark.[3] The parties in *Aspen* shared a longstanding business relationship that created a "joint venture"; Syniverse and tyntec were essentially strangers until the assignment of Iris's contract. The parties in *Aspen* shared a voluntary and mutually profitable relationship; Syniverse and tyntec shared no relationship but for a contractually imposed duty induced by a third party. The *Aspen* defendant's conduct introduced a sudden and unexpected reversal into the parties' course of dealing; assuming (generously) a course of dealing between Syniverse and tyntec, Syniverse's **[*6]** conduct was foreseeable and anticipatorily announced. The *Aspen* defendant's conduct inflicted monetary loss on the defendant; Syniverse's conduct guaranteed higher profit.[4] The *Aspen* defendant refused to sell products to the competitor at a retail price despite the defendant's selling to others in the relevant market at a retail price; Syniverse offered to tyntec services at precisely the "retail" price offered to entities similarly situated to tyntec.[5] The *Aspen* defendant's refusal generated disgruntled consumers who lacked a meaningful, alternative product option; Syniverse's refusal generated one potentially dissatisfied customer, which ultimately denied Syniverse's offer for services and pursued an alternative.[6] The *Aspen* defendant offered no legitimate business justification or efficiency defense for the challenged conduct; Syniverse offers an array of business justifications, all of which comport with a goal to perpetuate profit.

Given these differences, permitting liability for Syniverse's conduct is to mistakenly permit the proverbial camel to pass through the unusually impassable "narrow-eyed needle of refusal to deal doctrine." *Novell, 731 F.3d at 1074*. "[T]he limits on the **[*7]** administrative capacities of courts to police market . . . transactions,"[7] the judiciary's duty to foster predictable rules and results on which a business can rely, and the "presumption of freedom [ ] appropriate to a free market economy"[8] — even taken singularly, but especially taken collectively — commend judicial restraint unless distinct evidence reveals the refusal as predatory. As *Novell* states, "If the doctrine . . . must err still to some slight degree, perhaps it is better that it should err on the side of firm independence." *731 F.3d at 1076*.

In sum, tyntec fails to establish a causal link between Syniverse's ostensibly "anti-competitive refusal" and injury to consumers and competition, Syniverse's behavior fails to qualify as "predatory" conduct within the meaning contemplated by *Section 2*, and the magistrate judge's cogent report offers still other persuasive reasons for

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3 Although aptly summarizing the facts in, and ably applying the law of, *Aspen*, the report perhaps awkwardly analogizes Syniverse's free peering to free skiing on a competitor's mountain. However, no awkwardness in any of the report's analogies undermines the balance of the report's well-reasoned and thorough analysis.

4 Syniverse's charging tyntec for ICV services suggests an aim to increase short-term profit. That is, tyntec cannot reasonably argue that the only possible reason for Syniverse's terminating the free peering arrangement was to exclude tyntec from the market. If tyntec accepted Syniverse's offer, the result would guarantee immediate short-term profit for Syniverse. Thus, although Syniverse's rejection of free peering "may suggest a hard-nosed intent to undo rivals" (which is unactionable conduct by itself), the rejection suggests no "inten[t] to forgo profits." *Novell, 731 F.3d at 1078*. Even if cast as "raising rivals' costs," as attempted by tyntec, that description fails to "displace *Aspen* and *Trinko*'s profit-sacrifice test in the narrow world of refusal to deal cases." *Novell, 731 F.3d at 1079*. tyntec clearly cannot satisfy *Trinko*'s profit-sacrifice test. The record lopsidedly establishes that Syniverse retained a profit-seeking incentive throughout the entirety of Syniverse's negotiations with tyntec. The desire to defeat competition, if coupled with legitimate business or efficiency explanations, defeats antitrust liability.

5 Although tyntec disputes similarity to these entities, tyntec itself analogizes the business services of these entities to tyntec's own business services.

6 Of course, tyntec argues that many more customers will become dissatisfied because Syniverse will eventually charge monopolistic prices — after Syniverse routs tyntec out of the market. Determining the accuracy of broad, speculative, and attenuated assumptions such as this, even if correct, falls outside the judiciary's expertise. Further, the *Aspen* defendant and plaintiff were the only two participants in the construed "market," but more options exist for ICV customers. Thus, tyntec's argument falters in any event.

7 *Novell, 731 F.3d at 1072*.

8 BORK, THE ANTITRUST PARADOX, at 344.

granting summary judgment in favor of Syniverse. However, if summary judgment in favor of Syniverse is proper for no other reason, "[w]here an efficiency potential appears in a case involving an individual refusal to deal, and there is no clear evidence that the purpose of the refusal was predatory, courts," philosopher-kings, central **[*8]** planners, "experts," and many others are ill-equipped and ill-advised to meddle in an independent industry by imposing antitrust liability for routine refusals to deal. BORK, THE ANTITRUST PARADOX, at 346. History suggests that in any event the undertaking would not meet with success.

The magistrate's report and recommendation (Doc. 240) is **ADOPTED**. tyntec's motion (Doc. 116) for summary judgment is **DENIED**, and Syniverse's motion (Doc. 119) for summary judgment is **GRANTED**. The clerk is directed to enter judgment in favor of Syniverse and against tyntec, and the clerk is directed to close the case.

ORDERED in Tampa, Florida, on May 29, 2020.

/s/ Steven D. Merryday

STEVEN D. MERRYDAY

UNITED STATES DISTRICT JUDGE

LexisNexis

Kentucky v. Marathon Petro. Co. LP

United States District Court for the Western District of Kentucky, Louisville Division

June 1, 2020, Decided; June 1, 2020, Filed

Civil Action No. 3:15-cv-354-DJH-CHL

Reporter

464 F. Supp. 3d 880 *; 2020 U.S. Dist. LEXIS 95481 **; 2020-1 Trade Cas. (CCH) P81,243; 2020 WL 2842842

COMMONWEALTH OF KENTUCKY, Plaintiff, v. MARATHON PETROLEUM COMPANY LP et al., Defendants.

Prior History: *Kentucky v. Marathon Petroleum Co., LP, 191 F. Supp. 3d 694, 2016 U.S. Dist. LEXIS 74585 (W.D. Ky., June 8, 2016)*

Core Terms

Petroleum, venue, relevant market, antitrust, reliable, Defendants', geographic, damages, personal jurisdiction, Clayton Act, service-of-process, markets, expert testimony, summary judgment, regression, yardstick, waived, summary judgment motion, consumers, wholesale, factors, terminals, gasoline, exchange agreement, nationwide, variables, fails, anti trust law, inadmissible, methodology

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Judges: David J. Hale, United States District Judge.

Opinion by: David J. Hale

Opinion

[*884] **MEMORANDUM OPINION AND ORDER**

The Commonwealth of Kentucky alleges that Defendants **[**2]** Marathon Petroleum Corporation, Marathon LP, and Speedway LLC violated federal antitrust laws by overcharging consumers for gasoline. (Docket No. 88) Marathon Petroleum Corporation asserts that the Court may not exercise personal jurisdiction over it and moves for summary judgment on that ground. (D.N. 156) Following oral argument, the Court directed the parties to file supplemental briefs addressing the impact of the Clayton Act's nationwide service-of-process provision on the Court's jurisdiction over Marathon Petroleum Corporation. (D.N. 224) For the reasons stated below, the Court finds that it has personal jurisdiction over Marathon Petroleum Corporation and will therefore deny Marathon Petroleum Corporation's motion for summary judgment on personal-jurisdiction grounds. The Court will, however, grant Defendants' motion to exclude the Commonwealth's expert witness, Dr. Michael Sattinger (D.N. 191), and therefore also grant Defendants' motion for summary judgment on the merits. (D.N. 195)

[*885] I.

The factual background is nearly unchanged since the Court's ruling on Marathon Petroleum Corporation's motion to dismiss (D.N. 147); thus, only a brief summary of the facts is necessary here. **[**3]**

Marathon Petroleum Corporation, together with its subsidiaries Marathon LP and Speedway LLC, is one of the largest petroleum-product refiners, marketers, and transporters in the United States. (D.N. 88, PageID # 1093) "Marathon" is the largest refiner in the Midwest and owns the only refinery in Kentucky. (*Id.*, PageID # 1089) It is also the largest gasoline supplier in Kentucky and largest reformulated gasoline (RFG) supplier in Louisville and Northern Kentucky. (*Id.*)

The Commonwealth claims that Marathon's market share "has allowed [Marathon] to illegally manipulate and attempt to manipulate the market for RFG in . . . Louisville and [Northern Kentucky] (hereinafter "LNK.")." (*Id.*) Specifically, the Commonwealth contends that Marathon maintains its market dominance through a variety of contractual arrangements, including the anticompetitive use of specialized supply agreements known as exchange agreements. (*See* D.N. 147 (summarizing the practices the Commonwealth alleges violate ***antitrust law***); *see also infra*, Part III.B., for detailed definition of exchange agreements) As a result of these practices, the Commonwealth asserts, Marathon has caused the wholesale and retail prices of RFG **[**4]** to be substantially higher in Kentucky than those found in comparative competitive markets. (*Id.*, PageID # 1101)

The Commonwealth filed this suit against Marathon LP on May 12, 2015, alleging violations of the Sherman Antitrust Act and the Clayton Act. (D.N. 1) On November 7, 2017, the Commonwealth amended its complaint to add Marathon Petroleum Corporation and Speedway, LLC as defendants, invoking the Clayton Act. (D.N. 88) Marathon Petroleum Corporation moved to dismiss for lack of personal jurisdiction and failure to state a claim. (D.N. 92) Marathon Petroleum Corporation's personal-jurisdiction argument hinged on the company's allegedly insufficient contacts with the forum state. Marathon Petroleum Corporation claimed that as a parent corporation it has no direct connections with Kentucky and that Kentucky's long-arm statute thus does not allow this Court to exercise jurisdiction over Marathon Petroleum Corporation. The Court denied the motion to dismiss. (D.N. 147) Marathon Petroleum Corporation now seeks summary judgment, again arguing that it lacks the necessary contacts with the forum state. (D.N. 156)

The Court heard oral argument on the motion for summary judgment on October **[**5]** 18, 2019. (D.N. 224) After the hearing, the Court directed the parties to file supplemental briefs addressing the application of *15 U.S.C. § 22* and the Sixth Circuit's holding in *Carrier Corp. v. Outokumpu Oyj, 673 F.3d 430 (6th Cir. 2012)*, to the parties' positions on personal jurisdiction. (D.N. 224) Specifically, the Court asked the parties to address whether personal jurisdiction was proper in this action anywhere within the United States because of the Clayton Act's national service-of-process provision. *See* *Carrier Corp., 673 F.3d at 449-50* (holding that under the Clayton Act, "personal jurisdiction exists whenever the defendant has 'sufficient minimum contacts with the United States' to satisfy the due process requirements under the *Fifth Amendment*"); *see also* *In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 297-98 (3d Cir. 2004)* (finding that nationwide service of process is appropriate under the Clayton Act if the defendant has sufficient minimum contacts with the **[*886]** United States). In its supplemental brief, Marathon Petroleum Corporation argues for the first time that venue in the Western District of Kentucky is improper under the Clayton Act, and that proper venue is a prerequisite to application of the nationwide service-of-process provision addressed in *Carrier.* (D.N. 228) Neither party addressed venue in its briefs on the motion for summary judgment, so the **[**6]** Court bases its conclusions on the legal arguments presented in the post-hearing briefs.

II.

A. Clayton Act

Because the Court must decide whether it can exercise personal jurisdiction over Marathon Petroleum Corporation before it may rule on the substantive motions, the Court will consider Marathon's motion for summary judgment on personal jurisdiction first.

Marathon argues that for the Clayton Act's nationwide service-of-process provision to apply, the Act's venue provision must also be satisfied. The Clayton Act prohibits numerous business practices that can result in antitrust injury to consumers. Both the nationwide service-of-process provision discussed above and the Clayton Act's venue provision are found in *15 U.S.C. § 22*, which states:

> Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business [venue provision]; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found [nationwide service-of-process provision].

15 U.S.C. § 22.

In their post-hearing briefs, the parties focus on the circuit **[**7]** split regarding whether the venue and service-of-process provisions of the Clayton Act should be read together or separately—i.e., whether the provisions are "coupled" or "decoupled" for purposes of statutory interpretation. Marathon argues that the provisions must be read together and that because the Commonwealth cannot establish *venue* under the Clayton Act, the nationwide service-of-process provision is irrelevant and the case must be dismissed for lack of personal jurisdiction. (D.N. 228, PageID # 15232 (citing *KM Enter., Inc. v. Glob. Traffic Techs., Inc., 725 F.3d 718, 733-34 (7th Cir. 2013)* (holding that venue and service provisions of the Clayton Act must be read together)).) The Commonwealth argues that the venue and service-of-process provisions of the Clayton Act can be read separately and that the Court may exercise personal jurisdiction over Marathon Petroleum Corporation via the Clayton Act's service-of-process provision because venue is appropriate under the general venue statute, *28 U.S.C. § 1391*. (D.N. 231, PageID # 15261 (citing *Go-Video, Inc. v. Akai Elec. Co., 885 F.2d 1406, 1408 (9th Cir. 1989)* (holding that the venue and service provisions of the Clayton Act may be considered separately))) The Sixth Circuit has not yet considered this discrete question. And district courts in the circuit are, as noted by the parties, divided **[**8]** on the issue. *Compare Hyland v. Homeservices of Am., Inc., No. 3:05-cv-612-R, 2007 U.S. Dist. LEXIS 47502, 2007 WL 1959158 (W.D. Ky. June 28, 2007)* (finding "proper venue is still required in order to confer personal jurisdiction" under the Clayton Act), *with Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc., 410 F. Supp. 2d 592, 601 (E.D. Ky. 2006)* (adopting reasoning of *Go-Video* and decoupling Clayton Act's service-of-process and venue provisions). The Court need not weigh **[*887]** the competing approaches here, because as explained below, Marathon Petroleum Corporation waived any challenge to venue by not raising it in its first affirmative pleading.

B. Waiver of Venue

"Unlike jurisdictional defects, venue objections can be waived." *Al-Muhaymin v. Jones, 895 F.2d 1147, 1149 (6th Cir. 1990)*. *Federal Rule of Civil Procedure 12(h)(1)* provides:

> A party waives any defense listed in *Rule 12(b)(2)-(5)* by:
>
> (A) omitting it from a motion in the circumstances described in *Rule 12(g)(2)*; or
> (B) failing to either:
> (i) make it by motion under this rule; or
> (ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

Rule 12(b)(3) covers the defense of improper venue. A party must therefore raise venue in its first responsive pleading, or else that defense is waived. *See* Whittington v. Milby, 928 F.2d 188, 192 (6th Cir. 1991) ("It is true that improper venue is a personal defense which is waived if not raised either by motion or in a responsive pleading."); *see also* Palazzo v. Harvey, 380 F. Supp. 3d 723, 730 (M.D. Tenn. 2019) ("Generally speaking, arguments raised for the first time in **[**9]** reply briefs are waived, and this applies both on appeal, *American Family Prepaid Legal Corp. v. Columbus Bar* [Ass'n], 498 F.3d 328, 335 (6th Cir. 2007), and to summary judgment motions filed in the trial court, Ryan v. Hazel Park, 279 F. App'x 335, 339 (6th Cir. 2008)."). This rule applies equally in actions brought under the Clayton Act. *See* KM Enter., 725 F.3d at 733-34 (discussing theory of waiver of venue in antitrust case); Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1237 n.3 (6th Cir. 1981) (declining to address relationship between Clayton Act's venue and service-of-process provisions given defendant's waiver of objections to venue and service of process in the district court).

Marathon Petroleum Corporation's first responsive pleading was a motion to dismiss for lack of personal jurisdiction and failure to state a claim. (D.N. 92) Following the Court's denial of that motion, Marathon Petroleum Corporation moved for summary judgment, again on personal-jurisdiction grounds. (D.N. 156) In both the motion to dismiss and the first motion for summary judgment, Marathon Petroleum Corporation's personal-jurisdiction argument turned on whether the company had the requisite minimum contacts with Kentucky to satisfy the Commonwealth's long-arm statute. Marathon Petroleum Corporation raised no venue argument in either motion. In its post-hearing supplemental brief, however, Marathon **[**10]** Petroleum Corporation shifted its focus from the Clayton Act's nationwide service-of-process provision to the Act's venue provision, arguing for the first time that venue is improper in the Western District of Kentucky under the Clayton Act. (D.N. 228, PageID # 15232)

Waiver is clearly established when an issue was not raised in the first responsive pleading. *See* King v. Taylor, 694 F.3d 650, 660 (6th Cir. 2012) (holding that "forfeiture . . . was . . . clear" where, "[a]fter including the service defense in his answer, [defendant] was completely silent about it until the summary judgment stage"); Whittington, 928 F.2d at 192. The Sixth Circuit has addressed a similar scenario in the antitrust context and concluded that the defendant waived the defense of improper venue. In *Chrysler Corp.*, the defendant argued that the nationwide "service of process provision in the second **[*888]** clause of [§] 12 is available only when the forum contact requirements of the first clause are met." 643 F.2d at 1237 n.3. But the Sixth Circuit found that it "need not decide this question because . . . failure to object to service of process or venue in [the defendant's] Rule 12(b) motion below constitutes a waiver of any such objection here." *Id.* The Sixth Circuit thus declined to address the circuit split as to whether the **[**11]** Clayton Act's venue and service-of-process provisions should be coupled because the defendant waived the defense of improper venue. *Id*; *see also* Daniel v. Am. Bd. of Emergency Med., No. 90-CV-1086A, 1997 U.S. Dist. LEXIS 22425, 1997 WL 785635, at *2 (W.D.N.Y. Nov. 19, 1997) (holding that because defendants in Clayton Act case "failed to raise their venue defense in their original pleadings with the court, they have waived the defense and cannot now raise it"); *cf.* KM Enter., 725 F.3d at 733-34 (discussing possibility of defendant's waiver-of-venue argument, but finding that venue had not been waived).

In sum, the Court finds that Marathon Petroleum Corporation waived any challenge to venue by failing to assert the defense in either of its first two substantive motions. Because the challenge to venue has been waived, Marathon Petroleum Corporation's challenge to the Court's personal jurisdiction fails. Summary judgment on personal-jurisdiction grounds is therefore inappropriate.

III.

Because the Court may exercise personal jurisdiction over Marathon Petroleum Corporation, it will next consider the motion of all three defendants (Marathon Petroleum Corporation, Marathon LP, and Speedway) to exclude the Commonwealth's only expert witness, Dr. Michael Sattinger. (D.N. 191)

District courts serve as gatekeepers for admission of expert-witness testimony **[**12]** and must exclude "expert testimony that is unreliable and irrelevant." Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 792 (6th Cir.

2002) (citing Hardyman v. Norfolk & W. Ry. Co., 243 F.3d 255, 260 (6th Cir. 2001)). The Court's analysis is guided by the principles set forth in Federal Rule of Evidence 702, which provides that

> [a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

The main goal of the admissibility inquiry is "to determine whether the evidence 'both rests on a reliable foundation and is relevant to the task at hand.'" Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc., 588 F.3d 908, 915 (6th Cir. 2009) (citing Daubert v. Merrell Dow Pharm., 509 U.S. 579, 597 (1993)). With respect to the admissibility determination, *Daubert* "provided a non-exclusive checklist for trial courts to consult in evaluating the reliability of expert testimony." In re Scrap Metal Antitrust Litig., 527 F.3d 517, 529 (6th Cir. 2008). The *Daubert* factors include "testing, peer review, publication, error rates, the existence and maintenance of standards controlling the technique's operation, and general **[**13]** acceptance in the relevant scientific community." United States v. Langan, 263 F.3d 613, 621 (6th Cir. 2001) (citing Daubert, 509 U.S. at 593-94). **[*889]** Although the factors are not a "definitive checklist or test," Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), they can guide a court's inquiry "where they are reasonable measures of the reliability of expert testimony." Gross v. Comm'r, 272 F.3d 333, 339 (6th Cir. 2001). Determining reliability and relevance does not require a court to evaluate the accuracy of an expert's opinion—a task reserved for the jury—but rather requires the Court "to determine whether [the expert's testimony] rests upon a reliable foundation, as opposed to, say, unsupported speculation." *In* Re Scrap Metal, 527 F.3d at 529-30.

Defendants move to exclude the Commonwealth's expert, Dr. Michael Sattinger.[1] (D.N. 191) Defendants do not attack Sattinger's qualifications but argue that the methodology he employed to reach his conclusions regarding the relevant market, the existence of antitrust injury, and the amount of damages was technically deficient and renders his opinion unreliable, irrelevant, and inadmissible. (*Id.*) After careful consideration of the record, the Court agrees and will exclude Sattinger's testimony on these topics for the reasons detailed below.

A. Relevant Market

An antitrust plaintiff bears the burden to "define the relevant market within which the alleged anticompetitive **[**14]** effects of the defendant's actions occur." Worldwide Basketball & Sport Tours v. Nat'l Coll. Athletic Ass'n, 388 F.3d 955, 962 (6th Cir. 2004). The relevant market contains "both a geographic component and a product component," Ky. Speedway, 588 F.3d at 916, and is defined by "commodities reasonably interchangeable by consumers for the same purposes [that] make up that part of the trade or commerce, monopolization of which may be illegal." United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956). The Sixth Circuit applies the reasonable-interchangeability standard to define the relevant market. The reasonable-interchangeability standard relies on "(1) product uses (whether substitute products can perform the same function) and/or (2) consumer response (also known as 'cross-elasticity'), defined as 'consumer sensitivity to price levels at which they elect substitutes for the defendant's product or service.'" Ky. Speedway, 588 F.3d at 917 (quoting Worldwide Basketball & Sport Tours, 388 F.3d at 961). "Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim." NHL Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 719-20 (6th Cir. 2003); *see also* ABA Section of ***Antitrust Law***, ***Antitrust Law*** Developments, 629 (8th ed. 2017) ("[M]any [courts] have found the lack of sufficient expert testimony supporting or refuting a proposed market to be fatal.") (citations omitted).

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[1] Defendants requested oral argument on their motion to exclude Sattinger's testimony. (D.N. 212, PageID # 13591) Because the issue has been thoroughly briefed following extensive discovery and the parties' arguments are fully developed, the Court finds oral argument unnecessary. Defendants' request for oral argument will therefore be denied.

The Commonwealth alleges that Marathon LP and Marathon Petroleum Corporation monopolized the wholesale market for Summer RFG, **[**15]** a special type of gasoline that gas stations must sell during the summer in certain parts of Kentucky *See* *42 U.S.C. § 7545(k)(6)(A)*. (D.N. 88, PageID # 1090) Reformulated blendstock for oxygenate blending (RBOB) is a type of **[*890]** gasoline that serves as the active and necessary ingredient of RFG. (D.N. 203-3, PageID # 12579) RFG, however, cannot be shipped in its final state for practical reasons, so RBOB is blended with ethanol at terminals—docking stations that receive shipments of raw petroleum products—to create RFG. (*Id.*, PageID # 12580) That RFG is then sold to retailers for sale to the ultimate consumer at the gas station. (*Id.*) The crux of the Commonwealth's argument is that Marathon dominates the wholesale RFG market because it controls the influx of RBOB, allowing it to monopolize the market for retail RFG, a downstream product of RBOB. (D.N. 203-3, PageID # 12576) The "consumers" in this market are therefore retailers of RFG, such as Kroger and Valero, that either buy or self-supply RFG from terminals. Sattinger determined that "at the wholesale level, the terminals where RFG is sold constitute the relevant geographic market for Summer RFG." (D.N. 203-3, PageID # 12596) He further limited the geographic **[**16]** market to terminals located in Kentucky. (*Id.*) Thus, the geographic market defined by Sattinger consists solely of terminals in Kentucky that blend RBOB to produce and then sell Summer RFG.

Sattinger's report fails to identify a reliable geographic market. The market Sattinger defined suffers from two fatal shortcomings. First, Sattinger did not explain his methodology for defining the relevant market. Generally, to define a relevant market, economists employ the hypothetical-monopolist test, also known as the SSNIP[2] test, a widely used device that allows analysts to determine whether customers would leave the market in response to a "small but significant non-transitory increase in price," usually using a five percent increase. *See* *Ky. Speedway, 588 F.3d at 918* (citing *FTS v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1038 (D.C. Cir. 2008)* (finding that SSNIP test is an admissible tool for defining relevant market)). If customers leave the market in response, the market is defined too narrowly. *See In* *Re Se. Milk Antitrust Litig., 739 F.3d 262, 277 (6th Cir. 2014)* (acknowledging that SSNIP typically utilizes a 5% price increase).

Although Sattinger acknowledged that the hypothetical-monopolist test "provides a guide" to defining a relevant market (D.N. 203-3, PageID # 12594 (citing Merger Guidelines, Section 4.1)), he did not employ it here. (D.N. 191-4, **[**17]** PageID # 7924) While a relevant market can be defined without the use of the SSNIP test, Sattinger is nonetheless required to root his conclusions in a reliable methodology. *See* *Universal Surveillance Corp. v. Checkpoint Sys., Inc., No. 5:11-CV-1755, 2015 U.S. Dist. LEXIS 147106, 2015 WL 6082122, at *8 (N.D. Ohio Sept. 30, 2015)* (finding expert analysis reliable despite absence of SSNIP test because expert "utilized a different, still-reliable statistical method to determine the relevant product market"); *Encana Oil & Gas, Inc. v. Zaremba Family Farms, Inc., No. 1:12-cv-369, 2015 U.S. Dist. LEXIS 183802, 2015 WL 12883545 (E.D. Mich. Sept. 18, 2015)* (holding expert testimony admissible where expert employed an economic analysis other than SSNIP test to define relevant market). Yet Sattinger's report contains no explanation for why he chose to limit the market to terminals in Kentucky. (*See* D.N. 203-3) In the absence **[*891]** of an alternative, but "still-reliable statistical method to determine the relevant product market," *Universal Surveillance, 2015 U.S. Dist. LEXIS 147106, 2015 WL 6082122*, and considering the additional deficiencies discussed below, the Court concludes that the market Sattinger proposes lacks the "objective, independent validation of methodology" that is required for admissibility. *Vaughan v. Konecranes, Inc., 642 F. App'x 568, 577 (6th Cir. 2016)*; *see also* *Ky. Speedway, 588 F.3d at 919* (excluding expert testimony in antitrust case because expert used unreliable methodology to define a relevant **[**18]** market).

Second, even if the Commonwealth had demonstrated that Sattinger defined his market using a reliable method, his opinion would still be excluded because his proposed market does not reflect the economic realities of the wholesale RFG market. *See* *Brown Shoe Co. v. United States, 370 U.S. 294, 336-37, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* (holding that the relevant market must "correspond to the commercial realities of the industry and be economically significant"). Marathon LP and its competitors must ship RBOB, a necessary component of RFG, into

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[2] "Specifically, the [hypothetical monopolist] test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market." Horizontal Merger Guidelines, U.S. Dept of Justice and FTC, Section 4.1.1, August 19, 2010 (hereinafter "Merger Guidelines").

terminals in the Commonwealth. Yet Sattinger's proposed geographic market fails to consider where Marathon's competitors could "practicably turn for [RBOB]." *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*; *see also* Merger Guidelines § 4.2.1, 4.2.2, 5.1 (stating that geographic markets must include competitors and that "firms that clearly possess the necessary assets to supply into the relevant market rapidly" must be considered part of the geographic market). Determining where market participants can practicably turn for supplies requires a fact-intensive inquiry that includes "considerations of areas where products are marketed, or where the defendant perceives that it is competing; any applicable regulatory standards; transportation costs and challenges such as risk of spoilage, size, **[**19]** or weight; and 'other factors bearing upon where customers might realistically look to buy the product.'" *In re Se. Milk, 739 F.3d at 277* (quoting *E.I. du Pont de Nemours & Comp. v. Kolon Indus., Inc., 637 F.3d 435, 442-43 (4th Cir.2011)* (internal citations omitted)).

Sattinger limited the geographic market to terminals in Kentucky. But he failed to explain why he excluded the sources of RBOB from his market. For example, Valero, Marathon's only competitor for RFG, self-supplied RBOB from its refinery in Louisiana to supplement its supply of RFG available for sale in Louisville. (D.N. 191, PageID # 7888) Indeed, Sattinger noted in his report that Valero "received RBOB [at its Louisville terminal] from its Memphis, St. Charles, and Meraux refineries by barge on the Mississippi and Ohio Rivers." (D.N. 203-3, PageID # 12586) Further, Marathon has submitted evidence demonstrating that both Kroger and Marathon LP have trucked in supplemental sources of RBOB from terminals in the Chicago and St. Louis areas. (D.N. 212, PageID # 13604-05) Without explanation, Sattinger dismisses this evidence in his rebuttal report as "anecdotal" and thus irrelevant. (D.N. 191-11, PageID # 8105) But this evidence establishes that not only could wholesale customers turn to sources of RBOB from refineries well outside of the proposed **[**20]** geographic market, they *already have.* By failing to include "reasonably interchangeable" sources of RBOB, the necessary precursor for RFG, Sattinger's geographic market is rendered unreliable. *See* *Worldwide Basketball & Sport Tours, 388 F.3d at 961*.

Without relying on an established methodology, and while excluding sources of supply already used by competitors in the wholesale market, Sattinger defined a geographic market that is "connected to existing **[*892]** data only by the *ipse dixit* of the expert" and does not meet the admissibility requirements of *Daubert. Nelson v. Tenn. Gas Pipeline Co., 243 F.3d 244, 254 (6th Cir. 2001)* (citing *General Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997))*; *see* Black's Law Dictionary (11th ed. 2019) (defining "ipse dixit" as "[s]omething asserted but not proved"). The geographic market defined by Sattinger is therefore unreliable and cannot be used to calculate market share or demonstrate market dominance. *See* *Worldwide Basketball & Sport Tours, 388 F.3d at 963* (holding that antitrust claim must be dismissed because plaintiff's expert failed to define a relevant market through reliable means).

B. Antitrust Injury

Sattinger's opinion must also be excluded because it fails to establish a connection between Defendants' allegedly anticompetitive behavior and harm to consumers. Sattinger employed a yardstick approach—a straightforward comparison—to calculate $173.6 million in damages. (D.N. **[**21]** 203-3, PageID # 12563) To reach this figure, he compared the markets for RFG in Baltimore and St. Louis to the LNK market. (*Id.*) Sattinger analyzed the market prices of RFG across the cities, accounting for discounts that Marathon allegedly provided its wholesale customers, and then attributed the difference in price to anticompetitive conduct by Defendants. (D.N. 203-3, PageID # 12620-21) He multiplied that price differential by the relevant time period to arrive at his damages figure, assuming that the difference in price was attributable to the alleged wrongdoing of the defendants. (*Id.*, PageID # 12688) According to Sattinger, St. Louis and Baltimore were appropriate comparison cities because they represented competitive markets for RFG with a substantial number of wholesale customers. (D.N. 203-3, PageID # 12617) He also testified in his deposition that the two cities had been chosen for him before he ran any analysis. (D.N. 212-1, PageID # 13608)

A yardstick approach is one way that an expert can calculate antitrust damages. The approach requires the expert to analyze the differences in the price of the product at issue among meaningfully comparable markets, firms, or locations. **[**22]** It is typically used when comparing profitability between similar firms, *MM Steel, L.P. v. JSW Steel*

(USA) Inc., 806 F.3d 835, 851-52 (5th Cir. 2015) (analyzing how comparable yardsticks must be), or to compare profit margins within the same company in differently situated markets. *See* Conwood Co., 290 F.3d at 794 (finding that yardstick approach was appropriately employed by expert to compare the defendant's profits across two different tobacco markets). Expert opinions based on the yardstick approach may be admissible when the approach is properly applied. *See, e.g., id.* Successful applications of this approach usually employ a regression analysis. A regression analysis is a basic statistical tool "useful in quantifying the relationship between a dependent variable [e.g., the price of Summer RFG] and independent variables [e.g., demand for gasoline and population size]." *In* Re Se. Milk, 739 F.3d at 285 (citing Wiesfeld v. Sun Chemical Corp., 84 F. App'x 257, 261 n.3 (3d. Cir. 2004)).

To be meaningful, the yardsticks to be compared must be the same length. *See* Eleven Line, Inc. v. N. Texas State Soccer Ass'n, Inc., 213 F.3d 198, 208 (5th Cir. 2000) (finding that expert testimony could not support a jury verdict where the expert's yardsticks were not nearly identical and he offered no evidence of the comparison markets' geographic locations, sizes, markets served, or costs of operation). **[*893]** The Seventh Circuit found that expert testimony was inadmissible for failing to control **[**23]** for the length of yardsticks in Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 152 F.3d 588 (7th Cir. 1998). There, Judge Posner deemed "worthless" expert reports that compared damages between the antitrust defendant's clinics and other providers in the area but failed to control for any factors except the mix of drugs provided. Id. at 593. Without any sort of regression analysis to "correct for salient factors, not attributable to the defendant's misconduct, that may have caused the harm of which the plaintiff is complaining," Judge Posner concluded, expert reports "do not provide a rational basis for a judgment." *Id.* The expert opinion at issue in *Marshfield Clinic* was therefore excluded because the "evidence [was] not probative because it omitted the major variables," rendering it a "'regression[] so incomplete as to be inadmissible as irrelevant.'" Bickerstaff v. Vassar College, 196 F.3d 435, 449 (2d Cir. 1999) (quoting Bazemore v. Friday, 478 U.S. 385, 400 n.10, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986)).

By contrast, the Sixth Circuit found in *Conwood Co.* that the plaintiff's expert testimony that relied upon a yardstick approach was admissible. 290 F.3d 768. There, the expert employed "regression analyses, a yardstick test and a before-and-after test" to establish antitrust damages. Id. at 793. The court analyzed the expert's report and found it sufficiently reliable because the expert "ruled out the possibility that the statistical **[**24]** relationship was caused by factors other than [the defendant's] conduct" and "examined the possible explanations that [the defendant's] own expert suggested" by using regression analyses. *Id.*

Here, Sattinger merely compared LNK to Baltimore and St. Louis, subtracted the discounts given by Marathon to its retailers, and then concluded that the difference in price must be attributable to anticompetitive conduct by Defendants. (D.N. 203-3, PageID # 12620-21) This application of the yardstick approach is fundamentally flawed for three reasons. First, Sattinger testified that "there could be other factors," besides Defendants' conduct, that "could add [to] the difference or reduce the difference" in price of RFG between the comparison cities. (D.N. 191-4, PageID # 7947-48) Those factors included population size, number of automobile drivers, and geographic proximity to different sources of supply. (D.N. 191-4, PageID # 7917-19, 7924). Sattinger conceded that he did not control for those factors among the cities, although he acknowledged the existence of fundamental differences in both supply and demand and population size in his report. (D.N. 203-3, PageID # 12620; D.N. 191-4, PageID # 7948) **[**25]**

In *Conwood*, the Sixth Circuit found "particularly relevant the undisputed evidence" that the plaintiff's expert controlled for the other factors that could have explained the price differences using regression analyses. 290 F.3d at 793. Here, Sattinger failed to account for even the most salient differences among the comparison cities:

> Q: [D]id you make any comparisons of the population between Baltimore and the populations in the Kentucky markets? . . .
>
> A I do not see a comparison population in the report. It's possible that others have looked at the populations. But that is not included in the report. . . .
>
> Q: Did you make any comparisons about the demand characteristics of Summer RFG in Baltimore Versus the Kentucky areas?
>
> A: No. . . .

[*894] Q: Did you make any analysis of the - anything relating to traffic of vehicles using gasoline in Baltimore vs. Kentucky?

A: No, I did not.

(D.N. 191-4, PageID # 7917-19; 7924)

To be reliable and thus admissible, Sattinger's application of the yardstick approach would need to follow established methodology and control for the major differences among the cities that could impact the market price for RFG. *See* *The Iams Co. v. Nutro Prod., Inc., No. 3:00-CV-566, 2004 U.S. Dist. LEXIS 31141, 2004 WL 5496244, at *6 (S.D. Ohio June 30, 2004)*, *on reconsideration* ***[**26]*** *sub nom.* *Iams Co. v. Nutro Prod., Inc., No. 3:00-CV-566, 2004 U.S. Dist. LEXIS 30334, 2004 WL 5831566 (S.D. Ohio Aug. 23, 2004)* (holding that it is appropriate to "declar[e] regression analysis inadmissible when it omits one or more major variables" (quoting Paul C. Giannelli and Edward J. Imwinkelried, Scientific Evidence 3rd, 719-20 (1999) ("The courts have been increasingly receptive to regression analysis. . . . However, the model's omission of any obviously influential variable or the absence of a major assumption of regression analysis often results in the inadmissibility of the evidence."))). But as in *Marshfield Clinic*, Sattinger's analysis is rendered "worthless" because it failed to control for even the most fundamental differences among LNK, Baltimore, and St. Louis. *152 F.3d at 593*. Sattinger's analysis is ultimately "evidence [that] is not probative because it omitted the major variables," rendering it a "'regression[] so incomplete as to be inadmissible as irrelevant.'" *Bickerstaff, 196 F.3d at 449* (quoting *Bazemore, 478 U.S. at 400 n.10*).

Second, Sattinger's analysis failed to account for whether the comparison markets utilize exchange agreements. An exchange agreement "is a contract between two [gasoline] refiners by which the two companies trade gasoline." (D.N. 88, PageID # 1094) As characterized by Marathon LP, the exchange agreements **[**27]** "involve a refiner or supplier agreeing to provide gasoline to a competing refiner for sale in a particular area where that competitor has insufficient supply." (D.N. 28-1, PageID # 219) The use of exchange agreements is a particularly important variable here because the Commonwealth has identified Defendants' use of exchange agreements as one of the three main forms of anticompetitive conduct that allegedly harmed consumers. (D.N. 88, PageID # 1097) If wholesale buyers and sellers in the Baltimore and St. Louis markets also entered exchange agreements, then Sattinger's conclusion that the differences in price among the markets must be attributable to anticompetitive conduct is significantly undermined. And Sattinger admitted at his deposition that it was possible that Baltimore and St. Louis market participants use exchange agreements because "[i]t is widespread practice in the oil industry." (D.N. 191-4, PageID # 7921-22)

Finally, Sattinger failed to disaggregate the portion of his ultimate damages figure that could be attributable to any of the Defendants' *procompetitive* conduct. To prevail on its antitrust claim, the Commonwealth must be able to show that Defendants' illegal conduct **[**28]** is the source of the alleged injury to consumers. *See, e.g.,* *U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1378 (2d Cir. 1988)* (holding that antitrust plaintiff must link injury to defendant's anticompetitive conduct with economic analysis). As noted by the Commonwealth, an antitrust expert is not required to attribute exact sums of damages to particular actions by the defendant. *See* *MCI Commc'n Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1161 (7th Cir. 1983)* (applying Supreme Court's determination that antitrust plaintiff need **[*895]** not disaggregate "damages among the various unlawful acts of the defendant"). But an antitrust plaintiff must distinguish between "damages attributable to lawful competition and [those] attributable to the unlawful scheme." *Farley Transp. Co. v. Santa Fe Trail Transp. Co., 786 F.2d 1342, 1352 (9th Cir. 1985)*; *U.S. Football League, 842 F.2d at 1378* (holding that "the damages awarded must be traced to some degree to unlawful acts" (citing *MCI Commc'n, 708 F.2d at 1161*)). Sattinger's report fails because he did not specify what portion of the calculated damages figure stems from Defendants' legal conduct and what portion, if any, is caused by any of their allegedly illegal forms of conduct. Without establishing that illegal conduct by Defendants caused the claimed injuries, the Commonwealth cannot show proof of "injury of the type antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*.

In sum, the Court cannot find that the methodology Sattinger employed to arrive **[**29]** at his damages calculations was reliable or based upon sound scientific principles. He admitted to failing to control for rudimentary differences among cities, but then claimed to calculate damages by comparing LNK to Baltimore and St. Louis. The Court acknowledges that an expert is not required to control for every variable. *See* *Jahn v. Equine Servs., PSC, 233 F.3d 382, 390 (6th Cir. 2000)* ("In order to be admissible on the issue of causation, an expert's testimony need not eliminate all other possible causes of the injury."). Moreover, although Sattinger's rebuttal opinion attempted to control for the most salient differences between the comparison cities (D.N. 191-11, PageID # 8113), it still neglected to address or recalculate the original damages figure. Sattinger's failure to calculate a reliable damages figure renders his opinion inadmissible. *See* *In re Wireless Tel. Servs. Antitrust Litig., 385 F. Supp. 2d 403, 427 (S.D.N.Y. 2005)* ("Where an expert conducts a regression analysis and fails to incorporate major independent variables, such analysis may be excluded as irrelevant."). Further, Sattinger assumed that the differences in price were attributable to anticompetitive conduct and did not eliminate any procompetitive explanation for his ultimate damages figure. This shortcoming also renders his opinion inadmissible, **[**30]** because he cannot show that the Commonwealth's claimed injuries are "injur[ies] of the type the antitrust laws were intended to prevent and that flow[] from that which makes defendants' acts unlawful." *Brunswick Corp., 429 U.S. at 489*. Because Sattinger neither employed a scientifically reliable method to arrive at his proposed relevant market nor established an antitrust injury through reliable means, Defendants' motion to exclude Sattinger's testimony will be granted. *Daubert, 509 U.S. at 597* (holding that district court may only admit expert testimony that "both rests on a reliable foundation and is relevant to the task at hand").

IV.

The Court will next consider Defendants' motion for summary judgment on the merits of the Commonwealth's antitrust claims. (D.N. 195) Summary judgment is required when the moving party shows, using evidence in the record, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *see* 56(c)(1). For purposes of summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party. *Loyd v. Saint Joseph Mercy Oakland, 766 F.3d 580, 588* ***[*896]*** *(6th Cir. 2014)* (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*. The Court "need consider only the cited materials," however. *Fed. R. Civ. P. 56(c)(3)*; *see* *Shreve v. Franklin Cty., 743 F.3d 126, 136 (6th Cir. 2014)*. If the nonmoving party "fails to properly support an assertion **[**31]** of fact or fails to properly address another party's assertion of fact as required by *Rule 56(c)*," the fact may be treated as undisputed. *Fed. R. Civ. P. 56(e)(2)-(3)*. To survive a motion for summary judgment, the nonmoving party must establish a genuine issue of material fact with respect to each element of each of its claims. *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

Summary judgment is often unsuited for fact-intensive antitrust cases, but the standard for summary judgment remains the same. *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 481 (3d Cir. 1992)*. Both the Sixth Circuit and the Supreme Court have found that summary judgment is appropriate where a party fails to establish the necessary components of an antitrust claim. *See* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *Ky. Speedway, 588 F.3d at 915*. Specifically, "[a]ntitrust plaintiffs cannot survive motions for summary judgment without adequately alleging an antitrust injury." *In re Se. Milk, 739 F.3d at 284*. As stated above, an antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp., 429 U.S. at 489*. Summary judgment is also appropriate when a court excludes the only expert testimony proposing a relevant market, since antitrust claims make "no economic sense" in the absence of "proof of relevant markets." *Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc., No. CIV.A.05-138(WOB), 2008 U.S. Dist. LEXIS 1076, 2008 WL 113987, at *2 (E.D. Ky. Jan. 7, 2008)* **[**32]** , *aff'd*, *588 F.3d 908*.

As detailed above, Sattinger's report fails to establish a relevant market, calculates damages based on a flawed comparison, and makes no attempt to control for the impact of Defendants' procompetitive behavior as opposed to its alleged anticompetitive practices. Sattinger is the Commonwealth's only expert witness who has submitted a report. And the only other evidence of market definition or dominance offered by the Commonwealth is "lay testimony and internal [Marathon] documents," which are insufficient to establish a reliable geographic market. *Ky. Speedway, 588 F.3d at 919*. Without a properly defined relevant market, the Commonwealth cannot establish that

Marathon Petroleum Corporation and Marathon LP dominated the market for wholesale RFG; indeed, "[t]he purpose of defining a geographic market is to reveal whether, or to what extent, market power exists." *In re Se. Milk, 739 F.3d at 262, 277*. Without an adequately defined relevant market, the Commonwealth cannot demonstrate either that Defendants unreasonably restrained trade in the market or that they exercised monopoly power in the market. Therefore, the Commonwealth's Sherman Act §§ 1 and 2 claims must fail. *See Verizon Commc'ns, Inc. v. Law Offices of Curtis Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (holding that a claim under § 2 of the Sherman Act requires "the possession **[**33]** of monopoly power *in the relevant market*" (emphasis added)); *Worldwide Basketball & Sports Tours, 388 F.3d at 959* (listing requisite elements of § 1 Sherman Act claim, including unreasonable restraint of trade "in the relevant market"); *see also NHL Players' Ass'n, **[*897]** 325 F.3d at 719-20* ("Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim.").

Further, without evidence of an antitrust injury, the Commonwealth cannot establish that Defendants' alleged wrongdoing harmed consumers. Sattinger admitted that it was possible that "other factors" besides Marathon's misconduct contributed to the differences in prices among St. Louis, Baltimore, and LNK. (D.N. 191-4, PageID # 7947-48) The Commonwealth has not presented any other evidence of a link between Marathon Petroleum Corporation, Marathon LP, or Speedway's allegedly anticompetitive conduct and antitrust injury. It is the Commonwealth's burden to prove antitrust injury, *Worldwide Basketball & Sport Tours, 388 F.3d at 962*, and without Sattinger's testimony, no evidence remains to raise a material issue of fact as to causation. Summary judgment is therefore appropriate as to the Commonwealth's federal antitrust claims against all the defendants because there is no evidence of a "causal connection" between Defendants' conduct and the allegedly **[**34]** anticompetitive prices of Summer RFG in Louisville and Northern Kentucky. *See J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc., 485 F.3d 880, 891 (6th Cir. 2007)* (upholding grant of summary judgment based on failure to establish causal connection between the defendant's conduct and alleged antitrust injury); *see also Valley Prods., Inc. v. Landmark, 128 F.3d 398, 403 (6th Cir. 1997)* ("The Sixth Circuit, it is fair to say, has been reasonably aggressive in using the antitrust injury doctrine to bar recovery where the asserted injury, although linked to an alleged violation of the antitrust laws, flows directly from conduct that is not itself an antitrust violation."). And with the federal claims dismissed, the Court declines to exercise supplemental jurisdiction over the remaining state-law claims, which will be dismissed without prejudice. *Gamel v. City of Cincinnati, 625 F.3d 949, 952 (6th Cir. 2010)* ("When all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claims, or remanding them to state court if the action was removed." (quoting *Musson Theatrical, Inc. v. Fed. Exp. Corp., 89 F.3d 1244, 1254-55 (6th Cir. 1996))*); *see also 28 U.S.C. § 1367(c)(3)* (stating that a district court may decline to exercise supplemental jurisdiction if it has "dismissed all claims over which it ha[d] original jurisdiction"). Accordingly, and the Court being otherwise sufficiently advised, it is hereby

ORDERED as follows:

(1) Marathon Petroleum **[**35]** Corporation's motion for summary judgment on personal jurisdiction (D.N. 156) is **DENIED.**

(2) Defendants' motion to exclude the testimony of Dr. Sattinger (D.N. 191) is **GRANTED.**

(3) Plaintiff's motion to exclude the testimony of Dr. Shehadeh and Dr. Baye (D.N. 190) is **DENIED** as moot.

(4) Defendants' motion for summary judgment (D.N. 195) is **GRANTED** as to the Commonwealth's federal antitrust claims (Counts 1, 2, and 3).

(5) Plaintiff's remaining state-law claims are **DISMISSED** without prejudice pursuant to *28 U.S.C. § 1367(c)(3)*.
(6) A separate judgment will be entered this date.

June 1, 2020

/s/ David J. Hale

David J. Hale, Judge

United States District Court

End of Document

In re Auto. Parts Antitrust Litig.

United States District Court for the Eastern District of Michigan, Southern Division

June 2, 2020, Decided; June 2, 2020, Filed

MASTER FILE NO. 12-md-02311; 13-00803

Reporter
2020 U.S. Dist. LEXIS 260260 *

IN RE: AUTOMOTIVE PARTS ANTITRUST LITIGATION;In Re: Anti-Vibrational Rubber Parts. THIS DOCUMENT RELATES TO: End-Payor Actions

Prior History: *Bott v. Delphi Auto. LLP (In re Auto. Wire Harness Sys. Antitrust Litig.), 844 F. Supp. 2d 1367, 2012 U.S. Dist. LEXIS 16405 (J.P.M.L., Feb. 7, 2012)*

Core Terms

purchasers, settlement agreement, subsidiary, indirect, Rubber, settlements, class representative, named plaintiff, final judgment, entities, replacement part, allegations, antitrust, damages, courts

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For Automotive Parts Antitrust Litigation, other, 2:12-cv-100 - Wire Harness, other, 2:12-cv-200 - Instrument Panel, Clusters, other, 2:12-cv-300 - Fuel Senders, other, 2:12-cv-400 - Heater Control, Panels, other, 2:12-cv-500 - Bearings, other, 2:12-cv-600 - Occupant Safety, Systems, other, 2:13-cv-700 - Alternators, other, 2:13-cv-800 - Anti-Vibrational, Rubber Parts, other, 2:13-cv-900 - Windshield, Wipers, other, 2:13-cv-1000 - Radiators, other, 2:13-cv-1100 - Starters, other, 2:13-cv-1200 - Automotive, Lamps, other, 2:13-cv-1300 - Switches, other, 2:13-cv-

1400 - Ignition Coils, other, 2:13-cv-1500 - Motor, Generator, other, 2:13-cv-1600 - Steering Angle, Sensors, other, 2:13-cv-1700 - HID Ballasts, other, 2:13-cv-1800 - Inverters, other, 2:13-cv-1900 - Electronic, **[*7]** Powered Steering Assemblies, other, 2:13-cv-2000 - Air Flow, Meters, other, 2:13-cv-2100 - Fan Motors, other, 2:13-cv-2200 - Fuel Injection, Systems, other, 2:13-cv-2300 - Power Window, Motors, other, 2:13-cv-2400 - Automatic, Transmission Fluid Warmers, other, 2:13-cv-2500 - Valve Timing, Control Devices, other, 2:13-cv-2600 - Electronic, Throttle Bodies, other, 2:13-cv-2700 - Air, Conditioning Systems, other, 2:13-cv-2800 - Windshield, Washer Systems, other, 2:14-cv-2900 Automotive, Constant Velocity Joint Boot Products, In Re (2:12-md-02311-SFC-RSW): Bernard Persky, William Reiss, Robins Kaplan LLP, New York, NY; David H. Fink, Fink + Associates Law, Bloomfield Hills, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI; Gregory P. Hansel, Preti Flaherty Beliveau & Pachios, LLP, Portland, ME; Sheldon L. Miller, Farmington Hills, MI; William E. Hoese, Kohn, Swift, Philadelphia, PA.

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For Landers Auto Group Number One, Inc, 12-10676, 12-11156, 12-12614 & 12-12795, Doing business as Landers Toyota, Plaintiff (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Joel Davidow, Cuneo Gilbert & Laduca, Washington, DC; John C. Kakinuki, Kakinuki Law Office, PC, San Rafael, CA; Jonathan W. Cuneo, Cuneo Gilbert & Laduca, LLP, Washington, DC; Kathryn Eisenstein, Mantese Honigman, PC, Troy, MI;

For Landers Auto Group Number One, Inc, 12-10676, 12-11156, 12-12614 & 12-12795 Doing business as Landers Toyota, Plaintiff (2:12-md-02311-SFC-RSW): **[*11]** Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Phillip J. Duncan, Richard L. Quintus, Duncan Firm, Little Rock, AR; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; Thomas P. Thrash, Thrash Law Firm, P.A., Little Rock, AR; Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For George Nicoud, 12-10677, Plaintiff (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Joseph M. Bartonm, Slancy Binkow & Goldbergm, San Francisco, CA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; Susan G. Kupfer, Glancy Binkow & Goldberg LLP, San Francisco, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Jeffrey Budner, 12-10678, Dorine Kramer, 12-10678, Nicholas Mitchell, 12-10678, Lillian Fireside, 12-10678, Kelly Hopkins, 12-10678, **[*12]** Timothy Griffin, 12-10678, John Hollingsworth, 12-10678, Plaintiffs (2:12-md-02311-SFC-RSW): E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; Sylvie K. Kern, Law Offices of Sylvie Kulkin Kern, San Francisco, CA; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Tony Maravilla, 12-10679, Plaintiff (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Reginald Von Terrell, Richmond, CA; Reginald Von Terrell, Oakland, CA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Gretha Wilkerson, 12-10679, **[*13]** Plaintiff (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Reginald Von Terrell, Richmond, CA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Tye Smith, 12-10680, Plaintiff (2:12-md-02311-SFC-RSW): Christopher Micheletti, Craig Corbitt, Heather T. Rankie, Judith A. Zahid, Zelle Hofmann Voelbel & Mason, San Francisco, CA; Demetrius X. Lambrinos, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Francis O. Scarpulla, Law Offices of Francis O. Scarpulla, San Francisco, CA; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; E. Powell Miller, The Miller **[*14]** Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Gary Brock, 12-10682 & 12-10683, Plaintiff (2:12-md-02311-SFC-RSW): Daniel E. Becnel , Jr., Becnel Law Firm, New Orleans, LA; Dianne M. Nast, Erin C. Burns, NastLaw LLC, Philadelphia, PA; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Kevin P. Klibert, Matthew B. Moreland, Reserve, LA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For William J Byrne, Jr, 12-10682 & 12-10685, Plaintiff (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; John R. Malkinson, Malkinson & Halpern, P.C., Chicago, IL; Leonard A. Davis, Herman Herman Katz & Cotlar, LLP, New Orleans, LA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman **[*15]** Godfrey, L.L.P., Los Angeles, CA; Russ M. Herman, Herman Herman Katz & Cotlar, New Orleans, LA; Stephen J. Herman, Herman, Herman, Katz & Cotlar, LLP, New Orleans, LA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Don T Lewis, 12-10682 & 12-10685, Plaintiff (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; John R. Malkinson, Malkinson & Halpern, P.C., Chicago, IL; Leonard A. Davis, Herman Herman Katz & Cotlar, LLP, New Orleans, LA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Russ M. Herman, Herman Herman Katz & Cotlar, New Orleans, LA; Stephen J. Herman, Herman, Herman, Katz & Cotlar, LLP, New Orleans, LA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Superstore Automotive, Inc, 12-10687, 12-11156 & 12-11161, Plaintiff (2:12-md-02311-SFC-RSW): **[*16]** Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI; Gregory J Johnson, Apple Valley, MN; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Joel Davidow, Cuneo Gilbert & Laduca, Washington, DC; John C. Kakinuki, Kakinuki Law Office, PC, San Rafael, CA; Jonathan W. Cuneo, Cuneo Gilbert & Laduca, LLP, Washington, DC; Kathryn Eisenstein, Mantese Honigman, PC, Troy, MI; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Shawn M. Raiter, Larson King, LLP, St Paul, MN; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For Hammett Motor Company, Inc, 12-10688, 12-11156 & 12-11161, 12-12795, Plaintiff (2:12-md-02311-SFC-RSW): Brian K. Herrington, Barrett Law Group, P.A., Lexington, MS; David M. McMullan, Don Barrett, P.A., Lexington, MS; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI; Jeffrey B Gittleman, Barrack, Rodos & Bacine, **[*17]** Philadelphia, PA; Joel Davidow, Cuneo Gilbert & Laduca, Washington, DC; John W BARRETT, Barrett Law Group, P.A., LEXINGTON, MS; John C. Kakinuki, Kakinuki Law Office, PC, San Rafael, CA; Jonathan W. Cuneo, Cuneo Gilbert & Laduca, LLP, Washington, DC; Kathryn Eisenstein, Mantese Honigman, PC, Troy, MI; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Sarah S. Starns, Don Barrett, P.A., Lexington, MS; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For Zahira Crespo, 12-10689 & 12-12573, Plaintiff (2:12-md-02311-SFC-RSW): Daniel E. Becnel , Jr., Becnel Law Firm, New Orleans, LA; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; John F. Nevares, John Nevares and Associates PSC, San Juan, PR; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; E. Powell Miller, **[*18]** The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Stacey R Nickell, 12-10690, Plaintiff (2:12-md-02311-SFC-RSW): Aaron E. Robinson, Bailey & Glasser, Charleston, WV; Alyson L. Oliver, Oliver Law Group PC, Troy, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Eric B. Snyder, Bailey & Glasser, Charleston, WV; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Robert Rice, 12-10690, Janne Rice, 12-10690, Plaintiffs (2:12-md-02311-SFC-RSW): Aaron E. Robinson, Bailey & Glasser, Charleston, WV; Alyson L. Oliver, Oliver Law Group PC, Troy, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Eric B. Snyder, Bailey & Glasser, Charleston, WV; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn **[*19]** Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Teresa Ballek, 11-14555, Plaintiff (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Patrick E. Cafferty, Cafferty Clobes Meriwether & Sprengel LLP, Chicago, IL; S. Thomas Wienner, The Miller Law Firm, P.C., Rochester, MI; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Jimmy Junkins, 11-14556, Plaintiff (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; S. Thomas Wienner, **[*20]** The Miller Law Firm, P.C., Rochester, MI; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Meredith Heller, 11-14593, Plaintiff: Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Paul F. Novak, Weitz & Luxenberg, P.C., Fisher Building, Detroit, MI; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Meetesh Shah, 11-14739, 12-10476, 12-11369, 12-12582 & 12-12680, Plaintiff: Adam J. Zapala, Cotchett, Pitre & McCarthy, Burlingame, CA; Alyson L. Oliver, Oliver Law Group PC, Troy, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Elizabeth A. Fegan, Fegan Scott LLC, Chicago, IL United Sta; Frank C. Damrell, Cotchett, Pitre & McCarthy LLP, Sacramento, CA; Gene Kim, Cotcheett, Pitre & McCarthy, LLP, Burlingame, CA; **[*21]** Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Joseph W. Cotchett, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Sheldon L. Miller, Farmington Hills, MI; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; Steven N. Williams, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Thomas E Ahlering, Seyfarth Shaw LLP, Chicago, IL; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Ellis Winton McInnis, 11-14811, Plaintiff: Alyson L. Oliver, Oliver Law Group PC, Troy, MI; David E. Plunkett, Williams, Williams, Birmingham, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Gary Arthur Herr, 11-14836, Plaintiff: E. Powell Miller, The Miller Law **[*22]** Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Patrick E. Cafferty, Cafferty Clobes Meriwether & Sprengel LLP, Chicago, IL; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Michael Tracy, 11-14838, Plaintiff: Alyson L. Oliver, Oliver Law Group PC, Troy, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Page Poerschke, Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A, Pensacola, FL; Sheldon L. Miller, Farmington Hills, MI; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Ifeoma Adams, 11-14989 & 12-12272, Plaintiff: Alyson L. Oliver, **[*23]** Oliver Law Group PC, Troy, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Patrick E. Cafferty, Cafferty Clobes Meriwether & Sprengel LLP, Chicago, IL; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Jennifer Chase, 11-15041, Plaintiff: Alyson L. Oliver, Oliver Law Group PC, Troy, MI; Anthony L. DeLuca, Anthony L. DeLuca, Grosse Pointe Park, MI; Christopher Micheletti, Zelle Hofmann Voelbel & Mason, San Francisco, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; Gerard V. Mantese, Mantese Honigman, P.C., Troy, **[*24]** MI.

For Curtis Gunnerson, 11-15041, Kelly Klosterman, 11-15041, Darrel Senior, 11-15041, Plaintiffs: Alyson L. Oliver, Oliver Law Group PC, Troy, MI; Anthony L. DeLuca, Anthony L. DeLuca, Grosse Pointe Park, MI; Christopher Micheletti, Zelle Hofmann Voelbel & Mason, San Francisco, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Martinez Manufacturing, Inc., 11-15186, Plaintiff: Darryl Bressack, Fink Bressack, Bloomfield Hills, MI; David H. Fink, Fink + Associates Law, Bloomfield Hills, MI; Douglas A. Abrahams, Kohn, Swift and Graf, P.C., Philadelphia, PA.

For For Martinez Manufacturing, Inc., Mexican Industries In Michigan, Incorporated, 11-15553, Plaintiffs (2:12-md-02311-SFC-RSW): Darryl Bressack, Fink Bressack, Bloomfield Hills, MI; David H. Fink, Fink + Associates Law, Bloomfield Hills, MI; **[*25]** Douglas A. Abrahams, Kohn, Swift and Graf, P.C., Philadelphia, PA; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Gregory P. Hansel, Preti Flaherty Beliveau & Pachios, LLP, Portland, ME; Irwin B. Levin, Cohen & Malad LLP, Indianapolis, IN; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Jonathan M Jagher, Freed Kanner London & Millen LLC, Conshohocken, PA; Joseph C. Kohn, Kohn, Swift, Philadelphia, PA; Linda P. Nussbaum, Nussbaum Law Group, P.C., New York, NY; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Michael E. Moskovitz, Freed Kanner London & Millen LLC, Bannockburn, IL; Michael S. Smith, Preti Plaherty Beliveau & Pachios LLP, One City Center, Portland, ME; Randall B. Weill, Preti Flaherty Beliveau & Pachios, One City Center, Portland, ME; Scott D. Gilchrist, Cohen & Malad LLP, Indianapolis, IN; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; William E. Hoese, Kohn, Swift, Philadelphia, PA; William H. London, Freed Kanner London & Millen LLC, Bannockburn, IL; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese **[*26]** Honigman, P.C., Troy, MI.

For Sonny Beck, 11-15445, Curtis P. Boudreaux, 11-15445, Robert Beeson, 11-15445, Tommy N. Wilson, 11-15445, Plaintiffs (2:12-md-02311-SFC-RSW): Bernard Persky, Robins Kaplan LLP, New York, NY; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; William Reiss, Robins Kaplan LLP, New York, NY; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Aaron Brandstein, 11-15468, Bobbie Schwartz, 11-15468, Plaintiffs (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Patrick E. Cafferty, Cafferty Clobes Meriwether & Sprengel LLP, Chicago, IL; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, **[*27]** CA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Tenisha Burgos, 11-15468, Jason Grala, 11-15468, Plaintiffs (2:12-md-02311-SFC-RSW): Alyson L. Oliver, Oliver Law Group PC, Troy, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Patrick E. Cafferty, Cafferty Clobes Meriwether & Sprengel LLP, Chicago, IL; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For T.M. MORRIS MANUFACTURING COMPANY, INC., 12-10130, Plaintiff (2:12-md-02311-SFC-RSW): Darryl Bressack, Fink Bressack, Bloomfield Hills, MI; David H. Fink, Fink + Associates Law, Bloomfield Hills, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Gregory P. Hansel, Preti Flaherty Beliveau & Pachios, LLP, Portland, ME; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett **[*28]** Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; Michael S. Smith, Preti Plaherty Beliveau & Pachios LLP, Portland, ME; Randall B. Weill, Preti Flaherty Beliveau & Pachios, Portland, ME; Solomon B. Cera, Cera LLP, San Francisco, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Cesar-Scott, Inc., 12-10177, Plaintiff (2:12-md-02311-SFC-RSW): Anna M. Horning Nygren, Julie A. Strother, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; David H. Fink, Fink + Associates Law, Bloomfield Hills, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Irwin B. Levin, Scott D. Gilchrist, Cohen & Malad LLP, Indianapolis, IN; Jason J. Thompson, Sommers Schwartz, P.C., Southfield, MI; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Jeffrey L. Spector, Spector Roseman & Kodroff, P.C., Philadelphia, PA; Jonathan M Jagher, Freed Kanner London & Millen LLC, Conshohocken, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; **[*29]** Michael E. Moskovitz, Steven A. Kanner, William H. London, Freed Kanner London & Millen LLC, Bannockburn, IL; Michael S. Smith, Preti Plaherty Beliveau & Pachios LLP, Portland, ME; W. Joseph Bruckner, Lockridge Grindal Nauen, Minneapolis, MN; William Caldes, SPECTOR ROSEMAN & KODROFF, P.C., Philadelphia, PA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Paesano Connecting Systems, Inc., 12-10201, Plaintiff (2:12-md-02311-SFC-RSW): Anna M. Horning Nygren, Julie A. Strother, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; David H. Fink, Fink + Associates Law, Bloomfield Hills, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Irwin B. Levin, Scott D. Gilchrist, Cohen & Malad LLP, Indianapolis, IN; Jason J. Thompson, Sommers Schwartz, P.C., Southfield, MI; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Jeffrey L. Spector, Spector Roseman & Kodroff, P.C., Philadelphia, PA; Jonathan M Jagher, Freed Kanner London & Millen LLC, Conshohocken, PA; Joseph R Saveri, Joseph Saveri Law Firm, Inc., San Francisco, CA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, **[*30]** CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; Michael E. Moskovitz, Steven A. Kanner, William H. London, Freed Kanner London & Millen LLC, Bannockburn, IL; Michael S. Smith, Preti Plaherty Beliveau & Pachios LLP, Portland, ME; W. Joseph Bruckner, Lockridge Grindal Nauen, Minneapolis, MN; William Caldes, SPECTOR ROSEMAN & KODROFF, P.C., Philadelphia, PA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Darcy Sherman, 12-10260 & 12-12811, Plaintiff (2:12-md-02311-SFC-RSW): Alyson L. Oliver, Oliver Law Group PC, Troy, MI; Daniel E. Gustafson, Jason S Kilene, Gustafson Gluek PLLC, Minneapolis, MN; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For RD Automotive, Inc., 12-10262, Plaintiff (2:12-md-02311-SFC-RSW): Alyson L. Oliver, Oliver Law Group PC, **[*31]** Troy, MI; Daniel E. Gustafson, Jason S Kilene, Gustafson Gluek PLLC, Minneapolis, MN; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For CRAFT-CO ENTERPRISES, INC., 12-10336, Plaintiff (2:12-md-02311-SFC-RSW): Darryl Bressack, Fink Bressack, Bloomfield Hills, MI; David H. Fink, Fink + Associates Law, Bloomfield Hills, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Gregory P. Hansel, Preti Flaherty Beliveau & Pachios, LLP, Portland, ME; Irwin B. Levin, Scott D. Gilchrist, Cohen & Malad LLP, Indianapolis, IN; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Jonathan M Jagher, Freed Kanner London & Millen LLC, Conshohocken, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; Michael E. Moskovitz, **[*32]** William H. London, Freed Kanner London & Millen LLC, Bannockburn, IL; Michael S. Smith, Preti Plaherty Beliveau & Pachios LLP, Portland, ME; Randall B. Weill, Preti Flaherty Beliveau & Pachios, Portland, ME; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Terry Gordon, 12-11014, Janet Morgan, 12-11014, Jeffrey Grant Brown, 12-11014, Plaintiffs (2:12-md-02311-SFC-RSW): Anthony D. Shapiro, Hagens Berman, Seattle, WA; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeff D. Friedman, Hagens Bernam Sobol Shapiro, Berkely, CA; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; Shana E. Scarlett, Hagens Berman Sobol Shapiro, Berkeley, CA; Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Melissa Barron, 12-11021, 12-13257, 12-13261, 12-13263, 12-13264 & 12-13265, Plaintiff (2:12-md-02311-SFC-RSW): Adam C. Belsky, Gross **[*33]** Belsky Alonso, San Francisco, CA; Alyson L. Oliver, Oliver Law Group PC, Troy, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; Sarah Crowley, Gross Belsky Alonso, San Francisco, CA; Sheldon L. Miller, Farmington Hills, MI; Terry Gross, Gross & Belsky P.C., San Francisco, CA; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Craig Vanhoutte, 12-11054, Plaintiff (2:12-md-02311-SFC-RSW): Brian R. Strange, Strange and Butler, Los Angeles, CA; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Tuan Nguyen, 12-10951, Plaintiff (2:12-md-02311-SFC-RSW): **[*34]** Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; Mark J. Schirmer, Straus & Boies, Fairfax, VA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Roger D. Olson, 12-10929, Plaintiff (2:12-md-02311-SFC-RSW): Alyson L. Oliver, Oliver Law Group PC, Troy, MI; Anthony L. DeLuca, Anthony L. DeLuca, Grosse Pointe Park, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; Terry Rose Saunders, The Saunders Law Firm, Chicago, IL; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Susan B. Olson, 12-10929, Phillip G. Young, 12-10929, Plaintiffs (2:12-md-02311-SFC-RSW): Alyson L. Oliver, Oliver Law Group **[*35]** PC, Troy, MI; Anthony L. DeLuca, Anthony L. DeLuca, Grosse Pointe Park, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; Terry Rose Saunders, The Saunders Law Firm, Chicago, IL; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Kathleen Tawney, 12-10951, Paul Gustafson, 12-10951, Plaintiffs (2:12-md-02311-SFC-RSW): Alyson L. Oliver, Oliver Law Group PC, Troy, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; Mark J. Schirmer, Straus & Boies, Fairfax, VA; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Moses Choi, 12-10951, Steven Battaglini, 12-10951, Plaintiffs (2:12-md-02311-SFC-RSW): **[*36]** Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; Mark J. Schirmer, Straus & Boies, Fairfax, VA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Michael Wick, 12-10966, Alena Farrell, 12-10966, Plaintiffs (2:12-md-02311-SFC-RSW): Alyson L. Oliver, Oliver Law Group PC, Troy, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; Paul F. Novak, Weitz & Luxenberg, P.C., Detroit, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Kim Shannon, 12-10968, Plaintiff (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos **[*37]** & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; Paul F. Novak, Weitz & Luxenberg, P.C., Detroit, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Peter Brook, 12-10968, Plaintiff (2:12-md-02311-SFC-RSW): E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; Paul F. Novak, Weitz & Luxenberg, P.C., Detroit, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For South Star Corporation, Plaintiff: Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Irwin B. Levin, Scott D. Gilchrist, Cohen & Malad LLP, Indianapolis, IN; Jason J. Thompson, Sommers Schwartz, P.C., Southfield, MI; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Jonathan M Jagher, Freed Kanner London & **[*38]** Millen LLC, Conshohocken, PA; Lisa Saveri, Richard A. Saveri, Saveri & Saveri, Inc., San Francisco, CA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Michael E. Moskovitz, Susman Godfrey, L.L.P., Los Angeles, CA; Michael S. Smith, Preti Plaherty Beliveau & Pachios LLP, Portland, ME; Steven G. Sklaver, William H. London, Susman Godfrey L.L.P., Los Angeles, CA; David H. Fink, Fink + Associates Law, Bloomfield Hills, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Cindy Prince, Plaintiff: Alyson L. Oliver, Oliver Law Group PC, Troy, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Hassan A. Zavareei, Tycko & Zavareei LLP, Washington, DC; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Scott Lamson, Plaintiff: Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, **[*39]** AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Joseph Marid Patane, Joseph M Patane Assoc, San Francisco, CA; Lauren Clare Russell, Trump, Allioto, San Francisco, CA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; Mario Nunzio Alioto, Trump, Alioto, San Francisco, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Capitol Dealerships, Inc., Plaintiff: Doing business as, Capitol Toyota, Doing business as, Todd Archer Hyundai; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos &

Bacine, Philadelphia, PA; Joel Davidow, Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; John C. Kakinuki, Kakinuki Law Office, PC, San Rafael, CA; Jonathan W. Cuneo, Cuneo Gilbert & Laduca, LLP, Washington, DC; Kathryn Eisenstein, Gerard V. Mantese, Mantese Honigman, PC, Troy, MI; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; E. Powell Miller, The **[*40]** Miller Law Firm, Rochester, MI.

For Table Rock Automotive, Inc, Landers McLarty Fayetteville TN, LLC, Ramey Motors, Inc., Lee's Summit Chrysler Jeep Dodge, Plaintiffs: Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Joel Davidow, Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; John C. Kakinuki, Kakinuki Law Office, PC, San Rafael, CA; Jonathan W. Cuneo, Cuneo Gilbert & Laduca, LLP, Washington, DC; Kathryn Eisenstein, Gerard V. Mantese, Mantese Honigman, PC, Troy, MI; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For Central Salt Lake Valley GMC Enterprises, LLC, Plaintiff: Doing business as, Salt Lake Valley Buick GMC; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Joel Davidow, Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; John C. Kakinuki, Kakinuki Law Office, PC, San Rafael, CA; Jonathan W. Cuneo, Cuneo Gilbert & Laduca, LLP, **[*41]** Washington, DC; Kathryn Eisenstein, Gerard V. Mantese, Mantese Honigman, PC, Troy, MI; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For Green Team of Clay Center Inc., Plaintiff: Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Joel Davidow, Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; John C. Kakinuki, Kakinuki Law Office, PC, San Rafael, CA; Kathryn Eisenstein, Gerard V. Mantese, Mantese Honigman, PC, Troy, MI; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For Green Team of Clay Center Inc., 12-12614 & 12-12795, Plaintiff (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Joel Davidow, Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; John C. Kakinuki, **[*42]** Kakinuki Law Office, PC, San Rafael, CA; Kathryn Eisenstein, Mantese Honigman, PC, Troy, MI; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For SLT Group II, Inc, 12-12614 & 12-12795 Doing business as Planet Nissan Subaru of Flagstaff, Plaintiff (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Joel Davidow, Victoria Romanenko, Jonathan W. Cuneo, Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; John W BARRETT, Barrett Law Group, P.A., LEXINGTON, MS United Sta; John C. Kakinuki, Kakinuki Law Office, PC, San Rafael, CA; Kathryn Eisenstein, Mantese Honigman, PC, Troy, MI; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA; E. Powell Miller, The Miller Law Firm, Rochester, **[*43]** MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Pitre, Incorporated, 12-12614 & 12-12795 Doing business as Pitre Buick GMC, Plaintiff (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Joel Davidow, Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; John C. Kakinuki, Kakinuki Law Office, PC, San Rafael, CA; Jonathan W. Cuneo, Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; Kathryn Eisenstein, Mantese Honigman, PC, Troy, MI; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Dave Heather Corporation, 12-12614 & 12-12795 Doing business as Lakeland Toyota Honda Mazda Subaru, Dave Heather Corporation, 12-12614 & 12-12795 Doing business as Lakeland Toyota Honda Mazda Subaru, Herb Hallman Chevrolet, Inc, 12-12614 & 12-12795 Doing business **[*44]** as Champion Chevrolet, Beck Motors, Inc., 12-12614 & 12-12795, Plaintiffs (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Joel Davidow, Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; John C. Kakinuki, Kakinuki Law Office, PC, San Rafael, CA; Kathryn Eisenstein, Mantese Honigman, PC, Troy, MI; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Victoria Romanenko, Jonathan W. Cuneo, Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Commonwealth Volkswagen, Inc., d/b/a Commonwealth Volkswagen, Plaintiff (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Joel Davidow, Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; John C. Kakinuki, Kakinuki Law Office, PC, San Rafael, CA; Kathryn Eisenstein, Mantese Honigman, PC, Troy, MI; Manfred P. Muecke, **[*45]** Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Victoria Romanenko, Jonathan W. Cuneo, Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Capitol Chevrolet Cadillac, Inc. 12-12614 & 12-12795, Thornhill Superstore, Inc, 12-12614 & 12-12795 Doing business as Thornhill GM Superstore, Westfield Dodge City, Inc., 12-11156, 12-11161, 12-12614 & 12-12795, Plaintiffs (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Joel Davidow, Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; John C. Kakinuki, Kakinuki Law Office, PC, San Rafael, CA; Jonathan W. Cuneo, Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; Kathryn Eisenstein, Mantese Honigman, PC, Troy, MI; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steve W. Berman, Hagens Berman **[*46]** Sobol Shapiro LLP, Seattle, WA; Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Archer-Perdue, Inc., d/b/a Archer-Perdue, Suzuki 12-12795, Patsy Lou Chevrolet, Inc., 12-12614 & 12-12795, V.I.P. Motor Cars Ltd., 12-11156, 12-11161 & 12-12614, McGrath Automotive Group, Inc., Plaintiffs (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Joel Davidow, Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; John C. Kakinuki, Kakinuki Law Office, PC, San Rafael, CA; Jonathan W. Cuneo, Cuneo Gilbert & Laduca, LLP, Washington, DC; Kathryn Eisenstein, Mantese Honigman, PC, Troy, MI; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For John Greene Chrysler Dodge Jeep, LLC, 12-12614 & 12-12795, Plaintiff (2:12-md-02311-SFC-RSW): **[*47]** David M. McMullan, Don Barrett, P.A., Lexington, MS; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Joel Davidow, Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; John C. Kakinuki, Kakinuki Law Office, PC, San Rafael, CA; Jonathan W. Cuneo, Cuneo Gilbert & Laduca, LLP, Washington, DC; Kathryn Eisenstein, Mantese Honigman, PC, Troy, MI; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Findlay Industries, Incorporated, 12-13079, Plaintiff (2:12-md-02311-SFC-RSW): Jayne Goldstein, LEAD ATTORNEY, Shepherd Finkelman Miller & Shah, Ft. Lauderdale, FL; Darryl Bressack, Fink Bressack, Bloomfield Hills, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Gregory P. Hansel, Preti Flaherty Beliveau & Pachios, LLP, Portland, ME; Irwin B. Levin, Scott D. Gilchrist, Cohen & Malad LLP, Indianapolis, IN; Jeffrey B Gittleman, **[*48]** Barrack, Rodos & Bacine, Philadelphia, PA; Jonathan M Jagher, Michael E. Moskovitz, William H. London, Freed Kanner London & Millen LLC, Conshohocken, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Michael S. Smith, Preti Plaherty Beliveau & Pachios LLP, Portland, ME; Randall B. Weill, Preti Flaherty Beliveau & Pachios, Portland, ME; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; David H. Fink, Fink + Associates Law, Bloomfield Hills, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For Robert Klingler, Rebecca Lynn Morrow, Rebecca Lynn Morrow, Arthur Stukey, Lori Curtis, Nathan Croom, David Bernstein, Plaintiffs (2:12-md-02311-SFC-RSW): Alyson L. Oliver, Oliver Law Group PC, Troy, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Patrick E. Cafferty, Cafferty Clobes Meriwether & Sprengel LLP, Chicago, **[*49]** IL; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA.

For Ron Blau, Becky Bergeson, Plaintiffs (2:12-md-02311-SFC-RSW): E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA.

For Frances Gammell Roach, Richard Stoehr, William Picotte, Jessee Powell, James Marean, Erica Shoaf, 12-10967, Virginia Pueringer, Jane FitzGerald, Ian Groves, Nilsa Mercado, Lauren C. Primos, Melinda Harr DDS PC, Plaintiffs (2:12-md-02311-SFC-RSW): Alyson L. Oliver, Oliver Law Group PC, Troy, MI; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA.

For Jessica DeCastro, Plaintiff (2:12-md-02311-SFC-RSW): **[*50]** Alyson L. Oliver, Oliver Law Group PC, Troy, MI; Donald L. Schlapprizzi, Schlapprizzi, Attorneys at Law., St. Louis, MO; E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA.

For Melinda Harr DDS PC, Plaintiff (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For AGA Realty LLC, Tommy Wilson, 12-10406 & 12-10407, Calvin Kendrick, 12-10406, 12-10407 & 12-10410, Florida Welding Fabricators & Erectors, Inc. 12-12352, Elizabeth Kaufman 12-12263, Zaccagnino Electric, 12-10784, Plaintiffs (2:12-md-02311-SFC-RSW): E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, **[*51]** Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA.

For Lilliana Diaz, 12-12572, Luis Maldonado, 12-12574, Plaintiffs (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; John F. Nevares, John Nevares and Associates PSC, San Juan, PR; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For TIFFIN MOTOR HOMES, INC., 12-12866, Beam's Industries, Inc., 12-13214, Plaintiffs: Jayne Goldstein, LEAD ATTORNEY, Shepherd Finkelman Miller & Shah, Ft. Lauderdale, FL; Darryl Bressack, Fink Bressack, Bloomfield Hills, MI; David H. Fink, Fink + Associates Law, Bloomfield Hills, MI; Douglas A. Abrahams, Kohn, Swift and Graf, P.C., Philadelphia, PA; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Eugene A. Spector, Jeffrey **[*52]** L. Spector, SPECTOR ROSEMAN & KODROFF, P.C., Philadelphia, PA; Gregory P. Hansel, Preti Flaherty Beliveau & Pachios, LLP, One City Center, Portland, ME; Jason J. Thompson, Sommers Schwartz, P.C., One Towne Square, Southfield, MI; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Jonathan M Jagher, Michael E. Moskovitz, Steven A. Kanner, Freed Kanner London & Millen LLC, Conshohocken, PA; Joseph C. Kohn, Kohn, Swift, Philadelphia, PA; Julie A. Strother, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Lee Albert, Glancy Prongay & Murray LLP, New York, NY; Linda P. Nussbaum, Nussbaum Law Group, P.C., New York, NY; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Marvin L. Frank, Frank & Bianco LLP, New York, NY; Michael S. Smith, Preti Plaherty Beliveau & Pachios LLP, One City Center, Portland, ME; Randall B. Weill, Preti Flaherty Beliveau & Pachios, One City Center, Portland, ME; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; W. Joseph Bruckner, Lockridge Grindal Nauen, Minneapolis, MN; William Caldes, SPECTOR ROSEMAN & KODROFF, P.C., Philadelphia, PA; William E. Hoese, **[*53]** Kohn, Swift, Philadelphia, PA; William H. London, Freed Kanner London & Millen LLC, Bannockburn, IL; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For Howard Tepler, 12-13257, 12-13261 & 12-13265, Rochelle Meyer, 12-13257, 12-13261 & 12-13265, Eugene Friedman, 12-13257, 12-13261, 12-13263 & 12-13265, Plaintiffs: Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Sheldon L. Miller, Farmington Hills, MI; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For Michael Scott Redpath, 12-13075, Plaintiff: E. Powell Miller, The Miller Law Firm, Rochester, MI; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA.

For SPS Spindle Parts an **[*54]** Service, LLC, 12-13142, Plaintiff: Darryl Bressack, Fink Bressack, Bloomfield Hills, MI; David H. Fink, Fink + Associates Law, Bloomfield Hills, MI; Douglas A. Abrahams, Kohn, Swift and Graf, P.C., Philadelphia, PA; Joseph C. Kohn, Kohn, Swift, Philadelphia, PA; William E. Hoese, Kohn, Swift, Philadelphia, PA; Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Michael E. Moskovitz, Steven A. Kanner, Freed Kanner London & Millen LLC, Conshohocken, PA; Michael S. Smith, Preti Plaherty Beliveau & Pachios LLP, One City Center, Portland, ME; Steven A. Kanner, Freed Kanner London & Millen LLC, Conshohocken, PA; Joseph C. Kohn, Kohn, Swift, Philadelphia, PA; Steven G. Sklaver, Susman Godfrey L.L.P., Los Angeles, CA; William H. London, Freed Kanner London & Millen LLC, Bannockburn, IL; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For Kent Busek, Edward Muscara, Sophie O'Keefe-Zelman, Keith Uehara, Plaintiffs: Alyson L. Oliver, Oliver Law Group PC, Troy, MI; E. Powell **[*55]** Miller, The Miller Law Firm, Rochester, MI; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA.

For Tom Halverson, Thomas Wilson, Plaintiffs: Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For Roseana Weatherwax, Plaintiff: Lingel H. Winters, Law Offices of Lingel H. Winters Professional Corporation, LEAD ATTORNEY, San Francisco, CA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For Landers McLarty Lee's Summit Missouri, LLC, Stranger Investments, Doing business as Stephen Wade Toyota, Hartley Buick GMC Truck, Inc., Lee Oldsmobile Cadillac, Inc., Doing business as Lee Honda, Lee Auto Malls-Topsham, Inc., Doing business as Lee Toyota of Topsham, Cannon Nissan of Jackson, LLC, Plaintiffs: Jonathan W. Cuneo, Cuneo Gilbert & Laduca, LLP, Washington, DC; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Shearer Automotive Enterprises III, Inc., Apex Motor Company, **[*56]** Plaintiffs (2:12-md-02311-SFC-RSW): Jonathan W. Cuneo, Cuneo Gilbert & Laduca, LLP, Washington, DC; Manfred P. Muecke, Bonnett Fairbourn

Friedman & Balint, P.C., San Diego, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Apex Motor Corporation, STOEBNER HOLDINGS, INC., Plaintiffs (2:12-md-02311-SFC-RSW): Gerard V. Mantese, LEAD ATTORNEY, Mantese Honigman, P.C., Troy, MI; Jonathan W. Cuneo, Cuneo Gilbert & Laduca, LLP, Washington, DC; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For VITEC, L.L.C., Plaintiff (2:12-md-02311-SFC-RSW): David A. Langer, Ruthanne Gordon, Berger Montague PC, Philadelphia, PA; David H. Fink, Fink + Associates Law, Bloomfield Hills, MI; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Marvin A. Miller, Miller LLC, Chicago, IL; Michael S. Smith, Preti Plaherty Beliveau & Pachios LLP, Portland, ME; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For Florida, State of, Plaintiff (2:12-md-02311-SFC-RSW): Robert Scott Palmer, LEAD ATTORNEY, Robert Scott Palmer, Attorney General of Florida, **[*57]** PL-01 The Capitol, Tallahassee, FL; Greg Slemp, Timothy Fraser, Office of the Attorney General - State of Florida, Antitrust Division, PL-01 The Capitol, Tallahassee, FL; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For Ford Motor Company, Plaintiff (2:12-md-02311-SFC-RSW): Cindy C. Kelly, Kasowitz, Benson, Torres & Friedman LLP, New York, NY; Kanchana Wangkeo Leung, Gilead Capital LP, New York, NY; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For DALC GEAR & BEARING SUPPLY CORP., Plaintiff (2:12-md-02311-SFC-RSW): Jayne Goldstein, LEAD ATTORNEY, Shepherd Finkelman Miller & Shah, Ft. Lauderdale, FL; David H. Fink, Fink + Associates Law, Bloomfield Hills, MI; Gregory P. Hansel, Preti Flaherty Beliveau & Pachios, LLP, Portland, ME; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Michael S. Smith, Preti Plaherty Beliveau & Pachios LLP, Portland, ME; Pamela A. Markert, Cera LLP, San Francisco, CA; Randall B. Weill, Preti Flaherty Beliveau & Pachios, Portland, ME; E. Powell Miller, The Miller **[*58]** Law Firm, Rochester, MI.

For SLTNTRST LLC, Plaintiff (2:12-md-02311-SFC-RSW): Jayne Goldstein, LEAD ATTORNEY, Shepherd Finkelman Miller & Shah, Ft. Lauderdale, FL; Daniel R. Karon, Karon LLC, Cleveland, OH; David H. Fink, Fink + Associates Law, Bloomfield Hills, MI; Jason S. Hartley, Stueve Siegel Hanson LLP, San Diego, CA; Manfred P. Muecke, Bonnett Fairbourn Friedman & Balint, P.C., San Diego, CA; Matthew Ruan, Cohen Milstein Sellers & Toll PLLC, New York, NY; Michael S. Smith, Preti Plaherty Beliveau & Pachios LLP, Portland, ME; Solomon B. Cera, Thomas C. Bright, Cera LLP, San Francisco, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI.

For Kimberly Bennett, Rita Cornish, Dori Gilels, Curtis Harr, Andrew Hedlund, Michelle McGinn, Whitney Porter, Plaintiffs (2:12-md-02311-SFC-RSW): E. Powell Miller, The Miller Law Firm, Rochester, MI.

For Auto-Dealer Plaintiffs, Plaintiff (2:12-md-02311-SFC-RSW): Brian K. Herrington, Barrett Law Group, P.A., Lexington, MS; Gary M. Yarborough, Yarborough Law Firm, PLLC, Bay St. Louis, MS; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI; John C. Kakinuki, Kakinuki Law Office, PC, Ste 270, San Rafael, CA; Jonathan W. Cuneo, Cuneo Gilbert & **[*59]** Laduca, LLP, Washington, DC.

For City of Richmond, Plaintiff (2:12-md-02311-SFC-RSW): Robert S Green, Green & Noblin, P.C., Larkspur, CA.

For End-Payor Plaintiffs, Plaintiff (2:12-md-02311-SFC-RSW): Chanler Ashton Langham, Susman Godfrey LLP, Houston, TX; E. Powell Miller, The Miller Law Firm, Rochester, MI; Marc M. Seltzer, Susman Godfrey, L.L.P., Los Angeles, CA; Steven Moffat Shepard, Susman Godfrey L.L.P., New York, NY; Steven N. Williams, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA.

For California, State of, Plaintiff (2:12-md-02311-SFC-RSW): Anik Banerjee, California Department of Justice, Los Angeles, CA.

For DAT-A-SYST, LLC, Dakkota Integrated Systems LLCPlaintiffs (2:12-md-02311-SFC-RSW): Gregory P. Hansel, Preti Flaherty Beliveau & Pachios, LLP, Portland, ME; Michael S. Smith, Preti Plaherty Beliveau & Pachios LLP, Portland, ME; Randall B. Weill, Preti Flaherty Beliveau & Pachios, Portland, ME.

For Airflow Catalyst Systems, Inc., Nett Technologies Inc., Plaintiffs (2:12-md-02311-SFC-RSW): Gregory P. Hansel, Preti Flaherty Beliveau & Pachios, LLP, Portland, ME; Michael S. Smith, Preti Plaherty Beliveau & Pachios LLP, Portland, ME; Randall B. Weill, Preti Flaherty Beliveau & **[*60]** Pachios, Portland, ME; Solomon B. Cera, Thomas C. Bright, Cera LLP, San Francisco, CA.

For Government of Puerto Rico, 20-11208, Plaintiff (2:12-md-02311-SFC-RSW): Elizabeth A. Fegan, LEAD ATTORNEY, Fegan Scott LLC, Chicago, IL; Jonathan David Lindenfeld, LEAD ATTORNEY, Fegan Scott LLC, New York, NY.

For Lee Pontiac-Oldsmobile-GMC Truck, Incorporated, Plaintiff (2:12-md-02311-SFC-RSW): Elaine A. Ryan, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Jeffrey B Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Joel Davidow, Victoria Romanenko, Cuneo Gilbert & Laduca, Washington, DC; John C. Kakinuki, Kakinuki Law Office, PC, San Rafael, CA; Jonathan W. Cuneo, Cuneo Gilbert & Laduca, LLP, Washington, DC; Kathryn Eisenstein, Kathryn Eisenstein, Mantese Honigman, PC, Troy, MI; Marc M. Seltzer, Steven G. Sklaver, Susman Godfrey, L.L.P., Los Angeles, CA; E. Powell Miller, The Miller Law Firm, Rochester, MI; Gerard V. Mantese, Mantese Honigman, P.C., Troy, MI.

For Furukawa Electric Company, Limited, Defendant (2:12-md-02311-SFC-RSW): David H. Suggs, Demetra V. Frawley, Jack E. Pace, John H. Chung, Priya Srinivasan, White & Case LLP, New York, NY; Kenneth R. Davis, II, Lane Powell PC, **[*61]** Portland, OR; Larry S. Gangnes, Lane Powell PC, Seattle, WA; Marguerite M. Sullivan, Latham & Watkins, Washington, DC; Peter D Hawkes, Lane Powell, Portland, OR; Richard D. Bisio, Ronald S. Nixon, Kemp, Klein, Troy, MI.

For Sumitomo Electric Industries, Limited, Defendant (2:12-md-02311-SFC-RSW): Andrea M. Price, Barrasso Usdin Kupperman Freeman & Sarer, New Orleans, LA; Daniel M. Wall, Latham & Watkins, San Francisco, CA; David Daniel Cross, MORRISON FOERSTER, Washington, DC; Elizabeth A. Favaro, William H. Horton, Giarmarco, Mullins & Horton, P.C., Troy, MI; J. Bruce Cross, Mary G. Cooper, Cross Gunter Witherspoon & Galchus, Little Rock, AR; Kathleen Mary Clair, Crowell & Moring LLP, Washington, DC; Kelsey A. McPherson, Latham & Watkins LLP, Washington, DC; Marguerite M. Sullivan, Latham & Watkins, Washington, DC; Rachel Talbot Osborn, Morrison & Foerster LLP, Washington, DC.

For Yazaki Corporation, Defendant (2:12-md-02311-SFC-RSW): John V. Biernacki, Zachary D. Trotter, Jones Day, Cleveland, OH; John M. Majoras, Jones Day, Columbus, OH; Michael R. Shumaker, Tiffany Danielle Lipscomb-Jackson, Jones Day, Washington, DC; Michelle K. Fischer, Jones Day (Cleveland), Cleveland, OH.

For **[*62]** Yazaki North America, Incorporated, Defendant (2:12-md-02311-SFC-RSW): Carmen G. McLean, Michael R. Shumaker, Tiffany Danielle Lipscomb-Jackson, Jones Day, Washington, DC; Gregory R. Hanthorn, Jones Day, Atlanta, GA; John M. Majoras, Jones Day, Columbus, OH; Lin Wang, Jones Day, San Francisco, CA; Michelle K. Fischer, Stephen J. Squeri, Zachary D. Trotter, Cleveland, OH; Shelley R. Hebert, Seyfarth Shaw LLP, Chicago, IL.

For Denso Corporation, Defendant (2:12-md-02311-SFC-RSW): April Williams, Benjamin Chapin, Brian C. Smith, David S. Molot, Jacquelyn Leigh Stanley, Patrick J. Carome, Steven F. Cherry, Wilmer Cutler Pickering Hale and Door LLP, Washington, DC; Kevin Gallagher, Washington, DC; Marguerite M. Sullivan, Latham & Watkins, Washington, DC; Seth Bastianelli, Wilmer Hale, Washington, DC.

For Denso International America, Incorporated, Defendant (2:12-md-02311-SFC-RSW): Andrew D. King, April Williams, Benjamin Chapin, Brian C. Smith, David S. Molot, Jacquelyn Leigh Stanley, Patrick J. Carome, Steven F. Cherry, WILMER CUTLER PICKERING HALE & DORR LLP, Washington, DC; Kevin Gallagher, Washington, DC; Marguerite M. Sullivan, Latham & Watkins, Washington, DC; Patrick S. Williams, Briggs **[*63]** & Morgan, Minneapolis, MN; Seth Bastianelli, Wilmer Hale, Washington, DC.

For Tokai Rika Company, Ltd., formerly known as Tokai Rika U.S.A., Incorporated, Defendant (2:12-md-02311-SFC-RSW): David F. DuMouchel, George B. Donnini, Butzel Long (Detroit), Detroit, MI; Erin A. Glavich, W. Todd Miller, Baker & Miller PLLC, Washington, DC; Marguerite M. Sullivan, Latham & Watkins, Washington, DC; Robert J. Wierenga, Schiff Hardin LLP, Ann Arbor, MI; Sheldon H. Klein, Butzel Long, Bloomfield Hills, MI.

For TRAM, Incorporated, Doing business as Tokai Rika U.S.A., Incorporated, Defendant (2:12-md-02311-SFC-RSW): David F. DuMouchel, George B. Donnini, Butzel Long (Detroit), Detroit, MI; Erin A. Glavich, W. Todd Miller, Baker & Miller PLLC, Washington, DC; Marguerite M. Sullivan, Latham & Watkins, Washington, DC; Randall E. Kahnke, Faegre Baker Daniels, Minneapolis, MN; Robert J. Wierenga, Schiff Hardin LLP, Ann Arbor, MI; Sheldon H. Klein, Butzel Long, Bloomfield Hills, MI.

For American Furukawa, Inc., Defendant (2:12-md-02311-SFC-RSW): David H. Suggs, Demetra V. Frawley, Jack E. Pace, John H. Chung, Priya Srinivasan, White & Case LLP, New York, NY; Kenneth R. Davis, II, Peter D Hawkes, Lane Powell **[*64]** PC, Portland, OR; Larry S. Gangnes, Lane Powell PC, Seattle, WA; Marguerite M. Sullivan, Latham & Watkins, Washington, DC; Richard D. Bisio, Ronald S. Nixon, Kemp, Klein, Troy, MI.

For Junichi Funo, Defendant (2:12-md-02311-SFC-RSW): Kenneth R. Davis, II, Lane Powell PC, Portland, OR.

For Hirotsugu Nagata, Tetsuya Ukai, Defendants: Kenneth R. Davis, II, Lane Powell PC, Portland, OR; Larry S. Gangnes, Lane Powell PC, Seattle, WA.

For Fujikura Ltd., Defendant (2:12-md-02311-SFC-RSW): Elizabeth Fitzpatrick, James L. Cooper, Katherine Clemons, Arnold and Porter LLP, Washington, DC; Joanne G. Swanson, Kerr, Russell, (Detroit), Detroit, MI; Marguerite M. Sullivan, Latham & Watkins, Washington, DC; Matthew L. Powell, Kerr, Russell, Detroit, MI; Michael A. Rubin, Arnold & Porter Kaye Scholer LLP, Washington, DC; Stephanie Fine, Arnold and Porter Kaye Scholer LLP, San Francisco, CA.

For Asmo Co., Ltd., Defendant (2:12-md-02311-SFC-RSW): April Williams, Steven F. Cherry, Wilmer Cutler Pickering Hale and Door LLP, Washington, DC.

For Sumitomo Electric Wintec America, Inc., Defendant (2:12-md-02311-SFC-RSW): Daniel M. Wall, Latham & Watkins, San Francisco, CA; Elizabeth A. Favaro, Giarmarco, Mullins **[*65]** & Horton, P.C., Troy, MI; Kelsey A. McPherson, Latham & Watkins LLP, Washington, DC; Marguerite M. Sullivan, Latham & Watkins, Washington, DC; William H. Horton, Giarmarco, Mullins & Horton, P.C., Troy, MI.

For Kyungshin-Lear Sales and Engineering, LLC, Defendant (2:12-md-02311-SFC-RSW): James Kresta, Jaffe Raitt Heuer & Weiss, Southfield, MI; Jeffrey G. Heuer, Jaffe, Raitt, Southfield, MI; Peter M. Falkenstein, Jaffe Raitt Heuer & Weiss, PC, Ann Arbor, MI; William P. Sanders, Smith, Gambrell & Russell, LLP, Atlanta, GA.

For Sumitomo Wiring Systems Ltd., Sumitomo Electric Wiring Systems, Inc., Sumitomo Wiring Systems, (U.S.A.) Inc., Defendants (2:12-md-02311-SFC-RSW): Daniel M. Wall, Latham & Watkins, San Francisco, CA; David Daniel Cross, MORRISON FOERSTER, Washington, DC; Kathleen Mary Clair, Crowell & Moring LLP, Washington, DC; Kelsey A. McPherson, Latham & Watkins LLP, Washington, DC; Marguerite M. Sullivan, Latham & Watkins, Washington, DC; Rachel Talbot Osborn, Morrison & Foerster LLP, Washington, DC; William H. Horton, Giarmarco, Mullins & Horton, P.C., Troy, MI.

For K&S Wiring Systems, Inc., Defendant (2:12-md-02311-SFC-RSW): David Daniel Cross, LEAD ATTORNEY, MORRISON FOERSTER, **[*66]** Washington, DC; Daniel M. Wall, Latham & Watkins, San Francisco, CA; Kathleen Mary Clair, Crowell & Moring LLP, Washington, DC; Kelsey A. McPherson, Latham & Watkins LLP, Washington, DC; Marguerite M. Sullivan, Latham & Watkins, Washington, DC; Rachel Talbot Osborn, Morrison & Foerster LLP, Washington, DC; William H. Horton, Giarmarco, Mullins & Horton, P.C., Troy, MI.

For Tokai Rika, Ltd., Defendant (2:12-md-02311-SFC-RSW): Erin A. Glavich, Baker & Miller PLLC, Washington, DC; Robert J. Wierenga, Schiff Hardin LLP, Ann Arbor, MI.

For Tram, Inc., Doing business as Tokai Rika U.S.A. Inc., Defendant (2:12-md-02311-SFC-RSW): Kimberly N. Shaw, TRAM, Inc., Plymouth, MI; Marguerite M. Sullivan, Latham & Watkins, Washington, DC.

For G.S. Electech, Inc., G.S. Wiring Systems, Inc., G.S.W. Manufacturing, Inc., Defendants (2:12-md-02311-SFC-RSW): Donald M. Barnes, Jay L. Levine, Jetta C. Sandin, John Monica, Jr., Porter Wright Morris & Arthur LLP, Washington, DC; Jason E. Starling, Willis, Spangler, Starling, Hilliard, OH; Marguerite M. Sullivan, Latham & Watkins, Washington, DC; Molly Crabtree, Porter Wright Morris & Arthur, Columbus, OH.

For NSK, Ltd., Defendant (2:12-md-02311-SFC-RSW): Carl Lawrence **[*67]** Malm, Jeremy J. Calsyn, Mark Leddy, Steven J. Kaiser, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC; David A. Ettinger, Honigman, Miller, Schwartz and Cohn LLP, Detroit, MI; Robert J. Wierenga, Schiff Hardin LLP, Ann Arbor, MI.

For NTN Corporation, NTN USA Corporation, Defendants (2:12-md-02311-SFC-RSW): A. Paul Victor, James F. Lerner, Jeffrey J. Amato, Jeffrey L. Kessler, Molly Donovan, Ryan D. Fahey, Winston & Strawn LLP, New York, NY; Angela A. Smedley, Winston and Strawn, New York, NY; Fred K. Herrmann, Matthew L. Powell, Kerr, Russell, Detroit, MI; Robert J. Wierenga, Schiff Hardin LLP, Ann Arbor, MI.

For Nachi Fujikoshi Corporation, Defendant (2:12-md-02311-SFC-RSW): Robert J. Wierenga, Schiff Hardin LLP, Ann Arbor, MI.

For JTEKT Corporation, Defendant (2:12-md-02311-SFC-RSW): Alisa Mastro, Shearman & Sterling LLP, Washington, DC; Alison R. Welcher, Sherman & Sterling LLP, Washington, DC; Heather P. Lamberg, Keith Palfin, Winston & Strawn LLP, Washington, DC; Robert J. Wierenga, Schiff Hardin LLP, Ann Arbor, MI.

For Koyo Corporation of USA, Defendant (2:12-md-02311-SFC-RSW): Alison R. Welcher, Sherman & Sterling LLP, Washington, DC; Heather P. Lamberg, Keith Palfin, Winston **[*68]** & Strawn LLP, Washington, DC; Robert J. Wierenga, Schiff Hardin LLP, Ann Arbor, MI.

For Schaeffler AG, Defendant (2:12-md-02311-SFC-RSW): Eric J. Mahr Stacy E. Frazier, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Robert J. Wierenga, Schiff Hardin LLP, Ann Arbor, MI.

For Autoliv, Incorporated, Autoliv ASP, Incorporated, Autoliv B.V. & Co. KG, Autoliv Safety Technology, Inc., Autoliv Japan Ltd., Defendants (2:12-md-02311): Meredith Jones Kingsley, LEAD ATTORNEY, Alston and Bird LLP, Atlanta, GA; Fred K. Herrmann, Joanne G. Swanson, Robert J. Wierenga; Michael L. Brown, Alston & Bird LLP, Atlanta, GA; Peter Kontio, Alston & Bird, Atlanta, GA.

For Takata Corporation, Defendant (2:12-md-02311): Robert J. Wierenga, Schiff Hardin LLP, Ann Arbor, MI; William J. Vigen, Williams & Connolly LLP, Washington, DC.

For TK Holdings, Incorporated, Defendant (2:12-md-02311): Robert J. Wierenga, Suzanne L. Wahl, Suzanne L. Wahl, Schiff Hardin LLP, Ann Arbor, MI; Samuel Davidoff, William J. Vigen, Williams & Connolly LLP, Washington, DC; Suzanne L. Wahl, Schiff Hardin LLP, Ann Arbor, MI; William J. Vigen, Williams & Connolly LLP, Washington, DC.

For TRW Automobile Holdings Corporation, TRW Deutschland **[*69]** Holding GmbH, Defendants (2:12-md-02311): Benjamin W. Jeffers, Hickey Hauck Bishoff Jeffers & Seabolt, PLLC, Detroit, MI; Howard B. Iwrey, Robert J. Wierenga; James P. Feeney, Dykema Gossett, Bloomfield Hills, MI; Robert J. Wierenga, Howard B. Iwrey, Schiff Hardin LLP, Ann Arbor, MI.

For Autoliv North America, Inc., Defendant (2:12-md-02311): Meredith Jones Kingsley, LEAD ATTORNEY, Alston and Bird LLP, Atlanta, GA; Robert J. Wierenga, Schiff Hardin LLP, Ann Arbor, MI.

For AB SKF, Defendant (2:12-md-02311): Brian M. Moore, Howard B. Iwrey, Dykema Gossett (Detroit), Bloomfield Hills, MI; Danielle Garten, Alexandria, VA; Franklin R. Liss, Matthew A. Tabas, Arnold & Porter Kaye Scholer LLP, Washington, DC; Matthew L. Powell, Kerr, Russell, Detroit, MI; Riley Berg, Arnold & Porter Kaye Scholer LLP, Washington, DC; Sonia K. Pfaffenroth, Arnold & Porter LLP, Washington, DC.

For Nachi America Inc., Defendant (2:12-md-02311): Kristin Beneski, Lane Powell PC, Seattle, WA; Robert J. Wierenga; Schiff Hardin LLP, Ann Arbor, MI.

For Schaeffler Group USA, Incorporated, Defendant (2:12-md-02311): Bradley M. Baglien, WilmerHale LLP, Boston, MA; Eric J. Mahr, Robert J. Wierenga, Stacy **[*70]** E. Frazier; Mark A Ford, Wilmer Cutler Pickering Hale and Dorr LLP, Boston, MA; Neil J. Juliar, Conlin, McKenney,, Ann Arbor, MI; Timothy D. Syrett, Wilmer Cutler Pickering Hale & Dorr LLP, Boston, MA.

For SKF USA Inc., Defendant (2:12-md-02311): Brian M. Moore, LEAD ATTORNEY, Dykema Gossett (Detroit), Bloomfield Hills, MI; Howard B. Iwrey, LEAD ATTORNEY; Debra H. Dermody, Reed Smith LLP, Reed Smith Centre, Pittsburgh, PA; Michelle Mantine, Reed Smith LLP, Pittsburgh, PA.

For Nippon Seiki Company, Limited, N.S. International, Ltd., New Sabina Industries, Inc., Defendants (2:12-md-02311): A. Paul Victor, Winston & Strawn LLP, New York, NY; Angela A. Smedley, Winston and Strawn, New York, NY; Brandon W. Duke, Winston & Strawn LLP, Houston, TX; Erica C. Smilevski, Eva W. Cole, Mollie C. Richardson, Winston & Strawn LLP, New York, NY; Fred K. Herrmann, Joanne G. Swanson, Matthew L. Powell, Kerr, Russell, Detroit, MI; Jeffrey J. Amato, Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY.

For Mitsubishi Electric Corporation, Defendant (2:12-md-02311): Charles B. Sklarsky, Jenner and Block, Chicago, IL; David W.R. Wawro, Torys LLP, New York, NY; Gary K. August, **[*71]** Zausmer, P.C., Farmington Hills, MI; Marguerite M. Sullivan; Matthew G. McNaughton, Zausmer, P.C., Farmington Hills, MI; Michael T. Brody, Terrence J. Truax, Jenner & Block LLP, Chicago, IL.

For Hitachi Limited, Hitachi Automotive Systems Limited, Defendants (2:12-md-02311): Alden Lewis Atkins, Craig P. Seebald, Lindsey R. Vaala, Vinson & Elkins LLP, Washington, DC.

For Yamashita Rubber Co., Ltd., Defendant (2:12-md-02311): Adam M. Pergament, Arnold & Porter Kaye Scholer LLP, Washington, DC; Danielle Garten, Alexandria, VA; Francesca Pisano, Arnold and Porter LLP, Washington, DC; Fred K. Herrmann, James L. Cooper, Joanne G. Swanson; Matthew Oster, Arnold & Porter Kaye Scholer LLP, Washington, DC; Riley Berg, Arnold & Porter Kaye Scholer LLP, Washington, DC.

For Yusa Corporation, Defendant (2:12-md-02311): Adam M. Pergament, Arnold & Porter Kaye Scholer LLP, Washington, DC; Danielle Garten, Alexandria, VA; Francesca Pisano, Arnold and Porter LLP, Washington, DC; Fred K. Herrmann, James L. Cooper, Joanne G. Swanson; Matthew Oster, Arnold & Porter Kaye Scholer LLP, Washington, DC.

For DTR Industries, Inc., Defendant (2:12-md-02311-SFC-RSW): J. Clayton Everett, Jr., Morgan, Lewis & Bockius **[*72]** LLP, Washington, DC; Larry J. Saylor, Miller, Canfield, Detroit, MI.

For Calsonic Kansei Corporation, Defendant (2:12-md-02311-SFC-RSW): Adam Cardenas Hemlock, Weil, Gotshal & Manges, New York, NY; Joanne G. Swanson, Fred K. Herrmann, Matthew L. Powell, Joanne G. Swanson, Kerr, Russell, (Detroit), Detroit, MI; Steven A. Reiss, Weil, Gotshal & Mangas LLP, New York, NY.

For Denso Corp., Defendant (2:12-md-02311-SFC-RSW): Kevin Gallagher, Washington, DC.

For T. Rad Co., Ltd., Defendant (2:12-md-02311-SFC-RSW): Jason R. Gourley, Bodman LLP, Detroit, MI; Peter S. Guryan, Steven M. Witzel, Fried, Frank, Harris, Shriver & Jacobson LLP, One New York Plaza, New York, NY; Peter L. Simmons, Fried, Frank, One New York Plaza, New York, NY; Thomas J. Tallerico, Bodman, Troy, MI.

For Mitsuba Corporation, Defendant (2:12-md-02311-SFC-RSW): Austin Van Schwing, Caeli Higney, Eli M. Lazarus, George A. Nicoud, III, Leslie A. Wulff, Rachel S. Brass, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Charles R. Jaeger, Farmer Brownstein Jaeger LLP, San Francisco, CA; David C. Brownstein, Farmer Brownstein Jaeger Goldstein & Klein LLP, San Francisco, CA; Dennis A Dettmer, Dettmer & Dezsi, PLLC, Detroit, MI; Matthew **[*73]** L. Powell, Kerr, Russell, Detroit, MI; Michael R. Dezsi, Law Office of Michael R. Dezsi, PLLC, Detroit, MI; William S Farmer, Farmer Brownstein Jaeger LLP, San Francisco, CA.

For Alps Electric Co. Ltd., ALPS Electric (North America), Inc., Alps Automotive, Inc., Defendants (2:12-md-02311-SFC-RSW): Ashley E. Bass, Covington & Burling LLP, Washington, DC; Cortlin H. Lannin, Gretchen Hoff Varner, Marienna H. Murch, Covington & Burling LLP, One Front Street, San Francisco, CA; Maureen T. Taylor, Brooks Wilkins Sharkey & Turco PLLC, Birmingham, MI.

For Fujikura Automotive America LLC, Defendant (2:12-md-02311-SFC-RSW): Elizabeth Fitzpatrick, Arnold and Porter LLP, Washington, DC; Fred K. Herrmann, Joanne G. Swanson, Matthew L. Powell, Kerr, Russell, Detroit, MI; James L. Cooper, Michael A. Rubin, Arnold & Porter Kaye Scholer LLP, Washington, DC; Katherine Clemons, Arnold & Porter, Washington, DC; Marguerite M. Sullivan, Latham & Watkins, Washington, DC; Stephanie Fine, Arnold and Porter Kaye Scholer LLP, San Francisco, CA.

For Panasonic Corporation of North America, Panasonic Corporation, Defendants (2:12-md-02311-SFC-RSW): A. Paul Victor, Winston & Strawn LLP, New York, NY; Angela A. Smedley, **[*74]** Winston and Strawn, New York, NY; Brandon W. Duke, Winston & Strawn LLP, Houston, TX; Erica C. Smilevski, Eva W. Cole, Mollie C. Richardson, Winston & Strawn LLP, New York, NY; Fred K. Herrmann, Joanne G. Swanson, Matthew L. Powell, Kerr, Russell, Detroit, MI; Jeffrey J. Amato, Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY.

For Koito Manufacturing Co., Ltd., Defendant (2:12-md-02311-SFC-RSW): Barbara Wootton, Tiana L. Russell, Arnold and Porter LLP, Washington, DC; Brian M. Moore, Howard B. Iwrey, Dykema Gossett (Detroit), Bloomfield Hills, MI; Danielle Garten, Alexandria, VA; Franklin R. Liss, Matthew A. Tabas, Arnold & Porter Kaye Scholer LLP, Washington, DC; Matthew L. Powell, Kerr, Russell, Detroit, MI; Riley Berg, Arnold & Porter Kaye Scholer LLP, Washington, DC; Sonia K. Pfaffenroth, Arnold & Porter LLP, Washington, DC.

For Diamond Electric Mfg. Corporation, Diamond Electric Mfg. Co., Ltd., Defendants (2:12-md-02311-SFC-RSW): Abram J. Ellis, Matthew J. Reilly, Simpson Thacher & Bartlett LLP, Washington, DC; David T. Shogren, Simpson Thacher & Bartlett LLP, Washington, DC; George S. Wang, Shannon McGovern, Simpson Thacher & Bartlett LLP, New York, NY; Timothy J. Lowe, McDonald **[*75]** Hopkins PLC, Bloomfield Hills, MI.

For American Mitsuba Corporation, Defendant (2:12-md-02311-SFC-RSW): Dennis A Dettmer, LEAD ATTORNEY, Dettmer & Dezsi, PLLC, Detroit, MI; Michael R. Dezsi, LEAD ATTORNEY, Law Office of Michael R. Dezsi, PLLC, Detroit, MI; Austin Van Schwing, Caeli Higney, Eli M. Lazarus, Eli M. Lazarus, Leslie A. Wulff, Rachel S. Brass, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Charles R. Jaeger William S Farmer, Farmer Brownstein Jaeger LLP, San Francisco, CA; David C. Brownstein, Farmer Brownstein Jaeger Goldstein & Klein LLP, San Francisco, CA.

For Valeo Inc., Valeo Electrical Systems, Inc., Valeo Climate Control Corp., Valeo Japan Co., LTD., Valeo S.A., Defendants (2:12-md-02311-SFC-RSW): Brian Byrne, Jeremy J. Calsyn, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC; Brian M. Moore, Dykema Gossett (Detroit), Bloomfield Hills, MI; Howard B. Iwrey, Dykema Gossett, Bloomfield Hills, MI.

For NSK Americas, Inc., Defendant (2:12-md-02311-SFC-RSW): Carl Lawrence Malm, Jeremy J. Calsyn, Steven J. Kaiser, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC; David A. Ettinger, Honigman, Miller, Schwartz and Cohn LLP, Detroit, MI.

For Mitsubishi Heavy Industries **[*76]** America, Inc., Mitsubishi Heavy Industries Climate Control, Inc., Defendants (2:12-md-02311-SFC-RSW): Benjamin F. Holt, William L. Monts, III, Hogan Lovells US LLP, Washington, DC; Corey W. Roush, Hogan Lovells, Washington, DC; Scott T. Seabolt, Hickey Hauck Bishoff Jeffers & Seabolt, PLLC, Livonia, MI.

For Toyo Automotive Parts (USA), Inc., Toyo Tire & Rubber Co., Ltd., Toyo Tire North America Manufacturing, Inc., Toyo Tire North America OE Sales LLC, Defendants (2:12-md-02311-SFC-RSW): Angelo J. Suozzi, Courtney Ann Hoffmann, David C. Giardina, Kevin M. Fee, Sidley Austin LLP, Chicago, IL.

For II Stanley Co., Inc., Stanley Electric U.S. Co., Inc., Defendants (2:12-md-02311-SFC-RSW): Abram J. Ellis, David T. Shogren, Matthew J. Reilly, Simpson Thacher & Bartlett LLP, Washington, DC; George S. Wang Simpson Thacher & Bartlett LLP, New York, NY; Shannon McGovern, Simpson Thacher & Barlett, LLP, New York, NY; Timothy J. Lowe, McDonald Hopkins PLC, Bloomfield Hills, MI.

For North American Lighting, Inc., Defendant (2:12-md-02311-SFC-RSW): Barbara Wootton, Arnold and Porter LLP, Washington, DC; Brian M. Moore, Dykema Gossett (Detroit), Bloomfield Hills, MI; Danielle Garten, Alexandria, VA; **[*77]** Franklin R. Liss, Matthew A. Tabas, Riley Berg, Arnold & Porter Kaye Scholer LLP, Washington, DC; Howard B. Iwrey, Dykema Gossett, Bloomfield Hills, MI; Sonia K. Pfaffenroth, Arnold & Porter LLP, Washington, DC; Tiana L. Russell, Arnold and Porter LLP, Washington, DC.

For JTEKT Automotive North America, Inc., Defendant (2:12-md-02311-SFC-RSW): Alisa Mastro, Alison R. Welcher, Sherman & Sterling LLP, Washington, DC; Heather P. Lamberg, Keith Palfin, Winston & Strawn LLP, Washington, DC.

For Bridgestone APM Company, Bridgestone Corporation, Defendants (2:12-md-02311-SFC-RSW): Adam Cardenas Hemlock, LEAD ATTORNEY, Weil, Gotshal & Manges, New York, NY; Frederick R. Juckniess, LEAD ATTORNEY, Juckniess Law Firm, PLC, Ann Arbor, MI.

For Calsonic Kansei North America, Inc, Defendant (2:12-md-02311-SFC-RSW): Adam Cardenas Hemlock, LEAD ATTORNEY, Weil, Gotshal & Manges, New York, NY; Fred K. Herrmann, Matthew L. Powell, Kerr, Russell, Detroit, MI; Joanne G. Swanson, Kerr, Russell, (Detroit), Detroit, MI; Steven A. Reiss, Weil, Gotshal & Mangas LLP, New York, NY.

For American Showa, Inc., Showa Corporation, Defendants (2:12-md-02311-SFC-RSW): J. Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, **[*78]** Washington, DC; Matthew Lewis Fornshell, Ice Miller, LLP, Columbus, OH; William T. McEnroe, Morgan Lewis & Bockius LLP, Philadelphia, PA.

For Sumitomo Riko Company Limited, formerly known as Tokai Rubber Industries, Ltd., Defendant (2:12-md-02311-SFC-RSW): J. Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; Larry J. Saylor, Miller, Canfield, Detroit, MI.

For Robert Bosch LLC, Robert Bosch GmbH, Bosch Electrical Drives Co., Ltd., Defendants (2:12-md-02311-SFC-RSW): Erik J. Raven-Hansen, John Roberti, Allen & Overy LLP, Washington, DC; Matthew R. Boucher, Allen and Overy LLP, Washington, DC; Michael G. Brady, William R. Jansen, Warner, Norcross, Southfield, MI; Michael S. Feldberg, Reichman Jorgensen LLP, New York, NY.

For Chiyoda Manufacturing Corporation, Defendant (2:12-md-02311-SFC-RSW): Amanda M. Fielder, Warner Norcross + Judd LLP, Grand Rapids, MI; Brian Joseph Smith, K&L Gates, LLP, Chicago, IL; Courtney E. Torres, Lauren N. Norris, Lauren B. Salins, Michael E. Martinez, Steven M. Kowal, K&L Gates LLP, Chicago, IL; Marguerite M. Sullivan, Latham & Watkins, Washington, DC; Michael G. Brady, William R. Jansen, Warner, Norcross, Southfield, MI; Molly K. McGinley, **[*79]** K & L Gates, LLP, Chicago, IL.

For Aisin Automotive Casting, LLC, Aisin Seiki Co., Ltd., Defendant: Howard B. Iwrey, Dykema Gossett, Bloomfield Hills, MI; Jeremy J. Calsyn, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC.

For DENSO Korea Automotive Corporation, ASMO Greenville of North Carolina, Inc., Asmo North America, LLC, Defendants: April Williams, Benjamin Chapin, Steven F. Cherry, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Brian C. Smith, Patrick J. Carome, Wilmer Cutler Pickering Hale and Door LLP, Washington, DC; David S. Molot, Wilmer Cutler Pickering Hale and Dorr, Washington, DC; Kevin Gallagher, Washington, DC; Seth Bastianelli, Wilmer Hale, Washington, DC.

For ASMO CO., LTD, Defendant: Benjamin Chapin, Steven F. Cherry, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Brian C. Smith, Patrick J. Carome, Wilmer Cutler Pickering Hale and Door LLP, Washington, DC; David S. Molot, Wilmer Cutler Pickering Hale and Dorr, Washington, DC; Kevin Gallagher, Washington, DC; Seth Bastianelli, Wilmer Hale, Washington, DC.

For Asmo North America, LLC, Defendant: Kevin Gallagher, Washington, DC; Steven F. Cherry, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, **[*80]** DC.

For ASMO Greenville of North Carolina, Inc., Defendant: Kevin Gallagher, Washington, DC.

For Keihin North America, Inc., Keihin Corporation, Defendants: Anita F. Stork, Bruce Allen Baird, Michael J. Fanelli, Sarah Lynn Wilson, Covington & Buling LLP, San Francisco, CA; Maureen T. Taylor, Brooks Wilkins Sharkey & Turco PLLC, Birmingham, MI.

For Mikuni Corporation, Mikuni American Corporation, Defendants: James Michael Burns, Akerman LLP, Washington, DC; Richard Bernard Brosnick, Akerman LLP, New York, NY.

For Toyoda Gosei Co. Ltd., TG Missouri Corp., Toyoda Gosei North America Corp., Defendants: Caroline L. Jones, Heather Choi, John Taladay, Mark A. Miller, Sterling Marchand, Baker Botts LLP, Washington, DC.

For Mitsubishi Electric US Holdings, Inc., Mitsubishi Electric Automotive America, Inc., Defendants: David W.R. Wawro, Torys LLP, New York, NY; Matthew G. McNaughton, Zausmer, P.C., Farmington Hills, MI; Terrence J. Truax, JENNER & BLOCK LLP, Chicago, IL.

For Continental Automotive Systems, Inc., Continental Automotive Korea Ltd., Defendants: Alexander B. Reich, Maura L. Hughes, Ronald M. McMillan, Calfee, Halter & Griswold LLP, Cleveland, OH; Herbert C. Donovan, Brooks

Wilkins Sharkey **[*81]** & Turco, PLLC, Birmingham, MI; Maureen T. Taylor, Brooks Wilkins Sharkey & Turco PLLC, Birmingham, MI.

For Continental Automotive Electronics, LLC, Defendant: Alexander B. Reich, Maura L. Hughes, Ronald M. McMillan, Calfee, Halter & Griswold LLP, Cleveland, OH.

For Weastec, Inc., Toyo Denso Co., Ltd., Defendants (2:12-md-02311-SFC-RSW): Allyson M. Maltas, Latham & Watkins LLP, Washington, DC; Cody D. Rockey, Dykema Gossett, Ann Arbor, MI; Howard B. Iwrey, Dykema Gossett, Bloomfield Hills, MI; Marguerite M. Sullivan, Latham & Watkins, Washington, DC.

For Maruyasu Industries Co., Ltd., Curtis-Maruyasu America, Inc., Defendants (2:12-md-02311-SFC-RSW): Christopher M. Curran, Eileen Marie Cole, Samuel J. Sharp, White & Case LLP, Washington, DC.

For KYB Americas Corporation, Kayaba Industry Co., Ltd., Defendants (2:12-md-02311-SFC-RSW): Bradley Robert Love, Barnes & Thornburg, LLP, Indianapolis, IN; Brian Weir-Harden, Kendall Millard, Barnes & Thornburg, Indianapolis, IN; Cale A. Johnson, Dykema Gossett PLLC, Bloomfield Hills, MI; Howard B. Iwrey, Dykema Gossett, Bloomfield Hills, MI; John Barnstead, Barnes and Thornburg LLP, Indianapolis, IN.

For Toyota Motor North America, Inc., Toyota Motor **[*82]** Sales, USA, Inc., Toyota Motor Engineering & Manufacturing North America, Inc., Toyota Motor Manufacturing Alabama, Inc., Toyota Motor Manufacturing Indiana, Inc., Toyota Motor Manufacturing Kentucky, Inc., Toyota Motor Manufacturing Mississippi, Inc., Toyota Motor Manufacturing Texas, Inc., Toyota Motor Manufacturing West Virginia, Inc., Toyota Logistics Services, Inc., Calty Design Research, Inc., Defendants (2:12-md-02311-SFC-RSW): Carmen M. Bickerdt, Bowman and Brooke LLP, Bloomfield Hills, MI; Thomas P. Branigan, Bowman & Brooke LLP (Detroit), Bloomfield Hills, MI.

For Fiat Chrysler Finance North America, Inc., Defendant (2:12-md-02311-SFC-RSW): Cheryl A. Bush, Bush, Seyferth PLLC, Troy, MI; Susan M. McKeever, Bush Seyferth Paige, Troy, MI.

For Showa Denko K.K., Showa Aluminum Corporation of America, Defendants (2:12-md-02311-SFC-RSW): Anita G. Fox, Fraser, Trebilcock, Lansing, MI; David C. Brownstein, Farmer Brownstein Jaeger Goldstein & Klein LLP, San Francisco, CA; Paul Campbell Mallon, Fraser Trebilcock Davis & Dunlap P.C., Detroit, MI; William S Farmer, Farmer Brownstein Jaeger LLP, San Francisco, CA.

For MERITOR, INC., Defendant (2:12-md-02311-SFC-RSW): Amy Beth Manning, McGuirewoods **[*83]** LLP, Chicago, IL; Larry J. Saylor, A. Michael Palizzi, Miller, Canfield, Detroit, MI; Robert E. Murkowski, Miller Canfield Paddock & Stone PLC, Detroit, MI; Sarah A. Zielinski, McGuireWoods LLP, Chicago, IL.

For MERITOR, INC., Defendant: A. Michael Palizzi, Miller, Canfield, Detroit, MI.

For Sanden International (U.S.A.) Inc., Defendant (2:12-md-02311-SFC-RSW): James David Rowe, DuBois, Bryant & Campbell, LLP, Austin, TX; Millicent Meroney Lundburg, Dubois, Bryant & Campbell, LLP, Austin, TX; Robert Eric Linkin, Munck Wilson Mandala, LLP, Austin, TX.

For NGK Spark Plug Co., Ltd., NGK Spark Plugs (U.S.A.), Inc., Defendants (2:12-md-02311-SFC-RSW): Ellen Lindsey Maxwell-Hoffman, Bowles Rice LLP, Charleston, WV.

For NGK Automotive Ceramics USA, Inc., NGK Insulators, Ltd., Defendants (2:12-md-02311-SFC-RSW): Daniel G. Powers, McDermott Will & Emory, Washington, DC; Danyll W. Foix, Baker & Hostetler LLP, Washington, DC; Emre N. Ilter, Lisa A. Peterson, MCDERMOTT WILL & EMERY LLP, Washington, DC; Louise-Astrid Aberg, McDermott Will & Emery, Washington, DC; Stefan Meisner, Crowell & Moring LLP, Washington, DC.

For Nishikawa Rubber Co., Nishikawa of America, Inc., Nishikawa Cooper LLC, Defendants **[*84]** (2:12-md-02311-SFC-RSW): Cale A. Johnson, Dykema Gossett PLLC, Bloomfield Hills, MI; Howard B. Iwrey, Dykema Gossett, Bloomfield Hills, MI; John M. Tanski, Axinn, Veltrop & Harkrider LLP, Hartford, CT; Nicholas E. O. Gaglio, Axinn, Veltrop & Harkrider LLP, New York, NY; Rachel J. Adcox, Axinn, Veltrop & Harkrider LLp, Washington, DC.

For Bosal Industries-Georgia, Inc., Defendant (2:12-md-02311-SFC-RSW): Gary J. Mouw, Ronald G. DeWaard, Varnum, Riddering, Grand Rapids, MI; Matthew T. Anderson, Regan Ann Gibson, Varnum LLP, Grand Rapids, MI.

For Corning Incorporated, Corning International Kabushiki Kaisha, Defendants (2:12-md-02311-SFC-RSW): Angela A. Smedley, Winston and Strawn, New York, NY; Dan K. Webb, Winston & Strawn, Chicago, IL; Gretchen V.

Scavo, Winston & Straun LLP, Charlotte, NC; Jeffrey J. Amato, Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; William C. O'Neil, Winston & Strawn LLP, Chicago, IL.

For Green Tokai, Ltd, Defendant (2:12-md-02311-SFC-RSW): Scott R. Murphy, LEAD ATTORNEY, Barnes & Thornburg, Grand Rapids, MI; Bradley Robert Love, Barnes & Thornburg, LLP, Indianapolis, IN; John Barnstead, Barnes and Thornburg LLP, Indianapolis, IN.

For Mitsubishi Heavy Industries, **[*85]** Ltd., Mitsubishi Heavy Industries, Ltd., Defendant (2:12-md-02311-SFC-RSW): William L. Monts, III, Hogan Lovells US LLP, Washington, DC.

For Friedrich Boysen GmbH & Co. KG, Defendant (2:12-md-02311-SFC-RSW): Bradley J. Schram, Hertz, Schram, (Bloomfield Hills), Bloomfield Hills, MI; Brandon T. Boxbaum, Rachel J. Adcox, Axinn, Veltrop & Harkrider, LLP, Washington, DC; John M. Tanski, Axinn, Veltrop & Harkrider LLP, Hartford, CT; Matthew J. Turchyn, Hertz Schram PC, Bloomfield Hills, MI.

For Curtis-Maruyasu America, Inc., Defendant (2:12-md-02311-SFC-RSW): Christopher M. Curran, Eileen Marie Cole, Samuel J. Sharp, White & Case LLP, Washington, DC.

For Sanoh Industrial Co. Ltd., Sanoh America, Inc., Defendants (2:12-md-02311-SFC-RSW): Patrick F. Linehan, Rachel B. Peck, Steptoe & Johnson LLP, Washington, DC; Rudiger L. Breitenecker, Breitenecker & Associates, New York, NY.

For Eberspacher Exhaust Technology GMBH & Co. KG, Eberspacher North America Inc., Defendants (2:12-md-02311-SFC-RSW): Megan L. Havstad, O'Melveny & Myers LLP, San Francisco, CA.

For Hino Motors Manufacturing U.S.A. Inc., Hino Motors Manufacturing U.S.A. Inc., Respondents (2:12-md-02311-SFC-RSW): S. Thomas Wienner, The Miller **[*86]** Law Firm, P.C., Rochester, MI.

For David Dishman, Movant (2:12-md-02311-SFC-RSW): Marla A. Linderman, Linderman Law PLLC, White Lake, MI.

Sandra Singer, Movant (2:12-md-02311-SFC-RSW), Pro se, Boston, MA.

For McGuire Bearing Company, Interested Party (2:12-md-02311-SFC-RSW): Brent W. Johnson, Cohen Milstein Sellers & Toll PLLC, W. Tower, Washington, DC; David H. Fink, Fink + Associates Law, Bloomfield Hills, MI; Gregory P. Hansel, Preti Flaherty Beliveau & Pachios, LLP, Portland, ME; Kit A. Pierson, Cohen Mistein Sellers & Toll PLLC, West Tower, Washington, DC; Manuel J. Dominguez, Cohen Milstein Sellers Toll, PLLC, Ste N500, Palm Beach Gardens, FL; Matthew Ruan, Cohen Milstein Sellers & Toll PLLC, New York, NY; Michael S. Smith, Preti Plaherty Beliveau & Pachios LLP, Portland, ME; Pamela A. Markert, Solomon B. Cera, Thomas C. Bright, Cera LLP, San Francisco, CA; Randall B. Weill, Preti Flaherty Beliveau & Pachios, Portland, ME; Robert A. Braun, Cohen Milstein Sellers & Toll PLLC, Washington, DC.

For Sherman Bearings, Inc., Interested Party (2:12-md-02311-SFC-RSW): David H. Fink, Fink + Associates Law, Bloomfield Hills, MI; Gregory P. Hansel, Preti Flaherty Beliveau & Pachios, LLP, Portland, **[*87]** ME; Michael S. Smith, Preti Plaherty Beliveau & Pachios LLP, Portland, ME; Pamela A. Markert, Solomon B. Cera, Cera LLP, San Francisco, CA; Randall B. Weill, Preti Flaherty Beliveau & Pachios, Portland, ME.

For FCA US LLC, Interested Party (2:12-md-02311-SFC-RSW): Cheryl A. Bush, Bush, Seyferth PLLC, Troy, MI; Susan M. McKeever, Bush Seyferth Paige, Troy, MI.

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For American Honda Motor Company, Inc., Interested Party (2:12-md-02311-SFC-RSW): Ronald C. Wernette, Jr., Wernette Law Firm PLLC, Sylvan Lake, MI.

For Nissan Motors Acceptance Corp., NISSAN MOTOR ACCEPTANCE CORPORATION, Interested Parties (2:12-md-02311-SFC-RSW): Anthony J. Anscombe, Sedgwick LLp, Chicago, IL..

For General Motors LLC, Interested Party (2:12-md-02311-SFC-RSW): Richard Corey Worcester, Quinn Emanuel Urquhart & Sullivan, New York, NY.

For Usui International Corporation, Interested Party (2:12-md-02311-SFC-RSW): L. Pahl Zinn, Thomas G. McNeill, Dickinson Wright, Detroit, MI; Max A. Aidenbaum, Dickinson Wright PLLC, Detroit, **[*88]** MI.

For Ford Motor Company, Interested Party (2:12-md-02311-SFC-RSW): Hector Torres, Sarah G. Leivick, Kasowitz Benson Torres LLP, New York, NY.

For Group 1 Automotive, Inc. as Assignee on Behalf of Group 1 Automotive Wholly-Owned Subsidiary Dealerships, Interested Party (2:12-md-02311-SFC-RSW): Andrew G. Pate, LEAD ATTORNEY, Nix Patterson, LLP, Austin, TX; Jeffrey J. Angelovich, Michael B. Angelovich, Nix, Patterson and Roach, LLP, Austin, TX.

For Mitsubishi Motors North America, Inc., Mitsubishi Motors Credit of America, Inc., Mitsubishi Motors R&D of America, Inc., Mitsubishi Motors R&D of America, Inc., Objectors (2:12-md-02311-SFC-RSW): Elizabeth A. McNellie, Baker & Hostetler, Columbus, OH; Robert James Tucker, Baker Hostetler LLP, Columbus, OH..

For BMW Group, Objector (2:12-md-02311-SFC-RSW): Richard E. Kruger, Jaffe, Raitt,, Southfield, MI.

For Volkswagen Group of America, Inc., Volkswagen Group of America Chattanooga Operations, LLC and Volkswagen Credit, Inc., Objector (2:12-md-02311-SFC-RSW): Henry J. Andries, Jr., Strobl & Sharp, PC, Bloomfield Hills, MI, MI.

For Carlene Cross, Objector (2:12-md-02311-SFC-RSW): N. Albert Bacharach, Jr., N. Albert Bacharach, Jr., P.A., Gainesville, **[*89]** FL.

For William Thompson, Sylvia Thompson, Benjamin Feury, Margaret Marasco, Sean Odweyer, Thomas Saris, Objectors (2:12-md-02311-SFC-RSW): Marla A. Linderman, Linderman Law PLLC, White Lake, MI.

For olen york, Amy York, Nancy York, Objectors (2:12-md-02311-SFC-RSW): George W. Cochran, Streetsboro, OH.

Patrick S. Sweeney, Objector (2:12-md-02311-SFC-RSW), Pro se, Madison, WI.

For Mark Ray, Sean Hull, Objectors (2:12-md-02311-SFC-RSW): Christopher A. Bandas, Bandas Law Firm, P.C., Corpus Christi, TX.

For Caitlin Ahearn, Objector (2:12-md-02311-SFC-RSW): Edward W Cochran, Shaker Heights, OH.

Kevin L. Prins, Objector (2:12-md-02311-SFC-RSW), Pro se, Rockford, MI.

For 113 Class Member Plaintiffs, Objector (2:12-md-02311-SFC-RSW): John S. Gibson, Irving, CA.

For Financial Recovery Services, LLC, Intervenor (2:12-md-02311-SFC-RSW): Aaron M Panner, Matthew R. Huppert, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC; Jonathan T. Walton, Jr., Laura Donnelly Faussie', Fraser Trebilcock Davis & Dunlap PC, Detroit, MI; Michael P. Donnelly, Fraser, Trebilcock, Detroit, MI.

Judges: MARIANNE O. BATTANI, United States District Judge.

Opinion by: MARIANNE O. BATTANI

Opinion

OPINION AND ORDER DENYING DEFENDANTS' MOTION [*90] TO ENFORCE THIS COURT'S FINAL JUDGMENTS

Before the Court is Anti-Vibrational Rubber Parts ("AVRP") Defendants' Motion to Enforce this Court's Final Judgments in the End-Payor Plaintiffs' action (ECF No. 265). AVRP Defendants assert that Releases obtained in the End-Payor Plaintiffs' ("EPPs") class action against Defendants barr the claims advanced by the three named individual Plaintiffs in the Direct Purchaser Plaintiffs' action (13-801). EPPs take no position on the motion. The

Court heard oral argument, and at the conclusion of the hearing, took this matter under advisement. For the reasons that follow, the motion is **DENIED**.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

A. Direct Purchaser Case

In November 2016, Plaintiffs Jerry A. Anderson, Sr., Laura L. LaRue and Christopher A. Lee, filed a class action on behalf of a proposed class of direct purchaser plaintiffs ("DPPs") against Defendants, global manufacturers and suppliers of Anti-Vibrational Rubber Parts that are sold in the United States (See ECF No. 1 ¶ 1 in 16-14057). In their proposed class action, DPPs allege that Defendants engaged in a conspiracy, from as early as March 1996, to fix prices in the automotive parts industry by **[*91]** agreeing to rig bids for, and to fix, stabilize, and maintain the prices of AVRPs (Id. ¶¶ 1, 5). AVRPs are used to reduce engine and road vibration. (Id. ¶ 4). Among other things, DPPs allege that they purchased replacement parts "installed in motor vehicles to replace worn out, defective, or damaged Anti-Vibration rubber parts." (Id. ¶ 31). According to DPPs, they purchased the replacements "directly from an entity of which one of the Defendants is the ultimate parent. (Id. ¶¶ 11-13).

Defendants in the direct purchaser action are either the parent company of an American subsidiary or the subsidiary in one of four corporate families. According to DPPs, Bridgestone Corporation ("BCP"), which is a Japanese corporation, "directly and/or through its subsidiaries and other entities of which it is the ultimate parent, which it wholly owned and/or controlled--manufactured, marketed, and/or sold Anti-Vibration Rubber Parts that were purchased throughout the United States, including in this district, during the Class Period." (Id. ¶ 14). Bridgestone APM Company ("BAPM"), a subsidiary of Bridgestone Corporation, "manufactured, marketed, and/or sold Anti-Vibration Rubber Parts that were purchased **[*92]** throughout the United States, including in this District, during the Class Period." (Id. ¶ 15). Similar allegations are advanced against Yamashita Rubber Co., Ltd. and its subsidiary, YUSA Corporation (id. ¶¶ 17, 18); Sumitomo Riko Company, Ltd., and its subsidiary, DTR Industries, Inc. (id. ¶¶ 19, 20); and Toyo Tire & Rubber Co., Ltd. and its subsidiaries, Toyo Tire North America OE Sales LLC and Toyo Automotive Parts (USA), Inc. (id. ¶¶ 21, 22, 23). Paragraphs 11 through 13 of the DPP Class Action Complaint advance allegations regarding the relationship between Plaintiffs and Defendants. Each individual is alleged to have purchased AVRPs "directly from an entity of which one of the Defendants is the ultimate parent during the Class Period." (Id.) Defendants Bridgestone Corporation, Yamashita Rubber Co., Ltd., and Toyo Tire & Rubber Co., Ltd., pleaded guilty to federal charges and agreed to pay multimillion-dollar criminal fines for their role in a conspiracy to fix prices of AVRPs installed in cars sold in the United States and elsewhere. (Id. ¶¶ 66-74, 71).

AVRP Defendants filed a collective motion to dismiss Direct Purchaser Plaintiffs on several grounds, including that the three **[*93]** named individual Plaintiffs lacked antitrust standing. Among other things, AVRP Defendants asserted that the named plaintiffs could not establish that they were direct purchasers, entitled to pursue damages under federal ***antitrust law***. The purchasers' status was dispositive because under *Illinois Brick Co. v. Illinois, 431 U.S. 720, 746, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, only the direct purchasers of an allegedly price-fixed product may bring a private action for money damages under federal antitrust laws. Exceptions have been carved out of the direct purchaser rule, including one that DPPs asserted was dispositive: "instances where the defendant owns or controls the intermediary that sold the goods to the indirect-purchaser plaintiff." *Laumann v. Nat'l Hockey League, 907 F. Supp. 2d 465, 481 (S.D.N.Y. 2012)*. According to DPPs, the ownership/control exception to the direct purchaser rule applied in the case before the Court because DPPs purchased directly from one of Defendants' wholly-owned subsidiaries.

This Court, in deciding the motion to dismiss, reviewed the applicable caselaw and the allegations in the complaint. (See ECF No. 43 in 13-801 at 11-12). It concluded that DPPs had indeed alleged a claim based on the ownership/control exception to *Illinois Brick*. The Court's resolution was grounded in DPPs' allegations that Defendants were either **[*94]** the parent company of an American subsidiary or the subsidiary in one of four corporate families, that "directly and/or through [ ] subsidiaries and other entities of which it is the ultimate parent, which it wholly owned and/or controlled--manufactured, marketed, and/or sold Anti-Vibration Rubber Parts" that were purchased by DPPs. (Id. ¶ 14). Accordingly, the Court denied the motion to dismiss.

B. EPP Action

After DPPs filed their complaint, and after the Court resolved the motion to dismiss in that action, the defendants in the EPP AVRP component part case settled the claims. The End-Payor AVRP action was filed in June 2014. In their complaint, EPPs alleged that they suffered harm as a result of their purchases of AVRPs as component parts or as replacement parts. (ECF No. 20, Am. Compl. In 13-803). The defendants settled those claims for $81.5 million.

The settlement agreements, which form the basis upon which AVRP Defendants now move for dismissal of the DPP case, "completely released, acquitted, and forever discharged" each of the Defendants "[f]rom any and all claims, demands, actions, suits, causes of action" that the "Releasors, or any of them, ever had, now has, or hereafter **[*95]** can, shall or may ever have . . . in any way arising out of . . . or relating in any way" to Defendants' alleged conspiracy. (ECF No. 265 in 13-803, Ex. A at ¶ 23, Bridgestone Settlement Agreement; accord Ex. B at ¶ 21, Tokai Settlement Agreement; Ex. C at ¶ 22, Yamashita Settlement Agreement; Ex. D at ¶ 23, Toyo Settlement Agreement). The Agreements define Releasors as any member of the settlement class and include "**all persons and entities**" that "**indirectly purchased one or more AVRPs as a replacement part**, which were manufactured or sold by a Defendants, any current or former subsidiary of a Defendant, or any co-conspirator of a Defendant." Id. (Emphasis added).

After the Court approved the settlements, it entered final judgment under Rule 54(b) and dismissed each of the defendants with prejudice (See ECF Nos. 257, 258, 216, 260 in 13-803).

The Final Judgments included the language that follows:

> All persons and entities who are Releasors are barred and enjoined from commencing, prosecuting, or continuing in an individual or representative or derivative capacity, against the [Defendants], in this or any other jurisdiction, any and all claims, causes of action or lawsuits, which they had, have, **[*96]** or in the future may have, arising out of or related to any of the Released Claims as defined in the [Settlement] Agreement.

(ECF No. 257 at ¶ 7, Bridgestone Final Judgment; ECF No. 258 at ¶ 7, Yamashita Final Judgment; ECF No. 216 at ¶ 7, Tokai Final Judgment; ECF No. 260 at ¶ 7, Toyo Final Judgment in 13-803). The named plaintiffs in the Direct Purchaser Complaint did not seek exclusion from the EPP settlement classes.

II. STANDARD OF REVIEW

The Sixth Circuit holds that settlement agreements are contracts governed by principles of state contract law. *Neely v. Good Samaritan Hosp., 345 Fed. Appx. 39, 43 (6th Cir. 2009)*; *MLW Assocs., Inc. v. Certified Tool & Mfg. Corp., 106 Fed. Appx. 307, 312 (6th Cir. 2004)*. Under Michigan law, a plaintiff first must establish the elements of a valid contract to state a claim for breach of contract. *Pawlak v. Redox Corp., 182 Mich. App. 758, 453 N.W.2d 304, 307 (Mich. Ct. App. 1990)*. A valid contract in Michigan requires (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Thomas v. Leja, 187 Mich. App. 418, 468 N.W.2d 58, 60 (Mich. Ct. App. 1990)*.

Once a valid contract has been established, the plaintiff must prove (1) the terms of the contract, (2) breach of those terms by the defendant, and (3) injury to the plaintiff resulting from the breach. *In re Brown, 342 F.3d 620, 628 (6th Cir. 2003)*. When interpreting a contract, "Michigan courts 'examine contractual language and give the words their plain and ordinary **[*97]** meanings.' " *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp., 511 F.3d 535, 544 (6th Cir. 2007)* (alterations omitted) (quoting *Coates v. Bastian Bros., Inc., 276 Mich. App. 498, 741 N.W. 2d 539 (Mich. Ct. App. 2007)*). "If the language of the contract is unambiguous, the court construes and enforces the contract as written." *Quality Prod. & Concepts Co. v. Nagel Precision, Inc., 666 N.W.2d 251 (Mich. 2003)*.

III. ANALYSIS

At the outset, the Court observes that pursuant to the orders of dismissal in the EPP case, the Court retains jurisdiction over any disputes arising from the settlement agreement. (See ECF Nos. 257 at ¶ 11; 258 at ¶ 12; 216 at ¶11, and 260 at ¶ 11 in 13-803). Thus, this Court has jurisdiction over this dispute. See *Kokkonen v. Guardian Life Insurance Company of America, 511 U.S. 375, 380-81, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* (recognizing jurisdiction over a settlement agreement may be exercised where the obligation of the parties to comply with the settlement agreement had been made part of the order of dismissal either by: (1) a separate provision in the dismissal order retaining jurisdiction in the district court over the settlement agreement; or (2) "incorporating the terms of the settlement agreement into the order" of dismissal). Therefore, the Court turns its attention to the merits of the dispute; specifically, whether the language in the Settlement Agreements in the EPP action bars DPPs' claims.

AVRP Defendants characterize the DPP class representatives, who purport to represent a putative class of all direct purchasers, **[*98]** as advancing claims virtually identical to those asserted by the EPPs. AVRP Defendants assert that the named class representatives are merely styled as direct purchasers when they are not-- in fact the named class representatives indirectly purchased AVRPs as standalone replacement parts. Therefore, even if the DPPs' claims could proceed under *Illinois Brick*, the named class representatives are not transformed from indirect purchasers to direct purchasers. The rule put forth in *Illinois Brick* does not alter their status as indirect purchasers; it merely allows for an exception for indirect purchasers to bring claims for money damages under federal law. Consequently, their claims are barred by the language of the Settlement Agreements, and they cannot avoid the injunctions by claiming to be direct purchasers.

There is no dispute that the AVRPs purchased by the named plaintiffs were sold as replacement parts. Moreover, there is no dispute that the named plaintiffs, unlike EPPs, do not allege that the replacement parts they purchased were made by Defendants. Instead, the three named plaintiffs allege that they had their cars repaired at a repair shop ultimately owned by a named defendant. Based on these undisputed **[*99]** facts and allegations, AVRP Defendants conclude that the purchases are indirect purchases made from an entity other than the named antitrust violator defendant. (Tr. 77-8). Because the named plaintiffs in the direct purchaser case failed to opt out of the AVRP EPP settlements, AVRP Defendants assert that the claims advanced by the named plaintiffs are barred by the settlement language in the EPP case.

This Court acknowledges the accuracy of the facts as advanced by AVRP Defendants but disagrees with their legal analysis. Notably, no one contests that the settlements in the EPP action are valid. AVRP Defendants' argument, however, is at odds with the language contained in the Settlement Agreements that "**claims made by direct purchasers** of AVRPs" are not released. (ECF No. 266, Ex. 1 at ¶¶ 12, 23). Consequently, the Court must decide how to characterize the named plaintiffs in the DPP action.

In contrast to AVRP Defendants' conclusion, a review of applicable caselaw shows that the courts have used different lables to characterize purchasers in the situation presented by the named class representatives in the direct purchaser case. Some courts addressing such circumstances have deemed them **[*100]** direct purchasers. See *Domestic Drywall Antitrust Litig., 2016 U.S. Dist. LEXIS 90619, 2016 WL 3769680, at *5 (E.D. Pa. July 13, 2016)* (rejecting the argument that those plaintiffs that purchased drywall directly from a subsidiary of a defendant made the plaintiffs indirect purchasers); *Tech. Learning Collective, Inc. v. Daimler-Benz AG, 1980 U.S. Dist. LEXIS 9517, 1980 WL 1943, at *15 (D. Md. Aug. 28, 1980)* (finding that "[b]ecause the 'control' exception to *Illinois Brick* applies to parent-subsidiary relationships, these class members are direct purchasers from the defendants"). Other courts have deemed them indirect purchasers with special standing. See *In re: Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323, 326 (9th Cir. 1980)* (using the exception to *Illinois Brick* does not transform an indirect purchaser into a direct purchaser); *In re Lithium Ion Batteries Antitrust Litig., No. 13-MD-2420 YGR, 2014 U.S. Dist.*

LEXIS 7516, 2014 WL 309192, at *9 (N.D. Cal. Jan. 21, 2014) (observing that the owned or controlled exception to Illinois Brick permits suits brought by indirect purchasers when "the direct purchaser to whom they pay the passed-on overcharge is owned or controlled by a conspirator"). Some courts have deemed the exercise of how to characterize such purchasers as immaterial. See, e.g., In re Optical Disk Drive Antitrust Litig., No. 3:10-MD-2143 RS, 2012 U.S. Dist. LEXIS 55300, 2012 U.S. Dist. LEXIS 55300, 2012 WL 1366718, at *5 (N.D. Cal. Apr. 19, 2012) (describing this issue as "one of nomenclature rather than substance"); In re Mid-Atl. Toyota Antitrust Litig., 516 F. Supp. 1287, 1295 (D. Md. 1981) (bemoaning the fruitlessness of engaging in "an overly semantic analysis of the . . .exception; what is useful instead is to review the allegations in light of the policy objectives underlying Illinois Brick. If those policy considerations argue for application of the Illinois Brick rule it will be applied, if they do not, it will **[*101]** not.") None of the cases cited is dispositive. The Court finds the better approach is to place substance over semantics. The Sixth Circuit denied Defendants' request for interlocutory appeal in the DDP case. This Court declines to sanction this collateral attack on its ruling in the DPP case.

Finally, both AVRP Defendants and named class representatives assert that the decision in Apple, Inc. v. Pepper, 139 S. Ct. 1514, 203 L. Ed. 2d 802 (2019) favors their respective positions. In Apple, the Supreme Court held that consumers, who had purchased smartphone applications from Apple's retail stores, were direct purchasers with standing to sue the manufacturer for alleged monopolization. The Supreme Court expressly rejected Apple's assertion that iPhone owners were not direct purchasers, observing that there was no intermediary in the distribution chain. Id. at 1520-22.

In rendering its decision, the Supreme Court first considered the broad language contained in the statutory text of Section 4 of the Clayton Act, 15 U.S.C. § 14(a), observing that it authorizes "any person" injured in his property because of conduct forbidden by antitrust laws to sue the alleged violator. 139 S. Ct. at 1520. The Supreme Court next reviewed its Illinois Brick decision, observing that it incorporated proximate cause into § 4, preventing an indirect purchaser, **[*102]** "removed from the violator in a distribution chain" from bringing a suit under the statute. The Court characterized Illinois Brick as establishing "a bright-line rule that authorizes suits by direct purchases but bars suits by indirect purchasers." 139 S. Ct. at 1520 (citing Illinois Brick, 431 U.S. at 756). The Supreme Court concluded that iPhone owners did not fall to the "bottom of a vertical distribution chain" given the absence of an intermediary between Apple and the iPhone owner. Id. at 1521. Finally, the Court characterized iPhone owners as direct purchasers. Id.

The reasoning favors the named representatives' position. In addition other factors tip the scale in favor of named class representatives being deemed direct purchasers. Notably, DPPs' lawsuit was being litigated at the time of the EPP settlements. Nevertheless, counsel for Defendants never asked DPPs to release their claims or asked them to consent to inclusion in the EPP settlements. Defendants did not file a notice in the DPP case indicating they had settled the DPP claims. Nor did AVRP Defendants seek concurrence from DPPs or inform DPPs of the pendency of this motion. These actions strengthen named class representatives' suggestion that this motion is an attempt to do an **[*103]** end-run around the Court's ruling in which the Court rejected the request to dismiss DPPs' claim because DPPs are indirect purchasers prohibited by Illinois Brick from pursuing their claims. EPPs only sought injunctive relief under the Sherman Act; their damages claims were for violations of state law. In contrast, named class representatives are seeking money damages under federal law. They may proceed with their claims.

IV. CONCLUSION

For the reasons stated above, the motion is **DENIED**.

IT IS SO ORDERED.

Date: June 2, 2020

/s/ Marianne O. Battani

MARIANNE O. BATTANI

United States District Judge

In re Niaspan Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

June 2, 2020, Decided; June 3, 2020, Filed

MDL NO. 2460; MASTER FILE NO. 13-MD-2460

Reporter

464 F. Supp. 3d 678 *; 2020 U.S. Dist. LEXIS 97215 **; 2020-1 Trade Cas. (CCH) P81,245; 112 Fed. R. Evid. Serv. (Callaghan) 951; 2020 WL 2933824

IN RE: NIASPAN ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: ALL ACTIONS

Prior History: *In re Niaspan Antitrust Litig., 971 F. Supp. 2d 1346, 2013 U.S. Dist. LEXIS 132253 (J.P.M.L., Sept. 17, 2013)*

Core Terms

generic, class member, brand, purchasers, consumers, defendants', uninjured, ascertainability, Reply, class certification, antitrust, predominance, methodology, overcharge, feasible, damages, records, reliable, state law, pharmaceutical, Plaintiffs', motion to exclude, variations, prescriptions, co-payment, class period, loyalists, reimbursement, plans, expert testimony

LexisNexis® Headnotes

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN1[ ] **Expert Witnesses, Daubert Standard**

A court must determine whether an expert employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN2[ ] **Expert Witnesses, Daubert Standard**

Courts have adopted a liberal policy of admissibility with respect to *Fed. R. Evid. 702*. As such, the rejection of expert testimony is the exception and not the rule.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Burdens of Proof > Preponderance of Evidence

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

HN3[] **Expert Witnesses, Daubert Standard**

Courts must address a trilogy of restrictions before permitting the admission of expert testimony: qualification, reliability and fit. The party offering the expert must establish each requirement by a preponderance of the evidence.

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

HN4[] **Expert Witnesses, Qualifications**

To qualify as an expert, *Fed. R. Evid. 702* requires the witness to have specialized knowledge regarding the area of testimony. The Third Circuit has instructed courts to interpret the qualification requirement liberally and not to insist on a certain kind of degree or background when evaluating the qualifications of an expert. The Third Circuit noted that a witness can qualify as an expert under *Rule 702* on the basis of practical experience alone, and a formal degree, title, or educational specialty is not required.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN5[] **Expert Witnesses, Daubert Standard**

The reliability requirement of *Fed. R. Evid. 702* means that the expert's opinion must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation; the expert must have good grounds' for his or her belief.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Relevance > Relevant Evidence

Evidence > Admissibility > Expert Witnesses > Helpfulness

HN6[] **Expert Witnesses, Daubert Standard**

For expert testimony to meet the fit requirement, it must assist the trier of fact to understand the evidence or to determine a fact in issue. *Fed. R. Evid. 702*. This condition goes primarily to relevance. Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN7[] **Prerequisites for Class Action, Commonality**

The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. *Fed. R. Civ. P. 23(a)* sets out four prerequisites for a class action—numerosity, commonality, typicality, and adequacy. Subsection (b) provides additional requirements for each type of class action. To obtain certification under *Fed. R. Civ. P. 23(b)(3)*, the moving party must also show that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. These requirements are referred to, respectively, as predominance and superiority. *Rule 23(b)(3)* also contains an implied, judicially-created requirement that the identities of class members are ascertainable.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Preponderance of Evidence

HN8[] **Class Actions, Certification of Classes**

The party seeking certification bears the burden of establishing each element of *Fed. R. Civ. P. 23*. Trial courts must engage in a rigorous analysis and find each of *Rule 23* 's requirements met by a preponderance of the evidence before granting certification. They must do so even if it involves judging credibility, weighing evidence, or deciding issues that overlap with the merits of a plaintiff's claims. The *Rule 23* analysis also requires courts to determine the nature of the evidence, and how plaintiffs would present this evidence at trial. However, a court should not address merits-related issues beyond what is necessary to determine preliminarily whether certain elements will necessitate individual or common proof.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN9[] **Class Actions, Certification of Classes**

Actual, not presumed conformance with *Fed. R. Civ. P. 23* requirements is essential. When courts harbor doubt as to whether a plaintiff has carried her burden under *Rule 23*, the class should not be certified.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN10[] **Prerequisites for Class Action, Numerosity**

Fed. R. Civ. P. 23(a)(1) requires that the class be so numerous that joinder of all members is impracticable. *Fed. R. Civ. P. 23(a)(1)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN11[] **Prerequisites for Class Action, Commonality**

To satisfy *Fed. R. Civ. P. 23(a)(2)*, there must be questions of law or fact common to the class. Satisfaction of the commonality requirement requires that plaintiffs demonstrate that their claims depend upon a common contention, the resolution of which will resolve an issue that is central to the validity of each one of the claims in one stroke. Commonality does not require an identity of claims or facts among class members; instead, the commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN12[] Prerequisites for Class Action, Typicality

Fed. R. Civ. P. 23(a)(3) requires that the claims or defenses of the representative parties are typical of the claims or defenses of the class. The Third Circuit has a low threshold for satisfying typicality. To conduct the typicality inquiry, the Court must examine whether the named plaintiffs' claims are typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN13[] Prerequisites for Class Action, Adequacy of Representation

Fed. R. Civ. P. 23(a)(4) requires plaintiffs to show that the representative parties will fairly and adequately protect the interests of the class. Whether adequacy has been satisfied depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class. Only a fundamental conflict will defeat adequacy of representation. Judgment vacated on other grounds.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Preponderance of Evidence

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN14[] Class Actions, Certification of Classes

The ascertainability inquiry of Fed. R. Civ. P. 23(b) is two-fold, requiring a plaintiff to show that: (1) the class is defined with reference to objective criteria; and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition. Plaintiff has the burden of making this showing by a preponderance of the evidence, and the district court must undertake a rigorous analysis of the evidence to determine if the standard is met. However, plaintiff need not be able to identify all class members at class certification—instead, a plaintiff need only show that class members can be identified.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN15[] Class Actions, Certification of Classes

The Third Circuit has articulated three principal rationales for the ascertainability standard: First, ascertainability and a clear class definition allow potential class members to identify themselves for purposes of opting out of a class. Second, it ensures that a defendant's rights are protected by the class action mechanism, and that those persons who will be bound by the final judgment are clearly identifiable. Finally, it ensures that the parties can identify class members in a manner consistent with the efficiencies of a class action.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN16[] Prerequisites for Class Action, Predominance

The predominance and ascertainability inquiries are distinct because the ascertainability requirement focuses on whether individuals fitting the class definition may be identified without resorting to mini-trials, whereas the predominance requirement focuses on whether essential elements of the class's claims can be proven at trial with common, as opposed to individualized, evidence.

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

Evidence > Burdens of Proof > Preponderance of Evidence

HN17[] Class Actions, Prerequisites for Class Action

Plaintiffs have the burden of showing ascertainability by a preponderance of the evidence, and the district court must undertake a rigorous analysis of the evidence to determine if the standard is met.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN18[] Class Actions, Certification of Classes

While a plaintiff need only show at class certification that class members can be identified, actual, not presumed, conformance with the ascertainability requirement is essential.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN19[] Class Actions, Certification of Classes

When courts harbor doubt as to whether a plaintiff has carried her burden under *Fed. R. Civ. P. 23*, the class should not be certified.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN20[] Prerequisites for Class Action, Commonality

Fed. R. Civ. P. 23(b)(3) requires that the questions of law or fact common to class members predominate over any questions affecting only individual members. *Rule 23(b)(3)*, however, does not require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof. What the rule does require is that common questions predominate over any questions affecting only individual class members. An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN21[] **Class Actions, Certification of Classes**

The aim of the predominance inquiry is to test whether any dissimilarity among the claims of class members can be dealt with in a manner that is not inefficient or unfair. Inefficiency can be pictured as a line of thousands of class members waiting their turn to offer testimony and evidence on individual issues. Unfairness is equally well pictured as an attempt to eliminate inefficiency by presuming to do away with the rights a party would customarily have to raise plausible individual challenges on those issues.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

HN22[] **Sherman Act, Claims**

Under federal ***antitrust law***, antitrust injury occurs the moment that a purchaser incurs an overcharge. Antitrust injury is also referred to as antitrust impact.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN23[] **Standing, Requirements**

With respect to a class action, it is well established that the lack of common evidence of antitrust injury or impact alone can cause individual questions to predominate.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN24[] **Remedies, Damages**

It is undisputed that under longstanding federal ***antitrust law***, antitrust injury occurs the moment that a purchaser incurs an overcharge.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

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

HN25[] Clayton Act, Claims

Proof of antitrust injury or impact is analytically distinct from proof of antitrust damages. The purpose of the antitrust injury requirement is to prove that the theory of unlawful conduct, i.e. the theory of liability, was in fact responsible for causing harm to plaintiffs. The availability of a pass-on defense has no bearing on proof that a plaintiff sustained some harm traceable to the defendant's conduct. To the extent that pass-on defense is available, it relates to the calculation of damages, not the standard of antitrust injury.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN26[] Prerequisites for Class Action, Commonality

To the extent that a proposed class contains uninjured class members, plaintiffs must provide a reasonable and workable method for differentiating between uninjured class members and injured class members so that uninjured class members do not recover damages. Such a method must be protective of a defendant's constitutional rights and not cause individual inquiries to overwhelm common issues.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN27[] Prerequisites for Class Action, Predominance

For purposes of the predominance analysis, the number of potentially uninjured class members is a relevant consideration. While it is perfectly reasonable for the Court to address challenges to a small number of uninjured class members, it would be far more difficult for a court to weed out over 2,000 uninjured class members—or some subset of that number—from a class of over 16,000.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN28[] Class Actions, Certification of Classes

The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only, and for a party to take advantage of the class action device, it must limit their class to an operational definition.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN29[] Class Actions, Certification of Classes

At class certification, a model purporting to serve as evidence of damages in a class action must measure only those damages attributable to that theory.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN30[] **Remedies, Damages**

Unlike antitrust injury, a relaxed measure of proof is applied to antitrust damages calculations and the actual amount of damages may result from a reasonable estimate. A defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible. Any adjustment to damages calculations for pass-on defenses arising under state laws would not affect the fact of antitrust injury, and does not preclude class certification.

Governments > Courts > Authority to Adjudicate

HN31[] **Courts, Authority to Adjudicate**

The availability of the pass-on defense involves merits-related issues beyond what is necessary to determine preliminarily whether certain elements will necessitate individual or common proof.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Evidence > Burdens of Proof > Allocation

HN32[] **Prerequisites for Class Action, Predominance**

A plaintiff's burden of demonstrating that common questions of law or fact predominate includes providing the Court with an extensive analysis which demonstrates that the variations in the applicable state laws do not defeat predominance. Under the Third Circuit standard, courts may certify nationwide classes where differences in state law fall into a limited number of predictable patterns, and any deviations could be overcome at trial by grouping similar state laws together and applying them as a unit. However, plaintiffs face a significant burden to demonstrate that grouping is a workable solution.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN33[] **Prerequisites for Class Action, Numerosity**

The superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication. Superiority, unlike numerosity, considers alternatives to class actions other than joinder.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN34[] **Class Actions, Certification of Classes**

In considering whether superiority is established, the Court must consider whether variations in state laws present the types of insuperable obstacles which render class litigation unmanageable.

Judges: **[**1]** Hon. Jan E. DuBois, J.

Opinion by: Jan E. DuBois

Opinion

[*686] **MEMORANDUM**

TABLE OF CONTENTS

I. INTRODUCTION

This multidistrict litigation involves what has come to be known as a "pay-for-delay," or "reverse payment," settlement—a practice in which a brand-name drug manufacturer brings a patent-infringement action against a generic drug manufacturer and then compensates the generic drug manufacturer for its agreement to delay entering the market with a competing generic version of the brand-name drug. In this case, two putative classes—the Direct-Purchaser Plaintiffs ("DPPs") and the End-Payor Plaintiffs ("EPPs")—aver **[**3]** that the brand-name manufacturer of the drug Niaspan, Kos Pharmaceuticals, Inc. ("Kos"), entered into anticompetitive settlement agreements with the generic manufacturer of that drug, Barr Pharmaceuticals, Inc. ("Barr"), in March of 2005 in order to terminate patent-infringement litigation brought by Kos against Barr in the District Court for the Southern District of New York. Kos was later acquired by defendant AbbVie Inc. ("AbbVie"), and Barr was later acquired by defendant Teva Pharmaceuticals, Inc. ("Teva").

Presently before the Court are End-Payor Plaintiffs' Motion for Class Certification, Defendants' Motion to Exclude the Expert Testimony of Laura Craft and Eric Miller Offered in Support of End-Payor Plaintiffs' Motion for Class Certification, and End-Payor Plaintiffs' Motion to Exclude the Opinions and Testimony of John F. Fritz.

For the reasons that follow, (1) Defendants' Motion to Exclude the Expert Testimony of Laura Craft and Eric Miller is denied, (2) EPPs' Motion for Class Certification is denied without prejudice, and (3) EPPs' Motion to Exclude the Opinions and Testimony of John F. Fritz is denied as moot.

II. BACKGROUND

The background of this case is set forth in detail **[**4]** in the Court's Memorandum and Order of September 5, 2014. *See* *In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735 (E.D. Pa. 2014)*. This Memorandum recites only the facts and procedural history relevant to the motions presently before the Court.

Defendant AbbVie, a drug manufacturer that was spun off from Abbott Laboratories ("Abbott") in January 2013, manufactures and sells Niaspan, a brand-name prescription drug, primarily used in the treatment of lipid disorders. In the early 1990s, Kos, acquired by AbbVie in December 2006, developed a therapeutically-effective time-release version of niacin, which does not cause the side effects previously associated with niacin. Kos obtained a series of U.S. patents on time-release niacin and marketed the drug using the trademark Niaspan. Niaspan has been manufactured and sold by AbbVie (and AbbVie's predecessor corporations) since September of 1997.

In October 2001, Barr, acquired by Teva in January 2009, filed an Abbreviated New Drug Application ("ANDA") with the Food and Drug Administration ("FDA") seeking authorization to manufacture and sell a generic equivalent of certain dosages of Niaspan. The ANDA process provides for streamlined FDA approval of a bioequivalent generic version of an FDA-approved brand-name **[**5]** drug. As part of the ANDA process, Barr filed certifications with the FDA stating that its generic drug did not infringe any of the patents covering Niaspan and/or that the patents were invalid or unenforceable.

[*689] In March 2002, Kos initiated the first of a series of patent-infringement lawsuits against Barr in the Southern District of New York, alleging infringement of its Niaspan patents. After three years of litigation, on April 12, 2005, Kos and Barr entered into several related settlement agreements terminating the litigation. These agreements constitute the alleged "pay-for-delay" or "reverse payment" settlement that is the subject of this litigation.

EPPs allege that defendants' conduct violated the antitrust laws of 16 states, the consumer protection laws of 5 states, the unfair trade practices laws of 7 states, and the unjust enrichment laws of 25 states—a total of 53 state laws from 26 jurisdictions. *See* Defs.' Opp'n to EPPs' Mot. for Class Certification ("Defs.' Opp'n Class Cert") 3; Defs.' Apps. State L. Supp. Defs.' Opp'n to EPPs' Mot. for Class Certification (("Defs.' App.") A1-1-A1-4. Specifically, EPPs claim that as a result of the alleged unlawful reverse payment settlement, **[**6]** putative class members "were denied the opportunity to purchase generic Niaspan before September 20, 2013, and were further denied the benefit of the price competition that would have ensued in a competitive environment where Kos launched an authorized generic Niaspan to compete with Barr during the 180-day exclusivity period."[1] Mem. L. Supp. EPPs' Mot. for Class Certification ("EPPs' Mot. Class Cert") 12.

On December 19, 2018, EPPs filed a Motion for Class Certification. In their motion, EPPs seek certification of an overcharges class and an unjust enrichment class, each with two subclasses, a third party payor ("TPP") and a consumer subclass:

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[1] "[T]o encourage generic entry and to compensate ANDA filers for the expense and risk of a potential infringement lawsuit, federal law grants the first generic manufacturer to file a[n] . . . ANDA application (i.e., the "first-filer") a 180-day period of exclusive marketing rights." *In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 741 (E.D. Pa. 2014)*. The 180-day period is exclusive only with respect to other ANDA applicants and does not prohibit the holder of an approved New Drug Application (the manufacturer of the brand-name drug) from marketing its own generic version of its drug (an authorized generic). *Id.*

• Third Party Payor ("TPP") Overcharges Sub-class Definition:

○ All entities in the United States and its territories who purchased, paid, and/or provided reimbursement for some or all of the purchase price for Niaspan and/or generic versions of Niaspan in Arizona, California, Florida, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, West Virginia, and Wisconsin for consumption by their members, employees, **[**7]** insureds, participants, or beneficiaries **[*690]** during the period April 3, 2007 through January 31, 2018 (the "Overcharges Class Period").

• Consumer Overcharges Sub-class Definition:

○ All persons in the United States and its territories who purchased, paid, and/or provided reimbursement for some or all of the purchase price for Niaspan and/or generic versions of Niaspan in Arizona, California, Florida, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, West Virginia, and Wisconsin for consumption by themselves or their families during the period April 3, 2007 through January 31, 2018 (the "Overcharges Class Period").

• TPP Unjust Enrichment Sub-class Definition:

○ All entities in the United States and its territories who purchased, paid, and/or provided reimbursement for some or all of the purchase price for Niaspan and/or generic versions of Niaspan in Alabama, Arizona, Florida, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, **[**8]** Utah, Vermont, West Virginia, Wisconsin, and Wyoming for consumption by their members, employees, insureds, participants, or beneficiaries during the period April 3, 2007 through September 19, 2013 (the "Unjust Enrichment Class Period").

• Consumer Unjust Enrichment Sub-class Definition:

○ All persons in the United States and its territories who purchased, paid, and/or provided reimbursement for some or all of the purchase price for Niaspan and/or generic versions of Niaspan in Alabama, Arizona, Florida, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming for consumption by themselves or their families during the period April 3, 2007 through September 19, 2013 (the "Unjust Enrichment Class Period").

• Excluded from Overcharges and Unjust Enrichment Classes:

○ Defendants and their officers, directors, management, employees, subsidiaries, or affiliates;

○ All federal or state government entities other than cities, towns or municipalities with self-funded prescription drug plans;

○ All persons or entities **[**9]** who, after September 20, 2013, paid and/or provided reimbursement for branded Niaspan and did not pay and/or provide reimbursement for generic Niaspan;

○ All persons with a tiered co-pay plan who purchased only generic Niaspan;

○ All persons or entities who purchased Niaspan for purposes of resale or directly from Defendants or their affiliates.

○ Fully insured health plans (i.e., plans that purchased insurance from another third party payor covering 100% of the Plan's reimbursement obligations to its members);

○ Pharmacy Benefit Managers ("PBMs");

○ Flat co-payers (i.e., consumers who paid the same co-payment amount for brand and generic drugs);

○ The judges in this case and any members of their immediate families;

○ All Counsel of Record.

End-Payor Plaintiffs' Motion for Class Certification ("EPPs' Mot. Class Cert.") 1-3.[2]

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[2] At the Hearing on May 14 and 15, 2019, EPPs stated that the class definitions submitted with the Motion for Class Certification contained errors and submitted a slide deck correcting those errors. *See* May 14, 2019 Hr'g Tr. ("May 14 Tr.") 101:23-103:9; EPPs' Slide Deck (ECF No. 660) 51-54. The above class definitions incorporate those corrections.

[*691] In their motion, EPPs ask the Court to appoint plaintiffs A.F. of L. - A.G.C. Building Trades Welfare Plan, City of Providence, Rhode Island, Electrical Workers 242 and 294 Health & Welfare Fund, International Union of Operating Engineers Local 49 Health and Welfare Fund, International Union of Operating Engineers Local 132 Health and Welfare Fund, New England Electrical **[**10]** Workers Benefits Fund, Painters District Council No. 30 Health & Welfare Fund, United Food & Commercial Workers Local 1776 & Participating Employers Health and Welfare Fund, Miles Wallis, and Carol Prasse (collectively, "named plaintiffs") as class representatives. *Id.* 3. EPPs also request appointment of Kenneth A. Wexler of Wexler Wallace LLP, Steve Shadowen of Hilliard Shadowen LLC, Michael Buchman of Motley Rice LLC, and Marvin Miller of Miller Law LLC as Co-Lead Counsel, and Jeffrey Kodroff of Spector Roseman & Kodroff P.C. as Liaison Counsel for the EPP class pursuant to *Fed. R. Civ. P. 23(c)(1)(B)* and *23(g)*. *Id.* 3-4.

On February 25, 2019, defendants responded to EPPs' motion for class certification and filed a motion to exclude the expert testimony of EPP class certification experts Eric Miller and Laura Craft. On March 25, 2019, EPPs filed a reply in support of their motion for class certification, responded to defendants' motion to exclude the expert testimony of Miller and Craft, and filed a motion to exclude the expert testimony of defendants' expert John Fritz. On April 8, 2019, defendants responded to EPPs' motion to exclude Fritz's testimony. The Court held Hearings on EPPs' class certification motion and the related **[**11]** motions to exclude expert testimony on May 14 and 15, 2019, and July 23, 2019.

III. MOTION TO EXCLUDE THE EXPERT TESTIMONY OF LAURA CRAFT AND ERIC MILLER

Defendants argue that the expert testimony of two EPP rebuttal experts on class ascertainability, Eric Miller and Laura Craft, should be excluded under *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. Mem. L. Supp. Defs.' Mot. Exclude Expert Test. Laura Craft & Eric Miller Offered Supp. EPPs' Mot. Class Certification ("Mem. Exclude Craft & Miller") 1. EPPs oppose defendants' motion and argue that both experts provide admissible evidence. EPPs' Opp'n Defs.' Mot. Exclude Expert Test. Laura Craft & Eric Miller ("Opp'n Mot. Exclude Craft & Miller") 1. For the reasons that follow, the Court agrees with EPPs that Craft and Miller proffer admissible evidence. Defendants' motion to exclude the expert testimony of Craft and Miller is therefore denied.

A. *APPLICABLE LAW*

Federal Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the **[**12]** testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

That rule requires the Court to act as a gatekeeper and is applicable to scientific testimony and testimony based on "technical" **[*692]** and "other specialized" knowledge. *Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. ***HN1***[] A court must determine whether an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id. at 152*.

HN2[] Courts have adopted a "liberal policy of admissibility" with respect to *Rule 702*. *Pineda v. Ford Motor Co., 520 F.3d 237, 243 (3d Cir. 2008)* (quoting *Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 806 (3d Cir. 1997)*). As such, the "rejection of expert testimony is the exception and not the rule." *Dorman Prods. v. PACCAR, Inc., 201 F. Supp. 3d 663, 686 (E.D. Pa 2016)* (DuBois, J.) (quoting *Fed. R. Evid. 702* Advisory Committee Note).

HN3[] Courts must address a "trilogy of restrictions" before permitting the admission of expert testimony: qualification, reliability and fit. *Schneider v. Fried, 320 F.3d 396, 404 (3d Cir. 2003)*; *Elcock v. Kmart Corp., 233 F.3d 734, 741 (3d Cir. 2000)*. The party offering the expert must establish each requirement by a preponderance of the evidence. *In re TMI Litig., 193 F.3d 613, 663 (3d Cir. 1999)*.

i. Qualification

HN4[] To qualify as an expert, "*Rule 702* requires the witness to have 'specialized knowledge' regarding the area of testimony." *Betterbox Commc'ns Ltd. v. BB Techs., Inc., 300 F.3d 325, 335 (3d Cir. 2002)*. The Third Circuit has instructed courts to interpret the qualification **[**13]** requirement "liberally" and not to insist on a certain kind of degree or background when evaluating the qualifications of an expert. "[T]he Third Circuit noted that a witness can qualify as an expert 'under *Rule 702* on the basis of practical experience alone, and a formal degree, title, or educational specialty is not required.'" *Voilas v. Gen. Motors Corp., 73 F. Supp. 2d 452, 457 (D.N.J. 1999)* (citing *Lauria v. AMTRAK, 145 F.3d 593, 599 (3d Cir.1998)*).

ii. Reliability

HN5[] The reliability requirement of *Daubert* "means that the expert's opinion must be based on the 'methods and procedures of science' rather than on 'subjective belief or unsupported speculation'; the expert must have 'good grounds' for his or her belief." *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 742 (3d Cir. 1994)*.

iii. Fit

HN6[] For expert testimony to meet the *Daubert* "fit" requirement, it must "assist the trier of fact to understand the evidence or to determine a fact in issue." *Fed. R. Evid. 702*. "This condition goes primarily to relevance. Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert, 509 U.S. at 591*.

B. *DISCUSSION*

The Court reviews defendants' challenges to Miller and Craft's proffered opinions in turn.

i. Eric Miller

In his declaration, Miller proffers two primary conclusions. First, Miller opines that through subpoenas issued to PBMs and pharmacies, EPPs will be able to obtain transactional **[**14]** level purchase data regarding purchases of Niaspan and **[*693]** its generic equivalents during the class period. Decl. Eric J. Miller ("Miller Decl.") ¶¶ 3, 20. Second, he opines that through the PBM and pharmacy transaction records obtained by the EPPs, the EPPs will be able to identify purchasers of Niaspan and its generic equivalents during the Class Period. *Id.* ¶¶ 8, 10, 20. Miller also states that he "disagrees with [defense expert, Donald] Dietz's suggestion that there is no 'reliable and administratively feasible means to identify class members in this case.'" Miller Decl. ¶ 20.

The Court concludes that Miller meets the *Rule 702* requirements, but his testimony is limited to his opinions that (1) EPPs can obtain transactional level purchase data regarding purchases of Niaspan and its generic equivalents during the class period and (2) EPPs can use PBM and pharmacy transaction records to identify purchasers of Niaspan and its generic equivalents during the class period. To the extent that Miller purports to opine that class members can be identified, he has not addressed the way in which exclusions from the class can be applied and therefore he has not provided reliable grounds for any such opinion. **[**15]**

1. *Qualification*

EPPs claim Miller's "extensive experience obtaining and utilizing comparable data," including his direct involvement with settlement administration in over 25 indirect purchaser pharmaceutical class lawsuits, qualifies him to offer his opinions. Opp'n Mot. Exclude Craft & Miller 15.

Miller attests that he has "personally overseen the methodologies used in indirect purchaser pharmaceutical class actions to identify class members," which "utilized prescription data obtained from the records of pharmacies and PBMs to identify consumers who may be class members." Miller Decl. ¶ 9. He has 18 years of experience administering class actions settlements, including more than 25 indirect purchaser pharmaceutical class cases. Opp'n Mot. Exclude Craft & Miller 2. The Court concludes that Miller is sufficiently qualified to offer his opinions that EPPs can obtain brand and generic Niaspan transaction records for the class period and that those records can be used to identify purchasers of brand and generic Niaspan during the class period.

2. *Reliability*

Defendants argue that Miller is unreliable because he (1) did not offer a methodology to identify class members and (2) did not review **[**16]** any data produced in this case, address the challenges posed by the class definition, or address limitations in data availability and access in PBMs' data systems. Mem. Exclude Craft & Miller 4-9.

EPPs respond that (1) Miller need not provide a methodology to identify class members because he does not purport to provide a method for ascertaining class members, and (2) Miller was not required to review the record because his testimony is reliably based on his past industry experience and his involvement in four cases in which pharmaceutical transaction data was obtained and used. Opp'n Mot. Exclude Craft & Miller 15, 17-18.

First, the Court agrees with EPPs that Miller need not provide a methodology for identifying class members because he does not opine on such a methodology. Though EPPs' evidence of a reliable and administratively feasible methodology for identifying class members is critical to the Court's ascertainability inquiry, Miller's testimony does not address that issue—he only opines on the question whether Niaspan and generic *purchasers* can be identified. As Miller explained during his deposition, his declaration did not consider the EPPs' class definition, did not compare **[**17]** the EPPs' definition to the class definitions in *Relafen, Tricor, Provigil* and *Fluoride Tablets*, and did not address any of the exclusions in EPPs' class definition. Videotape Dep. Eric Miller 26:13-19, 27:13-18, 30:1-5. For those reasons, Miller will not be permitted **[*694]** to testify that he disagrees with defense expert Donald Dietz's opinion that there is no reliable and administratively feasible means to identify class members.

Second, the Court concludes that Miller has "good grounds" for both of his conclusions. Miller opines that EPPs can obtain brand and generic Niaspan transaction records for the class period based on his past experience with settlement administration in pharmaceutical cases in which he was involved. Miller Decl. ¶ 10. Specifically, he relies upon his experience in the *Relafen, Tricor*, *Provigil* and *Fluoride Tablets* cases, in which pharmaceutical records were obtained through subpoenas to pharmacies and PBMs. *Id.* ¶¶ 10-15. Miller's past experience provides reasonable grounds for him to conclude that subpoenas to PBMs and pharmacies will result in the production of pharmaceutical records in this case. *See* *In re Paulsboro Derailment Cases, 746 F. App'x 94, 98 (3d Cir. 2018)* (holding that an expert may base his opinion upon personal **[**18]** experience).

Similarly, Miller opines that EPPs can identify purchasers of Niaspan and its generic equivalents during the class period based on his experience with similar subpoenaed data. Miller Decl. ¶ 8. Specifically, he states that in the *Relafen, Tricor*, *Provigil* and *Fluoride Tablets* cases, the electronic data fields enabled the plaintiffs to identify each drug purchaser. *Id.* ¶¶ 11-18. Miller's past experience in which the subpoenaed pharmaceutical data identified drug purchasers provides good grounds for his belief that the production of Niaspan pharmaceutical data would enable the identification of brand and generic Niaspan purchasers.

Because Miller has good grounds for his opinions on the identification of purchasers of brand and generic Niaspan, defendants' arguments that Miller failed to review the produced data or to address limitations in data availability and retrieval address the weight of Miller's testimony, not its admissibility. *See* *In re TMI Litig., 193 F.3d 613, 665 (3d*

Cir. 1999) ("[T]he judge should not exclude evidence simply because he or she thinks that there is a flaw in the expert's investigative process which renders the expert's conclusions incorrect. The judge should only exclude the evidence if the flaw **[**19]** is large enough that the expert lacks the "good grounds" for his or her conclusions.").

For all of the forgoing reasons, Miller will be permitted to testify that brand and generic Niaspan purchasers can be identified. He will not be permitted to testify that class members can be identified.

3. *Fit*

Defendants argue that Miller's experience with claims administration in the settlement of cases is inapposite to this case because it does not involve a settlement class. Mem. Exclude Craft & Miller 10-11. In support, they point to the fact that several courts have recognized that "the successful administration of a settlement does not **[*695]** necessarily mean that a litigation class could be ascertained." *Id.* at 10.

EPPs respond that the fact Miller's experience with settlement administration does not impact his opinion on the availability of the data. *See* Opp'n Mot. Exclude Craft & Miller 18-19. They contend Miller's testimony addressing the existence and availability of PBM and pharmacy transaction data is relevant to the identification of brand and generic Niaspan purchasers.

The Court rejects defendants' argument that Miller's testimony is not relevant because his experience is based on settlement claims **[**20]** administration. Although defendants' are correct that "[t]he successful administration of a settlement does not necessarily mean that a litigation class could be ascertained," *In re Wellbutrin XL Antitrust Litig., 308 F.R.D. 134, 151 n.8 (E.D. Pa. 2015)*, EPPs correctly state that "the *fact* of data availability is the same, regardless of the context." Opp'n Mot. Exclude Craft & Miller 19. The Court thus concludes that Miller's testimony, as limited *supra*, satisfies the fit requirement under *Rule 702*.

4. *Conclusion*

Accordingly, that part of defendants' motion seeking to exclude all of the opinions and testimony of Miller is denied. However, Miller's testimony is limited to his opinions that (1) EPPs can obtain transactional level purchase data regarding purchases of Niaspan and its generic equivalents during the class period and (2) EPPs can use PBM and pharmacy transaction records to identify purchasers of Niaspan and its generic equivalents during the class period. However, he has not provided the required foundation to opine that class members can be identified in a reliable and administratively feasible manner.

ii. Laura Craft

In her declaration, Laura Craft attests that if provided with data from TPPs, PBMs, and pharmacies containing the identities of purchasers of **[**21]** Niaspan and its generic equivalents during the class period, she can compile a list reflecting the identities of the members of the proposed class in a manageable process that "can be carried out programmatically." Decl. Laura R. Craft ("Craft Decl.") ¶ 10. For the reasons below, the Court concludes that Craft's opinion is admissible under *Rule 702*'s "liberal policy of admissibility."

1. *Qualification*

EPPs argue that Craft is qualified as president of data analytics firm OnPoint Analytics, specializes in collecting, manipulating, and analyzing pharmaceutical industry data, especially in the litigation context, and has applied her expertise to over fifty pharmaceutical cases. Opp'n Mot. Exclude Craft & Miller 5-6.

Craft's qualifications include "extensive experience [at OnPoint] working with insurance and claims processing data, including the processing of prescription drug benefits." Craft Decl. ¶ 3. She also has extensive experience using transactional data to "identify[] individual class members in a variety of contexts . . . [including] identifying transaction dates, types, and costs, the participants in making payment, and eliminating duplicates." *Id.* ¶ 5. Craft declares that OnPoint's expertise **[**22]** with transactional data includes "the cleaning and transformation processes that create consistency and allow efficient programming across data obtained from multiple sources." *Id.*

The Court concludes that Craft's extensive experience working with pharmaceutical data qualifies her to opine that EPP class members can be identified in a programmatic and manageable process.[3]

2. *Reliability*

Defendants contend that Craft's testimony is unreliable because she has not reviewed the data produced in this case and has not offered a methodology for **[*696]** identifying class members. Mem. Exclude Craft & Miller 5-9.

EPPs respond that Craft properly based her opinions on her experience and not on the produced data because "absent a subpoena and a negotiated production process and the execution of protective orders that assure that there is a *HIPAA*-qualified protective order in place, one would not expect to see samples that would be, standalone, sufficient to answer all of the questions which might be implicit in defining the class." Opp'n Mot. Exclude Craft & Miller 12. They further argue that Craft justifiably relies on sworn declarations by four of the largest PBMs that they maintain their **[**23]** claims data in the industry standard format and that they maintain the types of data that would be required to identify class members and apply key exclusions. *Id.* at 10-12.

EPPs also contend that Craft explained a six-step methodology for identifying class members based on her experience manipulating pharmaceutical data, *id.* at 9, and that her methodology is particularly well-suited for drug sales in the pharmaceutical industry, "which are tracked, monitored, and recorded across a set of substantially uniform variables." Reply Mem. L. Supp. EPPs' Mot. Class Certification ("EPPs' Reply Class Cert.") 6.

The Court concludes that Craft's failure to review the data produced in this case does not render her opinion unreliable. Although Craft does not rely on actual produced data, she relies on her experience working with pharmaceutical data from PBMs, TPPs, drug manufacturers, pharmacies, and consumers. Craft Decl. ¶ 5-6. Craft reports that the data standardization process "is particularly easy in the pharmaceutical industry because the specific types of data reported are already relatively standard" and "[PBM] databases are generally able to report the same key variables." *Id.* She also relies on declarations **[**24]** from PBM representatives Kyle Brua (Prime Therapeutics LLC, March 28, 2018), Jonathan Stocker (Prime Therapeutics LLC, March 28, 2018), Tom Henry (Express Scripts, Inc., March 28, 2018), Robert Lahman (OptumRx, Inc. March 26, 2018), and Steven Schaper (Caremark, LLC, March 20, 2018), which detail the type of data that PBMs retain.

The Court further concludes that Craft's relatively threadbare methodology is adequate under the liberal admissibility standard of *Rule 702*. In her declaration, Craft asserts that "OnPoint would be able to merge the data from the various sources, identify and eliminate data errors, transform the data to standardize the fields, eliminate duplicates, and compile a list reflecting the identities of the class members contained in the data." Craft Decl. ¶ 10. Defendants are correct that Craft does not explain how any of these steps would be carried out and "did not describe a specific method" to identify payors who meet the class definitions in this case. Mem. Exclude Craft & Miller 6. However, Craft reviewed the class exclusions, and declared that "OnPoint has extensive experience applying these types of exclusions to pharmaceutical data." Craft Decl. ¶ 9. As such, Craft's **[**25]** opinion that she can create a list of class members and apply the class exclusions in this case is based on her experience applying these types of exclusions to similar data in other cases. The Court determines that Craft's reliance upon her past experience applying "these types of exclusions" provides sufficient grounds for her belief that she can do so again in this instance. Defendants' objections to Craft's assurances that she can apply the class exclusions go to the weight of her testimony and not its admissibility. *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 596, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)* **[*697]** ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

3. *Fit*

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[3] The analysis under *Daubert* involves a preliminary assessment of admissibility and has no effect on the Court's substantive analysis of whether the admissible evidence satisfies the more rigorous *Rule 23* ascertainability requirement by a preponderance of the evidence. *See, e.g., In re Wellbutrin XL Antitrust Litig., 308 F.R.D. at 144, 151* (concluding that plaintiff's witness was "sufficiently qualified to be an expert" but offered evidence that "[fell] short" of satisfying ascertainability).

Defendants argue that Craft has not shown her experience is sufficiently analogous because "Craft's declaration did not identify a single case that showed she had applied her (unspecified) methodology in a comparable setting." Mem. Exclude Craft & Miller 10. However, as explained above, Craft states that she has "extensive experience applying these types of exclusions to pharmaceutical data." Craft Decl. ¶ 9. Craft's declaration rebuts defense expert Dietz's opinion **[**26]** by explaining that she and OnPoint "routinely perform[] precisely th[e] type of work" that Dietz incorrectly (in her view) identifies as 'difficult' and 'cumbersome.'" Opp'n Mot. Exclude Craft & Miller 8. Thus, Craft's testimony assists the Court in understanding the evidence relating to whether EPPs have provided a reliable and administratively feasible mechanism for identifying class members, which is relevant to the Court's determination of class ascertainability.

4. *Conclusion*

The Court thus concludes that Craft's expert opinion is admissible. That part of defendants' motion seeking to exclude the opinion and testimony of Laura Craft is denied.

IV. EPPS' MOTION FOR CLASS CERTIFICATION

A. *LEGAL STANDARD*

HN7[] "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *In re Modafinil Antitrust Litig., 837 F.3d 238, 248 (3d Cir. 2016)*. *Subsection (a) of Federal Rule of Civil Procedure 23* sets out four prerequisites for a class action—numerosity, commonality, typicality, and adequacy. *Subsection (b)* provides additional requirements for each type of class action. To obtain certification under *Rule 23(b)(3)*, as EPPs seek to do in this case, the moving party must also show "that the questions of law or fact common to class members predominate over any questions **[**27]** affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." These requirements are referred to, respectively, as predominance and superiority. *Rule 23(b)(3)* also contains an implied, judicially-created requirement that the identities of class members are ascertainable. *Byrd v. Aaron's Inc., 784 F.3d 154, 162 n.5 (3d Cir. 2015)*.

HN8[] "The party seeking certification bears the burden of establishing each element of *Rule 23*." *In re Modafinil Antitrust Litig., 837 F.3d at 248*. "[T]rial courts 'must engage in a rigorous analysis and find each of *Rule 23*[ ]'s requirements met by a preponderance of the evidence before granting certification.' They must do so even if it involves judging credibility, weighing evidence, or deciding issues that overlap with the merits of a plaintiff's claims." *Harnish v. Widener Univ. Sch. of Law, 833 F.3d 298, 304 (3d Cir. 2016)* (citing *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316-25 (3d Cir. 2008)*). The *Rule 23* analysis also requires courts to "determine the nature of the evidence, and how plaintiffs would present this evidence at trial." *In re Domestic Drywall Antitrust Litig., 322 F.R.D. at 221*. However, "a court should not address merits-related issues 'beyond what is necessary to determine preliminarily whether certain elements will necessitate individual or common proof.'" *Harnish, 833 F.3d at 305*.

[*698] ***HN9***[] The Third Circuit has "repeatedly emphasize[d] that [a]ctual, not presumed conformance with *Rule 23* requirements is essential." **[**28]** *Gonzalez v. Corning, 885 F.3d 186, 192 (3d Cir. 2018)* (internal quotations omitted). "When courts harbor doubt as to whether a plaintiff has carried her burden under *Rule 23*, the class should not be certified." *Mielo v. Steak 'n Shake Operations, Inc., 897 F.3d 467, 483 (3d Cir. 2018)*.

B. *DISCUSSION*

EPPs contend that they meet the four requirements under *Rule 23(a)* and the three requirements under *Rule 23(b)(3)*. The Court addresses each such requirement in turn.

C. RULE 23(A) REQUIREMENTS

EPPs must initially satisfy the four prerequisites detailed in Rule 23(a): numerosity, commonality, typicality, and adequacy. The Court concludes that each requirement is satisfied.

i. Numerosity

HN10[] Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

EPPs assert that "Niaspan prescriptions peaked at nearly 600,000 per month in 2011," and argue that joinder is impracticable for such a large class. Mem. L. Supp. EPPs' Mot. Class Certification ("EPPs' Class Cert. Mem.") 8. The Court agrees with EPPs and concludes that the numerosity requirement is satisfied.

ii. Commonality

HN11[] To satisfy Rule 23(a)(2), there must be "questions of law or fact common to the class." Satisfaction of the commonality requirement requires that plaintiffs demonstrate that their claims "depend upon a common contention," the resolution of which "will resolve an issue that is central to the **[**29]** validity of each one of the claims in one stroke." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). "Commonality does not require an identity of claims or facts among class members; instead, [t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." Johnston v. HBO Film Mgmt., Inc., 265 F.3d 178, 184 (3d Cir. 2011).

The Court agrees with EPPs that most of the "central questions in this case focus entirely on Defendants' conduct" and involve common questions. EPPs' Class Cert. Mem. 9. These common questions include, *inter alia*, (1) whether Kos entered into a contract, combination, and/or conspiracy with Barr to restrain trade; (2) whether Kos paid cash and/or other valuable consideration to Barr in exchange for a promise to delay the launch of generic Niaspan; (3) whether defendants had pro-competitive justifications for their conduct; and (4) whether defendants possessed market power in the relevant market. The commonality requirement is satisfied.

iii. Typicality

HN12[] Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The Third Circuit has a "low threshold" for satisfying typicality. *See* In re Nat'l Football League Players Concussion Injury Litig., 821 F.3d 410, 428 (3d Cir. 2016). To conduct the typicality inquiry, the **[**30]** Court must examine "whether the named plaintiffs' claims are typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class." In re Blood Reagents Antitrust Litig., No. 09-2081, 2015 U.S. Dist. LEXIS 141909, 2015 WL 6123211, at *26 (E.D. Pa. Oct. 19, 2015) (DuBois, J.).

[*699] EPPs argue that typicality is satisfied because "named Plaintiffs' claims arise out of the same facts and legal theories that give rise to the claims of all EPP Class members: Kos and Barr entered into a reverse-payment settlement that unlawfully extended Kos' monopoly over the Niaspan market and delayed the onset of generic competition." EPPs' Class Cert. Mem. 11. Defendants do not contest that EPPs have satisfied the typicality requirement. The Court concludes that the typicality requirement is satisfied.

iv. Adequacy

HN13[] *Rule 23(a)(4)* requires plaintiffs to show that "the representative parties will fairly and adequately protect the interests of the class." "Whether adequacy has been satisfied 'depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.'" *McDonough v. Toys R Us, Inc., 638 F. Supp. 2d 461, 477 (E.D. Pa. 2009)*. "Only a fundamental conflict will defeat adequacy of representation." *In re K-Dur Antitrust Litig., 686 F.3d 197, 223 (3d Cir. 2012)*, ***[**31]*** *judgment vacated on other grounds*, *570 U.S. 913, 133 S. Ct. 2849, 186 L. Ed. 2d 904 (2013)*.

EPPs contend that "plaintiffs are represented by experienced counsel thoroughly familiar with litigating complex class actions" and "there is no likelihood of a conflict of interest among class members." EPPs' Class Cert. Mem. 11-12. Defendants make no argument to the contrary, and the Court agrees with EPPs that the adequacy requirement is satisfied.

D. ***RULE 23(B)(3) REQUIREMENTS***

EPPs must also satisfy the predominance and superiority requirements of *Rule 23(b)(3)* and the ascertainability requirement. *See* *In re: Domestic Drywall Antitrust Litig., 322 F.R.D. 188, 200 (E.D. Pa. 2017)*. Defendants argue that EPPs fail their burden of proving each of these requirements. The Court addresses each such requirement in turn, beginning with ascertainability.

i. Ascertainability

HN14[] The ascertainability "inquiry is two-fold, requiring a plaintiff to show that: (1) the class is 'defined with reference to objective criteria'; and (2) there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015)*. "Plaintiff has the burden of making this showing by a preponderance of the evidence, and the district court must 'undertake a rigorous analysis of the evidence to determine if the standard is met.'" **[**32]** *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc., 867 F.3d 434, 439 (3d Cir. 2017)* (internal citations omitted). "However, plaintiff need not 'be able to identify all class members at class certification—instead, a plaintiff need only show that 'class members can be identified.'" *Id.* (internal citations omitted).

HN15[] The Third Circuit has articulated three principal rationales for the ascertainability standard:

> First, ascertainability and a clear class definition allow potential class members to identify themselves for purposes of opting out of a class. Second, it ensures that a defendant's rights are protected by the class action mechanism, and that those persons who will be bound by the final judgment are clearly identifiable. Finally, it ensures that the parties can identify class members in a manner consistent with the efficiencies of a class action.

[*700] *City Select Auto Sales Inc., 867 F.3d at 439* (internal quotations and citations omitted).

HN16[] "The predominance and ascertainability inquiries are distinct . . . because the ascertainability requirement focuses on whether individuals fitting the class definition may be identified without resort[ing] to mini-trials, whereas the predominance requirement focuses on whether essential elements of the class's claims can be proven at trial with common, as opposed to individualized, **[**33]** evidence." *Byrd, 784 F.3d at 164*.

EPPs argue that under the governing Third Circuit law, plaintiffs can satisfy ascertainability with "almost zero evidence." EPPs' Class Cert. Mem. 17. In support, EPPs rely heavily on *Byrd*, for the proposition that EPPs need not show "how the records would be obtained, who would obtain them, or who would do the matching of records." EPPs' Class Cert. Mem. 18.

Defendants' respond that EPPs "offer a gross misreading of *Byrd* and the Third Circuit's ascertainability jurisprudence." Defs.' Opp'n Class Cert. 37.

The Court agrees with defendants that EPPs mischaracterize the Third Circuit ascertainability standard. Contrary to EPPs' assertion, *Byrd* does not stand for the proposition that ascertainability requires less than a rigorous showing of administrative feasibility. In *Byrd*, the Third Circuit reversed a denial of class certification in a case in which the district court "summarily adopted the Magistrate Judge's Report and Recommendation, and no oral argument was held on the class-certification motion," notwithstanding the fact that the plaintiffs had filed an objection to the Report and Recommendation that addressed class ascertainability. *Byrd, 784 F.3d at 169-170*. As such, the Third Circuit ruled **[**34]** that the district court erred in failing to conduct a rigorous analysis of the evidence presented.

Although Judge Rendell filed a concurring opinion in *Byrd* in which she opined that "the time has come to do away with [the ascertainability requirement]," that position has not been adopted by this Circuit. *See* *Byrd, 784 F.3d at 172* (Rendell, J., concurring). ***HN17***[] As the Third Circuit recently reiterated, plaintiffs have the burden of showing ascertainability "by a preponderance of the evidence, and the district court must 'undertake a rigorous analysis of the evidence to determine if the standard is met.'" *City Select Auto Sales Inc., 867 F.3d at 439*. Courts in this district have consistently rejected EPPs' argument that *Byrd* lowered the Third Circuit ascertainability standard, and this Court agrees with those decisions. *See, e.g.,* *In re Domestic Drywall Antitrust Litig., No. 13-2437, 2017 U.S. Dist. LEXIS 135758, 2017 WL 3700999, at *8 (E.D. Pa. Aug. 24, 2017)* ("[In *City Select*,] the court reaffirmed its prior precedent and did not take the opportunity to retreat from the "heightened" ascertainability standard that has been developed in this Circuit, as urged by Judge Rendell in her *Byrd* concurrence."); *Vista Healthplan, Inc. v. Cephalon, Inc., No. 06-1833, 2015 U.S. Dist. LEXIS 74846, 2015 WL 3623005, at *11 (E.D. Pa. June 10, 2015)* ("[P]lans to create a methodology at a later date do not satisfy the rigorous analysis insisted upon by the Third Circuit and I do not read *Byrd* to alter these requirements.").

Thus, **[**35]** the Court will rigorously analyze EPPs' evidence of ascertainability. ***HN18***[] While EPPs need only show at class certification that class members can be identified, *City Select, 867 F.3d at 439*, "actual, not presumed[,] conformance with [the ascertainability] requirement[] is essential." *Gonzalez v. Corning, 885 F.3d 186, 192 (3d Cir. 2018)* (internal quotations and alterations omitted). The Court next considers whether **[*701]** EPPs' class definition is defined with objective criteria.

1. *Defining Class with Reference to Objective Criteria*

EPPs argue that the provided class definitions are defined with reference to objective criteria. EPPs' Class Cert. Mem. 13. Defendants disagree, arguing that "given the complex flow of payments and reimbursements in the pharmaceutical distribution chain, it is far from clear exactly who is in the class and who is not." Defs.' Opp'n Class Cert. 29. Defendants also claim that there is an ambiguity in the class definition regarding whether a payor includes any entity that bears risk for drug costs. *Id.* at 29-31.

EPPs respond that "[t]he ambiguities that Defendants assert do not appear on the face of the class definitions, which is the standard by which to determine class membership." EPPs' Reply Class Cert. 3.

The Court agrees with EPPs that the class definition **[**36]** is defined with reference to objective criteria and satisfies the first prong of the ascertainability analysis. Defendants' arguments do not challenge the objective nature of the class criteria. *Cf.* *City Select Auto Sales Inc., 867 F.3d at 439* ("Under the objective criteria requirement, '[a] class definition that depends on subjective criteria, such as class members' state of mind, will fail for lack of definiteness.'"). The Court next turns to the evidence submitted by EPPs to establish that they have a reliable and administratively feasible mechanism for identifying class members.

2. *Reliable and Administratively Feasible Mechanism for Determining Whether Putative Class Members Fall Within the Class Definition*

EPPs assert that they have "submitted evidence that an administratively feasible methodology exists to allow for the determination of whether a TPP or consumer falls within the definitions of the Proposed Classes." EPPs' Class Cert. Mem. 14. Defendants respond that EPPs have not met their burden of proving a reliable and administratively feasible methodology by a preponderance of the evidence. Defs.' Opp'n Class Cert. 34.

Upon a rigorous analysis of the evidence, the Court determines that EPPs have failed to carry their **[**37]** burden of showing a reliable and administratively feasible mechanism for identifying class members by a preponderance of the evidence.

a. EPPs' Evidence of a Reliable and Administratively Feasible Mechanism

EPPs face an uphill battle in carrying their burden of proving they have a reliable and administratively feasible mechanism for identifying class members. Courts in this district have held in similar pay-for-delay cases that end-payor plaintiffs have failed to provide adequate evidence of an administratively feasible mechanism for identifying class members. *See, e.g.,* *Vista Healthplan, Inc. v. Cephalon, Inc., No. 06-1833, 2015 U.S. Dist. LEXIS 107013, 2015 WL 4737288, at *11 (E.D. Pa. Aug. 4, 2015)* ("Plaintiffs have . . . not met their burden of establishing that any methodology for identifying class members would be administratively feasible."); *see also* *In re Wellbutrin XL Antitrust Litig., 308 F.R.D. 134, 149-50 (E.D. Pa. 2015)* ("[Plaintiffs ha[ve] not shown by a preponderance of the evidence that there is a reliable and administratively feasible mechanism for determining which PBMs and individual consumers are members of the class.").

EPPs argue in this case, they "have provided the [evidentiary] record that the courts in *Wellbutrin* and *Vista [Healthplan]* lacked." EPPs' Reply Class Cert. 3. They argue that their evidence demonstrates "that obtaining, standardizing, and **[*702]** merging data **[**38]** from multiple sources with the goal of ascertaining class members is . . . common practice in antitrust litigation, [and] is especially well-suited to the pharmaceutical industry." EPPs' Reply Class Cert. 4. The Court reviews EPPs' evidence below.

First, EPPs proffer evidence that the relevant pharmaceutical transaction data exists. EPPs' expert, Myron Winkelman, asserts that "[e]very prescription drug transaction in the United States is well-documented and records of those transactions are maintained so that TPPs and consumers can identify, at a minimum, the prescriptions drugs they purchased, the date on which they were purchased, and the price they each paid for the medication." Decl. Myron Winkelman ("Winkelman Decl.") ¶ 18. Winkelman also claims that "PBMs are obligated by their contractual agreements with the TPPs to maintain records in connection to the processing, payment and denial of claims," *id.* ¶ 35, and "mail order and retail pharmacies maintain extensive records of each consumer's prescription purchase." *Id.* ¶ 36. Finally, Winkelman opines that pharmaceutical data is "maintained in standardized accepted industry format." *Id.* ¶ 32.

In support of EPPs' claim that the data **[**39]** exists, they have presented short declarations by several PBM representatives. For example, Jonathan Stocker, Vice President of PBM Operations at Prime Therapeutics LLC, declared "Prime has readily accessible records, in an industry standard format created by the National Council for Prescription Drug Program, by which third party payors and consumer can be identified on every purchase of Niaspan and Generic Niaspan that Prime adjudicates on behalf of its third-party payor clients." Decl. Non-Party Prime Therapeutics LLC ("Stocker Decl.") ¶ 7. Similarly, Robert Lahman, Senior Vice President of Industry Relations at OptumRx, Inc., attested that "OptumRx has readily accessible records, in an industry standard format created by the National Council for Prescription Drug Program, by which third party payors and consumers can be identified on every purchase of Niaspan and Generic Niaspan that OptumRx adjudicates on behalf of its third-party payor clients." Decl. Non-Party OptumRx ("Lahman Decl.") ¶ 5. Both PBM declarants stated that they maintain the records of transaction details in its regular course of business. Stocker Decl. 9; Lahman Decl. ¶ 7.

Second, EPPs proffer evidence that the **[**40]** data is obtainable. They rely on Miller's expert opinions, discussed above, in which Miller states that through subpoenas issued to PBMs and pharmacies, EPPs will be able to obtain transactional level purchase data regarding purchases of Niaspan and its generic equivalents during the class period, which will enable EPPs to identify purchasers of Niaspan and its generic equivalents during the class period. Miller Decl. ¶¶ 3, 8, 10, 20. As set forth in greater detail above, Miller bases his opinions on his experience in claims administration for settlement classes.

Third, EPPs assert that identifying class members from the obtained pharmaceutical data is administratively feasible. In support, they rely on Craft's declaration, discussed above, in which she states that she can compile a list reflecting the identities of the members of the proposed class in a manageable process that "can be carried out programmatically" and that she has "extensive experience applying these types of exclusions to pharmaceutical data." Craft Decl. ¶¶ 9-10.

EPPs also present a declaration by EPP Interim Co-Lead Counsel, Kenneth Wexler, which synthesizes EPPs' "evidence that an administratively feasible methodology **[**41]** **[*703]** exists to allow for the determination of whether a TPP or consumer falls within the definitions of the Proposed EPP Classes." EPPs' Class Cert. Mem. 14. First, Wexler states that Winkelman has provided evidence that "PBMs, TPPs, pharmacies, and individual consumers have records reflecting what TPPs and consumers purchased Niaspan or its generic versions during the class periods." Decl. Kenneth A. Wexler Supp. EPPs' Mot. for Class Certification ("Wexler Decl.") ¶ 26. Second, Wexler says that EPPs would serve HIPAA-compliant court-issued subpoenas to "the top six Pharmacy Benefit Managers (in terms of market share), the ten largest Third-Party Payors, the top ten chain store pharmacies, and the top five mail order pharmacies" for the production of purchase records for brand and generic Niaspan during the class period. *Id.* ¶¶ 27-28. Third, he says EPPs would retain OnPoint Analytics, transfer the obtained records to OnPoint, which "could then process the data and identify those persons and entities in the data who fit the class definitions." *Id.* ¶¶ 29-30. Finally, Wexler states that the remainder of unidentified class members can obtain records of their relevant purchases and prove their **[**42]** class membership. *Id.* ¶ 31.

Defendants argue that EPPs' evidence does not show that the class is ascertainable, and EPPs' "offer only vague assurances that they will somehow be able to ascertain class members in the future." Defs.' Opp'n Class Cert. 32. They claim that EPPs failed to present a methodology "specific to this case" or provide "evidentiary support that the method will be successful." *Id.* at 33 (citing *Carrera v. Bayer Corp., 727 F.3d 300, 306, 310 (3d Cir. 2013)*). Defendants also raise specific challenges to EPPs' evidence that they can obtain the necessary data and identify class members using pharmaceutical data.

For the reasons below, the Court agrees with defendants that EPPs have not satisfied their burden of proving a reliable and administratively feasible mechanism for identifying class members.

b. Data Obtainability

Defendants contend that EPPs have not shown that the records necessary to identify class members are obtainable and raise several challenges to EPPs' evidence. Defs.' Opp'n Class Cert. 39. Defendants note that EPPs have faced difficulties obtaining data in this case, as evidenced by the fact that when EPPs served deposition and document subpoenas on four PBMs, three PBMs served formal objections, and only two PBMs produced **[**43]** requested data—one of which produced an extremely limited report relating only to the transactions involving named plaintiff AF of L. *Id.* at 22. According to defendants, EPPs' declarations from the PBM representatives are inadequate because they "merely describe in non-specific terms the type of information generated in the claim adjudication process." *Id.* at 20.

Defendants' also challenge Miller's opinion that data of brand and generic Niaspan purchases can be feasibly obtained. They highlight that Miller did not account for data limitations that arose in past cases in which he was involved. Specifically, defendants present affidavits originally filed in *Relafen*, one of the four cases upon which Miller primarily relies in his report, in which two PBMs, Express Scripts and Medco, attested to the difficulties of data retrieval. *Id.* at 20-21.

EPPs' reply that defendants' objections to data obtainability rely on "outdated" declarations from PBMs and that PBMs' reluctance to produce data "merely underscores the importance of implementing a HIPAA-compliant protective order (which has been done in this case) and, if necessary, the routine matter of enforcing subpoenas." **[*704]** EPPs' Reply Class Cert. 14-15. EPPs also note that **[**44]** "[m]ost of the named Plaintiffs in this litigation were able to provide data for the complete set of relevant transactions going back to around the beginning of the class period." *Id.* at 14.

The Court concludes that, notwithstanding defendants' objections, EPPs have demonstrated by a preponderance of the evidence that the necessary records of brand and generic Niaspan purchases can be obtained. In addition to EPPs' evidence above, the Court notes that the Vice President of Knowledge Solutions and Chief Data Officer for PBM Express Scripts submitted a declaration in this case that "Express Scripts maintains records of claims that can be provided to its Clients, although certain additional fees, costs, or expenses may be associated with this service." Decl. Non-Party Express Scripts, Inc. ("Henry Decl."). Although the failure of several PBMs to provide any record evidence "heightens the Court's concern that such pharmaceutical records may not be obtainable for use in the ascertainability inquiry," *In re Wellbutrin XL Antitrust Litig., 308 F.R.D. 134, 150 (E.D. Pa. 2015)*, the Court is satisfied that through Court-issued subpoenas, records of brand and generic Niaspan transactions can be obtained. However, the Court is concerned about the economic feasibility of obtaining **[**45]** such information and the ability of EPPs to identify class members in a reliable and administratively feasible manner, issues that the Court addresses below.

c. Methodology for Determining Class Membership

In this case, EPPs have proffered a complex class definition with multiple exclusions. As such, the inquiry as to the ascertainability of class members does not end merely by noting the existence of obtainable records of brand and generic Niaspan purchasers. EPPs "must also demonstrate an administratively feasible method for [applying the exclusions], as required by the class definition." *In re Thalomid & Revlimid Antitrust Litig., No. 14-6997, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *21 (D.N.J. Oct. 30, 2018)*; *see also* City Select, 867 F.3d at 441-442 (remanding for an inquiry as to whether plaintiffs could use existing database as part of a reliable and administratively feasible means to determine class membership); *Vista Healthplan, Inc. v. Cephalon, Inc., No. 06-1833, 2015 U.S. Dist. LEXIS 107013, 2015 WL 4737288, at *2 (E.D. Pa. Aug. 4, 2015)* ("However, by choosing to define its class with eight specific exclusions, Plaintiffs have created the need for a structured, multi-stepped, individualized fact-finding process in order to determine which individuals would fall within the class definition and which would fall within one of the eight exclusions.").

Defendants contend that EPPs' "experts have affirmatively conceded that they have no methodology for determining **[**46]** class membership in this case." Defs.' Opp'n Class Cert. 1. They assert EPPs failed to provide a feasible methodology for identifying and removing brand and generic Niaspan purchases that fall within class exclusions. *Id.* at 41. Defendants specifically argue that EPPs failed to provide any method for identifying the exclusions of brand-only payors after actual generic entry, generic-only payors on tiered plans, consumers with the same co-payment for brand and generic drugs, fully insured plans, and state and federal agencies with self-funded prescription drug plans. *Id.* at 41-46.

EPPs respond that Craft proffers a six-step methodology for identifying class members based on her experience manipulating pharmaceutical data, and that her methodology is particularly well-suited for the pharmaceutical industry, "which are tracked, monitored, and recorded across a **[*705]** set of substantially uniform variables." EPPs' Reply Class Cert. 6. EPPs also argue defendants' challenges to feasibility address "tiny subgroups of consumers" and "each argument can be addressed reliably and programmatically through Plaintiffs' proposed methodology." *Id.* at 20.

The Court agrees with defendants on this issue. It is not persuaded that EPPs have **[**47]** an administratively feasible mechanism for identifying class members which involves applying all class exclusions. Craft's six-step methodology that "OnPoint would be able to merge the data from the various sources, identify and eliminate data errors, transform the data to standardize the fields, eliminate duplicates, and compile a list reflecting the identities of the class members contained in the data," Craft Decl. ¶ 10, does not offer a methodology "specific to this case." *See* *Carrera, 727 F.3d at 306, 311*. Without more information about the process through which Craft claims she will "compile a list reflecting the identities of the class members," defendants lack the ability to meaningfully test the reliability of EPPs' proposed method of identifying class members. *See* *Carrera, 727 F.3d at 307*. As defendants persuasively stated at oral argument, EPPs have the burden "to develop the methodology and bring it to the Court . . . for [defendants] to be able to evaluate and . . . to present [to the Court any] opposing positions." July 23, 2019 Hr'g Tr. ("July 23 Tr.") 137:5-10.

Craft's expert report assures the Court that she can "programmatically" through a "manageable process" identify a list of class members based on the fact that she **[**48]** has "extensive experience applying these types of exclusions." While Craft's report constitutes admissible evidence, the Court does not find that her report establishes by a preponderance of the evidence that EPPs have an administratively feasible methodology for identifying class members. The Court is particularly concerned by Craft's failure to provide any explanation as to how she can apply all of the exclusions required by plaintiffs' complex class definition in an administratively feasible manner. Mere assurances that a model will be effective to ascertain class members is insufficient. *Carrera, 727 F.3d at 311-312*. Accordingly, plaintiffs must provide more than Craft's *ipse dixit* to prevail under a rigorous ascertainability analysis.[4]

A review of EPPs' evidence belies their claim that all exclusions can be "addressed reliably and programmatically through Plaintiffs' proposed methodology." EPPs' Reply Class Cert. 20. EPPs submitted numerous short declarations that omitted critical supporting details necessary to satisfy the Court. EPPs present an individualized, *ad hoc* approach that does not adequately establish a feasible methodology to address **[**49]** the many class exclusions.

For example, defendants argue that EPPs have proposed no methodology for identifying federal and state entities with self-funded plans—one of the many class exclusions. Defs.' Opp'n Class Cert. 45; May 14 Tr. 175:23-177:15. EPPs respond that federal and government agencies are facially obvious. EPPs' Reply Class Cert. 17. However, defendants provided evidence that such plans are not necessarily facially obvious. May 14 Tr. 176:7-177:6. Moreover, even if such plans were facially **[*706]** obvious, EPPs have not explained how they intend to programmatically apply that exclusion to a putative class estimated at over 600,000 members.

The District of Rhode Island's recent decision on the ascertainability of TPPs is not persuasive on this issue. *See In re Loestrin 24 FE Antitrust Litig., 410 F. Supp. 3d 352, 2019 WL 5406077 (D.R.I. Sept. 17, 2019)* (Smith, J.). The *Loestrin* court approved of end payor plaintiffs' proposed methodology for identifying class members in part by dismissing concerns regarding the exclusion of federal and state entities with self-funded plans. *145 F.3d 593, [WL] at *30*. However, EPPs in that case made specific assurances that self-funded government plans would be removed from the data by PBMs rather than merely identified **[**50]** by name. *Id.* As discussed above, EPPs in this case have only said that such plans would be facially obvious—a contention that defendants have rebutted.

Additionally, defendants contend that plaintiffs have no methodology to identify and exclude "[f]ully insured plans (i.e. plans that purchased insurance from another third party covering 100% of the Plan's reimbursement obligations to its members)." Defs.' Opp'n Class Cert. 44. In her deposition, Craft asserted for the first time that Form 5500s, an IRS form filed by health benefit plans, could be used to identify fully insured plans. *Id.* at 44-45. However, defendants identify inconsistencies on the Form 5500 of named plaintiff AF of L as exemplary of the difficulties in ascertaining fully insured health plans in that manner. *Id.* at 45.

EPPs respond that defendants can only point to "a single Form 5500," which they contend does not rebut Craft's deposition testimony. EPPs' Reply Class Cert. 18. They also note that Winkelman testified that PBMs typically maintain data that can be used to identify and exclude fully-insured plans. *Id.* However, Winkelman acknowledged that no such data has been produced in this case. Defs.' Opp'n Class Cert. 45. In their Reply, **[**51]** EPPs proffer that "even to the extent that Form 5500 and PBM records do not capture the funding status of a small number of plans, those plans can be presumed to be fully-insured (and thus excluded from the subclasses) unless they are able to supply proof of their self-insured status." EPPs' Reply Class Cert. 19. It is possible that such a methodology, if adopted, could address this challenge. However, the above exchange further illustrates the extent of EPPs' *ad hoc* approach to applying class exclusions and the lack of a comprehensive methodology for systematically applying exclusions in this case.

For some exclusions, EPPs have simply not provided the Court with satisfactory evidence that the exclusions can be systematically applied. For example, the class definition excludes consumers with the same co-payment for brand and generic drugs ("flat co-payors"). Exclusion of these flat co-payers requires a determination of what purchasers would have paid for their brand Niaspan prescription as well as what they would have paid for generic

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[4] EPPs provided the Court with notice of the decision in *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, No. 18-md-2819, (E.D.N.Y. May 5, 2020), in which Judge Gershon of the Eastern District of New York certified an end payor class, relying in part on evidence provided by Craft (Document No. 706, filed May 15, 2020). The Court concludes that this precedent is unpersuasive because the Second Circuit applies a less rigorous standard for analyzing ascertainability.

Niaspan they never purchased, a task further complicated by the fact that a health plan co-payment structure can change over time. Defs.' Opp'n Class **[**52]** Cert. 42. EPPs provide evidence that at least some PBMs maintain this information. Jonathan Stocker of Prime Therapeutics stated that "Prime's database houses member plan design details, including, but not limited to, information regarding copayment structure (*i.e.* flat co-payment or percentage co-payment), to the extent applicable." Stocker Decl. ¶ 10. Kyle Brua, also of Prime Therapeutics, declared that "Prime can . . . provide purchase records that exclude purchases made by members with a flat co-payment benefit plan." Decl. Non-Party **[*707]** Prime Therapeutics LLC ("Brua Decl.") ¶ 6. However, as defendants' ascertainability expert, Donald Dietz, explains, in the pharmaceutical industry, the term "flat co-pay" refers to "a co-pay that is set in dollar amounts, as opposed to a percentage of the drug cost . . . and not a single-tier plan design that has the same co-pay for brand and generic drugs." Expert Rep. Donald J. Dietz ("Dietz Rep.") ¶ 68. Based on the evidence before the Court, EPPs' have not established that PBMs can provide purchase records that exclude consumers with the same co-payment for brand and generic drugs, or that transactional records stored by PBMs and other record holders **[**53]** contain information related to plan details in a way that could be programmatically and feasibly applied in order to exclude "flat co-payors" from the class.

The Court is further concerned about the possibility that even if identification of class members is technically possible, EPPs' proposed methodology would be prohibitively expensive and thus infeasible. At oral argument, EPPs claimed that an administratively feasible mechanism for identifying class members is not required for facilitating the best class notice practicable pursuant to *Rule 23(c)(2)*.[5]*See* May 15, 2019 Hr'g Tr. ("May 15 Tr.") 44:15-46:3. Moreover, EPPs predicted that they may never have to utilize their methodology for identifying class members. *Id.* at 45:8-21. In fact, counsel for EPPs reported that in a similar pay-for-delay case before Judge Saris,[6] when plaintiffs sought to subpoena the relevant pharmaceutical records, they learned it would cost $18 million to obtain the requested information. July 23 Tr. 181:20-182:1. In that case, Judge Saris rejected that approach as "too expensive because it [would] come[] out of the class's recovery," and pursued publication notice instead. *Id.* at 181:20-182-14. In view of these statements, **[**54]** the Court is concerned that EPPs' claimed ascertainability methodology is not reasonably practicable.

The Court harbors significant doubt as to whether EPPs have met their burden of showing they can identify class members through a reliable and administratively feasible mechanism. ***HN19***[] "When courts harbor doubt as to whether a plaintiff has carried her burden under *Rule 23*, the class should not be certified." *Mielo v. Steak 'n Shake Operations, Inc., 897 F.3d 467, 483 (3d Cir. 2018)*. Accordingly, the Court declines to certify the EPP class as ascertainable on the state of the present record. As detailed below, the EPP proposed class also fails the predominance and superiority requirements of *Rule 23(b)(3)*.

ii. Predominance

HN20[] *Rule 23(b)(3)* requires that "the questions of law or fact common to class members predominate over any questions affecting only individual members." "*Rule 23(b)(3)*, however, does *not* require a plaintiff seeking class certification to prove that each 'elemen[t] of [her] claim [is] susceptible to classwide proof.' What the rule does **[*708]** require is that common questions '*predominate* over any questions affecting only individual [class] members.'" *Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 469, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)* (emphasis in original).

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[5] The Court notes that EPPs' interpretation of the ascertainability requirement is not supported by Third Circuit precedent. *See, e.g., Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012)* ("[The ascertainability requirement] protects absent class members by facilitating the 'best notice practicable' under *Rule 23(c)(2)* in a *Rule 23(b)(3)* action."); *Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013)* ("First, at the commencement of a class action, ascertainability and a clear class definition allow potential class members to identify themselves for purposes of opting out of a class.").

[6] Judge, former Chief Judge, U.S. District Court for the District of Massachusetts. *In re Pharmaceutical Industry Average Wholesale Price Litigation*, No. 01-12257, (D. Mass. filed Dec. 19, 2001).

"An individual question is one where members of a proposed **[**55]** class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016)* (internal quotations and citations omitted).

HN21[] "The aim of the predominance inquiry is to test whether any dissimilarity among the claims of class members can be dealt with in a manner that is not 'inefficient or unfair.'" *In re Asacol Antitrust Litig., 907 F.3d 42, 51 (1st Cir. 2018)*. "Inefficiency can be pictured as a line of thousands of class members waiting their turn to offer testimony and evidence on individual issues." *Id.* "Unfairness is equally well pictured as an attempt to eliminate inefficiency by presuming to do away with the rights a party would customarily have to raise plausible individual challenges on those issues." *Id. at 51-52*.

EPPs' argue that common issues predominate across their antitrust claims and unjust enrichment claims, and that aggregate damages can be calculated on a classwide basis. EPPs' Class Cert. Mem. 20-28. Specifically, EPPs claim they will be able to prove their antitrust claims with common evidence that there was an unlawful restraint of trade through an unjustified reverse **[**56]** payment from Kos to Barr, that the reverse payment had anticompetitive effects in the relevant market, that the anticompetitive effects outweighed any pro-competitive justifications, and that EPPs sustained class-wide impact, or injury, caused by defendants' actions. *Id.* at 20-25. They also assert that their unjust enrichment claims can be proven by the same common evidence used to prove that unlawful delay in generic entry produced monopoly profits at the expense of EPPs. *Id.* at 26; EPPs' Reply Class Cert. 65.

Defendants respond that individual questions predominate because EPPs lack common evidence of antitrust injury and cannot establish that class members were injured without resorting to individualized evidence that would overwhelm common questions. They argue that EPPs improperly apply the federal overcharge standard for antitrust injury, but even under that injury standard, EPPs have no common proof of antitrust injury.[7] They further contend that EPPs' evidence of classwide injury relies on averages that impermissibly conceal uninjured class members and identify specific subsets of the class that are potentially uninjured. Defendants also raise challenges to EPPs' aggregate damages model, and contend **[**57]** that many state antitrust laws, unjust enrichment laws, and unfair trade practices and consumer protection laws require proof of actual damages and that variations between the state laws raise individualized questions that overwhelm the common issues.

The Court considers each of defendants' challenges in turn.

[*709] 1. *The Impact of Individual Questions for Antitrust Injury and Impact*

EPPs argue that defendants' predominance challenges focus on proof of injury, and that common questions predominate based on EPPs' "common proof to establish the [other] essential substantive elements of their antitrust claims, including the presence of a 'large, unjustified reverse-payment,' market power, anti competitive effects, and causation." EPPs' Reply Class Cert. 30.

The Court rejects EPPs' argument on this issue. ***HN23***[] It is well established that the lack of common evidence of antitrust injury or impact alone can cause individual questions to predominate. *See, e.g., In re Modafinil Antitrust Litig., 837 F.3d 238, 262 (3d Cir. 2016)* ("In an antitrust class action, 'impact often is critically important for the purpose of evaluating *Rule 23(b)(3)*'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof.'").

2. *Antitrust **[**58]** Injury and Impact Standard for State Law Claims*

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[7] ***HN22***[] Under federal ***antitrust law***, antitrust injury occurs the moment that a purchaser incurs an overcharge. *See Adams v. Mills, 286 U.S. 397, 407, 52 S. Ct. 589, 76 L. Ed. 1184 (1932)*. Antitrust injury is also referred to as "antitrust impact." *See In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311*.

HN24[] It is undisputed that under longstanding federal ***antitrust law***, antitrust injury occurs the moment that a purchaser incurs an overcharge. *See e.g., Adams v. Mills, 286 U.S. 397, 407, 52 S. Ct. 589, 76 L. Ed. 1184 (1932)* ("In contemplation of law the claim for damages arose at the time the extra charge was paid."). However, the parties disagree as to whether that same injury standard should apply to EPPs' state law antitrust claims. EPPs contend that the federal antitrust standard, under which injury occurs the moment of overcharge, applies to the state law claims. EPPs' Class Cert. Mem. 24. Defendants disagree, asserting that the Court has an obligation to determine whether each state would apply an actual economic harm standard, and that under the correct state law standards for injury, EPPs are required to prove that they suffered actual economic harm from the overcharge, and did not pass on that overcharge to others. Defs.' Opp'n Class Cert. 66-68.

In order to assess the antitrust injury standard for state law claims, it is important to first review the jurisprudential backdrop against which EPPs bring their antitrust claims.

In *Hanover Shoe*, the Supreme Court held that antitrust plaintiffs could recover **[**59]** the full amount of their overcharge damages, and antitrust defendants could not raise the defense that plaintiffs were unharmed because plaintiffs passed to others any overcharges that they had paid. *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 491-93, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. The Supreme Court chose to abolish this pass-on defense because "establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures [and] the task would normally prove insurmountable . . . Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories." *Id. at 493*.

In *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, the Supreme Court "made the symmetrical decision, consistent with *Hanover [Shoe]*, to disallow an offensive use of the [pass-on] theory." *In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1164 n.10 (3d Cir. 1993)*. "[J]ust as *Hanover Shoe* wanted to avoid burdening antitrust plaintiffs from nearly-impossible evidentiary challenges, *Illinois Brick* reflected the Supreme Court's 'perception of the uncertainties and difficulties in analyzing price and out-put decisions in the real economic **[*710]** world . . . and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom.'" *In re Processed Egg Prod. Antitrust Litig., 881 F.3d 262, 270 (3d Cir. 2018)*. Under **[**60]** *Illinois Brick*, federal antitrust claims by indirect purchasers were barred. However, *Illinois Brick* did not preempt indirect purchasers from bringing antitrust actions under state antitrust laws. *California v. ARC Am. Corp., 490 U.S. 93, 105-06, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*. In the present action, EPPs bring their antitrust claims under laws by "*Illinois Brick* repealer states" that have passed statutes enabling indirect purchasers to bring antitrust claims under state law. EPPs' Reply Class Cert. 35; *see generally In re Flonase Antitrust Litig., 284 F.R.D. 207, 214 n.9 (E.D. Pa. 2012)* (describing "*Illinois Brick* repealers").

Defendants argue that "[t]he federal overcharge measure of injury that EPPs rely upon is a legal construct that, for reasons grounded in federal antitrust policy, permit direct purchasers to recover the entire overcharge even if they 'passed on' the overcharge to others and suffered no actual economic harm." Defs.' Opp'n Class Cert. 67 (citing *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*). They state that "EPPs just assume, without any analysis of specific state laws, that the federal measure of injury for direct purchaser claims applies to their indirect purchaser claims [and that EPPs'] assumption makes no sense, as a matter of law or policy." Defs.' Opp'n Class Cert. 67. Defendants argue to the contrary that the Court must assess each state statute, **[**61]** and absent "a definitive ruling by a state's highest court, [this Court] must predict how that court would rule if faced with the issue." *Id.* at 68 (citing *Covington v. Cont'l Gen. Tire, Inc., 381 F.3d 216, 218 (3d Cir. 2004)*).

EPPs respond that "[t]he class states repealed *Illinois Brick Co. v. Illinois*'s prohibition against indirect purchaser antitrust actions, but they did not repeal the century of federal ***antitrust law*** preceding *Illinois Brick*[,] . . . includ[ing] the well established principle that 'antitrust injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset.'" EPPs' Reply Class Cert. 35 n. 55.

The Court agrees with EPPs that Illinois Brick repealer states have applied the federal overcharge injury standard. Defendants' argument conflates the policy that the Supreme Court articulated with respect to treatment of the pass-on defense in Hanover Shoe and the offensive use of the pass-on theory in Illinois Brick with the longstanding antitrust principle that injury occurs at the moment of overcharge. *See, e.g.,* Adams v. Mills, 286 U.S. 397, 407, 52 S. Ct. 589, 76 L. Ed. 1184 (1932); S. Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 534, 38 S. Ct. 186, 62 L. Ed. 451 (1918). The "federal" overcharge standard of antitrust injury is distinct from the policy judgments implicated by *Hanover Shoe* and *Illinois Brick* and the subsequent passage of the state statutes repealing **[**62]** Illinois Brick.

EPPs contend that defendants' argument "is based on the faulty legal premise that injury and damages are synonymous." EPPs' Class Cert. Mot. 34. The Court agrees with EPPs on that issue.

HN25[] Proof of antitrust injury or impact is analytically distinct from proof of antitrust damages. In re Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 194 (3d Cir. 2020) ("We have consistently distinguished injury from damages."); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 188 (3d Cir. **[*711]** 2001) ("Proof of injury (whether or not an injury occurred at all) must be distinguished from calculation of damages (which determines the actual value of the injury)."). "[T]he purpose of the antitrust injury requirement is to prove that the theory of unlawful conduct, i.e. the theory of liability, was in fact responsible for causing harm to plaintiffs." In re Niaspan Antitrust Litig., No. 13-2460, 397 F. Supp. 3d 668, 2019 WL 3816829, at *14 (E.D. Pa. Aug. 14, 2019). The availability of a pass-on defense has no bearing on proof that a plaintiff sustained "some harm traceable to the defendant's conduct." Harnish v. Widener Univ. Sch. of Law, 833 F.3d 298, 305 (3d Cir. 2016). To the extent that pass-on defense is available, it relates to the calculation of damages, not the standard of antitrust injury. *See* In re Cardizem CD Antitrust Litig., 200 F.R.D. 297, 317 (E.D. Mich. 2001) ("Defendants' by-pass and offsetting benefits arguments relate to the quantum of damages; not the fact of injury."); *see also* In re Vitamins Antitrust Litig., 259 F. Supp. 2d 1, 8-9 (D.D.C. 2003) (permitting a pass-on defense as a challenge to "plaintiff's damage estimates").

The Court **[**63]** concludes that EPP class members sustained antitrust injury at the moment they were overcharged. This decision is consistent with the approach adopted by other courts considering state law claims in similar antitrust actions by indirect purchasers. *See* In re Nexium Antitrust Litig., 777 F.3d 9, 27 (1st Cir. 2015) ("[A]ntitrust injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset."); In re Thalomid & Revlimid Antitrust Litig., No. 14-6997, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *14 (D.N.J. Oct. 30, 2018) (holding that subsequently recovered damages are "irrelevant to the question of impact"); In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-02503, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *15 (D. Mass. Oct. 16, 2017) ("[E]ven if putative class members were reimbursed for overcharges through insurance plans or coupons, they still experienced antitrust injury in the form of an overcharge, although the amount of damages may require adjustment."); In re Lidoderm Antitrust Litig., No. 14-02521, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *21 (N.D. Cal. Feb. 21, 2017) ("[T]he Court concludes that a person suffers a cognizable injury and is impacted by a price-fixing conspiracy at the moment he pays an antitrust overcharge, even if the anticompetitive conduct at issue also results in offsetting benefits.").

Thus, for purposes of the predominance inquiry, EPPs may satisfy their burden of showing common evidence of antitrust injury by establishing that each class member paid an overcharge, regardless of whether that overcharge was subsequently passed on to others. **[**64]**

3. *EPPs' Common Proof of Injury*

EPPs present an expert report from Dr. Meredith Rosenthal to support their claim that they have common proof of antitrust injury arising from the delay in generic entry. Dr. Rosenthal relies on extensive evidence, including a Federal Trade Commission ("FTC") study finding that "generic price discounts with respect to the pre-launch branded price reach 17% after 6 months," at which point generics hold 83.7% of the market share. Expert Rep. Meredith Rosenthal, Ph.D. ("Rosenthal Rep.") ¶ 37. According to Dr. Rosenthal, the actual launch of generic Niaspan resulted in a 33% price discount after 6 months, at which point generic Niaspan garnered 79% of the market share. *Id.* Dr. Rosenthal also notes that defendant AbbVie's internal analyses anticipated results similar to the FTC study, namely, "a generic penetration rate starting at 30% in the first month and reaching nearly 90% assuming two generic products." *Id.*

[*712] Based on this research, Dr. Rosenthal employs a "yardstick model," which compares the actual prices and quantities in the market of interest to the prices and quantities that occur in a similar market untainted by the delay of generic entry and foreclosure **[**65]** of lower prices. *Id.* ¶ 27. She bases her yardstick calculations on AbbVie's internal analysis and the FTC study results, and assumes an average rate of generic substitution of 87.8% from Kos' own internal forecasting. *Id.* ¶ 38.

Dr. Rosenthal concludes that "the likelihood that a consumer who paid for Niaspan during the Class Period would not have paid for at least one prescription of the generic in the but-for world is small -100 minus 87.8 or 12.2%. Moreover, because Niaspan is a maintenance drug most potential Class members will have many prescriptions and thus repeated opportunities to be offered and try the generic." *Id.* ¶ 39. With respect to TTPs, Dr. Rosenthal opines that, assuming a TPP pays for at least ten independent Niaspan claims, "the likelihood that a payer with only 10 claims for Niaspan in the actual world had no generic claims in the but-for world is approximately 0.000000001 or 1 in 1 billion." *Id.* ¶ 38.

According to EPPs, "the analysis conducted by Dr. Rosenthal demonstrates that virtually all class members were injured on at least one transaction by the unlawful delay in generic Niaspan competition."[8] EPPs' Class Cert. Mem. 33.

4. *Defendants' Challenges to EPPs'* ***[**66]*** *Common Proof of Injury*

Defendants argue that contrary to EPPs' assertions, Dr. Rosenthal's report does not provide common evidence of antitrust injury. Defs.' Opp'n Class Cert. 51-55. Defendants highlight Dr. Rosenthal's deposition testimony in which she conceded she does not opine that all class members were injured, and that her aggregate damages analysis does not show which individual class members were uninjured. *Id.* at 52. As defendants' expert, Professor James Hughes, opines, "if [Dr. Rosenthal's] damages model were reliable, which it is not, at best she could establish the average 'overcharge' per prescription paid by the class. But this average overcharge simply does not speak to whether any or all individual class members were injured." Expert Rep. Prof. James W. Hughes, Ph.D. ("Hughes Rep.") ¶ 119. Defendants contend that Dr. Rosenthal's reliance on averages impermissibly hides uninjured class members. In support, they rely on Professor Hughes' analysis of transactional data produced by ten EPP named plaintiffs. Defs.' Opp'n Class Cert. 54. After reviewing the data, Professor Hughes concluded that "there is wide heterogeneity across Named Plaintiffs in total prescription costs for **[**67]** Niaspan, ranging from $0 to over $1,000 per prescription," and that "[p]ayments made by consumers of Niaspan and generic niacin also vary considerably across consumers and also deviate substantially from Professor Rosenthal's calculated average, ranging from $0 to over $250." Hughes Rep. ¶ 122. Defendants argue that Dr. Rosenthal's assertion that Niaspan users will likely make at least one generic purchase "ignores studies that showed more than 40 percent of patients **[*713]** stopped taking Niaspan after the first three months, and only 16 percent continued to take Niaspan after one year." Defs.' Opp'n Class Cert. 26.

Defendants further argue that "there are numerous examples of circumstances in which potential class members would not have suffered any injury from the alleged delay in generic entry, and for which there is no way to identify those class members without individualized inquiries." Defs.' Opp'n Class Cert. 57. These groups include (1) consumers and TPPs who still would have paid for brand Niaspan after generic Niaspan was introduced (brand loyalists), (2) uninjured consumers due to copay assistance, (3) consumers fully reimbursed by health reimbursement accounts ("HRAs"), (4) flat **[**68]** co-payors, (5) consumers who filled all Niaspan prescriptions in

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[8] EPPs argue that they are entitled to a presumption of causation that the class sustained classwide injury. EPPs' Class Cert. Mem. 24-25. They claim that "an antitrust plaintiff may be entitled to a presumption of causation where the anticompetitive conduct 'is deemed wrongful because it is believed significantly to increase the risk of a particular injury' and that injury occurred." *Id.* at 24 (citing *In re Actos End-Payor Antitrust Litig., 848 F.3d 89, 101 (2d Cir. 2017)*). The Court agrees with defendants that *Actos* does not diminish EPPs' burden of proving classwide antitrust injury. *See* Defs.' Opp'n Class Cert. 56.

the Medicare Part D coverage gap, (6) TPPs that would have paid the same or more for generic Niaspan than brand Niaspan, and (7) rebates.

The Court first considers defendants' challenges to EPPs' use of averages to prove classwide injury, and then addresses the defendants' claims regarding specific subgroups of uninjured class members.

a. EPPs' Use of Averages To Prove Classwide Injury

The Court must determine whether Dr. Rosenthal's use of averages in her yardstick model masks uninjured class members or can be used to prove common classwide injury. The answer: Dr. Rosenthal does not provide common evidence of classwide injury; proof of injury would involve individualized inquiries that defeats predominance. Dr. Rosenthal's use of averages to determine classwide injury thus masks uninjured class members.

"The use of averages in a common impact analysis is controversial, and courts have come down on both sides of the issue at the class certification stage . . . Essentially, the case law seems to compel the court to view averages as at least somewhat suspect, but not as fatally flawed so long as (1) the differentiation among **[**69]** the data being averaged is not so great as to make the use of averages misleading; and (2) there are other indicia that the averages are not concealing the true story of the data." *In re Blood Reagents Antitrust Litig., No. 09-2081, 2015 U.S. Dist. LEXIS 141909, 2015 WL 6123211, at *18 (E.D. Pa. Oct. 19, 2015)* (DuBois, J.) (citing *In re Processed Egg Prod. Antitrust Litig., 81 F. Supp. 3d 412, 428 (E.D. Pa. 2015)*). "Averages are also more of a problem when plaintiffs seek to certify a class of indirect purchasers." *In re Lamictal Indirect Purchaser & Antitrust Consumer Litig., No. 12-00995, 2018 U.S. Dist. LEXIS 209993, 2018 WL 6567709, at *7 (D.N.J. Dec. 12, 2018)*, *rev'd on other grounds* *957 F.3d 184 (3d Cir. 2020)*. On this issue, the Third Circuit recently cautioned that courts should not assume, "absent a rigorous analysis, that averages are acceptable." *In re Lamictal Direct Purchaser Antitrust Litig., 957 F.3d at 194*.

EPPs contend that Dr. Rosenthal's proposed damages model uses common evidence to show class-wide injury, and "is constructed by reference to the well-researched and accepted understanding in the scholarly literature of the impact of generic competition on drug prices, real world data reflecting the prices and volume of brand and generic Niaspan, in addition to the prices and quantities sold for 'yardstick' products." EPPs' Reply Class Cert. 44. They argue that the variation is not so wide as to mask uninjured members. *Id.* According to EPPs, this case is similar to *Flonase*, another pay-for-delay case, in which plaintiffs submitted expert evidence of common injury based on a yardstick analysis. *Id.* at 44 n.66 (citing *In re Flonase Antitrust Litig., 284 F.R.D. 207, 222 (E.D. Pa. 2012)*. In that case, **[**70]** the **[*714]** court was "satisfied that the data variation in this case [was] not so extreme as to mask the absence of injury for a significant number of class members." *Id. at 229*.

Defendants argue that *Flonase* is inapposite. May 14 Tr. 191:7-15. In *Flonase*, plaintiffs' expert conducted a sensitivity analysis, which assured the court that the averages did not mask significant variation. *Id.*; *In re Flonase Antitrust Litig., 284 F.R.D. at 228-229*. In addition, defendants correctly note that the *Flonase* court was only satisfied that the averages did not mask significant variation after excluding several groups of potentially uninjured plaintiffs, including (1) uninsured consumers who purchased brand Flonase after generic entry; (2) all consumers who purchased brand Flonase prior to generic entry and did not purchase brand or generic Flonase after generic entry; and (3) TPPs that only purchased and/or reimbursed brand Flonase but never generic Flonase during the Class Period. *In re Flonase Antitrust Litig., 284 F.R.D. at 230-232*. Significantly, *Flonase* was decided prior to the Third Circuit adoption of the ascertainability requirement, so the court was able to exclude potentially uninjured purchasers without considering whether purchasers falling within those exclusions were reasonably ascertainable. *Id.*; May **[**71]** 14 Tr. 192:4-6. Thus, *Flonase* is distinguishable from this case.

EPPs correctly state that evidence of delay in generic entry that results in overcharges can in some cases suffice to show classwide evidence of injury. EPPs' Reply Class Cert. 44, 52-53. However, the substantial variation in prices reported by Dr. Hughes among the sliver of data produced by named plaintiffs—$0 to over $1,000 per prescription for TPPs, and $0 to over $250 for consumers—raises cause for concern in this case. *See* Hughes Rep. ¶ 122. EPPs do not contest Dr. Hughes' analysis, but instead observe that "most transaction prices clustered around [Dr.

Rosenthal's] average prices, and that any variations follow a discernable trend alongside the average prices." EPPs' Reply Class Cert. 52 n.75.

The Court concludes that the averages in Dr. Rosenthal's yardstick model do not suffice to prove classwide injury for EPPs in this case. Critically, Dr. Rosenthal conceded that her yardstick model does not purport to show that all class members were injured. Defs.' Opp'n Class Cert. 52 (citing Rosenthal Dep. 62:21-63:5). The Court finds this case analogous to *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC* **[**72]** , in which plaintiffs also relied on the expert testimony of Dr. Rosenthal. In that case, Judge Stengel conducted "[a] 'rigorous analysis' of Dr. Rosenthal's reports and testimony" and concluded "it does not show that *all* class members paid supra-competitive prices for generic or branded sustained release bupropion, or that this determination can be made with common proof." *No. 04-5898, 2010 U.S. Dist. LEXIS 105646 , 2010 WL 3855552, at *26 (E.D. Pa. Sept. 30, 2010)*. In *GlaxoSmithKline*, Dr. Rosenthal admitted that certain class members may be uninjured, and that her analysis would be unable to identify them, leading the court there to conclude that the proffered yardstick model masked groups of uninjured class members. *2010 U.S. Dist. LEXIS 105646, [WL] at *30*. As Judge Stengel noted in rejecting the proposed yardstick methodology, "the issue is not whether [the] techniques are generally accepted; it is whether they are appropriate when applied to the facts and data *in this case*." *Id.* (internal quotations omitted and emphasis in original). In this case, the Court concludes that the use of averages hides several groups of uninjured class members who cannot be easily identified.

[*715] b. Means of Removing Uninjured Class Members

Defendants argue that EPPs further fail the predominance requirement because there are large **[**73]** categories of uninjured class members that EPPs have not identified and cannot identify without individualized inquiry. Defs.' Opp'n Class Cert. 57. Specifically, defendants point to brand loyalists, consumers who are uninjured due to co-payment assistance, health reimbursement accounts ("HRAs"), flat co-payors, consumers who filled all Niaspan prescriptions during a Medicare Part D coverage gap, TPPs paying the same or more for generic Niaspan than for brand Niaspan, and TPPs that received brand rebates. In response, EPPs assert that "virtually all class members were injured on at least one transaction by the unlawful delay in generic Niaspan competition." EPPs' Reply Class Cert. 33.

HN26[] To the extent that a proposed class contains uninjured class members, plaintiffs must provide a reasonable and workable method for differentiating between uninjured class members and injured class members so that uninjured class members do not recover damages. *In re Asacol Antitrust Litig., 907 F.3d 42, 58 (1st Cir. 2018)*. Such a method must be protective of a defendant's constitutional rights and not cause individual inquiries to overwhelm common issues. *Id.*; *see also* *Vista Healthplan, Inc. v. Cephalon, Inc., No. 06-1833, 2015 U.S. Dist. LEXIS 74846, 2015 WL 3623005, at *21 (E.D. Pa. June 10, 2015)* ("Without a means of identifying these uninjured persons using common evidence, every class member **[**74]** would need to be reviewed on an individualized basis to see if they were impacted by Defendants' alleged anticompetitive actions."). Moreover, for purposes of the predominance analysis, the number of potentially uninjured class members is a relevant consideration. ***HN27***[] While it is perfectly reasonable for the Court to address challenges to a small number of uninjured class members, "it would be far more difficult for a court to 'weed out' over 2,000 uninjured class members—or some subset of that number—from a class of over 16,000." *In re Rail Freight Fuel Surcharge Antitrust Litig., 292 F. Supp. 3d 14, 137-38 (D.D.C. 2017)*; *see also* *In re Intuniv Antitrust Litig., No. 16-12396, 2019 U.S. Dist. LEXIS 141643, 2019 WL 3947262, at *8 (D. Mass. Aug. 21, 2019)*. In this case, there are an estimated 600,000 class members, any of whom may be uninjured, and according to defendants, there are thousands who in fact suffered no injury. *See* *In re Asacol Antitrust Litig., 907 F.3d at 53-54*.

The Court next addresses defendants' arguments on the issue of uninjured class members.

i. Brand Loyalists

The first and most significant group of uninjured, unidentified class members are consumer brand loyalists, who were unharmed by delayed generic entry because they would have continued buying brand Niaspan regardless of any price difference between brand and generic Niaspan. Dr. Rosenthal calculated that 12.2% of purchases after generic entry would remain brand purchases. **[**75]** Rosenthal Rep. ¶ 39.

Defendants contend that "there is simply no mechanism to determine which prescriptions [the 12.2% of continued brand purchases after generic entry] would have been, and who would have paid for them, without class-member-specific and even transaction-specific inquiries." Defs.' Opp'n 57.

EPPs first respond that "[d]ue to state automatic substitution laws, all or virtually all Niaspan consumers would try generic Niaspan at least once, even if they ultimately chose to return to the brand at a higher price." EPPs' Reply Class Cert. 49 **[*716]** (citing *In re Nexium Antitrust Litig., 777 F.3d 9, 27-30 (1st Cir. 2015)*. EPPs have provided no evidence regarding the specific terms of such state laws. This omission is significant because, while all states have such laws, not all states make substitution mandatory.

EPPs also argue that they have accounted for brand loyalists by excluding consumers who purchased only brand Niaspan after generic entry on September 20, 2013, and argue that such purchasers can be identified. EPPs' Reply Class Cert. 23. They assure the Court that they can create a database by which they can systematically apply the brand loyalist exclusion. *Id.* For the reasons discussed when analyzing class ascertainability, the Court **[**76]** doubts whether EPPs can feasibly produce such a database and systematically apply the brand loyalist exclusion.

Even assuming *arguendo* that EPPs could identify the brand loyalists that purchased only brand Niaspan after generic entry, EPPs have no means of identifying brand loyalists who purchased brand Niaspan prior to generic entry but made no purchases of brand or generic Niaspan after generic entry. EPPs respond with three arguments. The Court rejects EPPs' arguments.

First, EPPs argue that "such consumers cannot properly be considered brand loyalists because generic Niaspan was not yet available on the market, they lacked an opportunity to demonstrate any preference for or 'loyalty' to branded or generic Niaspan." EPPs' Reply Class Cert. 25. This response fundamentally misconceives the objective of the inquiry, which is to assess whether a purchaser *would have* purchased cheaper generic Niaspan had that option been available. This Court is aware of no court that has adopted this unfounded argument, and it declines to do so in this case.

Second, EPPs argue that the presence of unidentified, uninjured brand loyalists in the class does not prejudice defendants. EPPs' Reply Class Cert. **[**77]** 25. Specifically, they assert that Dr. Rosenthal factored in the presence of brand loyalists and calculated damages only for those class members who would have switched to generic Niaspan or who purchased the generic at inflated prices so "defendants have no interest tied to the exclusion of purported brand loyalist class members." *Id.* at 26.

EPPs' argument that defendants have no interest in the exclusion of uninjured class members has been rejected by the Third Circuit. *See* *Carrera v. Bayer Corp., 727 F.3d 300, 310 (3d Cir. 2013)* ("[Defendant] has an interest in ensuring it pays only legitimate claims. If fraudulent or inaccurate claims materially reduce true class members' relief, these class members could argue the named plaintiff did not adequately represent them [and they are not bound by the judgment."); *see also* *In re Asacol Antitrust Litig., 907 F.3d 42, 56 (1st Cir. 2018)* ("Once one accepts plaintiffs' 'no harm, no foul' position there would be no logical reason to prevent a named plaintiff from bringing suit on behalf of a large class of people, forty-nine percent or even ninety-nine percent of whom were not injured, so long as aggregate damages on behalf of 'the class' were reduced proportionately. Such a result would fly in the face of the core principle that class actions are the aggregation of **[**78]** individual claims, and do not create a class entity or reapportion substantive claims.").

Finally, EPPs argue "it would be inappropriate to exclude from the classes individuals who purchased Niaspan solely prior to generic entry because it would permit Defendants to benefit from their own illegal conduct." EPPs' Reply Class Cert. 26. However, this argument is unavailing, **[*717]** as under *Rule 23*, it is EPPs who bear the burden of proof. ***HN28***[] "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *In re Modafinil Antitrust Litig., 837 F.3d 238, 248 (3d Cir. 2016)*, and for EPPs to take advantage of the class action device, EPPs must limit their class to an operational definition. *See,* *e.g., In re Flonase Antitrust Litig., 284 F.R.D. 207, 232 (E.D. Pa. 2012)* (excluding class members who did not make any purchases of brand or generic Flonase after generic entry to avoid potential brand loyalists).

The Court concludes that there are a substantial number of brand loyalists in the class, and EPPs have the burden of showing that excluding them can be accomplished without extensive individualized inquiry. EPPs have provided no "reasonable and workable plan for how [the opportunity to press at trial genuine challenges to allegations of injury-in-fact] will be provided **[**79]** in a manner that is protective of the defendant's constitutional rights and does not cause individual inquiries to overwhelm common issues." *Thalomid, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *12*. Accordingly, the Court concludes that identification of consumer brand loyalists would require extensive individualized inquiries and defeat predominance. *See Vista Healthplan, Inc. v. Cephalon, Inc., No. 06-1833, 2015 U.S. Dist. LEXIS 107013, 2015 WL 4737288, at *19 (E.D. Pa. Aug. 4, 2015)*;[9]*Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, No. 04-5898, 2010 U.S. Dist. LEXIS 105646, 2010 WL 3855552, at *25 (E.D. Pa. Sept. 30, 2010)*.

Thus far, the brand loyalist discussion has focused on consumer purchasers. With respect to TPP brand loyalists, Dr. Rosenthal opined that the likelihood that a payor with only 10 independent claims for Niaspan had no generic claims is approximately 1 in 1 billion. Rosenthal Rep. ¶ 38. As a result, EPPs state there is no brand loyalist concern for TPPs with many independent claims. In response, defendants point out that there are over 20,000 self-insured health plans and over 4,000 mixed health plans, many of which are very small and would have made only a few purchases, thereby rendering it more likely that at least some of the TPPs are uninjured. May 14 Tr. 188:7-15. For example, defendants point to the fact that from 2014 to 2016, named TPP plaintiff AF of L paid for only 31 months of Niaspan for only three beneficiaries. **[**80]** *Id.* at 188:16-23.

Even if a TPP reimbursed only three beneficiaries, it would remain unlikely that all the TPP's reimbursements were for brand loyalists. On the current state of the record, the Court concludes that the number of any TPP brand loyalists is *de minimis*.

ii. Uninjured Consumers Due to Co-payment Assistance

Defendants argue that EPPs have made no attempt to determine whether there are uninjured class members due to coupon use—that involvement in a coupon co-payment assistance program resulted in some purchasers paying less for branded Niaspan than they would have paid for generic Niaspan had it been available. Defs.' Opp'n **[*718]** Class Cert. 61-62. Dr. Hughes estimates that 3-4% of brand Niaspan purchases were made with co-payment assistance coupons that included $0 co-payment coupons, $50 off co-payment coupons, and $25 maximum co-payment coupons, *id.* at 61, whereas Dr. Rosenthal estimates that 2.4% of prescription purchases involved coupon use. *Id.* at 62 n.27.

Defendants claim that they "are entitled to defend against individual claims by testing whether class members used copay assistance and did not pay an overcharge, necessitating individualized inquiries." *Id.* at 62. Defendants further contend that given the **[**81]** drug's low persistency rate, there were likely many consumers who used coupons for all of their purchases. *Id.* at 61-62.

EPPs respond that defendants concede that coupons apply to less than 4% of transactions and would affect "only a handful of customers." EPPs' Reply Class Cert. 22. However, even if only a small percentage of consumers were uninjured due to coupon use, the sheer class size creates significant difficulties for manageably addressing defendants' challenges. *In re Rail Freight Fuel Surcharge Antitrust Litig., 292 F. Supp. 3d 14, 137-38 (D.D.C. 2017)*.

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[9] EPPs provided notice to the Court that Judge Goldberg recently certified a settlement class in *Vista Healthplan, Inc. v. Cephalon, Inc., 2020 U.S. Dist. LEXIS 69614, No. 2:06-cv-01833, slip op. at 1 (E.D. Pa. Apr. 21, 2020)*. However, Judge Goldberg made clear that the prospect of settlement impacted his analysis of both ascertainability and predominance. *Id. at 24-25, 28*. Indeed, many of the concerns at issue in certifying a litigation class are alleviated after settlement. *See In re Wellbutrin XL Antitrust Litig., 308 F.R.D. at 151 n.8* ("In certifying a litigation class, the Court must be mindful of a defendant's due process rights. Such a concern is not present when administering a settlement class.").

EPPs also state that "even if there were a small substantiated subset of uninjured 'all-coupon' consumers—and there is not—these consumers can be identified and programmatically excluded from the subclasses" because "pharmacies track coupon usage on a transactional basis, including the coupon value, prescription fill date, and identity of the consumer." EPPs' Reply Class Cert. 22. Assuming *arguendo* that adequate records tracking coupon use on all Niaspan purchases could be produced prior to trial, defendants have the right to present evidence to the jury that a subset of class members did not suffer antitrust injury because of their coupon use. *See* *In re Asacol Antitrust Litig., 907 F.3d 42, 58 (1st Cir. 2018)* ("[C]ertainly where injury-in-fact is a required element of a claim, as it is **[**82]** in an antitrust action, a class cannot be certified based on an expectation that the defendant will have no opportunity to press at trial genuine challenges to allegations of injury-in-fact." (internal citations omitted)). EPPs have offered no means of manageably addressing such challenges in a manner that would not defeat predominance. EPPs' failure to identify a non-individualized means of addressing uninjured consumers due to coupon use weighs against class certification.

iii. Health Reimbursement Accounts

Defendants argue that consumers who were subsequently fully reimbursed by HRAs for their Niaspan and generic Niaspan payments had no damages and are therefore uninjured. Defs.' Opp'n Class Cert. 62. EPPs respond that "[t]hird-party reimbursements under HRAs—to the unsubstantiated extent they occur at all for Niaspan—are irrelevant to the issue of whether consumers were injured" because the purchasers were injured as soon as they paid the overcharge. EPPs' Reply Class Cert. 23. The Court agrees with EPPs that injury occurs at the time of an unlawful overcharge, and any subsequent reimbursement is irrelevant.

Defendants raise the possibility that some purchasers may be uninjured because **[**83]** they paid for brand Niaspan with debit cards issued and paid for by their employer. Defs.' Opp'n Class Cert. 10 n.2; May 14 Tr. 195:20-196:1. Defendants do not even attempt to estimate the prevalence of such uninjured class members. On this issue the Court concludes that, to the extent that the class contains such uninjured members, that number is *de minimis* and does not preclude certification.

[*719] iv. Flat Co-Payors

Defendants further argue that 4-9% of consumers had flat co-pays during the class period and would have paid the same for generic as brand Niaspan and therefore are uninjured. Defs.' Opp'n Class Cert. 58-59, 64.

EPPs respond that they "have established that records exist to identify plans by copayment structure, which can then be sorted by a data analytics firm to exclude transactions associated with a flat copay." EPPs' Reply Class Cert. 49-50.

To the extent that the identification of flat co-payors, which are excluded from the class definition, cannot be differentiated from other class members without extensive individualized inquiry, flat co-payors pose a predominance problem in addition to an ascertainability problem. As the Court discussed with respect to ascertainability, **[**84]** the Court is not convinced that EPPs have a method of differentiating flat co-payors from other class members through a means that avoids extensive individualized inquiries. Absent a systematic means of excluding flat co-payors, defendants would be entitled to present individualized evidence to a jury that certain Niaspan purchasers are uninjured due to a flat co-pay structure and are therefore excluded from the class definition. *See* *Vista Healthplan, Inc. v. Cephalon, Inc., No. 06-1833, 2015 U.S. Dist. LEXIS 74846, 2015 WL 3623005, at *19 (E.D. Pa. June 10, 2015)* ("When the identification and exclusion of these consumers cannot be managed without considering the highly individualized purchasing history of individuals and their specific insurance plans, simply stating that they are excluded from the class definition is not sufficient to show that common issues will predominate.").

v. Consumers Who Filled all Niaspan Prescriptions After Reaching a Medicare Part D Coverage Gap

Defendants assert that consumers who filled Niaspan prescriptions in a Medicare Part D coverage gap may not have incurred an overcharge because their coinsurance rates were lower for branded than generic drugs. Defs.' Opp'n Class Cert. 59.

EPPs contend that defendants' hypothetical is highly speculative, so "it is no surprise that neither Defendants **[**85]** nor Dr. Hughes identify a single consumer who meets these criteria nor attempt to estimate their prevalence." EPPs' Reply Class Cert. 50. They note that in order to reach the coverage gap,

> a Part D consumer must first reach their out-of-pocket deductible and then pay a copayment or coinsurance on their prescriptions until reaching their initial coverage limit. Only after surpassing these two coverage thresholds does a Part D consumer enter the coverage gap and allegedly pay less for brand Niaspan-and even then, only through the end of that policy period. A consumer would need to fill all of their Niaspan prescriptions only after entering the Part D coverage gap in every period during which they were prescribed Niaspan to be uninjured.

Id. The Court agrees with EPPs that defendants' argument rests on an unfounded hypothetical and "defendants' speculation cannot defeat certification." *In re Thalomid & Revlimid Antitrust Litig., No. 14-6997, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *23 (D.N.J. Oct. 30, 2018)*.

vi. TPPs Paying the Same or More for Generic Niaspan than Brand Niaspan

Defendants assert that there are multiple scenarios in which TPPs would not have paid an overcharge because they would have paid the same or more for generic Niaspan than for brand Niaspan. Defs.' Opp'n Class Cert. 59. Dr. Hughes **[*720]** hypothesizes **[**86]** that "if the retail price of the brand drug is $100 and $83 for the generic, and the consumer's copayment is $30 for a preferred brand drug and the generic copayment is $10 (as was the case for certain City of Providence plans), then the TPP would pay $70 for the brand but $73 for the generic." *Id.* Defendants also highlight that Dr. Hughes found that, for two named TPP plaintiffs, "the effective cost to TPPs for Niaspan just before actual generic entry [was] often lower than for generic niacin after actual generic entry." *Id.* at 54.

EPPs argue that the TPPs would have to have an unfavorable co-pay on every single payment, and note that in Hughes' two examples, for one insurer, twelve of the fifteen claims for generic Niaspan were less than the brand, and for the other, generic Niaspan claims were less in five out of eight transactions. EPPs' Reply Class Cert. 50. EPPs also persuasively note that Hughes not only failed "to identify a single Plaintiff that would have paid more on every generic Niaspan transaction for even one insured member in a competitive world, [he also failed to] even estimate the likelihood of that situation actually occurring for any TPP across all its members." *Id.*

The Court **[**87]** is convinced by EPPs' argument; given Dr. Hughes' failure to even estimate the prevalence of uninjured TPPs, the Court concludes that the number of TPPs in this hypothetical category is *de minimis*.

vii. Rebates

Defendants also argue that TPPs may have received brand rebates, which would further lower the costs of brand Niaspan and could result in generic Niaspan being more expensive. Defs.' Opp'n Class Cert. 60-61. Plaintiffs respond that there is no legal basis to argue that rebates negate antitrust injury, and instead would act as a "damages set-off." EPPs' Reply Class Cert. 48.

The Court agrees with EPPs. *See* *In re Thalomid & Revlimid Antitrust Litig., No. 14-6997, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *14* ("[A]s Plaintiffs correctly argue, any amounts that such Plan Sponsors received in coverage or in the form of rebates is irrelevant to the question of impact.").

Defendants argue that some rebates are different in that they do not operate as reimbursements but rather are credited towards the cost of prescriptions at the time of the invoicing. Defs.' Opp'n Class Cert. 61 n.26. This latter type of rebate could negate antitrust impact, or injury. *See* *In re Nexium Antitrust Litig., 777 F.3d 9, 28 (1st Cir. 2015)*. However, defendants do not even attempt to quantify the prevalence of such rebates, and on the present state of the record, the Court **[**88]** concludes that such rebates are *de minimis*.

viii. Conclusion: Uninjured Class Members

In sum, the Court is concerned that the class contains, at minimum, substantial numbers of uninjured consumer brand loyalists, coupon users, and flat co-payers.[10] The Court is not satisfied that EPPs have a non-individualized means of identifying these uninjured class members in a way that protects defendants' constitutional rights. *See, e.g., In re Intuniv Antitrust Litig., No. 16-12396, 2019 U.S. Dist. LEXIS 141643, 2019 WL 3947262, at *8 (D. Mass. Aug. 21, 2019)* (holding predominance not satisfied because plaintiffs "have not put forth a reasonable and workable plan to weed out uninjured class **[*721]** members"); *In re Asacol Antitrust Litig., 907 F.3d 42, 53-54 (1st Cir. 2018)* ("The need to identify those [uninjured] individuals will predominate and render an adjudication unmanageable absent evidence . . . [of] some . . . mechanism that can manageably remove uninjured persons from the class in a manner that protects the parties' rights."). The Court concludes that EPPs lack common evidence of antitrust injury, and cannot satisfy the *Rule 23(b)(3)* predominance requirement.

5. *Defendants' Challenge to EPPs' Aggregate Damages Model*

Defendants also challenge EPPs' classwide aggregate damages model. ***HN29***[] At class certification, "a model purporting to serve as evidence of damages in [a] class action must measure only **[**89]** those damages attributable to that theory." *In re Niaspan Antitrust Litig., No. 13-2460, 397 F. Supp. 3d 668, 2019 WL 3816829, at *14 (E.D. Pa. Aug. 14, 2019)* (citing *Comcast v. Behrend, 569 U.S. 27, 35, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*.

Defendants argue that "there is a mismatch between the EPPs' aggregate damages model and their exclusion of PBMs from . . . class membership," because "PBMs sometimes end up paying for part of the cost of prescriptions charged by pharmacies." Defs.' Opp'n Class Cert. 64-65. In support of their position, defendants assert that "the record contains documentary evidence of Caremark, a PBM, making a $333,906 payment to the City of Providence in order to perform a price guarantee. On this issue, Mr. Winkelman acknowledged that, in his experience auditing PBM contracts, around half of the time the PBM ended up having to make a payment to perform on price guarantees." *Id.* at 65.

EPPs respond that "[t]here is no merit to Defendants' argument that the role of PBMs—intermediary service providers who do not insure or pay for beneficiary purchases—somehow fatally wounds EPPs' damages model under *Comcast*." EPPs' Reply Class Cert. 44-45. They contend that "[d]efendants have completely failed to substantiate their argument that PBMs actually suffer losses on Niaspan purchases through the mechanics of their price negotiations on behalf of TPPs. Indeed, the **[**90]** PBMs themselves disavow this theory." *Id.* at 45. As Robert Lahman of OptumRx stated,

> As a PBM, OptumRx does not consider itself to be paying for its Clients' prescription drug purchases. While OptumRx may retain, in certain cases, compensation through spread pricing, rebates, or administrative fees, that compensation is payment for services that OptumRx provides and not payment for prescription drugs that are dispensed to health plan members and which are the financial responsibility of the health plan.

Lahman Decl. ¶ 11. EPPs further note that defendants' Caremark example does not show that any of the repayment in question was attributable to Niaspan purchases. EPPs' Reply Class Cert. 45.

Courts considering this argument in similar cases have recognized that a PBM's payment of part or all of the overcharge for the cost of prescriptions charged by pharmacies, "would create issues either with ascertainability or, if PBMs are excluded, with the classwide damages model." *In re Thalomid & Revlimid Antitrust Litig., No. 14-6997, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *23 (D.N.J. Oct. 30, 2018)*; *see also In re Wellbutrin XL Antitrust Litig., 308 F.R.D. 134, 149 (E.D. Pa. 2015)* (noting if PBMs were excluded from the class definition, "[plaintiffs'] current damages model would potentially include damages suffered by non-class members, and may therefore overstate the amount of damages suffered **[**91]** by the [class]."). However, **[*722]** courts have rejected this challenge in cases in which the defendants did not provide evidence that PBMs may have paid pharmacies more for a drug than the payment they received from a TPP, and therefore dismissed the challenge as a "general,

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[10] EPPs' contention that "[d]efendants have not rebutted Plaintiffs' common evidence of injury with any substantiated example of a specific uninjured class member in the record," EPPs' Reply Class Cert. 34, is unpersuasive in light of the expert testimony discussed above and the extremely limited data production in the case.

theoretical risk." *In re Thalomid & Revlimid Antitrust Litig., 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *23*; *In re Lidoderm Antitrust Litig., No. 14-02521, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *25 (N.D. Cal. Feb. 21, 2017)*.

In this case, the Court agrees with EPPs that defendants have not provided evidence that any PBM payments based on price guarantees resulted in a loss on Niaspan purchases, and further credits the statement by OptumRx that any such PBM payments are "not payment for prescription drugs." The Court thus concludes that EPPs' aggregate damages model is consistent with the exclusion of PBMs from class membership.

6. *Availability of Pass-On Defense Under State Law*

Defendants contend that individualized issues predominate because, unlike federal law, some states allow antitrust defendants to raise a pass-on defense, which requires individualized analysis as to whether any particular plaintiff sustained actual economic harm. Defs.' Opp'n Class Cert. 68-70. They rely on the opinion of their expert, John Fritz, to argue that many EPPs did not suffer actual economic harm because those EPPs passed on any overcharge **[**92]** incurred through increased insurance or contribution premiums. *Id.* at 72-75.

EPPs respond that the pass-on defense is not available under most state statutes, and when it is available, it is limited to transactions within the chain of distribution and does not include premium payments. EPPs' Reply Class Cert. 36. EPPs also filed a Motion to Exclude the Opinions and Testimony of Fritz.

As explained *supra*, to the extent that state laws do permit a pass-on defense,[11] that defense relates to the quantum of damages, not antitrust injury. ***HN30***[] Unlike antitrust injury, a "relaxed measure of proof" is applied to antitrust damages calculations and "the actual amount of damages may result from a 'reasonable estimate.'" *In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1176 (3d Cir. 1993)*; *Eastman Kodak Co. of New York v. S. Photo Materials Co., 273 U.S. 359, 379, 47 S. Ct. 400, 71 L. Ed. 684 (1927)* ("[A] defendant whose wrongful conduct has rendered difficult the ascertainment of **[*723]** the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible."). Any adjustment to damages calculations for pass-on defenses arising under state laws would not affect the fact of antitrust injury, and does not preclude class certification.

HN31[] As a result, the **[**93]** availability of the pass-on defense involves "merits-related issues 'beyond what is necessary to determine preliminarily whether certain elements will necessitate individual or common proof.'" *See Harnish v. Widener Univ. Sch. of Law, 833 F.3d 298, 305 (3d Cir. 2016)*. Accordingly, the Court does not address defendants' argument that certain class members did not suffer actual economic harm based on the pass-on defense or EPPs' motion to exclude Fritz's opinion addressing that issue.

7. *Consumer Protection and Unfair Trade Practices Claims and Unjust Enrichment Claims*

EPPs assert that their claims arising under state consumer protection and unfair trade practices laws "all recognize that satisfaction of antitrust elements constitute liability." EPPs' Reply Class Cert. 2. EPPs have asserted no other

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[11] EPPs have failed to provide to the Court with an adequate analysis of which state antitrust laws permit a pass-on defense to damages. EPPs summarily contend that the pass-on defense is not permitted under state law because "the relevant antitrust statutes have language mirroring federal antitrust laws, contain a federal harmonization provision, and/or have been interpreted in harmony with federal law." EPPs' Class Cert. Mot. 20 (citing App. A). However, as defendants persuasively argue, "[i]n permitting indirect purchaser actions at all, the [*Illinois Brick* repealer] state has already determined that its laws will not follow, but rather will deviate significantly, from federal ***antitrust law***." Defs.' Opp'n Class Cert. 70; May 15, 2019 Hr'g Tr. 20:6-19. These statutory deviations specifically repeal *Illinois Brick*'s bar against indirect purchaser actions, the symmetrical counterpart to *Hanover Shoe* which eliminated the pass-on defense under federal law. *See In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1164 n.10 (3d Cir. 1993)*. As such, EPPs' references to generic federal antitrust harmonization provisions does not provide the Court with the individualized analysis of the applicable states' laws to determine whether each state would permit a pass-on defense, and "the Court will decline to undertake the 'back-breaking labor involved in deciphering the state of antitrust [pass-on defense] in each of those states.'" *See In re Processed Egg Prod. Antitrust Litig., 312 F.R.D. 124, 148-149 (E.D. Pa. 2015)*.

theory of liability under the state consumer protection laws. Because the Court concludes that common issues do not predominate as to EPPs' antitrust claims, the Court likewise rejects EPPs' argument with respect to the state consumer protection claims. *See* *In re Processed Egg Prod. Antitrust Litig., 312 F.R.D. 124, 163 (E.D. Pa. 2015)*.

EPPs also argue that "all invoked unjust enrichment claims include essentially the same equitable elements" as the antitrust claims. EPPs' Reply Class Cert. 2. However, because EPPs have failed to demonstrate **[**94]** that common issues predominate as to their antitrust claims, and because EPPs assert no other theory of unjust enrichment, the Court rejects EPPs' argument as to EPPs' unjust enrichment claims. *See* *In re Processed Egg Prod. Antitrust Litig., 312 F.R.D. at 163*.

For these reasons, the Court concludes that EPPs' claims arising under consumer protection and unfair trade practices statutes and EPPs' unjust enrichment claims fail the *Rule 23(b)(3)* predominance requirement.

8. *Variations in States Laws*

Defendants further argue that the variations between the various state laws under which EPPs bring their claims defeat predominance.[12] Defs.' Opp'n Class Cert. 77-88.

HN32[] EPPs' burden of demonstrating that common questions of law or fact predominate "includes providing the Court with an extensive analysis which demonstrates that the variations in the applicable state laws do not defeat predominance."[13] **[*724]** *Vista Healthplan, Inc. v. Cephalon, Inc., 2015 U.S. Dist. LEXIS 74846, 2015 WL 3623005, at *33 (E.D. Pa. June 10, 2015)*. Under the Third Circuit standard, courts may "certify nationwide classes where differences in state law f[a]ll 'into a limited number of predictable patterns,' and any deviations 'could be overcome at trial by grouping similar state laws together and applying them as a unit.'" *Grandalski v. Quest Diagnostics Inc., 767 F.3d 175, 183 (3d Cir. 2014)*. However, "plaintiffs face a significant burden to demonstrate that grouping **[**95]** is a workable solution." *Id*; *see also* *In re Thalomid & Revlimid Antitrust Litig., No. 14-6997, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *16 (D.N.J. Oct. 30, 2018)* ("In a motion for class certification, plaintiff bears the burden of providing an extensive analysis of state law variations to determine whether there are insuperable obstacles to class certification.").

Defendants contend that "[f]or this case to proceed as a class action, this Court would need to analyze the specific elements and issues that may arise under 53 state laws, decide critical and unsettled legal issues regarding how those laws would apply to the allegations in this case, and determine how the case will be adjudicated and tried under the 53 state laws." Defs.' Opp'n Class Cert. 77. They further assert that "EPPs provide no analysis of the state laws, no explanation of how they plan to prove the necessary elements of the 53 state laws, no proposed jury instructions nor any plan to address and manage these issues." *Id.*; May 15 Tr. 33:9-35:23. In addition, defendants raise numerous putative differences between the various state laws. Defs.' Opp'n Class Cert. 81-88.

EPPs reply that "'variations' in applicable state laws do not exist or are minor and manageable." EPPs' Reply Class Cert. 54. They assure the Court that any **[**96]** variations between the various statutes "can be handled via a special verdict form or by separating the purported variations into grouped categories." *Id.* at 58. They also note that

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[12] Defendants also claim that EPPs failed to properly conduct a choice of law analysis. Defs.' Opp'n Class Cert. 77-81. The Court is not persuaded by this argument and agrees with EPPs that "[u]nder proper choice of law principles, the law of the state where the drug was purchased from a pharmacy governs because the injury (i. e., overcharge) occurs at the point of sale." EPPs' Reply Class Cert. 54. *See* *In re Flonase Antitrust Litig., 815 F. Supp. 2d 867, 883-84 (E.D. Pa. 2011)*; *In re Wellbutrin XL Antitrust Litig., 282 F.R.D. 126, 134-136 (E.D. Pa. 2011)*; *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 737 F. Supp. 2d 380, 391 (E.D. Pa. 2010)*.

[13] The inquiry into whether variations in state laws can be manageably addressed implicates both the predominance and superiority requirements. *See* *Vista Healthplan, Inc., No. 06-1833, 2015 U.S. Dist. LEXIS 74846, 2015 WL 3623005, at *35*. The Court considers this issue under the predominance standard. *See, e.g.,* *In re Thalomid & Revlimid Antitrust Litig., No. 14-6997, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *11*.

some courts have held that differences between state consumer protection and unjust enrichment laws do not defeat predominance and address many of the alleged specific variations raised by defendants. *Id.* at 56-68.

The Court is not persuaded by EPPs' *ipse dixit* that there are no significant variations between the various state laws. The Third Circuit's *Grandalski* opinion is instructive in this regard. In that case, the plaintiffs "failed to provide a sufficient, or virtually any, analysis describing how the grouped state laws might apply to the facts of this case. They assert[ed] only that the differences between the state laws within each group are 'insignificant or non-existent.'" *Grandalski v. Quest Diagnostics Inc., 767 F.3d at 184*. The *Grandalski* court explained that "[plaintiffs] must do more than provide their own *ipse dixit*, citation to a similar case, and a generic assessment of state consumer fraud statutes, to justify grouping." *Id.*

In this case, EPPs have provided no analysis of any variations between the various state laws other than to assure the Court that such differences **[**97]** are minor and manageable. Without an extensive analysis of the applicable state laws and any variation in state law, EPPs cannot meet their burden of proving predominance under *Rule 23*. *See Vista Healthplan, Inc. v. Cephalon, Inc., No. 06-1833, 2015 U.S. Dist. LEXIS 74846, 2015 WL 3623005, at *34 (E.D. Pa. June 10, 2015)* (concluding that "Plaintiffs' accounting of the state variations [was] not comprehensive and glosses over important differences."); *see also In re Processed Egg* ***[*725]*** *Prod. Antitrust Litig., 312 F.R.D. 124, 164 (E.D. Pa. 2015)* ("Plaintiffs have provided charts seeking to demonstrate what the requirements of each state are with respect to the claims at issue[], but Plaintiffs have not proposed how those state claims would be grouped and managed at trial.").

Moreover, in other indirect purchaser antitrust actions proceeding under a wide array of state laws, plaintiffs have proposed trial plans, jury instructions or verdict sheets to assist the Court in understanding how any variations could be managed at trial. *See, e.g., Vista Healthplan, Inc., No. 06-1833, 2015 U.S. Dist. LEXIS 74846, 2015 WL 3623005, at *34* (evaluating plaintiffs' "proposed jury instructions [to] organize the state laws into a limited number of permutations"); *In re Processed Egg Prod. Antitrust Litig., 312 F.R.D. at 165* (considering plaintiffs' "Suggested Trial Options" memorandum); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *20 (D. Mass. Oct. 16, 2017)* (addressing plaintiffs' proposed multiple phase trial plan). EPPs have not presented any such proposals in this case. Any renewed motion for class certification by EPPs should include, **[**98]** at minimum, charts identifying the substantive elements of each state law claim, an analysis of all variations between the state law claims, and a proposed trial plan through which these variations may be manageably addressed.

For all of the above reasons, the Court concludes that EPPs have not satisfied the predominance requirement.

iii. Superiority

HN33[] The superiority requirement "asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 533-34 (3d Cir. 2004)*. "[S]uperiority, unlike numerosity, considers alternatives to class actions other than joinder." *In re Modafinil Antitrust Litig., 837 F.3d 238, 253 n.11 (3d Cir. 2016)*.

HN34[] In considering whether superiority is established, the Court must consider "whether variations in state laws present the types of insuperable obstacles which render class litigation unmanageable." *Vista Healthplan, Inc., No. 06-1833, 2015 U.S. Dist. LEXIS 74846, 2015 WL 3623005, at *35* (citing *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 529 (3d Cir. 2004)*). For the reasons stated above, EPPs have not provided a record sufficient for the Court to conclude that variations in applicable state laws are manageable in a single trial. They have not demonstrated by a preponderance of the evidence that a single class action proceeding under the 53 state laws arising from 26 jurisdictions would be superior to alternative **[**99]** available methods of adjudication. The Court thus concludes that EPPs have not established superiority on the current state of the record.

iv. Conclusion

In sum, EPPs have not satisfied their burden of establishing ascertainability, predominance, or superiority by a preponderance of the evidence. For these reasons, EPPs' motion for class certification is denied. This decision is without prejudice to EPPs' right to file an amended motion for class certification if warranted by the facts and applicable law as set forth in this Memorandum.

V. EPPS' MOTION TO EXCLUDE THE OPINIONS AND TESTIMONY OF JOHN F. FRITZ

EPPs filed a motion to exclude the opinions and testimony of defendants' expert witness, John Fritz, who opines that certain EPP class members passed on the **[*726]** costs of any overcharge and therefore did not sustain actual economic harm. Mem. L. Supp. EPPs' Mot. Exclude Opinions & Test. John F. Fritz 1. As explained above, the issue of whether recoverable damages are limited to a class members' actual economic harm does not impact class certification, and the Court need not address this issue at this stage in the litigation. In light of the Court's denial of EPPs' motion for class certification, **[**100]** EPP's motion to exclude Fritz's opinions and testimony is denied as moot. This decision is without prejudice to plaintiffs' right to challenge Fritz's expert testimony, if warranted, at a later stage in this litigation.

VI. CONCLUSION

For the reasons set forth above, (1) defendants' Motion to Exclude the Expert Testimony of Laura Craft and Eric Miller is denied, (2) EPPs' Motion for Class Certification is denied without prejudice to EPPs' right to file an amended motion if warranted by the facts and applicable law as set forth in this Memorandum, and (3) EPPs' Motion to Exclude the Opinions and Testimony of John F. Fritz is denied as moot.

An appropriate Order follows.

ORDER

AND NOW, this 2nd day of June, 2020, upon consideration of End-Payor Plaintiffs' Motion for Class Certification (Document No. 578, filed December 19, 2018), Defendants' Opposition to End-Payor Plaintiffs' Motion for Class Certification (Document Nos. 601 & 608, filed February 25, 2019), Defendants' Appendices of State Laws in Support of Defendants' Opposition to End-Payor Plaintiffs' Motion for Class Certification (Document No. 602, filed February 25, 2019), Reply Memorandum of Law in Support of End-Payor Plaintiffs' **[**101]** Motion for Class Certification (Document No. 628, filed March 25, 2019), Defendants' Motion to Exclude the Expert Testimony of Laura Craft and Eric Miller Offered in Support of End-Payor Plaintiffs' Motion for Class Certification (Document Nos. 603 & 609, filed February 25, 2019), Declaration of Jeffrey Y. Wu in Support of Defendants' Opposition to End Payor Plaintiffs' Motion for Class Certification and Defendants' Motion to Exclude the Expert Testimony of Laura Craft and Eric Miller (Document Nos. 605 & 610, filed February 25, 2019), End-Payor Plaintiffs' Opposition to Defendants' Motion to Exclude the Expert Testimony of Laura Craft and Eric Miller (Document No. 627, filed March 25, 2019), End-Payor Plaintiffs' Motion to Exclude the Opinions and Testimony of John F. Fritz (Document No. 626, filed March 25, 2019), Defendants' Opposition to End-Payor Plaintiffs' Motion to Exclude the Opinions and Testimony of John F. Fritz (Document Nos. 630 & 631, filed April 8, 2019), and the parties' Notices of Supplemental Authority and responses (Document Nos. 691, 695, 704, 705, 706, 707), and following Hearings on May 14 and 15, 2019, and July 23, 2019, for the reasons stated in the accompanying **[**102]** Memorandum dated June 2, 2020, **IT IS ORDERED** as follows:

1. Defendants' Motion to Exclude the Expert Testimony of Laura Craft and Eric Miller Offered in Support of End-Payor Plaintiffs' Motion for Class Certification is **DENIED**;

2. End-Payor Plaintiffs' Motion for Class Certification is **DENIED WITHOUT PREJUDICE** to their right to file an amended motion if warranted by the facts and applicable law as set forth in the Memorandum dated June 2, 2020; and

3. End-Payor Plaintiffs' Motion to Exclude the Opinions and Testimony of John F. Fritz is **DENIED AS MOOT**.

[*727] IT IS FURTHER ORDERED that, on or before June 16, 2020, the parties shall submit a proposed schedule for further proceedings through the filing of Motions for Summary Judgment and responses. The Court will thereafter conduct a telephone conference to address scheduling.

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.

Distance Learning Co. v. Maynard

United States District Court for the Northern District of California

June 4, 2020, Decided; June 4, 2020, Filed

Case No. 19-cv-03801-KAW

Reporter

2020 U.S. Dist. LEXIS 99256 *; 2020-1 Trade Cas. (CCH) P81,247; 2020 WL 2995529

THE DISTANCE LEARNING COMPANY, Plaintiff, v. DERICK GENE MAYNARD, et al., Defendants.

Core Terms

traffic school, schools, unfair, monopolization, alleges, competitors, online, consumers, barriers, market share, conspiring, antitrust, relevant market, conspiracy, prices, teams, unity of interest, prong, quotation, balancing test, market power, licensed, marketplace, factors, website, argues, output, flood, factual allegations, decisionmaking

Counsel: **[*1]** For The Distance Learning Company, Plaintiff: Adrian R. Bacon, Meghan Elisabeth George, Adrian Bacon, Todd Michael Friedman, Law Offices of Todd M. Friedman, P.C., Woodland Hills, CA.

For Derick Gene Maynard, Bethany Susan Maynard, Defendants: Allan Steyer, LEAD ATTORNEY, Donald Scott Macrae, Jill Michelle Manning, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA.

Judges: KANDIS A. WESTMORE, United States Magistrate Judge.

Opinion by: KANDIS A. WESTMORE

Opinion

ORDER GRANTING MOTION TO DISMISS

Re: Dkt. No. 43

Plaintiff The Distance Learning Company filed this putative class action against Defendants Bethany Susan Maynard and Derick Gene Maynard, asserting that Defendants are seeking "to suppress competition and maintain control in the field of online traffic schools." (First Amended Compl. ("FAC") ¶ 2, Dkt. No. 39.)

Pending before the Court is Defendants' motion to dismiss. (Defs.' Mot. to Dismiss, Dkt. No. 43.) Having considered the parties' filings and the relevant legal authority, the Court GRANTS Defendants' motion.

I. BACKGROUND

Plaintiff and the putative class operate online driver's education and traffic schools in California. (FAC ¶ 9, 14.) The California Department of Motor Vehicles ("DMV") permits **[*2]** any company to set up a new traffic school by paying a $450 application fee if they have a course curriculum, place of business, operator, and bond. (FAC ¶ 32.) California law requires that the DMV maintain a list of driving schools, both on-line and in hard copy for distribution in traffic courts. (FAC ¶ 28.) Plaintiff alleges that schools that appear on this list do not need to spend money on advertising or marketing because they must be added to the list. (FAC ¶ 29.) The list is not alphabetized, but auto-rotates every time a user accesses the DMV's website, displaying a random list of several dozen traffic schools. (FAC ¶¶ 47-48.)

Defendants are a husband and wife who also own and operate online traffic schools. (FAC ¶¶ 30, 40.) Plaintiff asserts that Defendants have abused a "loophole" in the current DMV statute and regulations. (FAC ¶ 33.) Specifically, Plaintiff alleges that Defendants have registered hundreds of traffic schools that operate out of the same office space, with the intent of flooding the DMV's list with numerous schools operated by the same owner and operator. (FAC ¶ 35.) "Defendants' schools, in many cases, have different names, but utilize the exact same website, **[*3]** place of business, curriculum, and instructor." (FAC ¶ 35.) Defendants jointly and severally run the traffic schools, which are located at the same physical access and "offer identical services for identical prices." (FAC ¶¶ 39, 41.) Altogether, Plaintiff alleges that Defendants "jointly operate 1,500 of the 2,790 of the DMV's licensed traffic schools, or 53.8% of the licensed traffic schools," including setting up 501 schools on a single day in January 2019. (FAC ¶¶ 37-38.)

Plaintiff alleges that Defendants have admitted in published news articles that the sole purpose of opening so many traffic schools "was to flush out businesses who were charging lower prices for the same services as Defendants." (FAC ¶ 44.) By creating so many traffic schools, "Defendant[s] can attempt to monopolize the DMV's website, and to create high barriers to entry for new traffic schools, in order to discourage competition." (FAC ¶ 39.) In short, by creating so many "alter-ego proxy schools," Defendants can "increase their likelihood of appearing at or near the top of the randomized list, thereby bettering their chance of being selected by a consumer, not through any legitimate competitive advantage, but **[*4]** through sheer volume and luck of the randomized draw." (FAC ¶ 50.) This is because consumers are unlikely "to scroll through and research all 2,700 plus traffic schools to find a suitable and competitive option, especially given the relatively low price point of these traffic school programs[. Thus], schools listed at or near the top of these randomized lists are the most likely to be selected by a consumer." (FAC ¶ 49.)

Plaintiff further alleges that Defendants' actions encourage price collusion. (FAC ¶ 72.) Plaintiff asserts that the average price of an online traffic school is $17.00/person, but that Defendants agreed to have their schools charge $7.00 higher than the industry average, an increase of 41% from the industry average. (FAC ¶¶ 70, 72.) Plaintiff believes consumers are unlikely to notice the change or care, permitting Defendants to "gouge consumers and prevent law-abiding legitimate competitors, such as Plaintiff, from being exposed to consumers . . . ." (FAC ¶ 76.)

On June 28, 2019, Plaintiff filed the instant case. (Compl., Dkt. No. 1.) On January 6, 2020, Plaintiff filed the operative complaint, alleging claims for: (1) violation of the *Sherman Act § 1* (unlawful collusion), **[*5]** (2) violation of the *Sherman Act § 2* (unlawful monopolization), (3) violation of the *Sherman Act § 2* (attempted monopolization), (4) violation of the *Unfair Competition Law ("UCL")*, and (5) violation of the *Cartwright Act*. (FAC ¶¶ 81-136.)

On February 3, 2020, Defendants filed the instant motion to dismiss. On March 4, 2020, Plaintiff filed its opposition. (Pl.'s Opp'n, Dkt. No. 48.) On March 18, 2020, Defendants filed their reply. (Defs.' Reply, Dkt. No. 49.)

On May 5, 2020, the Court vacated the hearing, and requested supplemental briefing. (Dkt. No. 54.) On May 11, 2020, Plaintiff filed its supplemental brief. (Pl.'s Supp. Br., Dkt. No. 55.) On May 15, 2020, Defendants filed their supplemental brief. (Defs.' Supp. Br., Dkt. No. 56.)[1]

II. LEGAL STANDARD

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[1] On May 15, 2020, Plaintiff also filed a request for oral argument. (Dkt. No. 57.) Plaintiff did not explain why oral argument was needed. Having reviewed Plaintiff's request, the parties' filings, and the relevant legal authorities, the Court deems the matter suitable for disposition without a hearing pursuant to *Civil Local Rule 7-1(b)*.

Under *Federal Rule of Civil Procedure 12(b)(6)*, a party may file a motion to dismiss based on the failure to state a claim upon which relief may be granted. A motion to dismiss under *Rule 12(b)(6)* tests the legal sufficiency of the claims asserted in the complaint. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*.

In considering such a motion, a court must "accept as true all of the factual allegations contained in the complaint," *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (per curiam) (citation omitted), and may dismiss the case or a claim "only where there is no cognizable legal theory" **[*6]** or there is an absence of "sufficient factual matter to state a facially plausible claim to relief." *Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1041 (9th Cir. 2010)* (citing *Ashcroft v. Iqbal, 556 U.S. 662, 677-78, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; *Navarro, 250 F.3d at 732*) (internal quotation marks omitted).

A claim is plausible on its face when a plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678* (citation omitted). In other words, the facts alleged must demonstrate "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

"Threadbare recitals of the elements of a cause of action" and "conclusory statements" are inadequate. *Iqbal, 556 U.S. at 678*; *see also* *Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996)* ("[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim."). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully . . . . When a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 557*) (internal citations omitted).

If the court grants a motion to dismiss, it **[*7]** should grant leave to amend even if no request to amend is made "unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)* (citations omitted).

III. DISCUSSION

A. *Sherman Act § 1* (Antitrust Conspiracy)

"*Section 1 of the Sherman Act* prohibits '[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.'" *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1046 (9th Cir. 2008)* (quoting *15 U.S.C. § 1*). Defendants contend this claim must be dismissed because: (1) Plaintiffs fail to allege sufficient facts demonstrating an agreement or conspiracy between Defendants, and (2) Defendants are legally incapable of conspiring amongst themselves because there is a unity of interest. (Defs.' Mot. to Dismiss at 7, 8.)

i. Sufficiency of the Pleading

To plead a § 1 violation, a plaintiff must "plead not just ultimate facts (such as conspiracy), but evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." **[*8]** *Kendall, 518 F.3d at 1047*. Conclusory allegations that the defendants entered into a contract, combination or conspiracy are insufficient; instead, a plaintiff must plead "enough factual allegations to suggest an agreement was made." *Jones v. Micron Tech., Inc., 400 F. Supp. 3d 897, 914-15 (N.D. Cal. 2019)*; *see also* *Kendall, 518 F.3d at 1047*.

"Factual allegations concerning an agreement to restrain trade can take two forms: direct or circumstantial. Direct evidence factual allegations are explicit and require no inferences to establish the existence of a conspiracy." Jones, 400 F. Supp. 3d at 915 (internal quotation omitted). The Supreme Court has "suggested that to allege an agreement between antitrust co-conspirators, the complaint must allege facts such as a 'specific time, place, or person involved in the alleged conspiracies' . . . ." Kendall, 518 F.3d at 1047 (quoting Twombly, 550 U.S. at 565 n.10). In contrast, a plaintiff relying on circumstantial evidence "must present allegations of parallel conduct of the defendants as well as so-called 'plus factors.' Parallel conduct occurs when competitors act similarly or follow the same course of action . . . ." Jones, 400 F. Supp. 3d at 915 (citation omitted). Plus factors are circumstances that "point[] toward a meeting of the minds of the alleged conspirators," namely "economic actions and outcomes that are largely inconsistent with unilateral, lawful conduct but **[*9]** largely consistent with explicitly coordinated action." *Id.* (internal quotations omitted).

Here, Defendants argue that Plaintiff pleads inadequate facts of an agreement. (Defs.' Mot. to Dismiss at 7.) The Court disagrees. Plaintiff has alleged that Defendants entered into an agreement to flood the marketplace with duplicate traffic schools at the same time, using the same website, place of business, curriculum, and instructor. (FAC ¶¶ 35, 41, 83.) Such allegations go beyond "bare, unsupported conclusions" of an agreement, as it specifically identifies who is involved in the agreement, what was agreed to, how the agreement would be carried out, and the intended effects of the agreement.

Additionally, even if such allegations were insufficient to directly demonstrate an agreement, Plaintiff has pled sufficient circumstantial evidence of an agreement. Specifically, Plaintiff has alleged parallel conduct, namely registering hundreds of traffic schools using the same office space, website, curriculum, and instructor. (FAC ¶ 35.) Plaintiff has also alleged circumstances that point to a meeting of the minds; in addition to using the same resources, Defendants allegedly charged the same price **[*10]** and opened 500 traffic schools on the same day. (FAC ¶¶ 35, 36, 72.) It is difficult to imagine that such actions were coincidental, as Defendants suggest. (*See* Defs.' Mot. to Dismiss at 8.)

Accordingly, the Court finds Plaintiff has adequately pled an agreement between Defendants.

ii. Unity of Interest

In the alternative, Defendants argue that the § 1 claim must be dismissed because "there is a unity of interest among [Defendants] and the traffic schools they own," which makes Defendants "legally incapable of conspiring among themselves." (Defs.' Mot. to Dismiss at 8.) The Court agrees that as pled in the complaint, Defendants have a unity of interest.

"The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms 'contract, combination . . . or conspiracy' in § 1." Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). Specifically, "[n]othing in the literal meaning of those terms excludes coordinated conduct among officers or employees of the *same* company." *Id.* "The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." *Id.* Likewise, § 1 is **[*11]** not violated by coordination between a corporation and one of its unincorporated divisions, or between a parent and its wholly owned subsidiary. Id. at 770, 772. With respect to a parent and a subsidiary, this is because they "have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousness, but one." Id. at 771.

In determining whether entities are capable of conspiring, the key inquiry is whether the alleged agreement or conspiracy "joins together separate decisionmakers." Am. Needle, Inc. v. NFL, 560 U.S. 183, 195, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010). The entities must be "separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition." Id. at 195 (internal quotations omitted). Thus, "it is not determinative that two parties to an alleged § 1 violation are legally distinct entities." Id. at

196. Instead, "[t]he question is whether the agreement joins together 'independent centers of decisionmaking.' If it does, the entities are capable of conspiring under § 1 . . . ."

Plaintiff argues that Defendants are comparable **[*12]** to the NFL teams in American Needle, Inc. v. National Football League, which the Supreme Court found to be separate economic interests capable of conspiring under § 1.[2] (Pl.'s Opp'n at 23-24.) There, the 32 NFL teams formed the National Football League Properties ("NFLP") to develop, license, and market their intellectual property, eventually granting exclusive licenses. 560 U.S. 183, 187, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010). The defendants argued that the NFL, NFL teams, and NFLP were incapable of conspiring because they were a single economic enterprise. Id. at 188**.** The Supreme Court rejected this argument, explaining that "[t]he NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic independent action." Id. at 196. Rather, each team was "a substantial, independently owned, and independently managed business," with their corporate actions "guided or determined by separate corporate consciousness, and their objectives are not common." *Id.* (internal quotations omitted). Further, "[t]he teams compete with one another, not only on the playing field, but to attract fans, for gate receipts, and for contracts with managerial and playing personnel." Id. at 196-97. Significantly, the NFL teams also "compete **[*13]** in the market for intellectual property," as "[w]hen each NFL team licenses its intellectual property, it is not pursuing the 'common interests of the whole' league but is instead pursuing interests of each corporation itself." Id. at 197. Thus, each NFL team was a "separate, profit-maximining entit[y], and their interests in licensing team trademarks are not necessarily aligned." Id. at 198.

American Needle, Inc. is readily distinguishable from the instant case. There are no allegations that Defendants are or were competitors; instead, they are alleged to be a *husband and wife*, who would presumably have the same economic interest, especially given California's community property laws. (FAC ¶ 40; *see also* Cal. Fam. Code § 760 ("all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property").) This fact cuts against a finding that Defendants would ordinarily be competing against *each other* in the traffic school business absent the alleged conspiracy. Other allegations in the complaint further support a finding that Defendants have a unity of interest, including that Defendants "jointly operate" the schools, which use the same website, **[*14]** place of business, curriculum, and instructor. (FAC ¶¶ 35, 37.) In short, unlike the NFL teams, there is nothing to suggest that Defendants interest were never aligned with respect to owning and operating traffic schools, or that they are "independent centers of decisionmaking" who, by working together, deprive the marketplace of actual or potential competition.

Instead, these facts are more akin to Top Rank, Inc. v. Haymon. There, the plaintiff alleged that the Haymon defendants (professional boxing management companies) and the Waddell defendants (asset management and investment advisory firms) were conspiring together to monopolize the boxing sport. CV 15-4961-JFW (MRWx), 2015 U.S. Dist. LEXIS 164676, at *4-5 (C.D. Cal. Oct. 16, 2015). In dismissing the § 1 claim, the district court explained that the defendants had "no alleged separate interest, at least as it relates to the relevant management and promotion markets." Id. at *48. Of particular significance, the district court explained that "the Waddell Defendants, as asset management and investment advisory firms, are not actual or potential competitors of the Haymon Defendants. Accordingly, their alleged venture with the Haymon Defendants does not deprive the marketplace of independent centers of decisionmaking, **[*15]** or of a diversity of entrepreneurial interests, and thus of actual or potential competition." *Id.* (internal quotation omitted). Such is the case here, where Defendants are a husband and wife who would not ordinarily be competing against each other in business.

In its supplemental brief, Plaintiff concedes that under the American Needle test, a husband and wife would share a unity of interests. (Pl.'s Supp. Br. at 1.) Plaintiff, however, contends that this is not its allegation; rather, Plaintiff suggests that Defendants' 1,500 businesses are colluding with one another. (*Id.*) Plaintiff's argument is contrary to the pleadings; for example, the operative complaint alleges that "*Defendants* have together colluded to set up as many 'different' schools as possible, in order to flood the DMV's list with many schools which are all operated by the same owner/operator." (FAC ¶ 35 (emphasis added); *see also* ¶¶ 50 ("Defendants' intention in creating thousands

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[2] Plaintiff also argues that a determination of whether there is a unity of interest is premature at the pleading stage. (*See* Pl.'s Opp'n at 2 n.1.) As discussed below, however, based on Plaintiff's own allegations, there appears to be a unity of interest.

of alter-ego proxy schools is to increase their likelihood of appearing at or near the top of the randomized list."), 83 ("Defendants entered into an agreement to flood the marketplace with fake/duplicate traffic schools at the same time"). **[*16]** These are actions that only Defendants, not their schools, could have taken; the schools did not create themselves, nor did the schools enter into an agreement to flood the market. As alleged, the schools are the conduit through which Defendants, the alleged conspirators, attempted to collude.

Further, even if Plaintiff had alleged the driving schools themselves were colluding, as alleged, it appears unity of interest would still apply. Here, the driving schools are jointly operated by individuals who, as Plaintiff concedes, have a unity of interest. Courts have found that no § 1 violation occurred when the "corporations were under common ownership and control . . . ." *Century Oil Tool, Inc. v. Prod. Specialties, Inc., 737 F.2d 1316, 1317 (5th Cir. 1984)*; *see also* *Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp., 257 F. Supp. 2d 819, 835 (M.D. La. 2002)* ("Where two people together are controlling the affairs of separate corporations those corporations cannot conspire under *§ 1 of the Sherman Act*.") Further, there are no allegations that the driving schools would compete with each other; rather, they are all part of a single operation to increase the market share for their common owner.

Absent allegations that would allow the Court to find that Defendants are competitors, the Court finds that as pled, Defendants have a unity of interest and therefore are legally **[*17]** incapable of conspiring under *§ 1*. Accordingly, the § 1 claim is dismissed without prejudice. While it is unclear the driving schools are capable of conspiring with each other, the Court will allow amendment of this claim.

B. *Sherman Act § 2* (Monopolization and Attempted Monopolization)

Plaintiff alleges that Defendants have engaged in unlawful monopolization and attempted monopolization, in violation of the *Sherman Act § 2*. (FAC ¶¶ 94, 102.) A monopoly claim has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. Attempted monopoly has four elements: "(1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at achieving that purpose; (3) a dangerous probability of achieving 'monopoly power'; and (4) causal antitrust injury." *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1445 (9th Cir. 1995)*.

Here, Defendants effectively argue that Plaintiff's § 2 claims fail because Plaintiff has failed to adequately allege market power. In *Rebel Oil*, the Ninth Circuit explained that "reduction of competition does not **[*18]** invoke the *Sherman Act* until it harms consumer welfare." *51 F.3d at 1433*. Thus, "an act is deemed *anticompetitive* under the *Sherman Act* only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality." *Id.* In order to unilaterally "raise prices above competitive levels, the [defendant] must obtain sufficient market power." *Id. at 1434*. A defendant "has sufficient market power when, by restricting its own output, it can restrict marketwide output and, hence, increase marketwise prices." *Id.* To establish market power, "[t]he most common type of proof is circumstantial evidence pertaining to the structure of the market." *Rebel Oil, 51 F.3d at 1434*. Thus, "a plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." *Id.* The Ninth Circuit has applied these same factors in both monopolization and attempted monopolization cases, although a lesser market share suffices for attempted monopolization. *See* *Rebel Oil, 51 F.3d at 1432-34* (applying market power factors in an attempted monopolization case); **[*19]** *W. Parcel Express v. UPS of Am., 190 F.3d 974, 975 (9th Cir. 1999)* (applying market power factors in a monopolization case).

i. Relevant Market

First, Defendant argues that Plaintiff improperly limited the relevant market to online traffic schools because Plaintiff should have also included brick and mortar traffic schools. (Defs.' Mot. to Dismiss at 10.) The relevant market is "the pool of goods of services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)* (internal quotation omitted). Thus, "defining the product market involves identification of the field of competition: the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business." *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989)*.

A court may dismiss a monopolization claim if the plaintiff "alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products." *ChriMar Sys. v. Cisco Sys., 72 F. Supp. 3d 1012, 1017 (N.D. Cal. 2014)* (internal quotation omitted). Dismissal under *Rule 12(b)(6)*, however, is only appropriate "if the complaint's 'relevant market' definition is facially unsustainable" because "the validity of the 'relevant market' is typically a factual element rather than legal element . . . ." *Newcal Indus. v. Ikon Office Solution, Inc., 513 F.3d 1038, 1045 (9th Cir. 2008)*.

Here, Plaintiff's limitation of the relevant market to online traffic schools **[*20]** is not "facially unsustainable." While Defendants point to Plaintiff's allegation that both online and brick and mortar schools appear on the DMV's list, this does not necessarily mean the services provided are interchangeable. (*See* Defs.' Mot. to Dismiss at 10; FAC ¶ 28.) As Plaintiff points out, online traffic schools may be "more convenient, less time consuming, and cheaper" than brick and mortar schools. (*See* Pl.'s Opp'n at 23.) Indeed, an individual may be able to use an on-line traffic school located anywhere in California, but would be limited to specific brick and mortar schools in their surrounding area. Thus, not all brick and mortar schools would have "actual or potential ability to deprive" the internet traffic schools "of significant levels of business." *Thurman Indus., Inc., 875 F.2d at 1374*. Whether Plaintiff's defined market is too narrow is a determination appropriately left for summary judgment or trial.

ii. Market Share

Second, Defendants argue that even if the relevant market is limited to only online traffic schools, Plaintiff has not alleged adequate market share. (Defs.' Mot. to Dismiss at 11.) "Calculation of the market share allows for a proper understanding of the defendant's influence and relative **[*21]** power in the relevant market. A dominant share of the market often carries with it the power to control output across the market, and thereby control prices." *Image Tech. Servs. v. Eastman Kodak Co., 125 F.3d 1195, 1206 (9th Cir. 1997)*. For a monopolization claim, "[c]ourts generally require a 65% market share to establish a prima facie case of market power." *Id.* For an attempted monopolization claim, "a lower quantum than the minimum showing required in an actual monopolization case." *Rebel Oil, 51 F.3d at 1438*. Most attempted monopolization "cases hold that a market share of 30 percent is presumptively insufficient to establish the power to control price," although the Ninth Circuit has found that a market share of 44% was sufficient where "entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing." *Id.*

Here, Plaintiff alleges that Defendants have a 53.8% market share because Defendants own and operate approximately 53.8% of the DMV's licensed traffic schools. (FAC ¶¶ 37, 62, 73.) Thus, Plaintiff argues that this 54% market share is sufficient to survive a motion to dismiss because it lies in the "gray area of the law" between the 30% and 65% thresholds identified by the Ninth Circuit. (Pl.'s Opp'n at 19.) Operating 53.8% of **[*22]** online traffic schools, however, does not automatically mean Defendants conduct 53.8% of all online traffic school *business*; Defendants correctly argue Plaintiff has offered "no basis . . . for the implausible underlying assumption that market share in a given market is distributed evenly to all business in that market." (Defs.' Mot. to Dismiss at 11.) At best, Plaintiff can demonstrate that Defendants occupy 53.8% of the DMV's list, but even taking as true the allegation that consumers are likely to select the schools listed at the top of the list, this does not translate to market share. There is no allegation, for example, that most or even a meaningful number of consumers use the DMV's list to begin with, as opposed to an internet search. (*See* Defs.' Reply at 10.) In its supplemental briefing, Plaintiff argues that the vast majority of business for online

In its supplemental briefing, Plaintiff argues that the vast majority of business for online schools (80%) does come from the DMV list. (Pl.'s Supp. Br. at 1.) Plaintiff also cites to the drop in its business and that of other online traffic schools since Defendants' alleged opening of thousands of online schools. (*Id.* at 1-2.) Such facts, **[*23]** however, were not in the operative complaint. It is also not clear that even assuming Defendants now have 53.8% of the 80% of business that goes through the DMV list (*i.e.*, 43.04% of all business), this would be sufficient for a monopolization claim, which generally requires a 65% market share. *See* *Image Tech. Servs., 125 F.3d at 1206*. Even for an attempted monopolization claim, this 43.04% share is less than the 44% share in *Rebel Oil*, which the Ninth Circuit found sufficient because there were high barriers of entry. *51 F.3d at 1438*.

Because Plaintiff has not alleged facts demonstrating adequate market share, Plaintiff's § 2 claims must be dismissed.

iii. Barriers to Entry

Finally, Defendants argue that Plaintiff has not alleged any significant barriers to market entry. (Defs.' Mot. to Dismiss at 12.) "A § 2 plaintiff must show that new competitors face high market barriers to entry and that current competitors lack the ability to expand their output to challenge a monopolist's high prices." *Image Tech. Servs., 125 F.3d at 1208*. "Entry barriers are additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants, or factors in the market that deter entry while permitting incumbent firms to earn monopoly returns. *Rebel Oil Co., 51 F.3d at 1439*. Typical entry barriers **[*24]** include: "(1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) capital market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of scale." *Id.*

The Court finds that Plaintiff has not alleged significant barriers to entry. As Plaintiff itself alleges, "the DMV allows any company to pay the $450 application fee, and set up a new traffic school[]," in addition to having a course curriculum, place of business, operator, instructor, and a bond. (FAC ¶ 32.) These are not significant barriers that prevent new competitors from entering the market.

Instead, Plaintiff essentially argue that in order to *compete* with Defendants, new entrants must pay $675,000 in DMV application fees in order to set up 1,500 traffic schools of their own. (Pl.'s Opp'n at 7, 21; FAC ¶ 59.) In *United States v. Syufy Enterprises*, however, the Ninth Circuit rejected the argument that "competition is itself a structural barrier to entry." *903 F.2d 659, 667 (9th Cir. 1990)*. There, Syufy operated a movie theater, eventually buying out most of his competitors. *Id. at 662*. The Ninth Circuit found that Syufy did not have the power **[*25]** to exclude competition, as there were "no structural barriers to entry into the market . . . . To the contrary, the record discloses a rough-and-tumble industry, marked by easy market access, fluid relationships with distributors, an ample and continuous supply of product, and a healthy and growing demand." *Id. at 667*. As to the government's argument that "competitors w[ould] be deterred from entering the market because they could not hope to turn a profit competing against Syufy," the Ninth Circuit "ma[de] clear . . . that an efficient, vigorous, aggressive competitor is not the villain antitrust laws are aimed at eliminating." *Id. at 667-68*.

Alternatively, Plaintiff argues that Defendants have been able to charge rates 40% greater than the industry average by overwhelming the DMV list, thus demonstrating an ability to control prices. (Pl.'s Opp'n at 19.) It is not clear how this is relevant to barriers to entry or barriers to expansion; the fact that Defendants charge a higher rate than the industry average does not necessarily mean Defendants are preventing new entrants to the market or that current competitors cannot expand their output to challenge Defendants' higher prices. *See* *Image Tech. Servs., 125 F.3d at 1208*.

Accordingly, the Court **[*26]** finds that Plaintiff has failed to allege the second and third market power factors. As amendment is not futile, Plaintiff's § 2 claims are DISMISSED without prejudice.

C. Cartwright Act

"The analysis under California's ***antitrust law*** mirrors the analysis under federal law because the *Cartwright Act, Cal. Bus. & Professions Code § 16700 et seq.*, was modeled after the *Sherman Act*." *Cty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2011)*. Thus, where the plaintiff's "claim under the *Cartwright Act* is predicated on the same conduct underlying the Sherman Act claims[,] the legal analysis of [the] Cartwright Act claim . . . should mirror the analysis under the Sherman Act claims." *Stewart v. Gogo, Inc., Case No. 12-cv-5164-EMC, 2013 U.S. Dist. LEXIS 51895, at *15 (N.D. Cal. Apr. 10, 2013)*. Here, Plaintiff's Cartwright Act complains of the same actions as the Sherman Act claims, namely Defendants' alleged agreement to create duplicate traffic schools, using the same websites, business addresses, owners, and operators, in order to flood the marketplace. (*See* FAC ¶ 133.) Thus, Plaintiff's Cartwright Act claim is DISMISSED without prejudice.

D. Unfair Competition Law ("UCL")

"The UCL is a broad remedial statute that permits an individual to challenge wrongful business conduct 'in whatever context such activity might occur.'" *Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 731 (9th Cir. 2007)* (quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 181, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999))*. The *UCL* prohibits "unlawful **[*27]** competition," defined as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ." *Cal. Bus. & Prof. Code § 17200*. "Because the statute is written in the disjunctive, it is violated where a defendant's act or practice is (1) unlawful, (2) unfair, (3) fraudulent, or (4) in violation of *section 17500* (false or misleading advertisements)." *Lozano, 504 F.3d at 731* (internal citation omitted).

Here, Plaintiff brings UCL claims under the unlawful and unfair prongs. (*See* FAC ¶ 110-112.) As discussed above, Plaintiff has failed to allege violations of the *Sherman Act* or *Cartwright Act*, and therefore the UCL claim based on the unlawful prong fails.

The parties dispute, however, whether the UCL claim based on the unfair prong may survive independent of the Sherman Act or Cartwright Act claims. In general, "[e]ach prong of the UCL is a separate and distinct theory of liability; thus, the 'unfair' practices prong offers an independent basis for relief." *Lozano, 504 F.3d at 731*. Plaintiff argues that to determine whether the "unfair" UCL claim can survive, the Court should apply: "(1) the traditional balancing test; (2) the FTC Act section 5 test; or (3) the *Cel-Tech* tethering test." (Pl.'s Opp'n at 9.) The Court finds that the **[*28]** traditional balancing test and FTC Act section 5 test do not apply, and Plaintiff does not satisfy the *Cel-Tech* tethering test.

First, with respect to the Section 5 test, Plaintiff itself acknowledges that "it is not the appropriate standard in this case for the UCL claims." (Pl.'s Opp'n at 10.) It is therefore unclear how the Section 5 test is relevant to the instant case.

Second, with respect to the traditional balancing test, "the California Supreme Court rejected the balancing test . . . in suits involving unfairness to the defendant's competitors." *Lozano, 504 F.3d at 735*; *see also* *Morris v. BMW of N. Am., LLC, Case No. 07-2827-WHA, 2007 U.S. Dist. LEXIS 85513, at *19 (N.D. Cal. Nov. 7, 2007)* (same); *Hadley v. Kellogg Sales Co., 243 F. Supp. 3d 1074, 1104 (N.D. Cal. 2017)* ("[t]he California Supreme Court has rejected the traditional balancing test for UCL claims between business competitors and instead requires that claims under the unfair prong be 'tethered to some legislatively declared policy.'") (quoting *Cel-Tech, 20 Cal. 4th at 186*). While Plaintiff alleges damage to consumers because Defendants charge higher prices, Plaintiff cites no authority that the balancing test applies when the case is brought by a *competitor*, as is the case here. *See* *Almasi v. Equilon Enters., LLC, Case No. 10-cv-3458-EJD, 2012 U.S. Dist. LEXIS 128623, at *26 (N.D. Cal. Sept. 10, 2012)* ("Plaintiffs do not cite any authority indicating that the balancing test applies in cases **[*29]** where a plaintiff is not a consumer."). Ultimately, Plaintiff brings this case not on behalf of consumers, but on behalf of competitors such as itself. Accordingly, the traditional balancing test does not apply in this case.

Finally, the Court finds that Plaintiff does not satisfy the *Cel-Tech* tethering test. In *Cel-Tech*, the California Supreme Court explained that "a practice may be deemed unfair even if it is not specifically proscribed by some other law." *20 Cal. 4th at 180*. The California Supreme Court acknowledged, however, that in "determin[ing] whether the challenged conduct is unfair within the meaning of the unfair competition law[,] courts may not apply purely subjective notions of fairness." *Id. at 184*. Thus, "[w]hen a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id. at 187*.

Following *Cel-Tech*, courts have found that a UCL claim based on the "unfair" prong **[*30]** cannot survive when it is premised on the same actions as an alleged statutory antitrust claim. In *Chavez v. Whirlpool Corp.*, the California Court of Appeal found:

> If the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason -- because it unreasonably restrains competition and harms consumers -- the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' toward consumers. To permit a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty and could lead to the enjoining of procompetitive conduct.

93 Cal. App. 4th 363, 375, 113 Cal. Rptr. 2d 175 (2001). Applying *Chavez*, the Ninth Circuit in an unpublished decision upheld the dismissal of a UCL claim based on the "unfair" prong, finding that "[w]here . . . the same conduct is alleged to support both a plaintiff's federal antitrust claims and state-law unfair competition claim, a finding that the conduct is not an antitrust violation precludes a finding of unfair competition." *LiveUniverse, Inc. v. MySpace, Inc., 304 Fed. Appx. 554, 558 (9th Cir. 2008)*; *see also* *GreenCycle Paint, Inc. v. PaintCare, Inc., Case No. 15-cv-4059-MEJ, 2016 U.S. Dist. LEXIS 47960, at *31 (N.D. Cal. Apr. 8, 2016)* ("where the same conduct alleged to be **[*31]** unfair under the UCL is also alleged to be a violation of another law, the UCL claim rises or falls with the other claims") (internal quotation omitted); *DocMagic, Inc. v. Ellie Mae, Inc., 745 F. Supp. 2d 1119, 1147 (N.D. Cal. 2010)* ("DocMagic has not alleged facts showing that Ellie Mae's conduct violated the *Sherman Act* by posing a dangerous threat of monopoly in the DPS market. As a result, any claims DocMagic might be asserting under the UCL's unfair prong necessarily fail as well."); *ChriMar Sys., 72 F. Supp. 3d at 1020* ("Courts have held that where the alleged conduct does not violate the antitrust laws, a claim based on unfair conduct under the UCL cannot survive."); *Los Gatos Mercantile, Inc. v. E.I. Dupont de Nemours & Co., Case No. 13-cv-1180-BLF, 2014 U.S. Dist. LEXIS 133540, at *32 (N.D. Cal. Sept. 22, 2014)* ("Because Plaintiffs have failed to state a claim for an antitrust violation, they have failed to state a claim under the UCL based upon the alleged anticompetitive conduct.").[3]

Such is the case here, where Plaintiff's claims are based on the same actions that underlie the statutory violations, namely the creation of duplicate traffic schools in order to flood the marketplace. (FAC ¶ 112.) Because Plaintiff's factual allegations do not rise to a violation of the *Sherman Act* or the *Cartwright Act*, those same factual allegations cannot **[*32]** give rise to a UCL claim based on the "unfair" prong. Accordingly, Plaintiff's UCL claim is DISMISSED without prejudice.[4]

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[3] In its supplemental brief, Plaintiff argues that *Chavez* was limited to cases involving safe harbors. (Pl.'s Supp. Br. at 3.) As discussed above, however, numerous courts have applied *Chavez*, focusing on whether the plaintiff is relying on the same factual allegations for both the statutory violation and a UCL claim based on the "unfair" prong. The above cases did not involve conduct which was condoned under antitrust laws.

[4] In the alternative, Defendants argue that Plaintiff's UCL claim must be dismissed because it falls within the safe harbor of the DMV traffic school statutes, namely *California Vehicle Code § 11200 et seq.* *Section 11202(a)(7)(B)* provides: "A person may be an operator for more than one traffic school if (i) the schools have a common owner or owners and (ii) the schools share a single established business address." Defendants thus contend that its ownership of multiple traffic schools is expressly permitted by statute, and cannot support a UCL claim. (Defs.' Mot. to Dismiss at 15.) The Court need not reach this issue because the Court finds that the UCL claim fails for separate reasons. The Court observes, however, that the Supreme Court in *Cel-Tech* found that "[i]f the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination." *20 Cal. 4th at 182*.

E. Remedies

Defendants also challenge the remedies sought by Plaintiff, namely restitution under the UCL, injunctive relief, and punitive damages. (Defs.' Mot. to Dismiss at 18-20.) As the Court finds that the complaint must be dismissed for failure to state a claim, the Court need not address these arguments. The Court notes, however, that Plaintiff generally did not address the arguments made and legal authority cited by Defendants, particularly with respect to whether restitution is available for lost profits or if punitive damages are cognizable under any of Plaintiff's claims. In the future, Plaintiff must address the arguments made or the Court will presume that Plaintiff agrees with Defendants' position.

IV. CONCLUSION

For the reasons stated above, the Court GRANTS Defendants' motion to dismiss. Plaintiff may file an amended complaint within **thirty days** of the date of this **[*33]** complaint.

IT IS SO ORDERED.

Dated: June 4, 2020

/s/ Kandis A. Westmore

KANDIS A. WESTMORE

United States Magistrate Judge

City of Long Beach v. Total Gas & Power N. Am., Inc.

United States District Court for the Southern District of New York

June 8, 2020, Decided; June 8, 2020, Filed

19 Civ. 8725 (LAK)

Reporter

465 F. Supp. 3d 416 *; 2020 U.S. Dist. LEXIS 100804 **; 2020-1 Trade Cas. (CCH) P81,252; 2020 WL 3057796

CITY OF LONG BEACH, on behalf of itself and all others similarly situated, Plaintiff, -against- TOTAL GAS & POWER NORTH AMERICA, INC., TOTAL, S.A., and TOTAL GAS & POWER, LTD., Defendants.

Subsequent History: Affirmed by *City of Long Beach v. Total Gas & Power N. Am., Inc., 2021 U.S. App. LEXIS 35779 (2d Cir. N.Y., Dec. 3, 2021)*

Prior History: *C&C Trading LLC v. Total Gas & Power N. Am., 2018 U.S. Dist. LEXIS 216298 (S.D.N.Y., Dec. 20, 2018)*

Core Terms

trading, prices, personal jurisdiction, hubs, natural gas, manipulation, allegations, contacts, entity, swaps, traders, restitution, contracts, derivatives, antitrust, bidweek, state law claim, alter ego, anticompetitive, authorizes, unjust enrichment, minimum contact, ego, lose money, counterparties, purposes, courts, unfair, fails, complaint alleges

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For Defendants: Brad Schoenfeldt, William S. Scherman, David Debold, Jason Fleischer, GIBSON, DUNN & CRUTCHER LLP.

Judges: LEWIS A. KAPLAN, United States District Judge.

Opinion by: LEWIS A. KAPLAN

Opinion

[*426] MEMORANDUM OPINION

LEWIS A. KAPLAN, *District Judge*.

This class action involves futures contracts for natural gas. The complaint alleges that the three defendants — Total Gas & Power North America ("Total Gas"), its French parent company Total, S.A. ("Total S.A."), and Total Gas & Power, Ltd. ("Total Ltd."), a U.K. subsidiary of Total S.A. — unlawfully manipulated various indices that are used to price natural gas contracts traded at four hubs in the Southwestern United States. The plaintiff, the City of Long Beach, California, ("Long Beach"), claims that this conduct caused it to pay artificially inflated prices for natural gas that it purchased at one such hub.[1] On behalf of itself and others similarly situated, Long Beach raises claims for damages under *Section 2 of the Sherman Act*, restitution under the *California Unfair Competition Law ("UCL")*, **[**2]** and restitution and damages under the law of unjust enrichment.[2]

Before the Court are two motions to dismiss, one filed jointly by Total S.A. and Total Ltd. and one filed by Total Gas. The former presents issues concerning personal jurisdiction. The latter raises the question whether this alleged manipulation of a futures market states a legally sufficient antitrust claim. I hold that it does not. For the following reasons, both motions are granted.

Facts

The facts alleged are fairly straightforward but require some understanding of abstract financial instruments called derivatives. The Court begins by explaining what those instruments are and how they are used in the natural gas trade.

Derivatives and the Natural Gas Trade

"The term 'derivative,' as it is used in today's financial world, refers to a financial instrument that derives its value from the price of an underlying instrument or index."[3] Like other financial instruments, derivatives can be bought and sold. This case involves two types of derivatives: futures and swaps.

Futures Contracts and Natural Gas Pricing

A futures contract is a derivative that requires the holder to purchase a physical commodity in the future. **[**3]** The futures at issue here were for the purchase of natural gas throughout the following month at one of four delivery hubs in the Southwestern United States (the "Southwestern Hubs"). Those hubs are known as Southern California Gas Co. ("SoCal"), El Paso Natural **[*427]** Gas Co., Permian Basin ("Permian"), West Texas, Waha ("Waha"), and El Paso San Juan Basin ("San Juan").[4]

There are two common ways of pricing natural gas, quantities of which typically are referred to in millions of British Thermal Units ("MMBtu"). Some contracts use a predetermined "fixed rate," such as $4.10 per MMBtu, that remains the same throughout the life of the contract.[5] Others use a "floating rate," which is a rate pegged to a variable quantity that changes over time.[6] At the four Southwestern Hubs, the floating rates in some natural gas contracts incorporated hub-specific indices.[7] According to the complaint, companies called Platts and NGI calculated a "Monthly Index Price" for each hub by averaging the price of natural gas sold on the hub (as reported by the traders) during the last five business days of each month, a period called "bidweek."[8] Other floating rate contracts

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[1] Complaint, Dkt. 1 ("Cmplt.") ¶ 17.

[2] The laws of several jurisdictions theoretically could apply to the unjust enrichment claim. For reasons explained later in this opinion, the Court assumes without deciding that the claim arises under New York law.

[3] *trueEX, LLC v. MarkitSERV Ltd., 266 F. Supp. 3d 705, 709 (S.D.N.Y. 2017)*.

[4] Cmplt. ¶ 7.

[5] *Id.* ¶ 31.

[6] *Id.*; *see* Mitchell Grant, *Floating Interest Rate*, INVESTOPEDIA (last updated Jun. 25, 2019), https://www.investopedia.com/terms/f/floatinginterestrate.asp.

[7] Cmplt. ¶ 32.

used the New York Mercantile Exchange ("NYMEX") **[**4]** price, which was derived from trading prices at Henry Hub, Louisiana.[9] The Monthly Index Prices essentially were local rates specific to each of the four hubs, while the NYMEX price was used as a nationwide benchmark.

Swap Contracts

The second type of derivative relevant to this case is a "swap" contract. A swap is an "instrument[] whereby two counterparties agree to exchange cash flows on two financial instruments over a specific period of time."[10] "These are (1) a 'reference obligation' or 'underlying asset' such as a security, a bank loan, or an index, and (2) a benchmark loan, generally with an interest rate set relative to a commonly used reference rate such as the London Inter—Bank Offered Rate ('LIBOR')."[11] Swaps are purely financial transactions and do not involve the exchange of commodities. While parties often enter into swaps because they have exposure to the underlying commodity and wish to hedge various types of risk, others simply are speculating. Typically, swaps making use of different cash flows are executed when the party with the less favorable cash flow pays the difference between the two quantities to the counterparty.[12]

This case involves swaps referenced to the price of natural gas. Many involved exchanging the Monthly Index Price at a Southwestern Hub with the NYMEX price.[13] To understand how this works, imagine that Alice believes that the NYMEX price for natural gas in June will be lower than the SoCal Monthly Index Price. Alice can bet on this belief by swapping the SoCal price for the NYMEX price. If the NYMEX price is lower, the counterparty will pay Alice the difference between the prices multiplied by the quantity covered by the transaction. If instead the SoCal Monthly Index Price is lower, Alice **[*428]** will pay the difference to the counterparty. Neither party needs to own or purchase natural gas to enter into this transaction, and no natural gas changes hands.

For the swaps at issue in this case,[14] everything turned on the Monthly Index Price at one of the Southwestern Hubs. Depending on the net position of a trader's swaps for a given month at a given hub, an increase or decrease in the Monthly Index Price for that hub would yield higher or lower profits on the swaps. Accordingly, if a swap trader could control the Monthly Index Price at a particular hub, that trader could increase **[**6]** its profits at will — at the expense of the counterparties to its swaps, and to the detriment of other traders whose financial instruments are priced according to the same Monthly Index Price. That, in essence, is what Long Beach claims happened here.

This Lawsuit

The Defendants

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[8] *Id.*

[9] *Id.* ¶ 15. The NYMEX price frequently is used as a benchmark for the entire North American natural gas market. *See* James Chen, *Henry Hub*, INVESTOPEDIA (last updated Jul. 1, 2019), https://www.investopedia.com/terms/h/henry_hub.asp.

[10] **[**5]** *trueEX, 266 F. Supp. 3d at 709*.

[11] *Id.*

[12] *See, e.g.*, James Chen, *Swap*, INVESTOPEDIA (last updated Feb. 4, 2020), https://www.investopedia.com/terms/s/swap.asp.

[13] Cmplt. ¶ 32.

[14] These swaps are index and basis swaps, the differences between which are immaterial for the purposes of this opinion. For more information about these swaps, see *Harry v. Total Gas & Power North America, Inc., 889 F.3d 104, 108 (2d Cir. 2018)* (discussing the same contracts at issue in this case).

Total S.A. is a large oil and gas company headquartered in Paris that operates all over the world.[15] Total Ltd. is a subsidiary of Total S.A. based in London that directs Total S.A.'s global trading operations.[16] Total Gas is a subsidiary of Total S.A. headquartered in Houston, Texas and incorporated in Delaware that trades natural gas and related energy products in the United States and worldwide markets.[17] Long Beach alleges that Total Gas, through its trading activity, serves "to optimize market access for [Total S.A.'s] current and future natural gas production and reserves."[18] In furtherance of this purported goal, Total Gas purchases large quantities of natural gas products, and particularly liquefied natural gas, for export each year.[19]

In 2008, a natural gas trader at Total Gas in Houston named Aaron Hall founded the company's "West Desk."[20] Total Gas there executed trades of physical and financial natural **[**7]** gas securities — meaning, as explained above, futures and swaps.[21] From at least July 1, 2009 through July 31, 2012 (the "Class Period"), the West Desk traded futures and swaps pertaining to natural gas sold at the Southwestern Hubs.[22] Hall ran the West Desk until approximately September 2011.[23] At that time, a veteran West Desk trader named Therese Tran took over as its leader.[24]

Total Gas's Alleged Scheme

According to the complaint, the traders at Total Gas's West Desk, in Long Beach's word, "manipulated" the Monthly Index Prices for natural gas at the Southwestern Hubs during the Class Period. The alleged scheme involved two steps. Prior to certain bidweeks, Total Gas traded large volumes of futures and swaps using floating rates and taking positions on a Monthly Index Price at one of the four Southwestern Hubs relative to the NYMEX price.[25] **[*429]** Then, during those bidweeks, Total Gas traded large volumes of natural gas futures using fixed rate prices.[26] According to the complaint, these fixed rate futures offset the floating rate futures that Total Gas had purchased prior to bidweek.[27] This "flattening" process generally meant that Total Gas owned no natural gas **[**8]** at the end of the month.[28]

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[15] Cmplt. ¶ 19.

[16] *Id.* ¶ 20.

[17] *Id.* ¶ 18.

[18] *Id.*

[19] *Id.*

[20] *Id.* ¶ 21.

[21] *See, e.g., id.* ¶ 43.

[22] *See, e.g., id.* ¶¶ 1-2.

[23] *Id.* ¶ 21.

[24] *Id.* ¶ 22.

[25] *Id.* ¶¶ 32, 43, 79.

[26] *Id.* ¶¶ 43, 80.

[27] *Id.* ¶¶ 44-45.

[28] *Id.*

According to the complaint, Total Gas lost $2.09 million on its bidweek trades during the Class Period.[29] Allegedly, these trades often were made at artificially high or low prices, meaning that Total Gas could have gotten better rates.[30] However, the complaint claims that Total Gas ultimately made over $9 million in profit from its net trading activity throughout the Class Period.[31] This occurred because the bidweek trades moved the Monthly Index Prices in directions favorable to Total Gas's positions on its pre-bidweek trades.[32] The purported scheme allegedly succeeded because the West Desk traded a large volume of natural gas during the bidweek periods. Often, it was on one side or the other of transactions accounting for more than 50 percent of the total volume traded at a given hub during the measured period.[33]

These fairly abstract allegations can be explained more easily with an example. As alleged in the complaint: Prior to the July 2011 bidweek, the West Desk entered into numerous futures and swaps that left it with a "long" position of 14,000,000 MMBtu.[34] Total Gas would profit on these trades if the SoCal Monthly Index Price for August **[**9]** 2011 was high.[35] And the Monthly Index Price would be high if, during bidweek, buyers of fixed price futures at SoCal agreed to pay high fixed rates.[36] When SoCal bidweek arrived, Total Gas bought natural gas futures accounting for 48 percent of the reported trading volume during the week.[37] It paid higher prices than other buyers on these trades.[38] When all was said and done, Total Gas lost money on its bidweek trades, but it pushed up the SoCal Monthly Index Price and profited accordingly on its pre-bidweek trades.[39] The complaint alleges that Hall and Tran orchestrated this scheme on behalf of Total Gas with the knowing and willful participation of other traders at the West Desk and, to a vaguely described but apparently limited degree, the knowledge of other individuals at Total Gas.[40] It does not allege that Total S.A. or Total Ltd. played any role in orchestrating the scheme or even knew of its existence while it was ongoing. Two allegations in some sense pertain to those defendants and the price manipulation scheme. One is that some time after 2009, Total Gas's president sent a memorandum to, and met with, unnamed executives of both foreign entities "about **[*430]** [Total Gas's] very high market **[**10]** share at several trading points and resultant regulatory scrutiny."[41] The other is that Total Gas's president "alerted senior management at [Total S.A. and Total Ltd.]" shortly after receiving a June 10, 2012 "whistleblower" email informing him about the West Desk scheme."[42]

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[29] *Id.* ¶ 81.

[30] *Id.* ¶ 43.

[31] *Id.* ¶ 8.

[32] *Id.* ¶¶ 37, 43, 80.

[33] *Id.* ¶ 80.

[34] *Id.* ¶ 84-85.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* ¶¶ 1, 18, 88.

[41] *Id.* ¶ 92.

[42] *Id.* ¶ 96.

Prior Legal Actions

Before turning to Long Beach's claims, the Court notes three earlier proceedings — two regulatory and one judicial — involving the allegations outlined above.

Regulatory Investigations

In June 2012, Matt Wilson, a West Desk trader, contacted the Commodity Futures Trading Commission ("CFTC") and the Federal Energy Regulatory Commission ("FERC"), both of which are federal agencies, and each of which has a degree of regulatory authority over natural gas derivative trading.[43] Wilson told both agencies that Total Gas had been engaged in market manipulation — namely, the scheme described above.[44] Both agencies investigated these allegations.[45]

The CFTC issued a report on December 7, 2015 finding that Total Gas had manipulated some of the markets at issue during three of the months included in the Class Period.[46] Long Beach alleges that it did not discover, and could not have discovered, **[**11]** that Total Gas had engaged in any market manipulation prior to this date.[47] On April 28, 2016, FERC published a report alleging that Total Gas had manipulated rates at all four Southwestern Hubs 38 times during the Class Period — each manipulation representing one month for one market.[48] FERC found, and Long Beach now alleges, that Total Gas's manipulation of the Monthly Index Prices cost other market participants at least $89 million.[49]

The Harry Litigation

On December 10, 2015, on the heels of the CFTC report, Michael Anastasio filed a class action against Total Gas in this Court on behalf of all individuals who traded derivatives at the Southwestern Hubs during the Class Period.[50] Anastasio, and eventually several other plaintiffs, brought claims under the *Commodity Exchange Act ("CEA")* and *Section 2 of the Sherman Act* against Total Gas, Total S.A., and Total Ltd.[51]

On March 27, 2017, Judge Koeltl dismissed the complaint.[52] He concluded first that the plaintiffs had failed to state a claim under the CEA.[53] Then, turning to the Sherman Act claim, he held that the plaintiffs lacked antitrust

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43 *Harry, 889 F.3d at 108*.

44 *Id.*

45 *Id.*

46 Cmplt. ¶ 115.

47 *Id.*

48 *Id.* Long Beach's complaint relies heavily on the allegations in FERC's report, which it incorporates by reference.

49 *Id.* ¶ 8.

50 Complaint, *Anastasio v. Total Gas & Power North America, Inc.*, No. 15-cv-9689 (JGK), Dkt. 1 (S.D.N.Y. Dec. 10, 2015).

51 *Id.* Ultimately, Anastasio withdrew from the case and Alan Harry and several other plaintiffs took his place. Consolidated Amended Class Action Complaint, *id.*, Dkt. 58 (S.D.N.Y. May 12, 2016).

52 *Harry v. Total Gas & Power N. Am., Inc., 244 F. Supp. 3d 402, 406 (S.D.N.Y. 2017)*, *aff'd as modified*, *889 F.3d 104 (2d Cir. 2018)*.

standing.[54] The **[*431]** premise of this holding was that none **[**12]** of the plaintiffs alleged to have traded natural gas contracts on any of the four Southwestern Hubs.[55] For essentially the same reason, the court held that the plaintiffs lacked Article III standing.[56] The court declined to consider an argument by Total S.A. and Total Ltd. that it lacked personal jurisdiction over them.[57]

The Second Circuit affirmed in *Harry v. Total Gas & Power North America, Inc*.[58] The panel disagreed with the district court's conclusion that the plaintiffs lacked Article III standing, finding it "within the realm of possibility" — though not "plausible" — that "prices at U.S. natural gas hubs are so interconnected that manipulation at any of the hubs amounts to manipulation of all of them, including the one on which the prices of their derivative contracts were based."[59] However, the court agreed with the district court that the plaintiffs lacked antitrust standing because none of them alleged to having traded on the Southwestern Hubs or at "artificial prices" as a result of the alleged market manipulation.[60] Likewise, it agreed with the district court that the plaintiffs had failed to state a claim under the CEA.[61] It did not pass on the merits of the Section 2 claim **[**13]** or resolve the personal jurisdiction issue.

The Complaint

On September 19, 2019, Long Beach filed this complaint against Total Gas, Total S.A., and Total Ltd. on behalf of itself and all those who held a contract that settled against the NGI or Platts Monthly Index Prices for natural gas at SoCal, Permian, Waha, or San Juan during the Class Period. It asserts claims against Total Gas for monopolization and attempted monopolization under *Section 2 of the Sherman Act*.[62] In addition, Long Beach asserts claims against Total Gas on behalf of all members of the class who reside in California for a violation of the California UCL and the law of unjust enrichment.[63]

Count V asserts claims against Total S.A. and Total Ltd. on theories that they "controlled" Total Gas and that Total Gas was their *alter ego* or agent.[64] It is not entirely clear whether the "controlled" language in this claim is intended to mean that Long Beach is *directly* liable on the first four counts, each of which mentions only Total Gas, or instead is intended to assert only that they are *derivatively* liable on the *alter ego* and agency theories. The Court construes Count V to assert theories of direct and derivative liability against Total **[**14]** S.A. and Total Ltd.

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[53] *Id. at 412-19*.

[54] *Id. at 419-23*.

[55] *Id.*

[56] *Id. at 415 n.5*.

[57] *Id. at 423*.

[58] *889 F.3d 104 (2d Cir. 2018)*.

[59] *Id. at 111*.

[60] *Id. at 116*.

[61] *Id. at 111-15*.

[62] Cmplt. ¶¶ 131, 138-58.

[63] *Id.*

[64] *Id.* ¶¶ 159-63.

Discussion

Total S.A. and Total Ltd. argue that (1) the Court lacks personal jurisdiction over them and (2) Long Beach fails to allege plausibly that they are directly or derivatively liable for the alleged wrongdoing of Total Gas. Total Gas argues that (1) Long Beach lacks Article III standing, (2) its claims are untimely, (3) it has not pled antitrust standing as required for its Sherman Act claims, (4) it in any event fails to state claims for unlawful monopolization or attempted monopolization, and (5) its UCL and unjust enrichment claims fail as a matter of law. Total S.A. and Total Ltd. join Total Gas's arguments. The Court addresses **[*432]** these arguments only as needed to resolve the motions.

I. Personal Jurisdiction over Total S.A. and Total Ltd.

Personal jurisdiction is a court's authority to require a non-consenting party to appear before it. A federal court may exercise personal jurisdiction over a defendant where (1) it properly was served, (2) jurisdiction is authorized by statute, and (3) jurisdiction is not prohibited by the Constitution.[65] "A plaintiff 'must establish the court's jurisdiction with respect to each claim asserted.'"[66]

Total S.A. and **[**15]** Total Ltd. argue on various grounds that the court lacks a statutory basis for asserting personal jurisdiction against them and, in any event, that the exercise of such jurisdiction would be unconstitutional.

A. Personal Jurisdiction Arising from Total S.A.'s and Total Ltd.'s Contacts

1. Statutory Jurisdiction

i. Sherman Act Section 2 Claims

Long Beach contends that the Court may assert personal jurisdiction over Total S.A. and Total Ltd. with respect to the federal antitrust claims under either *Section 12 of the Clayton Act* or *Federal Rule of Civil Procedure 4(k)(2)*.

a. Section 12 of the Clayton Act

Section 12 of the Clayton Act states:

> "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."[67]

"Because the service of process provision [the second clause] applies only to 'such cases' described in the [venue provision, the first] clause, the Second Circuit has concluded that nationwide service of process is permissible 'only in cases in which [the] venue provision is satisfied.'"[68]

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[65] *See, e.g., Waldman v. Palestine Liberation Org., 835 F.3d 317, 327 (2d Cir. 2016)*.

[66] *Charles Schwab Corp. v. Bank of Am. Corp., 883 F.3d 68, 83 (2d Cir. 2018)* (quoting *Sunward Elecs., Inc. v. McDonald, 362 F.3d 17, 24 (2d Cir. 2004)*).

[67] *15 U.S.C. § 22*.

Total S.A. and Total Ltd. concede that they were served in accordance with *Section 12*. They argue, however, that the venue component is not satisfied because they are not "inhabitant[s]" of the Southern District of New York, they are not "found" here, and they do not "transact[] business" here.[69]

Total S.A. is based and incorporated in France and Total Ltd. is based and incorporated in the United Kingdom. The complaint does not allege that either has offices, employees, or any significant presence or operations in the Southern District of New York or even the United States. They plainly are not inhabitants of the district and are not "found" here within the meaning of *Section 12*. Long Beach does not challenge these findings; it focuses only on the "transacts business" prong.

In no significant way does the complaint allege that Total S.A. or Total Ltd. transacts business in the Southern District of **[*433]** New York. "The Supreme Court has construed the phrase 'transacts business,' as used in the venue provision of *Clayton Act Section 12*, to refer to 'the practical, everyday business or commercial concept of doing business or carrying on business of any substantial character.'"[70] This requires "some amount **[**17]** of business continuity and certainly more than a few isolated and peripheral contacts with the particular judicial district."[71] Long Beach alleges that Total S.A. has made securities filings with the New York offices of the Securities and Exchange Commission ("SEC"), that an agent of Total S.A. once paid a $500,000 settlement to the SEC through a New York bank account, and that Total S.A.'s CEO and CFO gave a strategy presentation in New York City in 2018.[72] None of these sporadic contacts, each of which concerned only Total S.A., comes close to satisfying the "transacts business" standard for either defendant. Nor does anything else alleged in the complaint.

Long Beach argues that "the relevant geographic area for assessing minimum contacts under the *Clayton Act* is 'the United States as a whole, not just New York.'"[73] But *Section 12*'s venue requirement is not concerned with "minimum contacts" at all. It unambiguously authorizes suit only "in the judicial district" where the defendant is an inhabitant or "in any district" where it is found or transacts business. As Long Beach's own authority makes clear, nationwide contacts are relevant to the different question of "whether the exercise of personal **[**18]** jurisdiction would comport with due process."[74]

b. Rule 4(k)(2)

Federal Rule of Civil Procedure 4(k)(2) authorizes the exercise of personal jurisdiction over defendants sued under federal law where "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction" and "exercising jurisdiction is consistent with the United States Constitution and laws." By arguing that *Rule 4(k)(2)* applies, Long Beach necessarily concedes that Total S.A. and Total Ltd. are not subject under state law to the

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[68] *Dennis v. JPMorgan Chase & Co., 345 F. Supp. 3d 122, 198 (S.D.N.Y. 2018)* (quoting **[**16]** *Sullivan v. Barclays PLC, No. 13-cv-2811 (PKC), 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at *42 (S.D.N.Y. Feb. 21, 2017)* (quoting *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 423 (2d Cir. 2005)*)).

[69] Dkt. 45 at 7-8.

[70] *Dennis, 345 F. Supp. 3d at 198* (quoting *Daniel, 428 F.3d at 428*).

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

[72] Cmplt. ¶ 16.

[73] Dkt. 53 at 6 (quoting *FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A., No. 16-cv-5263 (AKH), 2018 U.S. Dist. LEXIS 171999, 2018 WL 4830087, at *6 (S.D.N.Y. Oct. 4, 2018)*).

[74] *See* *Dennis, 345 F. Supp. 3d at 202*; *FrontPoint Asian Event Driven Fund, No. 16-cv-5263 (AKH), 2018 U.S. Dist. LEXIS 171999, 2018 WL 4830087, at *6*.

jurisdiction of any state court.[75] This inquiry thus merges with the constitutional analysis, to which the Court turns momentarily.[76]

ii. State Law Claims

Rule 4(k)(1)(A) authorizes the exercise of personal jurisdiction over a defendant where doing so would be consistent with the laws of the forum state.[77] Under New York's applicable long arm statute, **[*434]** *C.P.L.R. § 302(a)*, a court may exercise jurisdiction over a non- domiciliary based on its conduct if, among other possibilities not relevant here, the defendant "transacts any business within the state."[78] "To determine the existence of jurisdiction under *section 302(a)(1)*, a court must decide (1) whether the defendant 'transacts any business' in **[**19]** New York and, if so, (2) whether [the] cause of action 'aris[es] from' such a business transaction."[79]

By failing entirely to respond to Total S.A. and Total Ltd.'s argument that the Court lacks a statutory basis under New York law to exercise personal jurisdiction with respect to the state law claims, Long Beach has waived its opposition. In any event, nothing in the complaint permits an inference that Total S.A. or Total Ltd. transacts business in New York. The sporadic contacts referenced above do not suffice and have no relationship to the state law claims. To the extent that the complaint alleges that Total S.A. and Total Ltd. acted in any manner relevant to this lawsuit — a point to which the Court will return — it alleges that they acted from France and the United Kingdom to **[**20]** control Total Gas's conduct in Texas, California, and New Mexico.

2. Constitutional Minimum Contacts

The Constitution sets an outer limit on a court's authority to assert personal jurisdiction over a defendant. Litigants have a substantive due process right not to be haled into court unless they have minimum contacts with the forum in which the court sits.[80]

i. Which Forum?

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[75] Long Beach asserts that neither foreign defendant is "jurisdictionally present in *any* of the fifty states sufficient to subject them to general jurisdiction in *any* district." Dkt. 53 at 4. While it makes this assertion to invoke the first requirement of *Rule 4(k)(2)*, it evidently misreads the phrase "courts of general jurisdiction" to mean "general personal jurisdiction," which is a type of personal jurisdiction rather than a type of court. Nonetheless, the Court concludes — and therefore does not survey the laws of all fifty states — that Long Beach's failure to assert that any state court would exercise jurisdiction over Total S.A. or Total Ltd. is a concession that none would.

[76] The Court need not, and does not, address Total S.A. and Total Ltd.'s argument that they were not served in accordance with *Rule 4(k)*.

[77] *See, e.g., Spiegel v. Schulmann, 604 F.3d 72, 76 (2d Cir. 2010)*.

[78] *N.Y. C.P.L.R. § 302(a)(1)*.

> Other possibilities include that the defendant contracts anywhere to supply goods or services in the state, that under certain circumstances it commits a tortious act within the state, and that it owns, possesses, or uses real property situated within the state. *N.Y. C.P.L.R. § 302(a)*. Nothing alleged in the complaint supports the exercise of jurisdiction on any of these bases, and Long Beach does not argue otherwise.

[79] *Best Van Lines, Inc. v. Walker, 490 F.3d 239, 246 (2d Cir. 2007)* (citation omitted).

[80] *See, e.g., Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)*.

The parties disagree over the appropriate forum to be considered in the minimum contacts analysis. Total S.A. and Total Ltd. contend that New York is the proper jurisdiction for the federal and state law claims. Long Beach argues that the Court instead must ask whether the foreign defendants have minimum contacts with the United States as a whole.

With respect to each claim, the appropriate forum for assessing minimum contacts depends on which statute authorizes personal jurisdiction. That question, in turn, depends upon which statute authorizes service of process.

Several courts in this circuit, including this one, have held that where a claim "arises under federal law and a federal statute authorizes nationwide service of process, the relevant contacts for determining personal jurisdiction are contacts with **[**21]** the United States as a whole."[81] Although the Second Circuit has not yet passed on this issue, the Court reaches this conclusion once again for the reasons stated in a prior opinion.[82] In appropriate circumstances, *Section 12 of the Clayton Act* and *Rule 4(k)(2)* both may authorize nationwide service of process for federal **[*435]** antitrust claims. Thus, regardless of which provision is treated as having authorized service of process here, the relevant minimum contacts for the federal antitrust claims are with the United States as a whole. Personal jurisdiction with respect to the state law claims, however, is another matter.

Personal jurisdiction over these claims would flow through *Rule 4(k)(1)(A)*, which does not authorize nationwide service of process. Where a defendant is served in accordance with *Rule 4(k)(1)(A)*, a court must look instead to the defendant's contacts with the forum state to determine whether it has personal jurisdiction.[83]

The United States is the appropriate forum for contacts associated with the federal claims, and New York is the appropriate forum for contacts associated with the state law claims. Nonetheless, because the law is unsettled with respect to the federal claims, the Court will consider whether either set **[**22]** of claims bears a sufficient nexus to either forum.

ii. Minimum Contacts

The minimum contacts test can be satisfied where the forum jurisdiction's courts have general or specific jurisdiction over a defendant.[84] General jurisdiction authorizes suit against a corporation in forums where it is "essentially at home," which ordinarily means its place of incorporation or principal place of business.[85] The complaint alleges that Total S.A.'s home is France and that Total Ltd.'s home is the United Kingdom. As neither entity is at home in New York or the United States, the Court lacks general jurisdiction over them.

Specific jurisdiction considers whether a sufficient nexus exists between the forum and the defendant's conduct giving rise to the claims.[86] "When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the [forum]."[87]

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[81] *Dennis, 345 F. Supp. 3d at 201* (quoting *Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 142 n.21 (2d Cir. 2014)*).

[82] The issue ultimately does not matter here because, as explained, Long Beach fails to allege that Total S.A. or Total Ltd. has minimum contacts with either the United States as a whole or with New York specifically.

[83] *See, e.g., Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 60 (2d Cir. 2012)*.

[84] *See, e.g., Gucci, 768 F.3d at 134*.

[85] *See BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1552, 198 L. Ed. 2d 36 (2017)*.

[86] *See, e.g., Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty., 137 S. Ct. 1773, 1781, 198 L. Ed. 2d 395 (2017)*.

[87] *Id.*

The requirements of specific jurisdiction are not met here, either with respect to New York or the United States. The simple reason is that virtually all the conduct described in the complaint is attributed to Total Gas. The only arguably relevant allegations involving Total **[**23]** S.A. or Total Ltd. are as follows:

• Total S.A. is the parent corporation of Total Gas, which is located in the United States;[88]

• Total Gas "is part of [Total S.A.'s] trading group" and Total Ltd. "effectively[] directs Total [S.A.'s] global trading operations";[89]

• In 2009, after Total Gas's president reviewed a report noting that the West Desk had engaged in a high volume of trading during bidweeks, he sent a memorandum to, and met with, executives of Total S.A. "about [Total Gas's] very high market share at several trading points and resultant regulatory scrutiny";[90]

[*436] • On June 10, 2012, shortly after receiving a "whistleblower" email from a trader at the West Desk, Total Gas's president "alerted senior management at Total [S.A.] and [Total Ltd.] and asked [Total Gas's] Vice President of Risk Control . . . to analyze the West Desk's bidweek trading";[91]

• Total Ltd. and Total S.A. "participated in biweekly steering committee meetings with [Total Gas] personnel where they discussed [Total Gas] trading issues, including positions and market views";[92]

• Officers at Total Ltd. "participated in setting the trading strategies and budget of [Total Gas], and approved certain staffing decisions as well as **[**24]** the structure of [Total Gas's trade floor]."[93]

None of these allegations meaningfully links Total S.A. or Total Ltd. to New York. And, as noted above, the few facts involving New York have no connection to this lawsuit. Long Beach has not attempted to explain, and cannot explain, why the Total S.A. chief executive's one presentation in New York City or the company's filings with the SEC have anything to do with allegations that Total Gas, operating in Texas, manipulated prices used at four natural gas markets in the Southwest.[94]

The same is true as to Total S.A.'s and Total Ltd.'s contacts with the United States as a whole. Nothing in the complaint permits an inference that the facts giving rise to this lawsuit arose in any significant sense from these defendants' sparse contacts with the United States.[95] The story told by the complaint is that traders at Total Gas's West Desk devised and perpetrated the alleged scheme without the authorization, control, or even contemporaneous knowledge of Total S.A. or Total Ltd. The two vaguely described communications between Total Gas's president and one or both of the foreign corporations do not suggest otherwise.

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[88] Cmplt. ¶¶ 18, 20.

[89] *Id.* ¶¶ 19, 20.

[90] *Id.* ¶¶ 92-94. The allegation refers not to actual or threatened regulatory scrutiny, but to the possibility of regulatory scrutiny that the president apparently had inferred from the internal report he reviewed.

[91] *Id.* ¶ 96.

[92] *Id.* ¶ 125.

[93] *Id.*

[94] Likewise, the allegations that a wholly owned subsidiary of Total S.A. once made a $500,000 disgorgement payment to the SEC's New York office at Total S.A.'s direction, and that Total Gas reached a consent agreement with the SEC, have no asserted or apparent nexus to this lawsuit. *See id.* ¶ 16.

[95] Whether these defendants played a role in the alleged scheme through their own conduct is a separate question from whether they are *alter egos* of Total Gas and should be treated as a single entity for jurisdictional purposes. That question is addressed below.

In sum, **[**25]** even if the Court had the statutory authority to assert personal jurisdiction over Total S.A. or Total Ltd., the Constitution would forbid it.

iii. Pendent Personal Jurisdiction

As noted above, the minimum contacts test directs courts to consider whether a defendant has sufficient contacts with the forum. "The doctrine of pendent personal jurisdiction provides that 'where a federal statute authorizes nationwide service of process, and the federal and state-law claims derive from a common nucleus of operative fact, the district court may assert personal jurisdiction over the parties to the related state-law claims even if personal jurisdiction is not otherwise available.'"[96] The Court may not exercise pendent personal jurisdiction with respect to the state law claims because **[*437]** personal jurisdiction is lacking with respect to the federal claims.

B. Personal Jurisdiction Based on Total Gas's Contacts

The analysis thus far has considered whether the Court has personal jurisdiction over Total S.A. or Total Ltd. based on their own contacts with New York and the United States. Long Beach argues also that the Court should assert personal jurisdiction over the foreign entities based on Total Gas's **[**26]** contacts with these forums. Its argument is premised on an *alter ego* or, alternatively, an agency theory.

1. Alter Ego Theory

"[T]he exercise of personal jurisdiction over an alter ego corporation does not offend due process."[97] Thus, if a court finds that one corporation is the *alter ego* of another, it may disregard the corporate form for minimum contacts analysis. Long Beach argues that both Total Gas and Total Ltd. are *alter egos* of Total S.A.[98] On that ground, and based on the conduct attributed to Total Gas, it asks the Court to assert personal jurisdiction over the foreign defendants.

For an *alter ego* relationship to exist under federal common law, the controlling corporation "must have used the corporate entity to perpetrate a fraud or have so dominated and disregarded the corporate entity's form that the entity primarily transacted the [subservient entity's] personal business rather than its own corporate business."[99] Although this rule is for *alter ego* liability, courts apply it also to the question of whether an *alter ego* relationship exists for the purpose of personal jurisdiction.[100]

New York law[101] requires "a showing of fraud or . . . complete control **[**27]** by the dominating corporation that leads to a wrong against third parties."[102] But where, as here, the question is whether a court may exercise

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[96] *Dennis, 345 F. Supp. 3d at 211* (quoting *Charles Schwab, 883 F.3d at 88*).

[97] *S. New England Tel. Co. v. Glob. NAPs Inc., 624 F.3d 123, 138 (2d Cir. 2010)*.

[98] Cmplt. ¶ 160.

[99] ***Dow Chem. Pac. Ltd. v. Rascator Mar. S.A., 782 F.2d 329, 342 (2d Cir. 1986)*** (citation, quotation marks, and brackets omitted).

[100] *See, e.g., Status Int'l S.A. v. M & D Mar. Ltd., 994 F. Supp. 182, 186 (S.D.N.Y. 1998)*; *Tsangaris v. Elite, Inc., No. 92-cv-7855 (RPP), 1993 U.S. Dist. LEXIS 9235, 1993 WL 267425, at *3 (S.D.N.Y. July 9, 1993)*.

[101] "The law of the forum state governs where, as here, neither party alleges that the law of a different state would control and differs from New York law." *See, e.g., VTech Holdings, Ltd. v. Pricewaterhouse Coopers, LLP, 348 F. Supp. 2d 255, 262 n.48 (S.D.N.Y. 2004)*.

personal jurisdiction over an alleged *alter ego*, New York courts apply a "'less onerous standard' than that necessary for equity to pierce the corporate veil for liability purposes under New York law."[103] Whether an analogous "less onerous standard" exists for federal common law is unclear.[104]

The antitrust claims are governed by federal common law because they arise **[*438]** under federal law. The question of which law applies to the state law claims is more complicated.[105] Rather than decide an issue that the parties did not brief adequately, the Court considers both standards with respect to the state law claims.

The complaint offers little more than bare allegations of control. It says virtually nothing about the management of the defendants, explains only minimally their relationships with each other, and does not detail what role, if any, Total S.A. or Total Ltd. played in Total Gas's operations. Nor, as explained above, does the complaint allege in any meaningful way that either **[**28]** foreign defendant was involved in the conduct at issue in this case. The few paragraphs that mention Total S.A. and Total Ltd. do not permit an inference that any defendant exercised, as New York law requires, "complete control [over another defendant] . . . that leads to a wrong against third parties," even under the "less onerous standard" that applies in the context of personal jurisdiction. This same problem dooms the *alter ego* theory under federal common law's "dominated and disregarded" standard, whether or not that doctrine employs also a "less onerous standard" at the personal jurisdiction stage.[106]

The complaint fails to plead that, for the purpose of personal jurisdiction, any defendant is the *alter ego* of another.

2. Principal-Agent Theory

Long Beach alleges also that Total Gas is an agent of Total S.A. and Total Ltd. and that the Court therefore should attribute Total Gas's contacts to the foreign defendants for jurisdictional purposes. The parties fail to argue that any particular law should govern the existence of a principal-agent relationship. For the reasons explained in its *alter ego* analysis, the Court applies the federal common law of agency to the federal **[**29]** claims, and it considers both the federal and New York standards as to the state law claims. That said, the issue here turns not on the standards themselves, but on certain limitations common to both standards.

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[102] *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 933 F.2d 131, 138 (2d Cir. 1991)*.

[103] *D. Klein & Son, Inc. v. Good Decision, Inc., 147 F. App'x 195, 196 (2d Cir. 2005)* (quoting *Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981)*).

[104] *Compare* sources cited in note 100 *supra* (not purporting to apply a less onerous standard), *with In re Platinum & Palladium Antitrust Litig., No. 1:14-cv-9391 (GHW), 2017 U.S. Dist. LEXIS 46624, 2017 WL 1169626, at *47 & n.23 (S.D.N.Y. Mar. 28, 2017)* (noting, without distinguishing between federal and New York law, that some courts apply a "less onerous" standard but questioning whether they should).

[105] If the Court's jurisdictional authority arose from *Rule 4(k)(1)(A)*, New York's *alter ego* rule arguably would apply because the basis for the Court's jurisdiction would be state law. But the reason that the Court would look to state law is *Rule 4(k)(1)(A)*'s instruction to do so. One could argue that *Rule 4(k)(1)(A)* simply incorporates state law and that federal common law therefore applies. Moreover, if the Court chose to exercise personal jurisdiction pendent to the federal claims — pendent personal jurisdiction is federal common law — the federal doctrine arguably would apply. The Court need not and does not pass on the merits of these theories because the parties did not consider them.

[106] Total S.A. and Total Ltd. make factual assertions in declarations and in their memoranda supporting their argument that Total Gas is a separate corporate entity. *See, e.g.*, Dkt. 45 at 16-19. The Court does not consider these assertions in holding that the complaint does not permit a finding of *alter ego*.

"It is well established that a defendant can 'purposefully avail itself of a forum by directing its agents or distributors to take action there.'"[107] Although the Second Circuit has "not clearly delineated the showing necessary before an agent's contacts will be imputed to its principal for purposes of personal jurisdiction under the *Due Process Clause*," it has articulated several principles explaining when such a finding is inappropriate.[108] Under both New York and federal law, "a defendant must have purposefully availed itself of the **[*439]** privilege of doing business in the forum" for a principal-agent theory of jurisdiction to apply.[109] At least under New York law, this means that "the alleged agent acted in New York for the benefit of, with the knowledge and consent of, and under some control by, the nonresident principal."[110]

After stating these requirements in the context of a parent corporation and a broker-dealer subsidiary that sold securities on the parent's behalf, the Second Circuit held that **[**30]** "an agency relationship . . . could establish personal jurisdiction over the parent in a state in which the parent 'indirectly' sells the securities."[111] For that theory to succeed, the plaintiff must do more than "generally allege[] that [the parent] controlled or otherwise directed or materially participated in the operations of the broker-dealer[], and reaped proceeds or other financial benefits from the brokerdealer[' s] sales of [the relevant] financial instruments."[112] "The Second Circuit has credited allegations of principal-agent relationships, for example, where a plaintiff alleged that corporate officers 'benefitted from [the] corporation's in-forum activities and exercised extensive control over [the] corporation in the transaction underlying the suit.'"[113]

These same principles control here and make clear that Long Beach does not sufficiently allege that the foreign **[**31]** defendants purposefully availed themselves of the benefit of doing business in New York or the United States with respect to the claims at issue. Largely for the reasons explained above, the complaint does not allege plausibly that any defendant exercised control, extensive or otherwise, over any other defendant with regard to the facts giving rise to this lawsuit. Nor does it allege that Total Gas acted with the knowledge or consent of Total S.A. or Total Ltd. Its threadbare allegations of control fall short under federal law and New York law.

* * *

The Court lacks personal jurisdiction over Total S.A. and Total Ltd. with respect to all the claims asserted against them in the complaint.

II. Direct or Derivative Liability of Total S.A. and Total Ltd.

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[107] *Charles Schwab, 883 F.3d at 84* (quoting *Daimler AG v. Bauman, 571 U.S. 117, 135 n.13, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014)*).

[108] *See* *id. at 85*.

[109] *Id.* (citation and quotation marks omitted).

[110] *Id.* (quoting *Grove Press, Inc. v. Angleton, 649 F.2d 121, 122 (2d Cir. 1981)*).

[111] *Id. at 85-86*.

[112] *Id. at 86*.

[113] *Dennis v. JPMorgan Chase & Co., 439 F. Supp. 3d 256, 2020 U.S. Dist. LEXIS 25556, 2020 WL 729789, at *2 (S.D.N.Y. 2020)* (quoting *Charles Schwab, 883 F.3d at 85*).

Although this language suggests that the standard for finding a principal-agent relationship is similar to that for piercing the corporate veil, the two standards differ at least insofar as the latter requires a finding of "abuse of control." *See* *Itel Containers Int'l Corp. v. Atlanttrafik Exp. Serv. Ltd., 909 F.2d 698, 702 (2d Cir. 1990)* (distinguishing the standards on this ground).

As noted previously, Counts I through IV are pled solely against Total Gas. Count V alleges that Total S.A. and Total Ltd. are liable under three theories: that (1) they controlled Total Gas with respect to the relevant conduct, which the Court interprets as a theory of direct liability; (2) Total Gas and Total Ltd. are *alter egos* of Total S.A., and Total Gas is an *alter ego* also of Total Ltd.; and (3) Total Gas and Total Ltd. are agents of **[**32]** Total S.A., and Total Gas is an agent also of Total Ltd.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[114] "A **[*440]** claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[115]

Total S.A. and Total Ltd. argue that the complaint fails to plead facts sufficient to support any of the three theories of liability.

A. Direct Liability

In its personal jurisdiction analysis, the Court held that the complaint pleads virtually no facts linking Total S.A. or Total Ltd. to the alleged misconduct. The same is true for present purposes, and the Court therefore holds that the claims against the foreign defendants fail under *Rule 12(b)(6)*. Other than the allegations enumerated in the Court's minimum contacts analysis, nothing in the complaint suggests that Total S.A. or Total Ltd. played any meaningful role in the alleged antitrust or state law violations. Threadbare allegations that Total S.A. exercised "control" over its subsidiaries or that it operated "as a single entity with [Total **[**33]** Gas]" do not suffice to state a claim for relief.

B. Alter Ego Liability

The Court already has concluded that the complaint fails to plead sufficiently under federal common or New York law that any defendant is the *alter ego* of another for the purposes of personal jurisdiction. The Court now conducts the *alter ego* analysis for liability purposes.

1. Sherman Act Section 2 Claims

The federal common law standard for *alter ego* liability applies to the federal claims for the reasons explained in the personal jurisdiction analysis. Under that standard, the Court concluded that the complaint fails to demonstrate that any defendant is the *alter ego* of another for the purposes of personal jurisdiction.[116] Because the analysis is the same for liability purposes, the conclusion is the same, as well.

2. State Law Claims

At the personal jurisdiction stage, the Court analyzed the principal-agent question under New York law because neither party argued that a different jurisdiction's law should apply. For liability purposes, however, Total S.A. and Total Ltd. argue that New York's choice of law rules require the application of Delaware law. The Court agrees.

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[114] *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*.

[115] *Id.*

[116] The Court reached this conclusion regardless of whether the standard applied for purposes of personal jurisdiction is "less onerous" than that applied for liability purposes.

"[U]nder New York choice of law principles, the law of the **[**34]** state of incorporation determines when the corporate form will be disregarded and liability will be imposed on shareholders."[117]

"To prevail on an alter ego claim under Delaware law, a plaintiff must show (1) that the parent and the subsidiary 'operated as a single economic entity' and **[*441]** (2) that an 'overall element of injustice or unfairness . . . [is] present."[118] "Operating as a 'single entity' requires showing the parent entity's 'complete domination and control' to such an extent that the subsidiary entity 'no longer has legal or independent significance of its own.'"[119] "A plaintiff seeking to persuade a Delaware court **[**35]** to disregard the corporate structure faces 'a difficult task.'"[120] "Although the question of domination is generally one of fact, courts have granted motions to dismiss as well as motions for summary judgment in favor of defendant parent companies where there has been a lack of sufficient evidence to place the alter ego issue in dispute."[121]

Largely the reasons explained in the Court's analysis of the *alter ego* issue under the standards of federal common law ("dominated and disregarded the corporate entity's form") and New York law ("complete control"), the complaint falls short of Delaware's "complete domination and control" standard. Long Beach has not alleged plausibly any facts suggesting that any defendant meaningfully dominated or controlled another. Although it asserts that Total S.A. is the parent of Total Gas and Total Ltd., it barely discusses their relationships with each other, either in general or in a way that elaborates helpfully on the role, if any, that the foreign defendants played in the conduct relevant to this case. Showing that the defendants operated as a single economic entity requires more than skeletal allegations of "extraordinary administrative control" **[**36]** and "biweekly steering committee meetings" involving "trading issues."[122] In addition, the complaint does not explain how there would be any injustice or unfairness in declining to hold Total S.A. or Total Ltd. liable for the actions of Total Gas. There are no allegations that Total Gas would be unable to satisfy a judgment or that Long Beach could not prosecute its case in the absence of the foreign defendants.[123]

C. Principal-Agent Liability

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[117] *Fletcher v. Atex, Inc., 68 F.3d 1451, 1456 (2d Cir. 1995)* (brackets, quotation marks, and citation omitted).

Total S.A. and Total Ltd. assert that the outcome is the same under New York law. *See* Dkt. 45 at 24 n.10. Long Beach takes no position on the choice of law issue, but its authority applies Delaware law. *See* Dkt. 37 at 31 (citing, *e.g., Bentivoglio v. Event Cardio Grp., Inc., No. 18-cv-2040 (PKC), 2019 U.S. Dist. LEXIS 206381, 2019 WL 6341130, at *5 (S.D.N.Y. Nov. 27, 2019)* (applying Delaware law); *Allison v. Clos-ette Too, L.L.C., No. 14-cv1618 (LAK), 2015 U.S. Dist. LEXIS 2826, 2015 WL 136102, at *3 (S.D.N.Y. Jan. 9, 2015)* (same)). While the parties' failure to assert a true conflict ordinarily is grounds for applying forum law, the Court applies Delaware law because both assume that it applies and rely exclusively on Delaware authority.

[118] *Id. at 1457* (quoting *Harper v. Delaware Valley Broadcasters, Inc., 743 F. Supp. 1076, 1085 (D. Del. 1990)*).

[119] *Bentivoglio, No. 18-cv-2040 (PKC), 2019 U.S. Dist. LEXIS 206381, 2019 WL 6341130, at *5* (quoting *Wallace ex rel. Cencom Cable Income Partners II, Inc. v. L.P. Wood, 752 A.2d 1175, 1183-84 (Del. Ch. 1999)*).

[120] *Fletcher, 68 F.3d at 1458* (quoting *Harco Nat. Ins. Co. v. Green Farms, Inc., C.A. No. 1131, 1989 Del. Ch. LEXIS 114, 1989 WL 110537, at *4 (Del. Ch. Sept. 19, 1989)*)

[121] *Id.*

[122] *See* Cmplt. ¶ 125.

[123] In its personal jurisdiction analysis, the Court concluded under New York law that Long Beach had failed to show sufficiently that any defendant was the *alter ego* of another. It did so under the "less onerous" version of New York's *alter ego* standard that applies in the context of personal jurisdiction. Accordingly, if New York law applied at the liability stage, the ordinary level of onerousness would apply, and the Court would reach the same conclusion for the same reasons.

The principal-agent question requires similarly the application of different laws to different claims. Federal common law applies once again to the federal claims. Because neither party argues for the application of any particular law to the state law claims, New York's agency doctrine applies.

1. Sherman Act Section 2 Claims

Federal ***antitrust law*** provides that an alleged principal can be held liable for the unlawful conduct of its agent.[124] "[U]nder general rules of agency law," and with regard to *Section 2 of the Sherman Act* **[*442]** specifically, "principals are liable when their agents act with apparent authority."[125] "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the **[**37]** other, arising from and in accordance with the other's manifestations to such third persons."[126] "Under an apparent authority theory, '[l]iability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.'"[127]

As noted, the complaint alleges that traders at Total Gas's West Desk perpetrated the scheme over several years. But it fails to allege that they did so at any direction from, or with the contemporaneous knowledge of, Total S.A. or Total Ltd. It does not allege that either foreign defendant monitored or failed to monitor the traders, that they authorized any of the trades at issue, or even that they created indirectly conditions that helped facilitate the misconduct. Moreover, those counterparties' alleged injuries arose not from the trades themselves, but from the effect of those trades on the Monthly Index Prices.[128]

Long Beach places significant weight on its allegation that the foreign defendants "were closely involved in, and exerted significant control **[**38]** over, [Total Gas's] operations."[129] It claims, among other things not relevant to trading activity, that Total S.A. set risk limits for Total Gas's traders, that Total S.A. "retained extraordinary administrative control over the daily operation of critical business components such as IT systems and [Total Gas's] trading book," that "trading issues" were discussed in "biweekly steering committee meetings" involving unidentified "officers" of the three defendants, and that "officers" at Total Ltd. "participated in setting the trading strategies and budget of [Total Gas], and approved certain staffing decisions as well as the structure of [Total Gas's] trade floor."[130] "General allegations of corporate ownership, combined marketing, shared board membership, and so forth are insufficient to establish a principal-agent relationship between corporate entities."[131] And setting aside the

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[124] *See Am. Soc. of Mech. Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 572-74, 102 S. Ct. 1935, 72 L. Ed. 2d 330 & n.11 (1982)*.

[125] *Id. at 565-66*.

[126] *Id. at 566 n.5* (quoting *Restatement (Second) of Agency § 8 (1957)*).

[127] *Id. at 566* (quoting *RESTATEMENT (Second) of Agency § 261 (1957)*).

[128] In fact, Long Beach alleges that during bidweeks, Total Gas either overpaid for natural gas or sold its own natural gas at a discount. If true, these facts would mean that the counterparties *benefitted* from the alleged scheme, at least with respect to these trades.

[129] Cmplt. ¶ 125.

[130] *Id.*

> Long Beach provides slightly more detail about the "officers," **[**39]** "meetings," and alleged relationships among the defendants in its opposition memorandum. Dkt. 53 at 28-30. The Court does not credit these allegations to the extent that they are not found in the complaint, but whatever additional specificity they provide would make no material difference.

vagueness of these claims, the complaint fails to connect them to the trading activity at issue in this case. Liability on an apparent authority theory "is based upon the fact that the putative agent's position *facilitates the consummation of the fraud*."[132]

[*443] This final point suggests an additional problem: Long Beach has not pled sufficiently that Total Gas acted with the apparent authority of the foreign defendants. As noted at the outset, "[a]pparent authority is the power to affect the legal relations of another person by transactions with third persons, *professedly as agent for the other* [*i.e.*, the principal], *arising from and in accordance with the other's manifestations to such third persons."*[133] The complaint contains no allegations that Total Gas professed to be an agent for Total S.A. or Total Ltd. when engaging in the relevant activity. Nor does it contain allegations that Total S.A. or Total Ltd. made manifestations to third persons permitting them to conclude that Total Gas was acting under their authority and that such conclusions influenced the third parties' actions. In fact, the complaint **[**40]** does not allege that Total S.A. or Total Ltd. had *any* interactions with relevant third persons, such as the counterparties to Total Gas's trades, other traders on the affected markets, Long Beach itself, or those who compiled the NGI and Platts Monthly Index Prices. For this reason too, the principal-agent theory fails.

2. State Law Claims

New York law is no different on this point. Like federal courts, the New York Court of Appeals applies the "apparent authority" standard taken from *Section 8 of the Restatement (Second) of Agency*.[134] The Court of Appeals "has made it clear that 'apparent authority is dependent upon verbal or other acts *by a principal* which reasonably give an appearance of authority to conduct the transaction.'"[135] The complaint makes no such allegation here. It does not allege even that Total S.A. or Total Ltd. knew about the trades giving rise to this lawsuit until after they were made.

* * *

Total S.A. and Total Ltd.'s motion to dismiss is granted. The Court turns now to Total Gas's motion, which the foreign defendants join.

III. Article III Standing

Standing is a doctrine rooted in *Article III, Section 2 of the Constitution*, which restricts the federal judicial power to "Cases" and "Controversies." To have standing to sue in federal court, a "plaintiff must **[**41]** have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[136] The plaintiff bears the burden of alleging clearly facts that, if true,

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[131] *In re LIBOR-Based Fin. Instruments Antitrust Litig., No. 11-md-2262 (NRB), 2015 U.S. Dist. LEXIS 149629, 2015 WL 6696407, at *21 (S.D.N.Y. Nov. 3, 2015)* (citing *Fletcher, 68 F.3d at 1459-62*).

[132] *Hydrolevel Corp., 456 U.S. at 566* (emphasis added, citation, brackets, and quotation marks omitted).

[133] *Id. at 566 n.5* (emphasis added) (quoting *RESTATEMENT (SECOND) OF AGENCY § 8 (1957)*).

[134] *Fletcher, 68 F.3d at 1462*.

[135] *Id.* (emphasis in original) (quoting *Greene v. Hellman, 51 N.Y.2d 197, 204, 412 N.E.2d 1301, 433 N.Y.S.2d 75 (1980)*).

[136] *Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)*.

would satisfy each of these elements.[137] Where, as here, a plaintiff sues on behalf of a putative class, the standing inquiry looks only to the plaintiff's own alleged injuries, and not to those of the proposed class members.[138]

In the *Harry* litigation, the plaintiffs claimed to have traded natural gas contracts not incorporating the Monthly Index Prices at locations other than the Southwestern Hubs.[139] The Second Circuit **[*444]** held that they had Article III standing to sue for injuries arising from the alleged manipulation of the Monthly Index Prices.[140] It reached this holding by crediting as "within the realm of possibility" the plaintiffs' theory that "prices at U.S. natural gas hubs are so interconnected that manipulation at any of the hubs amounts to manipulation of all of them."[141]

The Court is bound by this holding. The complaint is based on the same facts as the *Harry* litigation. **[**42]** Long Beach, like the plaintiffs there, alleges that it traded natural gas contracts during the time when Total Gas allegedly manipulated the Monthly Index Prices. Moreover, and unlike the *Harry* plaintiffs, Long Beach alleges that it traded at one of the Southwestern Hubs (SoCal) and that its contracts incorporated the SoCal Monthly Index Prices.

Total Gas argues that Long Beach has not alleged that it suffered an economic loss. In its view, the complaint permits an inference that Long Beach *profited* as a result of the inflation and deflation of the SoCal Monthly Index Prices. It contends that to demonstrate standing, Long Beach would need to account for all of its trades and show that it was a net loser. Total Gas concedes, however, that the Second Circuit found standing in *Harry* where the plaintiffs made no such showing.[142] More fundamentally, "the fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing."[143]

At least at this pleading stage, Long Beach has Article III standing to pursue claims premised on trading at the four Southwestern Hubs.[144]

IV. Antitrust Standing

"It is a well-established principle **[**43]** that, while the United States is authorized to sue anyone violating the federal antitrust laws, a private plaintiff must demonstrate 'standing.'"[145] Assuming the existence of an antitrust violation, courts ask (1) whether the plaintiff has "suffered antitrust injury" as a consequence of the violation, and (2)

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137 *Id.*

138 *See, e.g., Denney v. Deutsche Bank AG, 443 F.3d 253, 263-64 (2d Cir. 2006)*; 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 2:3 (5th ed.).

139 *See Harry, 889 F.3d at 109*.

140 *Id. at 111*.

141 *Id.*

142 *See* Dkt. 20 at 10 n.7 (citing *Harry, 889 F.3d at 110-11*).

143 *Denney, 443 F.3d at 265*; *see also id.* ("For purposes of determining standing, we 'must . . . construe the complaint in favor of the complaining party." (quoting *Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*).

144 This conclusion says nothing about the question of whether Long Beach is typical, or could be an adequate representative, of a class of individuals who traded on the three hubs where it does not allege to having traded. These questions are not at issue here and are considered properly under *Rule 23(a)*. *See NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co., 693 F.3d 145, 165 (2d Cir. 2012)*.

145 *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 436 (2d Cir. 2005)*.

whether the plaintiff would be an "efficient enforcer[] of the antitrust laws."[146] This case turns on the first of these criteria.

An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[147] Determining whether a plaintiff has suffered an antitrust injury involves a three-step process:

> **[*445]** "[1] the plaintiff must 'identify the practice complained of and the reasons such a practice is or might be anticompetitive'; then [2] the court must 'identify the actual injury the plaintiff alleges' by 'look[ing] to the ways in which the plaintiff claims it is in a worse position as a consequence of defendant's conduct'; and finally, [3] the court must 'compare the anticompetitive effect of the specific practice at issue to the actual injury the plaintiff alleges.'"[148]

In *Harry*, the Second Circuit held that **[**44]** the plaintiffs failed to satisfy this three-pronged test.

> "Plaintiffs argue that they adequately alleged that they were part of the same undifferentiated natural gas commodities and commodities derivatives market as Defendants, that they were harmed by artificial prices at Henry Hub and on NYMEX, and that Defendants' manipulations required a connection between regional hubs, and as such trading at Henry Hub was inextricably intertwined with their trading.
>
> Set aside whether they were part of the same market as Defendants (they were not) or whether they have shown that Plaintiffs' alleged injuries were the fulcrum for Defendants' scheme (they were not); Plaintiffs do not even present evidence that they traded at 'artificial prices.' There is no actual injury the Plaintiffs allege, let alone a connection between Defendants' unlawful conduct and that non-injury. Any further analysis of the connection between regional hubs and Henry Hub or comparisons with other case law on antitrust standing is superfluous."[149]

Long Beach does not allege that it traded natural gas contracts incorporating the Permian, Waha, or San Juan Monthly Index Prices or that it traded at those hubs. Thus, just as in *Harry* ***[**45]*** , "[t]here is no actual injury that the [plaintiff] allege[s]" with respect to the trading on those markets.[150] Long Beach does not have antitrust standing to pursue claims based on the manipulation of the Monthly Index Prices at those three hubs. Unlike the *Harry* plaintiffs, however, Long Beach does allege that it traded derivatives at SoCal that were based on the SoCal Monthly Index Price. The Court applies the three-step inquiry to this portion of its claim.

For the first question, Long Beach alleges that Total Gas manipulated the Monthly Index Prices at SoCal during the Class Period. It posits that this practice was anticompetitive because it caused entities that bought or sold natural gas contracts on this market to pay higher prices for their purchases or receive lower prices for their sales.

"Generally, when consumers, because of a conspiracy, must pay prices that no longer reflect ordinary market conditions, they suffer injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[151] Based in part on this principle, the Second Circuit found the "anticompetitive practice" factor satisfied where several competitors **[**46]** allegedly conspired manipulate an index price.[152] But

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[146] *Gelboim v. Bank of Am. Corp., 823 F.3d 759, 772 (2d Cir. 2016)*; *see* *id. at 770*.

[147] *Harry, 889 F.3d at 115* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*).

[148] *Id.* (quoting *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 76 (2d Cir. 2013)*).

[149] *Id. at 116*.

[150] *See id.*

[151] *Gelboim, 823 F.3d at 772* (citation and quotation marks omitted).

part of the reason the conduct alleged was anticompetitive was that it involved a *conspiracy*, which *Section 1 of the Sherman Act* **[*446]** forbids. Here, Long Beach claims that Total Gas acted alone. It attempts to proceed on a *monopoly* theory and raises its claim under *Section 2*.

"*Section 2*, by contrast [to *Section 1*], is aimed primarily not at improper conduct but at a pernicious market structure in which the concentration of power saps the salubrious influence of competition.[153] In plain English, this eloquent language means that *Section 2* is not an all-purpose weapon against shady business practices. It instead takes aim at those who acquire monopoly power, "the power to control prices or exclude competition," and use it to injure competition.[154] "[T]he possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*."[155]

This final point is critical. *Section 2* is not intended to punish "the proverbial inventor of the better mousetrap" or one who succeeds by virtue of a superior product or business acumen.[156] If it were, the statute would stifle legitimate business competition — the opposite of its goal. "Courts . . . have been engaged for **[**47]** years in a case-by-case process of distinguishing between conduct that reflects a 'purpose or intent to exercise [monopoly] power,' and that which reflects no more than aggressive competition on the merits, competition that properly may utilize the advantages of size, but that may not employ the power derived from a dominant position in the market."[157] The aim is to prohibit the use of monopoly power to gain competitive advantages at the expense of others or victimize consumers by supracompetitive prices enabled by eliminating competition.

Long Beach's theory is that Total Gas influenced the price for natural gas, and thereby increased its profits on pre-bidweek derivatives trading, by manipulating the Monthly Index Prices by means of its bidweek transactions. This theory loosely resembles a monopoly allegation in the limited sense that Total Gas influenced natural gas prices and thereby injured Long Beach, which was forced to pay inflated rates. But if that were all that were required under *Section 2*, a plaintiff could state a monopolization claim by alleging that a defendant influenced the Monthly Index Prices by coercively threatening NGI and Platts to set them according to its will or by **[**48]** some other conduct having nothing to do with competition. Coercive threats no doubt would be unlawful on different legal theories — as may be the manipulation alleged in the complaint. But the problem with both allegations is that the type of anticompetitive conduct prohibited by *Section 2* is lacking.

An example borrowed from the context of predatory pricing helps underscore this point. In *Brooke Group Limited v. Brown & Williamson Tobacco Corp.*,[158] the Supreme Court discussed *Section 2 of the Sherman Act*'s prohibition on predatory pricing, a practice that at times is a **[*447]** gateway to the acquisition or maintenance of monopoly power.[159] The essence of a predatory pricing claim is that the defendant "priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant

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[152] *Id. at 771-75*; *see also* *Dennis, 345 F. Supp. 3d at 163* (similar).

[153] *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272 (2d Cir. 1979)*.

[154] *Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 98 (2d Cir. 1998)* (citation and quotation marks omitted).

[155] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (emphasis in original); *New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 651 (2d Cir. 2015)*.

[156] *Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc., 920 F. Supp. 455, 465 (S.D.N.Y. 1996)*.

[157] *Id.* (quoting *United States v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)*, and then citing *Berkey, 603 F.2d at 272*).

[158] *509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*.

[159] *Id. at 222*.

market."[160] As this language makes plain, the claim cannot lie where a defendant merely lowers its prices. Instead, the plaintiff must show that the defendant lowered its prices "below an appropriate measure of its . . . costs" in circumstances where there exists "a dangerous probability" that the defendant will recoup its short-term losses once the competition has **[**49]** been eliminated and it possesses a monopoly.[161] The critical point is that price cutting, which ordinarily is a pro-competitive practice, is not a violation of *Section 2* unless it has a significant anticompetitive effect — *i.e.*, it augurs the willful acquisition, maintenance, or exploitation of monopoly power.

As the foregoing discussion makes clear, the market manipulation is not alleged to have derived from Total Gas's size or its share of market power. Instead, it derived from strategically timed trades that, as far as the complaint alleges, any other participant in the market could have made. While the intent and effect of those trades was to influence prices, Long Beach does not allege that they involved the willful attainment, maintenance, or exercise of monopoly power. Accordingly, it has failed to identify an anticompetitive practice of a type which the antitrust laws were intended to prohibit. That is fatal to its Section 2 claims. But there is more.

This conclusion that Long Beach has failed to allege anticompetitive conduct flows also into the analysis of the second and third steps of the antitrust injury analysis. As to the second, the actual injury that Long Beach **[**50]** alleges is that, as a buyer of natural gas, it lost money because the alleged market manipulation moved the Monthly Index Prices in directions unfavorable to its contracts. While this injury is claimed to have been the consequence of Total Gas's conduct, Long Beach has failed to show that the conduct was anticompetitive within the meaning of the antitrust laws.[162] Likewise, the third step is not satisfied because Long Beach has failed to allege an *anticompetitive* effect given its failure to allege any anticompetitive practice.[163]

The Section 2 claims for monopolization and attempted monopolization are dismissed for lack of antitrust standing.

[*448] *V. State Law Claims*

Finally, Total Gas contends that the complaint fails to state a claim under the California UCL and New York's law of unjust enrichment.

A. California UCL Claim

The UCL authorizes claims for restitution by private parties injured by "unfair competition," which means "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [a separate statute]."[164] "Each prong of the UCL is a separate and distinct theory of

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[160] *Id.*

[161] *Id. at 222-24*; *cf. id. at 224* ("It is axiomatic that the antitrust laws were passed for the protection of *competition*, not *competitors."* (citation and quotation marks omitted)).

[162] Total Gas argues for the first time in its reply brief that Long Beach did not suffer an antitrust injury because "it is merely a go-between for natural gas it buys from an upstream purchaser and sells to downstream consumers, with the cost that it paid borne *entirely* by the latter." Dkt. 50 at 4 (citing *Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169, (1990)*). "Issues raised for the first time in a reply brief are generally deemed waived." *Connecticut Bar Ass 'n v. United States, 620 F.3d 81, 91 n.13 (2d Cir. 2010)*.

[163] Long Beach notes that at least one court in this district has held that a monopoly claim of this nature involves an antitrust injury. *See* *Merced Irrigation Dist. v. Barclays Bank PLC, 165 F. Supp. 3d 122, 133 (S.D.N.Y. 2016)* ("[The plaintiff] has pled an antitrust injury causally linked to [the defendant's] practices: it is a purchaser of electricity on the daily markets in which it alleges it paid higher supra-competitive prices or received lower sub-competitive prices as a result of [the defendant's] rate-manipulation."). For the foregoing reasons, the Court respectfully disagrees.

liability."[165] Long Beach seeks restitution on the **[**51]** theory that Total Gas engaged in "unfair, unconscionable, deceptive or fraudulent acts and practices" causing injury to its property.[166]

The UCL has a standing requirement for suits by private plaintiffs. The Court begins there.

1. UCL Standing

The UCL's private right of action authorizes suit by "a person who has suffered injury in fact and has lost money or property as a result of . . . unfair competition."[167] "To satisfy the . . . standing requirements imposed by [the voter initiative that created them], a party must . . . (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim."[168]

For the first prong, the phrase "injury in fact" has the same meaning as it does for Article III standing.[169] The requirement that a plaintiff have "lost money or property," however, is unique to the UCL. The loss of money or property can be shown in "innumerable ways."[170] And "the quantum of lost money or property necessary to show [UCL] standing is only so much as would suffice to establish **[**52]** injury in fact."[171] That said, a plaintiff must "allege or prove an identifiable monetary or property injury."[172] In this way, "the lost money or property requirement is more difficult to satisfy than that of injury in fact."[173]

The "as a result of prong "requires a showing of a causal connection or reliance on the alleged misrepresentation."[174] In effect, the statute incorporates ordinary principles of actual and proximate causation.[175]

With respect to trading at SoCal, the complaint alleges that Long Beach suffered an injury in fact and lost money by paying inflated natural gas prices as a result of Total Gas's conduct. Long Beach has standing under the UCL to pursue its claims based on this trading for the same reasons it has standing under Article III.

[*449] The question of whether Long Beach has UCL standing to pursue its claims based on trading at the Permian, Waha, or San Juan hubs is trickier. The Second Circuit held that the *Harry* plaintiffs had Article III standing premised on the alleged manipulation of indices used at hubs where they did not trade because it was "within the

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[164] *Cal. Bus. & Prof. Code § 17200*; *see id. § 17203* (restitution); *id. § 17204* (private right of action).

[165] *Birdsong v. Apple, Inc., 590 F.3d 955, 959 (9th Cir. 2009)*.

[166] Cmplt. ¶¶ 151-54.

[167] *Cal. Bus. & Prof. Code § 17204*.

[168] *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 120 Cal. Rptr. 3d 741, 246 P.3d 877, 885 (Cal. 2011)*.

[169] *Id.*

[170] *Id.*

[171] *Id. at 886*.

[172] *Id. at 887*.

[173] *Id.*

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

[175] *See id. at 887-88*.

realm of possibility" that "prices at U.S. natural gas hubs are so interconnected that manipulation at any **[**53]** of the hubs amounts to manipulation of all of them."[176] This holding necessarily entailed a finding that any entity that traded at any U.S. natural gas hub during the Class Period suffered an injury in fact with respect to the alleged price manipulation at Permian, Waha, and San Juan. The Court is bound by this precedent; the UCL's injury in fact requirement is met.

However, this does not mean that Long Beach has made the "more difficult" showing that it "lost money or property" as a result of these trades.[177] Long Beach did not trade at Permian, Waha, or San Juan. And it does not attempt to explain how a finder of fact could determine whether it lost any money or property in connection with the defendants' alleged manipulation at those markets. While the interconnectedness theory suffices under Article III (though barely), it is not enough under the UCL. Long Beach's failure to "allege or prove an identifiable monetary or property injury" requires the Court to dismiss this claim as it pertains to Permian, Waha, and San Juan.[178]

Far from helping Long Beach, *Harry* dooms its cause. Although the Second Circuit concluded that the plaintiffs had Article III standing on their interconnectivity **[**54]** theory, it held several times that this theory was not "plausible" for Rule 12(b)(6) purposes.[179] In fact, the court affirmed the dismissal of the CEA and *Sherman Act* claims *because* this theory was implausible. It observed that "[o]nly speculation" could allow it to infer whether the plaintiffs had lost money as a result of the alleged manipulation of indices at hubs where they did not trade.[180] Further, it concluded that allegations of this nature could not demonstrate even that the plaintiffs had "traded at 'artificial prices' on other markets.[181] For that reason, the court held, for the purpose of antitrust standing, that "[t]here is no actual injury the Plaintiffs allege, let alone a connection between [the defendants'] unlawful conduct and that non-injury."[182] The same reasoning applies here, where Long Beach makes no effort to explain how the manipulation of the index prices at Permian, Waha, or San Juan hubs plausibly could have caused it to pay artificially inflated prices at SoCal, the one market where it claims to have traded.

2. Entitlement to Restitution

Plaintiffs who prevail under the UCL "are generally limited to injunctive relief and restitution."[183] Long Beach has UCL standing insofar **[**55]** as it claims injury with respect to trading at SoCal. However, "the standards for establishing standing under [the UCL] and eligibility **[*450]** for restitution . . . are wholly distinct."[184] Here, that distinction matters.

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176 *Harry, 889 F.3d at 111*.

177 *See Kwikset, 246 P.3d at 887*.

178 *See id.*

179 *See Harry, 889 F.3d at 111, 114-15*.

180 *See id. at 115* ("We do not require that a plaintiff calculate damages at the pleading stage, but we certainly need some reason to believe that any damage has occurred at all. Only speculation could lead us to that belief here.").

181 *Id. at 116*.

182 *Id.*

183 *Zhang v. Superior Court, 57 Cal. 4th 364, 159 Cal. Rptr. 3d 672, 304 P.3d 163, 167 (Cal. 2013)* (citation omitted).

184 *Kwikset, 246 P.3d at 894*.

"Restitution under [UCL § 17203] is confined to restoration of any interest in 'money or property, real or personal, which may have been acquired by means of . . . unfair competition. '"[185] "A restitution order against a defendant thus requires both that money or property have been lost by a plaintiff, on the one hand, *and that it have been acquired by a defendant*, on the other."[186] "Compensatory damages are not recoverable as restitution."[187]

The complaint alleges that Total Gas profited as a result of its alleged market manipulation. It alleges also that the market manipulation caused Long Beach to lose money. It does not, however, connect the profit and the loss. There is no claim that Total Gas *acquired* any of the money that Long Beach lost or even that the two parties ever traded with each other. According to the complaint, Total Gas's profits came from the counterparties to its trades, and Long Beach's losses went to the counterparties to its trades.

Because Long Beach does not **[**56]** allege that Total Gas ever came to possess any of its money or property, and otherwise offers no theory as to how it might recover restitution, it fails to establish entitlement to that relief. It fails also to explain how it is entitled to any other form of relief that may be available under the UCL.[188] Its claim is dismissed.

B. New York Unjust Enrichment Claim

Long Beach asserts also a claim for unjust enrichment. It "seek[s] restitution with respect to, and/or disgorgement of, all illicitly obtained monies and profits obtained by [Total Gas] . . . either as damages or restitution."[189] The Court understands this as a claim for restitution and, to the extent that they differ from restitution and are permissible, damages.

The Court assumes without deciding that this claim arises under New York law. Total Gas posits that New York or California law might apply and argues that the outcome is the same under either.[190] In discussing this claim, Long Beach cites only to New York cases and thereby assumes that New York law applies.[191] "The law of the forum state governs where, as here, neither party alleges that the law of a different state would control and differs from New York law."[192]

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[185] Zhang, 304 P.3d at 167 (quoting Cal. Bus. & Prof. Code § 17203).

[186] *Id.* (citation omitted, emphasis added).

[187] *Id.* (citation and brackets omitted); *see* Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937, 948 (Cal. 2003) ("[T]he UCL is not an all-purpose substitute for a tort or contract action. . . . [T]he remedies provided are limited. . . . [I]t is well established that individuals may not recover damages . . . [including] nonrestitutionary disgorgement.").

[188] The complaint "seek[s] restitution and/or monetary recoveries permitted under California law as referenced herein for these injuries." Cmplt. ¶ 154. The meaning of the "monetary recoveries" language is entirely unclear. The only form of monetary recovery permitted by the UCL that Long Beach has brought to the Court's attention is restitution.

[189] *Id.* ¶ 158.

[190] Dkt. 27 at 31-32 & n.19.

[191] Dkt. 37 at 33.

[192] VTech Holdings, 348 F. Supp. 2d at 262 n.48.

California's unjust enrichment doctrine is notoriously confusing. For many years, courts believed that "in California, there is not a standalone cause of action for 'unjust enrichment,' which is synonymous with 'restitution.'" Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 762 (9th Cir. 2015). But like the discovery of a Lazarus taxon — a species long believed to be extinct that one day reappears — "the California Supreme Court [recently] has clarified California law, allowing an independent claim for unjust enrichment to proceed in an insurance dispute." ***Bruton v. Gerber Prods. Co., 703 F. App'x 468, 470 (9th Cir. 2017)*** (citing Hartford Cas. Ins. Co. v. J.R. Mktg., L.L.C., 61 Cal. 4th 988, 190 Cal. Rptr. 3d 599, 353 P.3d 319 (Cal. 2015)). Whether this

[*451] "In order to succeed on a claim for unjust enrichment under New York law, a plaintiff must prove that (1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover."[193] "The theory of unjust enrichment lies as a quasi-contract claim."[194] It "is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff."[195] While there need not be privity between the plaintiff and defendant, "a plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party."[196] The New York Court of Appeals has found several times that a relationship between two commercial entities was "too attenuated" where they "simply had no dealings with each other."[197]

There is not a sufficiently close relationship between Total Gas and Long Beach. Insofar as the complaint alleges, they "simply had no dealings with each other" and were not aware of each other's existence during the Class Period.

Moreover, **[**58]** that lack of a relationship prevents Long Beach from pleading the elements of unjust enrichment. Total Gas's alleged enrichment did not come at Long Beach's expense, at least in the equitable sense contemplated by the unjust enrichment cause of action. It came at the expense of the counterparties to Total Gas's trades, who allegedly paid more money to Total Gas as a result of the price manipulation.[198] Traders like Long Beach that used the index prices but did not transact with Total Gas were collateral **[*452]** damage. In these circumstances, Long Beach fails to show how equity or good conscience make it any more entitled than Total Gas to money allegedly taken from third parties.[199]

Conclusion

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cause of action is different from a quasi-contract claim for restitution remains disputed. *See* *Price v. L'Oreal USA, Inc., No. 17-cv-0614 (LGS), 2017 U.S. Dist. LEXIS 165931, 2017 WL 4480887, at *5 (S.D.N.Y. Oct. 5, 2017)*. **[**57]** But regardless of how it is captioned, California law permits a claim for restitution that resembles what other states, including New York, call unjust enrichment. *See* *Hartford, 353 P.3d at 326* (authorizing claims for restitution in the absence of a contract where "the enrichment obtained lacks any adequate legal basis and thus cannot conscientiously be retained" (citation and quotation marks omitted)).

[193] *Diesel Props S.r.l. v. Greystone Bus. Credit II LLC, 631 F.3d 42, 55 (2d Cir. 2011)* (citation and quotation marks omitted).

[194] *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of New Jersey, Inc., 448 F.3d 573, 586 (2d Cir. 2006)* (emphasis and citation omitted).

[195] *E.J. Brooks Co. v. Cambridge Sec. Seals, 31 N.Y.3d 441, 455, 80 N.Y.S.3d 162, 105 N.E.3d 301 (2018)* (citation omitted).

[196] *Georgia Malone & Co. v. Rieder, 19 N.Y.3d 511, 516, 973 N.E.2d 743, 950 N.Y.S.2d 333 (2012)*.

[197] *See* *id. at 516-18* (citing cases).

[198] These parties might not have a claim for unjust enrichment, either, because their relationship with Total Gas was created by the same contracts that incorporated the allegedly manipulated prices. "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Beth Israel, 448 F.3d at 587* (quoting *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 70 N.Y.2d 382, 388-89, 516 N.E.2d 190, 521 N.Y.S.2d 653 (1987)*).

[199] As noted above, California's unjust enrichment or quasi-contract doctrine is similar to New York's. *See supra* note 195; *see also* *First Hill Partners, LLC v. BlueCrest Capital Mgmt. Ltd., 52 F. Supp. 3d 625, 634 (S.D.N.Y. 2014)* (noting the similarity). California's doctrine authorizes claims for restitution where a defendant was "unjustly enriched *at the expense of another."* *Hartford, 353 P.3d at 326* (emphasis added). As explained, the complaint does not allege that Total Gas was enriched at Long Beach's expense. The outcome would be the same under California law.

Total S.A.'s and Total Ltd.'s motion to dismiss [Dkt. 44] and Total Gas's motion to dismiss [Dkt. 26] are granted, all for failure to state a claim upon which relief may be granted and the first motion on the additional ground **[**59]** of lack of personal jurisdiction.

SO ORDERED.

Dated: June 8, 2020

/s/ Lewis A. Kaplan

Lewis A. Kaplan

United States District Judge

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In re Humira (Adalimumab) Antitrust Litig.

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

June 8, 2020, Decided; June 8, 2020, Filed

No. 19 CV 1873

Reporter

465 F. Supp. 3d 811 *; 2020 U.S. Dist. LEXIS 99782 **; 2020-1 Trade Cas. (CCH) P81,255; 2020 WL 3051309

IN RE: HUMIRA (ADALIMUMAB) ANTITRUST LITIGATION

Subsequent History: Affirmed by *Mayor of Baltimore v. Abbvie Inc., 2022 U.S. App. LEXIS 21165 (7th Cir. Ill., Aug. 1, 2022)*

Core Terms

patents, biosimilar, settlements, antitrust, infringement, manufacturers, plaintiffs', unfair, competitors, baseless, invalid, launch, monopoly, prices, lawsuit, antitrust claim, anticompetitive, petitioning, consumers, anti trust law, patentee, sham, settlement agreement, allegations, asserts, consumer protection, purchasers, expiration, immunized, unconscionable

LexisNexis® Headnotes

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

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

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

A complaint must contain a short and plain statement that plausibly suggests a right to relief. *Fed. R. Civ. P. 8(a)(2)*. In ruling on a motion to dismiss, a court must accept all factual allegations in the complaint as true and draw all reasonable inferences in plaintiffs' favor, but need not accept legal conclusions, bare assertions, or conclusory allegations. The complaint does not need to include detailed factual allegations, but it must provide more than labels and formulaic recitations of the elements of the cause of action, and must present a story that holds together. If a complaint pleads facts that are merely consistent with liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Experimental Use & Testing

Patent Law > ... > Utility Patents > Process Patents > New Uses

Patent Law > Anticipation & Novelty > New Uses & Nonanalogous Art

HN2[] Defenses, Experimental Use & Testing

Anyone who invents or discovers any new and useful machine, manufacture, or composition of matter (e.g., a new drug) may apply for a patent from the United States Patent and Trademark Office. 35 U.S.C.S. § 101. Once issued, the patent comes with an exclusive right to make, use, and sell the invention in the United States. 35 U.S.C.S. § 154(a). This limited monopoly lasts for twenty years. 35 U.S.C.S. § 154(a)(2).

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Failure to Fulfill Duties

Patent Law > Anticipation & Novelty > Description in Publications

Patent Law > Nonobviousness > Elements & Tests > Prior Art

Patent Law > Statutory Bars > Public Use Bar > Elements

Patent Law > Anticipation & Novelty > Elements

HN3[] Inequitable Conduct, Failure to Fulfill Duties

Novel inventions are those not disclosed in the prior art. 35 U.S.C.S. § 102(a). The prior art includes anything that has already been patented or described in a printed publication, or that is in public use, on sale to the public, or otherwise available to the public. The patent application process is nonadversarial and relies on applicants to abide by their duty of disclosure, candor, and good faith. 37 C.F.R. § 1.56(a). If the applicant does not disclose (and the examiner does not find) all of the pertinent prior art, patents may issue to underserving inventions.

Patent Law > Statutory Bars > Public Use Bar > Elements

Patent Law > Double Patenting > Terminal Disclaimers

Patent Law > Infringement Actions > Defenses > Statute of Limitations

Patent Law > Nonobviousness > Elements & Tests > Prior Art

HN4[] Public Use Bar, Elements

As prior art accumulates, patent applicants face an increasingly crowded space. There are, however, ways to navigate around some of that prior art. For instance, inventors are granted a one-year grace period to file their patent applications after any public disclosure of their own invention. 35 U.S.C.S. § 102(b)(1). Continuation applications offer another work around: any applicant with a pending application may later tack on new, related claims. 35 U.S.C.S. § 120; 37 C.F.R. § 1.78(d). If the new claims are sufficiently related to the original claim, they are backdated and do not have to account for any prior art developed after the original application's filing date. 35 U.S.C.S. § 120; 37 C.F.R. § 1.78(d). The catch is that if the new claims are simple, obvious variations on the invention described in the original application, the applicant generally must file a terminal disclaimer (37 C.F.R. § 1.321(b)) relinquishing any portion of the new claim's term that would extend beyond the expiration date of the patent that is the subject of the pending application. In other words, if the applicant wants to use the original filing date for a simple and obvious variation on the original invention, the applicant has to accept the original expiration date, too.

Patent Law > Infringement Actions > Claim Interpretation > Scope of Claim

HN5[] Claim Interpretation, Scope of Claim

The claims define the exact boundaries beyond which no member of the public may pass without invading the exclusive rights of the patentee. Claims force the patentee to define precisely what his invention is.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food & Drugs Act

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN6[] Agriculture & Food, Federal Food & Drugs Act

Manufacturers that want to bring a new drug (patented or not) to market must first receive approval from the Food and Drug Administration. *21 U.S.C.S. § 355*; *42 U.S.C.S. § 262(a)*. Different kinds of drugs require different kinds of approvals. The process for biologic drugs starts when a manufacturer submits a Biologic License Application demonstrating that its new drug is (among other things) safe, pure, and potent. *42 U.S.C.S. § 262(a)(2)(C)(i)*. If the application is approved, the manufacturer enjoys a period of exclusivity during which it is the only entity that can market the drug for the approved purpose. *42 U.S.C.S. § 262(k)(7)*. Manufacturers often charge supracompetitive prices during this period in order to recoup their research and development costs and obtain a profit.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Experimental Use & Testing

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN7[] Defenses, Experimental Use & Testing

Eventually, the exclusivity following approval of a Biologic License Application ends. One way it can end is when a different manufacturer designs a biosimilar and submits (and has approved) an Abbreviated Biologic License Application. *42 U.S.C.S. § 262(k)(2)(A)*, *(k)(6)*. Abbreviated applications piggyback on existing approvals by identifying an approved reference biologic and demonstrating that there is no clinically meaningful difference between the reference biologic and the proposed biosimilar. *42 U.S.C.S. § 262(k)(2)(B)*, *(k)(4)*. Biosimilar manufacturers have to wait four years from the date the reference biologic was approved before submitting an abbreviated application, and the Food and Drug Administration has to wait twelve years from that same date before approving any abbreviated applications. *42 U.S.C.S. § 262(k)(7)(A)*, *(B)*. Once approved, the biosimilar can be marketed to the public—assuming the drug is not also patented. Prices tend to drop shortly after a new biosimilar is introduced.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Experimental Use & Testing

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN8[] Defenses, Experimental Use & Testing

Often, a drug is patented. The regulatory framework sets out a five-step series of required prelitigation exchanges (sometimes called the "patent dance") aimed at resolving patent disputes between the biosimilar manufacturer (the applicant) and the reference biologic's manufacturer (the sponsor). *42 U.S.C.S. § 262(l)*. Once the Food and Drug Administration accepts the application for review, the applicant is required to send information about its biosimilar to the sponsor (step one), 42 U.S.C.S. § 262(l)(2), the sponsor must send back a list of the patents (if any) that it believes would be infringed if the biosimilar was put on the market (step two), 42 U.S.C.S. § 262(l)(3)(A), the applicant explains why it believes those patents are invalid, unenforceable, or would not be infringed (step three), 42 U.S.C.S. § 262(l)(3)(B), and the sponsor responds (step four). 42 U.S.C.S. § 262(l)(3)(C). At the fifth step the applicant tells the sponsor the number of patents it would like test in litigation, and then both sides simultaneously exchange a list of patents. 42 U.S.C.S. § 262(l)(5). The sponsor then must initiate a lawsuit to determine the validity of the patents that appear on both lists (which, at most, includes double the number identified by the applicant, assuming no overlap). 42 U.S.C.S. § 262(l)(6).

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Experimental Use & Testing

Healthcare Law > Medical Treatment > Medical Devices > Premarket Approval

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN9[] **Defenses, Experimental Use & Testing**

At the fifth step aimed at resolving patent disputes between the biosimilar manufacturer (the applicant) and the reference biologic's manufacturer (the sponsor), the applicant has to decide whether to launch "at risk" by putting its biosimilar on the market notwithstanding the prospect of a large damages award against it in patent litigation. Unlike the Hatch-Waxman Act (which governs small molecule drugs and imposes an automatic 30-month stay on Food and Drug Administration (FDA) approval whenever a brand-name manufacturer files an infringement lawsuit (and meets other prerequisites), 21 U.S.C.S. § 355(j)(5)(B)(iii)), the Biologics Price Competition and Innovation Act allows the FDA to approve an abbreviated biologic application despite a pending infringement suit and only requires the applicant to give the sponsor 180-days' notice before launching. 42 U.S.C.S. § 262(l)(8)(A). But even if the biosimilar manufacturer decides to launch at risk, the sponsor can still file a second lawsuit seeking a preliminary injunction (sometimes referred to as "second phase" litigation). 42 U.S.C.S. § 262(l)(8)(B).

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

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

Antitrust & Trade Law > Sherman Act > Claims

HN10[] **Actual Monopolization, Claims**

Section 2 of the Sherman Act prohibits the wrongful monopolization of interstate trade or commerce. 15 U.S.C.S. § 2. In order to state a claim under § 2, a plaintiff must allege (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Constitutional Law > Congressional Duties & Powers > Copyright & Patent Clause

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN11[] **Inequitable Conduct, Anticompetitive Conduct**

Both the patent and antitrust laws aim to encourage innovation, industry, and competition. *U.S. Const. art. I, § 8, cl. 8*. The former does this by dangling the carrot of a limited and temporary right to exclude others from practicing a patented invention and the latter by prohibiting conduct which unfairly tends to destroy competition itself. Even though patents operate like limited exceptions to the Sherman Act, they do not wholly insulate the patent owner from the antitrust laws. And since it is unlawful to use monopoly power—however lawfully obtained—to foreclose competition, to gain a competitive advantage, or to destroy a competitor, it is in some instances unlawful to use patents in ways that foreclose competition.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN12[] **Fundamental Freedoms, Freedom to Petition**

Antitrust liability has long attached wherever there was a pattern of baseless, repetitive claims that shows the administrative and judicial processes have been abused. Although the *First Amendment* protects the right to petition the government, it does not protect exercising that right as the means or the pretext for achieving substantive evils which the legislature has the power to control. But because immunized conduct cannot be aggregated with nonimmunized conduct without nullifying the immunity, it is necessary to identify protected and unprotected conduct. The first step is to identify any conduct that is immunized, and then, after that, to consider the evidence of the remaining challenged conduct in the aggregate to see if it is sufficient to support antitrust liability.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN13[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington doctrine may be applied at the motion-to-dismiss stage.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN14[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

A pattern of baseless, repetitive claims instituted without probable cause, and regardless of the merits falls outside of Noerr-Pennington protection. Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc. articulates a two-part test for identifying sham litigation: first, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If the lawsuit is objectively baseless, then the court asks, whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor, through the use of the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN15[] Exemptions & Immunities, Noerr-Pennington Doctrine

The objectively reasonable requirement applies to the sham lawsuit exception to Noerr-Pennington whether the allegations involve a single instance of sham petitioning or a series. Any lawsuit reasonably calculated to elicit a favorable outcome is objectively reasonable, and any successful action self-proves its reasonableness.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Failure to Fulfill Duties

Patent Law > US Patent & Trademark Office Proceedings > Examinations > Office Actions

Business & Corporate Compliance > ... > Patent Law > US Patent & Trademark Office Proceedings > Reexamination Proceedings

HN16[] Inequitable Conduct, Failure to Fulfill Duties

Proceedings before the Patent and Trademark Office (PTO) are adjudicative. The PTO reviews patent applications submitted by interested parties often represented by counsel with specialized legal training, engages in formal fact-finding based on submissions made pursuant to duties of disclosure, candor, and good faith, and issues decisions subject to definite standards and judicial review. *37 C.F.R. § 1.56(a)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN17[] Agriculture & Food, Federal Food, Drug & Cosmetic Act

The Food and Drug Administration reviews applications for new drugs submitted in nonadversarial processes marked by strict guidelines. That formalized review looks at a wealth of technical information and is guided by standards set forth by federal law. *42 U.S.C.S. § 262*.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

Patent Law > Infringement Actions > Burdens of Proof

Evidence > Burdens of Proof > Clear & Convincing Proof

HN18[] Defenses, Bad Faith Enforcement

Even if patentees are presumed to enforce their patents in good faith (the law recognizes a presumption that the assertion of a duly granted patent is made in good faith), that presumption is evidentiary, and evidentiary presumptions do not overcome plausible allegations at the pleading stage. If the party challenging such statements under state or federal law presents clear and convincing evidence that the infringement allegations are objectively false, and that the patentee made them in bad faith, viz., with knowledge of their incorrectness or falsity, or disregard for either, the statements are actionable and are not protected by the existence of a patent.

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

HN19[] **Patent Invalidity, Presumption of Validity**

Anyone with a patent not obtained by fraud enjoys a presumption of validity that entitles them to sue alleged infringers, and to settle with them, whatever their private doubts, unless a neutral observer would reasonably think either that the patent was almost certain to be declared invalid, or the defendants were almost certain to be found not to have infringed it, if the suit went to judgment.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN20[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

For purposes of the Noerr-Pennington doctrine, when a lawsuit terminates in a settlement that provides substantial value to an antitrust defendant accused of initiating that lawsuit as a sham, that lawsuit is objectively reasonable.

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

HN21[] **Private Actions, Sherman Act**

There is a risk that by focusing only on each individual action in a series, a broader pattern of anticompetitive conduct might escape policing and remedy. Plaintiffs must be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each, but at the same time, conduct immunized from antitrust liability cannot be aggregated with nonimmunized conduct without nullifying the immunity.

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

HN22[] **Patent Invalidity, Presumption of Validity**

Patents are entitled to a presumption of validity, *35 U.S.C.S. § 282(a)*, and even though that presumption is not so strong as to make patents completely unassailable, it is a presumption rightly based on the expertise of patent examiners presumed to have done their job.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN23[] **Standing, Requirements**

The patent system might be thought to be in need of reform, but the antitrust laws were not designed to repair other government regulatory processes.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN24[] **Sherman Act, Claims**

The rule of reason analysis involves an inquiry into market power and market structure designed to assess the actual effect of the contract, combination, or conspiracy, or, in Sherman Act *§ 2*, *15 U.S.C.S. § 2*, cases, of an alleged monopolization.

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

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

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN25[] **Scope, Monopolization Offenses**

Section 1 of the Sherman Act declares illegal every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. *15 U.S.C.S. § 1*. In order to state a claim under *§ 1*, plaintiffs must plead (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in a relevant market; and (3) an accompanying injury. When assessing whether a particular restraint enhances or inhibits competition, courts apply three categories of analysis: per se, quick-look, and rule of reason. All three are meant to answer the same question: whether or not the challenged restraint enhances competition.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

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

HN26[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Per se analysis is applied when a practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, such as horizontal price fixing and output limitations. The quick-look approach asks whether an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect. If legitimate, procompetitive justifications for facially anticompetitive behavior are found, then rule of reason analysis may be necessary. Under the rule of reason, plaintiffs must allege that an agreement or contract has an anticompetitive effect on a given market within a given geographic area.

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

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

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

HN27[] **Per Se Rule & Rule of Reason, Per Se Violations**

Horizontal price fixing and output limitation are classic examples of behavior that is considered anticompetitive per se. Even reverse-payment patent settlement agreements that involve cash payments from the patentee to the alleged infringer do not usually receive per se treatment, and types of agreements that involve two sets of early entry dates in two different regions are even less facially restrictive because they do not involve a cash payment in return for a promise to keep a competing product off the market.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN28[] **Sherman Act, Claims**

Market allocation agreements are classic examples of per se Sherman Act *§ 1*, *15 U.S.C.S. § 1*, violations. In a market allocation agreement, competitors at the same level of a market allocate territories in order to minimize competition.

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

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

HN29[] **Per Se Rule & Rule of Reason, Per Se Violations**

To fit under the per se rule a horizontal, market-allocation agreement need not foreclose all possible avenues of competition.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN30[] **Conveyances, Licenses**

Patents come with the right to selectively license the patent to the whole or any specific part of the United States. *35 U.S.C.S. § 261*. A patent dispute that settles with a market division license agreement will be approved, and the courts repeatedly state that they are loath to inquire into such things as whether the patents in question are valid.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN31[] **Conveyances, Licenses**

A patentee may issue territorial licenses that allow competitors to sell patented products in some foreign countries but not others (and not in the U.S.).

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

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

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

HN32[] **Per Se Rule & Rule of Reason, Per Se Violations**

Market allocation agreements are not free from per se treatment just because they involve intellectual property licenses, but patents are different from other types of intellectual property when it comes to geographic restrictions, and an agreement to permit entry into a market previously protected by a patent does not become a per se invalid market allocation agreement just because it is specific to one territory (or one country). *35 U.S.C.S. § 261*. The most obvious reading of the Patent Act is that, where the patentee also makes the manufactured product in a territory, the statute explicitly authorizes a form of horizontal territorial division that would be illegal per se if done in the absence of an intellectual property license.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

HN33[] **Sherman Act, Claims**

Per se treatment is disfavored for novel theories of antitrust violations. Per se treatment is appropriate once experience with a particular kind of restraint enables the court to predict with confidence that the rule of reason will condemn it. It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act.

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

HN34[] Scope, Monopolization Offenses

An agreement that allows competitors to enter markets from which there is a chance they would otherwise be excluded is not on its face anticompetitive.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

HN35[] Sherman Act, Claims

Reverse-payment settlements (where the patentee pays the alleged infringer rather than the other way around) trigger § 1 of the Sherman Act, 15 U.S.C.S. § 1, antitrust scrutiny and rule of reason analysis.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN36[] Inequitable Conduct, Anticompetitive Conduct

Ordinarily, a patent holder has some entitlement to monopoly profits for the duration of its patent and consumers benefit from a deal to allow a competitor to enter the market before the patent expires.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN37[] Inequitable Conduct, Anticompetitive Conduct

A reverse payment from a patentee to an alleged infringer, where large and unjustified, can bring with it the risk of significant anticompetitive effects.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

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

HN38[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Although scrutiny of such settlements can lead to time-consuming, complex, and expensive litigation, the Supreme Court has rejected a blanket rule immunizing reverse-payment patent-infringement settlements from antitrust scrutiny. Procompetitive justifications (e.g., the avoidance of litigation costs) can be examined and accounted for as part of the rule of reason analysis. And fears that it would be expensive and time-consuming to assess the value of the underlying patent claim are mitigated by the fact that it is normally not necessary to litigate patent validity to answer the antitrust question (unless, perhaps, to determine whether the patent litigation is a sham). The size of the reverse payment can serve as a proxy for the patent's weakness without forcing a court to conduct a detailed exploration of the validity of the patent itself. A rule of reason analysis would not be cumbersome when the size of the payment suggests that the patentee possessed the market power it needed to bring about anticompetitive harm.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN39[] **Inequitable Conduct, Anticompetitive Conduct**

To avoid deterring reverse-payment patent infringement suit settlements because of exposure to antitrust liability, the Supreme Court has noted an important exception. Parties remain free to settle on other terms—for example, by allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN40[] **Inequitable Conduct, Anticompetitive Conduct**

FTC v. Actavis, Inc. identifies a settlement that allows early entry but without the patentee paying a competitor to stay out of the market as one type of agreement that is not an antitrust problem. This makes sense because such settlements increase competition by cutting monopolies short.

Patent Law > Remedies > Damages > Measure of Damages

HN41[] **Damages, Measure of Damages**

When considering whether a settlement of a patent infringement suit constitutes a large and unjustified reverse payment, the various payments cannot be examined in isolation.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN42[] **Inequitable Conduct, Anticompetitive Conduct**

When both licenses are permissible patent infringement suit settlement terms under FTC v. Actavis, Inc., the simultaneous grant of both does not render either license unlawful. Actavis does not provide a legal basis for restricting negotiated settlement terms where they do not restrain competition.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN43[] **Inequitable Conduct, Anticompetitive Conduct**

It is not unlawful to enter into agreements that have been explicitly recognized by the Supreme Court as not a matter for antitrust concern, that implement a right included in the bundle of rights awarded to patent holders, *35 U.S.C.S. § 261*; and that play an important role in making global patent settlement agreements easier.

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN44[] **Clayton Act, Claims**

Sections 4 and 16 of the Clayton Act provide for private rights of action (for damages and injunctive relief, respectively) in antitrust cases. *15 U.S.C.S. §§ 15*, *26*. Both require that plaintiffs suffer an antitrust injury. Antitrust injury analysis focuses on the type of injury claimed by a particular plaintiff and demands that it be an antitrust injury. An antitrust injury is any injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury must be the type of loss that the claimed violations would be likely to cause. The injury requirement applies to Sherman Act *§ 1* and *§ 2*, *15 U.S.C.S. §§ 1* and *2*, claims. The antitrust injury requirement comes from § 4 of the Clayton Act, which is what grants plaintiffs the right to bring a private right of action under both *§ 1* and *§ 2* of the Sherman Act.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN45[] **Standing, Requirements**

Antitrust injury analysis involves a two-step causation inquiry. After delineating the type of interests protected by the antitrust laws, the court must determine whether the violation was the cause-in-fact of the injury: that but for the violation, the injury would not have occurred. The illegality need only be a material cause of the injury and plaintiffs need not prove that there was no other potential cause of the injury. The injury must flow directly from the anticompetitive aspect of the practice under scrutiny.

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

HN46[] **Complaints, Requirements for Complaint**

There is no hard-and-fast rule against deciding the question of antitrust injury at the pleading stage. Dismissal is appropriate if the claim rests at bottom on some abstract conception or speculative measure of harm.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN47[] **Standing, Requirements**

Higher prices are one of the principles vices proscribed by the antitrust laws.

Antitrust & Trade Law > Sherman Act > Claims

HN48[] **Sherman Act, Claims**

Indirect and speculative injuries cannot support a private antitrust lawsuit. In order to allege cause-in-fact, plaintiffs must allege that the injury would not have occurred absent the alleged unlawful conduct.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN49[] **Scope, Monopolization Offenses**

AS 45.50.471 does not contain the words anticompetitive, monopoly, or unconscionable, and pertains to deceptive acts and practices more akin to trademark infringement than antitrust violations. Alaska's antitrust laws are codified elsewhere.

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

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

HN50[] **Motions to Dismiss, Failure to State Claim**

Plaintiffs do not have to cite the right laws in their complaint. A complaint should limn the grievance and demand relief and need not identify the law on which the claim rests. Plaintiffs do not need to plead legal theories. What matters is whether they have stated a claim upon which relief can be granted and provided defendants with fair notice of what the claim is and the grounds upon which it rests. *Fed. R. Civ. P. 8(a)*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Contracts Law > Defenses > Illegal Bargains

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

HN51[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

The Federal Trade Commission Act is aimed at all the familiar methods of law violation which prosecutions under the Sherman Act have disclosed, but also has a broader purpose. There are unfair or unconscionable acts that are not contracts or combinations in restraint of trade or unlawful monopolies.

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

HN52[] **Complaints, Requirements for Complaint**

A defendant is entitled to fair notice of what the claim is and the grounds upon which it rests. *Fed. R. Civ. P. 8(a)*.

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

HN53[] **Complaints, Requirements for Complaint**

A complaint need only limn the grievance and demand relief. It does not have to identify the law on which the claim rests. Plaintiffs do not need to plead legal theories.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Constitutional Law > Bill of Rights > State Application

HN54[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Noerr-Pennington may affect the viability of state-law claims because it is rooted in the *First Amendment*. The *First Amendment* applies to the states through the *Fourteenth Amendment*.

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

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

HN55[] **Trade Practices & Unfair Competition, State Regulation**

AS 45.50.471 of the Alaska Unfair Trade Practices and Consumer Act prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce. AS 45.50.471. AS 45.50.531 provides a private right of action for acts declared unlawful under § 45.50.471.

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN56[] **Standing, Clayton Act**

Only buyers that purchase products directly from the antitrust violator may bring claims against that party for damages. Some states have enacted Illinois Brick repealer statutes that allow indirect purchasers to sue for money damages. Alaska's repealer statute only partially repealed Illinois Brick. AS 45.50.577(i).

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN57[] **Remedies, Damages**

The attorney general is the only person who can bring an antitrust claim for damages on behalf of indirect purchasers under Alaska's Restraint of Trade Act. AS 45.50.562-45.50.570, 45.50.577(i).

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

HN58[] **Attempts to Monopolize, Elements**

No court has construed Alaska's consumer protection statute to permit claims based on alleged antitrust and monopolization conduct by indirect purchasers. Doing so would allow plaintiffs to circumvent Alaska's partial indirect purchaser bar by proceeding under Alaska's more general consumer protection statute.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

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

HN59[] **Purchasers, Indirect Purchasers**

The better reading of the Alaska Unfair Trade Practices and Consumer Act, considered in conjunction with Alaska's Restraint of Trade Act, is that it precludes plaintiffs from bringing claims as indirect purchasers even under a non-antitrust unfair practices theory.

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

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

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

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

HN60[] **Trade Practices & Unfair Competition, State Regulation**

California's Unfair Competition Law defines unfair competition to include unlawful, unfair or fraudulent business acts or practices and unfair, deceptive, untrue or misleading advertising. Cal. Bus. & Prof. Code § 17200.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Contracts Law > Remedies > Restitution

HN61[] **Types of Contracts, Quasi Contracts**

California law does not recognize an independent cause of action for unjust enrichment. Unjust enrichment is not a cause of action, just a restitution claim.

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

HN62[] **Deceptive & Unfair Trade Practices, State Regulation**

In addition to borrowing violations from other laws, California's Unfair Competition Law provides its own unique cause of action. A practice may be deemed unfair even if not specifically proscribed by some other law.

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

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

HN63[] **Trade Practices & Unfair Competition, State Regulation**

The District of Columbia's Consumer Protection Act makes it unlawful for any person to engage in an unfair or deceptive trade practice. D.C. Code Ann. § 28-3904. It was designed to police trade practices arising only out of consumer-merchant relationships, and covers only the ultimate retail transaction between the final distributor and the individual member of the consuming public.

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

HN64[] **Deceptive & Unfair Trade Practices, State Regulation**

The District of Columbia Code defines a consumer as any person who does or would purchase or receive consumer goods or services, including as co-obligor or surety, or does or would otherwise provide the economic demand for a trade practice. D.C. Code Ann. § 28-3901(a)(2)(A).

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

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

HN65[] **Trade Practices & Unfair Competition, State Regulation**

Georgia's Fair Business Practices Act prohibits unfair or deceptive acts or practices in the conduct of consumer transactions. *O.C.G.A. § 10-1-393*. In order to bring a suit under that statute, plaintiffs have to provide defendants with a written demand identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered at least thirty days before filing suit, but not if the prospective respondent does not maintain a place of business or does not keep assets within the state. *O.C.G.A. § 10-1-399(b)*.

Governments > Legislation > Interpretation

HN66[] Legislation, Interpretation

The notice provision of the Georgia Fair Business Practices Act is to be liberally construed.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

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

HN67[] Remedies, Damages

The Illinois Consumer Fraud and Deceptive Business Practices Act declares unlawful all unfair methods of competition and unfair or deceptive acts or practices, in the conduct of any trade or commerce whether any person has in fact been misled, deceived or damaged thereby. *815 ILCS 505/2*. Illinois has adopted an repealer statute that permits indirect purchasers to sue for antitrust money damages. *740 ILCS 10/7(2)*. However, that statute prohibits class action antitrust claims brought by indirect purchasers. *740 ILCS 10/7(2)*.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

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

HN68[] Purchasers, Indirect Purchasers

Even though in some states where Illinois Brick has been repealed, some courts have allowed suits brought by indirect purchasers under consumer protection statutes based on conduct that might also qualify as a violation of that state's antitrust statutes, the law in Illinois is different. Permitting plaintiffs to bring a class action based on conduct that more closely approximates an antitrust violation under a broader consumer protection statute would allow them to make an end run around the Illinois legislature's determination that such actions should not be permitted. Plaintiffs cannot assert what are essentially antitrust claims in the guise of a claim under the Illinois consumer protection statute, especially when doing so allows them to avoid a provision of Illinois law that would otherwise bar this particular type of suit. *740 ILCS 10/7(2)*.

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

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

HN69[] Trade Practices & Unfair Competition, State Regulation

Much like Georgia's statute, the Nevada Deceptive Trade Practices Act mandates that any person bringing an action under the statute shall, simultaneously with the filing of the complaint with the court, mail a copy of the complaint to the Attorney General. *Nev. Rev. Stat. Ann. § 598A.210(3)*.

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

HN70[] Motions to Dismiss, Failure to State Claim

When opposing a *Fed. R. Civ. P. 12(b)(6)* motion, plaintiffs may submit materials outside the pleadings to illustrate the facts the plaintiff expects to be able to prove, so long as those new elaborations are consistent with the complaint.

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

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

HN71[] Trade Practices & Unfair Competition, State Regulation

New Hampshire's Deceptive Trade Practices Act declares unlawful any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state. *RSA 358-A:2*. The words "trade" and "commerce" include the sale of any thing of value, wherever situate, and any trade or commerce directly or indirectly affecting the people of *New Hampshire. RSA 358-A:1(II)*.

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

HN72[] Deceptive & Unfair Trade Practices, State Regulation

The New Hampshire Deceptive Trade Practices Act is phrased broadly to include the sale of goods no matter where those goods are located and includes within its purview commerce that indirectly affects the people of New Hampshire. The New Hampshire Supreme Court has declined to prohibit the bringing of antitrust-type actions under New Hampshire's Deceptive Trade Practices Act and has found that the legislature intended a broad sweep. The offending conduct does not need to occur within New Hampshire so long as it had an effect on the people of that state. Even if New Hampshire's statute requires that the offending conduct take place within New Hampshire's borders, it is enough to allege that the defendants introduced overpriced products into New Hampshire markets.

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

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

HN73[] Trade Practices & Unfair Competition, State Regulation

North Carolina's Unfair Trade and Business Practices Act declares unlawful all unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce. *N.C. Gen. Stat. Ann. § 75-*

1.1. The Act addresses primarily local concerns. Actions that have only an incidental local effect fall outside its reach.

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

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

HN74[] Trade Practices & Unfair Competition, State Regulation

The North Carolina Unfair Trade and Business Practices Act does not require substantial effects on intrastate commerce. *N.C. Gen. Stat. Ann. § 75-1.1*. It is enough to plead intrastate effects that caused supracompetitive process in the relevant jurisdiction.

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

HN75[] Deceptive & Unfair Trade Practices, State Regulation

Utah's Consumer Sales Practices Act declares unlawful any unconscionable act or practice by a supplier in connection with a consumer transaction whether it occurs before, during, or after the transaction. *Utah Code Ann. § 13-11-5(1)*. In Utah, the term "unconscionable" defies precise definition, and Utah courts assess the circumstances of each particular case in light of the twofold purpose of the doctrine, prevention of oppression and of unfair surprise.

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

HN76[] Deceptive & Unfair Trade Practices, State Regulation

In the few cases where Utah courts have interpreted the Utah Consumer Sales Practices Act, they have consistently looked to contract principles to define its terms. Plaintiffs generally must allege gross bargaining power inequality or oppressive contractual terms.

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

HN77[] Deceptive & Unfair Trade Practices, State Regulation

Utah's Consumer Sales Practices Act is not limited to contract disputes, but it is limited to conduct that is unconscionable.

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

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

HN78[] Trade Practices & Unfair Competition, State Regulation

West Virginia's Consumer Credit and Protection Act declares unlawful unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. *W. Va. Code Ann. § 46A-6-104*. At least when consumers allege that a purchase was made because of a misrepresentation, the Act does not extend to prescription drug purchases, because physicians protect consumers when they intervene in that decision-making process.

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Judges: Manish S. Shah, United States District Judge.

Opinion by: Manish S. Shah

Opinion

[*819] **MEMORANDUM OPINION AND ORDER**

Defendant AbbVie Inc. makes a lot of money selling the prescription drug Humira. One reason for Humira's profitability is that AbbVie's Humira-related patents (more than a hundred) make it difficult (if not impossible) to sell competing drugs. Another reason may be that the Food and Drug Administration's lengthy approval process imposes additional costs on competitors hoping to reach the market. Still a third reason might be the expensive, complicated, and contentious patent infringement litigation that often follows on the heels of FDA approval.

Plaintiffs, indirect purchasers of Humira, allege a different reason: AbbVie cornered the market for Humira (and other biosimilar drugs) through anticompetitive conduct. They say that AbbVie (and its subsidiary, AbbVie Biotechnology, Ltd.) applied for, obtained, and asserted patents to gain the power it needed to elbow its competitors (the other defendants in this case, Amgen, Inc., Samsung Bioepis Co., Ltd., and Sandoz, Inc.) out of the Humira market in **[**7]** the United States (in violation of *§ 2 of the Sherman Act*) and then entered into agreements with those competitors to keep their competing drugs off the market (in violation of *§ 1*). In return, AbbVie gave those competitors permission to market their drugs in Europe (where AbbVie also possessed an imposing patent portfolio that blocked competition).

The legal and regulatory backdrop for patented biologic drugs, together with a well-resourced litigation strategy, gave AbbVie the ability to maintain control over Humira. Plaintiffs say that AbbVie's plan to extend its power over Humira amounts to a scheme to violate federal and state antitrust laws. But what plaintiffs describe is not an antitrust violation. AbbVie has exploited advantages conferred on it through lawful practices and to the extent this has kept prices high for Humira, existing antitrust doctrine does not prohibit it. Much of AbbVie's petitioning was protected by the *Noerr-Pennington* doctrine, and plaintiffs' theory of antitrust injury is too speculative. Because the federal antitrust claims fail, the state antitrust claims fail, too. And although the complaint is lengthy and detailed, its application to state statutes that prohibit **[**8]** unfair and unconscionable conduct falls short. The complaint is dismissed without prejudice.

I. Legal Standards

HN1[] A complaint must contain a short and plain statement that plausibly suggests a right to relief. *Ashcroft v. Iqbal, 556 U.S. 662, 677-78, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; *Fed. R. Civ. P. 8(a)(2)*. In ruling on a motion to dismiss, a court must accept all factual allegations in the complaint as true and draw all reasonable inferences in plaintiffs' favor, but need not accept legal conclusions, bare assertions, or conclusory allegations. *Iqbal, 556 U.S. at 680-82*. The complaint does not need to include detailed factual allegations, but it must provide more than labels and formulaic recitations of the elements of the cause of action, *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, and must "present a story that holds together." *Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. 2010)*. If a complaint pleads facts that are "merely consistent with" liability, it "stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal, 556 U.S. at 678*.

[*820] II. Facts

A. Humira and the '382 Patent

Humira is an anti-inflammatory biologic (a drug derived from living organisms that helps slow down overactive immune systems). [109] ¶¶ 2, 32, 77.[1] Originally developed for rheumatoid arthritis, Humira is now used to treat a variety of autoimmune disorders ranging from Crohn's disease to plaque psoriasis. *Id.* ¶ 81.

Humira generated **[**9]** almost $20 billion in worldwide sales in 2018 alone and more than $56 billion in the United States between 2012 and 2018, *id.* ¶ 84, making it the best-selling drug in the country. *Id.* ¶¶ 2, 84. Its sales dollars come not from volume, but from price: a one-month prescription of Humira injections costs about $4,500. *See id.* ¶ 84.

Humira's active ingredient is an antibody called "adalimumab." *See id.* ¶¶ 77-78. Abbott Laboratories bought the patent for adalimumab (U.S. Patent No. 6,090,382, originally assigned to BASF AG in 2000) and used it to launch a new drug—Humira—in 2002. *Id.* ¶¶ 78-80. Abbott sold Humira throughout the world for eleven years before passing the patent off to its spin-off biologic and branded drug business, AbbVie, Inc. *Id.* ¶ 87. The '382 patent expired on December 31, 2016. *Id.* ¶ 78.

The plaintiffs in this lawsuit—indirect purchasers of Humira, including the City of Baltimore, *id.* ¶ 13, an insurance trust fund for Miami Police Department officers, *id.* ¶ 14, and a Minnesota-based employee welfare benefit plan for plumbers, pipefitters, and other workers in the pipe trades industries, *id.* ¶ 15, among others—say that, in the months and years leading up to the expiration of the '382 patent, AbbVie created a thicket **[**10]** of intellectual property protection so dense that it prevented would-be challengers from entering the market with cheaper biosimilar alternatives.[2] *See id.* ¶¶ 4-9. Then, plaintiffs say, defendants AbbVie Inc. and AbbVie Biotechnology Ltd.

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[1] Bracketed numbers refer to entries on the district court docket. The facts are taken from the consolidated class action complaint, [109], plaintiffs' opposition to defendants' motions to dismiss, [144], and, where noted, from sources outside of those documents through judicial notice.

[2] Biosimilars are to biologics what generics are to small molecule drugs. *See* [109] ¶ 47. Small molecule drugs are those made from chemical processes. *See id.* ¶¶ 32, 47.

used that intellectual property as leverage during negotiations with the other defendants (Amgen, Inc., Samsung Bioepis Co., Ltd., and Sandoz, Inc.[3]), forcing them to agree to delay their market entry in return for licensing agreements that cut through AbbVie's patent thicket. *Id.* ¶¶ 4, 7.

B. The Patent System

HN2[] Anyone who invents or discovers any new and useful machine, manufacture, or composition of matter (e.g., a new drug) may apply for a patent from the United States Patent and Trademark Office. *See* 35 U.S.C. § 101. Once issued, the patent comes with an exclusive right to make, use, and sell the invention in the United States. 35 U.S.C. § 154(a). This "limited monopoly," *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901, 134 S. Ct. 2120, 189 L. Ed. 2d 37 (2014), lasts for twenty years. 35 U.S.C. § 154(a)(2). *But see* P. Areeda & H. Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application § 704a (4th ed. 2019) (Areeda & Hovenkamp) (a patent is more akin to a property right than a monopoly because the "great majority" of patents do not **[*821]** confer sufficient market **[**11]** power to dominate a properly defined market).

HN3[] Novel inventions are those not disclosed in the prior art. 35 U.S.C. § 102(a). The prior art includes anything that has already been patented or described in a printed publication, or that is in public use, on sale to the public, or otherwise available to the public. *Id.* The patent application process is nonadversarial and relies on applicants to abide by their duty of disclosure, candor, and good faith. 37 C.F.R. § 1.56(a); *Kingsland v. Dorsey*, 338 U.S. 318, 319, 70 S. Ct. 123, 94 L. Ed. 123, 1950 Dec. Comm'r Pat. 591 (1949); *Elkay Mfg. Co. v. Ebco Mfg. Co.*, No. 93 C 5106, 1995 U.S. Dist. LEXIS 473, 1995 WL 389822, at *11 (N.D. Ill. Feb. 15, 1995). *See also* [109] ¶ 58. If the applicant does not disclose (and the examiner does not find) all of the pertinent prior art, patents may issue to underserving inventions.

HN4[] As prior art accumulates, applicants face an increasingly crowded space. There are, however, ways to navigate around some of that prior art. For instance, inventors are granted a one-year grace period to file their patent applications after any public disclosure of their own invention. 35 U.S.C. § 102(b)(1). Continuation applications offer another work around: any applicant with a pending application may later tack on new, related claims.[4] 35 U.S.C. § 120; 37 C.F.R. § 1.78(d). If the new claims are sufficiently related to the original claim, they are backdated and do not have to account for any prior art developed after the original application's **[**12]** filing date. *Id. See also* [109] ¶¶ 55-56. The catch is that if the new claims are simple, obvious variations on the invention described in the original application, the applicant "generally must" ([109] ¶ 56) file a terminal disclaimer (*see* 37 C.F.R. § 1.321(b)) relinquishing any portion of the new claim's term that would extend beyond the expiration date of the patent that is the subject of the pending application. [109] ¶ 56. In other words, if the applicant wants to use the original filing date for a simple and obvious variation on the original invention, the applicant has to accept the original expiration date, too. *See id.*

C. The Food and Drug Administration's Approval Process

HN6[] Manufacturers that want to bring a new drug (patented or not) to market must first receive approval from the Food and Drug Administration. *See* 21 U.S.C. § 355; 42 U.S.C. § 262(a). Different kinds of drugs require different kinds of approvals. *See id.* The process for biologic drugs starts when a manufacturer submits a "Biologic License Application" demonstrating that its new drug is (among other things) "safe, pure, and potent." 42 U.S.C. §

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[3] Fresenius Kabi USA LLC was originally named as a defendant but was dismissed shortly before the filing of the motion to dismiss. *See* [120].

[4] **HN5**[] The claims "define the exact boundaries beyond which no member of the public may pass without invading the exclusive rights of the patentee." *Nat'l Carbon Co. v. W. Shade Cloth Co.*, 93 F.2d 94, 96 (7th Cir. 1937). Claims force the patentee to "define precisely what his invention is." *White v. Dunbar*, 119 U.S. 47, 52, 7 S. Ct. 72, 30 L. Ed. 303, 1886 Dec. Comm'r Pat. 494 (1886).

262(a)(2)(C)(i). *See also* [109] ¶ 35. If the application is approved, the manufacturer enjoys a period of exclusivity during which it is the only **[**13]** entity that can market the drug for the approved purpose. 42 U.S.C. § 262(k)(7). *See also* [109] ¶ 34. Manufacturers often charge supracompetitive prices during this period in order to recoup their research and development costs and obtain a profit. [109] ¶ 34.

HN7[] Eventually, that exclusivity ends. One way it can end is when a different manufacturer designs a biosimilar and submits (and has approved) an "Abbreviated Biologic License Application." 42 U.S.C. §§ 262(k)(2)(A), (k)(6). *See also* [109] ¶¶ 39-40. Abbreviated applications piggyback on existing approvals by identifying an approved reference biologic and demonstrating **[*822]** that there is no "clinically meaningful difference" between the reference biologic and the proposed biosimilar. 42 U.S.C. §§ 262(k)(2)(B), (k)(4). *See also* [109] ¶ 39. Biosimilar manufacturers have to wait four years from the date the reference biologic was approved before submitting an abbreviated application, and the FDA has to wait twelve years from that same date before approving any abbreviated applications. 42 U.S.C. §§ 262(k)(7)(A), (B). *See also* [109] ¶ 41. Once approved, the biosimilar can be marketed to the public—assuming the drug is not also patented. [109] ¶ 41. Prices tend to drop shortly after a new biosimilar is introduced. *See id.* ¶¶ 43-45.

HN8[] Often, the drug is **[**14]** patented. The regulatory framework sets out a five-step series of required prelitigation exchanges (sometimes called the "patent dance") aimed at resolving patent disputes between the biosimilar manufacturer (the "applicant") and the reference biologic's manufacturer (the "sponsor"). 42 U.S.C. § 262(l). *See also* [109] ¶ 61. Once the FDA accepts the application for review, the applicant is required to send information about its biosimilar to the sponsor (step one), *see* 42 U.S.C. § 262(l)(2), the sponsor must send back a list of the patents (if any) that it believes would be infringed if the biosimilar was put on the market (step two), *see* 42 U.S.C. § 262(l)(3)(A), the applicant explains why it believes those patents are invalid, unenforceable, or would not be infringed (step three), *see* 42 U.S.C. § 262(l)(3)(B), and the sponsor responds (step four). *See* 42 U.S.C. § 262(l)(3)(C). *See also* [109] ¶¶ 62-66. At the fifth step the applicant tells the sponsor the number of patents it would like test in litigation, and then both sides simultaneously exchange a list of patents. *See* 42 U.S.C. § 262(l)(5); [109] ¶ 67. The sponsor then must initiate a lawsuit to determine the validity of the patents that appear on both lists (which, at most, includes double the number identified by the applicant, assuming no overlap). *See* 42 U.S.C. § 262(l)(6) **[**15]** ; [109] ¶¶ 65-67.

HN9[] At that point, the applicant has to decide whether to launch "at risk" by putting its biosimilar on the market notwithstanding the prospect of a large damages award against it in patent litigation. Unlike the *Hatch-Waxman Act* (which governs small molecule drugs and imposes an automatic 30-month stay on FDA approval whenever a brand-name manufacturer files an infringement lawsuit (and meets other prerequisites), *see* 21 U.S.C. § 355(j)(5)(B)(iii)), the *Biologics Price Competition and Innovation Act* allows the FDA to approve an abbreviated biologic application despite a pending infringement suit and only requires the applicant to give the sponsor 180-days' notice before launching. 42 U.S.C. § 262(l)(8)(A). *See also* [109] ¶¶ 69-70. But even if the biosimilar manufacturer decides to launch at risk, the sponsor can still file a second lawsuit seeking a preliminary injunction (sometimes referred to as "second phase" litigation). 42 U.S.C. § 262(l)(8)(B).

D. AbbVie's Patents

In the lead up to the expiration of the '382 patent, AbbVie started applying for Humira-related patents. [109] ¶ 90. It sought patents on not only the many uses of Humira but also the process for manufacturing it and the ingredients and formulations that AbbVie anticipated its competition might **[**16]** seek to employ. *Id.* One estimate suggests that AbbVie filed a total of 247 patent applications related to Humira and obtained 132 patents (a batting average of .534). *Id.* ¶ 99. More than 90% of those patents were issued in 2014 or later, despite the fact that Humira was first marketed in 2002. *Id.* ¶ 4.

In the process, AbbVie relied heavily on continuation applications. *See id.* ¶¶ 99-100. **[*823]** For instance, AbbVie used one application from 2002 (U.S. Patent Application 10/22,140) to serve as the basis for twenty-two continuation applications, all of which would have been barred by prior art but-for their ability to relate back. *Id.* ¶¶ 102-104. AbbVie's 100-plus Humira-related patents can be traced back to twenty root patents, forming twenty patent trees. *Id.* ¶¶ 130-131. By targeting the root patents that lie at the base of these trees, plaintiffs say they can quickly identify whole swaths of AbbVie's IP portfolio that should not have issued. *See id.* ¶¶ 107, 131, 132.

For instance, fifteen of those trees are rooted in formulation and manufacturing process patents that, together, serve as the source of eighty-four of AbbVie's Humira-related patents. *Id.* ¶ 131. Twelve of those fifteen root patents **[**17]** were filed after 2006. *Id.* ¶ 132. Humira launched on New Year's eve of 2002, meaning AbbVie had until the first day of 2004 (the end of the one-year grace period) to apply for any patent describing a formulation or manufacturing process that was used to make Humira when it launched. *Id.* ¶¶ 126-128; *35 U.S.C. § 102(a)(1)*. As a result, the twelve patents filed after 2006 (and the nearly sixty patents that were issued as a result of continuation applications based on those underlying patents) are invalid because they describe inventions that were not novel when the patents issued. [109] ¶¶ 132-140.

Plaintiffs add that any formulation patent that describes a variant of Humira, (i.e., one that does not describe Humira as it was approved by the FDA) should not be used to block biosimilars of Humira. *Id.* ¶ 129. And, plaintiffs reason, any manufacturing process that was not used to make Humira when it launched must not be necessary to make Humira, meaning it should be no bar to making a biosimilar. *Id.*

AbbVie's wrongdoing was not limited to its continuation applications. For instance, AbbVie withheld information from the United States Patent and Trademark Office, such as the fact that it had already been using a **[**18]** way to make and sell a certain product for several years when it told the Patent and Trademark Office that the method was not obvious. *Id.* ¶ 114. And while prosecuting another patent, AbbVie filed a declaration affirming that a certain process was unexpected to be successful despite earlier disclosures that suggested the process was not only likely to be successful but was in fact the standard method for achieving that result. *Id.* ¶¶ 115-120. Some of AbbVie's other patents are invalid because they claim methods that were already in the prior art. *Id.* ¶¶ 109-113.

When the Patent Trial and Appeal Board heard challenges to five of AbbVie's Humira-related patents, it ruled that three were invalid. [109] ¶ 108. AbbVie terminated the other two before the board reached any final determination. *Id.*[5]

At the same time that AbbVie was obtaining these patents, its executives were discussing AbbVie's broader IP strategy **[*824]** with investors. For instance, in 2014, AbbVie's CFO said that AbbVie was "obviously not very specific about what" it was putting into its "very robust collection of IP" because "with a product as important and as attractive as Humira, you do everything you can on the IP **[**19]** front to ensure that you've protected it to the best you can." *Id.* ¶ 90. He added that the bulk of AbbVie's IP strategy was to "make it more difficult for a biosimilar to follow behind." *Id.* In an email to investors, AbbVie's CEO noted that market entry for any Humira biosimilars would likely be delayed because patent litigation takes more than four years and at-risk launches are rare. *Id.* ¶ 94.

E. The Other Defendants' Applications for Biosimilars and the U.S. Market Settlements

As AbbVie pursued new patents, its competitors applied for FDA approval to manufacture biosimilars. Amgen filed the first abbreviated biologic application for its biosimilar, Amjevita, in November of 2015. [109] ¶ 142. During the patent dance, AbbVie identified sixty-six patents that it believed Amjevita would infringe. *Id.* ¶ 143. Amgen responded by saying that it believed sixty-five of those patents (all but the original '382 patent) were invalid, and that it did not plan to market Amjevita until the '382 patent expired. *See id.* ¶¶ 140-146. By August of 2016, Amgen

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[5] In its motion to dismiss, AbbVie adds that, on thirteen occasions that plaintiffs neglect to mention, the Patent Trial and Appeal Board declined to initiate *inter partes* review of AbbVie's patents, finding that there was no reasonable likelihood that the challengers of AbbVie's patents (among them defendants Amgen and Sandoz and nondefendant Coherus) would succeed. [124] at 17-18. Plaintiffs do not object to AbbVie's request to take judicial notice of these decisions. [144]. The decisions are public court documents and beyond reasonable dispute. *Fed. R. Evid. 201(b)*; *White v. Keely, 814 F.3d 883, 886 (7th Cir. 2016)*; *Finjan, Inc. v. Blue Coat Sys., Inc.*, 2016 WL 7732542, at *1 n.1 (N.D. Cal. July 25, 2016); [124-1]; [124-2]; [124-3]; [124-4]; [124-5]; [124-6]; [124-7]; [124-8]; [124-9]; [124-10]; [124-11]; [124-12]; [124-13]. I take notice of them.

and AbbVie had finished the patent dance and AbbVie had filed suit. *Id.* ¶ 148. One month later, the FDA approved Amgen's abbreviated application to market Amjevita. ***[**20]*** *Id.* ¶ 149. On December 31, 2016, the '382 patent expired. *Id.* ¶ 78. Amgen did not launch at risk. *See id.* ¶¶ 149-51.

One year into litigation, in the fall of 2017, Amgen and AbbVie settled. *Id.* ¶ 151. At the time, a bench trial was scheduled to start in the fall of 2019. *Id.* ¶ 150. Any appeal would have taken (on average) at least another year to resolve.[6] *See* [125] at 3 n.3. The terms of the settlement are confidential, but AbbVie's press release made clear that Amgen had agreed to drop its patent challenges and delay Amjevita's market entry until January of 2023. *Id.* ¶ 151.[7]

AbbVie reached similar settlement agreements with eight other manufacturers seeking to market Humira biosimilars, including defendants Samsung Bioepis and Sandoz and nondefendants Mylan, Fresenius, Momenta, Pfizer, Coherus, and Boehringer. [109] ¶¶ 157-184. Each agreed to U.S. market entry dates ranging from June 30, 2023 (Samsung Bioepis) to December 15, 2023 (Coherus). *Id.* ¶¶ 157-184, 211. AbbVie reached these settlements at different stages of its disputes with these companies. It settled with Samsung Bioepis before that company even filed its abbreviated application, *id.* ¶ 157, with Sandoz after AbbVie had initiated **[**21]** litigation but before Sandoz had responded to the complaint, *id.* ¶ 170, and with Boehringer only after it had responded to AbbVie's **[*825]** infringement complaint and asserted counterclaims seeking to invalidate many of AbbVie's patents. *Id.* ¶¶ 183-84. In the process, AbbVie occasionally asserted patents for which there was not even an arguable claim of infringement. *Id.* ¶ 167. Only four of the biosimilar manufacturers that settled with AbbVie (Amgen, Samsung Bioepis, Sandoz, and Boehringer) ever received FDA approval to market their biosimilars. *Id.* ¶ 211. Only two (Amgen and Boehringer) received approval before they had entered into settlement agreements with AbbVie. *Id.*

F. The European Market Settlements

At the same time, in Europe, plaintiffs say that AbbVie took advantage of a more fractured patent system (and a type of European patent application similar to the continuation application, known as a "divisional application") to pressure the biosimilar defendants into settling there, too. *See id.* ¶¶ 185-89. AbbVie's strategy in Europe was to abandon or withdraw patents as soon as they were challenged in one jurisdiction and then use its pending applications in other jurisdictions as the basis **[**22]** for divisional applications that covered much the same material it had just abandoned. *Id.* ¶¶ 185-90.

For instance, when Samsung Bioepis and another company challenged two of AbbVie's patents in the U.K., AbbVie decided to abandon those patents rather than risk an adverse judicial verdict that could have been used to preclusive effect elsewhere. [109] ¶¶ 191-192. The judge issued an order finding that AbbVie "made every effort to shield the claims of its patents from scrutiny." *Id.* ¶ 199. AbbVie then turned around and filed divisional patents in other countries covering much the same subject matter as that in the patents it had just abandoned. *Id.* ¶ 198. As a result, AbbVie was able to extend the life of its patent protection for Humira in Europe.

The settlements AbbVie entered into in the U.S. included European market entry dates. *See id.* ¶ 203. AbbVie's agreement with Amgen allowed Amgen to enter the European market in October of 2018—more than four years before Amgen's January 2023 date for the U.S. market. *Id.* Samsung Bioepis's and Sandoz's agreements contained

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[6] Plaintiffs do not object to judicial notice of the fact that patent appeals, on average, take more than one year to complete. *See* [125] at 3 n.3; U.S. Court of Appeals for the Federal Circuit, Median Disposition Time for Cases Decided by Merits Panels, 2009-2018, available at http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/06_Med_Disp_Time_MERITS_table_-_Final.pdf (last visited June 4, 2020); [144].

[7] The complaint alleges that AbbVie promised to not let any other manufacturer enter the market until the end of June 2023, ensuring Amgen a five-month period of (semi) exclusivity worth nearly a billion dollars. [109] ¶¶ 151, 153, 154. AbbVie filed under seal copies of its settlement agreements with Amgen, [124-14]; [124-15]; [126-1]; [126-2], and, in response, plaintiffs dropped their claims that Amgen's *de facto* five months of exclusivity constituted a reverse payment. [144] at 46 n.15.

the same European early entry date (October 16, 2018). *Id.* That date coincided with the expiration of AbbVie's European **[**23]** patent for adalimumab. *Id.*

The early European entry dates were extremely valuable to Amgen, Samsung Bioepis, and Sandoz. *Id.* ¶ 205. And plaintiffs say that AbbVie used those early European entry dates as bargaining chips during negotiations over the entry dates for the U.S. market, inducing Amgen, Samsung Bioepis, and Sandoz to delay their U.S. market entry by offering the *quid pro quo* of earlier entry dates in Europe. [109] ¶ 206. AbbVie's motive was to keep prices in the U.S. artificially high for as long as possible. *Id.* ¶ 207. It succeeded: the cost of Humira to treat arthritis in the U.S. remains 50% more expensive than the cost of the same treatment in Spain (and 155% more expensive than in Switzerland). *Id.* ¶ 207.

G. The Claims in the Consolidated Complaint

Plaintiffs bring class action claims on behalf of two representative classes. The first seeks injunctive relief and is defined as, "[a]ll entities in the United States, the District of Columbia, and Puerto Rico who indirectly purchased, paid and/or provided reimbursement for some or all of the purchase price of Humira, other than for resale, from December 31, 2016, through the present." [109] ¶ 224.

The second seeks damages and **[**24]** is defined as, "[a]ll entities who indirectly purchased, paid and/or provided reimbursement **[*826]** for some or all of the purchase price for Humira, other than for resale," in thirty-one states and the District of Columbia, "from December 31, 2016, through the present, for consumption by their members, employees, insureds, participants, or beneficiaries." *Id.* ¶ 225.

The complaint has seven counts, seeking injunctive relief under federal law and damages under state law. Count I asserts a pay-for-delay theory of liability under *§ 1 of the Sherman Act* against all defendants (i.e., AbbVie, Inc., AbbVie Biotechnology, Ltd., Amgen, Inc., Samsung Bioepis Co., Ltd., and Sandoz, Inc.), [109] ¶¶ 261-68, Count III asserts a market-allocation-agreement theory of liability under *§ 1 of the Sherman Act* against all defendants, *id.* ¶¶ 279-85, and Count V asserts a violation of *§ 2 of the Sherman Act* against AbbVie. *Id.* ¶¶ 295-300. Each federal antitrust claim comes with its state-law analog: Count II asserts a pay-for-delay theory of liability under state antitrust laws (and consumer protection laws that prohibit anticompetitive conduct) against all defendants, *id.* ¶¶ 269-78, Count IV asserts a market-allocation-agreement **[**25]** theory of liability under state antitrust laws (and consumer protection laws that prohibit anticompetitive conduct) against all defendants, *id.* ¶¶ 286-94, and Count VI asserts a monopolization theory of liability under state antitrust laws (and consumer protection laws that prohibit anticompetitive conduct) against AbbVie. *Id.* ¶¶ 301-08. Lastly, Count VII asserts violations of state laws that prohibit unfair and unconscionable conduct against AbbVie. *Id.* ¶¶ 309-406. For purposes of the *Sherman Act* claims, the complaint defines the relevant geographic market as the United States, *id.* ¶ 236, and alleges that AbbVie maintains 100% of the relevant market share for adalimumab. *Id.* ¶ 238.

III. Analysis

Defendants move to dismiss the complaint. With regard to the *§ 2* claims, AbbVie says there is nothing illegal about amassing a broad portfolio of legitimate patents and that, even if a few were issued erroneously, the *Noerr-Pennington* doctrine immunizes them from liability. With regard to the § 1 claims, defendants say that the settlements at issue do not violate ***antitrust law*** because they: allow AbbVie's competitors to enter the market before the expiration of AbbVie's patents, do not involve any **[**26]** reverse payments from AbbVie (the patentee) to Amgen, Samsung Bioepis, and Sandoz (the alleged infringers), and only divvy up the market in ways consistent with AbbVie's patent rights. Third, with regard to both the *§ 1* and *§ 2* claims, defendants argue that if a single one of AbbVie's patents is valid, that patent would have prevented plaintiffs from entering the market at all. Defendants' unlawful conduct was only the but-for cause of plaintiffs' alleged injury if defendants obtained every single one of their patents unlawfully. And that, defendants say, is not plausible. Lastly, defendants advance arguments particular to each of the dozens of state-law claims.

Amgen, Samsung Bioepis, and Sandoz add that they had to enter into the settlement agreements because their only other choices were years of expensive litigation over an impassable patent thicket or an at-risk launch likely to result in a hefty damages award. They say the complaint's assessment of their bargaining position is too rosy and that their negotiated entry dates did not harm competition.

As plaintiffs recognize, theirs is a new kind of antitrust claim. [144] at 28-35. Although the *§ 2* claim in some ways resembles the one asserted **[**27]** in *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, which held that obtaining a patent **[*827]** by fraud can violate *§ 2 of the Sherman Act*, *382 U.S. 172, 174, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*, and the one asserted in *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, which assigned antitrust liability to "objectively baseless" petitioning that falls outside the protection of the *Noerr-Pennington* doctrine, *508 U.S. 49, 51, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993) ("PRE")*, plaintiffs disclaim reliance on those cases. [144] at 26 n.3, 38. And while the § 1 claims rely heavily on *F.T.C. v. Actavis, Inc., 570 U.S. 136, 141, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*, which calls for scrutiny of settlement agreements that require patent holders to pay money to alleged infringers (rather than the other way around), those claims bump against a sentence in *Actavis* that approved of settlements where the only reverse payment is an agreement permitting the alleged infringer to "enter the patentee's market prior to the patent's expiration." *Id. at 158*.

The complaint brings together a disparate set of aggressive but mostly protected actions to allege a scheme to harm competition and maintain high prices. The allegations—even when considered broadly and together for their potential to restrain trade—fall short of alleging the kind of competitive harm remedied by ***antitrust law***.

A. The *§ 2* Claims Against AbbVie [**28] and AbbVie Biotechnology Ltd.

HN10[] *Section 2 of the Sherman Act* prohibits the wrongful monopolization of interstate trade or commerce. *15 U.S.C. § 2*. In order to state a claim under *§ 2*, a plaintiff must allege "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 854 (7th Cir. 2011)*.

This complaint proposes a new theory of *§ 2* antitrust liability. Plaintiffs' claim is not that AbbVie obtained its patents by knowing and willful fraud. [144] at 27 n.4; *Ritz Camera & Image, LLC v. SanDisk Corp., 700 F.3d 503, 506 (Fed. Cir. 2012)*. Nor is their claim that it was anticompetitive to accumulate a large portfolio of patents. [144] at 26 n.3; *Automatic Radio Mfg. Co. v. Hazeltine Research, 339 U.S. 827, 829, 70 S. Ct. 894, 94 L. Ed. 1312, 1950 Dec. Comm'r Pat. 608 (1950)*. Nor is their claim that any one of AbbVie's petitioning activities was "objectively baseless." [144] at 38; *PRE, 508 U.S. at 51*.

Instead, the complaint alleges that AbbVie abused its monopoly over the U.S. market for adalimumab (which includes Humira and its biosimilars) when it gummed up progress toward lower prices by obtaining and asserting "swaths of invalid, unenforceable, or noninfringed patents without regard to the patents' merits." [109] ¶¶ 236-38; [144] at 44. By repeatedly and aggressively asserting **[**29]** this patent thicket during a lengthy, detailed regulatory process (and subsequent infringement litigation), AbbVie was able to delay its competitors and avoid any real examination of the patents' validity long enough to reap a few more years' worth of monopoly profit on its lucrative, patent-protected product, Humira. *Id.* at 44-45.

HN11[] Both the patent and antitrust laws aim to encourage innovation, industry, and competition. *Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1575 (Fed. Cir. 1990)*; *U.S. Const. art. I, § 8, cl. 8*. The former does this by dangling the carrot of a limited and temporary right to exclude others from practicing a patented invention and the latter by prohibiting "conduct **[*828]** which unfairly tends to destroy competition itself." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. Even though patents operate like limited exceptions to the *Sherman Act*, they do "not wholly insulate the patent owner from the antitrust laws." *Atari Games Corp., 897 F.2d at 1576*. And since it is unlawful to use monopoly power—however lawfully obtained—to "foreclose competition, to gain a competitive advantage, or to destroy a competitor," United States v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 92 L. Ed. 1236 (1948), *overruled on other grounds by* Copperweld Corp. v. Ind. Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984), it is in some instances unlawful to use patents in ways that foreclose competition. United States v. Line Material Co., 333 U.S. 287, 308, 68 S. Ct. 550, 92 L. Ed. 701 (1948).

Plaintiffs say one such example is when a patentee acquires and asserts whole tracts of questionable patents as part of a bad-faith, **[**30]** intentional effort to prop up the market for an existing, expiring patented product. Their theory depends on another old premise: that petitioning the government (during patent prosecutions, the FDA approval process, and in the courts) can violate the antitrust laws if, in reality, that petitioning is nothing more than a sham meant to inhibit competition. ***HN12***[] Antitrust liability has long attached wherever there was a "pattern of baseless, repetitive claims" that shows the "administrative and judicial processes have been abused." California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972) (citations omitted). Although the First Amendment protects the right to petition the government, *see* E. R. R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), it does not protect exercising that right as the "means or the pretext for achieving substantive evils which the legislature has the power to control." California Motor, 404 U.S. at 515 (citations omitted). But because immunized conduct cannot be aggregated with nonimmunized conduct without nullifying the immunity, it is necessary to identify protected and unprotected conduct. Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 839 (7th Cir. 2011) (the first step is to "identify any conduct that is immunized," and then, after that, to "consider the evidence of the remaining challenged conduct in the aggregate to see if it is sufficient to support antitrust liability").[8]

HN14[] In California Motor, the Court recognized that "a pattern of baseless, repetitive claims" instituted "without probable cause, and regardless of the merits" falls outside of *Noerr-Pennington* protection. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972). PRE articulates a two-part test for identifying sham litigation: "[f]irst, the lawsuit must be objectively baseless in the sense that no reasonable **[*829]** litigant could realistically expect success on the merits." Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 51, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993). If the lawsuit is objectively baseless, then the court asks, "whether the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor, through the use of the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." Id. at 60-61 (cleaned up).

Some courts have cabined the "objectively baseless" requirement from PRE to situations where it was only necessary to assess whether a single action constituted sham petitioning. Primetime 24 Joint Venture v. Nat'l Broad., Co., 219 F.3d 92, 101 (2d Cir. 2000); Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc., 806 F.3d 162, 180 (3d Cir. 2015); Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27, 728 F.3d 354, 363 (4th Cir. 2013); USS-POSCO Indus. v. Contra Costa Cty. Bldg. & Const. Trades Council, AFL-CIO, 31 F.3d 800, 810-11 (9th Cir. 1994). Plaintiffs rely on this line of cases to argue that AbbVie's serial use of legal process does not need to meet PRE's objectively baseless requirement (and that, instead, a more flexible test should be used to determine whether AbbVie's actions fell outside of **[**32]** *Noerr-Pennington*'s protection). *See* [144] at 42.

In U.S. Futures Exch., L.L.C. v. Bd. of Trade of the City of Chicago, Inc., 953 F.3d 955, 958 (7th Cir. 2020), *reh'g and reh'g en banc denied* (Apr. 23, 2020)—decided after briefing here—plaintiffs' theory (dubbed a "delay theory") invoked both the fraudulent misrepresentation and sham lawsuit exceptions to *Noerr-Pennington.* Id. at 959. The

[8] ***HN13***[] The *Noerr-Pennington* ***[**31]*** doctrine may be applied at the motion-to-dismiss stage. *See* Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 222 (7th Cir. 1975) (affirming district court's dismissal of the complaint on *Noerr-Pennington* grounds). *See also* United Food & Commer. Workers Unions & Employers Midwest Health Benefits Fund v. Novartis Pharms. Corp., 902 F.3d 1, 7 (1st Cir. 2018); Armstrong Surgical Ctr., Inc. v. Armstrong Cty. Mem'l Hosp., 185 F.3d 154, 164 (3d Cir. 1999); Mark Aero, Inc. v. Trans World Airlines, Inc., 580 F.2d 288, 290 (8th Cir. 1978); Oregon Nat. Res. Council v. Mohla, 944 F.2d 531, 533 (9th Cir. 1991); GF Gaming Corp. v. City of Black Hawk, Colo., 405 F.3d 876, 884 (10th Cir. 2005).

court first found that the fraudulent misrepresentation exception did not apply because the proceedings at issue were legislative. *Id. at 963*. ***HN15***[] Then, the court held that the "objectively reasonable" requirement from *PRE* applies to the sham lawsuit exception whether the allegations involve a single instance of sham petitioning or a series. *Id. at 963-65*. *See also* *Puerto Rico Tel. Co., Inc. v. San Juan Cable LLC, 874 F.3d 767, 769 (1st Cir. 2017)*. Any lawsuit "reasonably calculated to elicit a favorable outcome" is objectively reasonable, and any "successful action self-proves its reasonableness." *Id. at 963* (citations omitted). Because the subjective prong of *PRE* only comes into play once the objective prong is satisfied, the plaintiff in *U.S. Futures* was unable to prove that the proceedings were a sham "merely by showing that its competitor's purposes were to delay the plaintiff's entry into the market." *Id. at 965* (quoting *City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*) (cleaned up).[9]

The claim here involves adjudicative proceedings. AbbVie's alleged transgressions occurred **[**33]** in three venues: patent prosecutions and *inter partes* review proceedings before the United States Patent and Trademark Office, the biologic licensing process before the Food and Drug Administration, and patent infringement actions in federal district court. *See* [109] ¶¶ 32-43, 54-70. The last of those three is quintessentially adjudicative. ***HN16***[] Proceedings before the Patent and Trademark Office **[*830]** are also adjudicative. The PTO reviews patent applications submitted by interested parties often represented by counsel with specialized legal training, engages in formal fact-finding based on submissions made pursuant to duties of disclosure, candor, and good faith, and issues decisions subject to definite standards and judicial review. *See* [109] ¶¶ 54-58; *37 C.F.R. § 1.56(a)*.

The proceedings before the Food and Drug Administration are also adjudicative. Members of Congress have been critical of AbbVie's conduct before the Food and Drug Administration and some have even introduced legislation that could stymie AbbVie's efforts to obtain similar patent thickets in the future. *See* [109] ¶¶ 214-223. But those actions say nothing about the character of the FDA's process. ***HN17***[] The FDA reviews applications for new drugs submitted **[**34]** in nonadversarial processes marked by strict guidelines. *See id.* ¶¶ 32-43. That formalized review looks at a wealth of technical information and is guided by standards set forth by federal law. *See, e.g.*, [109] ¶ 40; *42 U.S.C. § 262*.

Plaintiffs' claim is not one under *PRE*. [144] at 38. But under *U.S. Futures*, AbbVie's conduct is protected by *Noerr-Pennington* (and not subject to antitrust scrutiny) unless its petitions—its patent applications, patent dance exchanges, and the lawsuits that followed—were objectively baseless. *U.S. Futures Exch., 953 F.3d at 958*. It is not enough to describe "numerous flaws in AbbVie's patents and its assertion of them." *See* [144] at 38. Plaintiffs have to allege that AbbVie's petitioning was objectively baseless.

The question then becomes whether plaintiffs have plausibly alleged objectively baseless conduct.[10] AbbVie's rate of success with its patent applications—more than half (53.4%) of AbbVie's patent applications resulted in patents, [109] ¶ 99—is not "irrelevant," [144] at 43; it compels the conclusion, as a matter of law, that more than half of AbbVie's patent applications were not objectively baseless. *U.S. Futures Exch., 953 F.3d at 963-64* ("a successful action self-proves its reasonableness"). It is also not the product of guesswork—that **[**35]** rate is apparent on the

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[9] *U.S. Futures* applied the objectively baseless test from *PRE* for two reasons: (1) that is the test to apply whenever the allegations involve a pattern of sham lawsuits, *id. at 965*, and (2) the conduct alleged involved a single proceeding within which the defendants were accused of making multiple filings, a situation which does not normally qualify as a "pattern." *See id. at 965-66*. Although the allegations here are characterized by a wide-ranging pattern of patent prosecutions, BPCIA exchanges, and federal litigation, *U.S. Futures* holds that the same test applies to that conduct, too.

[10] *See* *Michael v. Letchinger, No. 10 C 3897, 2011 U.S. Dist. LEXIS 86685, 2011 WL 3471082, at *11 (N.D. Ill. Aug. 5, 2011)* (applying plausibility standard to an allegation that a zoning and building code lawsuit was objectively baseless); *In re Skelaxin Metaxalone Antitrust Litig., No. 1:12-MD-2343, 2013 U.S. Dist. LEXIS 70968, 2013 WL 2181185, at *22 (E.D. Tenn. May 20, 2013)* (applying plausibility standard to claims of a series of objectively baseless sham petitioning under *California Motor Transport Co.*); *Inserra Supermarkets, Inc. v. Stop & Shop Supermarket Co., No. 16-CV-01697, 2017 U.S. Dist. LEXIS 118054, 2017 WL 3189029, at *3 (D.N.J. July 27, 2017)* (same).

face of the complaint. The allegations about AbbVie's petitioning of the USPTO are not plausible acts of sham petitioning.

Even in circuits that apply the type of more flexible test plaintiffs say should be applied here, a batting average of .534 would be too high to plausibly allege sham petitioning as a matter of law. *Compare* *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27, 728 F.3d 354, 365 (4th Cir. 2013)* (one out of fourteen (7%) success rate suggests a sham) *with* *USS-POSCO, 31 F.3d at 811* (no sham litigation when fifteen of twenty-nine (52%) of the lawsuits were successful); *Kaiser Found. Health Plan, Inc. v. Abbott Labs., Inc., 552 F.3d 1033, 1046-47 (9th Cir. 2009)* (no sham litigation when seven out of seventeen (41%) of the lawsuits were successful and where, in the other ten, the defendants had plausible arguments on which they could have prevailed); *Twin City Bakery Workers & Welfare Fund v. Astra Aktiebolag, 207 F.Supp.2d 221, 224 (S.D.N.Y. 2002)* (no sham litigation when "claims of infringement of four of the six asserted patents ... proceed[ed] **[*831]** beyond summary judgment, and two of the four ... proceed[ed] through trial").[11]

AbbVie's success rate during *inter partes* review was even higher, and establishes that AbbVie's conduct there was not objectively baseless, either. Although the Patent Trial and Appeal Board found invalid **[**36]** three of the five AbbVie patents that it reviewed (and even though AbbVie terminated the other two before a final determination could be reached), [109] ¶ 108, the PTAB declined to initiate *inter partes* review with regard to thirteen of AbbVie's other patents, finding there was no reasonable likelihood that the parties challenging AbbVie's patents would succeed on even one of the challenged claims. *See supra* n.5; *35 U.S.C. § 314*. True, patents cannot be challenged for failing to account for prior art during *inter partes* review, and even when AbbVie succeeded in convincing the PTAB to decline to initiate *inter partes* review, that success did not result in a finding that AbbVie's patents were valid. *Ethicon, Inc. v. Quigg, 849 F.2d 1422, 1429 n.3 (Fed. Cir. 1988)*; *In re TLI Commc'ns LLC Patent Litig., 87 F.Supp.3d 773, 781, 804 (E.D. Va. 2015)* (finding patent invalid under *§ 101* after an *inter partes* review petition was denied), *aff'd*, *823 F.3d 607 (Fed. Cir. 2016)*.[12] But the high success rate—thirteen out of eighteen, or 72.2%—renders implausible the allegation that AbbVie's submissions to the PTAB during those *inter partes* review proceedings were objectively baseless (at least without some other factual allegation to overcome that observation). AbbVie's petitioning before the USPTO and the PTAB is protected by *Noerr-Pennington*.[13]

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[11] The complaint also contains allegations that AbbVie made material misrepresentations and omissions to the USPTO during the prosecution of its patents. [109] ¶ 114. But the complaint does not assert a *Walker Process* claim, [144] at 27 n.4, likely because these plaintiffs would lack standing to do so. *Farag v. Health Care Serv. Corp., 2017 U.S. Dist. LEXIS 103302, 2017 WL 2868999, at *6 (N.D. Ill. July 5, 2017)*. In the end, even if plaintiffs could pursue a misrepresentation theory (while disclaiming reliance on *Walker Process*), plaintiffs effectively concede that not all of AbbVie's patents are invalid and they do not intend to prove that AbbVie's conduct was objectively baseless. That is enough to establish *Noerr-Pennington* protection for AbbVie's conduct before the USPTO.

[12] Plaintiffs identify another argument that could not have been advanced during *inter partes* review and that diminishes any suggestion that AbbVie's patent portfolio is legitimate: because AbbVie had to describe in its original patent application the best mode contemplated for carrying out the invention (i.e., adalimumab), *35 U.S.C. § 112(a)*, the formulation and manufacturing patents that post-date the original adalimumab patent cannot possibly have prevented biosimilar competitors from coming to market. [144] at 39-40. As a result, plaintiffs say AbbVie should be estopped from asserting that those patents ever could have prevented biosimilar competitors from coming to market. *Id.* at 40. But even if AbbVie could not point to some of its patents as barriers to biosimilar entry, plaintiffs' theory remains that the entire thicket and conduct surrounding the thicket restrained competition. Picking at some of the patents as legally irrelevant to biosimilar manufacturing because of the original patent's best-mode disclosure is just another way to say that AbbVie made unreasonable representations during the patent dance. But that the thicket and surrounding conduct were not as formidable as they may have seemed is a minor point given plaintiffs' overarching claim, and raises the question of how plausible it is to glean concrete harm to consumers from the biosimilar manufacturers' analysis of risk when taking on AbbVie's patents.

[13] To the extent AbbVie's petitioning before the USPTO and PTAB was unsuccessful, that petitioning did not give rise to an antitrust injury. *See* § III.C. AbbVie's patent applications required no response from any of the biosimilar manufacturers and were not so numerous that it is plausible to allege that their sheer volume intimidated AbbVie's sophisticated competitors into forgoing

[*832] To the degree the **[**37]** complaint describes a kernel of objectively baseless petitioning, it is what happened during the patent dances.[14] There, AbbVie allegedly asserted without basis that if Amgen launched its biosimilar, it would infringe no less than sixty-six of AbbVie's patents. [109] ¶ 143. When Amgen disagreed, AbbVie failed to address Amgen's concerns and declined to elaborate (even after Amgen repeatedly notified AbbVie of its failures to respond). *Id.* ¶¶ 144-147. During AbbVie's prelitigation exchanges with Sandoz, AbbVie listed nine formulation patents that specified the use of a buffer system with ingredients that were in neither Sandoz's biosimilar nor Humira—i.e., that were objectively baseless to assert. *See also id.* ¶¶ 167-168. AbbVie also listed patents that were not infringed or that had been invalidated during its patent dance with Boehringer. [109] ¶ 180.

AbbVie's presumptively valid patents were not presumptively infringed,[15] and unlike the proceedings before the USPTO and the PTAB, no neutral third party ever decided who was successful in these pre-litigation exchanges. Only successful petitioning self-proves its reasonableness, *see* *U.S. Futures Exch., 953 F.3d at 963*, and AbbVie's patent dance exchanges were **[**38]** not successful, so they may still have been objectively baseless. *But see* *Tyco Healthcare Grp. LP v. Mut. Pharm. Co., 762 F.3d 1338, 1345 (Fed. Cir. 2014)* ("it will be a rare case in which a patentee's assertion of its patent in the face of a claim of invalidity will be so unreasonable as to support a claim that the patentee has engaged in sham litigation"). And without a high success rate to make AbbVie's actions appear reasonable, it remains plausible that at least some of the assertions AbbVie made during the patent dances were objectively baseless.

One difference between AbbVie's patent applications to the USPTO and its responses during the patent dance is that AbbVie did not initiate the patent dance—the challengers did. *Kaiser Found. Health Plan, Inc. v. Abbott Labs., 552 F.3d 1033, 1047 (9th Cir. 2009)* ("[i]t is true that Abbott was litigious, but ... [t]he volume of Abbott's suits was dependent on the number **[*833]** of generic companies attempting to enter the ... marketplace, a matter over which Abbott had no control"). Nonetheless, AbbVie participated. It was not forced to assert any patents at all during the patent dance (and it certainly was not forced to assert patents that were invalid or not infringed). AbbVie's conduct during the patent dances was not protected by *Noerr-Pennington*. What effect AbbVie's **[**39]** actions during the patent dance had on the market for Humira is another question. *See* § III.C below.

With regard to the infringement litigation that followed, AbbVie's right to pursue those lawsuits was not without limitation. *Asahi Glass Co. v. Pentech Pharms., Inc., 289 F. Supp. 2d 986, 992-93 (N.D. Ill. 2003)*, *dismissed*, *104 Fed. Appx. 178 (Fed. Cir. 2004)* (***HN19***[↑] anyone with a patent not obtained by fraud enjoys a presumption of validity that entitles them "to sue alleged infringers, and to settle with them, whatever [their] private doubts, unless a neutral observer would reasonably think either that the patent was almost certain to be declared invalid, or the defendants were almost certain to be found not to have infringed it, if the suit went to judgment"). One potential

the production of biosimilars (especially not to the degree those petitions were objectively baseless), and plaintiffs have not alleged that any of AbbVie's submissions during the *inter partes* reviews were objectively baseless. *See* [109] ¶ 108.

[14] Actually, the exchanges that take place between applicants and reference product sponsors during the patent dance portion of the FDA's biosimilar application process might not qualify as petitioning at all, since neither party is (at that moment) asking the government to do anything. *See* *Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180, 1184 (9th Cir. 2005)* ("discovery is merely communication between parties as an aid to litigation," and is not a petition because it is not "in any sense a communication to the court," although "conduct incidental to" a petition is protected if the petition itself is protected). Still, as discussed below, plaintiffs fail to allege a *§ 2* claim because most of the conduct upon which their allegations are based was immunized, and because plaintiffs' theory depends on considering AbbVie's conduct as a whole. *See* [144] at 44-45. *See also* *MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1155 n.114 (7th Cir. 1983)*.

[15] ***HN18***[↑] Even if patentees are presumed to enforce their patents in good faith, *see* *C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1369 (Fed. Cir. 1998)* (the law "recognizes a presumption that the assertion of a duly granted patent is made in good faith"), that presumption is evidentiary, *id.*, and evidentiary presumptions do not overcome plausible allegations at the pleading stage. *See also* *Golan v. Pingel Enter., Inc., 310 F.3d 1360, 1371 (Fed. Cir. 2002)* ("if the party challenging such statements under state or federal law presents clear and convincing evidence that the infringement allegations are objectively false, and that the patentee made them in bad faith, viz., with knowledge of their incorrectness or falsity, or disregard for either, the statements are actionable and are not protected by the existence of a patent").

problem for plaintiffs is that AbbVie was required by law to bring those infringement suits, 42 U.S.C. § 262(l)(6) ("not later than 30 days after such agreement, the reference product sponsor shall bring an action for patent infringement with respect to each such patent"), which gives AbbVie an objectively reasonable basis for bringing them. *See* Kaiser Found. Health Plan, Inc., 552 F.3d at 1047.

In any event, each of the lawsuits was settled on terms that foreclose a finding of objective baselessness. ***HN20***[] When a lawsuit terminates in a settlement that provides substantial value to an antitrust defendant accused **[**40]** of initiating that lawsuit as a sham, that lawsuit is objectively reasonable. *See* New W., L.P. v. City of Joliet, 491 F.3d 717, 722 (7th Cir. 2007); *Theme Promotions, Inc. v. News Am. Mktg. FSI, 546 F.3d 991, 1008 (9th Cir. 2008)*.

AbbVie settled its suit with Amgen roughly one year after it began, agreeing to allow Amgen to enter the U.S. market five years before the expiration of AbbVie's U.S. patents. [109] ¶ 151. It then entered into similar settlements with other biosimilar applicants, all of which contemplated U.S. market entry dates during calendar year 2023. *See id.* ¶¶ 157, 160, 170, 173-176, 184. At least with regard to plaintiffs' § 2 claims, looking just at the allegations in the complaint, these settlements (all of which required concessions from both sides) render unreasonable any inference that the litigation that preceded them was an objectively baseless sham maintained by AbbVie to extend the patent-backed monopoly it had obtained in the market for Humira.

The foregoing raises the question as to what conduct should be considered part of the alleged overarching scheme to destroy competition and what parts should be swept aside as lawful petitioning. ***HN21***[] There is a risk that by focusing only on each individual action in a series, a broader pattern of anticompetitive conduct might escape policing and remedy. Plaintiffs must **[**41]** be given the "full benefit of [their] proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each," but at the same time, conduct immunized from antitrust liability cannot be aggregated with nonimmunized conduct without nullifying the immunity. Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 839 (7th Cir. 2011) (quoting Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)). *See also* City of Anaheim v. S. California Edison Co., 955 F.2d 1373, 1376 (9th Cir. **[*834]** 1992) (considering the "synergistic effect" of the "mixture of the elements").

Here, the vast majority of the alleged scheme is immunized from antitrust scrutiny, and what's left are a few sharp elbows thrown at sophisticated competitors participating in regulated patent and biologic-drug regimes. Some of AbbVie's conduct was not immunized by the *Noerr-Pennington* doctrine—including what plaintiffs allege to be the heart of their monopolization claim—but much of what preceded and followed that conduct was immunized, which makes the entirety of alleged monopolization scheme immune, because plaintiffs' theory depends on all the components of AbbVie's conduct as the means to suppress competition. [144] at 44-45.

Unlike many of the cases that have considered a series of allegedly sham petitions, these claims involve the patent system. That difference is all the more reason **[**42]** to decline to recognize plaintiffs' new theory of antitrust liability. ***HN22***[] Patents are entitled to a presumption of validity, 35 U.S.C. § 282(a), and even though that presumption is not so strong as to make patents "completely unassailable," Chicago Rawhide Mfg. Co. v. Crane Packing Co., 523 F.2d 452, 458 (7th Cir. 1975), it is a presumption rightly based on the "expertise of patent examiners presumed to have done their job." Brooktree Corp. v. Advanced Micro Devices, Inc., 977 F.2d 1555, 1574 (Fed. Cir. 1992). The patent prosecution system is no doubt imperfect, Saint Regis Mohawk Tribe v. Mylan Pharm. Inc., 896 F.3d 1322, 1331 (Fed. Cir. 2018) (Dyk, J., concurring) (noting that the USPTO is an agency with "finite resources that sometimes issues patents in error"), but even if it is so broken that patent examiners are having the wool pulled over their eyes more than half the time by applicants acting mostly nonfraudulently and with disregard for their applications' chances of success, the proper fix is not to use antitrust doctrine to launch a collateral attack on 132 patents, thirteen *inter partes* review determinations, multiple patent dance exchanges and at least two patent infringement lawsuits. Doing so will not revamp the FDA's biologics application process or the USPTO's drug patenting process. *See* Areeda & Hovenkamp, §§ 221, 704b4 (***HN23***[] "the patent system might be thought to be ... in need of reform," but "the antitrust laws were not designed to repair other **[**43]** government regulatory processes").

The cases plaintiffs cite in support of their new theory of antitrust liability are unconvincing and distinguishable. *In re Neurontin Antitrust Litigation* is inconsistent with *U.S. Futures, 953 F.3d 955, 958 (7th Cir. 2020)*, and, in any event, plaintiffs there firmly alleged that the petitioning in question was objectively baseless. *No. 02-1390, 2009 U.S. Dist. LEXIS 77475, 2009 WL 2751029, at *18-*23 (D.N.J. Aug. 28, 2009)*. So did the plaintiffs in *Nuance Communs., Inc. v. Omilia Natural Language Sols., Ltd., No. CV 19-11438-PBS, 2020 U.S. Dist. LEXIS 79718, 2020 WL 2198362 (D. Mass. May 6, 2020)*; [167]. Here, plaintiffs disclaim any intent to prove objectively baseless conduct. And in *Nuance Communications*, there was no basis for assessing the merits of the *§ 2* claim at the motion-to-dismiss stage, *2020 U.S. Dist. LEXIS 79718, 2020 WL 2198362 at *5*, while here, the vast majority of the petitioning has already proved itself reasonable. *U.S. Futures Exch., 953 F.3d at 963*.

Also distinguishable are the cases addressing the practice of "pooling" existing patents. In *Kobe, Inc. v. Dempsey Pump Co.*, the defendants were accused of purchasing large numbers of patents from the entities to whom the patents had been issued. *198 F.2d 416, 420 (10th Cir. 1952)*. *See also* *Intellectual Ventures I LLC v. Capital One Financial Corp., 99 F.Supp.3d 610, 626 (D. Md. 2015)* (the alleged conduct at issue there was the intentional acquisition of "a massive patent **[*835]** portfolio"). The practice of "pooling" patents does not involve petitioning the government, it involves a series of private transactions, **[**44]** and defendants' *First Amendment* right to petition the government for internally developed patents (and, to a certain degree, for FDA approval) is what protects most of their activity from suit here. Areeda & Hovenkamp, § 704c ("we would never hold internal patent development to be a *§ 2* exclusionary practice because we do not wish to discourage innovation, even by monopolists"). *See also* *Abbott Labs. v. Teva Pharms. USA, Inc., 432 F.Supp.2d 408, 429 (D. Del. 2006)* ("*Kobe* ... is contrary to more recent pronouncements by the Supreme Court concerning *Noerr* immunity"); *Axis, S.p.A. v. Micafil, Inc., 870 F.2d 1105, 1107 (6th Cir. 1989)* (dismissing antitrust action when allegation was that one company raised barriers to entering a market by acquiring companies that held patents relevant to the industry). Pooling patents also facilitates collusion among competitors, *Princo Corp. v. ITC, 616 F.3d 1318, 1334-35 (Fed. Cir. 2010)* (en banc), which is not at issue in AbbVie's patent-development conduct. And plaintiffs' reliance on *Dairy Foods Inc. v. Dairy Maid Prods. Coop.* is misplaced because *Dairy Foods* was decided before *California Motor* and *PRE*. *297 F.2d 805, 809 (7th Cir. 1961)*.

Lastly, plaintiffs say the rule of reason should be applied to their *§ 2* claims, that they need only make out a prima facie case of anticompetitive effect, and that any procompetitive justifications must be assessed later. *See* *In re Opana Er Antritrust Litig., 162 F. Supp. 3d 704, 719 (N.D. Ill. 2016)*. ***HN24***[] The rule of reason analysis involves an "inquiry into market power and **[**45]** market structure designed to assess the ... actual effect" of the contract, combination, or conspiracy, *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, or, in *§ 2* cases, of an alleged monopolization. *Hennessy Indus. Inc. v. FMC Corp., 779 F.2d 402, 404-05 (7th Cir. 1985)*. With regard to the conduct immunized by the *Noerr-Pennington* doctrine, rule of reason analysis is not necessary. *See* *Wilk v. Am. Med. Ass'n, 895 F.2d 352, 357 (7th Cir. 1990)*. And since so much of the conduct in question is immunized, and since the only parts that may not have been are inseparable from the alleged *§ 2* scheme, the claim fails. *See* *Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 839 (7th Cir. 2011)* (cautioning against aggregating conduct to nullify immunity). But even if AbbVie's nonimmunized conduct is sufficient to be a standalone scheme of monopolization, the complaint still fails for lack of an antitrust injury because it is not plausible that AbbVie's nonimmunized conduct intimidated the other defendants into delaying the launch of their biosimilars (or otherwise caused any antitrust injury). *See* § III.C below.

B. The § 1 Claims Against all Defendants

HN25[] *Section 1 of the Sherman Act* declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. In order to state a claim under *§ 1*, plaintiffs must plead "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint **[**46]** of trade in [a] relevant market; and (3) an accompanying injury." *Deppe v. NCAA, 893 F.3d 498, 501 (7th Cir. 2018)*. When assessing whether a particular restraint enhances or inhibits competition, courts apply three categories of analysis: per se, quick-look, and rule of reason. *Agnew v. NCAA, 683 F.3d 328, 335 (7th Cir. 2012)*. All three are "meant to answer the same question: whether or not the challenged restraint enhances competition." *Id.* (quotations omitted).

[*836] ***HN26***[] Per se analysis is applied when a "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output," such as horizontal price fixing and output limitations. *Id. at 336*. The quick-look approach asks whether an "observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect." *Id.* (quoting *California Dental Ass'n v. F.T.C., 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*). If legitimate, procompetitive justifications for facially anticompetitive behavior are found, then rule of reason analysis may be necessary. *Id.* Under the rule of reason, plaintiffs must allege that "an agreement or contract has an anticompetitive effect on a given market within a given geographic area." *Id. at 335*.

The complaint alleges that AbbVie, Amgen, Samsung Bioepis, and Sandoz violated *§ 1* when they entered into **[**47]** settlement agreements that required the latter three defendants to temporarily give up their efforts to introduce biosimilars in the U.S. market in return for near-immediate permission to launch their biosimilars in Europe. [109] ¶¶ 141-212. Plaintiffs say that those agreements violated *§ 1* under both a pay-for-delay theory (i.e., AbbVie paid off its competitors to buy itself more time as a monopolist), *id.* ¶¶ 261-68, and a market-allocation theory (i.e., AbbVie allocated to itself the U.S. market and allocated to the other defendants the European market). *Id.* ¶¶ 279-85.

These agreements do not justify per se treatment because they are not facially anticompetitive in any way that would always or almost always tend to restrict competition. The agreements do not set prices for Humira and its biosimilars, nor do they include terms setting the quantity of Humira (or its biosimilars) that is to be sold in the market. *See Agnew, 683 F.3d at 336* (***HN27***[] "[h]orizontal price fixing and output limitation are classic examples of behavior that is considered anticompetitive per se"). Even reverse-payment patent settlement agreements that involve cash payments from the patentee to the alleged infringer do not usually receive per **[**48]** se treatment, *see FTC v. Actavis, Inc., 570 U.S. 136, 158-59, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*, and the types of agreements at issue here—which involve two sets of early entry dates in two different regions—are even less facially restrictive because they do not involve a cash payment in return for a promise to keep a competing product off the market.

HN28[] Market allocation agreements, however, are "classic examples" of per se *§ 1* violations. *United States v. Topco Assocs., Inc., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*. In a market allocation agreement, competitors at the same level of a market "allocate territories in order to minimize competition." *Id.* For instance, in *Palmer v. BRG of Georgia, Inc.*, it was a per se violation of *§ 1* for *BRG* to promise not to provide bar review courses outside of Georgia in return for a promise from its competitor to not provide bar review courses inside of Georgia. *498 U.S. 46, 47, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)*. *See also Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 152 F.3d 588, 591 (7th Cir. 1998)* (the defendants "entered into agreements with competitors to stay out of each other's territories").

According to plaintiffs, the European entry dates are the quid pro quo for the U.S. market entry dates, and for the period that falls between the two, AbbVie effectively allocated to itself the U.S. market while allocating to the other defendants the European market. [144] at 47-48. The result is that, in the interim, consumers in **[*837]** the U.S. are "subsidizing **[**49]** competition in Europe." *Id.* at 48.

One difference between the usual market allocation agreement and the one alleged here is that there is no allegation that AbbVie planned to stop selling Humira in Europe after Amgen, Sandoz, Samsung Bioepis, and the others introduced their biosimilars. *See* [109] ¶¶ 203, 205, 209. That does not necessarily sink plaintiffs' claim. Areeda & Hovenkamp, § 2030c; *Blackburn v. Sweeney, 53 F.3d 825, 827 (7th Cir. 1995)* (***HN29***[] "[t]o fit under the *per se* rule" a horizontal, market-allocation agreement "need not foreclose all possible avenues of competition"). For instance, in *United States v. Topco*, one of the geographic restrictions that was found per se unlawful did not completely bar sales in the geographic region but placed some parties at a disadvantage in that region. *405 U.S. 596, 601-02, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*.

The first difference here is that this complaint mentions no such disadvantages in either the U.S. or Europe. There is no allegation that Amgen, Sandoz, Samsung Bioepis, or the others could only market their biosimilar in Europe (or in the U.S.) using a certain label, or to certain kinds of doctors, or for a certain price, or by using certain kinds of advertisements. Once the entry dates passed, all competitors were free to compete on level ground. *See* [109] ¶¶ **[**50]** 203-204.

The second (and bigger) difference is that AbbVie is asserting patents. ***HN30***[] Patents come with the right to selectively license the patent "to the whole or any specific part of the United States." *35 U.S.C. § 261*; Areeda & Hovenkamp, § 704b4 ("a patent dispute that settles with a market division license agreement will be approved, and the courts repeatedly state that they are loath to inquire into such things as whether the patents in question are valid"). ***HN31***[] A patentee may also issue territorial licenses that allow competitors to sell patented products in some foreign countries but not others (and not in the U.S.). *Dunlop Co. v. Kelsey-Hayes Co., 484 F.2d 407, 417 (6th Cir. 1973)*. *See also* Areeda & Hovenkamp, § 2044a1 (the *Patent Act* does not protect horizontal territorial divisions that do not involve the transfer of intellectual property rights unless the agreement resolves a bona fide intellectual property dispute, in which case the agreement receives "special consideration"); § 2045a ("[A]ssuming a genuine dispute, the outcome of even a settlement agreement producing a per se antitrust violation might be no more anticompetitive than the outcome of litigation.").

HN32[] Market allocation agreements are not free from per se treatment just because they involve intellectual property licenses, **[**51]** *see* *United States v. Sealy, Inc., 388 U.S. 350, 351, 357-59, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967)*, but patents are different from other types of intellectual property when it comes to geographic restrictions, and an agreement to permit entry into a market previously protected by a patent does not become a per se invalid market allocation agreement just because it is specific to one territory (or one country). *35 U.S.C. § 261*; Areeda & Hovenkamp, § 2044a1 (the "most obvious" reading of the *Patent Act* is that, "where the patentee also makes the manufactured product in a territory, the statute explicitly authorizes a form of 'horizontal' territorial division that would be illegal per se if done in the absence of an intellectual property license"). The settlement agreements here are not market-allocation agreements, as that term is understood for per se treatment.

HN33[] In any event, per se treatment is disfavored for novel theories of antitrust violations like this one. *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)* ("*Per se* treatment is appropriate **[*838]** once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.") (citations omitted); *United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)* ("[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations of the *Sherman Act*"). **[**52]** The agreements are not per se unlawful under *§ 1*.

The quick-look test is not the right test, either, because an observer with a rudimentary understanding of economics would not conclude that the agreements have an anticompetitive effect. *California Dental Ass'n v. F.T.C., 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*. AbbVie's intellectual property portfolio contains many Humira-related patents, and competitors Amgen, Sandoz, and Samsung Bioepis are all seeking to introduce drugs that are (by design) very similar to Humira. ***HN34***[] An agreement that allows competitors to enter markets from which there is a chance they would otherwise be excluded is not on its face anticompetitive. Even if the rudimentary economist is informed that most of the patents are likely invalid and uninfringed and being asserted without regard to their validity, there are still legitimate, procompetitive justifications for the agreements that require full rule of reason analysis (for instance, the agreements provide certainty to both parties and avoid further litigation costs). *See* *Agnew v. NCAA, 683 F.3d 328, 335 (7th Cir. 2012)*. Because a "great likelihood of anticompetitive effect" cannot "easily be ascertained," *California Dental, 526 U.S. at 770*, the quick look test is not right for these agreements, either.

The rule of reason is a better fit, although the question at this **[**53]** stage is simply whether there is a plausible claim for a restraint on competition.[16] ***HN35***[] Reverse-payment settlements (where the patentee pays the alleged infringer rather than the other way around) trigger *§ 1* antitrust scrutiny and rule of reason analysis. *FTC v. Actavis, Inc., 570 U.S. 136, 158, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*. In *Actavis*, the patent holder settled its infringement claims against a generic drug manufacturer. *Id. at 144-45*. In the settlement, the patent holder paid the alleged infringer and the alleged infringer agreed to delay its entry into the market. *Id. at 145*. That "unusual" form of settlement, where an alleged infringer received money to stay away from the patent holder's market, raised the concern that the agreement had an adverse effect on competition. *Id. at 147-48, 152*. ***HN36***[] Ordinarily, a patent holder has some entitlement to monopoly profits for the duration of its patent and consumers benefit from a deal to allow a competitor to enter the market before the patent expires. *Id. at 153-54*. But the *Actavis* settlement suggested that the patents were at risk and that the patentee purchased an opportunity to keep prices set at its preferred level—sharing monopoly profits with a competitor without consumer gains. *Id. at 154*. ***HN37***[] "In sum, a reverse payment, where large and unjustified, can bring with **[*839]** it the risk **[**54]** of significant anticompetitive effects." *Id. at 159*.

HN38[] Although scrutiny of such settlements can lead to "time-consuming, complex, and expensive litigation," the Court rejected a blanket rule immunizing reverse-payment patent-infringement settlements from antitrust scrutiny. Procompetitive justifications (e.g., the avoidance of litigation costs) can be examined and accounted for as part of the rule of reason analysis. *Id. at 156*. And fears that it would be expensive and time-consuming to assess the value of the underlying patent claim are mitigated by the fact that it is "normally not necessary to litigate patent validity to answer the antitrust question (unless, perhaps, to determine whether the patent litigation is a sham ...)." *Id. at 157*. The size of the reverse payment can serve as a proxy for the patent's weakness without forcing a court to conduct a "detailed exploration of the validity of the patent itself." *Id. at 157-58*. A rule of reason analysis would not be cumbersome when the size of the payment suggests that the patentee possessed the market power it needed to bring about anticompetitive harm. *Id. at 157*.

HN39[] To avoid deterring settlements because of exposure to antitrust liability, the Court noted **[**55]** an important exception. Parties remain free to settle on other terms—for example, "by allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point." *Id. at 158*.

The settlements here and their context are different than in *Actavis*. The *Actavis* settlement and its *Hatch-Waxman Act* context conferred limited exclusivity on the alleged infringer (*Actavis*, the generic manufacturer that was the first to file an abbreviated application), thereby allowing a patent monopoly to be shared, but not open to competition. *F.T.C. v. Actavis, Inc., 570 U.S. 136, 155, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*. Here, Amgen was not the only party to pursue litigation and reach an agreement for an early U.S. market-entry date—the complaint mentions eight other companies that followed closely on its heels (Samsung Bioepis, Mylan, Sandoz, Fresenius, Momenta, Pfizer, Coherus, and Boehringer). *See* [109] ¶¶ 141-184. Plaintiffs no longer allege that AbbVie granted any exclusivity to Amgen. *Id.* ¶ 155; *see* [126-1]; [126-2]; [144] at 46 n.15. Concerns that settlements like the one at issue here allow for sharing of monopoly profits to the detriment of consumers are undermined by the allegation that **[**56]** a wave of challengers stands waiting in the wings to sell adalimumab, and that none of them was forced to wait longer than the first-filer because of a settlement agreement. [109] ¶¶ 141-184; [144] at 46 n.15.

On their face, the U.S. settlements here are settlements that allow for early entry without a payment. ***HN40***[] *Actavis* identifies a settlement that allows early entry but without the patentee paying a competitor to stay out of the market as one type of agreement that is not an antitrust problem. *Actavis, Inc., 570 U.S. at 158*. This makes sense

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[16] It is not always necessary to determine which of the three categories of analysis should be applied when ruling on a motion to dismiss. *City of Rockford v. Mallinckrodt ARD, Inc., 360 F.Supp.3d 730, 754 (N.D. Ill. 2019)*, *reconsideration denied*, *No. 17 C 50107, 2019 U.S. Dist. LEXIS 103885, 2019 WL 2763181 (N.D. Ill. May 3, 2019)*. *See also* Areeda & Hovenkamp, § 305(e) ("Often ... the decision about which rule is to be employed will await facts that are developed only in discovery.") But there are no facts that need to be developed before determining which rule to apply here. The plaintiffs have alleged in their complaint the basic terms of the agreements and how they affected the market. *See* [109] ¶¶ 157-210.

because such settlements increase competition by cutting monopolies short. For instance, in *Asahi Glass Co. v. Pentech Pharms., Inc.*, a patentee had reached a settlement with a competitor that allowed that competitor to sell one of the patentee's drugs in Puerto Rico immediately and, in the rest of the U.S., as soon as any other generic version hit the market. *289 F.Supp.2d 986, 992-93 (N.D. Ill. 2003)*, *dismissed*, *104 Fed. Appx. 178 (Fed. Cir. 2004)*. There was no antitrust violation because the only "payment" was competition itself. *Id. at 994* ("the 'payment' of Puerto Rico ... increased the **[*840]** competition there"). Since the payment was permission to start competing a little earlier than the competitor otherwise had the right to, and because the agreement did not **[**57]** extend any existing monopolies, there was no § 2 antitrust violation. *See id.* That logic aligns with the Supreme Court's decision to name early entry settlement agreements as examples of permissible settlements. *See* *Actavis, 570 U.S. at 158*. The U.S. settlement agreements are not reverse-payment agreements subject to *Actavis* antitrust scrutiny.

HN41[] The fact that the settlements did not involve a direct payment is not determinative. *See* *In re Aggrenox Antitrust Litig., 94 F.Supp.3d 224, 242-243 (D. Conn. 2015)*. *See also* *King Drug Co. of Florence v. Smithkline Beecham Corp., 791 F.3d 388, 403 (3d Cir. 2015)*; *In re Opana Er Antritrust Litig., 162 F. Supp. 3d 704, 718 (N.D. Ill. 2016)* (when considering whether a settlement constitutes a large and unjustified reverse payment, the various payments cannot be examined in isolation); *In re Loestrin 24 Fe Antitrust Litig., 261 F. Supp. 3d 307, 331 (D.R.I. 2017)*. Plaintiffs allege that there was a reverse payment, just not one within the infringement litigation settlement agreements. AbbVie paid the biosimilar manufacturers in the form of European agreements that allowed the biosimilars to enter the European market. In exchange, the biosimilar companies agreed to settle the infringement litigation with an AbbVie-friendly U.S. early entry date. The package deals conferred large European revenue streams (hundreds of millions of dollars, [144] at 53) onto the biosimilar companies, while buying AbbVie even more lucrative monopoly time in the U.S. (worth billions of dollars **[**58]** in revenue for AbbVie, [109] ¶ 204).[17]

Nevertheless, and notwithstanding the allegation that this exchange was for the purpose of unnecessarily perpetuating AbbVie's patent monopoly, the package of global patent settlements were not an *Actavis*-like unlawful reverse-payment. They provided one early entry date for the European market and a different early entry date for the U.S. market—both permissible under *Actavis*. *See* *In re Actos End Payor Antitrust Litig., No. 13-CV-9244 RA, 2015 U.S. Dist. LEXIS 127748, 2015 WL 5610752, at *17 (S.D.N.Y. Sept. 22, 2015)* *vacated in part on other grounds*, *848 F.3d 89 (2d Cir. 2017)* (***HN42***[] when "[b]oth ... licenses [are] permissible settlement terms under *Actavis* ... the simultaneous grant of both does not render either license unlawful"). The European deals were early entry settlements of the **[*841]** kind that did not worry the Court in *Actavis*, as were the U.S. settlements. The transfer of value, as large as it was, did not have the hallmarks of an unjustified and otherwise inexplicable payment because the package either increased competition or preserved an anticompetitive status quo. *In re Actos End Payor Antitrust Litig., 2015 U.S. Dist. LEXIS 127748, 2015 WL 5610752, at *16* ("*Actavis* does not provide a legal basis for restricting negotiated settlement terms where they do not restrain competition"). The effect of the payment was to increase, not restrain competition **[**59]** by bringing competitors into the market when patents otherwise prohibited the competition.

There is also a broader reason to uphold these agreements under antitrust review: encouraging patent litigants to settle worldwide patent disputes. Any early entry date in one region could always be considered a transfer of value

[17] The defendants challenge the plausibility of plaintiffs' allegation that there was a quid pro quo in the U.S. and European agreements. Mylan and Boehringer agreed to roughly the same U.S. market entry dates as the other biosimilar manufacturers despite not accepting an early European entry date. [109] ¶¶ 177-84, 203. That undermines the inference that those European early entry dates were worth all that much or were a bargaining chip in the U.S. settlements. Similarly, AbbVie points out that it only has three European patents, that those three patents "protect indications for adalimumab for only four diseases, leaving at least five other diseases for which Humira is approved unguarded by patents in Europe," [124] at 36-37, and so the European patents were not a valuable barrier to competition. And the complaint itself alleges that AbbVie's European adalimumab patent expired on the same day that the agreements allowed Amgen, Samsung Bioepis, and Sandoz to enter the European market, further undermining the implication that the European early entry dates were worth all that much (or that they were "early" at all). [109] ¶ 203. But at this stage, I put aside potential inconsistencies and accept plaintiffs' factual allegation of an exchange. The complaint alleges that AbbVie's conduct rendered it difficult (if not impossible) to sell competing biosimilars in Europe absent the agreements in question, and concluding otherwise would require drawing an inference in AbbVie's favor. *See* [109] ¶¶ 185-202.

in return for a later entry date in another region. Plaintiffs assure the court that "[i]t is the particular circumstances of AbbVie's patent gamesmanship ... that, taken together with the contemporaneously executed settlement agreements, creates the violation," [144] at 59-60, but they do not elaborate. ***HN43***[] Although certain aspects of this settlement agreement might take it outside the norm (the alleged value of the European early entry dates, for one), it is not unlawful to enter into agreements that have been explicitly recognized by the Supreme Court as not a matter for antitrust concern, *Actavis, 570 U.S. at 152*, that implement a right included in the bundle of rights awarded to patent holders, *35 U.S.C. § 261*; *Dunlop Co. v. Kelsey-Hayes Co., 484 F.2d 407, 417-18 (6th Cir. 1973)*, and that play an important role in making global patent settlement agreements easier.

In *King Drug Co. of Florence v. Smithkline Beecham Corp.*, Smithkline induced Teva Pharmaceuticals to give up a **[**60]** challenge to Smithkline's patent by promising Teva two things: (1) an early entry into the generic market and (2) that Smithkline would not produce an authorized generic of its own. *791 F.3d 388, 393-94 (3d Cir. 2015)*. Finding that this "no AG" agreement represented an "unusual, unexplained reverse transfer of considerable value," the Third Circuit found that the agreement may have violated the antitrust laws because "the source of the benefit to the claimed infringer [was] something costly to the patentee." *Id. at 394, 405*. When a brand name manufacturer agrees to not produce a generic, consumers lose and the market for the brand name drug (and its generics) becomes less competitive than it would have been absent the agreement. The difference here is that when AbbVie agreed to let Amgen, Sandoz, and Samsung Bioepis enter the European and U.S. markets earlier than they might have been able to otherwise, consumers won and the market for Humira (and its generics) became more competitive. These agreements were decidedly not "as harmful as those resulting from reverse payments of cash." *Id. at 405*. *See also* *United Food & Commer. Workers Local 1776 & Participating Employers Health & Welfare Fund v. Teikoku Pharma USA, Inc., 74 F.Supp.3d 1052, 1067-68 (N.D. Cal. 2014)* (recognizing that agreements that increase competition fall outside the scope of *Actavis*).[18]

In both *King Drug*, and *In re Lipitor Antitrust Litig.*, the Third Circuit acknowledged **[*842]** that it might not be appropriate to justify anticompetitive effects in one market with procompetitive effects in another. *King Drug, 791 F.3d at 409 n.34*; *In re Lipitor Antitrust Litig., 868 F.3d 231, 256 n.12 (3d Cir. 2017)*. But both cases ultimately turned on the sufficiency of the complaint's allegation that a patent holder made an unjustified transfer of value to an alleged infringer in a manner suggestive of competitive harm. *In re Lipitor Antitrust Litig., 868 F.3d at 239*; *King Drug Co. of Florence, 791 F.3d at 392*.

Like *King Drug* and *In re Lipitor*, this case doesn't depend on the competitive benefits in one market (Europe) justifying the effects in another (the U.S.). The issue is whether the complaint alleges a patent settlement that has *Actavis*-like anticompetitive features and that warrants further scrutiny under the rule of reason. Unlike *King Drug* and *In re Lipitor*, the complaint here does not. The U.S. settlements were on terms consistent with *Actavis*'s notion of a competitively legitimate settlement, and while part of the bargain included the European deals, that part was also consistent with a permissible early entry settlement. The settlement terms, when taken together, involve transfers of value from the patentee to the alleged infringer. But because all the agreements **[**62]** are of a type specifically permitted by *Actavis*, and because they deliver value to consumers, plaintiffs have not plausibly alleged the existence of an agreement that restrained competition.[19] Both of plaintiffs' § 1 claims (for market allocation and pay-for-delay) against all of the defendants—AbbVie, Amgen, Samsung Bioepis, and Sandoz—are dismissed.

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[18] Plaintiffs also rely on *Tawfilis v. Allergan, Inc.. 157 F.Supp.3d 853, 862 (C.D. Cal. 2015)*. Although it found allegations of anticompetitive injury arising from a licensing agreement between competitors to be plausible, that case makes no mention of *Actavis* ***[**61]*** and is neither binding nor persuasive here.

[19] Although it is "normally not necessary to litigate patent validity to answer the antitrust question," *F.T.C. v. Actavis, Inc., 570 U.S. 136, 157, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*, plaintiffs' theory here does require a detailed exploration of both the validity of hundreds of patents (some of which have already been the subject of extensive infringement litigation and other disputes before the USPTO and PTAB) and whether those patents were infringed. That makes the European revenue conferred on the biosimilar companies a far less helpful proxy for market power because the alleged reverse-payment has to be measured against the global litigation risks and the approximate strength of hundreds of AbbVie's patents (plus AbbVie's intellectual property portfolio in Europe). In other words, the allegations here require even more expensive and time-consuming litigation

C. Antitrust Injury

HN44[] *Sections 4* and *16 of the Clayton Act* provide for private rights of action (for damages and injunctive relief, respectively) in antitrust cases. *15 U.S.C. §§ 15*, *26*; *Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1419 (7th Cir. 1989)*; *Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1377-78 (7th Cir. 1987)*; *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 112-13, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. Both require that plaintiffs suffer an "antitrust injury." *Id.* Antitrust injury analysis "focuses on the *type* of injury claimed by a *particular* plaintiff and demands that it be an 'antitrust injury.'" *Indiana Grocery, 864 F.2d at 1419* (emphasis in original). An antitrust injury is any "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. The injury must be "the type of loss that the claimed violations ... would be likely to cause." *Id.* The injury requirement applies to both plaintiffs' *§ 1* and *§ 2* claims. *See Indiana Grocery, Inc., 864 F.2d at 1419* (the antitrust injury requirement comes **[*843]** from *§ 4 of the Clayton Act*, which is what grants plaintiffs the right to bring a private right **[**63]** of action under both *§ 1* and *§ 2 of the Sherman Act*).

HN45[] Antitrust injury analysis involves a two-step causation inquiry. *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 395 (7th Cir. 1993)*. After delineating the "*type* of interests protected by the antitrust laws," the court must determine whether the "violation was the cause-in-fact of the injury: that 'but for' the violation, the injury would not have occurred." *Id.* (emphasis in original). The illegality need only be a material cause of the injury and plaintiffs need not prove that there was no other potential cause of the injury. *See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*. The injury must flow directly from the anticompetitive aspect of the practice under scrutiny. *McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., Inc., 937 F.3d 1056, 1065 (7th Cir. 2019)*.

HN46[] There is no hard-and-fast rule against deciding the question of antitrust injury at the pleading stage. *See McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., Inc., 937 F.3d 1056, 1061 (7th Cir. 2019)* (upholding dismissal on antitrust injury grounds at the motion to dismiss stage); *Midwest Gas Servs., Inc. v. Indiana Gas Co., 317 F.3d 703, 712-13 (7th Cir. 2003)* (same). Dismissal is appropriate if the claim "rests at bottom on some abstract conception or speculative measure of harm." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 543, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*.

The type of antitrust injury that plaintiffs allege they suffered is monopoly prices. Plaintiffs claim they paid monopoly prices for Humira during a period of time when, but-for the alleged unlawful conduct, competition would have driven prices lower. ***HN47***[] Higher prices are **[**64]** one of the "principles vices" proscribed by the antitrust laws, *McGarry & McGarry, LLC, 937 F.3d at 1065*, so the allegations satisfy the first part of the causation test. *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 395 (7th Cir. 1993)*.

Plaintiffs advance two sets of allegations to demonstrate that defendants' conduct was the cause-in-fact of the monopoly prices: one set pertains to the underlying infringement litigation and the other pertains to the settlement agreements. With regard to the litigation, plaintiffs allege that, if the biosimilar manufacturers had pursued the underlying infringement suits, they could have prevailed and, by invalidating the patents that were preventing them from entering the market, entered the market even sooner than they are now able to under their settlement agreements, driving prices down. [144] at 64-67. With regard to the alternative settlement theory, plaintiffs allege that if AbbVie had asserted only those patents that were valid and infringed (i.e., fewer patents), the biosimilars' bargaining position would have been stronger and the biosimilar manufacturers would have been able to negotiate earlier entry dates. [144] at 63.

The allegations about what might have happened in the underlying infringement litigation are too speculative and would require **[**65]** legal and factual determinations that go beyond judicially manageable limits. *Associated Gen.*

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than in *Actavis*, and this further suggests that plaintiffs' theory pushes antitrust doctrine into unintended overlap with the patent regime.

Contractors, 459 U.S. at 543; *Greater Rockford, 998 F.2d at 394* (***HN48***[] indirect and speculative injuries cannot support a private antitrust lawsuit). In order to allege cause-in-fact, plaintiffs must allege that "the injury would not have occurred" absent the alleged unlawful conduct. *Greater Rockford, 998 F.2d at 395*. With regard to the underlying infringement litigation, plaintiffs are **[*844]** not willing to go that far. Instead, they argue that at least one of the biosimilar defendants could—not would—have prevailed in one of the underlying infringement suits. [144] at 64 (citing *United Food & Commer. Workers Local 1776 v. Teikoku Pharma USA, 296 F. Supp. 3d 1142, 1155 (N.D. Cal. 2017)* (requiring "some evidence" of the patents' invalidity "is not the same as requiring plaintiffs to prove that the generic defendant *would have* won, only that it *could have*" won in the underlying infringement suit) (emphasis in original)). Plaintiffs' position has some support: at the pleading stage the question is "*could* these things have happened, not *did* they happen." *Carlson v. CSX Transp., Inc., 758 F.3d 819, 826-27 (7th Cir. 2014)*. But when it comes to this proposed alternative history, plaintiffs' use of the word "could" instead of "would" is not merely semantic; it signals that they do not intend to prove that prices were going to fall but-for the **[**66]** litigation. They have conceived of a world where that might have happened, but conceivable falls short of plausible. *Id. at 826*.

The first problem with the litigation theory is that it only takes one valid, infringed patent to render all the rest—whether invalid, infringed, or not—irrelevant for purposes of cause-in-fact analysis. If a drug is not able to launch because launching would infringe even a single patent, then the "injury (if it could still be called that) would be caused not by the settlement but by the patent laws prohibiting the launch." *In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class, 868 F.3d 132, 165 (3d Cir. 2017)*, *judgment entered sub nom.* *In re Wellbutrin XL Antitrust Litig., 868 F.3d 132, 2017 WL 3529114 (3d Cir. 2017)*; *In re Canadian Imp. Antitrust Litig., 470 F.3d 785, 791 (8th Cir. 2006)* ("[t]he absence of competition from Canadian sources in the domestic prescription drug market ... is caused by the federal statutory and regulatory scheme adopted by the U.S. government, not by the conduct of the defendants," and, "[c]onsequently, the alleged conduct of the defendants did not cause an injury of the type that the antitrust laws were designed to remedy"). If the reason the biosimilar manufacturers could not make it to market was that AbbVie had a patent that prevented them from doing so, it was the patent—and not AbbVie's other conduct—that was the but-for cause of the monopoly prices.

Against that backdrop, **[**67]** plaintiffs' theory of antitrust injury is not plausible. The complaint calls many of AbbVie's patents "weak," [109] ¶ 6, its patent applications "dubious," *id.* ¶ 185, says that some of the patents were "obvious in light of prior art," *id.* ¶ 107, and identifies four patents that were issued as the result of material misrepresentations and omissions to the USPTO. *Id.* ¶¶ 114-20. But the complaint never alleges that all of AbbVie's patents were invalid or not infringed. *See, e.g.*, [109] ¶ 107 ("many" of AbbVie's patents do not withstand scrutiny), ¶ 112 (all of the formulation patents are invalid in light of prior art), ¶¶ 130-132 (of AbbVie's more than 100 patents covering adalimumab, each can be traced back to twenty patents, two-thirds of which fail the novelty requirement), ¶ 134 ("the majority" of AbbVie's formulation and manufacturing/process patents fail other requirements), ¶ 140 (AbbVie should be precluded from asserting any formulation and manufacturing patents filed after February 1996). Confirming as much in their response, plaintiffs say they do not need to allege that all of AbbVie's patents were invalid or infringed. *See* [144] at 62. Instead, they say it is enough that a **[**68]** "great many of the patents were invalid or not infringed," [144] at 65, and that, as a result, at least one of the biosimilar manufacturers could have prevailed in the underlying litigation. **[*845]** [144] at 64. But without identifying which patent at issue in the litigation was going to be declared invalid or committing to a clear pathway to establish how prices would have fallen if the biosimilars had stuck it out in the global patent fight against AbbVie, plaintiffs' complaint leaves the defendants (and the reader) without notice of their claim.[20]

The second problem is that litigation takes time. In the case of complex patent portfolios, it can take a lot of time. For instance, when Amgen and AbbVie settled their infringement suit, trial was still two years away (they settled in September of 2017, at which point trial was scheduled for November of 2019). *See* [109] ¶¶ 148-51. Plaintiffs' theory requires them to allege that trial would have taken place as scheduled, that Amgen would have prevailed, and that any appeal would have resolved in time for Amgen's biosimilar to hit the market before January 31, 2023

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[20] Plaintiffs say that under their alternative settlement theory, the biosimilar companies had significant leverage and could have obtained licenses for any patents that were valid and infringed (i.e., "blocking patents"). [144] at 67. But for the reasons discussed with regard to the alternative settlement theory below, that claim is possible—not plausible.

(the market entry date Amgen received under its settlement agreement). [144] at 66. **[**69]** Nondefendant Boehringer's infringement suit was scheduled to go to trial in October of 2020 when it settled in May of 2019. [109] ¶¶ 181, 183-84. And since no trial date had been set in either Samsung Bioepis's or Sandoz's patent infringement suits when they settled in April and October of 2018, respectively, [109] ¶¶ 157, 170, plaintiffs are left to allege it was "likely" that their trials would have been scheduled and would have concluded—and that any appeal would have been resolved—early enough to allow them to bring their biosimilars to market before their June (Samsung Bioepis) and September (Sandoz) 2023 entry dates. [144] at 66; [109] ¶¶ 83-84, 148-51, 157, 170. Nothing in the complaint demonstrates a basis to predict the requisite timing to establish plaintiffs' injury.

Alternatively, the biosimilar manufacturers might have launched at risk. According to the complaint, the only two biosimilar companies that received FDA approval before settling (Amgen and Boehringer) chose not to launch at risk. *See* [109] ¶¶ 149, 151, 182, 184, 211. Boehringer spent twenty months waiting for the underlying patent litigation to wrap up without launching. *See id.* ¶¶ 182, 184.[21] As the complaint **[**70]** points out, the reason for their delay was AbbVie's patent thicket, which was "impassable." [109] ¶ 9. *See also supra*, n.5 (thirteen of the eighteen petitions for *inter partes* review had failed to punch a hole through the thicket). Launching while the underlying patent litigation was ongoing posed an enormous risk. *See id.* ¶¶ 86, 97 (the potential damages were "crushing"). And while plaintiffs acknowledge that phase-two litigation often poses a significant final barrier for biosimilar manufacturers hoping to reach the market, *see* [144] at 45, they say nothing about what it was that they think Boehringer or Amgen (or Samsung Bioepis and Sandoz) might have done to get their biosimilars to market before 2023 if they had tried launching at risk and AbbVie had initiated second-phase litigation seeking an injunction. **[*846]** With regard to the potential at-risk launches, too, plaintiffs' theory rests on speculative guesses about what hypothetically competitive biosimilar manufacturers might have done.

Amgen, [125] at 5-6, Samsung Bioepis, [130] at 5-6, and Sandoz, [131] at 3-4, all argue that the complaint does not plausibly allege that, but-for their allegedly illegal agreements, the patent litigation **[**71]** would have concluded in time for consumers to have been able to buy their biosimilars any sooner than they will be able to under the existing agreements. I agree. The complaint requires drawing a conclusion that rests on too many inferences and reveals a theory of antitrust injury that is speculative as a matter of law.

The alternative settlement theory fares no better. Plaintiffs say that all they have to allege is that, but-for AbbVie's conduct, the biosimilar manufacturers could have obtained earlier U.S. market entry dates than they did. [144] at 67. But the allegations in the complaint do not make plaintiffs' hypothesis plausible. The complaint alleges that the defendants entered into settlements. As discussed above, these settlements are not anti-competitive reverse payments of the kind that worried the Court in *Actavis*. Another way to see that these agreements do not suggest antitrust liability is to focus on the question of antitrust injury. As alleged, AbbVie and the biosimilar defendants agreed to early entry in Europe in exchange for favorable (to AbbVie) early entry in the United States. But to allege injury, plaintiffs must still plausibly allege that but for that agreement, **[**72]** the biosimilars would have entered sooner—that they had the kind of leverage over AbbVie's patents to negotiate licenses or settlements even more favorable to them (and to consumers) than the compromise they agreed to. Given that AbbVie's IP portfolio was "impassable," its patents had survived thirteen *inter partes* review challenges, and that all it would have taken was one valid and infringed patent to preclude market entry until that patent's expiration, it is not plausible that these agreements prevented an even earlier entry date in the U.S. market for a biosimilar. *See* *Kroger Co. v. Sanofi-Aventis, 701 F.Supp.2d 938, 957 (S.D. Ohio 2010)* ("an injury deriving from the failure to reach a hypothetical procompetitive agreement is 'nothing but speculation.'" (quoting *Associated Gen. Contractors, 459 U.S. at 543*)).

Antitrust injury is a prerequisite for all of plaintiffs' federal antitrust claims against not only AbbVie but also defendants Amgen, Samsung Bioepis, and Sandoz. Because plaintiffs have failed to plausibly allege that the but-for cause of Humira's monopoly prices was the biosimilar manufacturers' failure to pursue infringement litigation to its

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[21] Plaintiffs did not allege that any of the biosimilar manufacturers sent notice to AbbVie that they intended to market their biosimilar, which suggests those manufacturers may not have launched their biosimilars anyway. *See* *42 U.S.C. § 262(l)(8)(A)* & *(B)*; [124] at 47; [150] at 26. But plaintiffs were not required to account in their complaint for all of AbbVie's alternative scenarios, and I draw the reasonable inference in plaintiffs' favor that there was no technical barrier to launching at risk.

conclusion, AbbVie's unlawful assertion of its patent thicket, or the biosimilar manufacturers' failure to use the leverage that they apparently **[**73]** didn't know they had to reach an agreement to enter the market sooner than they did, all of the federal antitrust claims in the complaint fail.

D. State Law Claims

Plaintiffs' state-law claims are spread across four counts.[22] Counts II and IV assert pay-for-delay and market-allocation-agreement theories of liability under antitrust laws from twenty-seven states. [109] ¶¶ 269-78, 286-94. Count VI asserts a monopolization theory of liability under the **[*847]** antitrust laws of twenty-three states. [109] ¶¶ 301-08.

Counts II, IV, and VI also list six states' consumer protection laws. *See id.* [109] ¶¶ 276, 292, 306 (citing *Alaska Stat. Ann. § 45.50.471*; *Cal. Bus. & Prof. Code §§ 17200, et seq.*; *Fla. Stat. §§ 501.201 et seq.*; *Ga. Code Ann. § 10-1-393*; *S.C. Code Ann. §§ 39-5-20, et seq.*; *Vt. Stat. Ann. tit. 9, §§ 2453, et seq.*). According to the complaint, these state consumer protection laws prohibit both anticompetitive conduct, [109] ¶¶ 276, 292, and monopolization. *Id.* ¶ 306. Count VII asserts violations of sixteen states' laws that prohibit unfair and unconscionable conduct. *Id.* ¶¶ 309-406. Five of the same six consumer protection laws cited in Counts II, IV, and VI also appear in Count VII. *Id.* ¶¶ 317, 327, 339, 346, 391.[23]

Both AbbVie and plaintiffs agree that if the federal antitrust claims are dismissed, the state-law antitrust claims should **[**74]** be dismissed, too. [124] at 49-50; [144] at 74 ("[t]he defendants are correct that the plaintiffs' state law antitrust claims ... should be dismissed if their federal antitrust claims are dismissed"). I dismiss plaintiffs' state-law antitrust claims for the same reasons I dismissed the federal antitrust claims.

Plaintiffs also agree that if their federal antitrust claims are dismissed, the state law antitrust claims brought pursuant to consumer protection statutes should be dismissed, too. [144] at 74. Accordingly, those claims are dismissed, and that resolves the last of the claims asserted against Amgen, Samsung Bioepis, and Sandoz.

With regard to the claims in the complaint under the heading, "unfair and unconscionable conduct," *id.* ¶¶ 309-406, AbbVie says that all of plaintiffs' state-law consumer protection claims fail because they are "inextricably linked" to plaintiffs' antitrust claims. [124] at 53-54. But just because plaintiffs used certain factual allegations to support their antitrust claims does not mean that they cannot use those same factual allegations to support their unfair and unconscionable conduct claims. AbbVie also argues that if the conduct in the complaint fails **[**75]** to allege an antitrust violation, then it must also fail to allege any unfair or unconscionable act or practice. [124] at 53. But many of the state laws that form the basis of plaintiffs' unfair and unconscionable conduct claims are modeled after the Federal Trade Commission Act, which is broader than *§ 1* and *§ 2 of the Sherman Act*. *See, e.g.*, *Fla. Stat. Ann. §*

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[22] Subject-matter jurisdiction exists over the state-law claims because the amount in controversy exceeds $5,000,000, *see, e.g.*, [109] ¶ 251, and because at least one member of the proposed class of plaintiffs is a citizen of a state different from at least one of the defendants. *Id.* ¶¶ 14-24, 224-225; *28 U.S.C. § 1332(d)(2)*.

[23] Plaintiffs' statutory labels are not controlling. For instance, plaintiffs cite *Alaska Stat. Ann. § 45.50.471*, which they describe first as a "state consumer protection law[] that prohibit[s] anticompetitive conduct," [109] ¶¶ 276, 292, second, as a "state consumer protection law[] that prohibit[s] monopolization," *id.* ¶ 306, and third, as a state law that prohibits "unfair and unconscionable conduct." *Id.* ¶¶ 309-10, 317. ***HN49***[] The statute does not contain the words anticompetitive, monopoly, or unconscionable, and pertains to deceptive acts and practices more akin to trademark infringement than antitrust violations. *See, e.g.*, *Alaska Stat. Ann. § 45.50.471(b)(1)*. Alaska's antitrust laws are codified elsewhere. *See, e.g.*, *Alaska Stat. Ann. § 45.50.562*. ***HN50***[] That being said, plaintiffs do not have to cite the right laws in their complaint. *N.A.A.C.P. v. Am. Family Mut. Ins. Co., 978 F.2d 287, 292 (7th Cir. 1992)* (a complaint "should limn the grievance and demand relief" and "need not identify the law on which the claim rests"); *Beaton v. SpeedyPC Software, 907 F.3d 1018, 1023 (7th Cir. 2018)*, *cert. denied*, ***139 S. Ct. 1465, 203 L. Ed. 2d 684 (2019)*** ("plaintiffs do not need to plead legal theories"). What matters is whether they have stated a claim upon which relief can be granted and provided defendants with "fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *Fed. R. Civ. P. 8(a)*.

501.204(2); **[*848]** 15 U.S.C. § 45; Fed. Trade Comm'n v. R.F. Keppel & Bro., 291 U.S. 304, 310, 54 S. Ct. 423, 78 L. Ed. 814, 18 F.T.C. 684 (1934) (**HN51**[] the Federal Trade Commission Act was "aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed," but "also had a broader purpose") (citations omitted). There are unfair or unconscionable acts that are not contracts or combinations in restraint of trade or unlawful monopolies.

But because the complaint is shaped by its antitrust theories, once those theories fall out of the case it becomes difficult to assess how the allegations satisfy the unfair or unconscionable standards of various states' laws. **HN52**[] AbbVie is entitled to "fair notice of what the ... claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); Fed. R. Civ. P. 8(a). The first few hundred paragraphs of the complaint contain detailed allegations about AbbVie's conduct, and the complaint recaps the relevant portions of those factual allegations generally before invoking **[**76]** state consumer protection statutes. [109] ¶¶ 310-316. But at bottom, the complaint lists various states' consumer protection laws and asserts that AbbVie's conduct was unfair and unconscionable without ever explaining (or even implying) what was unfair or unconscionable about AbbVie's conduct beyond its potential to restrain competition or effect an unlawful monopoly (both of which it fails to allege plausibly). The complaint says the conduct violated public policy and there was a gross disparity between price and value, but never offers an explanation beyond invoking the words of the statutes. In some cases that may be enough to tell the defendant what it is defending against. **HN53**[] A complaint need only "limn the grievance and demand relief." N.A.A.C.P. v. Am. Family Mut. Ins. Co., 978 F.2d 287, 292 (7th Cir. 1992). It does not have to "identify the law on which the claim rests." *Id.*; Beaton, 907 F.3d at 1023 (7th Cir. 2018) ("plaintiffs do not need to plead legal theories").

But the problem here is that read as a whole, the complaint sounds in antitrust, and once it is understood to not state such a claim, something more (perhaps not much) must be offered other than statutory language or quotations from state caselaw to understand why the nonactionable antitrust conduct happens to limn the grievance **[**77]** of state prohibitions against unfairness or unconscionability. **HN54**[] *Noerr-Pennington* may affect the viability of these state-law claims, too, because it is rooted in the First Amendment. *See, e.g.,* Green Mountain Realty Corp. v. Fifth Estate Tower, LLC, 161 N.H. 78, 89, 13 A.3d 123 (2010) (applying that doctrine in the context of New Hampshire's unfair and unconscionable conduct statute); Curtis Pub. Co. v. Butts, 388 U.S. 130, 149, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967) (the First Amendment applies to the states through the Fourteenth Amendment). Incorporating large swaths of allegations that describe activity protected by the First Amendment further makes it difficult to separate the unfair and unconscionable from nonactionable conduct. Count VII is dismissed without prejudice for failure to give adequate notice of the claim. Because plaintiffs may be able to cure this problem, some additional state-specific issues merit resolution to give plaintiffs additional guidance going forward.

1. *Alaska*

HN55[] Section 45.50.471 of the Alaska Unfair Trade Practices and Consumer Act prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce." [109] ¶¶ 276a, 292a, 306a, 317; Alaska Stat. Ann. § 45.50.471. *See also* Alaska Stat. Ann. § 45.50.531 (providing a private right of **[*849]** action for acts declared unlawful under § 45.50.471).

HN56[] Only buyers that purchase products directly from the antitrust violator may bring claims against that party for damages. Illinois Brick Co. v. Illinois, 431 U.S. 720, 735-38, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977). Some states have **[**78]** enacted "Illinois Brick repealer" statutes that allow indirect purchasers to sue for money damages. *See* McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., Inc., 937 F.3d 1056, 1064 (7th Cir. 2019). Alaska's repealer statute only partially repealed Illinois Brick*. See* Alaska Stat. Ann. § 45.50.577(i). **HN57**[] As a result, the attorney general is the only person who can bring an antitrust claim for damages on behalf of indirect purchasers under Alaska's Restraint of Trade Act. Alaska Stat. Ann. §§ 45.50.562-45.50.570, 45.50.577(i); In re Lidoderm Antitrust Litig., 103 F.Supp.3d 1155, 1163 (N.D. Cal. 2015).

HN58[] "No court has construed Alaska's consumer protection statute to permit claims based on alleged antitrust and monopolization conduct by indirect purchasers." In re Lidoderm Antitrust Litig., 103 F.Supp.3d at 1163. Doing so would allow plaintiffs to circumvent Alaska's partial indirect purchaser bar by proceeding under Alaska's more general consumer protection statute. *See* In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 516 F.Supp.2d 1072, 1108 (N.D. Cal. 2007). HN59[] The better reading of the Act, considered in conjunction with Alaska's Restraint of Trade Act, is that it precludes plaintiffs from bringing claims as indirect purchasers even under a non-antitrust unfair practices theory.

2. *California*

HN60[] California's Unfair Competition Law defines unfair competition to include "unlawful, unfair or fraudulent business act[s] or practice[s] and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. In the last paragraph of their California-law-based unfair and unconscionable conduct allegations, **[**79]** plaintiffs allege that, as a result of AbbVie's wrongful conduct, AbbVie was unjustly enriched. [109] ¶ 332. HN61[] As AbbVie points out, California law does not recognize an independent cause of action for unjust enrichment. Hill v. Roll Internat. Corp., 195 Cal. App. 4th 1295, 1307, 128 Cal. Rptr. 3d 109 (2011) ("Unjust enrichment is not a cause of action, just a restitution claim"); United Food & Commer. Workers Local 1776 & Participating Employers Health & Welfare Fund v. Teikoku Pharma USA, Inc., 74 F. Supp. 3d 1052, 1091 (N.D. Cal. 2014).

But plaintiffs have not brought a cause of action for unjust enrichment, they seek equitable relief in the form of restitution and disgorgement. [109] ¶¶ 327-32. HN62[] In addition to borrowing violations from other laws, De La Torre v. CashCall, Inc., 854 F.3d 1082, 1085 (9th Cir. 2017), California's Unfair Competition Law provides its own unique cause of action. *See* Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal.4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999) (a "practice may be deemed unfair even if not specifically proscribed by some other law"). AbbVie's argument that the claim is a prohibited unjust enrichment claim is not well taken and would not be an impediment to an amended complaint.

3. *District of Columbia*

HN63[] The District of Columbia's Consumer Protection Act makes it unlawful for "any person to engage in an unfair or deceptive trade practice." D.C. Code Ann. § 28-3904. It was "designed to police trade practices arising only out of consumer-merchant relationships," Ford v. Chartone, Inc., 908 A.2d 72, 80-81 (D.C. App. 2006) (citations omitted), and covers only **[*850]** the "ultimate retail transaction **[**80]** between the final distributor and the individual member of the consuming public." Adam A. Weschler & Son, Inc. v. Klank, 561 A.2d 1003, 1005 (D.C. App. 1989). Since plaintiffs here are indirect purchasers that reimburse their members, the transactions do not qualify under the statute. *See also* In re Lidoderm Antitrust Litig., 103 F.Supp.3d 1155, 1164-65 (N.D. Cal. 2015) (dismissing CPPA claim brought by end-payor plaintiff). *But see* In re Remicade Antitrust Litig., 345 F.Supp.3d 566, 588 (E.D. Pa. 2018).

HN64[] The code also defines a consumer as "any person who ... does or would purchase ... or receive consumer goods or services, including as co-obligor or surety, or does or would otherwise provide the economic demand for a trade practice." D.C. Code Ann. § 28-3901(a)(2)(A). The plaintiffs here do not purchase or receive Humira. They also do not provide the economic demand for Humira—they reimburse the people that provide the economic demand for Humira. *See* [109] ¶¶ 13-17, 225. The people that suffer from the ailments that Humira treats provide the demand. Plaintiffs have not alleged that they are co-obligors or sureties of the people that provide the demand for Humira. *See id.* ¶¶ 333-38. (That being said, plaintiffs have adequately alleged that AbbVie is a merchant within the meaning of the Consumer Protection Act because they have alleged that AbbVie sells a broad range of drugs all over the United States at volumes that plausibly suggest **[**81]** they sell with regularity in the District of Columbia. [109] ¶¶ 19, 84; D.C. Code Ann. § 28-3901(a)(3). The District of Columbia's Consumer Protection Act does not reach the transactions at issue.

4. *Georgia*

HN65[] Georgia's Fair Business Practices Act prohibits "[u]nfair or deceptive acts or practices in the conduct of consumer transaction[s]." *Ga. Code Ann. § 10-1-393*; [109] ¶¶ 276d, 292d, 306d, 346-350. In order to bring a suit under that statute, plaintiffs have to provide defendants with a written demand "identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered" at least thirty days before filing suit, but not if "the prospective respondent does not maintain a place of business or does not keep assets within the state." *Ga. Code Ann. § 10-1-399(b)*.

The complaint does not say whether notice was provided, but as plaintiffs point out in their opposition, the complaint also does not say that AbbVie maintains an office in Georgia. ***HN66***[] The notice provision is to be liberally construed, *Amin v. Mercedes-Benz USA, LLC, 301 F.Supp.3d 1277, 1292 (N.D. Ga. 2018)*, and a reasonable inference drawn from the factual allegations in the complaint is that AbbVie does not maintain an office in Georgia, meaning that no notice was required.

5. *Illinois*

The *Illinois Consumer Fraud and Deceptive Business Practices Act* **[**82]** declares unlawful all "[u]nfair methods of competition and unfair or deceptive acts or practices, ... in the conduct of any trade or commerce ... whether any person has in fact been misled, deceived or damaged thereby." *815 Ill. Comp. Stat. Ann. 505/2*; [109] ¶¶ 351-54. Illinois has adopted an *Illinois Brick* repealer statute that permits indirect purchasers to sue for antitrust money damages. *McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., Inc., 937 F.3d 1056, 1064 (7th Cir. 2019)*; *740 Ill. Comp. Stat. Ann. 10/7(2)*. However, that statute prohibits class action antitrust claims brought by indirect purchasers. *740 Ill. Comp. Stat. § 10/7(2)*.

[*851] ***HN67***[] Even though in some states where *Illinois Brick* has been repealed, some courts have allowed suits brought by indirect purchasers under consumer protection statutes based on conduct that might also qualify as a violation of that state's antitrust statutes, *see, e.g., Mack v. Bristol-Myers Squibb Co., 673 So.2d 100, 104 (Fla. Dist. Ct. App. 1996)*; *In re Generic Pharms. Pricing Antitrust Litig., 368 F.Supp.3d 814, 842-43 (E.D. Pa. 2019)*, the law in Illinois is different. Plaintiffs' claim under the *Illinois Consumer Fraud and Deceptive Business Practices Act* is a class action. [109] ¶¶ 252, 254-55. Permitting plaintiffs to bring a class action based on conduct that more closely approximates an antitrust violation under a broader consumer protection statute would allow them to make an "end run around the Illinois legislature's determination" that such actions should not be **[**83]** permitted. *In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 539 (E.D. Pa. 2010)*. ***HN68***[] Plaintiffs cannot assert what are "essentially antitrust claims in the guise of a claim under the Illinois consumer protection statute," *In re Wellbutrin XL Antitrust Litig., 260 F.R.D. 143, 162 (E.D. Pa. 2009)*, especially when doing so allows them to avoid a provision of Illinois law that would otherwise bar this particular type of suit. *740 Ill. Comp. Stat. § 10/7(2)*. *See also Appraisers Coalition v. Appraisal Institute, 845 F.Supp. 592, 609 (N.D. Ill. 1994)* (dismissing consumer protection claims because they only "alleged violations of the *Sherman* and *Clayton Acts*").

6. *Nevada*

HN69[] Much like Georgia's statute, the *Nevada Deceptive Trade Practices Act* mandates that any person bringing an action under the statute "shall, simultaneously with the filing of the complaint with the court, mail a copy of the complaint to the Attorney General." *Nev. Rev. Stat. Ann. § 598A.210(3)*. As pointed out in the plaintiffs' opposition, several plaintiffs sent the required notice to the Nevada Attorney General. [145-1] at 22-23. *See also Geinosky v. City of Chicago, 675 F.3d 743, 745 n.1 (7th Cir. 2012)* (***HN70***[] when opposing a Rule 12(b)(6) motion, plaintiffs "may submit materials outside the pleadings to illustrate the facts the [plaintiff] expects to be able to prove," so long as those "new elaborations" are consistent with the complaint"). The Attorney General notice requirement is not a basis to dismiss the Nevada statutory claim.

7. *New Hampshire*

HN71[] *New Hampshire's Deceptive Trade Practices Act* **[**84]** declares unlawful "any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state." *N.H. Rev. Stat. Ann. § 358-A:2*; [109] ¶¶ 367-372. The words "trade" and "commerce" include the sale of any "thing of value, wherever situate," and "any trade or commerce directly or indirectly affecting the people of" New Hampshire. *N.H. Rev. Stat. Ann. § 358-A:1(II)*.

HN72[] The statute is phrased broadly to include the sale of goods no matter where those goods are located and includes within its purview commerce that indirectly affects the people of New Hampshire. *See* LaChance v. U.S. Smokeless Tobacco Co., 156 N.H. 88, 94-96, 931 A.2d 571 (2007) (declining to prohibit the bringing of antitrust-type actions under New Hampshire's Deceptive Trade Practices Act and finding that the legislature intended a "broad sweep"). The offending conduct does not need to occur within New Hampshire so long as it had an effect on the people of that state. In re Packaged Seafood Prods. Antitrust Litig., 242 F. Supp. 3d 1033, 1081 (S.D. Cal. 2017); In re Zetia (Ezetimibe) Antitrust Litig., 400 F.Supp.3d 418, 438 (E.D. Va. 2019) ("a nationwide pattern of conduct that resulted in consumers in each **[*852]** of the challenged jurisdiction[s] purchasing [a drug] at elevated prices adequately pleads sufficient intrastate connections" for purposes of a claim under New Hampshire's Deceptive Trade Practices Act) (citations omitted); In re DDAVP Indirect Purchaser Antitrust Litig., 903 F.Supp.2d 198, 231 (S.D.N.Y. 2012) (denying motion to dismiss because the complaint **[**85]** alleged that the putative plaintiffs "located in New Hampshire had to pay higher prices ... because of [the] alleged deception"). *But see* Pacamor Bearings, Inc. v. Minebea Co., 918 F.Supp. 491, 504 (D.N.H. 1996) ("the statute is only applicable if the offending conduct took place within the territorial borders of the state"); In re Flash Memory Antitrust Litig., 643 F.Supp.2d 1133, 1159 (N.D. Cal. 2009). Even if New Hampshire's statute requires that the offending conduct take place within New Hampshire's borders, it is enough to allege that the defendants introduced overpriced products into New Hampshire markets. In re Chocolate Confectionary Antitrust Litig., 749 F.Supp.2d 224, 235 (M.D. Pa. 2010).

The complaint alleges that AbbVie's conduct "substantially affected New Hampshire's trade and commerce." [109] ¶ 370. Elsewhere, it includes allegations that plausibly suggest that Humira was introduced into the New Hampshire market, such as the allegation that AbbVie made more than $56 billion selling Humira throughout the United States during a six-year period. *Id.* ¶ 84. Although Count VII is dismissed for other reasons, it adequately pleads the requisite effect in New Hampshire.

8. *North Carolina*

HN73[] North Carolina's Unfair Trade and Business Practices Act declares unlawful all "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. Ann. § 75-1.1; [109] ¶¶ 379-84. **[**86]** The Act addresses "primarily local concerns." The 'In' Porters, S.A. v. Hanes Printables, Inc., 663 F. Supp. 494, 502 (M.D.N.C. 1987); ITCO Corp. v. Michelin Tire Corp., Commercial Div., 722 F.2d 42, 48 n.9 (4th Cir. 1983). Actions that have only an "incidental local effect" fall outside its reach. The 'In' Porters, 663 F.Supp. at 502; In re Refrigerant Compressors Antitrust Litig., No. 2:09-MD-02042, 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at *19 (E.D. Mich. Apr. 9, 2013).

HN74[] That statute does not, however, require "substantial effects" on intrastate commerce. *See* N.C. Gen. Stat. Ann. § 75-1.1. And unlike in The 'In' Porters, S.A., 663 F.Supp. at 502, the plaintiffs here include at least a few people that purchased Humira in the state of North Carolina. [109] ¶ 382. That is enough to satisfy the "primarily local" aims of North Carolina's Unfair Trade and Business Practices Act. In re Lidoderm Antitrust Litig., 103 F.Supp.3d 1155, 1174 (N.D. Cal. 2015); Hosp. Auth. of Metro. Gov't of Nashville v. Momenta Pharms. Inc., 353 F. Supp. 3d 678, 695 (M.D. Tenn. 2018) (it is enough to plead intrastate effects that caused supracompetitive process in the relevant jurisdiction); In re Ductile Iron Pipe Fittings ("DIPF") Indirect Purchaser Antitrust Litig., 2013 U.S. Dist. LEXIS 142466, 2013 WL 5503308, at *22 (D.N.J. Oct. 2, 2013). The alleged aggregate effect of those purchases was more than incidental. *See* In re Remicade Antitrust Litig., 345 F.Supp.3d 566, 586 (E.D. Pa. 2018) (allegations that defendants had monopolized the market for a drug, "resulting in North Carolina purchasers paying artificially inflated prices" for that drug, was enough to survive a motion to dismiss).

9. *Utah*

HN75[] Utah's Consumer Sales Practices Act declares unlawful any "unconscionable **[*853]** act or practice by a supplier in connection with a consumer transaction ... whether it occurs before, during, or after the transaction." Utah Code Ann. § 13-11-5(1); [109] ¶¶ 395-401. In **[**87]** Utah, the term "unconscionable ... defies precise definition," and Utah courts "assess the circumstances of each particular case in light of the twofold purpose of the doctrine, prevention of oppression and of unfair surprise." *Woodhaven Apartments v. Washington, 942 P.2d 918, 924 (Utah 1997)* (quoting *Res. Mgmt. Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028, 1041 (Utah 1985)*).

HN76[] In the few cases where Utah courts have interpreted the statute, they have consistently looked to contract principles to define its terms. *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 350 F.Supp.2d 160, 204 (D. Me. 2004)*; *In re Interior Molded Doors Indirect Purchaser Antitrust Litig., No. 3:18-CV-00850-JAG, 2020 U.S. Dist. LEXIS 78458, 2020 WL 2110931, at *3 (E.D. Va. May 4, 2020)*; *Imperial Mobile Home Park, L.L.C. v. Kelsch, No. 971591-CA, 1998 Utah App. LEXIS 171, 1998 WL 1758393, at *1 (Utah Ct. App. Nov. 27, 1998)* (plaintiffs generally must allege "gross bargaining power inequality or oppressive contractual terms").

The Utah-based claim alleged here, which is brought against AbbVie only, is based on AbbVie's alleged patent-related conduct. *See* [109] ¶¶ 310-316, 401. The fact that the patent-related conduct in question did not relate to a contract is not determinative. What matters is whether AbbVie's alleged conduct qualifies as unconscionable, as Utah's courts have interpreted that term. The problem for plaintiffs is that AbbVie's alleged patent-related conduct did not involve either gross bargaining power or oppression. *Imperial Mobile Home Park, 1998 Utah App. LEXIS 171, 1998 WL 1758393 at *1*. Nor have plaintiffs alleged facts that show procedural unconscionability (i.e., that plaintiffs did not have "a reasonable **[**88]** opportunity to read and understand the terms of the contract," *Woodhaven Apartments, 942 P.2d at 925*), or substantive unconscionability (i.e., facts that show a disparity in bargaining power "so great as to shock the conscience," *id.* (citations omitted)).

HN77[] *Utah's Consumer Sales Practices Act* is not limited to contract disputes, but it is limited to conduct that is "unconscionable," and the complaint fails to allege conduct that qualifies as unconscionable as that word has been interpreted by Utah courts.

10. *West Virginia*

HN78[] *West Virginia's Consumer Credit and Protection Act* declares unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *W. Va. Code Ann. § 46A-6-104*; [109] ¶¶ 402-406. At least when consumers allege that a purchase was made because of a misrepresentation, the Act "does not extend to prescription drug purchases," because physicians protect consumers when they intervene in that decision-making process. *White v. Wyeth, 227 W.Va. 131, 141, 705 S.E.2d 828 (2010)*. Here, plaintiffs' allegations are not based on any alleged misrepresentations to consumers, but to the degree any of AbbVie's conduct involved misrepresentations to patent examiners, the claims fail for the same reason the claims failed in *White v. Wyeth*: a trained third-party **[**89]** intervened before consumers were affected. *227 W.Va. 131, 140-41, 705 S.E.2d 828*.

IV. Conclusion

Defendants' motion to dismiss [123] is granted. The complaint is dismissed without prejudice and with leave to file an amended complaint. *Barry Aviation Inc. v. Land O'Lakes Mun. Airport Comm'n, 377 F.3d 682, 687 (7th Cir. 2004)*; *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana, 786 F.3d 510, 518 **[*854]** (7th Cir. 2015)*. Plaintiffs shall file a status report on June 29, 2020, with a statement of whether they intend to file an amended complaint, or if they instead prefer that the dismissal convert to a dismissal with prejudice so they may seek appellate review.

ENTER:

/s/ Manish S. Shah

Manish S. Shah

United States District Judge

Date: June 8, 2020

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